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PREFACE

Americans have long cherished our country's expansive notions of freedom of speech and religion, but as our current culture war rages on, the scope of these rights going forward has increasingly come into doubt. This third Issue of Volume 42 of the *Harvard Journal of Law & Public Policy* begins with a consideration of the future of religious freedom and the First Amendment more generally.

Professor Mark Movsesian examines *Masterpiece Cakeshop*, a case decided last term by the Supreme Court about a baker who refused to design a cake for a same-sex wedding, and discusses its implications. Although the case did little to resolve the conflict between anti-discrimination laws and the conscience claims of individual service providers, it did lay bare the rising cultural conflict between the "Nones," who reject organized religion, and the "Traditionally Religious." Professor Marc DeGirolami sees similar trends at play in First Amendment doctrine more generally. He argues that the spectacular success of the First Amendment in protecting speech and religion has become its own undoing. As limitations on freedom of speech and religion aimed at safeguarding the common good have been discarded, it has become increasingly difficult to show how these freedoms serve the common good. Hence, he concludes, new calls for restricting the scope of the First Amendment are inevitable.

While the first two Articles of the Issue consider the future, the next two look back to history. James Conde and Professor Michael Greve retell the story of *Yakus v. United States*, an oft-overlooked Supreme Court case from 1944. They argue that *Yakus* laid the foundations for the modern administrative state by disjoining—and thereby neutering—the doctrines that serve to subject administrative agencies to the rule of law. Doctor James Phillips, Benjamin Lee, and Jacob Crump apply the tools of corpus linguistics to shed light on the original meaning and scope of the phrase "Officers of the United States" in Article II of the Constitution. They conclude that the original definition of *officer* was broader than the one adopted by the Supreme Court last term in *Lucia v. SEC*.

This Issue also contains two student Notes authored by editors of the *Journal*. Chadwick Harper examines the conflict between the veteran's canon, which calls in veteran's benefit cases for interpretive doubt to be resolved in the veteran's favor, with the deference courts typically owe agency interpretations under *Chevron* and *Auer*. He argues that the veteran's canon should prevail over *Chevron* and *Auer* deference when the two appear to come into conflict. Branton Nestor offers a fresh consideration of the free exercise provisos cited by Justice Scalia in *City of Boerne v. Flores*. Contrary to Justice Scalia, he concludes that the provisos constituted specifically enumerated, narrow exceptions to an otherwise broad free exercise right.

I would be remiss if I did not thank in this final Issue all the editors whose countless hours of hard work have made this forty-second Volume of the *Journal* a great success. They have shepherded every Article we published through a painstaking, multi-month process of selection, substantive editing, and multiple rounds of line editing. I would especially like to thank all the editors this Issue who, under the superb leadership of Kevin Koljack, were able to accomplish the challenging feat of publishing the *Journal's* first corpus linguistics article. In particular, Truman Whitney, Joshua Ha, Douglas Stephens, Alex Cave, Chance Fletcher, Chanslor Gallenstein, Mark Gillespie, and Matthew Weinstein all did much more than was expected of them on this assignment.

I also owe a special debt of gratitude to my fiancée Farheen for all the support she has given me in my term as Editor-in-Chief, not the least of which included several tedious hours personally setting our subscriber list back in order. She has been exceptionally patient with me during all the hours I have spent cooped up in the *Journal* office away from her.

I am truly grateful for the opportunity to serve as Editor-in-Chief of this storied *Journal*. It has been the greatest privilege of my law school career. I am confident that in future years the *Journal* will continue to be a bastion of quality conservative and libertarian scholarship in an academy and a profession that are sorely in need of it.

Ryan M. Proctor
Editor-in-Chief

MASTERPIECE CAKESHOP AND THE FUTURE OF RELIGIOUS FREEDOM

MARK L. MOVSESIAN*

INTRODUCTION

Last term, the Supreme Court decided *Masterpiece Cakeshop*, one of several recent cases in which religious believers have sought to avoid the application of public accommodations laws that ban discrimination on the basis of sexual orientation.¹ Like most such disputes, the case involved a small business that declined, because of the owner's religious convictions, to provide a service for a same-sex wedding—in this case, Colorado cake designer Jack Phillips's convictions against designing and baking a cake for a gay couple, Charlie Craig and Dave Mullins.² In most of these cases, courts have been unwilling to exempt businesses from the anti-discrimination laws on religious grounds and have ruled in favor of the customers. One might have thought Jack Phillips would lose in

* Frederick A. Whitney Professor and Director, Center for Law and Religion, St. John's. I thank Marc DeGirolami, John McGinnis, Micah Schwartzman, and Michael Simons, as well as the participants in a conference on "Religion and the State" at the Center for the Study of the Administrative State at George Mason University, and a conference on "Higher Powers" at the Notre Dame Center for Ethics and Culture, for thoughtful comments. I wrote much of this paper while a Visiting Fellow at Princeton University's James Madison Program in American Ideals and Institutions, and presented it there as part of the Program's workshop series. I thank the Madison Program for its support and the participants at that workshop for their helpful feedback.

1. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* 138 S. Ct. 1719 (2018). For other recent cases, see, e.g., *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 572 U.S. 1046 (2014); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), *vacated*, 138 S. Ct. 2671 (2018); *Brush & Nib Studio, LC v. City of Phoenix*, 418 P.3d 426 (Ariz. Ct. App. 2018).

2. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

Masterpiece Cakeshop as well. Indeed, many observers were surprised that the Court had granted cert in his case at all.³

Somewhat surprisingly, though, the Supreme Court ruled in his favor, on the basis of an argument few observers had credited before the Court heard the case.⁴ In a 7-2 opinion by Justice Kennedy, the Court held that, in deciding that Phillips's refusal to create a cake for a same-sex wedding violated the state's anti-discrimination laws, the Colorado Civil Rights Commission had violated Phillips's free exercise rights.⁵ The Commission, the Court wrote, had failed to treat Phillips's religious convictions in a neutral and respectful way.⁶ At least two of the commissioners had publicly disparaged Phillips's religious convictions and none of the other commissioners present had objected.⁷ Moreover, the Commission had acted inconsistently in at least three prior cases involving other bakers who had refused, on grounds of conscience, to create cakes with anti-gay marriage sentiments. The Commission had ruled that those bakers had acted lawfully in refusing service. This inconsistency suggested that the state had not been neutral with respect to the substance of Phillips's convictions. Punishing Phillips for refusing, on grounds of conscience, to create a *pro*-gay marriage cake, while failing to punish other bakers who declined, on grounds of conscience, to create *anti*-gay marriage cakes, suggested that the state simply disfavored the content of Phillips's convictions.⁸

Because the Commission had failed to treat Phillips's religious convictions in a neutral and respectful way, the Court

3. See Amy Howe, *Argument preview: Wedding cakes v. religious beliefs?*, SCOTUSBLOG (Nov. 28, 2017, 3:14 PM), <http://www.scotusblog.com/2017/11/argument-preview-wedding-cakes-v-religious-beliefs/> [<https://perma.cc/H643-JXRH>]

4. See Robert W. Tuttle & Ira C. Lupu, *Masterpiece Cakeshop—A Troublesome Application Of Free Exercise Principles By A Court Determined To Avoid Hard Questions*, TAKE CARE (June 7, 2018), <https://takecareblog.com/blog/masterpiece-cakeshop-a-troublesome-application-of-free-exercise-principles-by-a-court-determined-to-avoid-hard-questions> [<https://perma.cc/3Z67-WWY4>] (“[M]ost observers believed that the Free Exercise Clause issues would not be crucial to the disposition of the case.”).

5. *Masterpiece Cakeshop*, 138 S. Ct. at 1724.

6. *Id.* at 1729.

7. *Id.* at 1729–30.

8. *Id.* at 1730–31. I discuss the Court's reasoning on this point further below. See *infra* pp. 720–21.

held, its action against him violated the Free Exercise Clause of the U.S. Constitution.⁹ The Court stressed that future cases, in which state authorities had not demonstrated overt hostility to a claimant's religious convictions, might well reach a different result—a fact that Justice Kagan stressed in a concurring opinion.¹⁰ *Masterpiece Cakeshop* thus does relatively little to resolve the conflict between anti-discrimination laws and the right of business owners to decline, out of sincere religious conviction, to provide services in connection with same-sex weddings.¹¹

Masterpiece Cakeshop is nonetheless important for what it reveals about deeper cultural and political trends, all related, that will affect the future course of the law. Two cultural trends are important: religious polarization and an expanding concept of equality. Over the past two decades, American religion has become polarized between two groups, the Nones, who reject organized religion as authoritarian and hypocritical, especially with respect to sexuality, and the Traditionally Religious, who continue to adhere to organized religion and to traditional religious teachings, especially with respect to sexuality.¹² Each group views the other's values as threatening and incomprehensible. Neither is going away, and neither seems in a mind to compromise—including in commercial life.¹³ This religious polarization has figured very prominently in the public's response to *Masterpiece Cakeshop* and similar controversies.

Masterpiece Cakeshop also reflects a second cultural trend, one that Alexis de Tocqueville—whose work runs like a red thread through our story—saw long ago: an expanding notion of

9. *Masterpiece Cakeshop*, 138 S. Ct. at 1731–32.

10. *Id.* at 1732; *id.* at 1732–34 (Kagan, J., concurring).

11. See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 133 (2018) (noting that the *Masterpiece Cakeshop* Court “ducked central questions” in the case).

12. On the Nones generally, see Mark L. Movsesian, *Defining Religion in American Law: Psychic Sophie and the Rise of the Nones* (Robert Schuman Ctr. for Advanced Studies, Research Paper No. 2014/19, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399470 [<https://perma.cc/8AMF-H3AW>].

13. See Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 183 (2014) (observing that, with respect to LGBT issues, “the marketplace itself has become a site of social contestation rather than a refuge from the culture wars”).

equality.¹⁴ Increasing numbers of Americans endorse a capacious concept of equality—“equality as sameness”—that treats social distinctions, especially religious distinctions, as arbitrary and unimportant.¹⁵ Asserting the importance of religious boundaries, as Jack Phillips did, seems unreasonable to growing numbers of our fellow citizens. Asserting such boundaries strikes them—as it did Charlie Craig and Dave Mullins, and at least some of the Colorado commissioners—as deeply insulting, an affront to human dignity. That so many of the actors in *Masterpiece Cakeshop* could not credit Jack Phillips’s assertions of good faith explains much of what happened in the case, and much of what is likely to happen in future cases.

Finally, *Masterpiece Cakeshop* reflects an important political trend: the steady growth of an activist state committed to the idea of equality as sameness. At both the federal and state level, administrative agencies work to promote equality in all areas of life. Their actions increasingly impinge on the Traditionally Religious, who face an expanding set of rules and policies, backed by serious sanctions, which promote new understandings of equality, particularly with respect to sex and gender. The actions of the Colorado Civil Rights Commission offer a very good example. Although state officials will not likely demonstrate the same overt hostility to traditional religious beliefs in future cases, they will likely remain committed to the same expansive view of equality. As a result, conflicts between our anti-discrimination laws, on the one hand, and the religious beliefs of millions of American citizens, on the other, will continue.

As Tocqueville famously observed, American political questions inevitably become judicial ones.¹⁶ Conflicts like the one in *Masterpiece Cakeshop* will continue to find their way into

14. On Tocqueville and equality, see *infra* at 731–32.

15. See Samuel Gregg, *Equality in Democracy: Tocqueville’s Prediction of a Falling America*, CNS NEWS (Feb. 6, 2017, 10:38 AM), <https://www.cnsnews.com/commentary/samuel-gregg/equality-democracy-tocquevilles-prediction-falling-america> [https://perma.cc/S8LN-TKCR].

16. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* I.ii.8, at 257 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1840) [hereinafter *DEMOCRACY IN AMERICA*] (“There is almost no political question in the United States that is not resolved sooner or later into a judicial question”).

our courts. How will the courts resolve them? The law with respect to religious accommodations is currently something of a “patchwork.”¹⁷ Different jurisdictions employ different tests in different circumstances. Nonetheless, the leading test remains the so-called “compelling interest” test, which holds that the government may impose a substantial burden on a person’s religious exercise only if the government has a compelling interest in doing so and has chosen the least restrictive means.¹⁸ Notwithstanding *Masterpiece Cakeshop’s* somewhat unusual resolution, the compelling interest test will probably determine the outcome in most future cases.

But the compelling interest test presents significant difficulties.¹⁹ The test turns controversies about religious accommodation into judgment calls, the outcomes of which depend, practically speaking, on the intuitions of the people doing the judging.²⁰ In a polarized society like ours, with deeply divergent understandings about the nature and value of religion and the scope of equality, intuitions about “substantial burden” and “compelling interest” vary widely from person to person—and from judge to judge.²¹ The test makes it very hard to predict what result will obtain in any particular case and makes judges’ identity, background, and prior normative

17. MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 149 (2016).

18. *See, e.g.*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1488–89 (codified at 42 U.S.C. § 2000bb-1 (2012)). On the current status of the compelling interest test, see MCCONNELL ET AL., *supra* note 17, at 198. *See also* W. COLE DURHAM, JR. & BRETT G. SCHARFFS, *LAW AND RELIGION: NATIONAL, INTERNATIONAL, AND COMPARATIVE PERSPECTIVES* 231 (2010). I discuss the compelling interest test further below. *See infra* pp. 745–47.

19. *See, e.g.*, *Emp’t Div. v. Smith*, 494 U.S. 872 (1990) (rejecting the compelling interest test for purposes of the Free Exercise Clause); *see also* William P. Marshall, *Bad Statutes Make Bad Law*, 2014 SUP. CT. REV. 71 (reviewing problems with the compelling interest test).

20. *See* Mark L. Movsesian, *The Powerful Headwinds Confronting Religious Freedom*, L. & LIBERTY (May 2, 2018), <https://www.lawliberty.org/2018/05/02/masterpiece-cakeshop-religious-freedom-nones/> [https://perma.cc/FC7F-LUTF].

21. In a related context, David Bernstein has written that the compelling interest test may only serve as “an empty vessel for the justices’ moral intuitions.” David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 U. CHI. LEGAL F. 133, 167 (discussing freedom of association).

commitments signally important.²² In short, the cultural and political trends I have identified—growing religious polarization, an expanded concept of equality, and an activist state—suggest that conflicts between anti-discrimination norms and the religious beliefs of millions of Americans will, if anything, grow more frequent and bitter and that courts will continue to have to resolve them. And the vague nature of the compelling interest test suggests that the ultimate legal resolution will remain unclear for a long time to come.

This Article proceeds as follows. Part I describes the Court's decision in *Masterpiece Cakeshop*. Part II explores the cultural and political trends I have identified and shows how the *Masterpiece Cakeshop* litigation reflects them. Part III concludes and ventures three predictions: conflicts like *Masterpiece Cakeshop* will grow more frequent and harder for our society to negotiate; the law in this area will remain unsettled and deeply contested; and the judicial confirmation wars will grow even more bitter and partisan than they already are.

One clarification at the start: this Article is analytical rather than normative. For what it is worth, *Masterpiece Cakeshop* struck me as a difficult case. But my goal here is not to argue the merits. Rather, I seek to illuminate the issues and make some predictions about the future course of the law. Those predictions may turn out to be wrong. But their correctness does not depend on one's views about which side should prevail in the clash of important values that *Masterpiece Cakeshop* represents: our society's commitments both to non-discrimination and to religious freedom.

I. THE MASTERPIECE CAKESHOP DECISION

Masterpiece Cakeshop presents what has become a familiar pattern in American commercial life. A gay couple asks a vendor to provide services in connection with the couple's wedding—photography, flowers, invitations—which the

22. See Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 393–94 (1994) (observing that the balancing contemplated by the compelling interest test “invites judges to put their personal values onto the scale”).

vendor refuses on the basis of his religious convictions.²³ Providing services for a gay wedding, he explains, would make him complicit in conduct he considers sinful.²⁴ The couple objects that the vendor is denying service in violation of state public-accommodations laws that prohibit discrimination on the basis of sexual orientation. The vendor responds that he is willing to provide services to all customers, including the couple, whether they are gay or straight. But he declines to participate in gay weddings, because gay weddings violate his religious beliefs.

In *Masterpiece Cakeshop*, a gay couple, Charlie Craig and Dave Mullins, asked a Colorado cake designer, Jack Phillips—the owner of Masterpiece Cakeshop—to create a cake for their wedding celebration.²⁵ The couple didn’t specify exactly what they wished the cake to say, or, in fact, whether they wanted an inscription on the cake at all.²⁶ But they did want a custom cake that Phillips would design especially for their wedding. They were not interested in the off-the-shelf baked goods that Phillips offered to sell them.²⁷

Phillips, a conservative Christian with traditional views about marriage, declined to fill their order, explaining that creating a cake for a gay wedding would violate his religious convictions. Creating such a cake, he said, would amount to his “participat[ing] in” and “personally endors[ing]” a relationship he considered unbiblical.²⁸ Indeed, the subsequent investigation by the state civil rights authorities revealed that Phillips had a policy against creating cakes for gay weddings and had declined to do so several times in the past.²⁹ He had also refused, out of religious conviction, “to bake cakes

23. See Kendrick & Schwartzman, *supra* note 11, at 133–34 (discussing cases).

24. On complicity claims generally, compare Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015), with Joshua J. Craddock, *The Case for Complicity-Based Religious Accommodations*, 12 TENN. J.L. & POL’Y 233 (2018).

25. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n* 138 S. Ct. 1719, 1724 (2018).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1726.

containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween.”³⁰

Shortly after Phillips rejected their order, Craig and Mullins began an administrative action against him (and Masterpiece Cakeshop) by filing a complaint with the Colorado Civil Rights Division, the state agency responsible for enforcing Colorado’s Anti-Discrimination Act, or CADA.³¹ Like many similar laws across the country, CADA prohibits places of public accommodation from refusing customers equal service on the basis of sexual orientation, among other things.³² The Division investigated Phillips, found probable cause that he had violated CADA, and referred the case to another state agency, the Colorado Civil Rights Commission, which in turn referred the case to an administrative law judge, who held a hearing and determined that Phillips had violated CADA by discriminating against Craig and Mullins on the basis of sexual orientation.³³

Phillips appealed the ALJ’s ruling to the Commission itself, which held two public meetings in his case. At both meetings, but especially at the second, individual commissioners made remarks dismissing and disparaging Phillips’s religious convictions.³⁴ One commissioner suggested that, if Phillips’s religious beliefs prevented him from complying with Colorado’s anti-discrimination law, Phillips might find another place to do business.³⁵ Another likened Phillips’s stance to historical episodes in which religion had been used to justify violent acts of oppression, including slavery and the Holocaust.³⁶ This commissioner described Phillips’s religious objection to same-sex marriage as simply a way to injure gay

30. *Id.* at 1745 (Thomas, J., concurring in part and concurring in the judgment).

31. *Id.* at 1725 (majority opinion).

32. COLO. REV. STAT. § 24-34-601(2)(a) (2018).

33. *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

34. *Id.* at 1729.

35. The “commissioner suggested that Phillips can believe ‘what he wants to believe,’ but cannot act on his religious beliefs ‘if he decides to do business in the state.’ A few moments later, the commissioner restated the same position: ‘[I]f a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.’” *Id.* (citations omitted).

36. *Id.*

people and “one of the most despicable pieces of rhetoric people can use.”³⁷ The Supreme Court made much of these remarks in its eventual decision.

The Commission affirmed the ALJ’s decision and ruled against Phillips.³⁸ It ordered him to stop refusing orders for wedding cakes from gay couples and to provide “comprehensive staff training” at his shop on CADA and on the requirements of the Commission’s ruling against him.³⁹ In addition, it required him to file compliance reports with the Commission on a quarterly basis for two years. The reports were to provide the Commission with details about how many people Phillips had refused to serve and the reasons for his refusals, among other things.⁴⁰

When the Colorado Court of Appeals rejected his appeal of the Commission’s order, Phillips sought review in the United States Supreme Court, arguing that requiring him to create wedding cakes for gay couples violated both his free speech and free exercise rights under the First Amendment.⁴¹ When the Supreme Court granted review, most observers thought the Court would focus on Phillips’s free speech claim. His free exercise claim seemed precluded by the Court’s landmark decision in *Employment Division v. Smith*, which held that the Free Exercise Clause is not violated by a neutral, generally applicable law that incidentally burdens a citizen’s religious exercise.⁴² CADA certainly seemed to be such a law: it amounted to a blanket prohibition on discrimination in places of public accommodation, whether the motivation for the discrimination was religious or not.⁴³ Further, the Court’s Civil

37. *Id.*

38. *Id.* at 1726.

39. *Id.*

40. *Id.*

41. Brief for Petitioners at 14–15, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2017) (No. 16-111).

42. 494 U.S. 872, 879 (1990).

43. In relevant part, CADA provides:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the

Rights Era jurisprudence suggested that, at least with respect to racial discrimination, religious objections would not exempt public accommodations from anti-discrimination laws.⁴⁴ To most observers, Phillips's chance of succeeding on a free exercise claim seemed remote.⁴⁵

Somewhat surprisingly, however, the Court ruled, 7-2, that the Commission had violated Phillips's free exercise rights, not so much in its ultimate decision against him, but in its decision-making process. Writing for the Court, Justice Kennedy explained that the Free Exercise Clause gave Phillips the right to a neutral decision maker.⁴⁶ But the Commission had not been neutral at all. In fact, it had shown a clear bias against him—that is, against his sincere religious beliefs. As evidence, Justice Kennedy adduced the commissioners' official comments in the case, especially the remark about the "despicable" nature of Phillips's religious convictions against same-sex weddings.⁴⁷ In addition, he noted that the Commission had in prior cases allowed bakers to decline, on the basis of conscience, customers' orders for cakes with messages opposing gay marriage. This disparate treatment suggested that the Commission had ruled against Phillips simply because the Commission was hostile to the substance of Phillips's religious views.⁴⁸

Because the Commission had not shown neutrality with respect to Phillips's sincere religious beliefs, Justice Kennedy concluded, its decision against him violated the Free Exercise Clause.⁴⁹ This conclusion, too, was a bit of a surprise, since it seemed to leave out a step. Most commentators had understood the Court's 1993 decision in *Church of Lukumi*

goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

COLO. REV. STAT. § 24-34-601(2)(a) (2017).

44. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.5 (1968) (per curiam).

45. See *supra* note 3 and accompanying text.

46. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

47. *Id.* at 1729. For an argument that the Court misinterpreted these comments, see *Kendrick & Schwartzman*, *supra* note 11, at 135.

48. *Masterpiece Cakeshop*, 138 S. Ct. at 1730–31.

49. *Id.* at 1731–32.

*Babalu Aye v. City of Hiialeah*⁵⁰ to require strict scrutiny in circumstances where the state had not been neutral with respect to religion: a state could burden religion in a non-neutral way only for a compelling reason and through the least restrictive means of doing so.⁵¹ Indeed, Justice Gorsuch assumed as much in his concurring opinion, which applied the compelling interest test to invalidate the Commission's decision.⁵² But Justice Kennedy skipped the compelling interest analysis altogether.

Justice Kennedy also left unresolved the question of what would happen if a state agency did not demonstrate overt bias against a claimant's religion. Presumably, in many cases in which state agencies apply anti-discrimination laws to vendors, officials do not make on-the-record comments disparaging the vendors' sincere religious convictions, and do not have a record of ruling inconsistently in prior disputes.⁵³ The Court would decide any such future cases, Justice Kennedy said, on the basis of the particular circumstances.⁵⁴ About the only guidance the Court was willing to give was this: courts would have to strike a balance between the right of religious persons to have their beliefs respected and the right of gay persons to obtain goods and services in the marketplace without suffering affronts.⁵⁵

Masterpiece Cakeshop ultimately settled fairly little, and the fight over future cases already has begun.⁵⁶ Indeed, the

50. 508 U.S. 520 (1993).

51. *Id.* at 546; see also, e.g., Christopher C. Lund, *Exploring Free Exercise Doctrine: Equal Liberty and Religious Exemptions*, 77 TENN. L. REV. 351, 375 (2010).

52. *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring).

53. Cf. Kendrick and Schwartzman, *supra* note 11, at 150 ("Going forward, state civil rights enforcement agencies have the chance to try again, while avoiding the mistakes of the [Colorado] Commission.").

54. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

55. *Id.*

56. Only two weeks after the Court ruled in *Masterpiece Cakeshop*, the Colorado Civil Rights Commission sanctioned Jack Phillips for refusing to create a cake for a transgender celebration. See Amy B. Wang, *Baker claims religious persecution again—this time after denying cake for transgender woman*, WASH. POST (Aug. 15, 2018), <https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/15/baker-claims-religious-persecution-again-this-time-after-denying-cake-for-transgender-woman/> [<https://perma.cc/A4MN-NZGK>]. The Commission ultimately determined not to move forward with the case, as part of a settlement with

separate opinions in *Masterpiece Cakeshop* suggest where the battle lines may be drawn for the many complicated issues future cases will raise.⁵⁷ Still, although it did not resolve matters, the decision reveals important cultural and political trends that will likely drive future cases. I turn to those trends now.

II. CULTURAL AND POLITICAL TRENDS IN MASTERPIECE CAKESHOP

A. *Religious Polarization: The Nones vs. the Traditionally Religious*

Masterpiece Cakeshop reflects two important cultural trends. The first is a growing polarization between two groups in American religious life: the Nones and the Traditionally Religious. The second is an expanding notion of equality, one that goes beyond the anti-discrimination norms of the Civil Rights Movement, which opposed the state's differential treatment of persons on the basis of race and other characteristics, to a more general rejection of social distinctions, especially including those grounded in religion. This Article addresses each of these trends in turn.

The rise of the Nones is perhaps the most talked-about development in American sociology in the last decade.⁵⁸ "Nones" are those people who describe their religion in surveys as "none" or "nothing in particular"—people who say they have no religious affiliation at all.⁵⁹ According to the most recent Pew Research Center study in 2014, about 23% of Americans adults now fall within this category, an increase of about seven percent from the previous survey in 2007.⁶⁰ In

Phillips. Chris Mills Rodrigo, *State of Colorado, baker in same-sex wedding case agree to end litigation*, THE HILL (Mar. 5, 2019), <https://thehill.com/regulation/court-battles/432722-state-of-colorado-baker-in-same-sex-wedding-case-agree-to-end>.

57. *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (Kagan, J., concurring); *id.* at 1734 (Gorsuch, J., concurring); *id.* at 1740 (Thomas, J., concurring in part and concurring in the judgment); *id.* at 1748 (Ginsburg, J., dissenting).

58. Much of this discussion of the Nones derives from my earlier work. Movsesian, *supra* note 12.

59. Movsesian, *supra* note 12, at 1.

60. PEW RESEARCH CTR., AMERICA'S CHANGING RELIGIOUS LANDSCAPE 20 (2015) [hereinafter AMERICA'S CHANGING RELIGIOUS LANDSCAPE],

historical terms, this percentage is extremely large. In the 1950s, only three percent of Americans said they had no religious identity.⁶¹ According to the Pew survey, Nones now qualify as the second largest “religious” group in the country, after Protestants and ahead of Catholics—though, when aggregated, Christian faiths still claim the large majority of Americans, about 70%.⁶²

Among Millennials, the percentage of Nones is significantly higher than in the general population. Pew divides Millennials into two cohorts, “Older Millennials,” born between the years 1981 and 1989, and “Younger Millennials,” born between the years 1990 and 1996.⁶³ Among Older Millennials, the percentage of Nones is 34%, up nine points from 2007; among Younger Millennials, the percentage is even higher—36%.⁶⁴ These numbers are significant because of what sociologists refer to as the “generational replacement” effect.⁶⁵ As older Americans with relatively strong religious commitments die off, younger, less affiliated Americans gradually will take their place. As a result, over time, Nones will make up an increasingly large percentage of the population. It is true that people often become more religious as they age, and today’s Millennials may do so as well. At the moment, though, they are not following that pattern. In terms of indicators such as church attendance and prayer, older Millennials “are, if anything, *less* religiously observant today than they were” just seven years ago.⁶⁶

To be sure, some sociologists question whether the percentages are really as high as these surveys indicate.⁶⁷ Baylor University sociologist Rodney Stark, for example,

<http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> (select “Complete Report PDF”) [<https://perma.cc/2CBC-YA4P>].

61. MARK CHAVES, *AMERICAN RELIGION* 15 (2d. ed. 2017).

62. *AMERICA’S CHANGING RELIGIOUS LANDSCAPE*, *supra* note 60, at 3–4.

63. *Id.* at 11.

64. *Id.*

65. *Id.*

66. PEW RESEARCH CTR., *U.S. PUBLIC BECOMING LESS RELIGIOUS* 24 (2015) [hereinafter *U.S. PUBLIC BECOMING LESS RELIGIOUS*], <http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/> (select “Complete Report PDF”) [<https://perma.cc/3ZC7-ML8G>].

67. Movsesian, *supra* note 12, at 1.

believes that surveys overstate the numbers of Nones in America today; some respondents apparently list their religion as “None” to indicate that “they do not belong to a specific church”—that is, when they are non-denominational Christians.⁶⁸ (Some anecdotal evidence: When I presented an earlier version of this Article at a conference at the Notre Dame Center on Ethics and Culture, one audience member approached me afterwards to say that he would describe himself as a “None,” even though he was a Christian, precisely because he had never formally joined any church congregation). Whatever the precise numbers may be, most sociologists take the rise of the Nones to be a “‘highly reliable’ statistical finding” with implications for the future of American religion.⁶⁹

Most Nones do not reject religious belief as such. The majority of them in the 2014 Pew survey, 61%, say they believe in God or a universal spirit—though that percentage represents a decline from the 2007 survey, which showed that 70% of Nones believed in God.⁷⁰ About a third of Nones say that religion is somewhat or very important in their lives—though, again, that percentage is down a great deal since 2007, which suggests that Nones are becoming more secular over time.⁷¹ What most characterizes Nones is a rejection of institutional religion. The Nones are spiritual “Independents” who refuse to join formal, authoritative religious communities, which they see as coercive and stifling.⁷² Instead, Nones believe they can fashion their own, personal religions from a variety of different traditions—indeed, from traditions which present themselves as opposed to one another. As Ross Douthat writes, the memoirist Elizabeth Gilbert, whose bestseller, *Eat Pray Love* helped popularize the concept of “spiritual but not religious” in the first decade of this century, created her own, personal

68. *Conversations: Rodney Stark*, LAW AND RELIGION FORUM BLOG (Aug. 5, 2013), <https://lawandreligionforum.org/2013/08/05/conversations-rodney-stark/#more-13283> [<https://perma.cc/C5Y7-PEG6>].

69. Movsesian, *supra* note 12, at 1 (quoting FRANK NEWPORT, *GOD IS ALIVE AND WELL* 13 (2012)).

70. AMERICA’S CHANGING RELIGIOUS LANDSCAPE, *supra* note 60, at 47.

71. *Id.* at 15.

72. See Chaeyoon Lim et al., *Secular and Liminal: Discovering Heterogeneity Among Religious Nones*, 49 J. SCI. STUDY OF RELIGION 596, 597, 614 (2010).

spirituality by combining elements from Hindu polytheism, Christian monotheism, and Buddhist non-theism.⁷³

Nones believe they can do this sort of thing for two reasons. First, they reject the idea that any one religious tradition can be uniquely true to the exclusion of all others. Exclusive claims of religious authority strike them as an affront to reason and good sense, as well as human freedom.⁷⁴ Second, they believe that the individual has the right to pick and choose among various traditions and forge a spiritual path that works for him, because the individual has God within him.⁷⁵ Spiritual enlightenment and peace come, not from submitting to external religious authority, which inevitably squelches spiritual authenticity, but from discerning and accepting the divine guidance that exists within oneself.⁷⁶ The individual, not the religious community, has the right to judge what is true—or, at least, what is true for him.

Religious Independents have always been part of American life.⁷⁷ In the eighteenth century, Thomas Paine wrote, “My own mind is my own church,”⁷⁸ a sentiment many twenty-first century Nones share. And the nineteenth-century Transcendentalists sound, to today’s ears, a great deal like Nones.⁷⁹ In the past, though, this sort of religious idiosyncrasy was essentially a fringe phenomenon.⁸⁰ Today, by contrast, Nones make up the second largest religious group in America, and roughly a third of Millennials. For large numbers of our fellow citizens, the conventional understanding of religion “as a distinctive body of beliefs, a moral and ritual set of practices, and the organizational structures surrounding ideas and ideals

73. ROSS DOUTHAT, *BAD RELIGION: HOW WE BECAME A NATION OF HERETICS* 218 (2012).

74. See Movsesian, *supra* note 12, at 2.

75. See DOUTHAT, *supra* note 73, at 4–5, 216–17.

76. See Movsesian, *supra* note 12, at 2.

77. *Id.* at 8.

78. KERRY S. WALTERS, *THE AMERICAN DEISTS* 213 (1992).

79. See DOUTHAT, *supra* note 73, at 217–19 (comparing Ralph Waldo Emerson with contemporary spiritual guides like Deepak Chopra, Paulo Coelho, and Oprah Winfrey).

80. See Movsesian, *supra* note 12, at 8.

of the sacred," no longer represents the norm.⁸¹ In fact, for these citizens, traditional religion represents a malign force that stifles authentic spirituality, creating inner turmoil and preventing individuals from attaining their true potential.

Why should the rise of the Nones occur now, at the start of the twenty-first century? Many factors exist, but three merit special attention. First, there are demographic explanations. Changes in family structure, and, in particular, high rates of religious intermarriage and divorce have an important role. About half of Americans who marry today choose a spouse of a different religion.⁸² More than a quarter of Millennials say they were raised in a religiously mixed family.⁸³ As one would expect, children from such families more often become Nones when they grow up than children whose parents shared the same religion.⁸⁴ Moreover, Nones are themselves having and raising children. Roughly one-quarter of Millennials in the Pew survey report having been raised by at least one parent who was a None; about six percent say both their parents were Nones.⁸⁵ A large percentage of these children also become Nones when they reach adulthood—62% percent where both parents were Nones.⁸⁶ Parental divorce also appears to have a role. Children of divorce are significantly less likely to identify with a religion than children from intact families, perhaps because they have less trust in institutions and authority figures generally.⁸⁷

Second, the rise of the Nones seems to be associated with the Sexual Revolution, especially with changing views on homosexuality. According to a 2017 Pew report, a solid

81. James Davison Hunter, *Law, Religion, and the Common Good*, 39 PEPP. L. REV. 1065, 1065 (2013).

82. ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE* 148 (2010).

83. PEW RESEARCH CTR., *ONE-IN-FIVE U.S. ADULTS WERE RAISED IN INTERFAITH HOMES 4* (2016) [hereinafter *ONE-IN-FIVE U.S. ADULTS WERE RAISED IN INTERFAITH HOMES*], <http://www.pewforum.org/2016/10/26/one-in-five-u-s-adults-were-raised-in-interfaith-homes/> (select "Complete Report PDF") [<https://perma.cc/LDA6-TWZN>].

84. See Movsesian, *supra* note 12, at 9.

85. *ONE-IN-FIVE U.S. ADULTS WERE RAISED IN INTERFAITH HOMES*, *supra* note 83, at at 4.

86. *Id.* at 5.

87. Movsesian, *supra* note 12, at 9.

majority of Americans, about 62% percent, now say that same-sex marriage should be legal.⁸⁸ Among Nones, however, the percentage is strikingly high—85%.⁸⁹ Here again, Millennials are key. Young adults are driving the changing social consensus on homosexuality, including among Nones. Millennials generally have more positive views of homosexuality than older Americans, and nearly 90% of Millennial Nones say that society should accept homosexuality.⁹⁰ The Pew report also offers support for what sociologists have been saying for years: young Nones dislike organized religion because they associate it with traditional, negative views about homosexuality, and because they believe organized religion's rejection of homosexuality masks hypocrisy about sexual sins generally.⁹¹

Finally, the rise of the Nones in the twenty-first century may reflect the gradual, but inevitable, working-out of the inner logic of liberalism, America's dominant political ideology. In the nineteenth century, Tocqueville wrote that escaping the hold of habit, family, and tradition were among the principal features of the American mindset.⁹² More recently, Patrick Deneen has observed that liberalism has always opposed received authority, which it views as arbitrary and accidental, in favor of individual autonomy and choice. Liberalism teaches that loosening the bonds of family, community, and religion is necessary in order to release the full potential of human beings.⁹³ Liberalism encourages the person to think of himself as "primarily a free chooser" with respect to "all relationships, institutions, and beliefs."⁹⁴ Over time, the ethos of choice extends to more and more subjects. It is no surprise, then, in a society where liberalism dominates, that many people eventually come to see choice as extending to religious institutions and beliefs.

88. *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (June 26, 2017), <http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/> [<https://perma.cc/6WNN-A6SZ>].

89. *Id.*

90. U.S. PUBLIC BECOMING LESS RELIGIOUS, *supra* note 66, at 35.

91. See PUTNAM & CAMPBELL, *supra* note 82, at 130.

92. DEMOCRACY IN AMERICA, *supra* note 16, II.i.1, at 403.

93. See PATRICK DENEEN, WHY LIBERALISM FAILED 30 (2018).

94. *Id.* at 78.

Nonetheless, the rise of the Nones does not mean that religion is simply disappearing from American life. The increase in the number of the religiously unaffiliated is occurring simultaneously with an increase in religiosity among Americans who *do* maintain a religious identity—a group one might call the Traditionally Religious. According to the 2014 Pew survey, religiously affiliated Americans “appear to have grown *more* religiously observant in recent years,” if one considers things like Bible study and prayer groups.⁹⁵ Another recent survey shows that the percentage of “intensely religious” Americans, with intensity being measured in terms of indicators such as church attendance and frequent prayer, has remained remarkably stable for decades.⁹⁶ The percentage of Americans with a “strong” religious affiliation has remained steady, at a little less than 40%, since 1989.⁹⁷

In other words, America is experiencing a deepening religious polarization rather than a systematic falloff from religion. The growing percentage of Nones does not result from a general decrease in religious observance, but “a dramatic decline” in the numbers of the “moderately religious”—people who formally identify with a religion but who show only modest levels of commitment.⁹⁸ As in so many areas of American life, the middle is dropping out in favor of the extremes on either end. The moderately religious are rapidly ending their affiliations and becoming Nones, while the Traditionally Religious are maintaining their affiliations or even increasing their intensity. We appear to be reaching a point of rough parity. More than a fifth of Americans, and more than a third of younger Americans, are now Nones, while something like two-fifths of Americans are among the Traditionally Religious.

This deepening polarization will exacerbate conflicts like the one in *Masterpiece Cakeshop* and make it harder for our society to negotiate them. Compromise requires an ability to sympathize with the other side, to understand, even if one does

95. U.S. PUBLIC BECOMING LESS RELIGIOUS, *supra* note 66, at 6.

96. Landon Schnabel & Sean Bock, *The Persistent and Exceptional Intensity of American Religion: A Response to Recent Research*, 4 SOC. SCI. 686, 687–88 (2017).

97. *Id.*

98. *Id.* at 689.

not share, the commitments that motivate one's interlocutor. It requires some common base of experience. Americans have not always shown such sympathy for minority religious communities, of course. At various times, Catholics, Jews, and Mormons all have experienced hostility, among other religious groups. But a general sympathy for religion and religious claims has always marked American culture. In the past, someone like Jack Phillips might have counted on a widespread, if thin, sympathy with the idea of traditional religious commitments. The vast majority of Americans would have understood why he thought it so important to follow the tenets of his religion, for the simple reason that the vast majority of Americans would have had some connection with institutional religion. Even if they were only nominally religious, and even if they disagreed with his particular convictions, most Americans would have understood why Phillips insisted on acting as he did.

But this wider social sympathy for traditional religion is fading. Large numbers of Americans no longer have experience with traditional, organized religion—and, to the extent they do have such experience, they reject it. Nones are unlikely to respond sympathetically when the Traditionally Religious seek exemptions from legal requirements.⁹⁹ Indeed, Nones are likely to see such exemptions as an unfair advantage for organized religion. For their part, the Traditionally Religious are also unlikely to sympathize with the worldview of the Nones. Disagreements between the two groups will likely be amplified by the fact that Nones overwhelmingly reject traditional teachings on sexuality, which they see as psychologically damaging and essentially unjust, while the Traditionally Religious continue to endorse them as necessary for human dignity.¹⁰⁰ In short, we now have two fairly sizable, competing groups with sharply divergent understandings of the beneficence of traditional religious commitments, especially

99. See JOHN INAZU, *CONFIDENT PLURALISM* 22–23 (2015).

100. See Mark L. Movsesian, *Of Human Dignities*, 91 *NOTRE DAME L. REV.* 1517, 1529 (2016).

with respect to sexuality—and neither group seems especially interested in compromise.¹⁰¹

The public response to controversies like *Masterpiece Cakeshop* reflects this religious polarization. In the summer of 2016, while the Court was considering Jack Phillips’s cert petition, the Pew Research Center surveyed Americans’ opinions on whether a business should be obligated to provide services for a gay wedding notwithstanding the owner’s religious objections.¹⁰² The responses closely tracked America’s religious divide. About two-thirds of the religiously unaffiliated—the Nones—said that a business should be required by law to provide services for a gay wedding even if the owner had religious objections.¹⁰³ About two-thirds of Americans who attend religious services frequently—the Traditionally Religious—said that a business owner should *not* be required to do so.¹⁰⁴ Only a relatively small number of Americans, 18%, found it possible to sympathize with both sides’ points of view.¹⁰⁵ This sharp religious divide suggests that achieving social consensus on cases like *Masterpiece Cakeshop* will be extremely difficult.

B. Equality as Sameness

Masterpiece Cakeshop also reflects a second cultural trend: society’s expanding conception of equality. Equality has been central to the American worldview ever since Jefferson enshrined the concept in the Declaration of Independence. But equality can mean different things. According to one understanding, it refers to legal equality—to the fair and uniform application of the law to all citizens.¹⁰⁶ In the twentieth

101. On the unwillingness of both the LGBT community and the Traditionally Religious to compromise in the marketplace, see, e.g., Mark L. Movsesian, *Markets and Morals: The Limits of Doux Commerce*, 9 WM. & MARY. BUS. L. REV. 449, 472 (2018).

102. PEW RESEARCH CTR., WHERE THE PUBLIC STANDS ON RELIGIOUS LIBERTY VS. NONDISCRIMINATION (2016), <http://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-liberty-vs-nondiscrimination/> (select “Complete Report PDF”) [<https://perma.cc/BY4U-83ZC>].

103. *Id.* at 16.

104. *Id.*

105. *Id.* at 5.

106. Cf. Jurgen Habermas, *Paradigms of Law*, 17 CARDOZO L. REV. 771, 778–79 (1996) (distinguishing between “legal equality” and “actual equality”).

century, America gradually extended legal equality to racial and other minorities against whom it had discriminated, in law, for centuries. This has been one of the great achievements of our time.

However, equality can also refer to a broader unwillingness to accept any distinctions among groups and individuals, whether “material, social, or personal.”¹⁰⁷ According to this view, equality means a rejection of the idea of “difference per se.”¹⁰⁸ All boundaries that distinguish one group of people from another—for example, beliefs and practices that mark out a religious community and exclude non-members—are presumptively suspect because of the implicit judgments they suggest. Some groups apparently think their beliefs and ways of life are superior to others. Such judgments seem impolite, ungenerous, and inconsistent with the spirit of true equality, which requires that each community acknowledge the basic correctness and good will of all others. Suggesting that one finds others’ beliefs and practices morally inferior is, on this view, a grave affront to human dignity. Notwithstanding societal claims to respect diversity, it is this second concept of equality—“equality as sameness”¹⁰⁹—that pervades our culture today, especially with respect to religion.

Once again, Tocqueville saw this coming. Equality, he observed, was Americans’ most fundamental moral commitment, the criterion by which we judged everything else.¹¹⁰ Equality required that social distinctions be ignored—between aristocrats and common men, the educated and the unschooled, man and woman, parent and child. In law, it called for uniformity;¹¹¹ in philosophy and religion, for

107. Patrick Deneen, *Alexis de Tocqueville*, FIRST PRINCIPLES (March 14, 2011), <http://www.firstprinciplesjournal.com/print.aspx?article=911&loc=b&type=cbtp> [<https://perma.cc/WRH7-AUYM>].

108. See Gregg, *supra* note 15.

109. *Id.*

110. See DEMOCRACY IN AMERICA, *supra* note 16, I:Introduction, at 3 (“[A]s I studied American society, more and more I saw in equality of conditions the generative fact from which each particular fact seemed to issue.”); see also PIERRE MANENT, *TOCQUEVILLE AND THE NATURE OF DEMOCRACY* (John Waggoner trans., Rowman & Littlefield 1996) (1982).

111. See DEMOCRACY IN AMERICA, *supra* note 16, II.iv.2, at 641; *id.* II.iv.3, at 645.

generality rather than a focus on the particular.¹¹² In fact, with respect to religion, the preference for generality ultimately worked to minimize distinctions between particular faith traditions and promote pantheism, which not only denied the relevance of difference in the created order, but also the distinction between creation and the Creator Himself.¹¹³

The emphasis on religious equality did not result in widespread pantheism in Tocqueville's time. Christianity had too powerful a hold on nineteenth-century Americans for that to happen.¹¹⁴ Today, however, his predictions seem to be coming true. Americans are remarkably broad-minded about the legitimacy of all religions. A 2010 study by sociologists Robert Putnam and David Campbell reveals that almost 90% of Americans believe that members of other religions, not only their own, can go to Heaven.¹¹⁵ Nuances exist, and much depends on how people understand the question. The percentage goes down, for example, when surveyors ask Christians whether non-Christians (as opposed to different kinds of Christians) can go to Heaven.¹¹⁶ And much depends on how respondents understand the question. Some Christians would say, for example, that Christianity is the unique path to salvation, but members of other faiths may be on the path without knowing it. Other Christians would say that it's possible for non-Christians to go to Heaven, but rare. Still, it is noteworthy that the large majority of American Christians, even those who belong to churches that teach that Christianity is the exclusive path to salvation, believe that non-Christians can, in principle, receive eternal life.

Putnam and Campbell ascribe this remarkable ecumenism to a number of factors, including the large number of mixed-religious families in America, which tend to mute religious distinctions (how could my saintly "Aunt Susan" not go to

112. *Id.* II.iv.2, at 640.

113. *Id.* II.i.7, at 425–26.

114. An "innumerable multitude of sects" existed in America, he noted, but all were "within the great Christian unity." *Id.* at I.ii.9, at 278; see also *id.* II.i.1., at 406 ("In the United States, Christian sects vary infinitely and are constantly modified, but Christianity itself is an established and irresistible fact that no one undertakes either to attack or defend.").

115. PUTNAM & CAMPBELL, *supra* note 82, at 534.

116. See *id.* at 536.

Heaven just because she's not a Christian?), and the inevitable social interactions between people from different religions in daily life ("My Friend Al" is an evangelical Christian, but he's not a bad guy).¹¹⁷ These explanations seem to have things backwards: it is the norm of tolerance that lets Aunt Susan marry into the family in the first place, and allows one to have a friend from a different faith tradition. Whatever the reasons, when it comes to perhaps the most important religious question of all, Americans show a remarkably latitudinarian attitude. With respect to attaining salvation, and with the qualifications I suggest above, most Americans seem to believe that all ways are equally good.

On the one hand, the concept of equality as sameness may make conflicts like the one in *Masterpiece Cakeshop* less likely. If people perceive all ways as equally good, they will not have problems participating in all sorts of celebrations, whatever their religious convictions. On the other hand, when such conflicts do occur, an expansive concept of equality will make them more bitter and harder to resolve. To refuse to participate in someone else's wedding on religious grounds is to erect a boundary that seems socially incomprehensible. It is to express a judgment that the life events of other citizens are so opprobrious that one cannot take part in them. Such a judgment violates the principle of "equality as sameness" and, as a result, is likely to be taken as a deep insult to the dignity of other citizens.

If I may offer a personal anecdote, I recently posed a hypothetical case in my Law and Religion class.¹¹⁸ Suppose, I asked the students, an observant Jew has a florist shop. One day, a customer, who is also Jewish, comes to the shop to say she's getting married and would like the florist to do the wedding. "That's wonderful," the florist says. "Where will you get married?" The customer replies that the wedding will be at a local nondenominational church, because her fiancé is Christian, and she, the customer, isn't very observant. The florist thinks about it and says, "I'm so sorry, but I can't do

117. *Id.* at 526, 531.

118. I related this anecdote in a blog post. Mark Movsesian, *Passion for Equality*, FIRST THINGS (July 10, 2017), <https://www.firstthings.com/web-exclusives/2017/07/passion-for-equality> [<https://perma.cc/2SRF-ETCE>].

your wedding. It's nothing personal; I'm sure your fiancé is a fine person, as are you. It's just that as an observant Jew, I don't approve of interfaith weddings. For our community to survive, we must avoid intermarriage and assimilation. Please understand. There are many other florists who can do your wedding. I'll even suggest some. But I can't, in good conscience, participate." What result?

In posing this hypothetical, I was trying to show the students that these are complicated questions and that they need to consider both sides. Much to my surprise, the students were uniformly unsympathetic to the florist. There should be no legal right to decline services in this situation, they told me: the florist was not acting reasonably and in good faith. I pressed them. Didn't they see that genuine religious diversity requires respect for difference, that difference implies boundaries, and that boundaries necessarily exclude? Couldn't a member of a minority religion believe, in good faith, that her community faced assimilation and decline to run her business in a way that promoted it? Wasn't that a concern worthy of respect? No, they told me. The florist in my hypothetical case should have no right to turn away the interfaith couple.

I have thought about the students' reaction, and it seems to me that it results from the students' sense that it is wrong to draw religious distinctions that exclude others and injure their dignity, no matter what the justification. That is what the florist did in my hypothetical case—and that, I think, was what bothered the students. The florist was violating the "equality as sameness" principle, and my students simply did not think her concerns justified her in doing so.

Something similar, I believe, occurred in *Masterpiece Cakeshop* itself. Craig and Mullins viewed Phillips's objection to creating their wedding cake as an insult, no matter how much he protested about the good will he bore them, and no matter how willing he was to sell them goods off the shelf.¹¹⁹ They experienced an affront so deep that, rather than obtain a cake somewhere else, as they easily could have done, they sought

119. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* 138 S. Ct. 1719, 1724 (2018).

vindication by the state and pursued a lengthy litigation.¹²⁰ And the members of the Colorado Civil Rights Commission agreed with them about the depth of the insult, especially the one commissioner who compared Phillips's objections to historical episodes like slavery and the Holocaust.¹²¹ Like the florist in my classroom hypothetical, Phillips had violated the "equality as sameness" principle. His claim that he could not in good conscience participate in a gay wedding, because that would make him complicit in activity his religion regarded as sinful, erected a boundary that increasing numbers of Americans find rebarbative.¹²²

C. *The Activist State*

The third trend that *Masterpiece Cakeshop* reflects is a political one: the rise of activist administrative agencies at both the federal and state levels. The growth of government over the course of the twentieth century, starting with the Progressives in the early 1900s, picking up steam in the New Deal of the 1930s, and continuing in the Great Society of the 1960s, has been much discussed.¹²³ Notwithstanding occasional resistance by Presidents and governors, the welfare state, "characterized by a high level of government action in all phases of economic and social life," is an inescapable fact of contemporary American politics.¹²⁴ Government rules affect virtually every aspect of our society, including commerce, communications, consumer transactions, education (at all levels), employment, food, health and safety, land use, and professional qualifications.

The expanding scope of the federal government illustrates the trend. Since the so-called "New Deal Settlement" of the

120. See Transcript of Oral Argument at 62, *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) (Kennedy, J.) (noting availability of other bakeries to fill the couple's order).

121. See *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

122. See *id.* at 1724 ("To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs."). For sources on complicity arguments generally, see *supra* note 24.

123. See, e.g., JOSEPH POSTELL, *BUREAUCRACY IN AMERICA* (2017).

124. Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 375 (1990).

1930s, the federal government has had more or less plenary legislative power under the Constitution's Commerce Clause.¹²⁵ The Court has occasionally suggested, most recently in the first Obamacare case, some limits to the Commerce Clause power, but it has not reconsidered the basic understanding.¹²⁶ The Court has also allowed Congress effectively unlimited discretion in delegating authority to executive branch agencies, and has allowed those agencies considerable discretion in interpreting congressional mandates.¹²⁷ As a result, "[t]here is now virtually no significant aspect of life that is not in some way regulated by the federal government."¹²⁸ Federal "agencies wield immense influence in shaping the conduct of individuals and organizations."¹²⁹

Numbers tell part of the story. Consider federal government expenditures, which serve as a rough proxy for the state's growing role in the American economy. If we focus on entitlement spending—programs like Medicare and Social Security—the increase since the New Deal is remarkable. Adjusting for inflation and population growth, the federal government spends about fifteen times more today on entitlements than it did in 1940.¹³⁰ Federal spending on entitlements far outstrips spending on other government functions, such as national defense.¹³¹ Or consider another number, the page count of the Federal Register, "the daily repository of all proposed and final federal rules and

125. On the "New Deal Settlement," see Lawrence B. Solum, *How NFIB v. Sebelius Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1 (2013).

126. *Nat'l Fed'n Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). For a good overview of the doctrine, see Solum, *supra* note 125.

127. On delegation, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994). On agency deference, see *id.* at 1247; Jeffrey A. Pojanowski, *Reason and Reasonableness in Review of Agency Decisions*, 104 NW. U. L. REV. 799, 802–04 (2010).

128. Lawson, *supra* note 127, at 1236.

129. Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 114 (2011).

130. WILLIAM VOEGELI, *NEVER ENOUGH: AMERICA'S LIMITLESS WELFARE STATE* 25 (2010). Voegeli's figures exclude veterans' programs and benefits, *id.* at 22, and measure the years 1940–2007.

131. *See id.* at 31–33.

regulations.”¹³² The Federal Register for the year 2016 came to almost 100,000 pages, “the highest level in its history,” about 20% higher than the previous year’s edition.¹³³ Page counts are an imperfect measure of government activity, of course.¹³⁴ But, as a rough guide, they do indicate the increasing activity of federal agencies. And, again, these numbers relate only to the federal government, not to state governments, which retain plenary legislative jurisdiction in our constitutional system.

To be sure, the current administration has announced a deregulation campaign at the federal level—“a fundamental shift” in policy which, among other things, directs “federal agencies to eliminate two regulations for each new one implemented and to reduce new regulatory costs to zero.”¹³⁵ As Adam White writes, however, this “very, very good start” faces substantial obstacles, including inevitable legal challenges.¹³⁶ Moreover, “the next Democratic administration could undo much of the Trump administration’s deregulatory effort every bit as quickly as the Trump administration undid the Obama administration’s regulatory actions.”¹³⁷ It will take more than a few years of deregulation to stop the expansion of government—and the current efforts at the federal level will have no impact at all at the state level. Claims that “the era of big government is over” have misled people in the past.¹³⁸

132. CLYDE WAYNE CREWS JR., COMPETITIVE ENTERPRISE INSTITUTE, TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 16 (2017), <https://cei.org/sites/default/files/Ten%20Thousand%20Commandments%202017.pdf> [<https://perma.cc/3DKC-BULV>]; see also MCCONNELL ET AL., *supra* note 17, at 77 (using page count of Federal Register to illustrate growth of government).

133. CREWS, *supra* note 132, at 3, 16.

134. *Id.* at 16.

135. NEOMI RAO, OFFICE OF INFO. & REGULATORY AFFAIRS, INTRODUCTION TO THE FALL 2017 REGULATORY PLAN (2017), <https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201710/VPStatement.pdf> [<https://perma.cc/73C2-BCQU>].

136. Adam J. White, *Trumping the Administrative State*, WEEKLY STANDARD (Jan. 19, 2018, 4:25 AM), <https://www.weeklystandard.com/adam-j-white/trumping-the-administrative-state> [<https://perma.cc/HJ62-FG8U>].

137. *Id.*

138. See, e.g., Gary Lawson, *One(?) Nation Overextended*, 94 B.U. L. REV. 1109, 1120 (2014).

The growth of activist administrative agencies figures prominently in controversies like *Masterpiece Cakeshop*. In part, it is simply a matter of volume. The more regulations, and the more subjects covered, the greater the potential for businesses to violate the law.¹³⁹ As Marc DeGirolami writes, where “government assumes an increasingly large role in the life of the citizenry, more injuries are transformed into legally (and perhaps even constitutionally) cognizable rights.”¹⁴⁰ But the volume of regulation alone does not explain things. The content matters, too. For reasons I will explain, administrative agencies inherently tend to favor the expansive concept of equality I have described. As a consequence, conflicts between the administrative state and the Traditionally Religious are apt to occur much more frequently.

Once again, Tocqueville offers useful insights as to why this should be so. Egalitarian democracies, he believed, tend to encourage a powerful state—because they promote an individualism that is unsustainable without it.¹⁴¹ In a democracy, the individual learns to rely on his own judgment, not received wisdom, in making his life choices.¹⁴² He learns to see himself as equal to everyone else; he sees no reason to defer to other people’s judgments or to the wisdom of traditional authority.¹⁴³ But this individualism, paradoxically, promotes a powerful state. The individual will from time to time feel his weakness and need the help of others. Subjecting oneself to one’s equals, or to traditional authority, would be unthinkable; but subjecting oneself to a state that stands alone above

139. See Epstein, *supra* note 124, at 375; see also MCCONNELL ET AL., *supra* note 17, at 77 (“In a society that is pervasively regulated as ours now is, there are many more occasions for conflict between the government and religious believers.”).

140. Marc O. DeGirolami, *Free Exercise By Moonlight*, 53 SAN DIEGO L. REV. 105, 131 (2016); see also Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103 (2015).

141. For a discussion of individualism, by which Tocqueville meant a kind of withdrawal from and indifference to the affairs of other citizens, see DEMOCRACY IN AMERICA, *supra* note 16, II.ii.2, at 482–84.

142. “The inhabitant of the United States learns from birth that he must rely on himself to struggle against the evils and obstacles of life; he has only a defiant and restive regard for social authority and appeals to its power only when he cannot do without it.” *Id.* I.ii.4, at 180.

143. See *id.* at II.iv.1; *id.* at II.iv.3.

everyone would not only be thinkable but necessary.¹⁴⁴ Of the citizen in an egalitarian democracy, Tocqueville wrote:

His independence fills him with confidence and pride among his equals, and his debility makes him feel, from time to time, the need of the outside help that he cannot expect from any of them, since they are all impotent and cold. In this extremity, he naturally turns his regard to the immense being that rises in the midst of universal debasement. His needs and above all his desires constantly lead him back toward it, and in the end he views it as the unique and necessary support for individual weakness.¹⁴⁵

Only a powerful state has the ability to protect and provide for the individual who has abandoned traditional sources of belonging and authority.

Tocqueville thought that American democracy overcame this tendency to statism through its commitment to private associations, including religious associations, which provided competing sources of loyalty that kept the state in check.¹⁴⁶ But, over time, a democratic state will find such associations a threat and try to weaken them, all in the interests of human flourishing.¹⁴⁷ As Patrick Deneen writes, the logic of liberal democracy requires an activist state that breaks the hold of traditional authorities in order to promote a salutary personal autonomy. Individualism and the activist state thus reinforce one another—“a virtuous circle,” from the perspective of liberalism.¹⁴⁸ In Tocqueville’s words, the state willingly works for each individual’s happiness, asking in return only the authority to “knead him as it likes” and have the final say on what happiness shall mean.¹⁴⁹

In short, over time, a democratic state will tend to promote the “equality as sameness” principle through its administrative apparatus. The state will encourage people to think of

144. *See id.* at II.iv.3.

145. *Id.* at II.iv.3, at 644 (footnote omitted).

146. Movsesian, *supra* note 12, at 14.

147. *See* DEMOCRACY IN AMERICA, *supra* note 16, II.ii.4, at 485 (“Despotism, which in its nature is fearful, sees the most certain guarantee of its own duration in the isolation of men, and it ordinarily puts all its care into isolating them.”); *see also* Movsesian, *supra* note 12, at 14.

148. DENEEN, *supra* note 93, at 59.

149. DEMOCRACY IN AMERICA, *supra* note 16, II.iv.6, at 663.

themselves only as citizens and abandon traditional sources of identity that distinguish them.¹⁵⁰ It will work to break down the social boundaries that groups, including the Traditionally Religious, erect to maintain their distinctiveness and preserve their values. Indeed, as Philip Hamburger writes, in contemporary America, it is the small-o “orthodox” who need most to worry about government action—those “minorities that seek to preserve their distinctive beliefs in the face of majoritarian pressures to conform to more universal liberal views.”¹⁵¹ In a society like ours, which prizes equality and which deeply suspects tradition and communal authority, “orthodoxy” is itself “unorthodox,”¹⁵² even when people voluntarily choose it, and therefore occasions serious conflicts that our courts ultimately must resolve.

In twenty-first century America, this dynamic appears in various actions by government agencies that impinge on traditional religious associations and identities. Government has always impinged on the activities of religious associations in America to some degree, of course, going back to the early Republic.¹⁵³ But the potential for conflict has become much larger today. The Traditionally Religious face an expanding set of rules and policies that promote new understandings of equality, particularly with respect to sexuality and gender, along with an ever-expanding bureaucracy dedicated to enforcing them.¹⁵⁴ As Richard Epstein writes, civil rights offices exist today “in virtually every government agency, most notably in the agencies that regulate housing, education, and

150. Cf. *Town of Greece v. Galloway*, 572 U.S. 565, 615 (2014) (Kagan, J., dissenting) (“A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.”).

151. Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1929 (2015).

152. *Id.*

153. See, e.g., Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Property and Power before the Civil War*, 162 U. PA. L. REV. 307, 311 (2014).

154. On the centrality of sexuality in contemporary conflicts over religious liberty, see Horwitz, *supra* note 13, at 160.

employment.”¹⁵⁵ The Traditionally Religious face increasing pressure to accept the new understandings and comply with the new rules, or face a “looming threat of a wide range of legal sanctions.”¹⁵⁶

Masterpiece Cakeshop offers a good example. The Colorado Civil Rights Commission ruled against Jack Phillips in order to promote equality for same-sex marriage, a concept that relatively few would have endorsed even a decade ago, even on the progressive left.¹⁵⁷ It imposed significant regulatory burdens on him, including training and quarterly reporting requirements that would have demanded significant time and money.¹⁵⁸ One commissioner even hinted that, with views like his, maybe Phillips should think about doing business in a different state.¹⁵⁹ Phillips decided to resist. But not many businesses will do so. Not many will be willing to bear such burdens or to relocate. The more likely result will be that Traditionally Religious businesspeople like Phillips abandon, or at least soften, their convictions in order to make a living. Of course, the commissioners were trying to promote human flourishing and protect gay couples from indignities in the marketplace; that is not the point. The point is that in imposing these burdens, the Commission acted in a way calculated to advance the principle of equality as sameness and weaken the hold of traditional religious commitments. As Rod Dreher writes, we can anticipate many more such conflicts in the future.¹⁶⁰

155. Richard Epstein, *Freedom of Association and Antidiscrimination Law: An Imperfect Reconciliation*, L. & LIBERTY (Jan. 2, 2016), <http://www.libertylawsite.org/liberty-forum/freedom-of-association-and-antidiscrimination-law-an-imperfect-reconciliation/> [https://perma.cc/N6RS-XNDT].

156. *Id.*

157. President Obama notably did not endorse marriage equality in his first campaign in 2008, though he did endorse it in time for his second. Saikrishna Bangalore Prakash, *Missing Links in the President's Evolution on Same-Sex Marriage*, 81 FORDHAM L. REV. 553, 554 (2012).

158. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n* 138 S. Ct. 1719, 1726 (2018).

159. *Id.* at 1729.

160. On the challenges conservative Christians, in particular, may expect to face in the marketplace, see ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* 179–94 (2017).

III. CONCLUSION: AFTER *MASTERPIECE CAKESHOP*

In short, *Masterpiece Cakeshop* reflects important cultural and political trends. Those trends will continue to shape future conflicts between anti-discrimination norms, on the one hand, and religious freedom, on the other—disputes, to paraphrase Justice Kennedy, which set the right of gays and lesbians to obtain goods and services in the marketplace without experiencing affronts against the right of religious persons to have their sincere beliefs respected by our government.¹⁶¹ In the space remaining, I would like to offer three predictions for what may lie ahead.

First, conflicts like the one in *Masterpiece Cakeshop* will become more frequent and harder for our society to negotiate. The “equality as sameness” principle has expanded to cover sexual identity and behavior in a way few foresaw even a decade ago.¹⁶² The principle continues to expand, driven by its own inner logic. As Adrian Vermeule observes, the “triumph of same-sex marriage” has been “followed . . . rapidly by the opening of a new regulatory and juridical frontier, the recognition of transgender identity.”¹⁶³ Indeed, shortly after Jack Phillips won his case at the Supreme Court, the Colorado Civil Rights Division found probable cause that he had again violated CADA, this time by refusing to create a cake for a customer who wished to celebrate the anniversary of her coming out as transgender.¹⁶⁴ Phillips then filed an action for an injunction against the Colorado authorities, again alleging a violation of his constitutional rights.¹⁶⁵ The state ultimately decided not to pursue the case against Phillips as part of a

161. *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

162. See, e.g., Horwitz, *supra* note 13, at 173–74 (discussing the rapid change in public acceptance of homosexuality and same-sex marriage).

163. Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), <https://www.firstthings.com/article/2017/01/liturgy-of-liberalism> [<https://perma.cc/WT2N-B2A9>].

164. See *Scardina v. Masterpiece Cakeshop Inc.*, Charge No. CP2018011310 (Colo. Civil Rights Div. June 28, 2018) (probable cause determination), <http://www.adfmedia.org/files/MasterpieceCakeshopProbableCauseDetermination.pdf> [<https://perma.cc/GX3C-X5XG>].

165. See *Complaint, Masterpiece Cakeshop Inc. v. Elenis*, No. 1:18-cv-02074 (D. Colo. Aug. 14, 2018), <http://www.adfmedia.org/files/MasterpieceCakeshopComplaint.pdf> [<https://perma.cc/WL5Q-EV3S>].

settlement agreement.¹⁶⁶ But it seems likely that the courts will soon need to decide whether vendors have a free exercise right to decline to provide services for transgender coming out ceremonies.

The new understanding of sexual identity and behavior has become a flash point in our culture wars. Nones, especially younger Nones, embrace the new understanding,¹⁶⁷ as do regulatory agencies, which seek to promote it in American life.¹⁶⁸ But the Traditionally Religious, who remain comparatively numerous, continue to oppose it. Some of them, at least, will continue to resist government efforts to enforce it. That each side in the conflict cares deeply about the outcome, and finds the other's position increasingly unfamiliar and offensive, will make compromise much more difficult.¹⁶⁹

It is true that the Traditionally Religious may themselves come to accept the new understanding over time. According to the Pew survey I quoted earlier, acceptance of homosexuality does appear to be "growing rapidly even among religious groups" that traditionally have "strongly opposed" same-sex relations.¹⁷⁰ If the Traditionally Religious were to accept the new understanding of sexuality, conflicts like *Masterpiece Cakeshop* would fade from view, much as conflicts over serving African-Americans in public places thankfully have disappeared from American life. But it seems more likely that those Traditionally Religious who accept the new understanding will gradually drift away from religion entirely and join the Nones. The mainline Protestant denominations that have embraced new norms about homosexuality—for example, the Episcopalians and Presbyterians¹⁷¹—have

166. See *supra* note 56.

167. On Nones' acceptance of homosexuality, see *supra* Part II.A.

168. See *supra* Part II.C.

169. See INAZU, *supra* note 99, at 2–3 (discussing growing polarization over values in American life). For an interesting discussion of how mutually incompatible values make the resolution of social conflict between secular and traditionally religious groups difficult, see JONATHAN HAIDT, *THE RIGHTEOUS MIND* 105–10 (2012).

170. See AMERICA'S CHANGING RELIGIOUS LANDSCAPE, *supra* note 60, at 34.

171. The Episcopal Church reported a 19% decline in active members over the ten-year period from 2007 to 2017. *Episcopal Domestic Fast Facts: 2017*, GEN. CONVENTION OF THE EPISCOPAL CHURCH, <https://extranet.generalconvention.org/>

continued to experience sharp declines in membership, even as membership in conservative churches has remained relatively stable.¹⁷² Endorsing the new sexual norms has not kept believers in the pews. Religious polarization, in other words, seems likely to continue.

Second, the law in this area likely will remain unsettled and deeply contested for some time to come, for two reasons. First, as I explained earlier, the law of religious exemptions is already something of a “patchwork.”¹⁷³ Different jurisdictions apply different tests in different circumstances. For example, for purposes of the Free Exercise Clause, the Court’s 1990 decision in *Employment Division v. Smith* indicates that no constitutional right to a religious exemption exists where a law is neutral and generally applicable.¹⁷⁴ In circumstances where the state has not shown neutrality towards religion, however, or where a law is not generally applicable, a different rule applies under a later case, *Church of the Lukumi Babalu Aye v. City of Hialeah*.¹⁷⁵ Before *Masterpiece Cakeshop*, most commentators understood that *Lukumi* called for the compelling interest test in those circumstances: the government could substantially burden religious exercise if it had a compelling reason for doing so and had chosen the least restrictive means.¹⁷⁶ Justice Kennedy’s

staff/files/download/22938 [https://perma.cc/VQ9B-3LY4] (last visited Mar. 9, 2019). The Presbyterian Church (USA) lost almost 5% of its membership in 2017 alone. See *2017 Comparative Summaries*, OFFICE OF THE GEN. ASSEMBLY, PRESBYTERIAN CHURCH (USA), http://oga.pcusa.org/site_media/media/uploads/oga/pdf/statistics/2017_comparative_summaries.pdf [https://perma.cc/5TD9-SRGW] (last visited Mar. 9, 2019) (listing a decline of 68,000 members out of 1.48 million in 2016). Since 2005, it has lost two out of every five active members. Compare *id.* (listing 1.42 million active members in 2017), with *2008 Comparative Summaries*, OFFICE OF THE GEN. ASSEMBLY, PRESBYTERIAN CHURCH (USA), https://www.pcusa.org/site_media/media/uploads/oga/pdf/2008-comp-sum.pdf [https://perma.cc/ENW4-8B63] (last visited Mar. 9, 2019) (listing 2.31 million active members in 2005).

172. MARK CHAVES, *AMERICAN RELIGION* 87 (2011). For an interesting discussion of how doctrinal leniency generally can lead to a decline in religious commitment, see Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341, 1355–58 (2016).

173. See *supra* note 17 and accompanying text.

174. 494 U.S. 872, 879 (1990).

175. 508 U.S. 520, 546 (1993).

176. See, e.g., Lund, *supra* note 51, at 375 (“The *Smith/Lukumi* rule evaluates facially discriminatory laws under a compelling interest test.”).

opinion in *Masterpiece Cakeshop* suggests, though, even without going through the compelling interest analysis, that the government's failure to act neutrally amounts to a per se violation.¹⁷⁷ It remains to be seen what the Court will make of this suggestion in future cases.

Federal constitutional doctrine is thus unsettled. With respect to federal statutory law, the Religious Freedom Restoration Act (RFRA) requires the compelling interest test,¹⁷⁸ although, as I will explain in a moment, saying that does not clarify things too much. With respect to state constitutional and statutory law, substantial variation exists.¹⁷⁹ Some states apply the *Smith* test as a matter of state constitutional law, while others apply some version of the compelling interest test.¹⁸⁰ Some states have adopted a version of RFRA and apply the compelling interest test as a matter of state statutory law; some do not.¹⁸¹ In short, generalizations are difficult.

Nonetheless, notwithstanding the doctrinal uncertainty, the compelling interest test remains the leading test in this area—under *Lukumi*, under RFRA and its state analogues, or under state constitutional provisions—and will provide the rule of decision in most cases in which a vendor seeks a religious exemption from anti-discrimination laws.¹⁸² But—and this is the second reason for my prediction that the law will remain unsettled—the compelling interest test itself is deeply indeterminate. It turns on vague concepts that provide little guidance in specific cases.¹⁸³ The test depends almost entirely on the intuitions of individual judges, which of course differ

177. See *supra* pp. 720–21.

178. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3(b), 107 Stat. 1488, 1488–89 (codified at 42 U.S.C. § 2000bb-1(b) (2012)).

179. See MCCONNELL ET AL., *supra* note 17, at 189–90.

180. See *id.* at 198; see also DURHAM & SCHARFFS, *supra* note 18, at 231 (identifying the state high courts that have adopted some form of the *Smith* analysis for state constitutional purposes).

181. MCCONNELL ET AL., *supra* note 17, at 189–90.

182. See *id.* at 198 (noting that “more than half of the states currently apply the compelling interest test to free exercise claims”); DURHAM & SCHARFFS, *supra* note 18, at 231 (observing that “it seems likely that a majority of jurisdictions will ultimately maintain strict scrutiny protections”).

183. See *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 808 F.3d 1, 21–22 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (discussing indeterminacy of the compelling interest standard).

greatly.¹⁸⁴ In the recent *Hobby Lobby* case, for example, in which plaintiffs sought a religious exemption under RFRA from the so-called “contraceptive mandate,” the Justices differed strongly among themselves on the meaning and application both of “substantial burden” and “least restrictive means.”¹⁸⁵

Indeed, in a society as polarized as ours, how could judges’ views on these concepts not differ? Is requiring a Christian vendor to provide services on an equal basis for gay and straight weddings a substantial burden on the vendor’s religion? Does the state have a compelling interest in ending discrimination that would justify that burden, even if other nearby vendors would readily provide those services? Does the state have reasonable alternative measures available to it that would burden the vendor’s religious exercise to a lesser degree? The answers depend on one’s perception of the nature and value of religion, the true meaning of equality, the proper scope of government action, and many other factors. The questions do not submit to easy, objective criteria on which everyone agrees, certainly not in our society, today. In a society in which we cannot agree on what is good, how can we agree on what is a compelling interest?

It is possible, of course, that these indeterminacy problems will hasten the end of the compelling interest test. The test has drawn strong criticism from judges and scholars for decades, as far back as the Court’s 1990 *Smith* decision, which sought to do away with the test, or at least to sharply confine it.¹⁸⁶ Justices Gorsuch and Alito hinted at their disapproval of *Smith* in *Masterpiece Cakeshop* itself.¹⁸⁷ But the test has shown remarkable durability. As I have explained, the Court reaffirmed the test, at least in some circumstances, only a few terms after *Smith*, in

184. See *supra* pp. 715–16.

185. Compare *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726–31 (2014) (arguing that the expense of the contraceptive mandate constituted a substantial burden and that it would be less restrictive for the Government to assume the cost of coverage itself or shift the costs of covering contraceptives to insurers than to mandate employers directly fund contraceptive coverage), *with id.* at 760–68 (Ginsburg, J. dissenting) (arguing that the contraceptive mandate was too tenuously connected to religious beliefs to constitute a substantial burden and that no alternative would effectuate the compelling interests at hand).

186. See *Emp’t Div. v. Smith*, 494 U.S. 872, 884–86 (1990).

187. See *Kendrick & Schwartzman*, *supra* note 11, at 162.

Lukumi.¹⁸⁸ Moreover, in 1993, Congress reinstated the test in RFRA, by a unanimous vote in the House and a vote of 97–3 in the Senate.¹⁸⁹ It is not clear that RFRA would pass today—but it is not clear that a vote to repeal it would succeed, either.¹⁹⁰ Two years ago, in the run-up to the Court’s decision in *Masterpiece Cakeshop*, Democratic members of Congress introduced the “Do No Harm Act,” which sought to amend RFRA to make clear that it would not apply to federal anti-discrimination laws.¹⁹¹ The Do No Harm Act would not have repealed RFRA, only limited its application.¹⁹² And yet the new act did not attract a single Republican cosponsor, in either the House or the Senate.¹⁹³ Repealing, or even amending, RFRA would require a bipartisan coalition, and it is difficult to see how a coalition could form in our current political environment.

American politics is becoming more and more polarized on the basis of religion—something that has not been true, historically.¹⁹⁴ Religion is now a strong element of partisan identity.¹⁹⁵ Today’s Democratic and Republican Parties have dramatically different religious profiles. According to a Pew survey conducted in 2018, about 70% of Republicans and people who lean Republican believe in the God of the Bible—they are the Traditionally Religious.¹⁹⁶ By contrast, only 45% of

188. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

189. L.A. Powe, Jr., *The Court’s Constitution*, 12 U. PA. J. CONST. L. 529, 541 (2010).

190. See Richard W. Garnett, *Religious Accommodations and—among—Civil Rights: Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 501 (2015) (“It is, as many have observed, extremely unlikely that the RFRA would be enacted today, let alone enacted with near-unanimous and bipartisan support . . .”).

191. Do No Harm Act, H.R. 3222, 115th Cong. (2017). The Senate version of the bill, which bore the same name, was S. 2918, 115th Cong. (2018).

192. See H.R. 3222 § 3.

193. See *id.* at 1 (listing House co-sponsors); S. 2918 at 1 (listing Senate co-sponsors).

194. See Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Anti-Discrimination Law*, 88 S. CAL. L. REV. 619, 656–58 (2015).

195. See Mark Movsesian, *The New Divide in American Politics*, FIRST THINGS (May 23, 2018), <https://www.firstthings.com/web-exclusives/2018/05/the-new-divide-in-american-politics> [<https://perma.cc/Q8PP-HFE6>].

196. PEW RESEARCH CTR., WHEN AMERICANS SAY THEY BELIEVE IN GOD, WHAT DO THEY MEAN? 22 (2018), <http://www.pewforum.org/wp-content/>

Democrats and Democratic-leaning say they believe in the God of the Bible.¹⁹⁷ Another Pew survey revealed that Nones now make up the largest “religious” grouping in the Democratic Party—about 30 percent.¹⁹⁸ To be sure, some progressives are religious believers, a group some have called the “Religious Left.”¹⁹⁹ But this group has relatively little impact within the contemporary Democratic Party, and it’s not clear how much impact the group will have in the future.²⁰⁰

In this political environment, a move by one party to tinker with RFRA would immediately raise suspicions on the part of the other. Achieving agreement on any changes seems unlikely. As a result, the compelling interest test seems here to stay. And that observation leads to my third and final prediction. *Masterpiece Cakeshop* suggests that judicial appointments, certainly on the federal level, will become even more heated and partisan than they already are. Because the compelling interest test is so indeterminate, so dependent on the prior commitments of the people doing the judging, the identity of the judges is extremely important. Each side in our polarized society understands how crucial it is to have judges with the “right” intuitions about religion and equality on the bench. Each, therefore, will fight long and hard to ensure that such judges are appointed—and, conversely, that judges with the “wrong” intuitions are not. Having judges with the “wrong” intuitions about religion and equality could lead to negative outcomes in cases about which both sides care deeply. The stakes are too high to be ignored.

The late Justice Scalia recognized this dynamic long ago, in a different context, in his dissent in *Planned Parenthood of*

uploads/sites/7/2018/04/Beliefs-about-God-FOR-WEB-FULL-REPORT.pdf
[<https://perma.cc/8V4F-AUNB>].

197. *Id.*

198. See AMERICA’S CHANGING RELIGIOUS LANDSCAPE, *supra* note 60, at 9.

199. See, e.g., STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS (2009).

200. For explanations why the religious left will have difficulty influencing progressive politics, see, e.g., Daniel Cox, *Don’t Bet on the Emergence of a “Religious Left,”* FIVETHIRTYEIGHT (Apr. 20, 2017), <https://fivethirtyeight.com/features/dont-bet-on-the-emergence-of-a-religious-left/> [<https://perma.cc/YSM6-PQE5>]; Massimo Faggioli, *Francis & the “Religious Left”: It Won’t Be an Easy Match*, COMMONWEAL (July 30, 2018), <https://www.commonwealmagazine.org/francis-religious-left> [<https://perma.cc/2D7R-53TH>].

Southeastern Pennsylvania v. Casey.²⁰¹ Because the Court's constitutional jurisprudence had come to turn on the personal values of the Justices, he observed, the electorate had every right to focus on nominees' values during the selection process. "[C]onfirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them," he wrote.²⁰² "Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally [sic] committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward."²⁰³ For Justice Scalia, interrogating nominees about their personal value judgments was a matter for regret. But, good or bad, the compelling interest test, which makes judges' value judgments about religion and equality crucial to the outcome of a case, creates strong incentives to do so.

In short, the new religious partisanship will only amplify the already intense acrimony over judicial selection. Given their religious profiles, the two parties will likely nominate judges with very different views on the conflict between anti-discrimination laws and religious liberty; each party will be very wary of the other's nominees. On the whole, given the party's religious makeup, one would expect Democrats to nominate judges with skeptical views of traditional religion—and therefore, less favorable views on exemptions for the Traditionally Religious from anti-discrimination laws. One would expect the opposite, on the whole, from judges Republican administrations nominate. Again, because everyone knows how high the stakes are, the judicial confirmation wars will likely be quite passionate and divisive for the foreseeable future.

201. 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting).

202. *Id.* at 1001.

203. *Id.*

* * *

Masterpiece Cakeshop is a narrow decision. The case turns on rather unique facts and does little to resolve conflicts between our anti-discrimination laws, on the one hand, and our commitment to religious freedom, on the other. But the narrowness of the case's holding is deceptive. In fact, *Masterpiece Cakeshop* reflects very broad cultural and political trends that drive those conflicts and shape their resolution: a deepening religious polarization between Nones and the Traditionally Religious, an expansive understanding of equality as sameness, and an activist state dedicated to enforcing that understanding in large areas of our common life.

As everyone knows, law and culture have a mutually reinforcing relationship.²⁰⁴ Court rulings influence the way our culture perceives social conflicts: which arguments seem legitimate and which parties deserve our sympathies. But culture, in turn, influences law. I have explored here the cultural and political trends that form the backdrop to our law's attempt to resolve our competing commitments to equality and to religious freedom. Those trends, which *Masterpiece Cakeshop* so clearly reflects, will continue to shape our law for decades to come.

204. See, e.g., Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 37 (2001) (describing the "mutually constitutive nature of the relationship"). For a good introductory essay on the subject of law and culture, see Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011).

THE SICKNESS UNTO DEATH OF THE FIRST AMENDMENT

MARC O. DEGIROLAMI*

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*Such is the nature of despair, this sickness of the self, this sickness unto death.*¹

INTRODUCTION

The “sickness unto death,” in Søren Kierkegaard’s work of the same name, is the despair an individual experiences in real-

* Professor of Law, St. John’s University School of Law. Thanks to Helen Alvaré, Jud Campbell, Rick Garnett, Paul Horwitz, John Inazu, Randy Kozel, Mark Movsesian, Mark Rienzi, Steven Shiffrin, Anna Su, Nelson Tebbe, Adam White, George Wright, and the participants at the conference on “Religion and the Administrative State” at the C. Boyden Gray Center for the Study of the Administrative State at George Mason University.

1. SØREN KIERKEGAARD, THE SICKNESS UNTO DEATH: A CHRISTIAN PSYCHOLOGICAL EXPOSITION FOR UPBUILDING AND AWAKENING 21 (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1980) (1849).

izing that the self is separated from God.² In perceiving the division of the finite self from the infinite God, and in yearning for a union that is impossible, the individual despairs of his individuality—of his autonomous liberty and detachment from the divine—and strives mightily to reattach the self to something collective, extrinsic, and transcendent. Back to God.³

Something like this despair now afflicts the First Amendment in American law and culture. But it was not always so. In the early American Republic, free speech was conceived as a natural right that government ought often to constrain in order to achieve or protect certain collective social goods. Its purposes, as well as its limits, were understood in instrumental, communal, and other-regarding terms. Those purposes and limits assumed that the political community could and should make value judgments among different ideas. The justifications for and limits to free speech were closely aligned with those invoked for religious freedom. Both freedoms were conceived within a larger framework of collective, extrinsic ends.

But beginning in the middle decades of the twentieth century, courts and commentators increasingly justified freedom of speech as enhancing and maximizing individual autonomy. Other earlier justifications and limits steadily receded in prominence. By the late twentieth century, these justifications and limits had largely been supplanted by the view that free speech was intrinsically valuable for human identity and self-actualization.

During this period, the self-regarding rationale for free speech was united with a related prudential consideration that repudiated any state or official orthodoxy as to the value of speech. The new rule was that the government must never make judgments about the substantive worth of speech, and that courts must assiduously guard against communal efforts to set “content-based” limits on the full freedom of speech.⁴ In

2. The phrase is taken by Kierkegaard from *John* 11:4 (King James), where Jesus, having been apprised by Mary and Martha of the illness of Lazarus, says to them: “This sickness is not unto death”

3. See DAPHNE HAMPSON, *KIERKEGAARD: EXPOSITION AND CRITIQUE* 221–22 (2013) (describing Kierkegaard’s view of the “relational self” as one which “understands the person to be grounded extrinsically Kierkegaard understands the relation to God to be foundational to the self coming to itself.”).

4. See, e.g., *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980).

the rhetoric of American law and culture, free speech was, in this period, routinely defended as inherently good for the individual, or even as constitutive of what it means to be American. Some limits remained, but communal political judgments about the value of the content of speech were no longer thought legitimate grounds for legal restriction. “Anti-orthodoxy” of all kinds became a watchword of free speech protection. For both principled and prudential reasons, government could never be granted the power to judge the value of speech.

Yet once the right of free speech was understood as a self-regarding and intrinsic end of human fulfillment, very little remained to inform its exercise beyond the caprice of the exerciser. As before, the prevailing legal conception of the right of free speech was united with that of the right of freedom of religion during this period: solipsistic, personalized, changeable, deracinated from any common purposes and traditions, and often unchallengeable inasmuch as there were no acceptable, extrinsic criteria for doing so—and certainly none with which the political community could be trusted. Within this framework, the scope of free speech as well as religious liberty rights greatly expanded. The last hundred years represent, as one recent book reports, “The Free Speech Century,”⁵ and the right of religious freedom also enjoyed enormous growth.

In recent years, however, this expansion has met with resistance and arguments for constriction by both academics and judges. The new free speech constrictors have criticized free speech rights principally by setting them against other rights and interests, such as democracy, dignity, equality, sexual autonomy, antidiscrimination, decency, and progressivism.⁶ For the new free speech constrictors, it is these other rights and interests, not free speech, that are the true or defining American civic goods. There have been parallel developments in debates about the scope of religious freedom. In both contexts, for example, the constrictors use the metaphor of “weaponization,” and sometimes even speak of violence, in objecting to rights of religious and speech freedom that they believe undermine more important political and social goods. In both contexts,

5. THE FREE SPEECH CENTURY 1–2 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

6. For only a partial catalog and discussion, see *infra* Part III.

some variation of “third-party harm” frequently serves as a counterweight to, and limitation on, First Amendment rights.

In arguing for new First Amendment limits, the constrictors hearken to an earlier period in attempting to reconceive freedom of speech in instrumental terms—as serving, and being delimited by, specific common ends. Once the right of free speech was hollowed out of any common civic ends, it was rendered problematic, if not intolerable, to those who believed that free speech should serve other, greater social and civic interests. The rise of the constrictors was a predictable result, and the right of free speech, evacuated of its prior ends and limits, could now be infused with new ones, including some derived from other areas of constitutional law.⁷

The sickness unto death of the First Amendment is that the spectacular success of free speech and religious freedom as American constitutional rights, premised on liberal, individual autonomy, has been the very cause of mounting and powerful collective anxiety. The impressive growth in the twentieth century of these rights has rendered them fragile, if not unsustainable, in their current form. Their unprecedented expansion has brought on an awareness of their emptiness in serving the larger, common political good. The yearning for political community and a shared purpose transcending individual interest has in turn generated vigorous calls for First Amendment constriction in service of what are claimed to be higher ends—in some cases ends that were promoted by the hypertrophy of the First Amendment itself.

What binds these claims is the view that expansive First Amendment rights harm others or, more generally, are socially or politically harmful. In some cases, the same people who argued that free speech rights should be disconnected from common civic ends now advocate free speech constriction in order to reconnect free speech to new ends said to be constitutive of the American polity. The same is true for religious free-

7. The eminent free-speech historian David Rabban wrote nearly twenty years ago that “[i]rony abounds in this development,” because the “political left typically advocated greater protection for speech” in the pre-war period. DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 381 (1997). This article, though gratefully drawing on Rabban’s work in Part II, offers a somewhat different diagnosis of this development in Part III.

dom. But in a society that is deeply divided about where the common good lies, imposing new limits on First Amendment rights in the name of dignity, democracy, equality, sexual freedom, third-party harm, or any of the other purposes championed by the new constrictors is at least as likely to exacerbate social and civic fragmentation as to reconstitute a new social cohesion.

Part I of this paper describes early American understandings of the purposes and limits of freedom of speech. During this period, the outer bounds of freedom of speech reflected similar limits on the right of religious freedom: both were conceived within an overarching framework of natural rights delimited by legislative judgments about the common political good. Though there is scholarly debate about how much the Fourteenth Amendment may have altered that approach in certain details, the basic legal framework remained intact in the nineteenth century.

Part II traces the replacement of that framework with a very different one in the twentieth century, describing the judicial turn toward self-regarding justifications of speech that prioritize individual autonomy, self-actualization, and absolute anti-orthodoxy. Contrary to Professor G. Edward White's description of this development as free speech's "com[ing] of age,"⁸ this article argues that the period is better characterized as the "adolescence" of free speech—one marked especially by the ascendancy of internally oriented and self-regarding justifications for both speech and religious freedom.

The article describes the crisis or despair of free speech and the coming of the First Amendment constrictors in Part III. It concludes briefly in Part IV by recapitulating the parallel paths of the rights of free speech and religious freedom, disagreeing with the work of some scholars who argue that, for cultural reasons, free speech in its present expansive form is more secure today than religious freedom. It is, in fact, remarkable that over the centuries, some of the most prominent justifications for and objections to the scope of these rights have proceeded *pari passu* and assumed nearly identical shape.

8. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996).

I. PERIOD ONE: FIRST AMENDMENT NATURAL RIGHTS AND LIMITS

All governments negotiate the balance between permitting and restricting speech within an overarching conceptual framework of the ends and limits of free speech. That framework may be thick or thin, explicitly articulated or unspoken, clearly understood or only hazily, if at all, perceived. But all governments grapple with the central problem of free speech—how best to regulate speech so as to avert excessive social hurt, while allowing as much expression as may be tolerated—within a larger set of ideas about the social virtues and vices of speech.⁹

American conceptual frameworks for free speech have not remained static across time. The early American understanding of free speech, for example, was not grounded in an abstract justification or theory of speech's value as a unique good. The right and the good of free speech in eighteenth and nineteenth century America were located within a larger world view that distinguished natural rights—rights that one could exercise in the state of nature or without government action—from other rights that depended upon government intervention.¹⁰ The right of free speech was “natural” in the sense that, unlike other rights such as habeas corpus or the right to a trial by a jury of one's peers, it was an element of “natural liberty”¹¹—“the freedom an individual could enjoy as a human in the absence of government.”¹²

Even in the state of nature, the scope of one's natural rights did not encompass uses that interfered with the natural rights of others.¹³ As James Madison put it in *The Federalist No. 43*, “the moral relations” and obligations imposed by natural

9. For further discussion of this problem, see Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1487–88 (2016).

10. See Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 252–53 (2017).

11. *Id.* at 253.

12. Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 919 (1993).

13. For the founding generation, the state of nature was not an amoral or asocial condition. Rather, it was simply the social condition in which people lived before the organized state. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 62 (1985) (describing the state of nature as “the absence of organized political society and of government”).

rights “will remain uncanceled” for any state that refused to ratify the Constitution.¹⁴ Yet once natural rights like freedom of speech were incorporated into the social contract, several additional limitations on them were warranted. The people’s representatives, not the judiciary, were empowered to impose these limits in the service of a general concept of common social welfare and protection, variously denominated the “public interest,” the “common good,” the “collective interest,” or the “general welfare.”¹⁵ Though there were often prudential disagreements among lawmakers about what this collective, social ideal demanded concerning particular, political applications,¹⁶ there was no challenge to the general principle that the common good properly circumscribed the right of free speech, including on matters of substance or content.

The right of free speech coexisted with and promoted the moral duties of the rights holder to the community.¹⁷ Speech regulations that promoted public morality were considered “necessary for ensuring sufficient public order to host, defend, and extend individual liberty.”¹⁸ So, for example, “[b]lasphemy and profane swearing . . . were thought to be harmful to society and were thus subject to governmental regulation even though they did not directly interfere with the rights of others.”¹⁹ Blasphemy was punished in part to promote public respect for religion, and most especially Christianity—“the foundation of moral obligation”²⁰—and in part for its tendency to disturb public order.²¹ The punishment of blasphemy was not thought

14. THE FEDERALIST NO. 43, at 230 (James Madison) (George W. Carey & James McClellan eds., 2001).

15. See Campbell, *supra* note 10, at 273 (collecting and quoting sources).

16. Most prominent among which was the advisability of proscribing seditious speech. See *id.* at 277–79.

17. See THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM 6 (2017) (“Government encourages the people to respect and fight for the natural rights of fellow citizens by promoting appropriate moral conduct, including devotion to the common good.”).

18. See MARK E. KANN, TAMING PASSION FOR THE PUBLIC GOOD: POLICING SEX IN THE EARLY REPUBLIC 21 (2013).

19. Campbell, *supra* note 10, at 276–77.

20. *People v. Ruggles*, 8 Johns. 290, 293 (N.Y. Sup. Ct. 1811).

21. See JAMES S. KABALA, CHURCH-STATE RELATIONS IN THE EARLY AMERICAN REPUBLIC, 1787–1846, at 124–28 (2013) (discussing early American blasphemy law); see also *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 399 (Pa. 1824).

to be inconsistent with rights of religious free exercise: there was believed to be a difference between what James Kent described as “decent discussions” of religious differences and “revil[ing] with malicious and blasphemous contempt.”²² Proscribed speech also included certain types of advertising of immoral activities (such as gambling), the making of certain kinds of agreements on Sundays,²³ and other forms of speech thought threatening to the general morality, peace, and good order.²⁴ Pennsylvania’s 1779 “Act for the Suppression of Vice and Immorality,” for example, prohibited “profane swearing, cursing, drunkenness [sic], cock fighting, bullet playing, horse racing, shooting matches and the playing or gaming for money or other valuable things, fighting of duels and such evil practices which tend greatly to debauch the minds and corrupt the morals of the subjects of this commonwealth.”²⁵

Likewise, libelous speech was well within the regulatory power, and what today goes by the name of “expressive conduct”²⁶ did not enjoy presumptive protection, let alone immunity from government control. To the contrary, the government enjoyed broad discretion to regulate this manifestation of the natural right of free speech in furtherance of the public good.²⁷ Laws punishing obscene or sexually suggestive speech were also uncontroversial, inasmuch as the protection of the natural right of marriage was deemed an important office of the state.²⁸ As William Paley put it in his widely read *The Principles of Mor-*

22. *Ruggles*, 8 Johns. at 294.

23. Sunday closing laws are not examples of speech restrictions, but they are part of the larger phenomenon of state regulation of activities on Sunday. Their history is recounted in *McGowan v. Maryland*, 366 U.S. 420, 431–35 (1961).

24. See *Campbell*, *supra* note 10, at 310 n.285.

25. Act of March 14, 1779, 9 Statutes at Large of Pa. 333.

26. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404–05 (1989).

27. See *Campbell*, *supra* note 10, at 286–87 (“Some expressive conduct, like instinctive smiles, surely fell on the side of inalienability. But when expressive conduct caused harm and governmental power to restrict that conduct served the public good, there is no reason to think that the freedom of opinion nonetheless immunized that conduct.”).

28. See, e.g., *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91, 102–04 (Pa. 1815). Geoffrey Stone has emphasized the rarity of such prosecutions. See Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U. CHI. L. REV. 1857, 1863 (2007). Yet they did exist, and nobody suggested that sanctioning obscenity, post-publication, was an inappropriate role for the state. See Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2187 (2015) (distinguishing between prior restraints on obscenity and criminal prosecutions after publication).

al and Political Philosophy, “[i]f fornication be criminal, all those incentives which lead to it are accessaries [sic] to the crime, as . . . wanton songs, pictures, [and] books.”²⁹ Laws against obscenity were not often enforced, but had particular salience in cases where their violation was “open and notorious.”³⁰

So conceived and delimited, the right of free speech assumed a dualistic structure. At its core was an inalienable natural right to express, as Jud Campbell puts it, “well-intentioned statements of one’s thoughts”—statements of thoughts made honestly, decently, and in good faith.³¹ Parties to the social compact would have no reason to protect the right to make dishonest or bad faith statements of one’s dishonest or bad faith thoughts. This narrow right of free speech was nevertheless deep. What it covered was categorically outside the cognizance or jurisdiction of the state and therefore categorically exempt from regulation. The right of stating one’s opinions in good faith was derivative of the non-volitional natural fact of having such opinions and of the classical liberal view that it was futile to coerce a person either not to have opinions or to change them to conform to someone else’s.³² If there was anything categorically anti-censorial about freedom of speech, it lay only in this narrow core.³³

But beyond this core lay a vast periphery of other contexts in which the natural right of speech was alienable depending upon political judgments about the requirements of the common good. While the existing deposit of common law traditions assisted the lawmaker in determining the contours of the demands of the public good, decisions about the scope of free speech outside the core were left primarily to legislative judg-

29. WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 173 (Liberty Fund 2002) (1785).

30. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 130–31 (1993).

31. See Campbell, *supra* note 10, at 280–83.

32. See, e.g., James Madison, *Memorial and Remonstrance Against Religious Assessments*, [ca. 8 June] 1785, in 8 *THE PAPERS OF JAMES MADISON*, 295–306 (Robert A. Rutland & William M. E. Rachal eds., 1973) (“[T]he opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men . . .”).

33. *But see* FLOYD ABRAMS, *THE SOUL OF THE FIRST AMENDMENT* 10–13 (2017). Abrams makes the case for restraint of government censorship as the overriding end of free speech, but he does not adequately distinguish between the modes in which the freedom might be exercised.

ment and discretion.³⁴ There was, as Genevieve Lakier has argued, no overarching theory of the sorts of speech that were valuable or worthless, but that did not mean that the content of speech could not be regulated: “expression could be criminally sanctioned whenever it posed even a relatively attenuated threat to public peace and order.”³⁵

It is this two-tiered framework that formed the basis for a set of shared assumptions about speech³⁶ which, as Campbell argues, informed the meaning of the Constitution’s Speech Clause.³⁷ To “abridge” freedom of speech was either to regulate the *unalienable* component of the freedom (that is, the freedom to make good faith statements of one’s thoughts, setting aside its own natural limits) or to restrict speech of the *alienable* component beyond what was required by the need to protect the public good.³⁸ What Congress could not do in “making no law” that abridged the right of free speech was to exceed the proper limits of a regulatory threshold. But Congress was not thereby removed from evaluating and regulating the content of speech—particularly for purposes of preserving general welfare, common morality, and the public good—*tout court*.

One virtue of this explanatory framework is its analogue in the right to religious freedom. Indeed, in almost every respect, the structure of the protection for and limits on the right of free speech mirrors that of religious freedom. Like the right of free speech, religious freedom was also considered a natural right.³⁹ James Madison, for example, explicitly united the two, referring in his notes on the Bill of Rights to “*natural rights*, re-

34. See Campbell, *supra* note 10, at 291.

35. Lakier, *supra* note 28, at 2181. Lakier’s core claim concerns the broad condemnation of prior restraints in the early Republic and thereafter, irrespective of content. See *id.* at 2179–80.

36. See Hamburger, *supra* note 12, at 917 (“Congregationalists and Baptists, Federalists and Anti-Federalists, Southerners and Northerners, all could use the natural rights analysis and, even while developing different versions of that analysis, they appear to have drawn upon certain shared assumptions.” (citations omitted)).

37. See Campbell, *supra* note 10, at 251.

38. See *id.* at 305.

39. See, e.g., DEL. BILL OF RIGHTS of 1776, § 2 (“[A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding”); PA. CONST. of 1776, § 2; N.C. CONST. of 1776, § 19.

tained—as Speech [and] Con[science].”⁴⁰ John Locke wrote that “Liberty of Conscience is every mans natural Right, equally belonging to Dissenters as to [established institutions].”⁴¹ Religious freedom’s inalienability depended, just as for speech, on the view that it was futile for the government to compel people to embrace religious beliefs with which they disagreed.⁴²

Yet the nature of the claim about religious liberty was not merely pragmatic but theological: for “true and saving Religion consists in the inward perswasion of the Mind; without which nothing can be acceptable to God.”⁴³ Indeed, the connection between the natural rights justifications for free speech and religious liberty is precisely a view about the operation of the natural laws of God, and about man’s created nature and obligations to God.⁴⁴ For even if legal compulsion could change a person’s mind (an empirical proposition about which the evidence must surely be more mixed than these Enlightenment voices admit), “yet would not that help at all to the Salvation of their Souls. For, there being but one Truth”—the Christian truth, so it was thought—there is only “one way to heaven,” which can only be reached by obedience to the dictates of “Conscience[].”⁴⁵

Just as for speech, the ends and limits of the natural right of religious freedom imparted to it a dual structure, with a core untouchable by positive law, and a periphery that could be policed and regulated by the legislature in furtherance of the common good. At the core, as Vincent Phillip Muñoz has argued, is a form of religious exercise that is wholly exempt from the jurisdiction of the State—a right retained from the state of nature that is not subject to the authority of government.⁴⁶ Yet

40. James Madison, *Notes for Speech in Congress, [ca. 8 June] 1789*, in 12 THE PAPERS OF JAMES MADISON, at 194 (Charles F. Hobson & Robert A. Rutland eds., 1979).

41. JOHN LOCKE, A LETTER CONCERNING TOLERATION 53 (Mark Goldie ed., Liberty Fund 2010) (1689) (footnote omitted).

42. *See id.* at 13.

43. *Id.*

44. Madison’s argument in *Memorial and Remonstrance* concerning compelled opinions is conjoined to another concerning “the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him.” Madison, *supra* note 32, at 295–306.

45. LOCKE, *supra* note 41, at 14.

46. Vincent Phillip Muñoz, *Two Concepts of Religious Liberty: The Natural Rights and Moral Autonomy Approaches to the Free Exercise of Religion*, 110 AM. POL. SCI.

the scope of this unalienable right was, at least by modern lights, narrow. It certainly encompassed the right to worship,⁴⁷ but it did not extend to what Muñoz calls “religious interests.”⁴⁸ And yet Muñoz and Campbell both emphasize that this approach had the salutary effect of preserving the core of these rights, whether of free speech or religious liberty, in unadulterated form: there could be no judicial balancing-away of the core for other putatively greater ends.⁴⁹

Religious interests outside the core, however, spanned the broad periphery of potential claims to religious exemption from general laws on account of religious scruple. And as to these peripheral manifestations of religious freedom, the legislature enjoyed broad delimiting discretion in accordance with its view of the public good, peace, and order.⁵⁰ So, for example, the Massachusetts Bill of Rights protected the right of subjects to “worship[] God in the manner . . . most agreeable to the dictates of his own conscience, . . . provided he doth not disturb the public peace.”⁵¹ There is a longstanding debate between those who claim that religious exemptions were constitutionally required under some circumstances and those who argue that they were always a matter of legislative grace.⁵² But even advocates of the former view would probably agree that religious *interests*—particular forms of exercise outside the core protection for worship—were highly regulated in the early American Republic, and that constitutional appeal to the courts in such cases was unavailing.

REV. 369, 373 (2016) (“This lack of sovereignty means that legislators lack authority to prohibit that which belongs to the natural right of religious liberty.”).

47. Even here, however, there were *natural* limits on the right of religious worship. The possibility of, for example, child sacrifice as part of the natural right to religious worship would have been ruled out.

48. Muñoz, *supra* note 46, at 374.

49. *See id.* at 376–77 (citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), as an example of modern judicial balancing as to the core of religious liberty); Campbell, *supra* note 10, at 316 (arguing that the contemporary judicial balancing approach “waters down what was originally absolute protection for well-intentioned statements of one’s views”).

50. *See* Muñoz, *supra* note 46, at 374.

51. MASS. CONST. art. II; *see also* MD. CONST. of 1776, art. 33.

52. Compare Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990), and Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990), with Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

For purposes of this Article, however, the critical point is that the dual hierarchy of the rights of free speech and religion rooted these rights in dual authorities external to the individual. First, in God: for the unalienable elements of free speech and free religious exercise were both rights derived from and solemn duties toward an authority transcending the self. Second, in the political community, and most particularly in its legislature: when the individual left the state of nature, a part of the social contract he entered into assigned the government the responsibility to constrain his natural liberties of speech and religious exercise to further the social goods of safety, morality, and public order. “The founders,” wrote Thomas West, “did not separate rights from duties. They believed that the laws of nature and of nature’s God impose moral obligations on human beings in their dealings with other people.”⁵³ Virtuous behavior was a condition of the freedoms of speech and religion. The genesis, nature, and limits of these natural rights all depended upon their connection to sources of authority and obligation outside of and transcending the self.

II. PERIOD TWO: THE TURN INWARD

The early view of free speech’s value and limits—which often depended upon judgments about the social worth of free speech—endured into the twentieth century, even if the natural rights framework that grounded it steadily declined in influence.⁵⁴ Some scholars have argued that there were significant conceptual changes following ratification of the Fourteenth Amendment, where there was a renewed focus on freedom of speech,⁵⁵ and prosecutions for blasphemy, for example, became problematic under the Establishment Clause through operation

53. WEST, *supra* note 17, at 47. There is rich disagreement about whether the early combination of liberal and republican views—of rights and duties—was integrated and internally consistent, or instead a kind of patchwork whose commitments existed in tension with one another. *See id.* at 44–47. This Article takes no position on that debate, instead simply describing the coexistence of these views.

54. *See* Campbell, *supra* note 10, at 259.

55. *See* MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 362–63 (2000).

of the Privileges or Immunities Clause.⁵⁶ Yet whatever changes were intended by the ratifiers of the Fourteenth Amendment, during the period from the Civil War to World War I, the Court consistently upheld regulations of speech that were perceived to have a “bad tendency”—a tendency to produce an action that was threatening to social order and morality.⁵⁷ Even defenders of a more expansive scope for free speech rights after the Fourteenth Amendment’s ratification acknowledge that the bad tendency test was invoked successfully “against antiwar speech during the Civil War and World War I,”⁵⁸ and in between as well. In *Ex Parte Jackson*, for example, the Court unanimously upheld a provision of the Comstock Act of 1873 prohibiting the mailing of lottery advertisements against First Amendment challenge, concluding that a law proscribing “obscene” and “indecent” activities that “are supposed to have a demoralizing influence upon the people” was perfectly in keeping with freedom of speech.⁵⁹

Even as there were contrary strains of libertarian-inflected thought concerning speech in the nineteenth and early twentieth centuries,⁶⁰ and occasionally the odd judicial swipe at what was felt by some to be an outdated and fussy legal moralism,⁶¹

56. See generally Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995). The thesis of a “second adoption” and a changed meaning of the Establishment Clause, however, has been disputed. See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 287–334 (2002).

57. RABBAN, *supra* note 7, at 132; see also *United States ex rel. Turner v. Williams*, 194 U.S. 279, 294 (1904) (applying the bad tendency test to the views of an anarchist in upholding his conviction and deportation under a federal statute). Rabban notes that this test can be (and was) traced to Blackstone’s view that “criminal libels” consisted of “writings ‘of an immoral or illegal tendency,’” together with other speech that provokes breaches of the peace. RABBAN, *supra* note 7, at 134 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *150). But regard for the public good was often implicit in the social contractarian view of the limits of natural rights, a view that Blackstone endorsed. See 1 WILLIAM BLACKSTONE, COMMENTARIES *118–41 (chronicling the “Rights of Persons”).

58. CURTIS, *supra* note 55, at 385.

59. 96 U.S. 727, 736 (1877).

60. See RABBAN, *supra* note 7, at 23, ch. 1 (describing a “tradition of libertarian radicalism” in the late nineteenth century that “defended the primary value of individual autonomy against the power of church and state”). It is notable, however, that this stream of libertarian thought did not have much effect on the courts.

61. See, e.g., *United States v. Kennerley*, 209 F. 119, 120 (S.D.N.Y. 1913) (Hand, J.) (criticizing the prevailing test of obscenity— “[w]hether the tendency of the matter

as late as 1907, the Supreme Court would say that the government could punish speech that “may be deemed contrary to the public welfare.”⁶² And free speech skepticism did not come only from what would today be considered social conservatives. David Rabban has observed that before World War I, progressives were not sympathetic to speech rights that they perceived as inconsistent with positive social reforms or that blocked egalitarian and redistributive measures.⁶³ As for American judges of the pre-war period, “no group of Americans was more hostile to free speech claims before World War I than the judiciary, and no judges were more hostile than the justices on the United States Supreme Court.”⁶⁴ All of this was generally in keeping with the early republican view, which tied freedom of speech closely to legislative judgments about limits on speech to serve the public good, though it was perhaps an even more restrictive approach.

A. *The First Wave of Change: Political Speech’s Preferred Position*

When conceptual change did come to the law in the twentieth century, change whose causes were manifold,⁶⁵ it came in two waves. In the first wave, the Supreme Court (following, in part, the scholarly claims of Zechariah Chafee⁶⁶), emphasized that political speech, and especially dissenting political views, merited special solicitude under the First Amendment because of its contribution toward the development and strengthening of democratic government. Though it had not previously been conceptualized in precisely these terms, this democracy-enhancing justification for the right of free speech *might* be seen as consistent with the early American view that there was a core or natural right to the good faith expression of one’s

charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences”—as a discreditable example of “mid-Victorian morals” (citation omitted)).

62. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

63. See RABBAN, *supra* note 7, at 3.

64. *Id.* at 15.

65. It is not my purpose to survey the reasons for these changes. Surely the “war to end all wars”—and yet which did no such thing—was one cause, and there were many others. This Article, however, focuses on the nature of the changes to the conceptual framework of free speech as manifested in legal, and primarily Supreme Court, doctrine.

66. See generally ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* (1920).

thoughts. But the notion that politically dissenting speech merited a near-absolute, or “preferred position,”⁶⁷ protection was already a considerable expansion. It meant that the political community was disabled as a legal matter from making any distinctions of value in the political speech of its members.

So, for example, Justice Oliver Wendell Holmes Jr. (joined by Justice Louis Brandeis) could say in his *Gitlow* dissent that the speech of a member of the Socialist Party of America could not be punished because it presented no “clear and present danger” to American government;⁶⁸ it was merely “redundant discourse” with “no chance of starting a present conflagration.”⁶⁹ The “test of truth,” or truth-seeking, justification described by Holmes in his *Abrams* dissent, it should be remembered, reflected a pragmatic social interest in the soundest civic policy-making that could survive in the marketplace competition for the fittest ideas.⁷⁰ Truth-seeking and democratic governance, which are often separated as distinctive ends, thus share certain fundamental premises about the purposes of free speech.⁷¹ In a similar way, Brandeis wrote in his *Whitney* concurrence that the speech of a communist could not be criminalized because “[t]hose who won our independence believed that . . . public discussion is a political duty; and that this should be a fundamental principle of the American govern-

67. See *Jones v. Opelika*, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting). With the addition of Justice Wiley Rutledge to the Court in early 1943, the rhetoric of “preferred position” for political speech appeared in several of the Court’s majority decisions thereafter. See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943). For criticism of the “preferred position” transformation, see generally WALTER BERNS, *FREEDOM, VIRTUE, AND THE FIRST AMENDMENT* (1957).

68. On the changing meaning of the “clear and present danger” test from something approximating the “bad tendency” test to something more like incitement to violence, see RABBAN, *supra* note 7, at 132–46, and White, *supra* note 8, at 317–18, 322–24.

69. *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting). Indeed, Holmes’s dismissive attitude toward *Gitlow*’s ineffectual speech—his confidence that American democratic government could tolerate it exactly because it was so unimportant—has been criticized. See HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 155–56 (1988). On the differences between Holmes the skeptic and Brandeis the moral crusader, see PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 69–71 (1982).

70. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

71. See *Janus v. Am. Fed’n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (separating the “democratic form of government” and the “search for truth” arguments for free speech).

ment.”⁷² Brandeis’s “remedy” for the hurtful potential of false ideas is “more speech” because he was confident that the “more speech” would be undertaken under the protection of those secure and sturdy pillars of American government—public education and democratic politics—that surely would overwhelm the ineffectual and false views of a weak and misguided dissenter.⁷³ But he believed that democratic citizenship would be strengthened and enriched by the confrontation with dissenting speech, as the power of rational thought in democratic decision making would thereby be honed.⁷⁴

The emphasis on the relationship of free speech and democratic government is perhaps nowhere more powerfully evident than in the work of the great mid-century speech scholar, Alexander Meiklejohn.⁷⁵ Meiklejohn emphasized that the “model” of First Amendment free speech was the town meeting, in which “the people of a community assemble to discuss and to act upon matters of public interest” and accept procedural and substantive abridgements on their speech to fulfill the core democratic purposes of free speech.⁷⁶ The town meeting, he continued, “is not a Hyde Park. It is a parliament or congress It is not a dialectical free-for-all. It is self-government.”⁷⁷ His was a communitarian conception of freedom of speech—an expanded conception of the right both from the early republican position and from the more immediately anterior, highly restrictive view of the pre-war period that claimed “absolute” protection within the sphere of political speech but not elsewhere.⁷⁸

Yet the Meiklejohnian view was still delimited by some common political ends. The purpose of free speech was the formation of a better and more “rational” type of democratic self-government, which helps to explain Meiklejohn’s statement that free speech’s “point of ultimate interest is not the

72. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

73. *Id.* at 377.

74. *See id.* at 377–78; *see also* RABBAN, *supra* note 7, at 355–71 (emphasizing the democracy-enhancing features of Brandeis’s free speech jurisprudence).

75. *See, e.g.*, ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

76. *Id.* at 22.

77. *Id.* at 23.

78. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 245–66.

words of the speakers, but the minds of the hearers.”⁷⁹ The paradox in the democracy-enhancing justification for free speech has been noted before: it seems contradictory to promote democratic governance by categorically protecting political speech that the people have elected to proscribe by democratically enacted laws.⁸⁰ The “minds of the hearers” have already been made up in democratically authorized law. One evasion of the paradox is to concede that “democratic governance” means something other than raw popular or majoritarian preference—perhaps something that depends upon a sufficient airing of dissenting opinion in order to ensure the proper, or rational, functioning of democracy.⁸¹ Yet the question remains precisely what sort of substantive values are promoted by this justification for free speech, how much airing is enough, and who is to determine what constitutes proper or true or rational democracy.⁸²

Yet these difficulties in some ways illustrate the collective character of the Meiklejohnian view. True or proper democracy—the people’s arrival at “wise” decisions—consists in protection against the “*mutilation of the thinking process of the community.*”⁸³ But speech that does tend to mutilate the collective enterprise is outside constitutional protection. Philip Hamburger has observed that theologically liberal assumptions and purposes were often at work in defining what counted as rational political decisions, as compared with those thought to depend upon irrational or blind adherence to received doctrine or authority.⁸⁴ Thus, “propaganda”—often a “code word” for the speech of religious organizations and institutions—was not

79. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26 (1960).

80. For canonical statements of this paradox, see LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 137 (2005); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 40–44 (1982); JEREMY WALDRON, *LAW AND DISAGREEMENT* ch. 10 (1999).

81. *See generally* OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

82. I confess to sharing Larry Alexander’s opinion that “I never find my views to be ‘adequately aired’ until everyone agrees with them.” ALEXANDER, *supra* note 80, at 138 n.16.

83. MEIKLEJOHN, *supra* note 75, at 26.

84. *See generally* PHILIP HAMBURGER, *LIBERAL SUPPRESSION: SECTION 501(C)(3) AND THE TAXATION OF SPEECH* chs. 1 & 4 (2018).

regarded as worthy of the same protection in the law as other putatively healthier varieties of political speech.⁸⁵ And yet such assumptions may have allowed Meiklejohn to invoke, as early Americans had also done in a different context, the “general welfare” as an organizing political aim and limit on free speech protection.⁸⁶ Indeed, the democratic assembly is itself a selective group of people that are loyal to one another: “the people” excludes the criminal, the foreigner, the traitor to the community, and even the person who does not have the community’s true interests at heart.⁸⁷ The first wave of free speech reconceptualization in this second historical period still retained an important element of mutual moral duty that shaped and delimited the right to speak freely.⁸⁸

B. *The Second Wave of Change: The Inward, Anti-Orthodoxy First Amendment*

The second wave of conceptual change was quite different. The first wave expanded the scope of speech rights to include a general protection against regulation of political dissent. But the right of free speech was still conceived collectively—as serving and being delimited by the common social and political good of achieving a more rational polity, however rationality might be measured. The second wave loosened and eventually removed those collective ends and limits by justifying free speech inwardly, coupled with a more thoroughgoing skepticism about the state’s authority to make rules about speech for the common good.

Freedom of speech now was understood to require special protection because verbal expression was believed to go to the essence of what it means to be human, protecting not only the

85. *Id.* at 95.

86. MEIKLEJOHN, *supra* note 75, at 39 (“The constitutional status of a merchant advertising his wares, of a paid lobbyist fighting for the advantage of his client, is utterly different from that of a citizen who is planning for the general welfare.”).

87. This view of the relevant political community is consistent with the earlier social contractarian position that “there is no natural right to become a citizen of a society that refuses to accept you.” WEST, *supra* note 17, at 118.

88. See Gerhart Niemeyer, *A Reappraisal of the Doctrine of Free Speech*, 25 THOUGHT: FORDHAM U. Q. 251, 259 (1950) (“[T]he question which concerns us is whether the doctrine of free speech admits of any criterion by which utterances may be recognized as either belonging to the circle of mutual loyalty or denying the basic community.”).

development of individual thought but also the self-realization or self-actualization of the speaker. Thus, free speech was re-conceived as intrinsically valuable because it is a prerequisite for complete autonomy: "An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do."⁸⁹ This autonomy and identity-based justification was influenced by an egalitarian undercurrent: the notion that we treat people unequally unless we recognize and respect the beliefs that go to the core of their persons—their real or authentic selves. It is reflected in what one casebook refers to with the umbrella term, "individual-centered theories" of the First Amendment,⁹⁰ as well as Justice Clarence Thomas's view that "the First Amendment . . . enact[s] a distinctly individualistic notion of 'the freedom of speech,' and Congress may not simply collectivize that aspect of our society."⁹¹

As the second wave of conceptual change crested, it rapidly absorbed the first wave. American political or civic cohesion was no longer manifested in any shared set of substantive convictions of the people as a community, democratic or otherwise, so much as in an allegiance to individual freedom itself. It was the view that very little that is permanent binds the People other than the conviction that very little that is permanent binds it. The forms of free speech were thought to be synonymous with its social value, and the "dialectical free for all" deplored by Meiklejohn was the result. Indeed, as to substantive evaluations of the content of speech, the second wave dissolved the idea of the People as anything other than a physical aggregation of individual persons.

The Supreme Court's embrace of this second wave was gradual but steady. A critical step in its development was the union of inwardly oriented justifications for free speech with closely connected pragmatic worries that the government could not be trusted to make any judgments at all about the communal value of speech. Consider the widely celebrated case of *West Virginia State Board of Education v. Barnette*, in which the

89. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS., 204, 216 (1972).

90. VINCENT BLASI, *IDEAS OF THE FIRST AMENDMENT* 832–967 (2006).

91. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 506 n.3 (1997) (Thomas, J., dissenting).

Court held that a public-school student who was a Jehovah's Witness could not be compelled to recite the Pledge of Allegiance in school.⁹² The Court justified this conclusion on the ground that the government's efforts at enforcing unifying, communal projects through law were to be feared, and "[a]s governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be."⁹³ Government orthodoxies enforced by compulsion always lead to conflict—even violent conflict—and ultimately, in the Court's memorably dire warning, "the unanimity of the graveyard."⁹⁴ The *Barnette* opinion represented a new commitment to absolute anti-orthodoxy—the view that the government could have no say at all in assessing the communal value of speech.

"Authority," the *Barnette* Court said, "is to be controlled by public opinion, not public opinion by authority."⁹⁵ One should appreciate just how distant the Court's absolute anti-orthodoxy rule is from the early American position on free speech. The latter clearly contemplated a vital and substantial role for government authority in the regulation of the natural right of speech, as well as considerable discretion in negotiating conflicts of individual freedom and public morality and welfare. The new position in *Barnette* purported to establish "public opinion" as the font of all orthodoxy in proclaiming that "[i]f 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."⁹⁶ The state was now cut out altogether from making any evaluations of speech's civic worth through regulation, replaced for these purposes by "public opinion." Yet "public opinion" was itself not understood by the *Barnette* Court as a communal authority capable of prescribing general rules; freedom of speech instead entailed an absolute "intellectual individualism" liberated from any governmental control.⁹⁷ A pragmatic rule of absolute anti-orthodoxy as to the government

92. 319 U.S. 624, 642 (1943).

93. *Id.* at 641.

94. *Id.*

95. *Id.*

96. *Id.* at 641–42.

97. *Id.*

thus complemented and promoted the second wave conception of free speech as an entirely interior affair.⁹⁸

In the early years of the second wave, the democracy-enhancing justification for free speech could still be discerned, though it was already greatly diminished. In *Terminiello v. City of Chicago*, for example, the Court overturned the conviction of a Catholic priest whose speech was intended to whip up a crowd inside an auditorium into a frenzy against a second crowd pressing to enter the auditorium and hurling bricks, rocks, bottles, and icepicks.⁹⁹ The speech was laced with fascist epithets of hate and vilification aimed at particular classes and races of people. In an opinion for the Court, Justice Douglas characterized the quality of the speech at issue:

The vitality of civil and political institutions in our society depends on free discussion [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Accordingly a function of free speech under our system of government is to invite dispute Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.¹⁰⁰

The passage is extraordinary inasmuch as Douglas—though using the first-wave rhetoric of democratic self-governance—implied that this sort of speech is not merely the kind of political dissent that must be tolerated, but that it is actually healthy for American democracy. That is, it is not the sort of ineffectually vicious speech that Holmes had sneered at in his *Gitlow* dissent¹⁰¹ (or that Justice Frankfurter, one year before *Terminiello* was decided, had deprecated as “[w]holly neutral futilities”¹⁰²) but a positive good for the democratic polity and a cen-

98. Steven Smith has argued that the governmental anti-orthodoxy view of the First Amendment is untenable because successful governments always proclaim orthodoxies. Steven D. Smith, *Barnette's Big Blunder*, 78 CHI.-KENT L. REV. 625, 625–28 (2003).

99. 337 U.S. 1, 5 (1949); *id.* at 15 (Jackson, J., dissenting).

100. *Id.* at 4 (majority opinion).

101. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

102. *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting).

tral concern of the First Amendment. Yet if inviting dispute in this fashion is the central function of free speech, then it seems to have far more to do with Terminiello's own authority to do so in the manner of his choosing than with "free debate and free exchange of ideas" among the frenzied rabble to whom, and against whom, Terminiello's self-expression was directed. Terminiello was empowered to establish his own "orthodoxy," and the state, as Gerhart Niemeyer once put it, must acknowledge the "recognized truth" of the individual to say whatever he wills.¹⁰³

The Court's more proximate first-wave invocations of speech's power to shape public debate, or to enhance democratic governance, seem even less persuasive. The newer cases and their justifications instead involve the individual's rights to be unconstrained in the exercise of his muscular right against the state to proclaim his antiorthodoxies. Perhaps Paul Robert Cohen intended to contribute to democratic self-government and the exchange of ideas in wearing a jacket with the words, "Fuck the Draft," inside a courthouse corridor.¹⁰⁴ Perhaps his expression was so received. But the terms in which the Court justified Cohen's speech rights—the vindication of his "inexpressible emotions" that likely sound to those around him like a "verbal cacophony," or to "lyric[ize]" in whatever vulgarities suited his "taste and style"—suggest that the Court's true justification was not communal but individual.¹⁰⁵

Today, the second-wave approach to free speech predominates in the Supreme Court. The rise of autonomy-maximizing justifications has resulted in a massive expansion of the varieties of speech that merit constitutional protection. The right of speech is conceived primarily as validating the autonomous self, and the Court largely has dispensed even with its prior honorific nods toward the democracy-enhancing function of speech protection. Speech that is "outrageous,"¹⁰⁶ that is used

103. See Niemeyer, *supra* note 88, at 256.

104. *Cohen v. California*, 403 U.S. 15, 16 (1971).

105. *Id.* at 25–26; see also Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303, 310 (1991) (describing public expression as an "element of several styles of life" and freedom of speech as an identification with a particular style).

106. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).

as an instrument of “aggression and personal assault,”¹⁰⁷ that is cruel and sexually arousing because of the torture that it inflicts,¹⁰⁸ that glories in the wanton slaughter of African-Americans and Jews,¹⁰⁹ that is personally abusive and intended to “inflict great pain”¹¹⁰—all are now protected by the First Amendment.

The merging of the absolute anti-orthodoxy and individualistic justifications for free speech has become clearer as well. Recall that in the early Republic, speech by someone in bad faith could be outlawed, for there was no reason for parties to a social compact to protect lies or speech not made in good faith.¹¹¹ Yet in 2012, the Court held in *United States v. Alvarez* that speech that is “an intended, undoubted lie” about a concrete fact—in this case, a lie about receiving the Congressional Medal of Honor, which had been proscribed by statute—and known to be so at the time spoken receives First Amendment protection.¹¹² Justice Kennedy, writing for the plurality, justified this conclusion by recurring to the absolute anti-orthodoxy rationale that allowing the government to prohibit lying about the receipt of military honors would give it limitless authority—“a broad censorial power unprecedented in this Court’s cases”¹¹³—perhaps even leading to the sort of dystopian surveillance state contemplated by George Orwell.¹¹⁴

That pragmatic justification, however, was merely supportive of another justification: that Alvarez’s free and false speech is actually a positive social good, since, through the operation of counter-speech, it “can serve to reawaken and reinforce the public’s respect for the Medal, its recipients, and its high purpose.”¹¹⁵ In a “free society,” the “remedy for speech that is false is speech that is true,”¹¹⁶ Justice Kennedy explained—a view

107. *Time, Inc. v. Hill*, 385 U.S. 374, 412 (1967) (Fortas, J., dissenting).

108. *United States v. Stevens*, 559 U.S. 460, 465–66, 482 (2010).

109. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 798–99 (2011).

110. *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011).

111. See *supra* notes 31–33 and accompanying text.

112. 567 U.S. 709, 715 (2012) (plurality opinion).

113. *Id.* at 723.

114. *Id.*

115. *Id.* at 727.

116. *Id.* The Court in *Alvarez* distinguished lies in general, which receive full constitutional protection, from lies “made to effect a fraud or secure moneys,” prohibitions against which would survive constitutional scrutiny. *Id.* at 723.

that might have been accepted at the founding but would not have exhausted the remedies on offer. But the Court has adopted it because, as it has explained in another context, the “fundamental rule of protection” of freedom of speech—the new core of freedom of speech—is “that a speaker has the autonomy to choose the content of his own message.”¹¹⁷

It is possible to characterize all of this newly protected speech as somehow contributing to the collective aim of democratic self-governance. Perhaps at some deeply subconscious level, it performs something like the “reawakening” function described by Justice Kennedy in *Alvarez* (though one might ask why it should always be desirable to invite persuasion about at least some of the issues in these cases). Yet to speak of Cohen’s speech, Westboro Baptist Church’s speech, *Alvarez*’s speech, Stevens’s speech, or EMA’s speech as speech that attempts to “persuade” others of some controversial position on a matter of public concern, as the Court sometimes does, seems implausible. If “persuasion” is defined, as David Strauss has argued, as “a process of appealing, in some sense, to reason,”¹¹⁸ then it verges on the farcical to suggest that animal crush videos, visual depictions of the titillating slaughter of Black people and Jews, and lies about easily verifiable facts such as the earning of military honors perform this function. But First Amendment protection of speech of this kind *does* perform the function simultaneously of vindicating claims of individual recognition and self-actualization, supported by an overriding fear of government-imposed orthodoxy.

In expanding the ambit of free speech to encompass these interests, the Court has had to eliminate any collective or extrinsic social interest in distinguishing between valuable and worthless speech. The two-track structure of the founding period had to be dismantled. “The First Amendment itself,” the Court has claimed, “reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”¹¹⁹ But that judgment is inconsistent with most of the history of free speech regulation in this country, in which

117. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 573 (1995).

118. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991).

119. *United States v. Stevens*, 559 U.S. 460, 470 (2010).

free speech rights were always closely tethered to limits reflecting either legislative or (much later) judicial evaluations of the common good. The Court has reached this view in order to align its own holdings with its vastly expanded anti-orthodoxy justification for free speech. Justice Breyer noted in his *EMA* dissent that the Court's decision was in fact arguably inconsistent with the aim of "rais[ing] future generations committed cooperatively to making our system of government work"¹²⁰—that is, with the cultivation of what had previously been the democracy-enhancing function (and limit) of absolute free speech protection. In this case, at least, Justice Breyer seems to be observing that the first wave of free speech expansion has been engulfed by the second.

The second wave swept up not only the Court but many speech scholars as well, who increasingly championed the self-authenticating, self-validating, identity-forming, Romantic account of freedom of speech. Thomas Emerson's influential *The System of Freedom of Expression* was one of the earliest treatments of freedom of speech as concerned primarily with "individual self-fulfillment."¹²¹ Steven Shiffrin has argued, against the Meiklejohnian position, that freedom of speech should shield *all* expressions (and not merely the political varieties) of "nonconformity," and should "protect the romantics—those who would break out of classical forms: the dissenters, the unorthodox, [and] the outcasts."¹²² Shiffrin's account is useful in plotting the transition from a purely political to a more expansively socio-cultural "preferred position" approach.¹²³ Edwin Baker has emphasized that the core purpose of free speech was to protect the speaker's "authority (or right) to make decisions about herself."¹²⁴ Seana Shiffrin has claimed that free speech protects the right of each "thinker" to "[b]ecom[e] a distinctive

120. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 857 (2011) (Breyer, J., dissenting).

121. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970).

122. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 5 (1990).

123. For further discussion of the evolution of Shiffrin's views, see *infra* Part III.

124. C. Edwin Baker, *Autonomy and Free Speech*, 27 *CONST. COMMENT.* 251, 254 (2011).

individual,” “[r]espond[] authentically,” and fulfill her “interest in being recognized by other agents for the person she is.”¹²⁵

But perhaps the seminal account of second-wave free speech protection is Martin Redish’s article, *The Value of Free Speech*, in which Redish went so far as to claim that the “one true value” of free speech is “individual self-realization” and that any other justification is ultimately a “subvalue[]” of this master value.¹²⁶ This was a fully liberal, autonomized account of free speech that self-consciously rejected any common ends or limits. To be a free American citizen means not to be controlled by others, but rather to control oneself¹²⁷ and to be the sole and ultimate arbiter of the value of one’s own speech.¹²⁸

In an important article, Ted White described the transformation of free speech protection during this period as its “coming of age.”¹²⁹ White argued that the great expansion of speech protection as a unique type of right—a “constitutionally and culturally special” right¹³⁰—rested on what he called the arrival of “modernism” to law, and specifically to the First Amendment.¹³¹ This was the general view that humans were:

“free” in the deepest sense: free to master and to control their own destinies. In holding this “freedom premise” they were rejecting a heritage of causative explanations for the universe that emphasized the power of external, nonhuman forces, ranging from God to nature to inexorable laws of political economy or social organization to determinist theories of historical change. For them a recognition of the subjectivity of perception and cognition meant much more than the belief that individual humans were capable of giving individual meaning to their life experiences. It meant that hu-

125. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 289–90 (2011).

126. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593–94 (1982).

127. See THOMAS A. SPRAGENS, JR., CIVIC LIBERALISM: REFLECTIONS ON OUR DEMOCRATIC IDEALS ch. 5 (1999).

128. See Redish, *supra* note 126, at 629 (“[W]e have construed the first amendment to leave to the individual final say as to how valuable the particular expression is.”).

129. White, *supra* note 8, at 309–10.

130. *Id.* at 308.

131. *Id.* at 309.

mans had the potential—the freedom—to alter those experiences.¹³²

What White describes as features of “modernism,” others have characterized as those of “liberalism,” the liberation of humanity from the constraints of religion, association, prejudice, nature, and community custom or tradition.¹³³ But whichever label is preferred, what stimulated the enormous expansion of free speech rights was precisely a seemingly boundless faith in “the capacity of humans to master their experience and in effect to create their own destiny: it was a powerful affirmation of the capacity and potential of the individual.”¹³⁴ While the scope of free speech protection was, in the first wave of change, delimited by “empirical inquiry and rational policy-making,” those influences rapidly fell away and were replaced by “individual dignity and choice” and its mirror-image justification—absolute government anti-orthodoxy—as the philosophical touchstones of speech protection.¹³⁵

White observes that the enormous expansion of speech rights in what I have called the second wave proved difficult to reconcile with the aims of democratic self-governance, stimulating the arrival of new, retrenching, democracy-enhancing theories meant to realign speech protection along the modernist premises from which it had broken free.¹³⁶ Hence, he writes that freedom of speech had been “sever[ed]” from “democratic theory,” with all of its attendant rationalist and empiricist premises betokening freedom of speech’s coming of age.¹³⁷

But this characterization misses two crucial points. First, the second wave followed from the first, the first having been itself a reaction against an earlier, much more strictly regulated speech regime designed to promote a thicker set of common ends governed by authorities outside the self. It was only because of the newly created absolute protection for “political” speech bestowed by the first wave—the “invention,” as Gene-

132. *Id.* at 304.

133. See generally PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2018).

134. White, *supra* note 8, at 306.

135. *Id.* at 365–66. In addition to *Cohen* and the Nazi march case, White notes that the Court’s obscenity cases are critical in this development as well. See *id.* at 365–67 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)).

136. *Id.* at 368.

137. *Id.* at 369.

vieve Lakier has put it, of a new category of “valuable” speech¹³⁸—that the Court would eventually arrive at its much broader free speech absolutism in the second wave. Second, what the combination of the first and second waves accomplished was precisely to sever freedom of speech from serving any higher social or collective purposes. The waves together succeeded in fundamentally reorienting freedom of speech inwardly.

Free speech, therefore, did not come of age in this period, at least if a coming of age is synonymous with maturity. Free speech was not, *pace* White, severed from the premises of modernity; it *fulfilled* those premises. And in so doing, it entered its adolescence, its developmental period of self-involvement, egocentrism, and emotional and behavioral independence. True, certain narrow categories of speech remain proscribed. But the justification for continuing to regulate, say, child pornography, incitement to violence, or “fighting words” does not depend upon their lack of fit within the second wave (they, too, may be justified on grounds of personal fulfillment and absolute anti-orthodoxy), but on the vestigial view that some speech, even if self-fulfilling and deeply—even wildly—unorthodox, is just too awful to tolerate.¹³⁹ Free speech serves no other and greater end than the promotion and affirmation of the particular identity that a given individual cares to embrace, one that nobody else (neither God nor the political community acting through its government) could limit on the basis of its content. And this self-regarding, inward justification of free speech was in turn identified with the American national character.¹⁴⁰ The Court and commentators now speak of free speech as a fundamental feature of the “dignity” of the speaker, by which they seem to mean the speaker’s sense of self-esteem or *amour propre*.

Just as the general framework for religious liberty mirrored that of free speech in the early Republic,¹⁴¹ so, too, was religious freedom reconceived in parallel ways during this second period to reflect second-wave commitments—inwardness, solip-

138. See Lakier, *supra* note 28, at 2167, 2170.

139. Indeed, the *Chaplinsky* framework for “fighting words” has been narrowed to the point of irrelevance. *Id.* at 2173–76.

140. See generally DeGirolami, *supra* note 9.

141. See *supra* notes 39–53 and accompanying text.

sism, and absolute autonomy and anti-orthodoxy. The law of religious accommodation, for example, incorporates many of these assumptions. True, the view that a core feature of religious free exercise depends upon premises of individual choice and voluntarism has deep roots in the American experience.¹⁴² Yet the Court's religious liberty cases beginning in the 1960s went well beyond an interest in voluntarism. Indeed, concerns that the free-exercise balancing test authorized a kind of hyperpluralized anarchy motivated the Court's decision in *Employment Division v. Smith*, where it returned to the pre-*Sherbert v. Verner* exemption regime.¹⁴³

But the passage of RFRA and RLUIPA, together with sundry state versions of RFRA, restored the self-centered approach as the primary test against which religious exemption claims are evaluated. These laws generally instruct courts to avoid inquiries into the centrality of a belief—as, indeed, *Smith* itself had said.¹⁴⁴ What is central is to be determined by the individual, not the religious community. Subjective perceptions of burdens may not be questioned because religious exercise is primarily understood as a matter of autonomous, individual choice—a choice that must be honored because it is personally “fulfilling”¹⁴⁵ and marks one's distinctive human “identity.”¹⁴⁶ Requirements of a religious system of creedal commitments, internal consistency, and even rough alignment of beliefs with others within the religious community or group of which the claimant says he is a member all have been held out of order.¹⁴⁷ The Court has held that an individual's beliefs need not correspond at all with—indeed, may run directly contrary to—the beliefs of the religious group, community, or tradition with

142. See, e.g., Michael A. Helfand, *What is a “Church”? Implied Consent and the Contraception Mandate*, 21 J. CONTEMP. LEGAL ISSUES 401, 410–12 (2013); Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 65 (2007); Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. 1183, 1196–1201, 1203 (2014).

143. *Emp't Div. v. Smith*, 494 U.S. 872, 882–84 (1990).

144. *Id.* at 886–87; see also, e.g., Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (2012).

145. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

146. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565, 636 (2014) (Kagan, J., dissenting) (“A person's response to the doctrine, language, and imagery contained in those invocations reveals a core aspect of identity—who that person is and how she faces the world.”).

147. See *Thomas v. Rev. Bd.*, 450 U.S. 707, 715–16 (1981).

which the individual claims to be associated.¹⁴⁸ One could hardly imagine a more internally oriented freedom than religious liberty after these developments.

On the establishment side, the situation is more complicated, but in many ways similar. Separation of church and state may be championed if it is perceived to support the autonomized, voluntarist conception of religious liberty and to strike at the historical and cultural connections between the American state and organized, corporate Christian traditions.¹⁴⁹ But church-state separation is far more controversial when it is perceived to immunize the corporate personhood of religious groups from government regulations forbidding discrimination on certain specific bases, especially sex and sexual orientation. Indeed, the operation of broad, statutory free exercise and broad, constitutional establishment rules serves precisely to reorient religious freedom away from traditional religious institutions and groups and toward a view of religion as a set of ineffably subjective, inarticulable experiences, desires, and personal commitments, that cannot be touched at all, let alone questioned, by anyone. That perception of religion—as a changeable set of fragmented and idiosyncratic views mirroring the self's then-existing needs—is also reflected in the single-most rapidly growing religious constituency in the United States (particularly among millennials), the unaffiliated “Nones.”¹⁵⁰

With the arrival of the second wave reconceptualization of free speech (and its direct analogue in religious liberty), in sum, came the detachment of the substance of free speech—its content—from any collective aims and limits. The language of absolute anti-orthodoxy seen in *Barnette* is a pragmatic expression of a similar view—that the government as a political community is categorically disabled from making evaluations about speech's worth because there is no longer any acceptable com-

148. *Id.*

149. See, e.g., Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 371 (2014) (“To the extent that history should govern our understanding of contemporary debates, this Article establishes that protection of the individual against the power of religious organizations was the central preoccupation of those charged with implementing the new law of religious liberty.”).

150. For discussion, see Mark L. Movsesian, *Defining Religion in American Law: Psychic Sophie and the Rise of the Nones* (Robert Schuman Ctr. for Advanced Studies, EUI Working Paper RSCAS 2014/19, 2014).

mon standard of evaluation. The right of free speech was decisively detached from sources of authority outside the self and reoriented internally. That detachment resulted in the unparalleled expansion of free speech rights. It became, after the work of the second wave, a key symbol of American identity, though an identity that consisted in the rejection of any shared substantive political or social orthodoxies and commitments.

III. PERIOD THREE: THE COMING OF THE CONSTRICTORS

The inwardly oriented, absolute anti-orthodoxy First Amendment of the second period has been a spectacular success. At no time has the right of free speech been more powerful than it is today. The last hundred years truly have been the "free speech century."¹⁵¹ But free speech's very successes have rendered it vulnerable to increasingly numerous apprehensions, objections, and attacks. The absence of any acceptable, extrinsic criteria for challenging any conception of freedom of speech also has meant that there have been no acceptable, extrinsic criteria for validating any conception of it.

As the earlier, two-tiered structure of the core and periphery of free speech protection was dismantled, critics became conscious of free speech's lack of any common moral direction. And they despaired of its hollowness, its separation from any value transcending the self, and its complete detachment from any account of the public good. These new anxieties marked the advent of the sickness unto death of the First Amendment. What good was free speech if it did not sub-serve any particular politics? If the point of free speech was to pursue the "truth" as an "ultimate good," as Holmes argued in his *Abrams* dissent¹⁵² and as many others had also claimed, then little point in it remained if the exchange of ideas could never yield some result relevant to truth. After the second wave, every untruth was treated as a potential truth, and every truth as a potential untruth; freedom of speech had been disconnected from any notion of Holmes's "ultimate good." The political theorist Gerhart Niemeyer once predicted that when this should happen, the people would "in mortal fright embrace any ideological

151. See *THE FREE SPEECH CENTURY*, *supra* note 5, at 1.

152. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

substitute that happens to present itself in a plausible disguise.”¹⁵³

Yet the hypertrophy of freedom of speech did not occur in a vacuum. The First Amendment may have suffered the sickness unto death, but its illness ran its course alongside the creation of other rights and interests derived from other provisions of the Constitution. Just at the time when the Court was swelling freedom of speech during the second wave and draining it of any shared communal standards for validating the substance of speech, it was also discovering new rights of dignity, equality, autonomy, and sexual freedom in the Due Process Clause of the Fourteenth Amendment.

The progress of the obscenity or sexually suggestive speech cases of the twentieth century are a useful example. Scholars have noted the connection between the ACLU’s advocacy of enlarged speech protection and its promotion of “sex as a civil liberty” in constitutional litigation in the 1930s and 1940s.¹⁵⁴ By the 1960s, the Court’s substantive due process jurisprudence had caught up, establishing unenumerated rights of privacy grounding access to birth control (first for married couples,¹⁵⁵ then for individuals¹⁵⁶) as well as preventing the state—on free speech grounds—from regulating the private possession of obscene material.¹⁵⁷ Gradually, as Leigh Ann Wheeler has observed, the Court was persuaded that the “sanctity of freedom of speech and sexual privacy” stood at “the very core of American constitutionalism,” rendering them mutually reinforcing rights.¹⁵⁸

True, later obscenity cases implicating other ideals and interests—including the equality of the sexes, human dignity, and what were thought to be intolerable collateral costs—checked some of the progress of sexual libertarianism in the Court’s earlier jurisprudence. Cases including *Miller v. California*¹⁵⁹ and

153. Niemeyer, *supra* note 88, at 263.

154. See generally LEIGH ANN WHEELER, *HOW SEX BECAME A CIVIL LIBERTY* (2013).

155. *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965).

156. *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972).

157. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

158. WHEELER, *supra* note 154, at 224.

159. 413 U.S. 15 (1973).

New York v. Ferber,¹⁶⁰ allowing for somewhat greater state regulation of obscenity and holding child pornography to be unprotected by the First Amendment, showed that there were relevant competing values of equality and dignity at stake. Advocacy organizations like the ACLU noticed; the emerging tensions between expanding rights of sexual freedom and broader egalitarian and dignitarian ideals had the effect of moderating the ACLU's sexual libertarianism so as to parry accusations, for example, that it was "privileging men's over women's rights and liberty over equality."¹⁶¹

Nevertheless, and these complications aside, the main currents of autonomy, dignity, and equality coexisted harmoniously in the majority of the Court's twentieth century substantive due process and speech jurisprudence, whether the issue was reproductive rights,¹⁶² gay rights,¹⁶³ or other sexual liberations more directly implicating expressive freedom.¹⁶⁴ In this way, rights of free speech and rights of sexual equality, dignity, and liberty became mutually supportive, just at the moment when the right of free speech was swelling and turning inward in the later stages of the second wave. Both reflected an absolute, or near-absolute, privileging of certain rights (whether of speech or of sexual autonomy) as against communal interference. Although the project of the second wave was to empty freedom of speech of any external criterion—any transcendent source outside the self, including the democratic polity as a whole—against which to measure the substantive worth of speech, the hollowing out of free speech created space for its reinfusion with new ends and new limits. These came primarily, though not exclusively, from leading cases in the Court's Fourteenth Amendment substantive due process jurisprudence.

It is these new rights and interests that promised to cure the First Amendment's sickness unto death. These rights and inter-

160. 458 U.S. 747 (1982).

161. WHEELER, *supra* note 154, at 179–80.

162. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

163. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003).

164. See *United States v. Stevens*, 559 U.S. 460 (2010); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

ests could revitalize the First Amendment with what were claimed to be new, extrinsically, communally ordered and delimited ends. Academic and judicial arguments for First Amendment constriction—whether for religious or speech freedom—developed in order to protect, entrench, and advance these new ends. When constituencies that did not share, or that set themselves in opposition to, the new preferred ends invoke the expansive protections of freedom of speech’s second wave to resist them, they are now met with arguments that the First Amendment is not meant for their claims, but to protect higher common purposes.

A. *Academic Constrictors*

The scholarly literature advocating new free speech limits in the service of ostensibly common ends is vast and growing, and this article cannot hope to canvass every development.¹⁶⁵ It

165. For only a very partial list of relatively recent academic claims for speech constriction specifically, see RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS? WHY THE FIRST AMENDMENT SHOULD NOT PROTECT HATE SPEECH AND WHITE SUPREMACY* (2018) (The 1997 edition of this work included pornography in the title.); MARY ANN FRANKS, *THE CULT OF THE CONSTITUTION: OUR DEADLY DEVOTION TO GUNS AND FREE SPEECH* (2019); ANTHONY LEAKER, *AGAINST FREE SPEECH* (2019); BURT NEUBORNE, *MADISON’S MUSIC: ON READING THE FIRST AMENDMENT* (2015); STEVEN H. SHIFFRIN, *WHAT’S WRONG WITH THE FIRST AMENDMENT?* (2016); Tabatha Abu El-Haj, “*Live Free or Die*”—*Liberty and the First Amendment*, 78 OHIO ST. L.J. 917 (2017); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119 (2015); Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687 (2016); Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583 (2008); Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 174, 175, 194–96 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Louis Michael Seidman, *Can Free Speech be Progressive?*, 118 COLUM. L. REV. 2219 (2018); Steven H. Shiffrin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480 (2014); Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1 (2016); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389 (2017). For scholars advocating constriction of the First Amendment more generally, including the right of free speech, see Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015); Caroline Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241 (2015); Kenneth D. Katkin, *First Amendment Lochnerism? Emerging Constitutional Limitations on Government Regulation of Non-Speech Economic Activity*, 33 N. KY. L. REV. 365 (2006); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2014); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015). On religious freedom constriction in specific, see Frederick Mark Gedicks, *One Cheer for Hobby Lobby: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J.L. & GENDER 153 (2015); Micah Schwartzman, Richard Schragger

may instead be more useful to describe the trajectory of certain more prominent arguments.

One of the most interesting scholars of the new constriction is Steven Shiffrin, in significant part because Shiffrin's work marks the transition from the second wave expansion of free speech to constriction today. Shiffrin argued in his 1990 book *The First Amendment, Democracy, and Romance* that the core of freedom of speech protected the individual's "right to speak about any subject and that it most especially guaranteed the right to dissent against existing customs, habits, conventions, processes, and institutions."¹⁶⁶ At the time, Shiffrin framed his claim as a criticism of first-wave reformers like Meiklejohn, who had argued much more narrowly for the democracy-enhancing view of speech protection but also the limits of more expansive speech protection for non-political speech.

Shiffrin's project was to explode those Meiklejohnian limits: all speech representing "nonconformi[ty]" should be protected at least by balancing it against competing social values, any "paeans to democracy and self-government" notwithstanding.¹⁶⁷ This already represented a major expansion of speech protection. One of Shiffrin's primary examples of "dissent" concerned the use of offensive profanity—as in George Carlin's well-known monologue of "Filthy Words"—and the Supreme Court's decision to uphold the FCC's sanction of profanity as "too vulgar and too offensive for the radio."¹⁶⁸ For Shiffrin, profanity of this kind was "precisely what the first amendment is supposed to protect. Carlin is attacking conventions; assaulting the prescribed orthodoxy; mocking the stuffed shirts . . ."¹⁶⁹ One could hardly conceive of a more committedly anti-orthodoxy, expansive position, though a position that still conceded that some interests (inciting imminent lawless action, for example) could override free speech interests.

Yet just over two decades later, Shiffrin's view had altered substantially. In his Melville B. Nimmer Memorial Lecture,

& Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, BALKINIZATION BLOG (Nov. 27, 2013), <https://balkin.blogspot.com/2013/11/the-establishment-clause-and.html> [<https://perma.cc/E7ZA-FFRZ>].

166. SHIFFRIN, *supra* note 122, at 77.

167. *Id.* at 77–78.

168. *Id.* at 80 (citing *FCC v. Pacifica Foundation*, 438 U.S. 726 (1976)).

169. *Id.*

Shiffrin still argued in favor of a balancing approach that weighed the value of free speech against other rights and interests.¹⁷⁰ But the balance had now changed. Some form of absolutism had once been necessary, Shiffrin argued, as a “reacti[on] against puritanical censorship and the political witch hunting of the McCarthy era.”¹⁷¹ But today, Shiffrin claimed that an approach “that accommodates the First Amendment interests against the interests of concern to the government” — that is, a balancing test that favors social and communal interests much more systematically than in the past — ought to be adopted.¹⁷²

Shiffrin’s views thus migrated from an expansive justification for free speech emphasizing powerful protection for “assault” on any “orthodoxy,” no matter how necessary that orthodoxy may be from the perspective of the political community, to a balancing test that weighted social and communal interests much more heavily. He now says that protecting and promoting some forms of “human dignity” may outweigh the value of free speech.¹⁷³ In discussing the animal-crush video case, *United States v. Stevens*,¹⁷⁴ Shiffrin criticizes the treatment and consumption of animals in America as morally problematic, and charges that consumers of animal crush videos are “sick and twisted.”¹⁷⁵ Likewise, as to *Snyder v. Phelps*,¹⁷⁶ in which the Westboro Baptist Church protested the United States by chanting anti-gay invective near an American soldier’s funeral, Shiffrin writes that “a society unwilling to protect mourners at a funeral from verbal assaults of this kind has lost its way.”¹⁷⁷ It has, in Shiffrin’s view, “committed the sin of First Amendment idolatry” because it has pitted freedom of speech against “human dignity.”¹⁷⁸ “American democracy,” too, has been violated by expansive free speech rights now that

170. See Shiffrin, *supra* note 165, at 1482.

171. *Id.* at 1485.

172. *Id.* at 1488.

173. *Id.* at 1489.

174. 559 U.S. 460 (2010).

175. See Shiffrin, *supra* note 165, at 1489.

176. 562 U.S. 443 (2011).

177. Shiffrin, *supra* note 165, at 1496.

178. *Id.*

corporations can speak freely;¹⁷⁹ this is the “dark side” of the First Amendment.¹⁸⁰ What Shiffrin once decried as the overly restrictive democracy-enhancing justification for free speech, he now embraces as a necessary limit.

Shiffrin never explains precisely what accounts for the radical shift in emphasis from once advocating an inwardly oriented, orthodoxy-smashing, expansive freedom of speech to speaking in the theologically charged language of First Amendment “sins” and “idolatry,” as well as recommending the balancing of speech rights against dignitarian and democracy-enhancing interests. The Westboro Baptist Church’s views may indeed be unpalatable, but they are also certainly dissenting, offensive, and politically countercultural. Twenty-five years ago, it would have been unthinkable for Shiffrin to argue that the First Amendment did not protect Carlin, the political dissenter. Carlin’s speech was necessary to smash the puritanical idols. Why is not Westboro Baptist Church the new Carlin, smashing today’s idols?

Yet Shiffrin is not alone. Many other scholars have also argued vigorously for these and other constrictions of free speech—limitations that presuppose widely shared political ends such as a common commitment to “dignity” or “equality,” a particular view about the proper workings of “democracy,” the prevention of “third-party harm,” the preservation and extension of rights of sexual autonomy, or even a specifically partisan political program that sound altogether different than the second-wave view of the First Amendment.

Some scholars frame their arguments for speech constriction in overtly partisan terms. Burt Neuborne, once a staunch advocate of the civil libertarian freedom of speech, now argues that while progressives once promoted extremely broad speech rights in the service of progressive causes, the extension of such rights to conservatives has led many “progressives” to “suspect they had made a bad First Amendment bargain.”¹⁸¹ “Civil liberties once were radical,” writes the legal historian Laura Weinrib, but the dream of a radically progressive and liberated poli-

179. *Id.* at 1497 (quoting and criticizing *Citizens United v. FEC*, 588 U.S. 310 (2010)).

180. *Id.* For further elaboration of these points, see SHIFFRIN, *supra* note 165.

181. NEUBORNE, *supra* note 165, at 106–16.

tics was never fulfilled by expansive free speech rights.¹⁸² Louis Michael Seidman laments that free speech can never truly be “weaponized” to advance and entrench progressive ends because the freedom is “too deeply rooted in ideas about fixed property rights.”¹⁸³ Instead, progressives who long for “an activist government that strives to achieve the public good” should simply pursue those ends directly and constrict free speech for use only “as a side constraint” on the achievement of a truly radical progressive politics.¹⁸⁴

Not all academic speech constrictors argue in such unabashed partisan terms. Oftentimes, the language of “balancing” is used, together with the enumeration of somewhat under-specified social interests claimed to be of great communal value. Consider Alexander Tsesis’s claim that the rights of free speech must be balanced against other community interests in “equality, dignity, creativity, and public peace.”¹⁸⁵ Tsesis goes on to say that the right of free speech must be reattached to “the broader constitutional value of equal dignity secured by a system of government whose aim should be the common good.”¹⁸⁶ Likewise, in a careful and interesting paper arguing for “free speech consequentialism,” Erica Goldberg argues for a fundamental re-orientation in free speech law that would weigh the benefits of free speech against its costs, analogizing certain sorts of speech to physical acts of violence—including those that involve “revenge” pornography (but not pornography proper).¹⁸⁷ Goldberg writes that she undertakes this proposal for reform “with the aim of rehabilitating core values of our First Amendment doctrine and practice,”¹⁸⁸ and yet these core values are neither self-evident nor perhaps widely shared.

Yet other scholars speak about rights and interests in equality that are also claimed to be fully or relevantly “democratic.” Perhaps the earliest and best known of these is Cass Sunstein, who argued that freedom of speech should be interpreted so as

182. LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* 1, 9 (2016).

183. Seidman, *supra* note 165, at 2219.

184. *Id.* at 2220–21.

185. Tsesis, *supra* note 165, at 16.

186. *Id.* at 20.

187. Goldberg, *supra* note 165, at 687.

188. *Id.*

to promote “political equality” and “political deliberation,” which should include a “New Deal” for speech in which Congress should suppress speech that has “distorting effects” on true democracy.¹⁸⁹ Several other scholars have followed something like this line more recently. The government must protect and promote the “free and equal citizenship” of Americans and their “democratic values,” argues Corey Brettschneider, not by criminally punishing “hateful viewpoints,” but instead by engaging in the ostensibly softer censures and inducements of “persuasion.”¹⁹⁰ The state can and should nudge along those groups that do not accept its view of what “free and equal citizenship” requires; its objective should include, for example, the “transformation of discriminatory religious beliefs” into something more civically healthy.¹⁹¹ David Pozen and Jeremy Kessler likewise “search for an egalitarian First Amendment,”¹⁹² arguing that a series of “midlevel conceptual and jurisprudential moves”¹⁹³—which include strategic minimalism and maximalism to advance progressive ends, as well as the legal recognition of “expressive interests . . . downstream” of the speaker—can be used to reorient the First Amendment in what they regard as civically healthy directions.¹⁹⁴ Similarly, Nelson Tebbe also argues in an egalitarian register that the political good of “full and equal citizenship” requires certain distinctive limits on First Amendment rights, whether of speech or religion.¹⁹⁵

In some cases, echoes of the early American period in the claims of constrictors are startlingly direct. Morgan Weiland claims that free speech law assumes a two-tiered structure, with a libertarian “periphery” and a liberal-republican “core.”¹⁹⁶ The latter is threatened by the libertarian expansion

189. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 28, 94 (1993).

190. See COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY? HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY* 24–25 (2012).

191. *Id.* at 157.

192. Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1978 (2018).

193. *Id.* at 1953.

194. *Id.* at 1994–95.

195. See NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* (2017); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 712 (2013).

196. Weiland, *supra* note 165, at 1390.

of free speech in which corporations are granted speech rights, because while individuals have “an innate capacity for self-expression and self-realization,” corporations do not and corporate rights end up diminishing individual rights.¹⁹⁷ Weiland’s claims about a distinctive “libertarian tradition” that sprung into being in the 1970s, and her view that this tradition can be confined to cases involving “corporate” rights, are debatable. As this Article has shown, the second-wave, individually-oriented, libertarian expansion of freedom of speech decried by Weiland and many others is a much older phenomenon extending as far back as the early twentieth century, and in its earlier years it promoted progressive political ends. The division she creates between corporate and individual free speech protection may not pinpoint the true source and scope of the conceptual change to which she objects.¹⁹⁸ But the more important point is Weiland’s insistence on a two-tiered structure of “core” and “peripheral” speech rights, with the core encompassing communally oriented “republican” values concerning “collective self-determination.”¹⁹⁹ The core interests of the collective community as she perceives them are set against the peripheral rights of free speech, and particularly corporate speech. It is a view that mimics the two-tiered structure, though of course not the substance, of early republican views of free speech almost exactly.

As in each of the two previous periods, there are parallels for the right of religious freedom. Here, academic constrictors have instead generally focused on the idea that rights of religious freedom recall the specter (it always is a specter and never a pleasant memory) of *Lochner v. New York*²⁰⁰ or that they generate social harms of various kinds to third parties—frequently harms that threaten the new sexual rights conceived by the Court in its substantive due process jurisprudence and stabilized in subsequent legislation. Rights of religious freedom

197. *Id.* at 1396.

198. There are analogous claims in the free exercise context, which argue for the primacy, if not the exclusivity, of individual rights of free exercise as against corporate rights. See, e.g., Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 *FORDHAM L. REV.* 1965, 1988 (2007) (“[T]he constitutional significance of religious organizations depends upon what they can do for individuals.”).

199. Weiland, *supra* note 165, at 1404.

200. 198 U.S. 45 (1905).

therefore must be constricted accordingly, they argue, so as to protect and entrench these more important, common ends.

Elizabeth Sepper, for example, charges that rights of religious freedom often threaten vital social interests in “[s]ex equality and public health” in the same way that *Lochner* and its progeny threatened salubrious social and economic policies.²⁰¹ Similarly, the vital social good of “antidiscrimination protections”—and particularly those dealing with sexual liberties—is threatened by broad rights of religious liberty; the latter should accordingly be curtailed when they run up against these other more important rights, especially when antidiscrimination law has the capacity to vindicate interests in personal dignity.²⁰²

The disparaging comments by Sepper and others who take a similarly critical line about *Lochner* are perplexing. They evince a deep misunderstanding of what the *Lochner* era was all about. Substantive due process in the style of *Lochner* was meant to ensure that the government was properly pursuing the public good, rather than invidiously or arbitrarily depriving individuals of their liberty. Even the reviled *Plessy v. Ferguson*, a decision of the *Lochner* period, insisted that “every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class.”²⁰³ *Lochner* itself adopts a similar approach, balancing the broad police powers of the state for the protection of the community against individual liberties to arrive at what the Court thought were “reasonable” compromises.²⁰⁴ The formalism of the opinion in *Lochner* should not be mistaken for a more contemporary, libertarian view of individual rights.

Modern substantive due process doctrine, like modern free speech and religious freedom doctrine, is by contrast structured as an effort to identify particularly fundamental liberty interests that cannot be regulated collectively even under a law enacted in good faith for the promotion of the common good. It is this absolutist approach to speech and substantive due process rights that is the outlier. The claims of scholars like Sepper

201. Sepper, *supra* note 165, at 1479.

202. *Id.* at 1479–80.

203. 163 U.S. 537, 550 (1896).

204. 198 U.S. at 56–57.

and others who invoke *Lochner* as a legal hobgoblin are actually very similar in structure to the arguments of the *Lochner* period.²⁰⁵ They are today's *Lochner*izers, though they bring very different substantive visions of the common good to their work than did judges of the *Lochner* era. Indeed, it is they who insist on the demotion of First Amendment rights to interests that should be balanced in accordance with the public good against other interests they may think are more valuable. They have simply substituted a different baseline of political commitments for *Lochner*'s, while taking on board all of the solicitude and formalism for their baseline that *Lochner* did for its own very different one.

A final group of academic constrictors invokes claims of harm to third parties as limitations on First Amendment rights.²⁰⁶ These voices are particularly useful in cataloguing the new First Amendment constriction because "third-party harm" is a sufficiently capacious term to encompass a staggeringly broad array of putatively rivalrous interests. Indeed, third-party harms constrictors are sometimes vague about the kinds of harms that ought to serve as limits on First Amendment rights, and this imprecision is entirely sensible if the view is that the government should have far greater latitude in balancing rights of religious liberty and free speech against other collective social interests thought by these scholars to be of greater worth.²⁰⁷

Several prominent third-party harm constrictors do specify, however, that harm to "dignity" should defeat claims of religious freedom. Although Shiffrin used the term "dignity" to signal interests implicating animal rights and grieving at a funeral, these constrictors seem generally to mean rival interests involving sexual liberties of various kinds.²⁰⁸ Thus, for example, Reva Siegel and Douglas Nejaime write that denials of cost-free contraceptive coverage on the basis of claims of reli-

205. See *supra* note 165 for additional scholars deploying the *Lochner* theme.

206. See Gedicks, *supra* note 165, at 175; Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2516 (2015); Schwartzman, Schragger & Tebbe, *supra* note 165.

207. For a recent critique of this problem and an attempt to categorize harms, see Stephanie H. Barclay, *First Amendment Categories of Harm*, 95 *IND. L.J.* (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3385311 [<https://perma.cc/XSX6-DH58>].

208. See, e.g., Nejaime & Siegel, *supra* note 206, at 2558–65.

gious scruple, and their accommodation through law, are deeply injurious to individual dignity because they “stigmatize and demean” those whose own sexual morality deviates from “traditional sexual morality.”²⁰⁹ Indeed, these harms are claimed to be so serious that accommodating any contrary religious interest might itself be a violation of the First Amendment. “Dignity” has become a kind of totem for constriction—a symbol that encompasses a miscellany of interests thought to outweigh rights of speech and religious freedom.

For purposes of this Article, the critical point is not to evaluate these, or any other, constricting proposals. It is that scholars of constriction are increasingly hearkening—wittingly or not—to the early American framework in calling for the political community (working through its government) to delimit free speech and religious freedom rights in the service of the public good. The justifications for that constriction are, just as in the early Republic, claimed to lie in the core or root goods of the American democratic community. Today, however, these core goods often are derived from the Court’s substantive due process jurisprudence, and in particular its decisions about sex as a civil right. Academic constrictors of the First Amendment claim that these common American political values—whether defined in terms of democracy, dignity, equality, sexual freedom, third-party harm, or simply as an explicitly politically partisan program—must be balanced against any rights to free speech and religious freedom.

B. *Judicial Constrictors*

Judges have also recently argued for the constriction of First Amendment freedoms. Like their academic counterparts, judges explicitly invoke “democracy” and “dignity” as rightly imposing limits on free speech, though what precisely they mean by these terms can be as opaque as when first-wave reformers made similar claims about democracy.²¹⁰ In last year’s Supreme Court term, four Justices signed two dissenting opinions each of which decried the “weaponiz[ation]” of free speech by the majority, and it should come as no surprise that one of these cases involved what was perceived as a threat to abortion

209. *Id.* at 2520, 2566.

210. See discussion, *supra* Part II.

rights.²¹¹ Judges, too, raise the ghost of *Lochner* in what is meant to be a disparaging analogy.²¹² But unlike scholarly constriction, judicial constriction at present tends to be a dissenting view, at least at the Supreme Court. Nevertheless, at least five different Justices on the present Court have endorsed arguments for constriction, though to date never in the same case. The phenomenon of judicial constriction at the Court may be strengthening.

One of the earliest judicial constrictors on the contemporary Court was Justice John Paul Stevens, who emphasized in his well-known dissent in *Citizens United v. FEC* that “society could scarcely function,” if every public interest were “an illegitimate basis for qualifying a speaker’s autonomy.”²¹³ The “corporate domination of politics,” he argued, was a distinctive and grave threat to “democratic integrity,” one which had been recognized from “the inception of the republic.”²¹⁴ Corporations should not have free speech rights, he claimed, and regulations of them impinge on no true interests in “autonomy, dignity, or political equality,”²¹⁵ which are the fundamental values served by free speech. Stevens framed his argument for constriction exactly as an appeal to the promotion of a “broader notion of the public good”²¹⁶—distinctive ideas about republican government that explicitly draw on the Founders’ conception of free speech and that are disserved by granting corporations speech rights.

Justice Alito has also advocated free speech constriction, which may suggest that judicial constriction does not map perfectly onto any particular political preference or orientation. Alito’s dissenting opinions in *Snyder v. Phelps*²¹⁷ and *United States v. Alvarez*²¹⁸ argue that the Court should engage in some kind of evaluation of the “value” of free speech, and that cer-

211. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting); *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2382 (2018) (Breyer, J., dissenting).

212. See *NIFLA*, 138 S. Ct. at 2383 (Breyer, J., dissenting).

213. 558 U.S. 310, 422 (2010) (Stevens, J., dissenting in part).

214. *Id.* at 469.

215. *Id.* at 467.

216. *Id.* at 470.

217. 562 U.S. 443, 463–75 (2011) (Alito, J., dissenting).

218. 567 U.S. 709, 739–55 (2012) (Alito, J., dissenting).

tain types of speech “have no value,”²¹⁹ “inflict real harm,”²²⁰ or are “vicious verbal attacks that make no contribution to public debate.”²²¹ His dissent in *United States v. Stevens*²²² argues for an extension of *New York v. Ferber*, which had held that child pornography receives no free speech protection,²²³ to depictions of animal torture and dismemberment, which likewise “have by definition no appreciable social value.”²²⁴ His concurrence in *Brown v. Entertainment Merchants Association*²²⁵ contended that violent video games may well be different in kind from other media with respect to their potential social harm to “troubled teens,” and that the Court should have left open the possibility of balancing such harms against free speech rights in future cases.²²⁶

All of these opinions by Justice Alito reflect an approach that would have the Court constrict freedom of speech in its present sprawling form to account for competing social interests in decency and especially harm to third parties.²²⁷ All reflect an emphasis on the exchange of politically and socially worthwhile ideas (“public debate”)—to be distinguished from worthless ones—as freedom of speech’s principal object. Yet all also assume contested ideas of what counts as “valuable” and “harmful” speech—assumptions that are difficult to reconcile with the right of free speech after its second wave expansion.

Most recently, the Court has decided two cases indicating that a growing bloc on the Court favors more thoroughgoing free speech constriction. In arguing for constriction, the four-justice dissents in both cases accused the majority of “weaponizing” free speech, and both invoked “democracy” and the “true value” of freedom of speech in justifying that con-

219. *Id.* at 739.

220. *Id.*

221. *Snyder*, 562 U.S. at 464 (Alito, J., dissenting).

222. 559 U.S. 460, 482–505 (2010) (Alito, J., dissenting).

223. 458 U.S. 747, 748 (1982).

224. *Stevens*, 559 U.S. at 497–98 (Alito, J., dissenting).

225. 564 U.S. 786, 805–21 (2011) (Alito, J., concurring).

226. *Id.* at 816–21.

227. *See also* Dahne v. Richey, No. 18-761, 2019 WL 2078092 (U.S. May 13, 2019) (Alito, J., dissenting from denial of certiorari) (“Even if a prison must accept grievances containing personal insults of guards, a proposition that is not self-evident, does it follow that prisons must tolerate veiled threats? I doubt it, but if the Court is uncertain, we should grant review in this case.”)

striction. It should come as little surprise that one of the two cases involved abortion rights on one side and conservative Christian beliefs about abortion on the other. The opinions in these cases suggest—with both their rhetoric and their substantive disagreements with their respective majorities—that the war between free speech constrictors and second-wave expansionists is likely to intensify.

In *National Institute of Family and Life Advocates v. Becerra*, the Court reviewed a challenge to California regulations imposed on pro-life pregnancy resource centers.²²⁸ One required state-licensed centers to advertise the availability of state-subsidized abortion, while a second required unlicensed centers to notify women prominently and in several languages that they were not licensed.²²⁹ The law manifested an intent to target “largely Christian belief-based” centers,²³⁰ which California state legislators believed were not sufficiently “forward thinking” about abortion, as recorded in the statute’s legislative history.²³¹

In a 5-4 opinion, Justice Thomas held that the statute violated freedom of speech because its provisions compelled the centers to express content-specific messages, including about obtaining the very service to which the centers objected—abortion.²³² Justice Kennedy’s concurrence, joined by Justice Gorsuch, argued that the regulations were intended to squelch the pro-life views of the centers: “[I]t 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.’”²³³

Justice Breyer dissented, joined by Justices Kagan, Ginsburg, and Sotomayor. If a state may require an abortion provider to tell a woman seeking an abortion about adoption services (as the Court had held in *Planned Parenthood v. Casey*²³⁴), Breyer argued, it should also be able to require pro-life centers to tell a woman about the availability of state-subsidized abortion.²³⁵

228. 138 S. Ct. 2361, 2368 (2018).

229. *Id.*

230. *Id.*

231. *Id.* at 2379 (Kennedy, J., concurring).

232. *See id.* at 2371 (majority opinion).

233. *Id.* at 2379 (Kennedy, J., concurring) (second and third alterations in original) (quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)).

234. 505 U.S. 833, 881 (1992) (plurality opinion).

235. *NIFLA*, 138 S. Ct. at 2383–85 (Breyer, J., dissenting).

But the dissent went much further, charging that the majority had empowered pro-life centers “to use the Constitution as a weapon” to defeat “ordinary economic and social legislation.”²³⁶ The true value of free speech, wrote Breyer, is only “obscure[d], not clarif[ied]” by invoking it in an “[in]appropriate case” like this—a situation where state officials were simply doing their best to protect the health and safety of their people.²³⁷ “Even during the *Lochner* era,” said Breyer, the “Court was careful to defer to state legislative judgments concerning the medical profession.”²³⁸ In the dissent’s view, the Court’s holding in *NIFLA* was more egregious than those of the *Lochner* era itself.

In the other case, *Janus v. American Federation of State, County, and Municipal Employees*, the Court struck down an Illinois law that compelled non-members to pay public-sector union fees.²³⁹ The Court reversed *Abood v. Detroit Board of Education*,²⁴⁰ which had held that compulsory public-sector agency fees were constitutional, so long as the money was used only for activities “germane” to collective bargaining rather than for separate “political and ideological projects.”²⁴¹ In an opinion for the Court by Justice Alito on behalf of the same five-Justice majority as in *NIFLA*, the Court held that these compulsory union fees forced support (in the form of financial subsidies) for messages with which the litigants disagreed, and *Abood*’s distinction between permissible and impermissible expenditures had proved easier to articulate than apply.²⁴²

As in Justice Breyer’s *NIFLA* dissent, Justice Kagan’s *Janus* dissent accused the majority of “weaponizing” freedom of speech and “unleash[ing] judges” to ravage salutary, democratically validated policies.²⁴³ Kagan denounced the justices in the majority as “black-robed rulers overriding citizens’ choices” and censured them for “turning the First Amendment into a

236. *Id.* at 2381–82.

237. *Id.* at 2382–83.

238. *Id.* at 2382.

239. 138 S. Ct. 2448, 2486 (2018).

240. 431 U.S. 209 (1977).

241. *Janus*, 138 S. Ct. at 2460–61.

242. *Id.* at 2486.

243. *Id.* at 2501 (Kagan, J., dissenting).

sword.”²⁴⁴ “The First Amendment,” she argued, “was meant for better things. It was meant not to undermine but to protect democratic governance”²⁴⁵

Kagan’s *Janus* dissent is probably the strongest example of judicial constriction to date. The function of freedom of speech, in her view, is not to override certain sorts of healthy or valuable democratic choices of the kind made by state officials in *NIFLA* and *Janus*. Rather, individual rights like free speech should reinforce and promote this sort of “democratic governance” in furtherance of the public good—the “better things” that California and Illinois had wisely given their people—and judicial oversight in these kinds of cases sets the Court on the “long road” to juristocracy.

“Black-robed,” as a term of abuse, was first used by Justice Scalia in his dissent in *United States v. Windsor*, to describe the Court’s arrogation to itself of the power to strike down the Defense of Marriage Act—a decision that Kagan joined—on the basis that the statute restricting marriage for federal purposes to two members of the opposite sex ran afoul of the Court’s substantive due process sexual liberties jurisprudence.²⁴⁶ Kagan almost certainly intentionally echoed Scalia, though it seems plain that her views of sound and unsound social policies, and of the circumstances in which the Court legitimately overturns democratic choices, are rather different than Scalia’s. Indeed, notwithstanding the rhetorical warfare of the *NIFLA* and *Janus* dissenters, both of these decisions do showcase the Court’s enduring embrace of second-wave free speech expansionism—the dominant conceptual framework for roughly a century. Yet if this conception of free speech is today serving conservative ends, as Breyer, Kagan, and the other dissenters who joined them charge, one should recall that for many decades it promoted progressive ends in the Court’s cases involving defamation, obscenity, sexually explicit speech, and other twentieth century expansions of free speech.²⁴⁷

The metaphor of First Amendment “weaponization” that was deployed in both cases was minted a few years ago to at-

244. *Id.* at 2501–02.

245. *Id.* at 2502.

246. See 570 U.S. 744, 780 (2013) (Scalia, J., dissenting).

247. See discussion, *supra* Part II.

tack religious freedom, when *Burwell v. Hobby Lobby*²⁴⁸ was the case that evoked so much outrage.²⁴⁹ The metaphor is effective because it re-characterizes certain kinds of exercises of religious liberty—particularly those that are believed to threaten the new rights of sexual liberty and autonomy—as violence, similar to the way that some academic constrictors argue that speech may sometimes function as an act of violence.²⁵⁰ It was and remains a technique of those using the image of weaponry and violence to refer to “religious freedom” as against “civil rights,” the assumption being that religious freedom is not also a civil right.²⁵¹ Some academic constrictors are inclined to use the metaphor of First Amendment weaponry positively, in advocating for aggressively partisan uses of free speech.²⁵² Some continue to decry any uses of religious freedom that they dislike as “weaponization.”²⁵³ But until the 2017 Supreme Court term, the metaphor had not appeared in any Supreme Court opinion.²⁵⁴

But it is not an unexpected development. The sickness unto death of the First Amendment—the dissatisfaction and anxiety that resulted from its disconnection from any overarching idea

248. 134 S. Ct. 2751 (2014).

249. See, e.g., Dale Carpenter, *The clash of “religious freedom” and civil rights in Indiana*, WASH. POST (Mar. 30, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/the-clash-of-religious-freedom-and-civil-rights-in-indiana/?utm_term=.046b79689a62 [<https://perma.cc/G5CR-F4HG>] (“What started out as a shield for minority religious practitioners like Native Americans and the Amish is in danger of being weaponized into a sword against civil rights.”); Peter Montgomery, *The weaponization of religious liberty*, RELIGION NEWS SERV. (June 8, 2016), <https://religionnews.com/2016/06/08/the-weaponization-of-religious-liberty/> [<https://perma.cc/85EV-SUCV>]; Irin Carmon, *Religious freedom arguments used to weaponize the First Amendment*, MSNBC (Jan. 19, 2016), <http://www.msnbc.com/msnbc/religious-freedom-arguments-used-weaponize-the-first-amendment> [<https://perma.cc/BH4Q-82SH>].

250. See *supra* note 165.

251. See, e.g., Carpenter, *supra* note 249.

252. See Seidman, *supra* note 165, at 2248.

253. See Katherine Franke, *Religious freedom for me, but not for thee*, WASH. POST (Sept. 28, 2018), https://www.washingtonpost.com/opinions/religious-freedom-for-me-but-not-for-thee/2018/09/28/297ffb4-c340-11e8-8f06-009b39c3f6dd_story.html?utm_term=.5856abf4b364 [<https://perma.cc/78VG-E37S>] (denouncing the Trump Administration’s use of religious freedom as a “weapon”).

254. The media immediately noticed and followed suit. See, e.g., Adam 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> [<https://nyti.ms/2ID0Wov>].

of the public political and moral good transcending the self, just as the right was swelling to an unprecedented scope—has brought on a powerful reaction. The First Amendment constrictors argue that new values, derived from new rights and interests in dignity, equality, democracy, third-party harm, and others, must be balanced against the freedoms of speech and religion. These values were generated and entrenched in part by the hypertrophic First Amendment itself. These new interests poured in to fill up the void created by free speech's second wave reformers. For the constrictors, these new rights and interests are the cure for the sickness unto death, inasmuch as they reunite freedom of speech with, as Justice Kagan put it, the "better things"—the public good, and perhaps even Holmes's "ultimate good"²⁵⁵—of American political and moral life.

IV. THE UNITY OF SPEECH AND RELIGION

It is an open question whether arguments for First Amendment constriction will ultimately prove successful in constitutional law and elsewhere. They may well be adopted at some point by a majority of the Supreme Court, though to date they have persuaded only a quorum of dissenters. Given the deeply fractured state of American political life, and in the wake of the political wreckage that has followed the second wave expansion of free speech, one might well believe that imposing new limits on First Amendment rights in the name of dignity, democracy, equality, sexual freedom, third-party harm, progressivism, or any of the other purposes championed by the new constrictors is far likelier to exacerbate social and civic fragmentation than to reconstitute it. On the other hand, perhaps at this point any course of action—whether constriction or continued expansion of First Amendment rights—is likelier to result in further fracture than greater civic unity.

Whatever the future may hold, the rights of free speech and religious liberty are likely to suffer similar fates. This Article has shown how at each of the principal periods of their respective development—in the early Republic, during the twentieth century dual-wave expansion, and today—the justifications for

255. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

and limitations on these two rights have proceeded in tandem. From the two-tiered natural rights framework of the eighteenth and nineteenth centuries, to the inwardly oriented, absolute anti-orthodoxy explosion of the second wave in the twentieth century, to contemporary arguments for constriction in the service of a putative democratic common good, it is in fact remarkable that the progress of these two American rights has proceeded nearly, and with only some exceptions, *pari passu*.

Some scholars see things differently. For example, in a subtle article that compares the cultural power of the right of religious freedom against other First Amendment rights including free speech and association, John Inazu argues that various American sociological developments, including the declining religiosity of Americans, at least as respects traditional religions, and the sense that religious liberty has been captured by specific ideological constituencies, may weaken the right of religious liberty in ways that may not affect other First Amendment rights.²⁵⁶ Inazu contends that “with enough reflection,” people may be willing to acknowledge the value of associational and speech freedoms even for those with whom they disagree, in ways that may be more difficult or unavailing when it comes to religious freedom.²⁵⁷

In other work, I have voiced some doubts about Inazu’s view on the ground that in a society in which the government takes on an increasingly large role in the life of the citizenry, the protection of rights becomes a zero-sum game.²⁵⁸ Every inch won is a gain for individual rights like that of religious freedom, and every inch lost is a gain for the state. This dynamic should, in time, affect all rights, very much including the right of free speech, because the key issue is not evolving cultural perceptions of any given right’s strength and ambit, but evolving cultural perceptions of the strength and ambit of the state’s proper power.

But the conclusions of this paper offer a separate, historical reason for skepticism about Inazu’s view concerning the differ-

256. See John D. Inazu, *More is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485, 531–34 (2014).

257. See *id.* at 531 (“[C]laims for religious exceptionalism are unlikely to prevail against growing cultural resistance to the free exercise right.”).

258. See Marc O. DeGirolami, *Free Exercise By Moonlight*, 53 SAN DIEGO L. REV. 105, 129–45 (2016).

ential power of rights of religious and speech freedom. The fundamental frameworks within which these rights are situated, and the shared assumptions that have influenced commonly accepted views about their justifications and limits, run together across the history of their development. The early Republic was informed by the natural rights framework; the twentieth century by modernism and liberalism; and today perhaps a new structural and theoretical framework is emerging in the claims of the constrictors.

Rights of free speech and religious freedom are generally invoked by the discontents and dissidents in these regimes—those who reject or at least stand to one side of the dominant cultural orthodoxies and frameworks. And those who embrace the dominant frameworks of any given era are likely to oppose vigorously claims of First Amendment rights that obstruct or impede the progress and entrenchment of those frameworks. Some scholars have suggested that the warring frameworks are in essence theological. They represent the clash between theologically orthodox and theologically liberal positions—between worldviews that diverge radically about whether individuals should, as Ted White put it, be “‘free’ in the deepest sense: free to master and to control their own destinies”²⁵⁹ or whether individuals should instead derive knowledge and meaning from received authority and tradition.²⁶⁰

In a society in which theological and political liberals may have understood themselves to be an oppressed minority, the second wave expansion of free speech rights, together with the individualized turn of religious freedom rights, would have been very valuable to resist what were then more prevalent orthodox views. Indeed, the “anti-orthodoxy” component of the second wave expansion of free speech rights in cases like *Barnette* and others—far from serving the neutral function claimed for it—would instead disrupt and destabilize existing, orthodox traditions of authority, thought, and opinion. But once theological liberals began to displace the existing orthodoxies with their own, the anti-orthodox First Amendment was no longer needed. Anti-orthodoxy had become the new orthodoxy, and the old arguments became positively harmful to the

259. White, *supra* note 8, at 304.

260. See generally HAMBURGER, *supra* note 84.

protection and promotion of the new orthodoxy's view of the good society and the good life of the individual.

It is within this larger context that the migration of the "weaponization" accusation from religious freedom to free speech over only a short span of years is best understood. Far from indicating that the several rights of the First Amendment will apply with differential force in future cases, or that dissidents might strategically deploy arguments from speech freedom more effectively than religious freedom, it suggests that the fates of the rights of religious freedom and free speech today, as in past eras, are likely to be conjoined. Where "liberal anxieties about speech traditionally arose in response to anxieties about theologically orthodox or illiberal opinion, they nowadays also arise in response to fears about socially or politically illiberal opinion."²⁶¹ The conceptual unity of speech and religious freedom throughout the several periods of their development derives from the common theological, political, and cultural assumptions prevalent in American society across time.

CONCLUSION

The freedoms of speech and religion are not ends in themselves. They are part of the social superstructure—whether fully articulated or otherwise—that prevails during any given period. In tracing the history of the prevailing conceptual justifications for and limits on the freedoms of the First Amendment through three such American periods, this Article has argued that these freedoms are always connected to, and delimited by, larger frameworks and assumptions about the good polity and the good society.

This was understood in the early republican period, where the rights of free speech and religious liberty were located within, and shaped by, a natural rights worldview that contemplated considerable discretion in the political community's judgment about the ends and limits of these rights. But over the course of the twentieth century, as the First Amendment turned inward, the scope of the freedoms grew exponentially.

261. *Id.* at 314–15.

At no time in our history have these rights been more powerful and their coverage more vast.

The wild successes of the First Amendment have brought on deep anxieties that the rights of free speech and religious freedom have been permanently disconnected from any greater common social purposes. This is the First Amendment's sickness unto death, and it has generated an ever-expanding host of arguments for First Amendment constriction, academic as well as judicial. Claims for constriction, notwithstanding their vague appeal to ideals of "democracy," "dignity," the avoidance of "third-party harm," and others, themselves depend upon highly contested notions of the common political and moral good. Yet First Amendment constriction in the service of these new, putatively common, ends—ends that flourished during the years of the First Amendment's hypertrophy—are unlikely to reconstitute a deeply fragmented polity.

Yet the constrictors' claims do demonstrate the fundamental conceptual unity of the rights of free speech and religious liberty. Both rights have developed in historical tandem against prevailing theological, political, and cultural orthodoxies. Both provide the dissident from those orthodoxies recourse to dissent or, at least, to stand aside from prevailing opinion. Both are in consequence resisted by those who embrace the prevailing orthodoxies and would like to see them entrenched and extended. The fate of both rights will be the same.

YAKUS AND THE ADMINISTRATIVE STATE

JAMES R. CONDE & MICHAEL S. GREVE*

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"SEDER—Albert Yakus (left), president of Men's Associates of Boston's Jewish Memorial Hospital, joins Rabbi and Mrs. David Alpert for Seder service at hospital last night in commemoration of Passover." Leo Shapiro, *Days of Passover Welcomed in Hub*, BOSTON GLOBE, Mar. 30, 1972, at 6.

INTRODUCTION

On February 24, 1943, a grand jury in Boston indicted Albert Yakus, president of the Brighton Packing Company, for selling beef in violation of the Emergency Price Control Act of 1942 (the "EPCA").¹ The indictment was part of the Office of Price Administration's ("OPA's") aggressive enforcement campaign to suppress the vast black market in meat that developed during the war as a result of OPA's price control regulations.²

* Associate, Boyden Gray & Associates, J.D., Antonin Scalia Law School, 2015; Professor of Law, Antonin Scalia Law School. Many thanks to Aditya Bamzai, Jessica Bulman-Pozen, Eric Claeys, Richard Fallon, Robert Gasaway, and Aaron Nielson for their helpful comments and suggestions. Special thanks to Jeremy Rabkin for his insightful comments at every stage of the process.

1. Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23; Brief for the Petitioner at 4, *Yakus v. United States*, 321 U.S. 414 (1944) (No. 374), 1944 WL 42275.

2. Along with Albert Yakus, the grand jury indicted several other New England meat dealers and their employees. The litigation attracted substantial press attention. See, e.g., *Beef Company's Lawyers Assail Methods of OPA*, THE CHRISTIAN SCI.

OPA's regulations imposed a particularly heavy toll on meat packers.³ OPA controlled the price of wholesale and retail meat—but not of livestock.⁴ The result was a “price squeeze”: unregulated livestock prices kept rising, but regulated meat dealers could not raise prices in response to higher costs.⁵ Small independent meat dealers like Albert Yakus were forced to choose between facing criminal sanctions for selling “over-priced” meat, or obeying the regulations and going out of business.⁶

In Congress and in the halls of the New Deal bureaucracy, the meat dealers complained that they were being squeezed out of existence by OPA's price regulations. They also fought back in court, and their various challenges to OPA's regulations and to the EPCA reached the Supreme Court on several occasions.

Yakus v. United States was the final, most significant challenge. The meat dealers argued that any statute had to provide criminal defendants with *some* effective means of testing, in an independent court, the validity of a rule under which they were being prosecuted.⁷ The EPCA, they argued, violated that cardinal principle. In an opinion authored by Chief Justice Harlan Fiske Stone, the Supreme Court roundly rejected the meat dealers' contentions. Petitioners, the Court declared, had failed to exhaust the administrative remedies provided by the EPCA.⁸ Thus, the fact that the statute categorically barred courts from entertaining challenges to OPA's regulations in enforcement proceedings posed no constitutional problem.⁹ Albert Yakus, a

MONITOR, Jan. 15, 1943, at 4; *Boston Lawyers Argue OPA Price Fixing Illegal*, BOSTON GLOBE, Jan. 16, 1943, at 3; *Brighton Packing Co. Held Guilty of Violating OPA Beef Ceilings*, BOSTON GLOBE, Apr. 8, 1943, at 5; *Meat Dealers to Face Trial in U.S. Court*, THE CHRISTIAN SCI. MONITOR, Mar. 2 1943, at 2; *Meat Inquiry Brings More Indictments*, THE CHRISTIAN SCI. MONITOR, Mar. 16, 1943, at 5.

3. See Jacob Hyman & Nathaniel Nathanson, *Judicial Review of Price Control: The Battle of Meat Regulations*, 42 U. ILL. L. REV. 584, 603–10 (1947).

4. See *id.* at 596–600.

5. See Willard D. Arant, *Wartime Meat Policies*, 28 J. FARM ECON. 903, 909 (1946).

6. See *infra* notes 210, 214 and accompanying text.

7. *Yakus v. United States*, 321 U.S. 414, 433–44 (1944).

8. *Id.*

9. *Id.*

highly respected member of the local community and leader of his synagogue, went to jail.¹⁰

This Article recounts the story of *Yakus v. United States* in considerable, often depressing detail. The enterprise, we readily acknowledge, may seem of interest mostly to legal historians, rather than doctrinally or practically oriented scholars. *Yakus* is little more than a footnote cite in current Constitutional Law textbooks,¹¹ and a hiccup in the standard Federal Courts curriculum.¹² And so far as the administrative law profession is concerned, the case seems to have slipped down a memory hole. Textbooks and treatises mention *Yakus* as a case about the exhaustion of administrative remedies,¹³ pre-enforcement review,¹⁴ or similar issues¹⁵—but always in passing. As for the case law, stray cites aside, *Yakus* has figured in only a handful of Supreme Court decisions.¹⁶ Nevertheless, we persist. Our close examination aims to show that the near-forgotten *Yakus* case should command attention in the contemporary, ideologically fraught debate over the administrative state and its law.

Yakus v. United States arose over an extraordinary statute—a veritable monument to the New Dealers’ vision of the administrative process and administrative government. As we shall

10. See *Convicted Meat Dealers Label Price Act as Unconstitutional*, BOSTON GLOBE, June 30, 1943, at 13. Al Yakus returned to the meat business after the war, serving as president of the Yakus Beef Company. He was a “leader in Boston’s Jewish community,” active in “numerous Jewish civic and philanthropic organizations[,]” including Boston’s Jewish Memorial Hospital. Obituary, *Albert Yakus, 86: Was Head of Beef Company*, BOSTON GLOBE, Sept. 21, 1986, at 55.

11. See, e.g., LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 3-5, at 271 n.19 (3d ed. 2000).

12. See, e.g., DAVID P. CURRIE, FEDERAL COURTS 105–06 (4th ed. 2008); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 343–44 (7th ed. 2015); MARTIN H. REDISH ET AL., FEDERAL COURTS: CASES COMMENTS AND QUESTIONS 132–138 (7th ed. 2011). The usual question is Congress’s power over the federal courts’ “jurisdiction.”

13. See, e.g., STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 1159 (5th ed. 2002); RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 15.2 (5th ed. 2010).

14. See, e.g., GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 1114–16 (6th ed. 2013).

15. See, e.g., KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW: CASES AND MATERIALS 35 (2010) (citing *Yakus* in passing as a non-delegation case); ALFRED C. AMAN, JR., ADMINISTRATIVE LAW IN PROCESS (2d ed. 2006) (using the companion case to discuss “hearing rights”).

16. See *infra* notes 342–47 and accompanying text.

show,¹⁷ the EPCA entrusted OPA with virtually boundless discretion to set prices across the entire economy. Its administrative procedures were designed to frustrate regulated parties while presenting a mirage of fairness. And the statute's judicial review provisions were carefully calculated to block effective judicial review—even as the statute mobilized federal and state courts to enforce OPA's dictates. Arguably, Congress had enacted comparable provisions in earlier statutes, and the Supreme Court had sustained those enactments. But the EPCA's individual mechanisms and provisions had never been presented, let alone been judicially sanctioned, *in combination*, and in a form that threatened to accomplish what Congress and the Executive may not do directly: sport away the rights of individuals, and make the courts accomplices in the enterprise. That, at bottom, was the meat dealers' principal contention in *Yakus*.¹⁸ Their challenge failed; and because it failed, the EPCA's innovations and in particular the foreclosure of judicial review in enforcement proceedings became standard tools of administrative government.

Closer examination reveals a subtler but to our minds equally consequential aspect of the *Yakus* litigation. The preceding thumbnail account of the statute suggests the range of the constitutionally grounded administrative-law doctrines that were implicated in *Yakus*: the separation of powers and delegation; due process; and judicial review. Contemporary law provides separate, compartmentalized answers to those doctrinal questions: an "intelligible principle" of delegation;¹⁹ procedural requirements for administrative rulemaking;²⁰ and a presumption of reviewability,²¹ coupled with judicial deference canons.²² *Yakus*, however, was litigated against a constitutional understanding under which all the doctrinal answers still hung together, as mutually reinforcing "outworks of an elaborate

17. *Infra* Part II.A.

18. For detailed discussion see *infra* Part III.D.1.

19. See *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 472 (2001).

20. See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 302–03 (1979).

21. See *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

22. See *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

structure” that buttressed “the supremacy of the law.”²³ That understanding was not rigidly formalist: there could be some give in this or that doctrine, provided that the overarching purpose remained in view. Wrenched out of that context, however, the limiting doctrines cease to be integral parts of a recognizable constitutional structure. It then becomes harder to see their point or purpose. To disjoin the doctrines is to render them marginal and in the end nugatory.

That, we shall endeavor to show, makes *Yakus* a milestone in what Professor Adrian Vermeule has called “Law’s Abnegation,” meaning the surrender of effective legal constraints on administrative discretion.²⁴ The combatants at the time understood the point perfectly well. The EPCA’s architects defended its unprecedented combination of administrative instruments—broad delegation, bare-bones procedures, the separation of the courts’ review and enforcement functions—by way of compartmentalizing the limiting constitutional doctrines. The meat dealers’ challenge was a last-ditch effort to keep the pieces of the older order together. It failed: the *Yakus* majority fully embraced the New Dealers’ administrative process model. The victory was sufficiently triumphant to make us forget what the fight was actually about.

Our exhumation of *Yakus* proceeds in four Parts. Part I reconstructs the legal universe as it presented itself to the EPCA’s architects and, in short order, to the parties in incessant litigation over the statute, including the *Yakus* case.

Part II describes the origins and contours of the EPCA, as well as its architects’ legal defense of the statute, one piece at a time. Part III recounts the OPA’s aggressive enforcement campaign; Congress’s sporadic and, by and large, feckless interventions; the meat dealers’ desperate, multi-pronged litigation, culminating in *Yakus*; the Supreme Court’s decision and opinions in the case; and, in the aftermath, the demise of the OPA after the war.

23. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW IN THE UNITED STATES 75 (1927) (discussed *infra* notes 37–50 and accompanying text).

24. ADRIAN VERMEULE, LAW’S ABNEGATION 6–7 (2016).

The concluding Part IV sketches our thoughts on the legacy of *Yakus* and its lessons for the contemporary administrative law debate. We believe that the conflict between the integrated constitutional view of the (pre-)New Deal Era and the disaggregated approach of the postwar, post-APA decades remains—or rather should remain—an enduring question of administrative law. For scholars who embrace the administrative state, *Yakus* should regain its status as a milestone in the marginalization of constitutionally grounded doctrines.²⁵ For those who entertain apprehensions about an “unlawful” administrative state,²⁶ the case suggests the same lesson in reverse: there may be little mileage in agitating for the revision of discrete doctrines unless one can somehow re-connect the constitutional pieces.

I. THE OUTWORKS OF AN ELABORATE STRUCTURE:
ADMINISTRATIVE LAW, CIRCA 1940

Yakus lies at the end of a history of judicial efforts, spanning a rough half-century, to accommodate a growing administrative state to the constitutional order. The demands of that order are distilled in familiar propositions: only the legislature can make law—that is, rules with binding effect.²⁷ In matters of private right, citizens must have access to an independent court and its *de novo* judgment.²⁸ Roll the tape; cue *Marbury v. Madison*.²⁹

25. See *id.* at 44–45.

26. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

27. See *Dep’t Of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment).

28. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (“[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination . . .”); see also Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 568–70 (2007) (explaining the doctrine of private rights).

29. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 483 (2004) (describing *Marbury* as “a benchmark against which subsequent debate about the proper standard of review has unfolded”).

In constitutional practice, these rock-bottom propositions can and must tolerate a fair amount of slack and doctrinal blurriness. The jurisprudence of the nineteenth century provides impressive evidence of the difficulties that surround the scope of enumerated powers,³⁰ the delegation of legislative authority,³¹ the notion of “private right,”³² the characteristics of industries “affected with a public interest,”³³ and other concepts and doctrines that are central to the constitutional order. Still, institutional innovations that may seem dubious from a rigidly formalist vantage may well be bearable so long as constitutional principles are kept in view—and so long as those principles are understood as interconnected elements of a coherent constitutional order.

This frame of mind informed the jurisprudence of the early twentieth century, when the courts sought to accommodate regulatory commissions to the constitutional structure. Famous cases from the Progressive to the New Deal Era illustrate the point. Regulatory agencies *may* engage in ratemaking, the Supreme Court held—*provided* that the regulated entities have access to timely and effective judicial relief.³⁴ Congress *may* entrust fact-finding to an administrative agency, even in matters of private right—*provided* that questions of law and of constitutional fact and jurisdiction remain subject to full-scale, *de novo* judicial review in an independent court.³⁵ Congress *may* delegate to an independent agency the power to enforce prohibitions against “unfair trade practices”—*provided* that the agency proceeds in a fair and orderly fashion that permits meaningful judicial review.³⁶

30. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410–25 (1819).

31. See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

32. See, e.g., *Murray's Lessee*, 59 U.S. (18 How.) at 284; see also Nelson, *supra* note 28, at 587–90 (discussing the case); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1020–22 (2006) (discussing the notion of private and public rights).

33. See, e.g., *Munn v. Illinois*, 94 U.S. 113, 125–26 (1876); see also BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 48–51 (1998) (discussing *Munn* and its progeny).

34. *Ex Parte Young*, 209 U.S. 123, 148 (1908).

35. See *Crowell v. Benson*, 285 U.S. 22, 56–57 (1932).

36. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 533 (1935) (noting, in striking down the statute, that “[i]n providing for codes, the National

These positions were embodied in a series of doctrines: a constitutional due process doctrine, the *Ex Parte Young* doctrine, the “constitutional and jurisdictional fact” doctrine of *Crowell v. Benson*, and the non-delegation doctrine of *Schechter Poultry*. In Professor John Dickinson’s apt phrase, those doctrines were “but the outworks of an elaborate structure devised to buttress from different sides the central doctrine of the supremacy of the law.”³⁷ Though fraying and weakened by the New Deal, this “elaborate structure” would survive the 1930s. In *Yakus*, though, each of its “outworks” came under attack—and crumbled. A rough survey of the legal landscape circa 1940 helps to understand the significance of the case, both as it presented itself to the principal actors at the time and with an eye to its role in the development of administrative law.

The legal doctrines of the pre–New Deal Era were heavily influenced by the concept of the “supremacy of the law.”³⁸ In Albert Venn Dicey’s influential (though ultimately ill-fated) account, the “supremacy of the law” converged on two principles: “every citizen is entitled, first, to have his [private] rights adjudicated in a regular common-law court, and, secondly, to call into question in such a court the legality of any act done by an administrative official.”³⁹ In the ordinary case, this entailed access to an independent court and *de novo* review (typically, a full trial).⁴⁰

In confrontations between Dicey’s supremacy of the law and the regulatory commissions, an “appellate review” model of judicial review gradually took hold.⁴¹ The model allowed agencies to act as primary fact-finders in licensing or rate-making

Industrial Recovery Act dispenses with . . . any administrative procedure of an analogous character” to that of the FTC).

37. DICKINSON, *supra* note 23, at 75.

38. *Id.* at 32–33.

39. *Id.* at 35; *see also* DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940*, at 32–33 (2014).

40. *Id.*; *see also* DICKINSON, *supra* note 23, at 33 (“[N]othing has been held more fundamental to the supremacy of law than the right of every citizen to bring the action of government officials to trial in the ordinary courts of the common law.”).

41. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 953–64 (2011).

schemes, subject to stringent formal procedures and pre-enforcement judicial review on the record.⁴²

The appellate model soon found influential intellectual support in the scholarship of Professor John Dickinson.⁴³ Under Dickinson's conception of the "supremacy of the law," only pure questions of law were to be reviewed *de novo*; judicial review of questions of fact could properly be limited to a record and reviewed under a deferential jury standard.⁴⁴ According to Dickinson, this arrangement would allow judges to focus on general principles of law, while leaving to agencies matters of detail and evidence.⁴⁵

Dickinson's arguments played off of the anxieties of the bench: judges increasingly worried that judicial forays into administrative rate-making schemes would transform the courts into high commissions for the administrative state.⁴⁶ Even so, for many jurists at the time, independent judgment merely as to questions of law was inadequate.⁴⁷ By removing fact-finding from the province of the courts, the appellate review model threatened to expose the courts to "unscrupulous administrators," and to turn federal courts into rubber stamps for the executive branch.⁴⁸ The key distinction between law and

42. *E.g.*, the Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906), vested the Interstate Commerce Commission (ICC) with the power to set binding "just and reasonable" rates for carriers through self-executing administrative orders. Carriers could challenge these orders by petitioning a circuit court to "enjoin, set aside, annul, or suspend" the order. *Id.* § 5, at 592. Simultaneously, the ICC or injured third parties could ask a circuit court to enforce an ICC order. In such cases, courts were required to enforce an order if "upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served," and "that the carrier is in disobedience of the same." *Id.* § 5, at 591.

43. Merrill, *supra* note 41, at 939, 945, 953, 973-76, 979. For a short but impressive account of Professor Dickinson's life and many accomplishments, see George L. Haskins, *John Dickinson 1894-1952*, 101 U. PA. L. REV. 1 (1952).

44. Merrill, *supra* note 41, at 974, 976.

45. *Id.* at 940-42.

46. *Id.* at 987-94 (discussing how the "fear of judicial contamination" drove the appellate review model); *see also, e.g.*, *Federal Radio Comm'n v. Gen. Elec. Co.*, 281 U.S. 464, 470 (1930) ("Our conclusion is that the proceeding in that court was not a case or controversy in the sense of the judiciary article, but was an administrative proceeding, and therefore that the decision therein is not reviewable by this Court.").

47. ERNST, *supra* note 39, at 32.

48. As Chief Justice Hughes remarked before the American Bar Association in 1931, "[a]n unscrupulous administrator might be tempted to say, '[I]et me find the

fact was hardly airtight, so finality as to agency findings of fact could easily shade into finality as to agency determinations of law—"pure executive regulation."⁴⁹ As John Dickinson explained:

"[T]he tendency toward pure executive regulation takes the form of an effort to require the courts to treat the order or decision of the executive body as final and enforce it without looking behind it to the merits. Should this effort succeed, the action of the courts would become in such cases merely an automatic stage in the executive process, and they would be reduced to formally registering, and directing the enforcement of, executive decrees."⁵⁰

The federal courts developed several safeguards against this scenario. First, they moved to preserve judicial review through a structural "due-process" doctrine.⁵¹ Second, and relatedly, courts reviewed agency action through equitable anti-suit injunctions when legal remedies were perceived to be inadequate.⁵² Third, the Supreme Court developed a doctrine of "constitutional and jurisdictional facts" to preserve judicial fact-finding powers on important questions.⁵³ Once "at the cen-

facts for the people of my country and I care little who lays down the general principles.'" Laird Bell, *Let Me Find the Facts . . .*, 26 A.B.A. J. 552, 552 (1940).

49. See DICKINSON, *supra* note 23, at 55 ("In truth, the distinction between 'questions of law' and 'questions of fact' really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction."); *id.* at 309–13 (discussing the difficulty of determining "jurisdictional facts.").

50. *Id.* at 11.

51. See, e.g., *Chi., Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418, 456–57 (1890).

52. *Ex Parte Young*, 209 U.S. 123, 148 (1908); see also *Wadley S. Ry. v. Georgia*, 235 U.S. 651, 662–67 (1915) (explaining the due process doctrine of *Ex Parte Young*).

53. See *Crowell v. Benson*, 285 U.S. 22, 63–65 (1932); see also *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920).

ter of administrative law,"⁵⁴ this doctrine allowed courts to review critical factual findings in cases of private right *de novo*.⁵⁵

The first strategy is exemplified by the Supreme Court's 1890 decision in *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*.⁵⁶ The Minnesota legislature had vested the Railroad and Warehouse Commission with final and unreviewable power to promulgate railroad rates.⁵⁷ The Supreme Court declared the act void, holding that the legislature had violated due process of law by delegating power to the commission while failing to provide for judicial review of confiscatory rates.⁵⁸

The second strategy is exemplified by *Ex Parte Young*.⁵⁹ Decided in 1908, *Ex Parte Young* upheld the validity of an anti-suit injunction against Minnesota's Attorney General Edward Young, restraining him from instituting criminal proceedings under a statute that made ordinary judicial review of the railroad commission's regulations well-nigh unavailable.⁶⁰ *Ex Parte Young* confirmed that state officials could be subjected to anticipatory proceedings in equity when an administrative scheme failed to provide timely and effective judicial review of agency regulations.⁶¹

The third strategy, the "constitutional fact" doctrine, is often traced to *Smyth v. Ames*.⁶² As articulated in a later case, courts had a duty to exercise their "independent judgment" to deter-

54. GLEN O. ROBINSON & ERNEST GELLHORN, *THE ADMINISTRATIVE PROCESS* 35 (1974). By 1951, Professor Davis declared that the doctrine was "of little interest except as history." KENNETH C. DAVIS, *DAVIS ON ADMINISTRATIVE LAW* § 244 (1951). The doctrine remains alive only in the First Amendment context. PIERCE, *supra* note 13, § 17.9 ("The requirement of independent judicial determination of constitutional facts continues to exist only in the unique context of determinations that a particular expression is, or is not, protected by the First Amendment.")

55. *Crowell*, 285 U.S. at 51-54.

56. 134 U.S. at 456-57.

57. The Minnesota Supreme Court had held that rates fixed by the commission were not subject to judicial review. *State ex rel. R.R. & Warehouse Comm'n v. Chi., Milwaukee & St. Paul Ry. Co.*, 37 N.W. 782, 784 (Minn. 1888), *rev'd*, 134 U.S. 418 (1890).

58. *Chi., Milwaukee & St. Paul Ry.*, 134 U.S. at 456-57.

59. 209 U.S. 123 (1908).

60. *Id.* at 147-49.

61. *See id.* at 163-65.

62. 169 U.S. 466, 546-49 (1898).

mine facts when a petitioner alleged a constitutional violation.⁶³ At the dawn of the New Deal Era, this doctrine had come into considerable tension with a growing number of public utility cases in which courts had reviewed agencies' factual findings quite deferentially.⁶⁴ Perhaps for that reason, the doctrine found its canonical formulation in a case involving an ordinary workers' compensation dispute: In *Crowell v. Benson*, the Supreme Court reviewed an order of a federal workers compensation commission finding an employer liable for an employee's injuries in the course of riverboat work.⁶⁵ Writing for the majority, Chief Justice Hughes articulated a distinction between constitutional facts and ordinary facts.⁶⁶ Review of ordinary facts—such as the extent of the worker's injury—could be limited to the administrative record. In contrast, questions of constitutional fact—whether the accident occurred on waters of the United States, or whether the worker was actually in the defendant's employ—would be reviewed *de novo*.⁶⁷ Federal judges could supplement the record by holding hearings, by allowing in extrinsic evidence, or by ordering full-scale trials on these issues.⁶⁸

Despite this attempt at judicial reconciliation, the “supremacy of the law” remained in tension with the emerging appellate review model. The tension is illustrated by *St. Joseph Stock Yards*,⁶⁹ a case decided at the height of the New Deal. In the course of upholding a regulation by the Secretary of Agricul-

63. See *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920) (“[I]f the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause.”).

64. See DICKINSON, *supra* note 23, at 200 (arguing that the *Ben Avon* case was contrary to “the substantially unanimous agreement” of a growing body of public utility caselaw).

65. See Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in *FEDERAL COURTS STORIES* 359 (Vicki C. Jackson & Judith Resnik eds., 2010).

66. *Crowell v. Benson*, 285 U.S. 22, 62–63 (1932). The facts tried in *Crowell* were necessary for the agency—and for that matter Congress—to assert constitutional power over the employer. See Tushnet, *supra* note 65, at 359.

67. *Crowell*, 285 U.S. at 65.

68. See *id.* at 62–64.

69. 298 U.S. 38 (1936). Intriguingly, the case was argued by none other than John Dickinson, then Assistant Attorney General. *Id.* at 41.

ture setting maximum rates for stockyards, Chief Justice Hughes reaffirmed *Crowell* and confirmed its application to “quasi-legislative” (*i.e.*, regulatory) proceedings.⁷⁰ In cases involving “rights either of persons or of property [that are] protected by constitutional restrictions,” Hughes wrote, courts had a duty to examine constitutional findings *de novo*.⁷¹ Justice Brandeis, by contrast, urged the court to adopt the appellate review model without reservations.⁷² Even under Brandeis’s approach, however, “[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which the facts were adjudicated was conducted regularly.”⁷³ Facts could be surrendered to administrative agencies; law could not.

The interrelated doctrinal “outworks” just described, all implicated in the EPCA and in *Yakus v. United States*, hung together with a fourth doctrine that would also meet its denouement in that litigation: the delegation of legislative power. In the contemporary legal imagination, that problem seems several steps removed from questions regarding administrative procedure and the timing, availability, and standard of judicial review. The modern delegation test is whether Congress has supplied an “intelligible principle,” and neither the availability of review nor, for that matter, the regularity of the agency’s procedures or its checks and balances is a systematic, integral part of that inquiry.⁷⁴

This constricted view, however, is a post-*Yakus* construct. In the 1930s, the questions were still linked through a straightforward logic. Congress, the theory went, may authorize spe-

70. *Id.* at 52; see also *Carter v. Carter Coal Co.*, 298 U.S. 238, 319 (1936) (“The exercise of the power of regulation is subject to the constitutional restriction of the due process clause, and if in fixing rates, prices or conditions of competition, that requirement is transgressed, the judicial power may be invoked to the end that the constitutional limitation may be maintained.”).

71. *St Joseph Stock Yards Co.*, 298 U.S. at 52–53.

72. *Id.* at 84 (Brandeis, J., concurring).

73. *Id.*

74. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472–77 (2001); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *YALE L.J.* 952, 989 n.158 (2007) (citing modern Supreme Court cases that ignore the “due process” aspects of the New Deal Era’s non-delegation doctrine).

cialized agencies to make binding rules.⁷⁵ Such delegations, however, require fair, regular agency procedures and meaningful judicial review on the record. The “principle” supplied by Congress must be sufficiently “intelligible” for a reviewing court to discern whether or not the agency has acted within the scope of its legal authority. Those structural concerns, closely linked to due process and the separation of powers, are articulated in *A.L.A. Schechter Poultry Corp. v. United States* and in *Panama Refining Co. (the “Hot Oil” case)*, two seminal cases decided in 1935—three years after *Crowell* and one year before *St. Joseph Stockyards*.⁷⁶

Hot Oil struck down Section 9(c) of the National Industrial Recovery Act (NIRA) as unconstitutional.⁷⁷ As part of its “non-delegation” holding, the Court insisted on the need for procedural regularity, observing that “the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon [the agency] a certain course of procedure and certain rules of decision in the performance of its function.”⁷⁸ The Court also reaffirmed the constitutional need for judicial review of agency findings of fact.⁷⁹ In *Schechter*, too, the Court affirmed the importance of regular administrative procedure to sustain delegations. The NIRA did not require any reviewable findings of fact to limit official discretion, and it provided no regular course of administrative procedure to secure due process.⁸⁰ Moreover, in response to the government’s argument that the Court had sustained comparably broad delegations (for example, to the Federal Trade Commission), the *Schechter* Court noted that the

75. See *United States v. Grimaud*, 220 U.S. 506, 517–18 (1911).

76. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan (Hot Oil)*, 293 U.S. 388, 430 (1935). For a similar reading of the cases, see Stack, *supra* note 74, at 986–989.

77. *Hot Oil*, 293 U.S. at 430 (“Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.”).

78. *Id.* at 432 (quoting *Wichita R.R. & Light Co. v. Pub. Utils. Comm’n*, 260 U.S. 48, 59 (1922)).

79. *Id.* (“If the citizen is to be punished for the crime of violating a legislative order of an executive officer . . . due process of law requires that . . . if [its] authority depends on determinations of fact, those determinations must be shown.”).

80. See *Schechter*, 295 U.S. at 533–34 (contrasting the administrative procedure governing the FTC with the lack of procedure in the NIRA).

open-ended, prescriptive nature of the NIRA's codes of "fair competition" rendered them suspect, delegation- and due process-wise, in a way in which the FTC's more conventional, proscriptive orders against unfair competition were not.⁸¹

Schechter's signal, though poorly understood today, was apparent to many New Dealers: the Supreme Court was willing to accommodate New Deal demands, but only under arrangements that preserved the judiciary's role as a rival check. The statutes governing the FTC and the SEC, both discussed approvingly in *Schechter*, provided the New Deal with a blueprint, which Roosevelt's lawyers used to draft the National Labor Relations Act (NLRA).⁸² In *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld the NLRA not only against a Commerce Clause challenge (the best-known part of the case), but also against due process and separation-of-powers attacks.⁸³

The attempted compromise proved short-lived: leading New Dealers harbored grander visions of the administrative state. In his influential book, *The Administrative Process*, Professor James Landis launched a frontal assault on lingering "supremacy of the law" notions.⁸⁴ Landis attacked *Crowell* as "syllogistic" reasoning stemming from the anxieties of the judicial "class."⁸⁵ His goal was to replace the supremacy of the law with the "administrative process." Instead of applying "essentialist" separation of powers concepts, judges would exercise judicial review in light of the comparative "expertness" of administrators, "the

81. *Id.* To our minds the distinction is best understood in light of interrelated considerations of administrative regularity and judicial reviewability. The piecemeal development of common-law-like prohibitions imposes a certain discipline on administrators, and courts are institutionally equipped to review the product under legal standards, *de novo*. *FTC v. Gratz*, 253 U.S. 421, 427 (1920) ("The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include."). In contrast, prescriptive codes of fair competition will tend to reflect unguided interest group compromises, which courts cannot assess by any genuinely legal means at their disposal.

82. ERNST, *supra* note 39, at 67–69. The NLRA required adjudications to proceed through notice followed by a hearing on the record. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937). The NLRB was required to seek judicial enforcement of its orders before they were effective, and "all questions of constitutional right or statutory authority" were subject to judicial review. *Id.*

83. *NLRB*, 301 U.S. at 46–48.

84. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 123–155 (1938).

85. *Id.* at 127–131, 135.

procedure employed" by the agency, and judicial notions of "fairness" and expediency.⁸⁶ As Roosevelt appointees came to dominate the Supreme Court and the appellate courts, that vision of the administrative process gained ground in judicial opinions. In a 1939 opinion, Justice Douglas praised the "valuable qualities" of the "administrative process" in Landis-like fashion: "ease of adjustment to change, flexibility in light of experience, swiftness in meeting new or emergency situations."⁸⁷ Shortly thereafter, Justice Stone announced the "cardinal principle[]" that "court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action."⁸⁸ In the same vein, Justice Frankfurter admonished that "although the administrative process . . . pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice[.]"⁸⁹ This "collaborative" vision well-nigh invited "pure executive regulation" and left little if any room for judicial review as a rival, independent check.

That vision triumphed in *Yakus*, and perhaps, that *had* to happen. In retrospect, the formula of *Ex Parte Young* and *Crowell* and *Schechter* seems unstable.⁹⁰ Already by the time of *Yakus*, a vastly expanded Commerce Clause had swept aside the jurisdictional-cum-constitutional questions that had loomed large in 1932,⁹¹ and the Supreme Court had upheld many broad

86. *Id.* at 124, 142, 144.

87. *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 101 (1939).

88. *United States v. Morgan (Morgan III)*, 307 U.S. 183, 190–191 (1939).

89. *United States v. Morgan (Morgan IV)*, 313 U.S. 409, 422 (1941); *see also* *United States v. Ruzicka*, 329 U.S. 287, 295 (1946) ("In construing the enforcement provisions of legislation like the Marketing Act, it is important to remember that courts and administrative agencies are collaborative 'instrumentalities of justice,' and not business rivals.").

90. This is Professor Vermeule's decided view. *See* VERMEULE, *supra* note 24, at 24–29, 213–15 (discussing the instability of "half-measures" like *Crowell*). For discussion *see infra* Part IV.A.

91. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

delegations.⁹² However, answers that now look like foregone conclusions were still open questions at the time. The New Dealers were well aware of the constraints posed by lingering supremacy-of-law doctrines. The EPCA was a frontal attack on all of those doctrines and an embrace of pure executive regulation. Part II describes the statute and the New Dealers' defense.

II. THE NEW DEAL GOES TO WAR

A. *The Emergency Price Control Act: Origins and Structure*

As War World II approached, President Roosevelt took steps to prepare for inflation. Roosevelt appointed Leon Henderson, a former SEC commissioner, to head a Price Stabilization Division within the National Defense Advisory Commission ("NDAC").⁹³ Henderson, in turn, hired young David Ginsburg as his chief legal advisor.⁹⁴ Ginsburg would be the key drafter of the statute at issue in *Yakus*.⁹⁵

Without statutory authorization to promulgate binding price controls, NDAC published its first "advisory" price regulation on February 17, 1941.⁹⁶ By August 1941, NDAC had issued 105 "advisory" price schedules.⁹⁷ On May 31, 1941, the Administration also acquired the power to ration strategic commodities.⁹⁸

92. See, e.g., *Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dep't of Labor*, 312 U.S. 126 (1941); *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588 (1939); *United States v. Rock Royal Coop.*, 307 U.S. 533 (1939).

93. See HARVEY C. MANSFIELD ET AL., *A SHORT HISTORY OF OPA* 16–19 (1946).

94. *Id.* at 19. David Ginsburg worked at the SEC during the 1930s after being recommended by Felix Frankfurter. Later, he clerked for Justice Douglas. After he resigned from OPA in 1943, he enlisted in the military. He dedicated much of his later life to racial integration. Ginsburg died in 2010 at the age of 98. See William Grimes, *David Ginsburg, Lawyer, Dies at 98; Led 1960s Panel on Race Relations*, N.Y. TIMES, May 26, 2010, at A25; see also John Q. Barret, *David Ginsburg (1912–2010), Lifelong New Dealer*, JACKSON LIST (2010), <http://thejacksonlist.com/wp-content/uploads/2014/02/20100714-Jackson-List-David-Ginsburg.pdf> [<https://perma.cc/4UB5-4FM2>].

95. See MANSFIELD ET AL., *supra* note 93, at 20.

96. David Ginsburg, *The Emergency Price Control Act of 1942: Basic Authority and Sanctions*, 9 L. & CONTEMP. PROBS. 22, 23 (1942).

97. *Id.* at 25 n.14.

98. Act of May 31, 1941, Pub. L. No. 77-89, 55 Stat. 236 ("Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner

Shortly thereafter, Congress granted the President broad powers to ration ordinary goods, including meat.⁹⁹ Seeking to centralize rationing and price control functions in a single agency, President Roosevelt created the Office of Price Administration and Civilian Supply, later known as OPA.¹⁰⁰

But OPA still lacked statutory authority to promulgate binding price controls. Ginsburg and Henderson accordingly drafted a bill that would give OPA that power. But their draft went considerably further: it placed district courts at OPA's disposal for enforcement purposes, while making OPA's regulations effectively unreviewable. As a congressional committee would later find, "one of the purposes of the legislation which they drafted was to place, so far as possible, final and non-reviewable power and authority in the hands of the Administrator to be created by the proposed legislation."¹⁰¹ The draft was submitted to Congress in August 1941, approved by Congress with minor modifications, and signed by the President on January 30, 1942.¹⁰²

As the timing suggests, Congress enacted the EPCA in response to the perceived exigencies of war. However, the EPCA was *not* a product of wartime hysteria; it was a deliberate political and institutional choice, crafted by skilled New Deal lawyers.¹⁰³

First, the statute incorporated the political economy principles of the New Deal. It embodied a demand-centered econom-

and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."); *see also* Ginsburg, *supra* note 96, at 24 n.7.

99. First War Powers Act of 1941, Pub. L. No. 76-354, 55 Stat. 838 (1941); Second War Powers Act of 1942, Pub. L. No. 77-507, 56 Stat. 176, 178 (1942) (authorizing the President to "allocate" any material or facility as necessary "in the public interest and to promote the national defense").

100. *See* Exec. Order No. 8734, 3 C.F.R. 921 (1938-1943).

101. H.R. Rep. No. 78-862, at 4 (1943). The committee based this conclusion on Ginsburg's personal files. *Id.*; *see also* JOHN H. CRIDER, *THE BUREAUCRAT* 144 (1944) (asserting that the Ginsburg files showed "the excess zeal which characterized the whole Henderson-Ginsburg operation").

102. *MANSFIELD ET AL.*, *supra* note 93, 20-21. The Senate "began its consideration of the bill on December 9, 1941, the day after Congress declared the existence of a state of war." *Shapiro v. United States*, 335 U.S. 1, 10-11 (1948).

103. Cf. Joseph W. Aidlin, *The Constitutionality of the 1942 Price Control Act*, 30 CALIF. L. REV. 648, 649-50 (1942) ("Upon a careful reading of the Act one is impressed with the skill and thoroughness evident in its preparation.").

ic theory that, while now widely viewed as seriously misguided, was deeply engrained in New Deal thinking.¹⁰⁴

Second, the EPCA reflected fateful political compromises to accommodate potent New Deal constituencies. One of them was labor. Unions were prepared to support the price control bill, if OPA was denied jurisdiction to control wages.¹⁰⁵ A second formidable constituency was the farm bloc. Accommodating farmers was no small difficulty, especially inasmuch as inflating food prices had been the goal of earlier New Deal farm programs.¹⁰⁶ Congress yielded to farm-group pressures: the final bill included a 110% parity guarantee, which in effect prohibited OPA from controlling prices set by farmers and ranchers.¹⁰⁷ This guarantee would trigger the market disruptions that eventually led to the litigation in *Yakus*.¹⁰⁸

Third, and most important for present purposes, the EPCA enshrined the New Dealers' institutional commitments—

104. See Meg Jacobs, "How About Some Meat?": *The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–1946*, 84 J. AM. HIST. 910, 915 (1997) (" [OPA policy makers] saw the world through the prism of consumption Indeed, the Office of Price Administration served as a magnet for these mass-consumption activists").

105. Andrew H. Bartels, *The Office of Price Administration and the Legacy of the New Deal, 1939–1946*, 5 PUB. HISTORIAN 5, 10–11 (1983). Senator Albert Gore introduced a bill instructing OPA to "stabilize wages," but the bill was defeated in the House. See MANSFIELD ET AL., *supra* note 93, at 29; see also J.M. Clark, *Wartime Price Control and the Problem of Inflation*, 9 LAW & CONTEMP. PROBS. 6, 17 (1942). In the final statute, Congress merely encouraged federal agencies "to work toward a stabilization of prices, fair and equitable wages, and cost of production" while specifically prohibiting OPA from regulating wages. Emergency Price Control Act of 1942, Pub L. No. 77-421 § 1(a), 56 Stat. 23, 23–24. The Administration eventually created the National War Labor Board to mediate union demands. See MANSFIELD ET AL., *supra* note 93, at 29; see also E. Riggs McConnell, *The Organization and Procedure of the National War Labor Board*, 9 LAW & CONTEMP. PROBS. 567 (1942).

106. Clark, *supra* note 105, at 14. The New Deal farm programs sought to return farm producers to the purchasing power "parity" levels prevailing before World War I through a vast system of price supports and regulatory cartels. See, e.g., *Parker v. Brown*, 317 U.S. 341, 355 n.3 (1943); *United States v. Butler*, 297 U.S. 1, 7, 25, 58–59 (1936); see also Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 336 (1983) (explaining the New Deal's "parity" ideology).

107. Emergency Price Control Act of 1942, § 3(a), 56 Stat. at 27.

108. See *Armour & Co. v. Bowles*, 148 F.2d 529, 532 (Emer. Ct. App. 1945) (explaining that the theory behind ceilings on retail and wholesale meat prices failed when livestock prices rose; "the cattle prices on which the regulation appears to have been predicated were soon left behind in the rising market").

foremost, an abiding faith in bureaucratic expertise and a corresponding, unremitting hostility to markets, interloping courts, and the separation of powers. The executive's proposed bill combined vast grants of executive discretion with a set of administrative and appellate review procedures that, while not entirely unprecedented, were wholly new in combination.¹⁰⁹ That choice did not go unnoticed in Congress. A bill sponsored by Senator Robert Taft would have authorized OPA to issue temporary regulations lasting sixty days without a hearing, but otherwise required OPA to institute formal rulemaking procedures before promulgating a rule.¹¹⁰ The Taft bill was never brought to the floor.¹¹¹ Instead, Congress enacted the executive's proposed statute.

The EPCA's institutional design rested on four foundations. First, the EPCA gave OPA, acting under an exceedingly broad delegation, the power to promulgate binding regulations.¹¹² Second, the EPCA channeled all regulatory challenges through an administrative procedure that was designed to delay judicial relief.¹¹³ Third, the EPCA gave a newly created Emergency Court of Appeals exclusive jurisdiction to adjudicate challenges to OPA's regulations.¹¹⁴ Fourth, the EPCA placed the regular courts at OPA's disposal for enforcement purposes, even while the regulations were being challenged through the administrative process or in the Emergency Court.¹¹⁵ The provisions made OPA's regulations binding in the courts, even in criminal cases, without a meaningful opportunity for judicial review.¹¹⁶

109. Justice Rutledge's dissent in *Yakus* emphasized this feature of the statute. See *Yakus v. United States*, 321 U.S. 414, 474 (Rutledge J., dissenting) ("[N]o one of these [earlier] arrangements goes as far as the combination presented by this Act.").

110. See Nathaniel L. Nathanson, *The Emergency Price Control Act of 1942: Administrative Procedure and Judicial Review*, 9 LAW & CONTEMP. PROBS. 60, 61 n.9 (1942).

111. *Id.*

112. Emergency Price Control Act of 1942 §§ 2, 4, 56 Stat. at 24–28.

113. *Id.* §§ 203, 204, at 31–33.

114. *Id.* § 204, at 31–33.

115. *Id.* § 205, at 33–35; Hyman & Nathanson, *supra* note 3, at 584.

116. MANSFIELD ET AL., *supra* note 93, at 276 (A seller "confronted with a regulation which the Administrator had no right to impose might have had to choose between conviction for a crime . . . and compliance, possibly to his financial ruin, for the months or years before the regulation was adjudged to be invalid. Yet no court anywhere could give him relief for this dilemma.").

Title I of the Act set out the purposes of the statute and OPA's powers. Section 1 provided a broad statement of congressional purposes, including "stabiliz[ing] prices"; protecting the "standard of living" of "persons with relatively fixed and limited incomes"; promoting "fair and equitable wages"; permitting cooperation between producers and the government; ensuring that defense appropriations were not "dissipated by excessive prices"; and "eliminat[ing] and prevent[ing] profiteering, hoarding, manipulation, speculation, and other disruptive practices."¹¹⁷ Section 2 granted the Administrator the power to issue "generally fair and equitable" price controls "[w]henever in [his] judgment . . . the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."¹¹⁸ Section 4 of Act gave OPA regulations and orders the force of law.¹¹⁹

Title II of the Act set out the administrative procedure, judicial review, and enforcement provisions of the EPCA. Section 205 gave broad enforcement powers to OPA and to consumers harmed by inflation.¹²⁰ OPA could sue violators for injunctive relief and treble damages, as could aggrieved consumers.¹²¹ OPA was also granted licensing and suspension powers,¹²² and OPA could petition the Attorney General to bring criminal actions in district court to punish "willful[]" violations of OPA regulations or orders.¹²³

117. Emergency Price Control Act of 1942 § 1(a), 56 Stat. at 23–24.

118. *Id.* § 2(a), at 24–25. Section 2 further vested OPA with the power to prohibit certain practices and to make exceptions as "necessary or proper" to carry out the purposes of the Act. *Id.* § 2(c)–(d), at 26.

119. *Id.* § 4(a), at 28.

120. *Id.* § 201, at 29.

121. *Id.* § 205(e), at 34. The EPCA's expansive enforcement provisions reflect its architects' determination to enlist the courts in the regulatory enterprise. *See, e.g.,* *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944) ("The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. And their discretion . . . should reflect an acute awareness of the Congressional admonition that 'of all the consequences of war, except human slaughter, inflation is the most destructive' and that delay or indifference may be fatal." (citation omitted)).

122. Emergency Price Control Act of 1942 § 205(f), 56 Stat. at 34–35.

123. *Id.* § 205(b), at 33. OPA gained a reputation of often filing criminal charges for publicity purposes. *See* Ernest Gellhorn, *Adverse Publicity by Administrative*

Sections 203 and 204 set out the administrative procedure and judicial review mechanisms of the Act. As Justice Rutledge explained in dissent, the administrative process consisted of “short-cut proceedings, trimmed almost to the bone of due process, even for wholly civil purposes, and pared down further by a short statute of limitations.”¹²⁴ While the EPCA required OPA to publish a “statement of . . . considerations” alongside a regulation,¹²⁵ it did not require OPA to make any reviewable findings.¹²⁶ The EPCA allowed administrative protests to be filed only “within a period of sixty days after the issuance of any regulation or order unless based solely on grounds arising after the expiration of such sixty days.”¹²⁷ Upon denying a protest, OPA was required to state the grounds for its denial.¹²⁸ Once OPA denied a protest, the challenger could bring suit in the Emergency Court of Appeals, which could set aside OPA’s regulations if they were “arbitrary or capricious” or “not in accordance with law.”¹²⁹ At that point, however, regulated parties had no opportunity to present additional evidence to the court.¹³⁰

OPA had broad discretion to delay its decision on a protest—even while it brought suits to enforce its regulations in court.¹³¹ OPA made ample use of that discretion.¹³² In practice,

Agencies, 86 HARV. L. REV. 1380, 1403–04 (1973) (“Perhaps the most serious criticism leveled against OPA was that it sometimes filed charges merely to call public attention to its program and to coerce compliance rather than to try the allegations in court. In response, one newspaper even refused to report OPA charges until proceedings reached the trial stage.”).

124. *Yakus v. United States*, 321 U.S. 414, 474 (1944) (Rutledge, J. dissenting).

125. Emergency Price Control Act of 1942 § 2(a).

126. *Yakus*, 321 U.S. at 454 (Roberts, J., dissenting) (OPA “need make no findings of fact.”).

127. Emergency Price Control Act of 1942 § 203(a), at 31.

128. *Id.*

129. *Id.* § 203(a)–(b), at 31.

130. *Yakus*, 321 U.S. at 475 (Rutledge, J. dissenting). Parties could argue before the Emergency Court that evidence rebutting OPA’s grounds for decision “could not reasonably have been offered” at the time of the protest, but the only remedy was a remand to OPA. Emergency Price Control Act of 1942 § 204(a), 56 Stat. at 31–32.

131. See Emergency Price Control Act of 1942 § 203(a), 56 Stat. at 31 (“Within a reasonable time after the filing of any protest . . . the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith.”).

most sellers were prosecuted before the Emergency Court ever reached a decision on the merits.¹³³ That new court was staffed with New Deal judges who practically never set a regulation aside.¹³⁴ In any event, the burden of proving the invalidity of a regulation in the Emergency Court at all times rested with the party protesting the regulation.¹³⁵ A challenger had the burden of showing that a regulation *was not* “generally fair and equitable” or *did not* promote any of the vague purposes of the Act. In practice, then, the EPCA foreclosed well-nigh all meaningful judicial review of price regulations in the Emergency Court.¹³⁶

At the same time, Section 205(c) vested federal district courts, state courts, and territorial courts with jurisdiction over OPA’s criminal enforcement actions. Section 204(d) simultaneously divested “Federal, State, or Territorial” courts of “all jurisdiction or power to consider the validity of any such regulation, order, or price schedule” and “to restrain or enjoin the enforcement of any such provision.”¹³⁷

The scope of Section 204(d) was breathtaking. On its face, the provision allowed for what Professor Dickinson had called “pure executive regulation”: if OPA brought a criminal prosecution, judges had to treat the regulation “as final and enforce

132. H.R. REP. NO. 78-862, at 7 (1943) (finding that “the Act has been studiously and adroitly used by the Office of Price Administration in a great many instances as a means of indefinitely delaying the right to judicial review”).

133. OPA had brought 2,219 enforcement actions by the end of 1943 (not accounting for private cases or administrative sanctions). Only 19 protests were decided by the Emergency Court in 1943, compared to 91 in 1944 and between 80 and 120 during the years following the war. See MANSFIELD ET AL., *supra* note 93, at 271, 276.

134. The Emergency Court set aside the Administrator’s decisions in only 30 cases (out of 397) as of February 28, 1947, and “[m]ost of the adverse decisions dealt with peripheral problems. OPA’s construction of the statute and development of standards under it were approved by the court on all essential points.” MANSFIELD ET AL., *supra* note 93, at 279. This centralization mechanism to avoid “hostile courts” “has been credited to Judge Harold Leventhal.” James R. Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113, 118 n.17.

135. See *Cudahy Bros. Co. v. Bowles*, 142 F.2d 468, 470 (Emer. Ct. App. 1944); see also *Montgomery Ward & Co. v. Bowles*, 138 F.2d 669, 671 (Emer. Ct. App. 1943).

136. See Ralph F. Fuchs, *Prerequisites to Judicial Review of Administrative Action*, 51 IND. L.J. 817, 876–77 (1976).

137. Emergency Price Control Act of 1942, Pub L. No. 77-421, §§ 204(d), 205(c), 56 Stat. 23, 32–33.

it without looking behind it to the merits."¹³⁸ Enforcing courts were thus "reduced to formally registering, and directing the enforcement of, executive decrees."¹³⁹

The EPCA's review-stripping provision was so broad that Solicitor General Charles Fahy took the extraordinary position (before the Supreme Court) that OPA could bring criminal cases to enforce rules that had been set aside by the Emergency Court, as long as the underlying violation happened before the regulation was finally set aside.¹⁴⁰ On that theory, a defendant could prevail on the merits in the Emergency Court and still remain subject to a subsequent criminal suit to enforce an invalidated regulation. This position was not entirely fanciful: it was accepted by the Court of Appeals for the First Circuit.¹⁴¹

This highly unusual set of institutional arrangements demanded a careful legal defense. EPCA's architects had worked it out, long before *Yakus*.

B. *The New Dealers' Defense*

According to Peter H. Irons's masterful account, early New Deal statutes often foundered in the Supreme Court due, in no small part, to inartful drafting and lawyering.¹⁴² The *Yakus* litigation presents a very different picture. The New Deal lawyers had learned their lessons from prior defeats (such as *Schechter* and *Hot Oil*). In the EPCA, they combined ideological ambition with careful—if aggressive—lawyering. Moreover, by the time of *Yakus*, the federal judiciary was composed predominantly of Roosevelt appointees, and the lawyers could claim the benefit of some favorable precedents.¹⁴³

For all that, the New Dealers recognized that the EPCA's defense would require a bit of work. The Act's combination of

138. DICKINSON, *supra* note 23, at 11.

139. *Id.*

140. Hyman & Nathanson, *supra* note 3, at 591; *see also* *Yakus v. United States*, 321 U.S. 414, 467 (1944) (Rutledge J., dissenting) (noting that "[t]he prohibition is unqualified").

141. *See* *Rottenberg v. United States*, 137 F.2d 850, 858 (1st Cir. 1943).

142. *See generally* PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982).

143. The administration's review of the available precedents is reflected in a memorandum prepared for Congress. *See Hearings Before the Comm. on Banking and Currency on H.R. 5479, 77th Cong.* 302–39 (1941).

review-preclusive mechanisms had never been tested. Its unbounded delegation to OPA without any real procedural safeguards ran up against *Schechter*; the limitation on judicial remedies, against *Ex Parte Young*; and the limitations on judicial review, against *Crowell v. Benson* and, by implication, *Marbury*. The EPCA architects' response was both simple and ingenious lawyering: instead of defending the law as a whole, they defended the statute provision-by-provision and precedent-by-precedent. Viewed in isolation, the provisions of the law would seem less revolutionary, perhaps even ordinary.

The EPCA's architects set out their strategy in a symposium held at Duke Law School in 1942. OPA General Counsel David Ginsburg discussed the EPCA's general framework.¹⁴⁴ Nathaniel Nathanson, Assistant General Counsel for OPA, presented the strategy to defend the administrative procedure and review provisions;¹⁴⁵ Assistant Solicitor General Paul Freund, the strategy to counter delegation and fair-return challenges.¹⁴⁶

Professor Nathanson rested his case on (now textbook) principles of administrative law. The promulgation of "generally fair and equitable" price regulations, he observed, involved questions of legislative fact; therefore, under the venerable case of *Bi-Metallic Investment Co. v. State Board of Equalization*,¹⁴⁷ no trial-like hearing was required.¹⁴⁸ To sidestep Section 204(d)'s *Marbury* problem, Nathanson relied chiefly on the exhaustion doctrine articulated in *Myers v. Bethlehem Shipbuilding Corp.*¹⁴⁹ In that case, Bethlehem Shipbuilding had sought to restrain the Board from holding adversarial hearings on the company's allegedly unfair labor practices.¹⁵⁰ Bethlehem Shipbuilding argued that the statute violated the Commerce Clause and asserted that the NLRB hearing itself would cause the company "irreparable damage."¹⁵¹ The Supreme Court found the compa-

144. Ginsburg, *supra* note 96, at 26–33.

145. See generally Nathanson, *supra* note 110.

146. See generally Paul A. Freund, *The Emergency Price Control Act of 1942: Constitutional Issues*, 9 LAW & CONTEMP. PROBS. 77 (1942).

147. 239 U.S. 441, 445 (1915).

148. See *id.* at 445.

149. 303 U.S. 41 (1938).

150. *Id.* at 44–46.

151. *Id.* at 47.

ny's contention "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."¹⁵² Nathanson seized on this ruling to argue that the EPCA's review-stripping arrangement "merely codifie[d] the usual rule of exhaustion of administrative remedies."¹⁵³

Paul Freund took on the fair return and *Ex Parte Young* doctrines. Section 4(d) of the EPCA provided that no person was "require[d]" to "sell any commodity."¹⁵⁴ The purpose of this seemingly odd provision was to defeat "fair return" claims. According to Freund, *Ex Parte Young* and *Ben Avon* did not apply to price controls outside the common carrier context: although regulated utilities had an affirmative duty to provide public services, private sellers had no such duty.¹⁵⁵ Moreover, unlike in *Ex Parte Young*, Freund argued, the EPCA allowed challengers to assert their defenses in a non-criminal forum.¹⁵⁶

These arguments were hardly airtight. Nathanson's argument that *Crowell* was irrelevant to legislative rules contradicted the Supreme Court's opinion in *St. Joseph Stockyards*.¹⁵⁷ Freund's theory that the fair return doctrine applied exclusively to regulated utilities was flatly contradicted by Chief Justice Hughes's concurring opinion in *Carter Coal*,¹⁵⁸ and his argument that *Ex Parte Young* did not apply manifestly misstated

152. *Id.* at 50–51. Only months after the Supreme Court's ruling, a Michigan *state* court enjoined NLRB officials from holding a hearing. That probably motivated the EPCA's ban on the exercise of *state* judicial power. For discussion, see generally Amos J. Coffman, Comment, *Power of a State Court to Enjoin National Labor Relations Board Officials*, 36 MICH. L. REV. 1344 (1938).

153. Nathanson, *supra* note 110, at 70.

154. Emergency Price Control Act of 1942, Pub L. No. 77-421, § 4(d), 56 Stat. 23, 28.

155. See Freund, *supra* note 146, at 83–84.

156. *Id.*

157. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 49–50 (1936).

158. *Carter v. Carter Coal Co.*, 298 U.S. 238, 319 (1936) (Hughes, C.J., concurring in part and dissenting in part) ("The exercise of the power of regulation is subject to the constitutional restriction of the due process clause, and if in fixing rates, prices or conditions of competition, that requirement is transgressed, the judicial power may be invoked to the end that the constitutional limitation may be maintained.").

the rationale of that case.¹⁵⁹ Nor, contrary to Nathanson, did *Bethlehem Shipbuilding* validate EPCA. As the Supreme Court emphasized, the NLRB held hearings and created a record, and its orders were not binding until a court of law entered a final judgment enforcing the NLRB's orders.¹⁶⁰ All of those safeguards were lacking in the EPCA.¹⁶¹ Moreover, the exhaustion doctrine announced in *Bethlehem Shipbuilding* merely prevented a pre-enforcement challenge in equity, not a defense in an enforcement action.¹⁶²

The short of it is that no Supreme Court case had ever held that anything roughly analogous to the EPCA's jurisdiction-stripping framework would be constitutionally "adequate" under the Due Process Clause.¹⁶³ Shortly after the war (and after *Yakus* was decided), Nathanson acknowledged the pioneering nature of the statute he and others had been tasked with defending.¹⁶⁴ Unlike prior statutes, he observed, the EPCA "contemplated the enforcement of price and rent regulations in the regular courts even while their validity was being challenged in the Emergency Court of Appeals."¹⁶⁵ Moreover, "unlike . . . other statutes, there was no way in which the courts could suspend operations of [EPCA] regulations while their

159. Nothing in *Ex Parte Young* indicates that it turned on the civil or criminal nature of the hypothetical forum. See *Ex Parte Young*, 209 U.S. 123, 165 (1908). Moreover, the statute in *Ex Parte Young* at least allowed railroad officers to raise legal defenses in a criminal trial. *Id.* at 164–65. The EPCA did not even pretend to extend that favor.

160. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49–50; see also *Yakus v. United States*, 321 U.S. 414, 474 n.26 (1944) (Rutledge, J., dissenting) (distinguishing the NLRA from the EPCA on these grounds) ("[N]o penalty attaches until the [NLRB] has sought and obtained an order from the court for enforcement. With this done, there is no danger the individual will be sentenced for crime for failure to comply with an invalid order. And there is none that the court will be called upon to lend its hand in enforcing an unconstitutional edict or, for that matter, one merely in excess of statutory authority.").

161. See *Yakus*, 321 U.S. at 475 & n.32 (Rutledge, J., dissenting).

162. Cf. Raoul Berger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 985–986 (1939) ("From the beginning, the exhaustion rule was formulated in terms of equity jurisdiction, that is to say, a litigant who failed to avail himself of administrative avenues of redress could not 'maintain a suit in equity.'").

163. See *Yakus*, at 476–77 & n.33 (Rutledge, J., dissenting).

164. See Hyman & Nathanson, *supra* note 3, at 591–92.

165. *Id.* at 584.

validity was contested.”¹⁶⁶ Thus, prior precedents “[did] not entirely meet . . . the due process” challenge to the statute.¹⁶⁷ The statute did break new ground, after all—and so would the *Yakus* decision. Part III chronicles the litigation and describes the decision.

III. THE BEEF OVER BEEF PRICES.

Yakus v. United States was part of a dramatic, fast-paced story. Some two years lay between the enactment of the EPCA and the Supreme Court’s decision in *Yakus*. Another two years later, the war was over, price regulation had lost public support, and a different political climate produced the APA’s settlement. In some ways, *Yakus* was a replay of *Schechter*—a constitutional attack on a massive regulatory scheme, brought by small ethnic middlemen in defense to a prosecution. *Schechter*, however, was a test case litigated in part by the whitest of white shoe New York law firms, financed by corporate interests with the hope of arresting the New Deal’s ambitions, and brought to a Supreme Court that was likely to be receptive to the challengers’ legal arguments.¹⁶⁸ *Yakus* differs in all those respects. There is something desperate about the meat dealers’ opposition to an administrative regime that threatened their very existence, about their pleas for legislative and regulatory relief, and about their attempts to obtain judicial protection under a statute that foreclosed all conventional avenues of relief. *Yakus* must be understood against this backdrop.

A. *The OPA Goes to Work*

Price Administrator Leon Henderson and his OPA staff pursued their price control mission with enthusiasm.¹⁶⁹ A veritable army of lawyers and economists enlisted in OPA’s price control

166. *Id.* at 590 n.18.

167. *Id.*

168. See AMITY SHLAES, *THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION* 239–41 (2007) (narrating the oral argument).

169. See MANSFIELD ET AL., *supra* note 93, at 7; see also CRIDER, *supra* note 101, at 140 (“[OPA] could be criticized on numerous other grounds, but never for lack of sincerity, or energy, or courage. Indeed, the most conspicuous fault of the team was excess of zeal.”).

mission.¹⁷⁰ Their task was daunting. As an OPA economist put it, price control “necessitate[d] replacing the myriad of price decisions made by thousands of individual buyers and sellers in peacetime with the judgments of a relatively few government experts.”¹⁷¹ Undaunted, OPA imposed nationwide price controls on almost every consumer commodity.

Tasked with the role of choosing *some* objective standard to implement Congress’s instruction that price controls be “generally fair and equitable,” Henderson decided to use a historical benchmark and to fix prices at a level that would allow industry to realize the same level of profits as it did during peacetime, despite the much greater demand.¹⁷² OPA soon settled on this “overall industry earnings” standard (industry net income before taxes, compared to historical industry profits for the 1936-1939 period) and rejected the “cost plus a fair profit” standard championed by Bernard Baruch, the World War I price control czar.¹⁷³ The “overall industry earnings” standard gave OPA flexibility to set prices for entire industries without worrying about the financial viability of marginal producers.¹⁷⁴ Henderson promised, however, that “if a particular product in a multiproduct industry was subject to a maximum price which was below the current industry cost attributable to that product, the maximum price would be increased to cover such cost.”¹⁷⁵

Problems that would have afflicted even the most sophisticated system of price controls were exacerbated by the Admin-

170. Between 1941 and 1946, OPA’s “paid and volunteer staff numbered over a quarter of a million and included twice as many economists as the Treasury Department.” Jacobs, *supra* note 104, at 911. A young John Kenneth Galbraith was appointed Deputy Price Administrator. See JOHN KENNETH GALBRAITH, *A LIFE IN OUR TIMES* 124–41 (1981).

171. Donald Wallace & Phillip H. Coombs, *Economic Considerations in Establishing Maximum Prices in Wartime*, 9 *LAW & CONTEMP. PROBS.* 89, 89 (1942).

172. By convention, OPA used the same period as the Administration used to calculate the “Excess Profits Tax” levied during the war. See MANSFIELD ET AL., *supra* note 93, at 31.

173. *Id.* at 32.

174. *Id.* at 281.

175. See *Gillespie-Rogers-Pyatt Co. v. Bowles*, 144 F.2d 361 (Emer. Ct. App. 1944).

istration's crusade against wartime profiteering.¹⁷⁶ In 1943, Roosevelt ordered all executive agencies to work to freeze all wages, rates, and prices across the entire economy at prewar levels to combat inflation.¹⁷⁷ Each and every price increase was prohibited, "regardless of whether it would be justified by cost or productivity increases and regardless of its distributional effects."¹⁷⁸ As noted, though,¹⁷⁹ these requirements were subject to exceptions for the farm bloc and other influential interests. Far from ameliorating the general situation, these exceptions compounded the distortions created by OPA's price controls. As Joseph A. Schumpeter scornfully observed at the time, "unless *intended* to force the surrender of private enterprise," OPA's system of price controls and exemptions was "irrational and inimical to the prompt expansion of output."¹⁸⁰ Among the most severely affected economic sectors was the meat industry.

B. *Regulating Meat*

OPA's meat regulations unfolded in stages. For those who actually knew the meat industry, it was "a foregone conclusion that price ceilings would not work well."¹⁸¹ For OPA officials, in contrast, it was a foregone conclusion that meat prices had to be controlled.

The regulation of meat prices began in earnest when Price Administrator Henderson issued a General Maximum Price Regulation, freezing commodity prices across the entire economy at the level of March 1942.¹⁸² As OPA's staff eventually acknowledged, "General Max" (as the regulation was popular-

176. On October 3, 1942, President Roosevelt directed OPA to prevent "unreasonable and exorbitant" war profits. 3 C.F.R. 1213 (1938-1943).

177. See Exec. Order 9328, 3 C.F.R. 1267 (1938-1943).

178. ROBERT A. KAGAN, *REGULATORY JUSTICE: IMPLEMENTING A WAGE PRICE FREEZE* 43 (1978).

179. *Supra* notes 105-07 and accompanying text.

180. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 387 (1942).

181. Arant, *supra* note 5, at 908.

182. General Maximum Price Regulation, 7 Fed. Reg. 3153 (April 28, 1942). Wittingly or not, OPA's title for the regulation harkened back to the "General Maximum" of 1793, a staple of the Reign of Terror in revolutionary France. See Henry Bourne, *Food Control and Price-Fixing in Revolutionary France*, 27 J. POL. ECON. 73 (1919).

ly known) proved “as disruptive and unsatisfactory to the industry as to the consumer.”¹⁸³ Accordingly, in June 1942, Henderson signed Maximum Price Regulation No. 169, a new order regulating beef and veal prices.¹⁸⁴ Both OPA and the meat industry soon came to regard this regulation, too, as “inadequate.”¹⁸⁵ OPA’s problem was that meat sold by independent packers and slaughterers was sold “without grade designation or on the basis of private grading systems” that could be manipulated to avoid price controls.¹⁸⁶ The meat dealers’ problem was the continued rise in cattle costs and the resulting price squeeze.¹⁸⁷

During the summer of 1942, Boston began to experience serious meat shortages.¹⁸⁸ Several meat dealers declared bankruptcy, even as grocery shops could not meet demand.¹⁸⁹ Four hundred Boston slaughterers and meat dealers rallied to petition the Administration to place a price ceiling on cattle.¹⁹⁰ Sidney H. Rabinowitz,¹⁹¹ the director of the New England Wholesale Meat Dealers Association, urged collective protest.¹⁹² Harold Widetzky, general counsel for the Wholesale Meat Dealers Asso-

183. Arant, *supra* note 5, at 908 n.7; Hyman & Nathanson, *supra* note 3, at 593.

184. Maximum Price Regulation No. 169, 7 Fed. Reg. 4653 (June 19, 1942).

185. Hyman & Nathanson, *supra* note 3, at 594.

186. *Id.* at 594. Although large integrated packers sold 85% of all meat products in the United States, the number of independent small packers and slaughterers was very large, and they sold most of the fresh beef available in northeast cities. *Id.* at 605–06.

187. Arant, *supra* note 5, at 908.

188. *Little Beef Expected in Boston Now, None Expected Next Week*, BOSTON GLOBE, July 23, 1942, at 1.

189. *Id.*

190. *Solution to “Squeeze” on Prices Sought*, BOSTON GLOBE, July 23, 1942, at 6.

191. Sidney Rabinowitz was born in Lithuania and immigrated to the United States in 1903. Rabinowitz started his own business (the Colonial Provision Company) in 1918 after working in a meat processing plant. Later, in the 1950s, the Colonial company became one of the largest meat dealers in the country. Rabinowitz was also one of the founders of Brandeis University. See *Deaths and Funerals: Throngs Pay Last Tribute To Sidney Rabinowitz*, BOSTON GLOBE, Aug 23, 1961, at 23; *Colonial Provision Co. Starts Big Campaign*, BOSTON GLOBE, May 8, 1932, at A53. Rabinowitz had a long history defending the civil rights of immigrants. See, e.g., *Delicatessen Men Protest*, N.Y. TIMES, Mar. 25, 1935, at 14.

192. *Solution to “Squeeze” on Prices Sought*, *supra* note 190, at 6; *Little Beef Expected in Boston Now, None Expected Next Week*, *supra* note 188, at 6.

ciation and the National Association of Hotel and Meat Purveyors, also urged action in opposition to farmer privileges.¹⁹³

Independent slaughterers and packers were a political force to be reckoned with. Despite opposition from the Texas and Southwestern Cattle Raisers' Association,¹⁹⁴ Congress amended the EPCA in October of 1942 to require OPA to provide a "generally fair and equitable" margin for the processing of farm commodities, "including livestock."¹⁹⁵ Upon the enactment of the McKellar Amendment (as it was called), Wilbur LaRoe, Jr., counsel for the Independent Meat Packers Association, proclaimed, "Hurrah, our battle is done, because Congress has told OPA they have to do it."¹⁹⁶

LaRoe's enthusiasm was misplaced. On December 10, 1942, OPA issued Revised Maximum Price Regulation 169 ("Rule 169"), the subject of the *Yakus* litigation.¹⁹⁷ The rule divided the country into price zones and allowed for "dollars and cents" increments based on OPA's geographic estimates of cost.¹⁹⁸ The rule also required meat dealers to follow prescriptive grading standards.¹⁹⁹ As the meat dealers later complained, Rule 169 "revolutionize[d] the meat industry by eliminating terms and cuts of meat upon which trade was founded and so recognized by custom for so many years."²⁰⁰

Rule 169's "statement of considerations" cited to Executive Order 9250 (requiring OPA to control "profiteering") and per-

193. *Little Beef Expected in Boston Now, None Expected Next Week*, *supra* note 188, at 6.

194. Hyman & Nathanson, *supra* note 3, at 599 & n.47.

195. Stabilization Act of 1942, Pub. L. No. 77-729, 56 Stat. 765.

196. See *Hearings Before S. Special Comm. to Study and Survey Problems of American of Small Business Enterprises & H. Select Comm. to Conduct a Study and Investigation of the National Defense Program in its Relation to Small Business in the United States*, 78th Cong. 1st Sess. (Mar. 1, 3, 10, 1943), at 2 [hereinafter *Hearings*]; see also *Hearings Before the Select Committee to Investigate Executive Agencies Pursuant to H. Res. 102, Part 2*, 78th Cong. (1943-44), at 1329-458 (collecting hearings related to OPA's meat regulations).

197. Revised Maximum Price Regulation 169, 7 Fed. Reg. 10,381 (Dec. 12, 1942).

198. *Armour & Co. v. Bowles*, 148 F.2d 529, 531 (Emer. Ct. App. 1945).

199. Hyman & Nathanson, *supra* note 3, at 596 ("Wholesale cuts were precisely defined in anatomical detail, and the sale of cuts not in compliance was prohibited.").

200. Brief for Petitioners at 67, *Yakus v. United States*, 321 U.S. 414 (1944) (No. 375) (*Rottenberg* was consolidated with *Yakus*).

functionarily stated that the regulation furthered the purposes of the Act.²⁰¹ OPA also filed an unpublished study of the industry's costs alongside the regulation.²⁰² These cost estimates were based on the mistaken assumption that cattle prices would not continue to rise.²⁰³ But rise they did, in response to increasing demand.²⁰⁴ And yet: in the face of overwhelming evidence of a price squeeze and despite the meat dealers' pleas, OPA refused to reconsider the rule.²⁰⁵

As Rule 169 went into effect, several meat industry groups filed protests before OPA, claiming that the rule and the resulting price squeeze violated the terms of the Act. The Armour Company, one of Chicago's "Big Four" integrated packers, was the largest corporate litigant.²⁰⁶ The National Independent Meat Packers Association, represented by Wilbur LaRoe, Jr., also filed a protest on behalf of independent packers and slaughterers.²⁰⁷

Responding to the protests, OPA replied that the evidence of a price squeeze was unconvincing. Even assuming that a "squeeze" existed, OPA argued, only "vigorous enforcement" against black market profiteers would redress the problem.²⁰⁸ OPA then proceeded to delay the beef litigation by prolonging administrative discovery. It would take more than two years for the Emergency Court of Appeals to reach a judgment on the merits of the challenge.²⁰⁹ Throughout this period, Rule 169 remained in effect, leaving many meat dealers with a grim choice of going out of business or into the black market, and possibly to jail.

201. 7 Fed. Reg. at 10,381-82.

202. *Armour & Co.*, 148 F.2d at 531-32.

203. *Id.* at 532.

204. *Id.*

205. See H.R. No. 78-898 (1943) ("[I]t was obvious that the Regulation would ultimately result in the destruction of all nonprocessing slaughterers as a class."). Even the price lawyers admitted that segments of the industry were in serious financial trouble by then. Hyman & Nathanson, *supra* note 3, at 601 & n.51.

206. See *Armour & Co.*, 148 F.2d at 529.

207. *Heinz v. Bowles*, 149 F.2d 277 (Emer. Ct. App. 1945), *vacated and dismissed*, 150 F.2d 546, *cert. denied sub. nom. E. Kahn's Sons Co. v. Bowles*, 326 U.S. 719 (1945).

208. Hyman & Nathanson, *supra* note 3, at 597.

209. See *Armour & Co.*, 148 F.2d at 529.

Meanwhile, in March 1943, meat packer and independent slaughterer groups appeared before a Senate small business committee. Testifying for the independent packers, Wilbur LaRoe stated that at present prices, some 25% to 40% of the wholesale meat industry could not make a return on investment.²¹⁰ This price squeeze, he argued, had created the worst black market "in the history of the country."²¹¹ OPA officials acknowledged that the meat regulations were causing difficulties, but they continued to insist that vigorous enforcement would "increase the supply."²¹² When Senators asked why OPA was flouting the McKellar Amendment by failing to take account of rising livestock prices, Price Administrator Prentiss Brown argued that relief was "impractical" because "you would have to change [the cost margin] every day" in response to increasing livestock prices.²¹³

Lastly, Sidney Rabinowitz and Harold Widetzky testified on behalf of the New England Meat Dealer Association. Rabinowitz explained the dire situation faced by the independent meat dealers:

You will find the following situation for our industry, and I speak for New England, and I might as well speak for the entire country, and that is, they either are in jail or they are blowing their brains out; and I think it's a terrible situation. And I think these articles and these newspapers about them engaging in the black market, I think there is nothing to it. It is nothing but men in the industry that are either falling by the wayside and going to jail or into bankruptcy, or, if they have the courage, blowing their brains out.²¹⁴

Albert Yakus would go to jail.

C. *Litigation*

Meat dealers pursued three avenues to challenge the EPCA and OPA's regulations. First, they availed themselves of the option provided by the statute: a protest before the agency and litigation before the Emergency Court. Second, they sought re-

210. See *Hearings*, *supra* note 196.

211. *Id.* at 2.

212. *Id.* at 16.

213. *Id.* at 20.

214. *Id.* at 81.

lief by means of an *Ex Parte Young* challenge. Third, they raised legal defenses against the regulations in enforcement proceedings.

That third scenario, of course, is *Yakus*. The case, though, must be understood in the context and chronology of the other two approaches. The first option, resort to the statutory avenues for legal redress, was designed to fail. It eventually did fail—well *after* the decision in *Yakus*.²¹⁵ However, it played a crucial role in the *Yakus* majority's opinion: Congress, it said, had not foreclosed but merely channeled judicial relief, as surely it could do under its copious powers. The second option, *Ex Parte Young* relief, was rejected by the Supreme Court in *Lockerty v. Phillips*,²¹⁶ a week after the *Yakus* defendants had filed their petition for certiorari. *Lockerty* reserved the precise question presented in *Yakus*, but it also narrowed the petitioners' case.

1. EPCA Proceedings

As mentioned, Armour & Co., as well as associations of independent wholesale dealers (like *Yakus*) and independent (non-processing) slaughterers, filed protests before OPA.²¹⁷ OPA consolidated the protests and demanded more evidence of a price squeeze, thus delaying the protestors' right to judicial review.²¹⁸ However, one non-processing slaughterer—a defendant in a pending criminal proceeding—was actually heard by the Emergency Court, on the question of whether the court should issue a writ of mandamus compelling OPA to make a decision.²¹⁹ Following the hearing, but before the Emergency Court decided whether to grant the writ, the government announced that non-processing slaughterers (the most vulnerable group) would receive subsidies from the Office of Economic

215. See *Armour & Co. v. Bowles*, 148 F.2d 529 (Emer. Ct. App. 1945); *Heinz v. Bowles*, 149 F.2d 277 (Emer. Ct. App. 1945).

216. 319 U.S. 182 (1943).

217. The Emergency Court meat litigation and the surrounding politics are explained in great detail in Hyman & Nathanson, *supra* note 3.

218. *Armour & Co.*, 148 F.2d at 530.

219. Hyman & Nathanson, *supra* note 3, at 609.

Stabilization.²²⁰ With the subsidy in place, OPA denied *all* the consolidated protests, and the litigation started anew before the agency.²²¹ Parties wishing to challenge the regulation had to introduce new evidence taking into account the effects of the subsidy program.²²² This additional delay bought time for the Supreme Court to decide *Yakus*.

2. *Equitable Relief*: Lockerty

New Jersey meat dealers (represented by Arthur T. Vanderbilt, later Chief Justice of New Jersey's Supreme Court) filed an *Ex Parte Young* action against the acting New Jersey United States Attorney, seeking to restrain criminal prosecutions.²²³ The meat dealers' complaint alleged that Rule 169 was irrational and oppressive class legislation and, further, that the threat of criminal sanctions, combined with the Act's defective judicial review procedures, deprived the meat dealers of due process.²²⁴ On March 29, 1943, a three-judge district court panel granted the government's motion to dismiss.²²⁵ Judge Guy Fake, a Coolidge appointee, dissented. In his view, the Act left the plaintiffs "stripped of their constitutional rights in the only forum where they may be tried on the indictments pending against them."²²⁶

The Supreme Court affirmed the district court in May of 1943, holding that it lacked jurisdiction to hear "collateral attacks" against the regulation.²²⁷ The opinion was written by Chief Justice Stone over a single weekend, a feat accomplished by preserving the question presented in *Yakus* (*i.e.*, whether

220. See 8 Fed. Reg. 14,641 (Oct. 26, 1943). This group did not include independent meat packers like Albert Yakus. The subsidy is explained in Hyman & Nathanson, *supra* note 3, at 609–10.

221. *Armour & Co.*, 148 F.2d at 530.

222. *Id.*

223. The U.S. Attorney had already filed charges against them. *Lockerty v. Phillips*, 319 U.S. 182, 184–85, 188 (1942).

224. See *id.* at 184–85; Brief for Appellants at 6, *Lockerty v. Phillips*, 319 U.S. 182 (1943) (No. 934), 1943 WL 54797 (specifically alleging that "the Administrator's assistants have publically declared that it was the intention of the Administrator to drive appellants and those similarly situated out of business").

225. *Lockerty v. Phillips*, 49 F. Supp. 513, 515 (D.N.J.), *aff'd*, 319 U.S. 182 (1943).

226. *Id.* at 516 (Fake, J., dissenting).

227. *Lockerty*, 319 U.S. at 189.

section 204, barring all courts except the Emergency Court from examining the validity of OPA regulations, was constitutional as applied in an enforcement action).²²⁸ The Justices also made short shrift of a case, manifestly contrived by a landlord and his tenant, in which an Indiana district judge had struck down the entire EPCA as a violation of the separation of powers.²²⁹ The Supreme Court vacated the judgment as lacking a genuine controversy.²³⁰ Next on the docket (the following Supreme Court Term) would be *Yakus*.

3. Criminal Defenses: *Yakus*

In Boston, an Assistant United States Attorney pressed criminal charges against Albert Yakus, Benjamin Rottenberg, and their respective companies and agents, charging them with committing several violations of Rule 169.²³¹ On February 24, 1943, a grand jury returned the indictment. The meat dealers moved to quash it on several grounds: the price ceiling established by OPA was an “arbitrary and capricious” invasion of property rights; Rule 169 was unreasonable class legislation; OPA had failed to follow proper procedures; and the EPCA violated the separation of powers and due process.

The motions were heard by District Judge Charles E. Wyzanski, Jr., a consummate New Dealer.²³² Unsurprisingly, Judge

228. The Court heard oral argument on May 3, 1943. On May 6, Chief Justice Stone circulated a memorandum to the Associate Justices stating that he wanted to dispose of the case “promptly” and asking them to respond by noon if this was “agreeable.” All of the Justices agreed, provided that Stone reserve the question of whether section 204 was constitutional as applied in an enforcement action. Box 68, HARLAN FISKE STONE PAPERS, MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, WASHINGTON D.C. (copy on file with author). The opinion was released on May 10. *Lockerty*, 319 U.S. at 182.

229. *Roach v. Johnson*, 48 F. Supp. 833, 834 (N.D. Ind.), *vacated sub nom.* *United States v. Johnson*, 319 U.S. 302 (1943).

230. *United States v. Johnson*, 319 U.S. 302 (1943).

231. The facts recounted here and below are taken from the “Transcript of Record” filed in the Supreme Court, unless otherwise noted. The record and briefs were retrieved from *The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832–1978*, GALE, <http://www.gale.com/c/making-of-modern-law-us-supreme-court-records-and-briefs-1832-1978> [<https://perma.cc/93TN-GUAM>].

232. Judge Wyzanski was a protégé of Felix Frankfurter. As solicitor for the Department of Labor under Frances Perkins, Wyzanski helped to draft the National Industrial Recovery Act. See PETER H. IRONS, *THE NEW DEAL LAWYERS* 23–24 (1982). Later, Wyzanski served in the Solicitor General’s Office under Attorney

Wyzanski denied the motion. After overruling all objections to the statute, Judge Wyzanski considered the dealers' objections to Rule 169. He noted that a motion to quash an indictment is the equivalent of a civil "demurrer," testing the validity of the regulation as it "appears upon its face."²³³ "Viewed in this limited aspect," Wyzanski held, the regulation was "plainly" valid.²³⁴ The United States had urged Judge Wyzanski to hold that the EPCA's Section 204(d) prohibited district courts from reviewing the validity of the regulation in an enforcement action.²³⁵ Agreeing with this position, the judge articulated a distinction, "familiar in the area of administrative law," between a regulation "invalid on its face" and one "invalid because of circumstances of its adoption or application."²³⁶ Because the regulation was not facially invalid, Wyzanski continued, he only had to consider whether Congress could preclude the introduction of extrinsic evidence to support an as-applied challenge to a general regulation.²³⁷ As Judge Wyzanski noted, the EPCA's procedures allowed the meat dealers to present extrinsic evidence before the Emergency Court of Appeals. Viewed in this light, Judge Wyzanski argued, the administrative procedure was "not so novel."²³⁸

General (by then Justice) Stanley Reed, where he earned a reputation as an able lawyer defending New Deal legislation, most notably the Wagner Act. *Id.* at 272–89.

233. *United States v. Slobodkin*, 48 F. Supp. 913, 915 (D. Mass. 1943).

234. *Id.* at 915–16.

235. *Id.*

236. *Id.* at 916.

237. *Id.* at 915–16.

238. *Id.* at 917. While Judge Wyzanski analogized the EPCA to the Hepburn Act, that analogy does not hold. Although the Hepburn Act made ICC orders enforceable within 30 days and precluded later challenges, the Commission first had to go through formal rulemaking. Regulated entities could immediately appeal the order to a court of law, and the court could enter a preliminary injunction to "suspend[]" the order during the pendency of the challenge. Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906) (amending Interstate Commerce Act of 1887, ch. 104, § 15, 24 Stat. 379, 384); see also *Yakus v. United States*, 321 U.S. 414, 473–74 (1944) (Rutledge, J. dissenting) (same); *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91–92 (1913) (rejecting the argument that ICC rate orders are conclusive on the courts and noting that the Hepburn Act "gave the right to a full hearing . . . conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved").

The resulting trial would be a farce, but the meat dealers had to go through the motions to preserve their right to appeal.²³⁹ During the trial in March of 1943, the lawyers for Mr. Yakus offered as evidence the testimony of Sidney Rabinowitz. According to the expert report, Rabinowitz would show that Rule 169 required Albert Yakus and similarly situated meat dealers to sell meat below the cost of production, in violation of the McKellar amendment and the "fair return" doctrine. The meat dealers also sought to introduce Administrator Prentiss Brown's testimony before Congress, in which he "admitted" that the meat and veal regulations were not "fair and equitable." Judge Healey, presiding over the trial, excluded all extrinsic evidence under Wyzanski's previous ruling. Albert Yakus was fined \$1,000 and sentenced to six months in prison.²⁴⁰ The meat lawyers filed an exception, and the convictions were stayed pending appeal.

The New England meat lawyers filed their appeal on May 4, 1943, six days before the Supreme Court decided *Lockerty*. Judges Calvert Magruder, John Mahoney, and Peter Woodbury, all Roosevelt appointees, heard the appeal in the First Circuit.²⁴¹ On August 23, 1943, the court rejected the meat dealers' appeal.²⁴² Judge Magruder's opinion dismissed the meat dealers' argument by holding that as a matter of law, any evidence showing the invalidity of the regulation was "entirely immaterial" under the statute.²⁴³ Analogizing OPA to a military operation, Magruder extolled OPA's efforts at the "home front"

239. See *Brighton Packing Co. Held Guilty of Violating OPA Beef Ceilings*, BOSTON GLOBE, Apr. 8, 1943, at 5; see also *Another Meat Dealer is Held in U.S. Court*, CHRISTIAN SCI. MONITOR, March 5, 1943.

240. Brief for the United States at 4-5, *Yakus*, 321 U.S. 414 (Nos. 374, 375), 1944 WL 42926.

241. *Rottenberg v. United States*, 137 F.2d 850, 851 (1st Cir. 1943); see also *Convicted Meat Dealers Label Price Act as Unconstitutional*, BOSTON GLOBE, 13 June 30, 1943, at 13. Judge Calvert Magruder, a Roosevelt appointee and former professor at Harvard, had clerked for Justice Brandeis and later served as General Counsel for the Wage and Hour Division of the Department of Labor during the height of the New Deal. See generally George Dargo, *Calvert Magruder of the First Circuit: The Law Professor as Judge*, 74 MASS. L. REV. 239 (1989); see also Felix Frankfurter, *Calvert Magruder*, 72 HARV. L. REV. 1201 (1959).

242. *Rottenberg*, 137 F.2d. at 858.

243. *Id.*

and stressed the need for expediency.²⁴⁴ Venturing no opinion on the protests pending before OPA, Magruder held that the EPCA's provisions were constitutionally adequate,²⁴⁵ and that the delegation challenge was "not well taken."²⁴⁶

D. *Yakus in the Supreme Court*

The meat dealers filed a petition for a writ of certiorari on September 23, 1943. Despite the lack of a circuit conflict, certiorari was likely. The Supreme Court had already expressly reserved the question presented in *Lockerty*, and many similar enforcement cases (75 to 100, on the petitioners' estimation) were pending in the lower courts.²⁴⁷ Confident in his case, Solicitor General Fahy did not oppose the grant.²⁴⁸ On November 8, 1943, the Supreme Court granted the petition and set the case for argument.²⁴⁹

1. *The Briefs*

The briefs for the meat dealers read as a frontal assault on the Act. The petitioners claimed that the statute unlawfully delegated legislative power, violated their liberty and property without due process, violated the separation of powers, and violated their sixth amendment right to a jury trial.²⁵⁰ Echoing *Schechter's* themes, the meat dealers argued that the Act did not require OPA to make regulations on the basis of reviewable factual findings and that the procedural requirements were meaningless.²⁵¹ Moreover, the Act gave OPA broad regulatory

244. *Id.* at 856.

245. *Id.* at 857.

246. *Id.* at 858.

247. Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit and Brief in Support of the Petition at 9, *Rottenberg v. United States*, 321 U.S. 414 (1944) (No. 375). In one case, a district court had held that section 204(d) of EPCA violated *Marbury v. Madison*, and had invalidated the rent control provisions of the Act because it did not require OPA to make findings of fact. See *Payne v. Griffin*, 51 F. Supp. 588, 597 (M.D. Ga. 1943).

248. Memorandum of the United States at 9, *Rottenberg v. United States*, 321 U.S. 414 (1944) (No. 375).

249. *Yakus v. United States*, 320 U.S. 730 (1943).

250. See Brief for the Petitioners at 6–7, 78–81, *Rottenberg v. United States*, 321 U.S. 414 (1944) (No. 375).

251. See *id.* at 8–22.

latitude while granting its regulations the force of law, without adequate judicial review. The meat dealers also pointed out that OPA's "statement of considerations" involved no actual findings of fact; the considerations were mere statements of opinion parroting the language of the statute.²⁵² The Act provided no means of guaranteeing that cases would "be decided according to evidence and the law, rather than arbitrarily or from extra-legal considerations."²⁵³ Invoking *Marbury*, the meat dealers urged that "the court has not only the power but the [constitutional] duty to say what the law is."²⁵⁴

The petitioners presented the Supreme Court with several alternative lines of arguments. They argued that the district court could at least consider whether the price regulation was really promulgated "under" Section 2 of the Act, and therefore within the scope of Section 204(d).²⁵⁵ Alternatively, the meat lawyers argued—in the teeth of the statute—that Congress had not meant to deprive district courts of the power to review OPA's regulations in criminal trials.²⁵⁶ However, the petitioners continued, if the court concluded that Congress *had* intended that result, Congress had violated Article III.²⁵⁷ Congress could not simultaneously draw the courts into the Act's enforcement scheme, while depriving them of the judicial power "to say what the law is" in particular cases.²⁵⁸

Solicitor General Fahy and Paul Freund, briefing for the United States, argued that the EPCA was entirely unexceptional under the current emergency. Fahy took the position that section 204(d) categorically prohibited the courts from considering any defense addressed to the validity of the regulation in an enforcement proceeding.²⁵⁹ This was necessary, he argued, "to safeguard the nation against the perils which inhere in de-

252. *Id.* at 32–33.

253. *Id.* at 28–29.

254. *Id.* at 25.

255. *Id.* at 6, 33–34.

256. *Id.* at 7, 48.

257. *Id.* at 60–63,

258. *Id.* at 64.

259. Brief for the United States at 16, *Yakus v. United States*, 321 U.S. 414 (1944) (Nos. 374, 375) ("The defendant may not . . . raise any defense addressed to the validity of the regulation . . .").

lay, premature interruption, or nonuniform application of inflation controls in wartime."²⁶⁰ His merits brief began with a long discussion of why price controls were "a matter of the most urgent necessity for a nation at war today."²⁶¹ The serious dangers of runaway inflation created a need for "expeditious . . . regulation."²⁶² Appealing to the New Deal Court's conception of the "administrative process," Fahy argued that the EPCA's administrative mechanisms served the need for continuous regulation, for simplified enforcement and expert review, and for administrative flexibility.²⁶³ Moreover, Al Yakus had merely "chosen" to forego the EPCA's "orderly" procedure and "invited criminal prosecutions."²⁶⁴ If everyone shared Yakus's disregard for the administrative procedure that Congress had enacted, Fahy urged, "the price control program would collapse."²⁶⁵

Fahy then defended Section 204(d) as constitutional. He argued that the provision plainly served the need of

ensuring well-advised judicial consideration, uniformity of judgment, and due reliance on a proper administrative record, in determining the complex questions presented by a challenge to a price regulation; and by ensuring that persons who disregard the statutory opportunities for review will not be permitted to convert prosecutions for violation of price ceilings into controversies resembling peacetime rate litigation.²⁶⁶

Echoing Professor Nathanson,²⁶⁷ Fahy argued that the validity of Section 204(d) was "fortified by established principles of administrative law."²⁶⁸ The defendants' inability to challenge the regulation, he argued, was "a normal consequence of their failure to exhaust their administrative remedies."²⁶⁹ The present

260. *Id.* at 25.

261. *Id.*

262. *Id.* at 27.

263. *Id.* at 25–34.

264. *Id.* at 33.

265. *Id.* at 34.

266. *Id.* at 35.

267. See *supra* note 153 and accompanying text.

268. See Brief for the United States, *supra* note 259, at 36.

269. *Id.*

challenge was simply a “collateral attack” that had to be rejected under *Bethlehem Steel*.²⁷⁰ Moreover, lower courts had previously upheld similar administrative arrangements against due process challenges.²⁷¹

Next, Fahy argued that the Act’s provision denying the courts the power to stay enforcement proceedings or to issue interlocutory injunctions was also constitutional.²⁷² Fahy questioned Yakus’s standing to attack the stay provisions and urged that congressional limitations on the court’s equity power in the public interest were unexceptional, citing precedents.²⁷³ Moreover, Fahy argued—now following Freund²⁷⁴—that *Ex Parte Young* and its progeny were not on point. Unlike the railroads in *Ex Parte Young*, the meat dealers in this case had an opportunity to challenge the regulation in a non-criminal forum, and unlike public utilities, they were not subject to a continuous confiscation of their property.²⁷⁵

Fahy’s brief devoted few pages to the delegation issue. In Fahy’s view, the regulatory standards set in the Act were adequate. Moreover, OPA’s unpublished report on the general economic conditions of the meat industry satisfied any requirement of findings of fact necessary to support a delegation.²⁷⁶

2. The Court Decides

Barely a week before oral argument in *Yakus*, the Supreme Court released an opinion that further undermined the meat dealers’ position. In *Falbo v. United States*,²⁷⁷ the Court upheld

270. *Id.*

271. *Id.* at 38–39. This portion of the brief misstated the law. The most analogous case cited by the Solicitor General was *United States v. Vacuum Oil Co.*, 158 F. 536 (W.D.N.Y. 1908) (construing the Elkins Act to deprive a shipper of the right to contest a filed rate in a criminal prosecution and upholding the statute against a due process challenge). However, as the district court had stressed in that case, the shipper could still seek to enjoin the rates and sue the railroads for damages. *Id.* at 540.

272. Brief for the United States, *supra* note 259, at 44.

273. *See id.* at 45–56.

274. *See supra* note 155 and accompanying text.

275. Brief for the United States, *supra* note 259, at 59.

276. *See id.* at 63–71.

277. 320 U.S. 549 (1944).

the conviction of a Jehovah's Witness for resisting an order to report for duty under the Selective Training and Service Act of 1940.²⁷⁸ Like other Witnesses, Falbo resisted the order in district court on the basis that the local board had erroneously and arbitrarily classified him as a conscientious objector, instead of a religious minister. The Supreme Court held that Congress had foreclosed Falbo's defense (while leaving open the possibility of habeas corpus review).²⁷⁹ Alongside *Hirabayashi v. United States*,²⁸⁰ *Falbo* was the only precedent supporting the Government's position that Congress could foreclose a defense of invalidity in a suit to enforce an administrative order. With that, the stage was set for *Yakus v. United States*.

We have been unable to locate a transcript or account of the oral argument.²⁸¹ By all appearances, it cannot have gone well for the petitioners. On March 27, 1944, the Supreme Court sustained the validity of Albert Yakus's conviction by a vote of six to three. Chief Justice Stone wrote for the Court. Justices Roberts, Murphy, and Rutledge dissented.

3. *The Majority Opinion*

The majority opinion, expertly crafted by Chief Justice Stone, made the EPCA seem entirely unexceptional. Brushing aside the petitioners' (and the dissenters') explanation that the administrative process was a charade, the majority opinion assumed a posture of extreme deference: "[W]e cannot assume," "we cannot pass upon," and "we cannot say," the Court reiterated throughout, that OPA would have declined to afford relief—if only the petitioners had filed a protest.²⁸² However, the Court's attempt to make *Yakus* look like a routine case over the exhaustion of administrative remedies barely disguises the bolder, bare-knuckles aspects of the majority opinion.

278. *Id.* at 555.

279. *Id.* at 554–55. In a later, post-*Yakus* case, the Supreme Court limited its holding in *Falbo* to exhaustion and allowed Jehovah's Witnesses to raise the invalidity of an induction board's order as a defense. *Estep v. United States*, 327 U.S. 114, 123 (1946).

280. 320 U.S. 81 (1943).

281. The Library of Congress does not have a transcript of the oral argument, and no transcript is available in the Gale online collection or in the Supreme Court Library.

282. *Yakus v. United States*, 321 U.S. 414, 434, 436, 438, 439, 440 n.7 (1944).

The first noteworthy feature is the Court's treatment of the wartime nature of the EPCA. Draconian statutes enacted during wartime, and judicial decisions that uphold or enforce them, pose a danger that one-off responses to a dire emergency might become the new normal. *Yakus* presented that problem in sharp relief. Moreover, the Government, while emphasizing the overriding need for an administrative apparatus adequate to the challenges of war, subtly worked to suggest that war was simply a particularly stark example of the sort of real-world challenges that administrators must be prepared to meet and conquer at all times. Its brief did advert to the urgency of the occasion. But then, it is difficult to imagine a situation in which government might *not* see a need for continuous regulation, simplified enforcement and review, and administrative flexibility—the rationales which the Government invoked in defense of the EPCA²⁸³ and which the majority opinion embraced. Justice Roberts's dissent articulated the fear that the Court's reasoning in support of the EPCA might come to stand as law for all times.²⁸⁴ Not one word in the majority's opinion disavows that proposition. Chief Justice Stone's opinion refers to the exigencies of war several times—in each instance, as a warrant for the statute, but never as a limit on the precedential scope of the Court's ruling.²⁸⁵

A second striking feature of the majority opinion is its rhetorical evasion of the precise question presented by the case. At the end of the day, Albert Yakus had one central claim: before a citizen may be sent to jail for violating a generally applicable rule of private conduct originating in an administrative agency, that person must have some effective means of testing, in an independent court, the validity of that rule vis-a-vis the congressionally enacted statute said to authorize it. The claim can be viewed from multiple perspectives. It can be said that a violation of this proposition unconstitutionally empowers agen-

283. See *supra* note 263 and accompanying text.

284. *Yakus*, 321 U.S. at 459–460 (Roberts, J., dissenting).

285. *Id.* at 419–20, 422–23, 431–32, 435, 439, 441–43 (majority opinion). In this regard, *Yakus* differs from the Japanese internment cases, which struggle to insist that exceptional wartime measures might well be unacceptable under peacetime conditions. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 223 (1944); *Hirabayashi*, 320 U.S. at 101.

cies (a non-delegation framing); or that it unconstitutionally eviscerates judicial review (an Article III or separation-of-powers framing); or that it unconstitutionally subjects citizens to arbitrary, tyrannical government (a due-process framing). But however one frames the problem, the basic rule of law problem of pure executive regulation remains.

Against this backdrop, the most jarring feature of the majority opinion, bearing directly on the contention of this Article, is the majority's acceptance of the EPCA's and the Government's disaggregation strategy. Where the dissenters—in different ways—insisted on viewing the EPCA, its procedures, and the constitutional structure in context and as a whole, Chief Justice Stone neatly divided the opinion into four isolated questions that disconnected the inquiry from any systematic constitutional perspective: (1) delegation; (2) the interpretation of 204(d); (3) due process; and (4) the Sixth Amendment and the judicial power of the United States.

The Chief Justice began by noting that the Act appropriately channeled the Administrator's discretion toward the goal of avoiding inflation and its consequences.²⁸⁶ The means of "maximum price fixing" were constrained,²⁸⁷ and the Act's standards were "sufficiently definite and precise"—when considered together with "the 'statement of the considerations' required to be made by the Administrator"—to satisfy the non-delegation doctrine.²⁸⁸ The opinion also distinguished *Schechter* on the ground that *Schechter* involved a delegation "to private individuals engaged in the industries to be regulated."²⁸⁹ That is untenable.²⁹⁰ The true distinction, noted in Justice Roberts's dis-

286. See *Yakus*, 321 U.S. at 423.

287. *Id.*

288. *Id.* at 426.

289. *Id.* at 424. The *Schechter* paragraph was added—to the delight of Justice Frankfurter—in response to Justice Roberts's argument that the court had overruled *Schechter*. Box 70, HARLAN FISKE STONE PAPERS, MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, WASHINGTON D.C. (copy on file with author).

290. Chief Justice Stone's argument deliberately misread *Schechter*. It could not be "seriously contended," the *Schechter* Court had written, that Congress could delegate legislative authority to a trade association. "The question, then, turns upon the authority which § 3 of the Recovery Act vests in the President to approve or prescribe." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (emphasis added).

sent,²⁹¹ was that the majority had denuded the non-delegation doctrine of its context and reduced it to a toothless “intelligible principle” test.²⁹²

Chief Justice Stone dealt swiftly with the question of whether Section 204(d) prohibited the courts from questioning the validity of a regulation in an enforcement proceeding.²⁹³ The text of 204(d) should be interpreted literally, “at least” before a regulation was held invalid by the Emergency Court.²⁹⁴ The qualifying phrase allowed that there *might* be an affirmative defense for a person convicted under a rule that had been found unlawful by the Emergency Court—assuming, against all odds, that such a ruling might materialize someday.

Chief Justice Stone then proceeded to consider whether the EPCA violated due process. When the EPCA was enacted, he noted, “it was common knowledge” that “there was a grave danger of wartime inflation and the disorganization of our economy from excessive prices.”²⁹⁵ Given the “emergency” conditions, it was a “sufficient answer” to the meat dealers’ contentions that nothing *on the face* of the statute required the courts to uphold “their conviction for violation of a regulation before they could secure a ruling on its validity.”²⁹⁶ Because the meat dealers had failed to exhaust their administrative remedies, Chief Justice Stone continued, “we cannot assume” that they would have been convicted without legal redress if they had filed a protest.²⁹⁷ “Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners,” the majority explained, “could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed.”²⁹⁸ In this case, it was at least conceivable that the

291. See *infra* note 310 and accompanying text.

292. *Yakus* is cited for that proposition to this day. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

293. *Yakus*, 321 U.S. at 429–430.

294. *Id.* at 430–431.

295. *Id.* at 432.

296. *Id.* at 434.

297. *Id.*

298. *Id.* at 435.

Emergency Court could enter a final judgment on the legality of Rule 169 before the Government secured a conviction.

In stipulating this chain of events, the opinion ignored reality.²⁹⁹ The majority's position is that due process *in a criminal prosecution* is satisfied by any administrative procedure that *might* provide relief under some conceivable set of circumstances, even when the effectiveness of that procedure is concededly left to the agency's well-nigh unreviewable discretion. Proceeding from that premise, the majority hacked through the EPCA's due process problems one by one, showing how, "on their face" and interpreted with reference to the present "emergency," they did not violate "traditional" due process.³⁰⁰ Moreover, said the Court, the Act's splintering of enforcement proceedings from regulatory challenges "presents no novel constitutional issue."³⁰¹ The Court recognized

no principle of law or provision of the Constitution . . . which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations.³⁰²

To support its proposition that this feature presented no "novel" question, the Court relied on administrative schemes like the Hepburn Act, the Packers and Stockyards Act, and the Radio Act of 1927, which (it argued) also barred defenses to administrative orders when the defendant failed to avail itself of the administrative process.³⁰³ The analogy to these peacetime

299. Even conceding the majority's exhaustion rationale, the result "was a harsh one toward the extremely numerous small enterprises which might be affected and, realistically, might not have had an opportunity to invoke the prescribed remedies." Fuchs, *supra* note 136, at 877.

300. *Yakus*, 321 U.S. at 443-444. Chief Justice Stone exaggerated. The statutes he cited imposed penalties only *after* a special proceeding, conducted through a formal hearing process followed by immediate judicial review. *See id.* at 473-74 (Rutledge, J., dissenting); *see also* *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 667 (1915) ("There is no room to doubt the power of the state to impose a punishment heavy enough to secure obedience to such orders *after* they have been found to be lawful . . ." (emphasis added)).

301. *Yakus*, 321 U.S. at 444.

302. *Id.*

303. *Id.* at 445-47.

administrative schemes, the Court said, was “complete and obvious.”³⁰⁴ As Justice Rutledge argued in dissent, however, none of those statutes presented quite the combination of devices at issue in *Yakus*. In fact, the Supreme Court had never decided a case that squarely presented the “due process” question presented in *Yakus*.³⁰⁵

Chief Justice Stone distinguished *Ex Parte Young* by (again) declaring that the meat dealers were “not confronted with the choice of abandoning their business or subjecting themselves to the penalties of the Act before they have sought and secured a determination of the Regulation’s validity.”³⁰⁶ This was not a fair account of the situation: on any realistic account, the meat dealers had no adequate legal remedy. Never mind: “*we cannot assume that [OPA] would decline to “suspend or ameliorate the operation of a regulation during the pendency of proceedings to determine its validity.”*³⁰⁷ In this fashion, the majority rejected a due process challenge on the assumption that OPA *could* exercise a dispensing power it had plainly declined to exercise in the case under review.³⁰⁸

4. *The Dissents*

Two separate dissents in *Yakus* present differing responses to the majority’s opinion. Justice Owen Roberts, the lone holdover from a Republican administration, mounted a last stand in defense of the old order. The purported standards to guide OPA’s discretion, Justice Roberts pointed out, were broad enough to allow the Administrator to adopt “any conceivable policy.”³⁰⁹ By upholding OPA’s roving commission to control prices, Justice Roberts wrote, the majority had effectively overruled *Schechter*.³¹⁰ Moreover, the broad delegation of power, when

304. *Id.* at 446.

305. *Id.* at 476–77 & n.33 (Rutledge, J., dissenting).

306. *Id.* at 438 (majority opinion).

307. *Id.* at 438 (emphasis added).

308. OPA lawyers would later criticize this holding. See Hyman & Nathanson, *supra* note 3, at 590 n.18 (arguing that a “more realistic answer would seem to lie in the nature of the emergency that the statute was designed to meet.”).

309. *Yakus*, 321 U.S. at 451 (Roberts, J., dissenting).

310. *Id.* at 452.

combined with the Act's procedures and judicial review provisions, was

a solemn farce in which the Emergency Court of Appeals, and this court, on certiorari, must go through a series of motions which look like judicial review but in fact are nothing but a catalogue of reasons why, under the scheme of the Act, the courts are unable to say that the Administrator has exceeded the discretion vested in him.³¹¹

In his closing paragraphs, Justice Roberts bitterly protested the majority's failure to limit its holding to Congress's war powers.³¹²

Justice Rutledge's dissent, joined by Justice Murphy, was more ambivalent. In a crucial passage, Justice Rutledge stated:

Once it is held that Congress can require the courts criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the courts parties to doing so. This Congress cannot do . . . [W]henver the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process, more especially in criminal trials.³¹³

Crowell v. Benson would be a perfectly fine cite here: by its terms, the quoted passage echoes the themes of the "supremacy of the law" jurisprudence.³¹⁴ Even so, Justice Rutledge was prepared to concede that "Congress [may], by offering the individual a single chance to challenge a law or an order, foreclose for him all further opportunity to question it, though requiring the courts to enforce it."³¹⁵ In civil proceedings, he

311. *Id.* at 458.

312. *Id.* at 459-460.

313. *Id.* at 468 (Rutledge, J., dissenting).

314. *Cf.* *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Like the *Crowell* opinion, Justice Rutledge's *Yakus* dissent viewed due process and judicial independence as two sides of the same coin. A surrender of the constitutional baseline threatens both government overreach and judicial contamination.

315. *Yakus*, 321 U.S. at 471 (Rutledge, J., dissenting).

argued, Congress could compel enforcing courts to automatically enforce regulations in most circumstances, as long as the regulation was not “invalid on its face.”³¹⁶ In other words, the result in *Yakus* would have been constitutionally permissible, even perhaps in times of peace, if only OPA had refrained from sending *Yakus* to jail and instead sought civil penalties. Justice Rutledge even conceded that Congress could require courts to enforce regulations without regard to their validity in criminal cases—provided that “the special proceeding is clearly adequate, affording the usual rights to present evidence, cross-examine, and make argument, characteristic of judicial proceedings” and provided that the opportunity for an administrative appeal is “long enough so that the failure to take it reasonably could be taken to mean that the party intends, by not taking it, to waive the question actually and not by forced surrender.”³¹⁷ In short, the supremacy of the law could be largely replaced with administrative process in civil cases, and maybe even in criminal cases too.

For all its diffidence, Justice Rutledge’s dissent persuaded Congress to amend the EPCA’s administrative procedures.³¹⁸ The Stabilization Extension Act of 1944, enacted on June 30, 1944, extended price controls for a year.³¹⁹ But the law included several new procedural safeguards. It allowed courts to stay enforcement proceedings until the regulation was reviewed by the Emergency Court, provided that the invalidity of a regulation would be an absolute defense, eliminated the 60-day time limit to file a protest, and provided a mandamus action for undue delay.³²⁰ Congress also required OPA to conduct formal adjudications before promulgating a regulation, “a provision

316. *Bowles v. Willingham*, 321 U.S. 503, 526 (1944) (Rutledge, J., concurring). In this companion case decided on the same day as *Yakus*, Justice Rutledge concurred on the basis that *Willingham* involved “civil” deprivations of “property,” which, in his view, were subject to less due process protections than criminal deprivations of liberty. *Id.* at 525–26.

317. *Yakus*, 321 U.S. at 489 & n.41 (Rutledge, J., dissenting). Rutledge added the note on March 24, 1944, three days before the opinion was released to the public. Box 70, HARLAN FISKE STONE PAPERS, MANUSCRIPT DIVISION, LIBRARY OF CONGRESS, WASHINGTON D.C. (copy on file with authors).

318. *MANSFIELD ET AL.*, *supra* note 93, at 277–78.

319. Stabilization Extension Act of 1944, Pub. L. No. 383, 58 Stat. 632.

320. *MANSFIELD ET AL.*, *supra* note 93, at 277–78.

that anticipated in effect one of the features of the Administrative Procedure Act of 1946."³²¹ This belated recognition of rule-of-law concerns, it seems safe to say, casts doubt on the administration's full-throated defense of the original EPCA and on the *Yakus* Court's embrace of that position: was all that *really* necessary?

E. *And in the End*

On June 21, 1944, almost three months after *Yakus* was decided, OPA denied the renewed protests filed by the meat industry.³²² The Emergency Court did not hear any of the protests on the merits of Rule 169 until October 1944, several months after the Supreme Court had upheld the conviction in *Yakus*, and it did not decide the merits of the independent packers' challenge to the regulation until 1945, when the war was all but over.³²³ The judge in that case, Calvert Magruder, was well-familiar with the matter: as a judge on the First Circuit Court of Appeals, he had written the appellate opinion in *Yakus v. United States*.³²⁴

After years of delay, independent packers and slaughterers petitioned the Supreme Court for review. Justice Roberts was proven right: given the EPCA's breadth and rudimentary procedures, the meat packers had no chance of showing in any judicial forum, let alone on a petition for discretionary Supreme Court review, that OPA had exceeded its delegated authority.³²⁵ The Supreme Court denied certiorari.³²⁶

By that time, all was over but the shouting. In June 1945, Congress responded to the industry's plight by requiring the Price Administrator to assure a fair profit on the processing of

321. *Id.* at 278. The formal adjudication procedure was applicable only to aggrieved parties filing a protest after September 1, 1944. *Id.*

322. *Id.*

323. *Heinz v. Bowles*, 149 F.2d 277, 281 (Emer. Ct. App. 1945).

324. *See Rottenberg v. United States*, 137 F.2d 850, 851 (1st Cir. 1943).

325. *See Yakus v. United States*, 321 U.S. 414, 458–59 (1943) (Roberts, J., dissenting) (“[N]o court is competent, on a mass of economic opinion consisting of studies by subordinates of the Administrator . . . to demonstrate beyond doubt, that the considerations and conclusions of the Administrator from such material cannot support the Administrator’s judgment . . . but a few of the stated purposes of the act.”).

326. *E. Kahn’s Sons Co. v. Bowles*, 326 U.S. 719 (1945).

each species of livestock.³²⁷ This overturned the “critical” industry earnings standard “which had been so long fought for” by OPA.³²⁸ In November 1945, wartime rationing came to an end, and the sense of shared sacrifice that had sustained OPA during the war quickly dissipated before the “more focused opposition” of the meat industry.³²⁹ In time for the November elections, President Truman deregulated meat.³³⁰ But Democrats paid a political price for the meat shortages: during the “beefsteak elections” of 1946, Republicans took control of Congress for the first time in sixteen years.³³¹

IV. CONCLUDING REMARKS: THE LEGACY AND LESSONS OF *YAKUS*

Why should administrative lawyers and legal scholars care about *Yakus v. United States*? The case has generated neither copious Supreme Court citations nor sustained scholarly discussion. Its specific holdings regarding the exhaustion of administrative remedies and review preclusion bear no comparison to contemporary, foundational administrative law decisions, from *Seminole Rock*³³² to *Chenery*.³³³ And the procedural deficiencies that were ignored so cavalierly in *Yakus* were soon addressed by Congress—first in the 1945 amendments to the EPCA and then in the APA, whose administrative procedures and judicial review provisions afford regulated parties a fair measure of protection. One can even argue that the seemingly troublesome holding of *Yakus* makes perfect sense in an administrative system that has come to operate principally through informal rulemaking. Modern-day notice-and-comment proceedings are subject to elaborate procedural protections, and pre-enforcement review—a rough substitute for the *Ex Parte Young* relief denied in *Lockerty* and *Yakus*—is a

327. See *Danz v. Reconstruction Fin. Corp.*, 192 F.2d 1012, 1012–13 (Emer. Ct. App. 1952) (discussing the amendment).

328. Hyman & Nathanson, *supra* note 3, at 625 & n.107.

329. Jacobs, *supra* note 104, at 934.

330. Hyman & Nathanson, *supra* note 3, at 627.

331. Emelyn Rude, *The “Beefsteak Election”: When Meat Changed the Course of American Politics*, TIME (Aug. 30, 2016), <https://www.time.com/4471656/the-beefsteak-election/> [<https://perma.cc/3B5J-EH9B>].

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

333. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

well-nigh foregone conclusion in any significant rulemaking proceeding. It is hard to see how that system could achieve bureaucratic rationality, uniform application, and stability *without* precluding subsequent collateral attacks in district courts.³³⁴ Viewed in that light, *Yakus* may be foundational in a good sense—blissfully ahead of its time, perhaps, in anticipating the demands of the regulatory state.

Our own view is not quite so sanguine. The EPCA, we hope to have shown, was a full-blown embodiment of a constitutionally unconstrained administrative state, and *Yakus* was quite arguably the most fulsome judicial endorsement of that vision. Our remarks in this Part concern that forgotten—but, we think, nonetheless foundational—aspect of the case. Subpart A describes what one might call, with apologies to Professor Henry Hart, *Yakus*'s true Dialectic:³³⁵ precisely because *Yakus* affirmatively laid to rest then-still-lingering notions of the supremacy of the law, the case itself receded from memory. It remained forgotten so long as, and again because, the basic constitutional presumptions of post-New Deal administrative law remained largely uncontested. Of late, however, those presumptions have become the subject of a vibrant and occasionally heated administrative law debate that resonates with supremacy-of-the-law themes last articulated in the 1930s.³³⁶ Subpart B sketches our thoughts on *Yakus*'s lessons in the context of that debate.

A. *Yakus v. United States: Dialectics*

The story of *Yakus*, we trust, leaves a sense of unease. In part, the discomfort stems from the gut sense that this should not have happened to Al Yakus. But that sentiment does not carry very far. Bad things happen to lots of good people in wartime, and while the meat dealers' fate was undoubtedly harsh, it is

334. Statutory law reflects this intuition. See, e.g., 33 U.S.C. § 1369(b)(2) (2012); 42 U.S.C. § 7607(b)(2); *id.* § 9613(a) (precluding judicial review of agency action in enforcement suits).

335. Cf. Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (discussed *infra* Part IV.A).

336. See generally Gillian E. Metzger, *Foreword: 1930's Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

hardly the stuff of *Korematsu*³³⁷ or *Ex Parte Quirin*.³³⁸ The true source of discomfort—ours, at any rate—is that *Yakus* runs up very hard against basic constitutional precepts. Before we deprive citizens of their rights (and send them to jail), they must have a chance to contest the validity of the rule under which they are being convicted in an independent court. Professor Henry Hart—a former OPA attorney—confronted the problem in his famous *Dialectic*. Show me a case, he wrote, that abrogates that principle, “and I will rethink *Marbury*.”³³⁹ And to Hart’s mind, *Yakus* was an exceedingly close case.

There are several ways to address *Yakus*’s *Marbury* problem. The first, most obvious option is to park the EPCA and *Yakus* in a wartime exception corner. Henry Hart flirted with that interpretation³⁴⁰ but did not rely on it, for reasons that strike us as convincing. A big difference exists between a wartime statute or decision—a *genuine* emergency measure, recognized as such—and a statute or decision that uses war as a pretext to realize broader political ambitions. The EPCA and *Yakus* fit the latter description. The EPCA was a reenactment of the National Industrial Recovery Act, and *Yakus* was a replay of *Schechter*. Wartime exigencies merely served to lend added plausibility to the New Deal’s legal positions.³⁴¹

A second way of dealing with *Yakus* is to evade the constitutional difficulties. That move is exemplified by *Adamo Wrecking Co. v. United States*,³⁴² the only Supreme Court decision to feature any meaningful discussion of the case. *Adamo Wrecking*

337. *Korematsu v. United States*, 323 U.S. 214 (1944).

338. 317 U.S. 1 (1942).

339. Cf. Hart, *supra* note 335, at 1378–79 (“Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I’m going back to re-think *Marbury v. Madison*.”).

340. *Id.* at 1379–80 (*Yakus* sanctioned departures from due process “only because an alternative procedure had been provided which, in the exigencies of the national situation, the Court found to be adequate.” (emphasis added)).

341. See *supra*, notes 103, 283–85 and accompanying text. *Ex post* evidence supports our interpretation. Even before the case was overturned in *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018), the United States government never relied on *Korematsu*. It relies on *Ex Parte Quirin* only *in extremis*. It relies on *Yakus* all the time, with no concession to wartime exigencies.

342. 434 U.S. 275 (1978).

concerned a Clean Air Act provision that requires parties to bring pre-enforcement challenges to certain emission standards within sixty days and, with a narrow exception, bars judicial review thereafter.³⁴³ The defendant in *Adamo Wrecking* argued that the regulation under which it had been prosecuted was not actually an “emission standard” subject to the preclusion provision. Chief Justice Rehnquist’s majority opinion deemed the challenge permissible (and in the end meritorious). The statute at issue in *Yakus*, the Chief Justice wrote, broadly foreclosed any challenges outside the Emergency Court.³⁴⁴ The Clean Air Act, by contrast, permitted a challenge—and *de novo* review—on the question of whether the underlying regulation was in fact an emission standard (but not on any other question).³⁴⁵ Four dissenters took issue with the majority’s artful statutory reconstruction.³⁴⁶ But neither they nor the majority intimated that an across-the-board preclusion of review might pose constitutional problems. Only Justice Powell’s brief concurrence adverted to the due process issue—and, predictably, proposed to distinguish *Yakus* as a wartime case.³⁴⁷

The third way of dealing with the uncomfortable teaching of *Yakus* is to read it as it as case about the exhaustion of remedies: there *was* a process, if only the defendants had used it. That, in the end, was Henry Hart’s answer.³⁴⁸ To our minds, it is not a convincing answer. Put aside any quarrels over Hart’s contention that constitutional minima are satisfied so long as some court in the United States remains open. Put aside, too, the fact that even the EPCA’s procedural charade evidently measured up to Hart’s standard of “adequacy”: the plausibility

343. 42 U.S.C. § 7607(b) (2012).

344. *Adamo Wrecking*, 434 U.S. at 278.

345. *Id.* at 284–85.

346. *Id.* at 291 (Stewart J., dissenting); *id.* at 293 (Stevens, J., dissenting).

347. *Id.* at 290–91 (Powell, J., concurring); see also *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 n.15 (1987) (*Yakus* “was motivated by the exigencies of wartime . . . and, most significantly, turned on the fact that adequate judicial review of the validity of the regulation was available in another forum.”). More recently, Justice Alito questioned in oral argument whether *Yakus* “would be decided the same way today and not in wartime” and suggested that *Yakus* is troubling on due process grounds. Transcript of Oral Argument at 50, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (U.S. Mar. 25, 2019).

348. Hart, *supra* note 335, at 1369.

of his view depends on an a-contextual, compartmentalized view of constitutional constraints. For a ready example, it is one thing for Congress to withhold federal court jurisdiction or for that matter “adequate” administrative procedures in matters of “public” right, for an agency that is tightly controlled by legislative rules. It is a very different thing to dispense with judicial controls over an agency with roving rulemaking and enforcement authority over the entire economy.³⁴⁹ For an equally ready example, it is one thing to preclude effective judicial review, or for that matter to demand the exhaustion of chimerical administrative procedures. It is a very different thing to *then* mobilize the federal courts for enforcement purposes.³⁵⁰ In short, the plausibility of viewing *Yakus* as a mere exhaustion case hangs on one’s willingness to splinter and so to marginalize “supremacy-of-law” notions, the better to make way for a virtually unconstrained administrative process.

To be sure: *Yakus* is not the only case to reflect that program and orientation. However, the case was widely recognized as emblematic by numerous leading scholars, including the founders of the then-emerging disciplines of Administrative Law and Federal Courts scholarship. Early casebooks and treatises place *Yakus* at the heart of the administrative law enterprise and discuss it prominently.³⁵¹ Writing in 1951, for example, Professor Kenneth Culp Davis looked back on the “supremacy of law” period, when “some writers . . . tried unsuccessfully to confine administrative power through a concept called ‘the rule of law.’”³⁵² Professor Davis’s treatise celebrated the passing of that “old” administrative law—“limited” as it was to judicial review, “with concentration on the separation of

349. See *Yakus*, 321 U.S. 414, 451–52 (1944) (Roberts, J., dissenting).

350. See *id.* at 468 (Rutledge, J., dissenting).

351. See DAVIS, *supra* note 54, §§ 12, 68, 91, 179, 190; WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 142–151, 812 (2d ed. 1947) (excerpting and discussing *Yakus*); WALTER GELLHORN & CLARK BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 99–101, 747–55 (3d ed. 1954) (excerpting and prominently discussing *Yakus* and *Willingham* as delegation and due process cases); LOUIS L. JAFFE & NATHANIEL L. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 34–48, 72–74, 107–139, 761, 906–909 (4th ed. 1976); ROBINSON & GELLHORN, *supra* note 54, 67–106 (prominently discussing and excerpting *Yakus* and the doctrines at issue in the case).

352. See DAVIS, *supra* note 54, § 8.

powers and non-delegation.” In lieu of the separation of powers, administrative law could now focus “upon the administrative process itself.”³⁵³ That view is manifestly inconsistent with constitutionally grounded doctrines of administrative law.³⁵⁴ If the “administrative process itself” is to become the core of the enterprise, the constitutional doctrines must be severed and marginalized. The EPCA’s architects and defenders saw the point, and the *Yakus* Court embraced it. And precisely because their vision triumphed so completely, *Yakus* eventually receded from the legal debate and the case law.

Professor Adrian Vermeule has recounted this dialectic in an ambitious, often compelling book.³⁵⁵ His examination begins where this Article began, many pages ago: with the jurisprudence at the dawn of the New Deal, and *Crowell v. Benson* in particular. Though limited to questions of pure fact, Vermeule argues, the judicial deference embraced by the *Crowell* Court proved the undoing of a constitutionally grounded framework of administrative law.³⁵⁶ *Crowell* made room for administrative discretion for compelling reasons, including the commission’s fact-finding expertise and the economy of the overall administrative system.³⁵⁷ The question then becomes how much courts can in the end contribute to administrative rationality and the smooth functioning of the system, and the answer is, not a great deal.³⁵⁸ Over time, law “abnegated” and gave way to deference—first on “mixed” questions of law and fact; then on questions of law and, eventually, even on questions of the agency’s jurisdiction. Law in a formal and constitutional sense became marginal, both in the colloquial sense of “not very im-

353. *Id.* § 1; see also JAFFE & NATHANSON, *supra* note 351, at 1 (“[O]ur purpose, here, is to consider the making and enforcing of law conceived as public policy by means of what is now called the administrative process.”).

354. DICKINSON, *supra* note 23, at 75.

355. VERMEULE, *supra* note 24.

356. *Id.* at 28–29, 214.

357. *Id.* at 24.

358. The *Crowell* Court, Professor Vermeule observes, already thought in such “marginalist” terms (except when it did not). Following David Currie, Vermeule describes *Crowell* as “schizophrenic.” *Id.* at 28, 214. While that may be a tad harsh, some of Chief Justice Hughes’s rule-of-law encomia do read like a dissent from the more “marginalist” portions of his opinion.

portant” and in the sense of operating as an outer boundary rather than an organizing principle.³⁵⁹

On Professor Vermeule’s own account, *Yakus* marks a milestone in the marginalization of constitutionally grounded doctrines of administrative law.³⁶⁰ Our microlevel analysis complements and qualifies the author’s account in one respect and rounds it in another. Whereas Professor Vermeule describes the trajectory just sketched as a self-driven, “internal” process of “abnegation,” our ground-level analysis shows real-world actors at work; and the EPCA and the *Yakus* case appear as an important moment of purposeful administrative state-building, not just an inflection point on “the arc of the law.”³⁶¹ And whereas Professor Vermeule describes the marginalization of rule-of-law constraints as a one-dimensional, law-versus-deference affair, we have described “law” at the time of *Crowell* as an “elaborate structure,” buttressed by constitutionally-based, interconnected “outworks.”³⁶² So long as the outworks remained connected, they were capable of bending without breaking. Isolate the “outworks”: they lose their purpose and the prospect of mutual reinforcement. That, we have argued at length, was the genius of *Yakus*—the deliberate splintering of legal doctrines that, in the supremacy-of-law imagination, belonged together: the separation of powers, delegation, due process, judicial review. Conjoin those elements: there is no very good answer to Justice Owen Roberts’s dissent in *Yakus*. Pull them apart: there is no very good answer to Chief Justice Stone’s majority opinion, or for that matter to Henry Hart’s *Dialectic*.

B. *The Lessons, Perhaps, of Yakus*

What ensured *Yakus*’s descent into a legal memory hole, we have just suggested, is the broad acceptance of its premises or perhaps better, its vision of an effectively unconstrained administrative process. But that consensus has been shaken. Long accepted administrative law canons, including *Chevron* defer-

359. *Id.* at 7.

360. *Id.* at 44–45.

361. *Cf. id.*, at 2.

362. *Supra* Part I.

ence, have become intensely controversial.³⁶³ The rise of an executive-led government and the corresponding decline of the powers of Congress have likewise sparked intense debate.³⁶⁴ Expansive delegations of legislative powers, coupled with highly deferential judicial review and increasingly “unorthodox” forms of lawmaking and regulation,³⁶⁵ have prompted scholars from diametrically opposed vantages to argue that administrative law is an unlawful break with constitutional government,³⁶⁶ or a thin veneer of law for an essentially “Schmittian” state above and beyond effective legal control.³⁶⁷ Even scholars who resist such dramatic claims have noted the improvisational nature of administrative law and called for a “constitutional reassessment.”³⁶⁸ Those scholarly contentions, moreover, are hardly academic; they have spilled over into judicial decisions and into the public debate.³⁶⁹ What, in that context, is one to make of, or learn from, *Yakus v. United States*?

For defenders of the administrative project, *Yakus* need not cause any great consternation. The *Dialectic* shows the way; and whatever misgivings one might have about the EPCA’s bare-bones procedures, they were soon supplemented and remedied, first by statutory amendments to the act and then by the APA. What remains to be done is what Professor Vermeule has done with commendable candor: face up to the case and its implications.³⁷⁰

363. See Kristin Hickman & Nicholas R. Bednar, *Chevron’s Inevitability*, 85 GEO. WASH. L. REV. 101, 125–26 (2017) (noting recent calls to overrule *Chevron*).

364. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 4–12 (2010); Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Christopher C. DeMuth, *Can the Administrative State Be Tamed?* 8 JOURNAL OF LEGAL ANALYSIS 121 (2016).

365. See Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

366. See HAMBURGER, *supra* note 26.

367. Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1096 (2009).

368. Robert R. Gasaway & Ashley C. Parrish, *Administrative Law in Flux: An Opportunity for Constitutional Reassessment*, 24 GEO. MASON L. REV. 392 (2017).

369. See Metzger, *supra* note 336, at 3–4 (criticizing contemporary “anti-administrativism”); Cass Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 47–54 (discussing these judicial opinions).

370. VERMEULE, *supra* note 24, at 44–45.

We are less confident about *Yakus's* lessons for “anti-administrativists”³⁷¹—a camp that (for present purposes) we take to include not only declared foes of “the administrative state” but also and especially more diffident scholars who are uneasy about an enterprise that is poorly constrained by constitutionally unmoored, pragmatically improvised doctrines. But we do suggest that the case should prompt deeper thought about fundamental questions of administrative law and constitutional government.

In the scholarly literature, attacks on the administrative state and its law have generally taken one of two forms: high-level constitutional argument that declares the entire enterprise unconstitutional and unlawful *ab ovo*;³⁷² or else, attacks on particular doctrines, from *Auer* to *Baltimore Gas* to *Chevron* and on through the alphabet.³⁷³ Neither line of argument seems very plausible, even on the proponents’ own terms. Constitutional formalism’s most formidable proponent in the Administrative Law profession (Gary Lawson) has declared the enterprise effectively hopeless.³⁷⁴ And meliorist proposals for more demanding judicial review—to the extent that they are not simply placeholders for much larger discontents³⁷⁵—meet with Professor Vermeule’s ready reply: judicial deference expanded for perfectly good reasons, including the systemic cost of legalism.³⁷⁶ Thus, we suspect that a program to re-constitutionalize the administrative state cannot rest on grim-faced, uncompromising formalism or modest calls for somewhat less judicial deference. Rather, effective reform would have to build more comprehensively, coherently, and painstakingly on some for-

371. Metzger, *supra* note 336.

372. HAMBURGER, *supra* note 26; Lawson, *supra* note 26.

373. *Auer v. Robbins*, 519 U.S. 452 (1997); *Baltimore Gas & Electric Co. v. NRDC, Inc.*, 462 U.S. 87 (1983); *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

374. See Lawson, *supra* note 26.

375. Sunstein & Vermeule, *supra* note 369, at 41–42.

376. See VERMEULE, *supra* note 24, at 209–15. Consistent with Professor Vermeule’s analysis and prediction, we frankly wonder whether the proponents of simply repealing *Chevron* (judicially or by statute) have fully considered the consequences of unleashing the courts on administrative agencies, in circumstances where the judiciary itself is deeply divided over constitutional and jurisprudential first principles. That concern, among others, prompted *Chevron* in the first place.

mula that retains the root aspirations of *Crowell* and *Schechter*, though not necessarily their specific doctrinal teachings—a formula that reconciles the demands of liberal constitutionalism with the inescapable realities of modern government.

If that is roughly right, such a re-articulation will hang on re-connecting the constitutional pieces torn asunder in *Yakus*. That is an exceedingly tall order. It is one thing to describe the conflict of visions between an integrated, structural view of the constitutional world and the slice-and-dice world of *Yakus*. It is much harder to ascertain precisely what—other than a generally shared sense of the legal universe—made the outworks hang together. (“Supremacy of the law” is no answer, only a different way of asking the question.) We suggest that *Yakus* may shed light even on that question.

All *Yakus* and merchants like him engaged in the most quotidian of private transactions: the sale of a basic commodity to willing customers, in a near-atomistic market and with no health or safety concerns anywhere in sight. Under a limited, constitutional government, a prohibition against that conduct—a pristine matter of private, common law right—is an extraordinary thing. It is yet more extraordinary to criminalize the transaction without affording the accused a full and fair defense, including a challenge to the rule under which he is being prosecuted. That, in fact, had been the common constitutional understanding from the Founding to the New Deal.³⁷⁷ In matters of “public right,” Congress may provide such process as it sees fit. In matters of private right, the process must be due process, and that can only be had in an independent court. That intimate connection between rights and structure is still vivid in *Crowell* and *Panama Refining* and *Schechter Poultry*. It gets buried in *Yakus*.³⁷⁸ Without a common baseline of private

377. Nelson, *supra* note 28, at 594–602.

378. We recognize the danger of overstating the point. The notion of private right had always been a mix of common-law background rules and intuitions, and thus somewhat fluid and messy. (Professor Nelson acknowledges the point. *Id.* at 567.) Nothing in the Constitution itself immunizes market transactions *per se*; and by the time of *Yakus*, the Supreme Court had given Congress a very wide berth in subjecting private transactions to public control. It had sanctioned minimum price regulations for products such as milk, *see Nebbia v. New York*, 291 U.S. 502 (1934); minimum wage regulations for ordinary services, *see W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937); and the state cartelization of entire industries, *see Par-*

rights, though, the “outworks of an elaborate structure” are bound to become disconnected: there is nothing to connect them to, or to one another. What remains is an administrative process constrained only by stray remnants of constitutional doctrine that have lost their sense and purpose. At that point, maybe we should rethink *Marbury* after all.³⁷⁹

A few recent judicial opinions have sought to articulate a structural, integrated perspective.³⁸⁰ However, a re-engagement with the pre-*Yakus* body of administrative law cannot be accomplished by private litigants, who will founder on the shoals of doctrinal disjunction and judicial deference. Nor can it be the work of Supreme Court Justices, encumbered as they are by the vagaries of litigation. Rather, any such re-engagement would require a broad, deep, and sustained scholarly debate over the constitutional-administrative middle ground.³⁸¹ And sooner rather than later in that debate, the participants will encounter Albert Yakus.

ker v. Brown, 317 U.S. 341, 355 (1943). Even so, there is something gratuitous and (to our minds unnerving) about *Yakus*. The Court could have found any number of ways of keeping Al Yakus out of jail without thwarting the EPCA’s objective (for example, by staying the prosecution until the relevant rule had actually been subject to pre-enforcement review in the Emergency Court). And it could have found a way of re-articulating essential constitutional requirements (for example, by suggesting that the EPCA might not pass constitutional muster in peacetime). The Court said, and did, no such thing. Instead, the Court characterized the statute as the baseline and the defendants’ contentions as extraordinary and perhaps even extravagant. See *Yakus v. United States*, 321 U.S. 414, 444 (1944).

379. Cf. *supra* note 339 and accompanying text.

380. Justice Thomas in particular has urged a broad re-examination of administrative law in light of first principles. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1220 (2015) (Thomas, J., concurring); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1243 (2015) (Thomas, J., concurring); *B & B Hardware, Inc. v. Hargis*, 135 S. Ct. 1293, 1310 (2015) (Thomas, J., dissenting).

381. Important contributions to the scholarly literature point in this direction. See, e.g., Gasaway & Parrish, *supra* note 368 (attempting such a reconciliation and contending that the common law provides an ingenious “adjudicatory baseline” that functions as our legal system’s “benevolent omnipresence on the ground”); Mila Sohoni, *Agency Adjudication and Judicial Nondelegation: An Article III Canon*, 107 NW. U. L. REV. 1569 (2013); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

CORPUS LINGUISTICS AND “OFFICERS OF THE UNITED STATES”

JAMES C. PHILLIPS, BENJAMIN LEE & JACOB CRUMP*

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* Dr. Phillips is currently a nonresident fellow with Stanford Law School’s Constitutional Law Center and an attorney in private practice. He has Ph.D. in Jurisprudence and Social Policy, as well as a J.D., from UC-Berkeley. Mr. Lee is currently a research fellow and linguistics analyst at Brigham Young University’s J. Reuben Clark Law School. He has a B.A. in linguistics from BYU and is an incoming J.D. candidate at Harvard Law School. Mr. Crump is currently a law clerk to Chief Judge Murray Snow in the District of Arizona. He has a bachelor’s degree in linguistics and a J.D. from Brigham Young University.

INTRODUCTION

With the Supreme Court's decision in *Lucia v. SEC*¹ this past June, the Court had a chance to revisit the meaning of "Officers of the United States."² However, it largely punted, with only Justice Clarence Thomas seriously engaging with the term's original meaning. In so doing, he relied on recent scholarship by Professor Jenn Mascott that contends that the term's original meaning is much broader, encompassing anyone employed by the government who has a continuing duty.

To arrive at that conclusion, Professor Mascott performed "corpus linguistic-like" analysis on the papers of six founders, covering 1783–1789, a total of about 7.7 million words from 16,000 texts.³ However, by using the new beta version of the Corpus of Founding Era American English ("COFEA"), we take this analysis one step further in several different dimensions. First, by using the entire COFEA, we expand the time period of our inquiry to 1760–1799. Second, across this time period, we look not only at these six Founders' papers, but also other documents in COFEA from the Evans Early American Imprint Series, which contains texts from more ordinary Americans, a wider variety of types of texts, and on a wider variety of subjects than the founders' writings. Finally, we look at legal documents from Hein Online's collection. In all, these three different sources consist of about 150 million words from nearly 120,000 texts. Third, we expand our search beyond just "officer(s)" or "officer(s) of the United States" to include officer within 5 words of the words "public" or "civil"; other "officer(s) of (the) (federal) government"; "officer(s) of (the) (federal) government"; and variations on "publicly employed." We sample approximately 150 instances from each of these four searches, balancing across all three sources (Founders, Evans, and Hein).

1. 138 S. Ct. 2044 (2018).

2. U.S. CONST. art. II, § 2, cl. 2.

3. Specifically, Professor Mascott's data consisted of 7,656,698 words from 16,683 files taken from the National Archive's Founders Online in the fall of 2015. Jennifer L. Mascott, *Who are the "Officers of the United States"?*, 70 STAN. L. REV. 443, 505 (2018).

We find the linguistic landscape to be messy, but more in line with Professor Mascott's proffered definition than the Supreme Court's ahistorical one, though this conclusion is not without some limitations. In so doing, we model how corpus linguistic analysis looks quite different when the question is not which of multiple senses is the most common, but rather what the breadth of the meaning a term encompasses. This application broadens the use of corpus linguistic tools to determining constitutional meaning beyond what it has been used for in the past.

I. BACKGROUND

A. *Lucia v. SEC*

In *Lucia*, the Court was faced with the question whether Securities Exchange Commission administrative law judges ("ALJs") were inferior officers under the Constitution, and thus cannot be appointed, as they have been, by SEC staff members. To answer this question the Court had to answer the long-vexing question of who exactly is an officer of the United States. The case produced four opinions. The dissenting opinions by Justice Breyer and Justice Sotomayor make little to no analysis of the original public meaning of "officers of the United States." In the majority opinion, Justice Kagan acknowledges that the central issue of the case is interpreting the Appointments clause, but she argues that there is no need to further spell out the meaning of the clause because *Lucia* can be resolved by relying on the precedent set by *Freytag v. Commissioner*.⁴ Justice Kagan writes that the ALJs relevant to *Lucia* are "near-carbon copies" of special trial judges of the U.S. Tax Court dealt with in *Freytag*.⁵ The rest of Kagan's majority opinion argues for the parallels between the tax court judges and ALJs. Both hold continued office, exercise significant discretion, and carry out important functions.

Justice Thomas was the only Justice willing to engage with the question of what the original meaning of "officers of the United States" means. In a short concurring opinion, with Jus-

4. 501 U.S. 868 (1991).

5. *Lucia*, 138 S. Ct. at 2052.

tice Gorsuch joining, Justice Thomas agreed that *Lucia* closely parallels *Freytag*, and that for this case alone *Freytag* is sufficient to reach a decision. But he argues that although elaborating on the significant authority test from *Buckley v. Valeo*⁶ may not be necessary to decide this case, doing so would be useful in providing guidance for future cases that do not parallel *Freytag* as closely as *Lucia* does. Justice Thomas argues that the best way to answer this question is by determining the original public meaning of “officers of the United States.” Citing to Federalist 76 and relying heavily on Professor Mascott’s research, Justice Thomas concludes that the original public meaning encompasses all federal civil officials.

According to Justice Thomas, the phrase’s meaning to the founders would include all federal officials “with responsibility for an ongoing statutory duty.”⁷ Thus, to the Founders, the term would “encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty.”⁸ And in Justice Thomas’s view, “[t]he ordinary meaning of ‘officer’ was anyone who performed a continuous public duty.”⁹ So an officer of the United States was “someone in ‘a public charge or employment’ who performed a ‘continuing’ duty.”¹⁰ Justice Thomas again relies on Professor Mascott for evidence that “officers of the United States” is not a term of art, but simply means federal officers, as well as to show that even those with simply “ministerial . . . duties” were also considered officers at the time of the Founding.¹¹

B. Professor Mascott’s Research

In an attempt to provide a test that will yield consistent results across courts, Mascott identified the original meaning of

6. 424 U.S. 1 (1976) (holding that to be an “officer of the United States” one must exercise “significant authority”).

7. *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring) (citations omitted).

8. *Id.* (citing Mascott, *supra* note 3, at 454).

9. *Id.* at 2057 (citing Mascott, *supra* note 3, at 484–507).

10. *Id.* (quoting *United States v. Maurice*, 26 F.Cas. 1211, 1214 (C.C.D. Va.1823) (No. 15,747) (citing 8 ANNALS OF U.S. CONG. 2304–05 (1799) (statement of Rep. Harper) (“explaining that the word officer ‘is derived from the Latin word *officium*’ and ‘includes all persons holding posts which require the performance of some public duty’”)).

11. *Id.* (citing Mascott, *supra* note 3, at 484–507).

"officers of the United States," from Article II of the Constitution.¹² Mascott used a research technique called corpus linguistics in addition to canvassing the historical record, allowing her to get an overall sense of what "officer" meant in the 18th century.¹³ Mascott's conclusion challenges the traditional interpretation that the Appointments Clause applies only to those government officials exercising "significant authority."

In contrast to previous legal applications of corpus linguistics, which mainly attempted to decide between a limited number of predetermined senses, Mascott's use of the methodology was more open-ended. She endeavored to answer the broad question of what "officer" meant during the founding era.¹⁴ The results of her analysis point to a much broader interpretation that would include all government employees who have any extended government responsibility.¹⁵

To reach that conclusion, Mascott first showed that "officers of the United States" is indeed ambiguous. She provides evidence that this phrase is not a term of art¹⁶ and that "officer" does not seem to have any special meaning in the Constitution.¹⁷ Therefore, "officer," as used in Article II, should be interpreted according to its ordinary public meaning during the Founding. To understand public meaning, Mascott first turned to dictionaries and corpus linguistics. She used ten Founding-era dictionaries, as well as commentaries and legal dictionaries. The dictionaries suggest that an "officer" was anyone who held some type of public office or government duty.¹⁸ The importance or prestige of the person's office seemed to have no impact on whether or not he was labelled as an officer. Mascott also employed Nathan Bailey's *New Universal Etymological Dictionary of English* as a sort of linguistic corpus, searching the dictionary for every time it used "office(s)" and "officer(s)." Those results suggest that "officer" was also used for less pres-

12. Mascott, *supra* note 3, at 456.

13. *Id.* at 495–96.

14. *Id.*

15. *Id.* at 564.

16. *Id.* at 471.

17. *Id.* at 472–73.

18. *Id.* at 486–490.

tigious jobs like record keepers, assistants, and employees with menial responsibilities.¹⁹

Mascott also performed searches of *Elliot's Debates*, the *Federalist* and *Anti-Federalist Papers*, *Farrand's Records*, and an early version of the Corpus of Founding Era American English. She searched for both "officer" and "officer(s) of the United States." Mascott coded each concordance line neutrally, not trying to fit the meaning of each instance into one of several predetermined senses.²⁰ Rather, she examined the context and noted how the key term was used, especially with regards to power and importance. While there are occasional examples that give evidence for a narrower interpretation of "officer," overall the evidence suggests that "officer" should be given a broader interpretation, one that includes public employees of lower rank. COFEA's collocate searches show that "officer(s)" and "office(s)" frequently co-occur with words that do not denote importance of power of position, such as "auditors," "clerks," and "subordinate."²¹

In addition to dictionary and corpus searches, Mascott also researched the historical record. In particular, she examined the appointments that occurred in the Continental Congress and First Federal Congress, as well as the statutes passed in the relevant time period. Mascott also analyzed the workings of the departments of the executive branch of the federal government, including payroll lists and other documentary records.²² Overall, these inquiries also show that "officer" had a larger scope than only those with "significant authority."

Based on the results of her research, Mascott ultimately concludes that the Supreme Court's understanding of "officers of the United States" is too narrow. The correct interpretation should be anyone with "responsibility for an ongoing statutory duty."²³

19. *Id.* at 492.

20. *Id.* at 496–506.

21. *Id.* at 505–06.

22. *Id.* at 508.

23. *Id.* at 564.

II. CORPUS LINGUISTICS & THE DATA

In this Article, we seek to test Justice Thomas's and Professor Mascott's conclusions by expanding the scope of the corpus linguistic inquiry. First, to get an idea of the attested senses of "officer" at the founding, we survey more dictionaries than she did. Next, we perform corpus analysis on not just papers of six Founders from 1783–1789, but the same Founders' papers from 1760–1799, as well legal materials from this same time period and materials (books, pamphlets, broadsides, etc.) from more common authors covering this same period. In sum, by expanding the number of words analyzed (about twenty times more than Mascott), the types of documents, and the types of authors, we can see if her findings, and thus Justice Thomas's concurrence, hold up more broadly in founding-era American English. First, though, we provide a brief introduction to corpus linguistics and the databases we analyze.

Corpus linguistics may sound enigmatic to the legal ear, but it has very familiar elements to those who have spent their careers comparing various examples of the use of a term, as lawyers and judges often do in sifting through a body (or corpus) of precedent.

A. *The Purpose of Corpus Linguistics*

Corpus linguistics is an empirical study of language that is based on the notion that "the best way to find out about how language works is by analyzing real examples of language as it is actually used."²⁴ Corpus linguistics gets its name from the databases (or bodies) of texts called *corpora* (or *corpus* in the singular) that linguists create to represent the speech community they seek to study.²⁵

Corpus linguistics is founded on the twin ideas that a corpus of texts can be constructed that accurately represents a particular speech community and that one can "empirically describe linguistic patterns of use through analysis of that corpus."²⁶

24. PAUL BAKER, GLOSSARY OF CORPUS LINGUISTICS 65 (2006).

25. See TONY MCENERY & ANDREW HARDIE, CORPUS LINGUISTICS: METHOD, THEORY AND PRACTICE 1–2 (2011).

26. Douglas Biber & Randi Rippen, *Introduction* to THE CAMBRIDGE HANDBOOK OF CORPUS LINGUISTICS 1, 1 (Douglas Biber & Randi Rippen eds., 2015).

Corpus linguistics thus “depends on both quantitative and qualitative analy[sis].”²⁷ And corpus linguistics results “in research findings that have much greater generalizability and validity than would otherwise be feasible.”²⁸ Because “a key goal of corpus linguistics is to aim for replicability of results, data creators have an important duty to discharge in ensuring the data they produce is made available to analysts in the future.”²⁹

B. Tools of Corpus Linguistics

Linguistic corpora have several tools that enable insight into linguistic meaning that is generally not possible “by human linguistic intuition alone.”³⁰ One is *frequency*—seeing how often a word appeared, including over time or across different types of genres or registers³¹ of language use can provide insight into meaning.³² And noting the different frequencies of senses can provide evidence of how a word might have been understood

27. Douglas Biber, *Corpus-Based and Corpus-driven Analyses of Language Variation and Use*, in THE OXFORD HANDBOOK OF LINGUISTIC ANALYSIS 159, 160 (Bernd Heine & Heiko Narrog eds., 2010).

28. *Id.* at 159.

29. MCENERY & HARDIE, *supra* note 25, at 66.

30. *Id.* at 36.

31. There are competing views on the difference between genres and registers. Some linguists use them interchangeably, some stick to one or the other, and some try to draw distinctions. Usually the distinction is that register is the variety of language used for a specific social setting or linguistic context and usually reflects differing levels of formality versus colloquialism (e.g. face-to-face conversation). Genre is the type of written or spoken discourse, and it is culturally and linguistically unique (e.g., story, news article, research paper, business letter). Some linguists take the stance that “a genre is a recognizable communicative event characterized by a set of communicative purpose(s) identified and mutually understood by the members of the professional or academic community in which it regularly occurs.” VIJAY KUMAR BHATIA, ANALYSING GENRE: LANGUAGE USE IN PROFESSIONAL SETTINGS 13 (1993); *see also* JOHN M. SWALES, GENRE ANALYSIS: ENGLISH IN ACADEMIC AND RESEARCH SETTINGS (1990). Others argue that “a register is a variety associated with a particular situation of use (including particular communicative purposes)” (e.g., face-to-face conversation, academic writing). DOUG BIBER & SUSAN CONRAD, REGISTER, GENRE, AND STYLE 6 (2009). Examples given for genre include a business letter or a newspaper article. We to use this distinction too but acknowledge that not all linguists care to distinguish at all.

32. TONY MCENERY & ANDREW WILSON, CORPUS LINGUISTICS: AN INTRODUCTION 82 (2d ed. 2001).

in a given context by the speech community represented by the corpus.

Another tool is called *collocation*—the “tendency of words to be biased in the way they co-occur [or co-locate].”³³ We like to think of collocates—the words that collocate with a particular word—as “word neighbors.” This concept was first traced in linguistics to the mid-1950s with the observation that “you shall know a word by the company it keeps,”³⁴ but has been around in the law for much longer under the canon of construction *noscitur a sociis* (“it is known by its associates”).³⁵ Thus, we would not be surprised to see the word *dark* often appear in the same semantic environment as the word *light*, but would not expect *dark* to appear frequently near the word *perfume*. As this example illustrates, just because one word is a collocate of another does not mean the words are synonyms—it just means they have some kind of relationship. Collocation can be examined via raw frequency or by statistics that measure how often a word appears near another compared to how often the word appears in the corpus. While collocation can reveal new patterns in language usage, it tends to be an exploratory tool rather than one that is used to test hypotheses about language.

In addition to collocation, corpus linguistic analysis also “looks at variation in somewhat fixed phrases, which are often referred to as lexical bundles.”³⁶ Generally, lexical bundles are defined as a repeated series or grouping of three or more words.³⁷ In other linguistic circles these lexical bundles are referred to as N-grams or clusters. (For this paper we will refer to these as clusters since this is what they are referred to in the corpus linguistics software used in this study.) For example, “Do you want me to” and “I don’t know what” are two of the most common clusters in conversational English.³⁸ Clusters are

33. See SUSAN HUNSTON, *CORPORA IN APPLIED LINGUISTICS* 78 (2002).

34. JOHN FIRTH, *PAPERS IN LINGUISTICS, 1934–1951*, at 11 (1957).

35. *Noscitur a sociis*, *BLACK’S LAW DICTIONARY* (10th ed. 2014).

36. GENA R. BENNETT, *USING CORPORA IN THE LANGUAGE LEARNING CLASSROOM: CORPUS LINGUISTICS FOR TEACHERS* 9 (2010).

37. *Id.*; see also DOUG BIBER ET AL., *LONGMAN GRAMMAR OF SPOKEN AND WRITTEN ENGLISH* 990 (1999).

38. BIBER ET AL., *supra* note 37, at 994.

“not complete phrases” and “are statistically defined (identified by their overwhelming co-occurrence).”³⁹

The final main tool of a linguistic corpus—what we consider the heart of corpus linguistics analysis—is the concordance line.⁴⁰ Concordance lines are familiar to all who have ever done a search in Google or Westlaw or LexisNexis. They are merely snippets of search results, centered on the word or phrase searched. One can click on a concordance line and see the word or phrase in greater context. And it is the slow and difficult analysis of concordance lines—the qualitative aspect of corpus linguistic analysis—that usually provides the best and most important data in corpus linguistic analysis. It is also very similar to running a search in a legal database that results in 100 cases, and then clicking through and looking at each result to get a sense of what courts are saying or doing in a particular area. The image below shows a display of concordance lines from COFEA.

39. BENNET, *supra* note 36, at 9.

40. Related to concordance lines is the Key Word in Context (“KWIC”), but KWIC is more of an exploratory tool and is merely a way to display concordance lines to quickly scan for patterns.

“Officers of the United States”

| SOURCE | YEAR | PRIMARY AUTHOR | GENRE | CONTEXT |
|---------------------------------|------|---------------------|-------|--|
| 1 205289 | 1799 | SHAW, WILLIAM SMITH | | ... they have declared it null & void - that a senator is not an officer of the united states |
| 2 254819 | 1778 | WASHINGTON, GEORGE | | ... them , or on parole among us , .. so long as they continue to be officers of the united states |
| 3 US REPORTS, VOL 3, 191 TO 390 | | | | ... their named in the first and second counts, was the lawful officer of the united states |
| 4 290520 | 1789 | GREGORY, STEPHEN | | ... a may be in my absence occasion for some marine or navy officers of the united states |
| 5 308708 | 1794 | HAMILTON, ALEXANDER | | ... the commissioned officers thereof be appointed as other officers of the united states |
| 6 255447 | 1778 | WASHINGTON, GEORGE | | ... he in confinement or on parole , so long as they continue to be officers of the united states |

And by clicking on a search result, one can look at it in its semantic environment—the context of its use (see below). This enables the researcher to qualitatively analyze each occurrence.

| SOURCE | DECADE | YEAR | PRIMARY AUTHOR | AUTHOR TYPE | GENRE | SUB GENRE |
|--------|--------|------|---------------------|---------------------|--------------|--------------|
| 205289 | 1790 | 1799 | Shaw, William Smith | Shaw, William Smith | Adams Papers | Adams Papers |

FULL CONTEXT

all their time , & neither of the bills have passed the house & it is very doubtful whether the bankrupt bill will pass the house . The Senate after spending nearly a fortnight on Blounts impeachment have declared it null & void -- that a senator is not an **officer of the United States** & therefore unimpeachable . I tremble for my country if it has not energy enough to punish a man " guilty of crimes & misdebeanoars " . The meeting of the president & his son was to me very affecting . He took him in his arms the tears all

C. COFEA

In order to use corpus linguistics to explore how Americans in the late 1700s used language, and thus what they might have understood the Constitution to mean, we need a general, historical corpus that covers the time period and adequately rep-

resents American English usage. For this we turn to the Corpus of Founding-Era American English,⁴¹ which covers 1760–1799—the years ranging from the beginning of the reign of King George III to the death of George Washington.⁴² The Authors have been involved in the creation of COFEA: partially on our own and partially with the aid of computer scientists working at the law school,⁴³ we compiled three distinct corpora to enable this Article's research. (These corpora form the bulk of COFEA's underlying data.) We then loaded each corpus into a freely available software designed by Professor Laurence Anthony called AntConc that enables one to apply the tools of linguistic corpora to one's own dataset—a build-your-own corpus computer program.⁴⁴ Since we conducted this research, COFEA has become publicly available. The same searches we performed could be replicated on the public version and should produce very similar results.

D. *This Article's Three Mini-Corpora*

The first corpus we created contained texts from the Evans Early American Imprint Series. Evans consists of "nearly two-thirds of all books, pamphlets, and broadsides known to have been printed in this country between 1640 to 1821."⁴⁵ These materials, particularly the books, often contain various other types of language usage, including sermons and fiction. Evans also contains works from all types of early American authors, from the famous to the forgotten to the never known. Of the nearly 40,000 titles available in Evans, the University of Michigan's Text Creation Partnership (TCP) worked with the owners of Evans (NewsBank/Readex Co. and the American Antiquarian Society) "to create 6,000 accurately keyed and fully searcha-

41. Pronounced like "Sophia" with an initial k-sound (koh-fee-uh).

42. CORPUS OF FOUNDING-ERA AM. ENGLISH, <https://lawcorpus.byu.edu> [<https://perma.cc/UW3R-UZ8U>] (last visited Mar. 1, 2019).

43. Thanks to Wayne Schneider and Harrison Fry.

44. *AntConc Homepage*, LAURENCE ANTHONY'S WEBSITE, www.laurenceanthony.net/software/antconc [<https://perma.cc/26JF-YS2X>] (last visited Mar. 1, 2019). We used AntConc 3.5.0, a developmental 64-bit version designed for Windows.

45. *Evans-TCP: Evans Early American Imprints*, TEXT CREATION PARTNERSHIP, <http://www.textcreationpartnership.org/tcp-evans/> [<https://perma.cc/TF6G-G28G>] (last visited Feb. 22, 2019).

ble . . . text editions . . . [that are] fully available to the public.”⁴⁶ All of these texts that fell within the time period of 1760–1799 we used for our Evans Corpus. We could classify this corpus as a general, historical, raw corpus.

The second corpus we created comprises texts from the National Archives Founders Papers Online project.⁴⁷ Founders Online contains the “correspondence and other writings of six major shapers of the United States”: “George Washington, Benjamin Franklin, John Adams (and family), Thomas Jefferson, Alexander Hamilton, and James Madison.”⁴⁸ Besides the writings of these Founders, the collection also contains letters written to them by a variety of Americans, including other Founders and more common folk. Again, we limited the date range to 1760–1799. And because the files were downloaded in the fall of 2015, our corpus does not reflect additional files the National Archives has since added.

Our final corpus contains materials from HeinOnline, which is partnering with BYU in providing its subscription materials for the creation of COFEA. Our Hein Corpus consists of legal materials from 1760–1799: statutes, cases, legal papers, legislative debates and materials, and so on. The table below shows the characteristics of our three corpora:

46. *Id.*

47. FOUNDERS ONLINE, NAT’L ARCHIVES & RECORDS ADMIN., <https://founders.archives.gov/> [<https://perma.cc/42BN-HLHX>] (last visited Feb. 22, 2019).

48. *Id.*

Table 1: This Study's Three Corpora

| Source | Material Type | Author Type | Millions of words | # of Texts |
|-------------------------|---|---|-------------------|------------|
| Evans American Imprints | Books (of various material, including sermons and fiction), pamphlets, and broadsides | Both "ordinary" people and elites | 53.4 | 2881 |
| Founders On-line | Letters and papers | Mostly six founders, but also other Americans | 43.9 | 115281 |
| Hein Online | Legal (cases, statutes, legislative records, etc.) | Various American government entities | 48.6 | 351 |

By relying on these three corpora, rather than just one or two, we have more representation of "types" of Americans and "types" of language usage. For instance, Evans provides more "ordinary" types of documents from more "ordinary" Americans. This should provide insight into more general meanings. Hein provides legal documents from a variety of Founding-era American sources and should provide a good view into the legal usage of terms. And Founders give us documents not covered by the other two corpora—letters—as well as a heavy dose of language usage from important founders who either directly framed or at least significantly influenced the Constitution (though with letters from more "ordinary" Americans as well). Together these three corpora—one general, one class-specific (elites), and one topic-specific (legal)—provide a comprehensive picture of language usage during the American founding.⁴⁹

Additionally, these corpora somewhat map onto varying theories of originalism. For those most concerned with how "ordinary" people at the Founding would have understood a word or phrase in the Constitution, the Evans Corpus is the most appropriate. For those most concerned about what the

49. The coverage of our three corpora is not perfect. We would have liked to have a corpus of newspapers from the era. But given that newspapers then were less likely to have a distinctive style of usage, we do not feel the lack of a newspaper corpus changes the results. That, however, is an empirical question for future research to answer.

Founders may have intended, understanding how the Founders used language can provide insight into the intent of specific word choices in the constitutional text, and the Founders Corpus will have most value. Finally, for those most concerned with how American lawyers of the founding era would have understood the Constitution, the Hein Corpus will be of most interest. But since we do not know which type of word *officer(s)* is—ordinary or legal—it is helpful to look at all three corpora.

E. The Limitations of Founding-Era Dictionaries

As has been explained more thoroughly elsewhere,⁵⁰ dictionaries, especially Founding-era dictionaries, have a host of limitations for determining constitutional meaning. For instance, they generally don't define phrases; they tend to be normative rather than descriptive. Founding-era dictionaries tend to be the work of just one mind, making them idiosyncratic. And they tend to plagiarize earlier dictionaries, which creates a false consensus and does not accurately reflect contemporaneous usage, among other problems. Finally, a dictionary is unlikely to answer the question of what types of government positions would count as an officer, even if Founding-era dictionaries did not have the flaws noted above. In short, dictionaries are a good starting place, but they have serious flaws that call into question relying on them for answers to constitutional meaning.

III. FINDINGS

We first survey Founding-era dictionaries, ordinary and legal, to get the linguistic lay of the land as to the possible senses of officer. We next explore frequency data, as well as collocates of and clusters containing officer. Finally, we dig into concordance line analysis.

50. See Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 283–87 (2019).

A. *Founding-era Dictionary Definitions*

We found thirty Founding-era ordinary dictionaries⁵¹ and three legal dictionaries (we used the term Founding-era loosely as it covered somewhat beyond the time period we are treating as the founding era: 1760–1799). Unfortunately, some of these dictionaries had a definition for neither "officer" nor "office." This left us with the following twenty-four dictionaries (presented in order of publication):

| Dictionary | Author(s) | Date | Words |
|--|------------------------------|------|--------------------|
| <i>Glossographia</i> | Thomas Blount | 1707 | office |
| <i>The New World of Words</i> | Edward Phillips | 1720 | officer |
| <i>Dictionarium Britannicum</i> | Nathan Bailey | 1736 | officer; office |
| <i>Lingua Britannica Reformata</i> | Benjamin Martin | 1749 | officer; office |
| <i>A New Etymological Dictionary</i> | Nathan Bailey & Joseph Scott | 1755 | office |
| <i>A New Classical English Dictionary</i> | John Kersey | 1757 | officer; office |
| <i>A New Universal English Dictionary</i> | William Rider | 1759 | officer |
| <i>A New Complete English Dictionary</i> | Daniel Bellamy | 1760 | officer |
| <i>The Royal English Dictionary</i> | Daniel Fenning | 1761 | officer |
| <i>A Universal Etymological English Dictionary</i> | Nathan Bailey | 1763 | officer; office |
| <i>The New Spelling Dictionary</i> | John Entick | 1765 | officer |
| <i>A New and Complete Law Dictionary</i> | T. Cunningham | 1771 | officer; office |
| <i>The Complete English</i> | Frederick Barlow | 1772 | officer |

51. Technically one of these dictionaries was not a Founding-era one: *The Oxford English Dictionary*. But because the *Oxford English Dictionary* includes archaic definitions and provides date ranges for when a sense entered (and possibly left) the English lexicon, we included it in this group.

| | | | |
|--|-------------------------------|------|--------------------|
| <i>Dictionary</i> | | | |
| <i>A New Dictionary of the English Language</i> | William Kennrick | 1773 | officer |
| <i>A New Law Dictionary</i> | Giles Jacob et al. | 1773 | officer |
| <i>The New and Complete Dictionary of the English Language</i> | John Ash | 1775 | officer; office |
| <i>The Royal Standard English Dictionary</i> | William Perry | 1775 | Officer |
| <i>A Critical Pronouncing Dictionary</i> | John Walker | 1775 | Officer |
| <i>A Complete Dictionary of the English Language</i> | Thomas Sheridan | 1780 | Officer |
| <i>A New General English Dictionary</i> | Thomas Dyche & William Pardon | 1781 | Officer |
| <i>English Etymology</i> | George Lemon | 1783 | Office |
| <i>A New Law Dictionary</i> | Richard & John Burn | 1792 | Office |
| <i>A General Pronouncing and Explanatory Dictionary</i> | Stephen Jones | 1797 | Officer |
| <i>The Union Dictionary</i> | Thomas Browne | 1800 | Officer |

Sometimes the definitions of *officer* were unhelpful. For instance, many dictionaries proffered some version of the following definition: “one who is in an office.” But some dictionaries put forth more detailed definitions, and those with unhelpful *officer* definitions sometimes had more instructive *office* definitions.

A series of dictionaries⁵² put forth three senses: (1) “a man employed by the public”; (2) “a commander in the army [or navy]”; (3) “one who has the power of apprehending criminals [and arresting debtors].”⁵³ Only the first sense seems relevant

52. Note that these dictionaries may have been plagiarizing each other.

53. See EDWARD PHILLIPS, *THE NEW WORLD OF WORDS* (7th ed. 1720) (providing only the “[o]ne that is in any office” sense and the military sense); WILLIAM RIDER, *A NEW UNIVERSAL ENGLISH DICTIONARY* 600 (1759) (adding “and arresting debtors” to third sense); DANIEL FENNING, *THE ROYAL ENGLISH DICTIONARY* 720 (1761)

to the constitutional debate here since the President appoints all military officers and at the Founding, without a federal police power, there would have been no officers of the United States with the power to apprehend criminals or debtors. We call these three senses the public employment, military, and law enforcement senses of *officer*.

The public employment sense could potentially be quite broad, certainly broader than the "exercising significant authority" definition currently in use by the Supreme Court. Some founding-era dictionaries hint at a broad employment sense of *officer* in their definition of *office*. A 1707 dictionary includes as part of its definition of *office* "a man [that] hath some employment in the affairs of another," seemingly pointing to the reality of both public and private officers.⁵⁴ A 1757 dictionary referred to *office* as "an employment, or the place where any business is managed."⁵⁵ It is not clear whether this dictionary was combining two different senses here, one for a position and one for a physical location, or if the physical location sense of *office* applied to both parts. The use of the punctuation here points toward the latter, though that could be reading too much into a founding-era dictionary. Similarly, a 1749 dictionary included as one of its five senses of *office*: "place, or employment."⁵⁶

A 1775 dictionary, however, distinguished the employment sense from a location-based sense when it provided as a distinct sense of *office* as "a public charge, a public employment," distinguishing this sense from two other senses: "a business, an

(adding "and arresting debtors" to third sense); JOHN ENTICK, *THE NEW SPELLING DICTIONARY* 246 (1765) (providing only the "[o]ne in office" sense and the military sense); 2 FREDERICK BARLOW, *THE COMPLETE ENGLISH DICTIONARY* 217 (1772) (adding "and arresting debtors" to third sense and a fourth sense: "any person in office"); WILLIAM KENRICK, *A NEW DICTIONARY OF THE ENGLISH LANGUAGE* 516 (1773); WILLIAM PERRY, *THE ROYAL STANDARD ENGLISH DICTIONARY* 257 (1775) (providing only the military sense and the "[o]ne in office" sense); JOHN WALKER, *A CRITICAL PRONOUNCING DICTIONARY* (1791); THOMAS SHERIDAN, *A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE* (1780); STEPHEN JONES, *A GENERAL PRONOUNCING AND EXPLANATORY DICTIONARY* 225 (2nd ed. 1797); THOMAS BROWNE, *THE UNION DICTIONARY* 315 (1800) (providing only the public employment and military senses).

54. *Office*, THOMAS BLOUNT, *GLOSSOGRAPHIA* (1707).

55. *Office*, JOHN KERSEY, *A NEW CLASSICAL ENGLISH DICTIONARY* (7th ed. 1757).

56. *Office*, BENJAMIN MARTIN, *LINGUA BRITANNICA REFORMATA* (1749).

agency” and “a place where business is transacted, a room in a house appropriated to a particular business.”⁵⁷

Some dictionaries also put forth a related, but sometimes distinct duty-based sense. For instance, a 1763 dictionary lumped the employment and duty senses together, adding a third sense (but clearly distinguishing from a place sense): “the part or duty of that which befits, or is to be expected from one; a place or employment; also a good or ill turn.”⁵⁸ A 1736 dictionary by the same author separated the duty sense from a charge or trust sense, though seemingly including a kind of duty sense with the latter: sense 3— “[t]he mutual aid and assistance which mankind owe to each other; also a particular charge or trust, whereby a man is authoriz’d to do something”; sense 2— “duty, or that which virtue and right reason directs mankind to do.”⁵⁹ The reason is unclear. A 1749 dictionary also proffers as one of its five senses of *office* simply “part, or duty.”⁶⁰ Relatedly, a 1781 dictionary provided an appointment sense of *office*: “[i]n general signifies a person that has a particular post or business appointed to him.”⁶¹ Likewise, a 1760 dictionary put forth a post sense of *officer*: “a person possessed of a post or office.”⁶²

While the Oxford English Dictionary (OED) is not a dictionary contemporaneous to the American Founding, it does list senses of words that are now obsolete and includes a date range for such senses, or a date when it has evidence a still extant sense entered the English lexicon. It thus has relevance to our inquiry. The OED has two senses related to the public/civil sense of *officer*. One of them the OED states is now obsolete, indicating that the potential range of usage was from 1390-1669, pre-dating the founding era: “[a] person who performs any duty, service, or function; a minister; an agent.”⁶³ That

57. *Office*, 2 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775).

58. *Office*, NATHAN BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1763) (listing as its fourth sense: “a place where any business is managed”).

59. *Office [in Ethicks] & Office [in a Civil Sense]*, NATHAN BAILEY, DICTIONARIUM BRITANNICUM (1736).

60. *Office*, MARTIN, *supra* note 56.

61. *Officer*, THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (18th ed. 1781).

62. *Officer*, DANIEL BELLAMY, NEW COMPLETE ENGLISH DICTIONARY (1760).

63. *Officer* (3), OXFORD ENGLISH DICTIONARY (3d ed. 2004).

Founding-era dictionaries still sometimes contain a similar sense means one of two things: these dictionaries are plagiarizing older ones that contain this sense, or the OED's ending date for the sense is too early.

The OED also notes a sense of *officer* meaning "[a] person who holds a particular office, post, or place."⁶⁴ And for this sense it lists four sub-senses, though only one is relevant.⁶⁵ Starting at least in 1380 and continuing to the present is the *officer* sense meaning "[a] person who holds a public, civil, or ecclesiastical office or appointment; a servant or minister of the Crown; an appointed or elected functionary in the administration of local government, a public corporation, institution, etc., and in early use esp. in the administration of law or justice."⁶⁶ There is a lot packed into that definition. It includes ecclesiastical officers, judicial and law officers, public and civil officers (which it appears to distinguish), elected or appointed local government officers, government ministers, and officers of public corporations. Some of these are not relevant for understanding the original public meaning of "officers of the United States." For example, we don't have federal ecclesiastical officers in this country. And it is unclear to what degree local government officers map onto the federal government; likewise servants or ministers of the Crown.

Finally, we examined the three legal dictionaries noted above, which did not appear to include any unique sense of *officer* or *office* but did provide some clarification. A 1773 dictionary distinguished between public and private officers.⁶⁷ It defined a public officer as one "who had any duty concerning the public," regardless of whether "his authority is confined to narrow limits." Thus, "it is the duty of his office, and the nature of that duty, which makes him a public officer, and not the extent of his authority." A 1771 legal dictionary observed that "[o]fficers are distinguished into civil and military, according

64. *Id.* at (1).

65. Two are officers of private institutions and one appears to be military-related.

66. OXFORD ENGLISH DICTIONARY, *supra* note 63, at *Officer* (1b).

67. *Officer*, GILES JACOB ET AL., A NEW LAW DICTIONARY (10th ed. 1773).

to the nature of their several trusts.”⁶⁸ It also clarified the potential breadth of the public employment sense of *office*: “[e]very office being an employment; but there are employments which do not come under the denomination of offices; such as an agreement to make hay, plough land, herd a flock, etc. which differ widely from that of a steward of a manor.”⁶⁹ This dictionary appears to claim that *office* is a subset of public employment. It is a little unclear where the line is being drawn. Perhaps it is the temporary nature of these other employments. Or perhaps it is the contract nature (“an agreement to”) of the employment, contrasted with the trust, charge, duty, post, or appointment of an officer. In fact, the definition appears to hint at stewardship as the distinguishing factor.

But it was not the scope of that stewardship that was the distinguishing factor since, according to this legal dictionary:

Every man is a publick officer, who have any duty concerning the publick; and he is not the less a publick officer, where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty, which makes him a public officer, and not the extent of his authority.⁷⁰

Admittedly, it is still a bit unclear what “the nature of that duty” is that distinguishes officers from others who are merely publicly employed, though this dictionary is perhaps drawing the distinction between contract labor and a longer-term stewardship.

The final legal dictionary we examined, published in 1792, hints at an even broader definition of *office*, and thus *officer*, when it noted statutory requirements of taking the sacrament applied to

every person admitted into any office, civil or military, or who shall receive any pay by reason of any patent or grant from the king, or shall have any command or place of trust in England, or in the navy, or shall have any service or employment in the king’s household.⁷¹

68. *Officer*, 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (2d ed. 1771).

69. *Id.*

70. *Id.*

71. *Office*, 2 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 168 (1792).

While three of these senses of *office* have appeared in other dictionaries, the sense of someone who is paid from a royal patent or grant is new. Further, it appears this legal dictionary also considers as officers “all persons teaching pupils[,] schoolmasters and ushers . . . and practisers of the law.”⁷² (It is unclear, however, whether this educator sense of *officer* is a private or public officer.) These last examples of officers, however, are just that—examples rather than definitions.

From this dictionary survey, it appears there are the following broad senses of *officer*:

1. Public/civil officer;
2. Military officer;
3. Law enforcement officer;
4. Ecclesiastical officer;
5. Judicial officer (perhaps also including lawyers);
6. Private officer;
7. College or educational officer.

However, most of these senses are either irrelevant to the constitutional inquiry (ecclesiastical, private, etc.), or not really debated (military officer, etc.). We therefore chose to focus just on the public/civil sense of *officer*.

Parsing dictionary definitions, we could perhaps create three sub-senses for the public/civil sense of *officer*:

1. Appointed to or in a public post, business, charge, trust, office, or place;
2. Performing any authorized public duty, service, function, or stewardship;
3. Hired by the public to do something (of any nature or duration).

However, senses one and two may not be distinct. One may not be able to perform any authorized public duty, service, function or stewardship without first being appointed to or placed in a public post, business, charge, trust, office or place. We will have to explore this more in the corpus data.

72. *Id.*

But it is clear that the Supreme Court's definition does not appear to be a Founding-era one, because our survey of dictionaries did not indicate that a necessary condition of being an officer is to exercise significant authority if significant is to mean anything. (If significant just means government authority, then the word is meaningless in the Court's definition of officer.) Of course, perhaps, given all of the flaws of Founding-era dictionaries, this "exercising significant authority" sense was just missed by eighteenth-century lexicographers, either because it was lumped in with another sense or through error. While unlikely to be completely missed by every dictionary, it certainly is possible, and corpus analysis is necessary.

Finally, thinking through the use of *public employment* as a definition of *officer*, we propose the following ways that term could interact with the definition of an *officer*:

1. If one is publicly employed, i.e., hired by the government to do something, one is also considered an officer;
2. All officers are publicly employed, but not all who are publicly employed (i.e., hired by the government) are officers;
3. *Publicly employed* is a term of art that means officer, and thus those hired by the state who are not officers are not publicly employed;
4. Being publicly employed is different from being an officer.

We note that delineating these possibilities will often be tricky. Options one and three will frequently look the same. And if one is merely referring to an officer being in public employment, it could be one, two, or three. We next turn to the corpus for answers.

B. COFEA and Public Employment

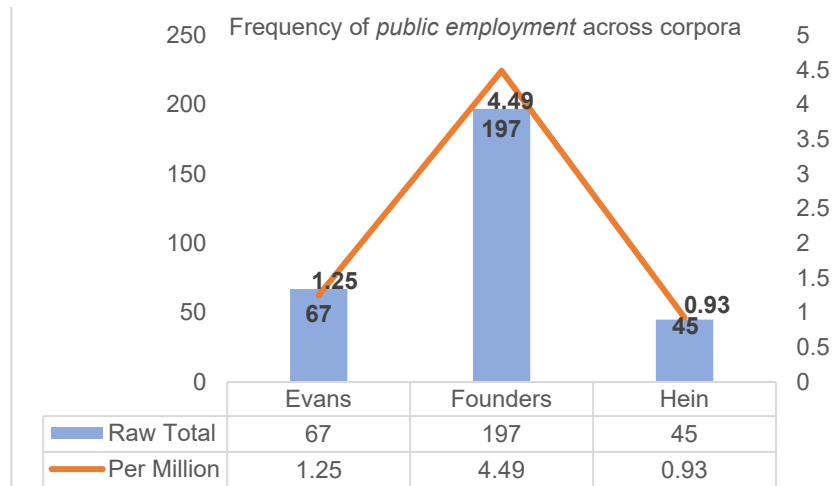
We first turn to *public employment*, including its variations.⁷³ Besides the four possible senses noted above (given the difficulty of delineating some of them) we also added these categories:

5. Either sense 1 or 3 (but can't tell which);

73. "Public(k) employment(s)," "public(k)ly employed," and "public(k) employ."

6. Either senses 1, 2, or 3 (but can't tell which);
7. Other senses.
8. Ambiguous.

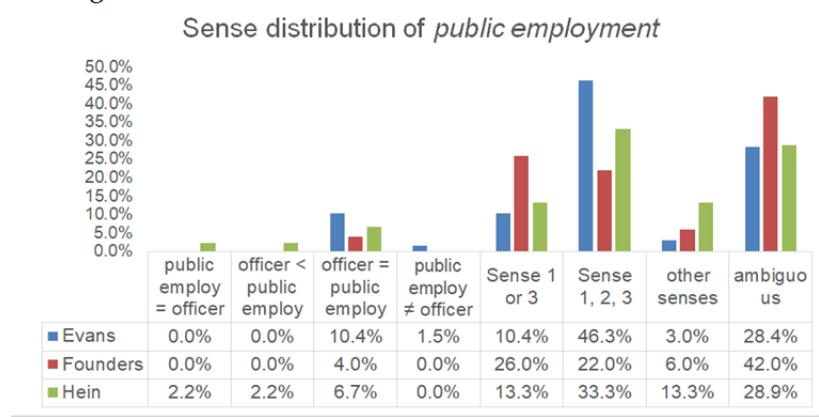
We first report the frequency of *public employment* (and its variations) across the three smaller corpora that make up COFEA. We note both raw totals as well as frequency per million since all three smaller corpora are not exactly the same size.



The term appears 3.6 times more frequently in Founders than Evans, and 4.8 times more often in Founders than Hein. It is perhaps not surprising that the term appears most frequently in the Founders corpus since that corpus consists of papers of men charged with running the government or the military during much of the time period COFEA covers. What is interesting is that the term appears 1.3 times more often in more ordinary writings by more ordinary authors than it does in legal materials, though that difference is not huge. This *could* point towards *public employment* not having a unique legal meaning, but certainly does not prove the point. After all, if there is a legal term-of-art sense of *public employment*, it could just occur mostly in legal materials whereas an ordinary sense of the term could appear mostly in ordinary materials. This frequency disparity across corpora can only point at the possibility of something, not prove it.

To analyze the sense distribution, we sampled fifty instances of *public employment* (and its variations) from the Founders

Corpus but classified each instance from the other two smaller corpora because their totals were so close to 50. Below are our findings:



While it is clear that *public employment* is related to the term *officer* in Founding-era American English, not much more is clear from the sense distribution data. The most common sense of *public employment* is sense three: where *officer* and *public employment* are used interchangeably such that *public employments* is a term of art for *officer* and is not used if one is hired by the state but not an officer. Still, at a frequency ranging from 4–10.4%, the sense does not dominate the data. Of course, when we were unable to distinguish between senses one and three, or between sense one, two, or three, there is a good possibility given how infrequently senses one and two clearly occurred, that in those instances sense three was the operative one. If that's the case, then sense three would occur 67.1% (Evans), 52% (Founders), or 53.3% (Hein) of the time.

What does all of this mean for determining the original meaning of “officers of the United States”? For the cautious it may mean little. After all, most of the time we could not point to a particular sense of *public employment*. For the less cautious, it could mean that not everyone hired by the government is publicly employed and thus an officer. But it does not necessarily tell us where to draw the line between those hired by the government and those publicly employed (*i.e.*, officers).

Perhaps a more qualitative look at the data will shed further light on the relationship between *public employment* and *officer* and thus the meaning of "officers of the United States."⁷⁴ For the first sense—that to be employed by the government was to be an officer—we only found one relatively clear example (from Hein), and it was a U.S. Congressman arguing that senators were publicly employed—"is not a seat in this honorable body 'a public employment'?"—because "every public post, which entitles to receive a compensation, great or small, from the public, is considered, in the proper legal sense, as an office of 'profit.'"⁷⁵ This somewhat begs the question as to what a public post is. Further, this type of linguistic evidence is less helpful since the Senator could be arguing for his meaning because of an end he wants to accomplish rather than because of his linguistic beliefs. There is little evidence, and weak evidence at that, of sense one.

There was similarly only one possible instance of sense two (that *officer* is a subset of *public employment*), likewise an example from Hein. In discussing a claim brought by a landlord against the government because the private building being leased as the War Office burnt down, being "an officer or agent of the Government," which is also referenced as being a government officer or his servants, is labeled as "be[ing] in public employment."⁷⁶ But one instance of this sense is not much.

Likewise, we only found one example of sense four (*public employment* is distinct from being an *officer*). In an example from Evans, a "Mr. Worthy" was described as being "much employed in offices in the town," but as having "modestly de-

74. The following footnotes for the instances of *office* or *officer* reference the name of the individual file in the corpus from which the sample was taken. For files that have official names, we have provided those names. For files without formal names, we have provided the name of the file we gave the file as we designated it while creating the corpora. The files corresponding to the footnotes are available at <https://www.dropbox.com/sh/i8dpum8vmnhy6n4/AACGdIUWSXw033xXxqLXCxYLza?dl=0> [<https://perma.cc/R2E6-N2AY>] and can be accessed for verification purposes. Our coding is available at <https://www.dropbox.com/sh/ngk6mik0undnhoh/AAAdEBAprQlkxZOQ-QLg4COa?dl=0> [<https://perma.cc/R692-879P>].

75. 8 ANNALS OF U.S. CONG. 2307 (1798) (statement of Rep. Harper).

76. 1 AMERICAN STATE PAPERS: CLAIMS 440 (1814).

clined all public employment, and public offices.”⁷⁷ Admittedly, the language used here is a bit tough to decipher. To be “employed in offices in the town” is neither to be publicly employed nor to be in public office. Granted, perhaps being employed in an office is referring to the location where one works. Mr. Worthy could have worked in private offices in town, or he could have been employed in a state office but not have had his employment raised to the level of being publicly employed or holding public office. Likewise, the phrase “all public employment, and public offices” seems to imply the two are distinct. Though it is possible to read the two senses as synonyms. In the end, the evidence for sense four is scarce and weak.

As already quantitatively noted, the evidence is stronger for sense three (*public employment* means *officer*, and not all hired by the government are considered publicly employed). The 1780 Massachusetts Constitution, in the context of the “frame of government” the people had adopted “caus[ing] their public officers to return to private life” and the need “to fill up vacant places, by certain and regular elections and appointments,” declared that “all the [legally qualified] inhabitants of this Commonwealth . . . have an equal right to elect officers, and to be elected, for public employments.”⁷⁸ This language also implies that one obtains public employment through either election or appointment, rather than perhaps just merely being hired. Similarly, Robert Morris, referring to his elected position in the Pennsylvania state legislature, treated such office as synonymous with “public employment” and “seats of authority.”⁷⁹ Likewise, “[p]ublic employments” was elsewhere used interchangeably with the public’s “rulers.”⁸⁰

A congressional debate during the second Washington term equated public employments with offices in the context of a debate over officer salaries:

77. ENOS HITCHCOCK, *THE FARMER’S FRIEND, OR THE HISTORY OF MR. CHARLES WORTHY* 270 (1793).

78. MASS. CONST. art. VIII; *id.* art. IX.

79. ROBERT MORRIS, *TO THE CITIZENS OF PENNSYLVANIA* 2 (Philadelphia, Hall & Sellers 1779).

80. JAMES DANA, *A SERMON, PREACHED BEFORE THE GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT, AT HARTFORD, ON THE DAY OF THE ANNIVERSARY ELECTION, MAY 13, 1779*, at 20 (Hartford, Hudson and Goodwin 1779).

[I]t was for the common interest of the people that persons selected for office should be fit and proper to fill their respective offices. And it was a fact, that from the dispersedness of the population of the country, and from other circumstances, there was great difficulty in finding suitable persons to fill the offices of Government. In other countries, Mr. A. said, where their Governments had been of long standing, persons were trained up with a view to public employments; but in this country this had not been the case, and, therefore, the [President] found the circle from which to select proper characters for office was very confined. It was, therefore, the more necessary that such an allowance should be made to officers of Government as should induce fit persons to accept of them; such as (to use a vulgar but strong expression) would *command the market*. Five hundred dollars, more or less, was nothing when compared with fitness for office.⁸¹

A 1792 letter by one Tobias Lear, declining an "appointment" and "post[] of honor" offered to him, equated such with "public employment."⁸² Further, a later American discussion of a 1689 debate in the House of Commons about whether to exclude "placemen" (political appointees to public office) from that house, noted that placemen should not be excluded "because otherwise the fittest persons for public employments would remain excluded."⁸³ Similarly, an eighteenth-century American recounting of an ancient Greek debate equated "public employments" with governing.⁸⁴ Another discussion of ancient practices treated being "admitted to important stations," "public employment," and "place[s]," and "offices" as synonymous.⁸⁵

81. 6 ANNALS OF U.S. CONG. 2004 (1797).

82. Letter from Tobias Lear to George Washington (Apr. 5, 1792), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/05-10-02-0125> [<https://perma.cc/JUM4-LLTR>] (last visited Feb. 22, 2019).

83. 2 JAMES BURGH, POLITICAL DISQUISITIONS OR, AN ENQUIRY INTO PUBLIC ERRORS, DEFECTS, AND ABUSES 175 (1774).

84. CHEVALIER (ANDREW MICHAEL) RAMSAY, THE TRAVELS OF CYRUS. TO WHICH IS ANNEXED, A DISCOURSE UPON THE THEOLOGY AND MYTHOLOGY OF THE PAGANS (Burlington [N.J.], Isaac Neale 1793).

85. 2 BURGH, *supra* note 83, at 80–82.

A 1786 sermon by a preacher in Massachusetts, which had an established state church, noted that the listeners' ancestors "as soon as the abilities of the country would permit, . . . established larger seminaries, in which youth might be trained up for publick employments, especially for the ministry, that this important office might not become useless and contemptible by falling into the hands of illiterate men."⁸⁶ A discussion of the Bank of England observed that Parliament, in contrast to private banks, had "given an unequivocal proof of their viewing the direction of the bank in the light of a public employment, for they required by their act that the directors should be regularly sworn into office, and permitted them to serve in parliament by a special dispensation . . ."⁸⁷

In sum, it is not crystal clear what *public employment* meant in the Founding era in relation to *officer* since the data can often be read to cover multiple senses. The one sense that is the most common (and arguably the only sense that occurs considering that the three other senses only occur once, if that often) is the sense that *public employment* was a synonym for *officer*, and thus did not apply to those hired by the government who were not officers. But we can only confidently classify *public employment* as falling under that sense 4–10% of the time.

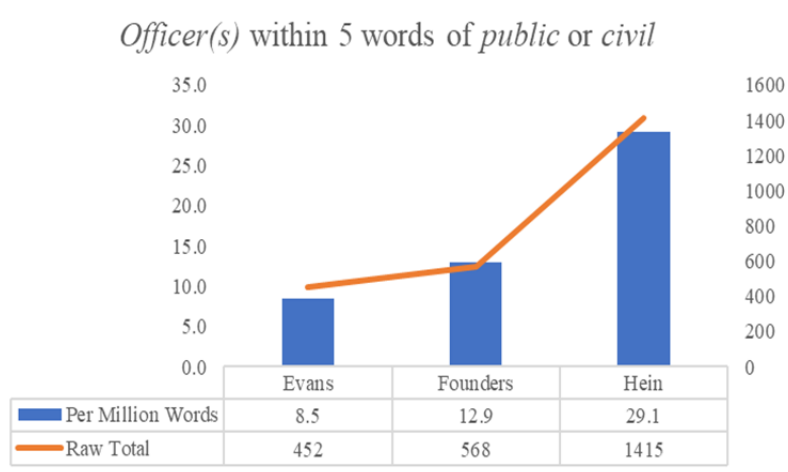
C. *Public or Civil Officers*

Because a search for *officer(s)* within COFEA resulted in so few results that were of the public/civil sense (the majority were of the military sense), we searched for *officer(s)* within 5 words of *civil* or *public* within each of the smaller corpora that make up COFEA.⁸⁸ Here are the frequency results (per million) compared to *officer(s)*:

86. JOSEPH LATHROP, A SERMON, PREACHED IN THE FIRST PARISH IN WEST-SPRINGFIELD, DECEMBER 14, MDCCLXXXVI: BEING THE DAY APPOINTED BY AUTHORITY FOR A PUBLICK THANKSGIVING 11 (Springfield, John Russell 1787).

87. TENCH COXE, THOUGHTS CONCERNING THE BANK OF NORTH AMERICA, WITH SOME FACTS RELATING TO SUCH ESTABLISHMENTS IN OTHER COUNTRIES, RESPECTFULLY SUBMITTED TO THE HONORABLE THE GENERAL ASSEMBLY OF PENNSYLVANIA, BY ONE OF THEIR CONSTITUENTS 5 (Philadelphia, s.n. 1787).

88. This included various spellings of *public* and *civil*.



Whereas *public employment* appeared about five times more in the Founders Corpus than in the other two, *officer(s)* used within five words of *public* or *civil* appeared the most in Hein, where it appeared about two-and-a-half times more than in Founders and about three-and-a-half times more than in Evans.

We randomly sampled fifty results from each of the three smaller corpora. Unfortunately, we were not able to consistently and confidently classify the various public/civil senses of *officer* that we had identified from dictionary definitions due to overlap among the senses or insufficient information. Instead we fell back on the second-best option: noting the specific officers referenced.

This method has some drawbacks. Factual frequency is not the same as sense frequency. For instance, factual frequency can be driven by factors unrelated to the scope of a sense. Prestigious officers, such as the President, a governor, or cabinet secretaries, will be referred to more often than will less prestigious officers. It thus would be a shaky inference to determine that officers only applied to those wielding significant government authority, just as it would be shaky inference to conclude that the predominant sense of *bird* was an animal who flew because robins and canaries appeared more often in a corpus than emus or penguins. In fact, it may be a better use of factual types of a word to expand the scope of the sense to include all found types. It is admittedly a tricky question. With that caveat in mind, below is a list of the various types of officers we found listed in the public/civil search samples, separated by mini-

corpus. While our sample consisted of 150 results, most of the time a specific officer was not mentioned (and occasionally the sense of officer was not of the public or civil variety).

| EVANS | FOUNDERS | HEIN |
|-------------------------------|--------------------------------------|--|
| Mayor ⁸⁹ | Treasurer ⁹⁰ | Judges ⁹¹ |
| Waggon-master ⁹² | President ⁹³ | State Delegates ⁹⁴ |
| Public Register ⁹⁵ | Department Secretaries ⁹⁶ | Trustee for Indian Lands ⁹⁷ |
| Surveyor ⁹⁸ | Tax Collector ⁹⁹ | Land Recorder ¹⁰⁰ |

89. GR. BRIT. COURT OF COMMON PLEAS., AN AUTHENTICK ACCOUNT OF THE PROCEEDINGS AGAINST JOHN WILKES, ESQ; MEMBER OF PARLIAMENT FOR AYLESBURY, AND LATE COLONEL OF THE BUCKINGHAMSHIRE MILITIA. (Boston, Richard Draper et al. 1763).

90. Letter from Timothy Pickering to John Adams (Sept. 5, 1797), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Adams/99-02-02-2123> [<https://perma.cc/8A6Y-58VY>] (last visited Feb. 22, 2019).

91. 25 JOURNALS OF THE CONTINENTAL CONGRESS 729–928 (1783).

92. Also included generally “officers in the civil departments of the army.” THOMAS CONDIE, BIOGRAPHICAL MEMOIRS OF THE ILLUSTRIOUS GEN. GEO: WASHINGTON, LATE PRESIDENT OF THE UNITED STATES OF AMERICA, &C. &C. : CONTAINING, HISTORY OF THE PRINCIPAL EVENTS OF HIS LIFE, WITH EXTRACTS FROM HIS JOURNALS, SPEECHES TO CONGRESS, AND PUBLIC ADDRESSES: — ALSO— A SKETCH OF HIS PRIVATE LIFE (Philadelphia, Charless & Ralston 1800).

93. Letter from George Washington to Alexander White (Mar. 25, 1798), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/06-02-02-0136> [<https://perma.cc/U5BB-NYMH>] (last visited Feb. 22, 2019).

94. 25 JOURNALS OF THE CONTINENTAL CONGRESS 729–928 (1783).

95. SAMUEL SMITH, THE HISTORY OF THE COLONY OF NOVA-CAESARIA, OR NEW-JERSEY: CONTAINING, AN ACCOUNT OF ITS FIRST SETTLEMENT, PROGRESSIVE IMPROVEMENTS, THE ORIGINAL AND PRESENT CONSTITUTION, AND OTHER EVENTS, TO THE YEAR 1721. WITH SOME PARTICULARS SINCE; AND A SHORT VIEW OF ITS PRESENT STATE. (Burlington [N.J.], James Parker, 1765) [hereinafter HISTORY OF NEW-JERSEY].

96. Letter from George Washington to Alexander White, *supra* note 93.

97. Session Laws of New Hampshire (text file in Hein corpus, *see supra* note 74).

98. SMITH, *supra* note 95.

99. Letter from George Washington to Charles Mynn Thruston (Aug. 10, 1794), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/05-16-02-0376> [<https://perma.cc/956Z-VJ9K>] (last visited Feb. 22, 2019).

| | | |
|---------------------------------|--|---------------------------------|
| Impost Collector ¹⁰¹ | Treasury Secretary ¹⁰² | Ministers ¹⁰³ |
| Notary Public ¹⁰⁴ | Loan Commissioners ¹⁰⁵ | Surveyor General ¹⁰⁶ |
| Magistrate ¹⁰⁷ | Customs Inspectors ¹⁰⁸ | Loan Officer ¹⁰⁹ |
| Governor ¹¹⁰ | Ship Captain (public vessel) ¹¹¹ | Mint Officer ¹¹² |

100. 1 LAWS OF THE STATE OF NEW YORK COMPRISING THE CONSTITUTION AND THE ACTS OF THE LEGISLATURE, SINCE THE REVOLUTION, FROM THE FIRST TO THE FIFTEENTH SESSION, INCLUSIVE (1792).

101. 7 ANNALS OF U.S. CONG. (1797–1798); THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS-BAY, FROM THE CHARTER OF KING WILLIAM AND QUEEN MARY, IN 1691, UNTIL THE YEAR 1750. (Boston, Thomas & John Fleet, 1767).

102. Letter from Tench Coxe to Alexander Hamilton (Jan. 2, 1795), *in* FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Hamilton/01-18-02-0004> [<https://perma.cc/3NU8-DABN>] (last visited Feb. 22, 2019).

103. 1 AMERICAN STATE PAPERS: CLAIMS 5 (1789–1823).

104. HUTCHINSON, *supra* note 101; A COMPLETE BODY OF THE LAWS OF MARYLAND (Annapolis, Thomas Reading 1700).

105. THOMAS CONDIE & RICHARD FOLWELL, HISTORY OF THE PESTILENCE, COMMONLY CALLED YELLOW FEVER, WHICH ALMOST DESOLATED PHILADELPHIA, IN THE MONTHS OF AUGUST, SEPTEMBER & OCTOBER, 1798. (Philadelphia, Richard Folwell, 1799); JOHN MITCHELL MASON, THE VOICE OF WARNING, TO CHRISTIANS, ON THE ENSUING ELECTION OF A PRESIDENT OF THE UNITED STATES (New York, G. F. Hopkins 1800); NARRATIVE OF THE LIFE, AND DYING SPEECH, OF JOHN RYER: WHO WAS EXECUTED AT WHITE-PLAINS, IN THE COUNTY OF WESTCHESTER, STATE OF NEW-YORK, ON THE SECOND DAY OF OCTOBER, 1793, FOR THE MURDER OF DR. ISAAC SMITH, DEPUTY-SHERIFF OF THAT COUNTY 4 (Danbury, Nathan Douglas 1793).

106. 3 ANNALS OF U.S. CONG. (1791–1793); 7 ANNALS OF U.S. CONG. (1797–1798).

107. CONDIE & FOLWELL, *supra* note 105; MASON, *supra* note 105; NARRATIVE OF THE LIFE, AND DYING SPEECH, OF JOHN RYER, *supra* note 105.

108. Report on the Petition of Robert Oliver and Hugh Thompson (Feb. 2, 1795), *in* NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Hamilton/01-18-02-0147> [<https://perma.cc/4Y6R-3DP6>] (last visited Feb. 22, 2019).

109. 7 ANNALS OF U.S. CONG. (1797–1798).

110. ZACHARIAH COX, AN ESTIMATE OF COMMERCIAL ADVANTAGES, BY WAY OF THE MISSISSIPPI AND MOBILE RIVERS, TO THE WESTERN COUNTRY. PRINCIPLES OF A COMMERCIAL SYSTEM, AND THE COMMENCEMENT AND PROGRESS OF A SETTLEMENT ON THE OHIO RIVER, TO FACILITATE THE SAME; WITH A STATEMENT OF FACTS (Nashville, J. McLaughlin 1799).

111. Letter from Timothy Pickering to George Washington (July 21, 1796), *in* FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/99-01-02-00760> [<https://perma.cc/KJV6-UAVD>] (Feb. 22, 2019).

| | | |
|------------------------------------|--|--|
| Tax Collector ¹¹³ | City Commissioners ¹¹⁴ | Attorney General ¹¹⁵ |
| Deputies and Agents ¹¹⁶ | Superintendent of the Works ¹¹⁷ | Indian Agents ¹¹⁸ |
| Judges ¹¹⁹ | | Agents for the Protection of Seamen ¹²⁰ |
| Congressmen ¹²¹ | | Postmasters ¹²² |
| President ¹²³ | | |
| Secretary of State ¹²⁴ | | |

Some of the officers are unsurprising: Presidents, mayors, governors, etc. They are those who exercise significant government authority. Others, though, seem to fall outside of the Supreme Court's current definition of *officer*: postmasters,

112. 7 ANNALS OF U.S. CONG. (1797–1798).

113. *Id.*; Thomas JOHNSON, REMARKS ON SOME PRINCIPLES CONTAINED IN THE PRESBYTERIAN SYSTEM, OR CONFESSION OF FAITH: LIKEWISE, REMARKS ON THE NECESSITY OF SUPPORTING GOSPEL MINISTERS, ACCORDING TO GOSPEL RULES. (Northampton [Mass.], William Butler, 1799).

114. Letter from Thomas Law to George Washington (Oct. 6, 1796), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/99-01-02-01001> [<https://perma.cc/92DK-R25N>] (Feb. 22, 2019).

115. 7 ANNALS OF U.S. CONG. (1797–1798).

116. TIMOTHY PICKERING, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, ACCOMPANYING A REPORT OF THE SECRETARY OF STATE, CONTAINING OBSERVATIONS ON SOME OF THE DOCUMENTS, COMMUNICATED BY THE PRESIDENT, ON THE EIGHTEENTH INSTANT. (Philadelphia, John Ward Fenno 1798) (These officers were tasked with deciding whether prize vessels could be kept).

117. Letter from Thomas Law to George Washington, *supra* note 114.

118. 7 ANNALS OF U.S. CONG. (1797–1798).

119. MASON LOCKE WEEMS, THE PHILANTHROPIST; OR, A GOOD TWELVE CENTS WORTH OF POLITICAL LOVE POWDER, FOR THE FAIR DAUGHTERS AND PATRIOTIC SONS OF AMERICA (1799).

120. 7 ANNALS OF U.S. CONG. (1797–1798).

121. *Id.*

122. *Id.*

123. *Id.*; DAVID OSGOOD, A DISCOURSE, DELIVERED DECEMBER 29, 1799, THE LORD'S-DAY IMMEDIATELY FOLLOWING THE MELANCHOLY TIDINGS OF THE LOSS SUSTAINED BY THE NATION IN THE DEATH OF ITS MOST EMINENT CITIZEN, GEORGE WASHINGTON, WHO DEPARTED THIS LIFE ON THE 14TH INSTANT, AETAT 68. (Boston, Samuel Hall 1800).

124. JOHN WARD FENNO, DESULTORY REFLECTIONS ON THE NEW POLITICAL ASPECTS OF PUBLIC AFFAIRS IN THE UNITED STATES OF AMERICA, SINCE THE COMMENCEMENT OF THE YEAR 1799. (1800).

waggon-master, tax collector, notary public, surveyor, public register, loan commissioner, customs inspector, etc. While certainly exercising government authority in some degree, it is not clear that a notary public or a surveyor, for example, could be said to be exercising significant government authority.

D. *And Other Officers*

We next continued our investigation into specific types of public/civil officers mentioned in the founding era to get leverage on what the scope of the sense of *officer* might be by looking at the phrase: "other officer(s) of (the) (federal) government." This phrase was usually preceded by the naming of at least one specific officer. We were unable to sample 50 instances of the phrase from each smaller corpus because only Hein had at least 50 (61 total), while Evans (22) and Founders (23) contained significantly less, for a combined total of 105 results. As before, we did not include non-public/civil senses of *officer* (i.e., military sense), and did not include when the Constitution was being quoted. Below are the types of officers we found:

| EVANS | FOUNDERS | HEIN |
|---------------------------------------|-----------------------------------|--|
| Colonial Commissioners ¹²⁵ | Governor ¹²⁶ | Superintendent of Purchases ¹²⁷ |
| Governor ¹²⁸ | City "Councillors" ¹²⁹ | Auditor of |

125. SMITH, *supra* note 95.

126. Letter from Anonymous to John Adams (May 3, 1797), *in* FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Adams/99-02-02-1959> [https://perma.cc/8SKV-QADC] (last visited Feb. 22, 2019); Letter from Anonymous to John Adams (May 3, 1797) [hereinafter Letter from Anonymous to John Adams (No. 1961)], *in* FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Adams/99-02-02-1961> [https://perma.cc/P62D-DPA7]; Letter from St. George Tucker to George Washington, (Oct. 26, 1781), *in* FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/99-01-02-07283> [https://perma.cc/Y354-FMSE] (same); Letter from William Franklin to Benjamin Franklin (Sep. 3, 1771) (incomplete), *in* Founders Online, NATIONAL ARCHIVES, <http://founders.archives.gov/documents/Franklin/01-18-02-0138> [https://perma.cc/6N5Q-F35N] (same).

127. PETER WILSON (Compiler), ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY (1784).

128. MATHEW CAREY, A SHORT ACCOUNT OF THE MALIGNANT FEVER, LATELY PREVALENT IN PHILADELPHIA: WITH A STATEMENT OF THE PROCEEDINGS THAT

| | | |
|--------------------------------------|-----------------------------------|-------------------------------------|
| | | Accounts ¹³⁰ |
| Privy Council Members ¹³¹ | Secretary of State ¹³² | Cabinet Secretaries ¹³³ |
| Land Commissioners ¹³⁴ | Attorney General ¹³⁵ | Attorney General ¹³⁶ |
| Comptroller-General ¹³⁷ | Postmaster-General ¹³⁸ | Treasury Comptroller ¹³⁹ |

TOOK PLACE ON THE SUBJECT IN DIFFERENT PARTS OF THE UNITED STATES (1793); THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS-BAY, FROM THE CHARTER OF KING WILLIAM AND QUEEN MARY, IN 1691, UNTIL THE YEAR 1750. (1767); ALEXANDER CONTEE HANSON, CONSIDERATIONS ON THE PROPOSED REMOVAL OF THE SEAT OF GOVERNMENT, ADDRESSED TO THE CITIZENS OF MARYLAND (1786); SMITH, *supra* note 95.

129. Letter from Edward Carrington to George Washington (June 4, 1798), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/06-02-02-0238> [<https://perma.cc/JA27-BPEL>] (last visited Feb. 22, 2019).

130. WILSON, *supra* note 127.

131. ALEXANDER CONTEE HANSON, REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT, ADDRESSED TO THE CITIZENS OF THE UNITED STATES OF AMERICA, AND PARTICULARLY TO THE PEOPLE OF MARYLAND (1788); HUTCHINSON, *supra* note 128; SMITH, *supra* note 95.

132. Letter from George Washington to Thomas Jefferson (Aug. 23, 1792), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/05-11-02-0009> (last visited Feb. 22, 2019); Letter from John M. Pintard to John Adams (Dec. 27, 1799), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Adams/99-02-02-4109> [<https://perma.cc/47SQ-CU87>] (last visited Feb. 22, 2019).

133. 6 ANNALS OF U.S. CONG. (1796–1797); 7 ANNALS OF U.S. CONG. (1797–1798); 1759–1776 N.H. TEMPORARY ACTS AND LAWS; BENJAMIN PERLEY POORE (Compiler), FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1270–1309 (1877); 2 THOMAS CARPENTER, THE AMERICAN SENATOR. OR A COPIOUS AND IMPARTIAL REPORT OF THE DEBATES IN THE CONGRESS OF THE UNITED STATES: INCLUDING ALL TREATIES, ADDRESSES, PROCLAMATIONS, &C. WHICH OCCUR DURING THE PRESENT SESSION, BEING THE SECOND OF THE FOURTH CONGRESS 201–366 (1797); Session Laws of New Hampshire, *supra* note 74.

134. SMITH, *supra* note 95. (“[C]ommissioners to lay out land”).

135. Letter from John M. Pintard to John Adams, *supra* note 132.

136. 6 ANNALS OF U.S. CONG. (1796–1797); POORE *supra* note 133; 1759–1776 N.H. TEMPORARY ACTS AND LAWS; CARPENTER, *supra* note 133 at 201–366; Session Laws of New Hampshire, *supra* note 74.

137. 1 FRANCIS HOPKINSON, THE PENNSYLVANIA STATE TRIALS: CONTAINING THE IMPEACHMENT, TRIAL, AND ACQUITTAL OF FRANCIS HOPKINSON, AND JOHN NICHOLSON, ESQUIRES. THE FORMER BEING JUDGE OF THE COURT OF ADMIRALTY, AND THE LATTER, THE COMPTROLLER-GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA. (1795).

| | | |
|---------------------------------|--|---|
| Register-General ¹⁴⁰ | Privy Counsellors ¹⁴¹ | Commissioner of Revenue ¹⁴² |
| State Treasurer ¹⁴³ | Supreme Court Judges ¹⁴⁴ | Auditor ¹⁴⁵ |
| President ¹⁴⁶ | Assistant Secretary of Treasury ¹⁴⁷ | Register ¹⁴⁸ |
| Prime Minister ¹⁴⁹ | Printer of the United States ¹⁵⁰ | Assistant Postmaster General ¹⁵¹ |
| Congressmen ¹⁵² | Inferior Court | Postmaster |

138. Letter from John M. Pintard to John Adams (Dec. 27, 1799), *supra* note 132.

139. 7 ANNALS OF U.S. CONG. (1797–98); 2 CARPENTER, *supra* note 133, at 201–366.

140. 1 HOPKINSON, *supra* note 137.

141. IV. The Plan of Government as Originally Drawn by George Mason (June 8–10, 1776) [hereinafter Plan of Government], in FOUNDERS ONLINE, NAT’L ARCHIVES & RECORDS ADMIN., <https://founders.archives.gov/documents/Jefferson/01-01-02-0161-0005> [<https://perma.cc/CN6P-3RUB>] (last visited Feb. 22, 2019).

142. 2 CARPENTER, *supra* note 133, at 201–366.

143. 1 HOPKINSON, *supra* note 137.

144. Plan of Government, *supra* note 141.

145. 7 ANNALS OF U.S. CONG. (1797–1798) (“Treasury Auditor”); 2 CARPENTER, *supra* note 133, at 201–366.

146. ALEXANDER ADDISON, A DISCUSSION OF THE QUESTION LATELY AGITATED IN THE CONGRESS OF THE UNITED STATES, WITH REGARD TO THE OBLIGATION OF TREATIES, CONCLUDED BY THE PRESIDENT AND SENATE, AND THE UNQUALIFIED DUTY OF THE HOUSE OF REPRESENTATIVES TO CARRY THEM INTO EXECUTION, SO FAR AS ANY ACT OF THEIRS, MAY BE NECESSARY FOR THAT PURPOSE. (1796); CAREY, *supra* note 128; HANSON, *supra* note 131; JAMES THOMSON CALLENDER, THE HISTORY OF THE UNITED STATES FOR 1796: INCLUDING A VARIETY OF INTERESTING PARTICULARS RELATIVE TO THE FEDERAL GOVERNMENT PREVIOUS TO THAT PERIOD. (1797).

147. Letter from Tench Coxe to Alexander Hamilton, *supra* note 102.

148. 7 ANNALS OF U.S. CONG. (1797–1798) (“Treasury Register”); 2 CARPENTER, *supra* note 133 at 201–366.

149. JAMES WILSON STEVENS, AN HISTORICAL AND GEOGRAPHICAL ACCOUNT OF ALGIERS: COMPREHENDING A NOVEL AND INTERESTING DETAIL OF EVENTS RELATIVE TO THE AMERICAN CAPTIVES. (1797).

150. Letter from James McHenry to John Adams (Apr. 29, 1800), in FOUNDERS ONLINE, NAT’L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Adams/99-02-02-4286> [<https://perma.cc/Q4ML-Z6XB>] (last visited Feb. 22, 2019).

151. 2 CARPENTER, *supra* note 133, at 201–366.

152. DANA HYDE, RUSSEL FITCH & ABEL DUNCAN, A COPY OF THE PETITION OF DOCTORS HYDE AND FITCH TO THE GENERAL ASSEMBLY OF THE STATE OF VERMONT: PRAYING FOR A MEDICAL LOTTERY. UNTO WHICH ARE ANNEXED, THE RECOMMENDATIONS OF SUNDRY GENTLEMEN: AND DOCTOR DUNCAN’S REASONS WHY THE PRAYER OF SAID PETITION OUGHT TO BE GRANTED. (1800).

| | Judges ¹⁵³ | General ¹⁵⁴ |
|------------------------------------|---|---|
| Judges (federal) ¹⁵⁵ | Chief Coiner of the Mint ¹⁵⁶ | State Loan Officer ¹⁵⁷ |
| Attorneys ¹⁵⁸ | Secretary of Treasury ¹⁵⁹ | Foreign Ministers ¹⁶⁰ and Diplomats ¹⁶¹ |
| Lieutenant Governor ¹⁶² | | President of Congress ¹⁶³ |
| Diplomatic Agents ¹⁶⁴ | | Senators ¹⁶⁵ |
| | | Congressmen ¹⁶⁶ |

153. Letter from the United States Supreme Court Justices to George Washington (Sept. 13, 1790), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/05-06-02-0207> [<https://perma.cc/Q5G9-RGW5>] (last visited Feb. 22, 2019).

154. 2 CARPENTER, *supra* note 133, at 201–366.

155. ADDISON, *supra* note 146; HYDE ET AL., *supra* note 152; HUTCHINSON, *supra* note 128.

156. Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Jefferson/01-24-02-0176> [<https://perma.cc/9TYT-KDLQ>] (last visited Feb. 22, 2019).

157. 2 CARPENTER, *supra* note 133, at 201–366.

158. HYDE ET AL., *supra* note 152.

159. Letter from George Washington to Alexander Hamilton (Aug. 26, 1792) FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Hamilton/01-12-02-0206> [<https://perma.cc/EZ7C-VZBX>] (last visited Feb. 22, 2019).

160. 6 ANNALS OF U.S. CONG. (1796–1797); 24 JOURNALS OF THE CONTINENTAL CONGRESS (1783); 3 CARPENTER, *supra* note 133, at 561–760.

161. 4 ANNALS OF U.S. CONG. (1793–1795).

162. HUTCHINSON, *supra* note 128.

163. 3 CARPENTER, *supra* note 133, at 561–760; 6 ANNALS OF U.S. CONG. (1796–1797).

164. Albert Gallatin, *The Speech of Albert Gallatin, Delivered in the House of Representatives of the United States, on the First of March, 1798, upon the Foreign Inter-course Bill* (Mar. 1, 1798), in EVANS EARLY AM. IMPRINT COLLECTION, <https://quod.lib.umich.edu/cgi/t/text/textidx?c=evans;cc=evans;q1=N25454;rgn=main;view=text;idno=N25454.0001.001> [<https://perma.cc/KX29-H3ZA>] (last visited Mar. 11, 2019).

165. 7 ANNALS OF U.S. CONG. (1797–1798); 1759–1776 N.H. TEMPORARY ACTS AND LAWS; Session Laws of New Hampshire, *supra* note 74. *But see* 9 ANNALS OF U.S. CONG. (1798–1799) (arguing that Senators are not officers).

166. 1 ANNALS OF U.S. CONG. (1789–1790); 3 ANNALS OF U.S. CONG. (1791–93); 4 ANNALS OF U.S. CONG. (1793–1795); 5 ANNALS OF U.S. CONG. (1795–1796); 1759–1776 N.H. TEMPORARY ACTS AND LAWS; Session Laws of New Hampshire, *supra* note 74.

| | | |
|--|--|--|
| | | Vice President ¹⁶⁷ |
| | | Congressional Delegates ¹⁶⁸ |
| | | Judges of the Revenue Superior Court ¹⁶⁹ |
| | | (State) President ¹⁷⁰ |
| | | Privy Council Member ¹⁷¹ |
| | | Judges ¹⁷² |
| | | Inspector of Revenue ¹⁷³ |
| | | Register of the Treasury ¹⁷⁴ |
| | | Treasury Treasurer ¹⁷⁵ |
| | | Ambassadors and Other Diplomatic Agents ¹⁷⁶ |
| | | Commissaries ¹⁷⁷ |
| | | Superintendent of Military Stores ¹⁷⁸ |
| | | Purveyor of Public Supplies ¹⁷⁹ |

167. 6 ANNALS OF U.S. CONG. (1796–1797).

168. 1759–1776 N.H. TEMPORARY ACTS AND LAWS; Session Laws of New Hampshire, *supra* note 74.

169. 1759–1776 N.H. TEMPORARY ACTS AND LAWS; Session Laws of New Hampshire, *supra* note 74.

170. 1759–1776 N.H. TEMPORARY ACTS AND LAWS; Session Laws of New Hampshire, *supra* note 74.

171. 1759–1776 N.H. TEMPORARY ACTS AND LAWS; Session Laws of New Hampshire, *supra* note 74.

172. 9 ANNALS OF U.S. CONG. (1798–1799); 2 BUSHROD WASHINGTON, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF APPEALS OF VIRGINIA (1799).

173. 6 ANNALS OF U.S. CONG. (1796–97); 1 JAMES RICHARDSON, COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS (1896) (George Washington); American State Papers – Misc. (text file in Hein corpus, *see supra* note 74).

174. 7 ANNALS OF THE U.S. CONG. (1797–1798).

175. *Id.*

176. *Id.*

177. 2 ANNALS OF U.S. CONG. (1790–1791).

178. 8 ANNALS OF U.S. CONG. (1798–1799).

179. *Id.*

| | | |
|--|--|-------------------------------------|
| | | Officers of the Mint ¹⁸⁰ |
| | | Customs Collectors ¹⁸¹ |
| | | Governor ¹⁸² |

These officers tend to be those of higher rank than when looking at the public/civil search done previously. But that is not surprising, when a phrase of “[some officer] and other officers” is used, it would be odd to have the only named officer be a minor one. Still, some of the officers listed here do not seem to fit the significant exercise of authority sense adopted by the Supreme Court: attorneys, commissaries, customs collectors, loan officers, and auditors. These officers do exercise some government authority, but they seem to fall outside the modern Supreme Court definition.

E. Officers of Government

To try to avoid the way a search for “other officers” might bias the results towards more preeminent officers, we also sampled 50 results from every mini-corpus for the phrase “officers of (the) (federal) government.” Not surprisingly, we had more than double the hits from Hein than we had from the other mini-corpora.¹⁸³

| EVANS | FOUNDERS | HEIN |
|-------------------------------|--------------------------|---|
| Prime Minister ¹⁸⁴ | President ¹⁸⁵ | State Land Tax Collector ¹⁸⁶ |

180. *Id.*

181. *Id.*; American State Papers – Misc., *supra* note 173.

182. SAMUEL ALLINSON, ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY, 1702–1776 (1776).

183. These were the results we found from each mini-corpus: Evans (155), Founders (206), and Hein (587).

184. STEVENS, *supra* note 149.

185. Letter from Alexander Hamilton to the Speaker of the House of Representatives (Frederick Muhlenberg) (July 20, 1790), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Hamilton/01-06-02-0408> [https://perma.cc/UYW5-2324] (last visited Feb. 22, 2019).

186. 4 ANNALS OF U.S. CONG. (1793–1795).

There were over 2,000 of this type of officer mentioned in this source: Mr. Fitz[im]ions knew a time when the land tax of Pennsylvania cost thirty

| | | |
|--|---|---|
| Register General ¹⁸⁷ | Vice President ¹⁸⁸ | Cabinet Secretaries ¹⁸⁹ |
| Members of House of Representatives ¹⁹⁰ | Clerk of the Supreme Court ¹⁹¹ | Assistant Postmaster General ¹⁹² |
| President ¹⁹³ | Surveyor General ¹⁹⁴ | Attorney General ¹⁹⁵ |
| Magistrate ¹⁹⁶ | Governor ¹⁹⁷ | Comptroller of the Treasury ¹⁹⁸ |
| Secretary of State ¹⁹⁹ | Secretary of War ²⁰⁰ | Treasurer ²⁰¹ |

per cent. in collecting it; and, at the same time, the officers employed were more numerous than all the revenue officers of the Federal Government at this day, put together. Mr. F. stated the former to have been about two thousand.

Id. at 631.

187. 1 HOPKINSON, *supra* note 137.

188. Letter from Alexander Hamilton to the Speaker of the House of Representatives, *supra* note 185.

189. 9 ANNALS OF U.S. CONG. (1798–1799) (referred to as principal officers).

190. Israel Evans, *A Sermon, Delivered at Concord, Before the Hon. General Court of the State of Newhampshire, at the Annual Election, Holden on the First Wednesday in June, M.DCC.XCI.* (June 1, 1791), in EVANS EARLY AM. IMPRINT COLLECTION <https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;q1=N18031;rgn=div1;rgn1=citation;view=text;idno=N18031.0001.001;node=N18031.0001.001:3> [<https://perma.cc/3AEG-NU4F>] (Mar. 11, 2019).

191. Letter from Alexander Hamilton to the Speaker of the House of Representatives, *supra* note 185.

192. 9 ANNALS OF U.S. CONG. (1798–1799) (referred to as a principal officer).

193. CAREY, *supra* note 128.

194. Letter from Alexander Hamilton to the Speaker of the House of Representatives, *supra* note 185.

195. 9 ANNALS OF U.S. CONG. (1798–1799) (grouped with principal officers); 1703–1786 N.J. LAWS; Session Laws of New Hampshire, *supra* note 74.

196. *The Annual register, and Virginian repository, for the year 1800.*, in EVANS EARLY AM. IMPRINT COLLECTION (2008–2009), <http://name.umdl.umich.edu/N26403.0001.001> [<https://perma.cc/2DUK-4YUJ>]. This usage may better correspond to the law enforcement sense of *officer*.

197. Letter from Anonymous to John Adams (No. 1961), *supra* note 126.

198. 9 ANNALS OF U.S. CONG. (1798–99).

199. Samuel Harrison Smith, *Remarks on education: illustrating the close connection between virtue and wisdom.: To which is annexed, a system of liberal education. Which, having received the premium awarded by the American Philosophical Society, December 15th, 1797, is now published by their order.*, in EVANS EARLY AM. IMPRINT COLLECTION (2008–2009), <http://name.umdl.umich.edu/N25985.0001.001> [<https://perma.cc/V9W2-TBJB>].

200. Letter from Thomas Mifflin to Thomas Jefferson (July 7, 1793), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Jefferson/01-26-02-0392> [<https://perma.cc/52S9-ERNK>] (last visited Feb. 22, 2019).

| | | |
|--|--------------------------------------|--|
| Governor ²⁰² | Territorial Secretary ²⁰³ | Auditor of the Treasury ²⁰⁴ |
| Colonial Council ²⁰⁵ | Territorial Judges ²⁰⁶ | Commissioner of the Revenue ²⁰⁷ |
| Colony Secretary ²⁰⁸ | Attorney General ²⁰⁹ | Register of the Treasury ²¹⁰ |
| Judges ²¹¹ | | Accountant of the War Department ²¹² |
| Attorney General ²¹³ | | Accountant of the Navy Department ²¹⁴ |
| Comptroller-General ²¹⁵ | | Postmaster General ²¹⁶ |
| Secretary of the Treasury ²¹⁷ | | Governor ²¹⁸ |
| Secretary of | | Deputy Governor/ |

201. 9 ANNALS OF U.S. CONG. (1798–1799) (grouped with principal officers); 1703–1786 N.J. LAWS.

202. 1 HOPKINSON, *supra* note 137; HUTCHINSON, *supra* note 101; JAMES OTIS, A VINDICATION OF THE CONDUCT OF THE HOUSE OF REPRESENTATIVES OF THE PROVINCE OF THE MASSACHUSETTS-BAY: MORE PARTICULARLY, IN THE LAST SESSION OF THE GENERAL ASSEMBLY (1762), *reprinted in* EVANS EARLY AM. IMPRINT COLLECTION (2009–2010), <http://name.umdl.umich.edu/N07231.0001.001> [<https://perma.cc/JJL9-M7KG>]; SMITH, *supra* note 199.

203. Letter from Alexander Hamilton to Israel Ludlow (Nov. 25, 1792), *in* FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN. (Jan. 18, 2019), <http://founders.archives.gov/documents/Hamilton/01-13-02-0092> [<https://perma.cc/BQ9B-J3EL>] (last visited Feb. 22, 2019).

204. 9 ANNALS OF U.S. CONG. (1798–1799) (grouped with principal officers).

205. Otis, *supra* note 202.

206. Letter from Alexander Hamilton to Israel Ludlow, *supra* note 203.

207. 9 ANNALS OF U.S. CONG. (1798–99) (grouped with principal officers).

208. SMITH, *supra* note 95.

209. Letter from George Washington to Charles Lee (Nov. 14, 1796), *in* FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN. (Jan. 18, 2019), <http://founders.archives.gov/documents/Washington/99-01-02-00002> [<https://perma.cc/9RBK-8RVN>].

210. 9 ANNALS OF U.S. CONG. (1798–1799) (grouped with principal officers).

211. 1 HOPKINSON, *supra* note 137.

212. 9 ANNALS OF U.S. CONG. (1798–1799) (grouped with principal officers).

213. 1 HOPKINSON, *supra* note 137.

214. 9 ANNALS OF U.S. CONG. (1798–1799) (grouped with principal officers).

215. 1 HOPKINSON, *supra* note 137.

216. 9 ANNALS OF U.S. CONG. (1798–1799) (grouped with principal officers).

217. 1 HOPKINSON, *supra* note 137.

218. 1703–1786 N.J. LAWS; Session Laws of New Hampshire, *supra* note 74.

| | | |
|-----------------------------|--|---|
| Commonwealth ²¹⁹ | | Lieutenant Governor ²²⁰ |
| | | Secretary of the Colony ²²¹ |
| | | Colonial Treasurer ²²² |
| | | Stewards for the Public Affairs of the Country ²²³ |
| | | Assistants ²²⁴ |
| | | Colonial Commissioners ²²⁵ |
| | | President of the Privy Council ²²⁶ |
| | | Clerk of the Privy Council ²²⁷ |
| | | Speaker of the House ²²⁸ |
| | | Clerk of the House ²²⁹ |
| | | Supreme Court Justices ²³⁰ |
| | | State Auditor ²³¹ |
| | | Mayor ²³² |
| | | Government Land Surveyors ²³³ |

219. 1 HOPKINSON, *supra* note 137.

220. Session Laws of New Hampshire, *supra* note 74.

221. *Id.*

222. *Id.*

223. *Id.* This is a colonial position.

224. *Id.* It is unclear who these officers were assistants to—perhaps the colonial privy council. There were thirty six in total.

225. *Id.* This included Commissioners in Reserve.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. 1703–1786 N.J. LAWS.

231. *Id.*

232. 1786 VT. LAWS.

233. JOURNALS OF THE CONTINENTAL CONGRESS (1788–1789).

Perhaps even more so than the “other officers” search, this search produced named officers that seemed to exercise significant authority. But there were a few exceptions: the over two thousand state land tax collectors,²³⁴ the three dozen assistants listed as officers in the Colony of New Hampshire,²³⁵ and accountants of the War and Navy Departments.²³⁶

Interestingly, sometimes officers were contrasted with those who are sometimes referred to as officers: members of Congress,²³⁷ state legislatures,²³⁸ or the courts.²³⁹ Once, we found an officer being contrasted with a special agent—“Wherever an object of public business is likely to be permanent, it is more fit that it should be transacted by an officer of the Government regularly constituted, than by the agent of a Department specially intrusted.”²⁴⁰

F. Officer(s) Clusters

We next explored the *office* related clusters. Below are the most common words that follow *office/officer/officers of*, ranked by frequency and mutual information score:

| Rank | Office(r)(s) of ____ | FREQ. | Office(r)(s) of ____ | MIS |
|------|----------------------|--------|----------------------|------|
| 1 | THE | 13,591 | DISCOUNT | 9.83 |
| 2 | A | 802 | INSPECTION | 9.62 |
| 3 | GOVERNMENT | 629 | DISTRIBUTOR | 9.61 |

234. 3–5 ANNALS OF U.S. CONG. (1793–95).

235. 1759 N.H LAWS.

236. 7–10 ANNALS OF U.S. CONG. (1798–99).

237. JOURNALS OF THE CONTINENTAL CONGRESS (1774–1789).

238. 3 CARPENTER, *supra* note 133, at i–560; The American Peace Commissioners to the President of Congress (Sept. 10, 1783), in FOUNDERS ONLINE, NAT’L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Adams/06-15-02-0133> [https://perma.cc/9RLP-C9MZ] (last visited Feb. 22, 2019).

239. Letter from Thomas Jefferson to John Garland Jefferson (Apr. 26, 1794), in FOUNDERS ONLINE, NAT’L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Jefferson/01-28-02-0058> [https://perma.cc/YH4-4JLY] (last visited Feb. 22, 2019).

240. Letter from Alexander Hamilton to George Washington, (December 1794), FOUNDERS ONLINE, NAT’L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Hamilton/01-17-02-0396> [https://perma.cc/TMP5-R6DX] (last visited Feb. 22, 2019).

| | | | | |
|----|--------------|-----|----------------|------|
| 4 | THIS | 593 | JUDGE-ADVOCATE | 8.8 |
| 5 | INSPECTION | 451 | INFPEAION | 8.63 |
| 6 | EACH | 403 | FINANCE | 8.54 |
| 7 | HIS | 399 | DISC | 8.4 |
| 8 | THAT | 300 | REFINER | 8.11 |
| 9 | FINANCE | 249 | PURVEYOR | 8.02 |
| 10 | SECRETARY | 244 | PROFIT | 7.64 |
| 11 | ANY | 242 | GONFALONIER | 7.55 |
| 12 | PRESIDENT | 238 | INLAND | 7.49 |
| 13 | REGIMENTS | 238 | BRIGADES | 7.48 |
| 14 | THEIR | 238 | SEARCHER | 7.47 |
| 15 | SUCH | 228 | PODEFTA | 7.35 |
| 16 | STATE | 209 | HIGH-PRIEST | 7.28 |
| 17 | PROFIT | 189 | REGIMENTS | 7.25 |
| 18 | ARTILLERY | 187 | REGTS | 7.23 |
| 19 | FOREIGN | 184 | ARTILLERY | 7.17 |
| 20 | EVERY | 183 | ADJUTANT | 7.16 |
| 21 | DISCOUNT | 153 | ADJT | 7.14 |
| 22 | SAID | 152 | ACCOUNTANT | 7.08 |
| 23 | YOUR | 152 | THEOPHILUS | 7.07 |
| 24 | JUSTICE | 145 | SUPERVISOR | 6.96 |
| 25 | OUR | 142 | MARINES | 6.88 |
| 26 | TRUST | 141 | GEOGRAPHER | 6.87 |
| 27 | COLLECTOR | 130 | COLLECTOR | 6.85 |
| 28 | SHERIFF | 125 | INSPECTOR | 6.82 |
| 29 | EQUAL | 118 | GOVERNMT | 6.8 |
| 30 | CORPS | 112 | SURVEYOR | 6.78 |
| 31 | INDIAN | 102 | POLICE | 6.69 |
| 32 | THOSE | 96 | INFPEGOR | 6.67 |
| 33 | COMMISSIONER | 94 | PRECEPTOR | 6.6 |
| 34 | ALL | 93 | MARSHAL | 6.57 |
| 35 | SURVEYOR | 93 | COMPTROLLER | 6.51 |
| 36 | TREASURER | 93 | INFPE | 6.33 |
| 37 | CHIEF | 91 | SHERIFF | 6.27 |

| | | | | |
|----|--------------|----|---------------------|------|
| 38 | MY | 90 | INFERIOUR | 6.27 |
| 39 | AN | 86 | CONSTABLE | 6.25 |
| 40 | JUDGE | 86 | ASSESSOR | 6.25 |
| 41 | RANK | 83 | SUPERINTEND- ANT | 6.24 |
| 42 | CONSUL | 77 | MUSTERS | 6.22 |
| 43 | INSPECTOR | 74 | CLOATHIER | 6.15 |
| 44 | CLERK | 70 | CONSUL | 6.13 |
| 45 | COMPANIES | 70 | SECY | 6.09 |
| 46 | GOVERNOR | 67 | ENGINEERS | 6.09 |
| 47 | ONE | 66 | COMMISSIONER | 6.01 |
| 48 | HIGH | 64 | CONFLABLE | 6 |
| 49 | ADJUTANT | 63 | DEACONS | 6 |
| 50 | BOTH | 62 | CAVALRY | 5.98 |
| 51 | BRIGADES | 61 | COLLEAOR | 5.96 |
| 52 | GREAT | 59 | RECEIVER | 5.92 |
| 53 | MILITIA | 59 | VICE-PRESIDENT | 5.9 |
| 54 | NEW | 57 | PROVOST | 5.86 |
| 55 | CONGRESS | 54 | COMPANIES | 5.84 |
| 56 | IT | 52 | CORPS | 5.83 |
| 57 | DEPUTY | 50 | MARSHALL | 5.82 |
| 58 | PENNSYLVANIA | 48 | BATTALIONS | 5.77 |
| 59 | COMMISSARY | 47 | CHANCELLOR | 5.77 |
| 60 | DISTRICT | 46 | KENT | 5.69 |
| 61 | HONOR | 46 | MEDIATOR | 5.6 |
| 62 | COMPROLLER | 43 | THERIFF | 5.57 |
| 63 | INLAND | 41 | FIATE | 5.56 |
| 64 | THESE | 41 | QUARTERMAS- TER | 5.49 |
| 65 | WHICH | 41 | DIRECTOR | 5.43 |
| 66 | COLONEL | 40 | TRUST | 5.42 |
| 67 | DIFFERENT | 40 | TRUSTEE | 5.29 |
| 68 | MERIT | 39 | EXCISE | 5.29 |
| 69 | ATTORNEY | 38 | MAGISTRACY | 5.28 |
| 70 | HUMANITY | 38 | RANK | 5.24 |

| | | | | |
|-----|---------------------|----|-------------|------|
| 71 | FRIENDSHIP | 37 | SUSSEX | 5.23 |
| 72 | SOME | 36 | DEACON | 5.22 |
| 73 | CAVALRY | 35 | PAYMASTER | 5.16 |
| 74 | MARSHAL | 34 | GOVERNMENT | 5.16 |
| 75 | COLO. | 33 | ARTIFICERS | 5.15 |
| 76 | PUBLIC | 32 | SENATOR | 5.15 |
| 77 | RELIGION | 32 | CARLISLE | 5.14 |
| 78 | VIRGINIA | 32 | DEPUTY | 5.13 |
| 79 | DISTINCTION | 31 | INFANTRY | 5.13 |
| 80 | HONOUR | 31 | COMMISSARY | 5.13 |
| 81 | MINISTER | 31 | JUFFICE | 5.1 |
| 82 | SUPERINTEND- ANT | 31 | CORONER | 5.05 |
| 83 | CHRIST | 29 | CIVILITY | 5.01 |
| 84 | REGISTER | 29 | DRAGOONS | 5 |
| 85 | ARMY | 28 | HUMANITY | 4.99 |
| 86 | KENT | 28 | OVERSEER | 4.98 |
| 87 | INFERIOR | 27 | DISTINCTION | 4.98 |
| 88 | CIVIL | 26 | FOREIGN | 4.97 |
| 89 | CONSTABLE | 26 | ASSISTANT | 4.97 |
| 90 | SECY | 26 | TREASURER | 4.96 |
| 91 | INFANTRY | 25 | POSTMASTER | 4.91 |
| 92 | OURS | 25 | SECRETARY | 4.84 |
| 93 | SLATE | 25 | OURS | 4.81 |
| 94 | FRANCE | 24 | EACH | 4.71 |
| 95 | MARSHALL | 24 | REGISTER | 4.66 |
| 96 | POLICE | 24 | EQUAL | 4.65 |
| 97 | ASSISTANT | 23 | INFERIOR | 4.62 |
| 98 | EXCISE | 23 | ENGINEER | 4.6 |
| 99 | LOVE | 22 | HAZEN | 4.6 |
| 100 | MASSACHU- SETTS | 22 | AUDITOR | 4.6 |

These data point to some further areas to explore, particularly when *the, a, this, each, that, any, such, and all* follow the cluster

office(r)(s) of. We just present the results of *office(r)(s) of the* ____ below:

| Rank | <i>Office(r)(s) of the</i> ____ | FRQ. | <i>Office(r)(s) of the</i> ____ | MIS |
|------|---------------------------------|------|---------------------------------|-------|
| 1 | TREASURY | 807 | CUFFOMS | 11.2 |
| 2 | ARMY | 763 | CUFLOMS | 10.98 |
| 3 | UNITED | 701 | ADMIRALTIES | 10.95 |
| 4 | SECRETARY | 613 | CUSTOMS | 10.48 |
| 5 | CUSTOMS | 551 | SOLICITOR | 9.89 |
| 6 | REGIMENT | 448 | INSPECTOSHIP | 9.87 |
| 7 | SAID | 414 | PROTHONO-TARY | 9.61 |
| 8 | MILITIA | 291 | ACCOUNTANT | 8.87 |
| 9 | STATE | 264 | PICQUET | 8.63 |
| 10 | DAY | 240 | REGIMENT | 8.11 |
| 11 | GOVERNMENT | 234 | DIFIRID | 7.99 |
| 12 | REVENUE | 180 | TREASURY | 7.91 |
| 13 | COUNTY | 179 | NAVY | 7.89 |
| 14 | LATE | 173 | MINT | 7.67 |
| 15 | CLERK | 172 | STAFF | 7.64 |
| 16 | LINE | 162 | INQUISITION | 7.5 |
| 17 | TROOPS | 152 | ADMIRALTY | 7.46 |
| 18 | COMPANY | 148 | BATTALION | 7.46 |
| 19 | COURT | 145 | ARMY | 7.44 |
| 20 | SEVERAL | 142 | CUS | 7.4 |
| 21 | NAVY | 133 | COMPTRROLLER | 7.35 |
| 22 | DEPARTMENT | 127 | REVENUE | 7.31 |
| 23 | SAME | 127 | RECORDER | 7.31 |
| 24 | PORT | 117 | SECRETARY | 7.26 |
| 25 | VIRGINIA | 107 | MILITIA | 7.25 |
| 26 | CONTINENTAL | 106 | BRIGADE | 7.22 |
| 27 | COMMISSIONER | 98 | REVOLUTION-ARY | 7.21 |
| 28 | AMERICAN | 91 | AUDITOR | 7.18 |
| 29 | CORPS | 88 | COMMISSION-ER | 7.16 |

| | | | | |
|----|---------------|----|---------------------|------|
| 30 | CROWN | 84 | CLERK | 6.96 |
| 31 | BRIGADE | 83 | HOSPITAL | 6.86 |
| 32 | DISTRICT | 73 | VIRGA | 6.85 |
| 33 | FIRST | 66 | LEGION | 6.77 |
| 34 | FRENCH | 64 | CAVALRY | 6.74 |
| 35 | SOUTHERN | 63 | REGT | 6.74 |
| 36 | ADMIRALTY | 62 | REGISTER | 6.72 |
| 37 | REGIMENTS | 61 | BELLIGERENT | 6.71 |
| 38 | GUARD | 59 | CORPS | 6.58 |
| 39 | REGISTER | 57 | ALLIANCE | 6.57 |
| 40 | HOSPITAL | 56 | TROOP | 6.57 |
| 41 | BRITISH | 55 | DIFTRIA | 6.56 |
| 42 | ALLIANCE | 48 | CROWN | 6.42 |
| 43 | CONVENTION | 48 | REGIMENTS | 6.38 |
| 44 | MINT | 47 | REFPEAIVE | 6.38 |
| 45 | PRINCIPAL | 46 | POLICE | 6.37 |
| 46 | AUDITOR | 45 | SOUTHERN | 6.32 |
| 47 | FAME | 45 | REGENCY | 6.24 |
| 48 | RESPECTIVE | 44 | PORT | 6.22 |
| 49 | DIFFERENT | 43 | MEDICAL | 6.2 |
| 50 | FEDERAL | 43 | GARRISON | 6.15 |
| 51 | SOLICITOR | 43 | CUTTER | 6.13 |
| 52 | ARTILLERY | 41 | REGULARS | 6.09 |
| 53 | GENERAL | 40 | JUDICIAL | 6.07 |
| 54 | MASSACHUSETTS | 40 | ARTILLERY | 6.07 |
| 55 | NEW | 40 | SECY | 6.07 |
| 56 | PLACE | 40 | DETACHMENT | 6.05 |
| 57 | CHURCH | 38 | GUARDS | 6.04 |
| 58 | CITY | 38 | SUPERINTEN- DENT | 6.02 |
| 59 | SHIP | 38 | FEDERAL | 6.02 |
| 60 | BATTALION | 37 | GUARD | 6 |
| 61 | LAND | 37 | MARINES | 5.97 |
| 62 | COMMISSIONERS | 36 | DEPARTMENT | 5.95 |
| 63 | COMPTRROLLER | 36 | MARINE | 5.91 |

| | | | | |
|----|---------------|----|--------------------|------|
| 64 | TWO | 36 | INVALID | 5.89 |
| 65 | REGT | 34 | MESSIAH | 5.84 |
| 66 | TOWN | 34 | INFANTRY | 5.83 |
| 67 | GARRISON | 33 | UNITED | 5.81 |
| 68 | OTHER | 33 | LINE | 5.8 |
| 69 | PENNSYLVANIA | 31 | TREA | 5.77 |
| 70 | SECOND | 31 | ADJUTANT | 5.73 |
| 71 | COUNTRY | 30 | TROOPS | 5.71 |
| 72 | COURTS | 30 | COMPANY | 5.69 |
| 73 | JUDICIAL | 30 | ARTIFICERS | 5.66 |
| 74 | COMMONWEALTH | 29 | PACKET | 5.6 |
| 75 | HOUSE | 29 | DISTRICT | 5.6 |
| 76 | STAFF | 29 | CONTINENTAL | 5.59 |
| 77 | CAVALRY | 28 | LATE | 5.53 |
| 78 | ACCOUNTANT | 26 | POSTMASTER | 5.51 |
| 79 | JERSEY | 26 | REVENUES | 5.5 |
| 80 | POST | 26 | GERMAN | 5.34 |
| 81 | DETACHMENT | 25 | VIRGINIA | 5.33 |
| 82 | DIVISION | 24 | HOSPITALS | 5.27 |
| 83 | SENATE | 24 | RESPECTIVE | 5.26 |
| 84 | BOARD | 23 | DRAGOONS | 5.25 |
| 85 | KING | 23 | CORPORATION | 5.23 |
| 86 | MARYLAND | 23 | FLYING | 5.21 |
| 87 | MILITARY | 23 | CONVENTION | 5.21 |
| 88 | PROTHONOTARY | 23 | AUDITORS | 5.2 |
| 89 | THIRD | 23 | PENNSYLVANIA | 5.18 |
| 90 | CONNECTICUT | 22 | DIVISION | 5.16 |
| 91 | FOUR | 22 | SQUADRON | 5.14 |
| 92 | MARINE | 22 | MINISTERIAL | 5.1 |
| 93 | NAVAL | 22 | NAVAL | 5.06 |
| 94 | REGULAR | 22 | SURVEYOR | 5.03 |
| 95 | REVOLUTIONARY | 22 | MASSACHU- SETTS | 5 |
| 96 | EXECUTIVE | 21 | FRIGATE | 4.96 |
| 97 | GUARDS | 21 | AMERICAN | 4.93 |

| | | | | |
|-----|----------|----|------------|------|
| 98 | PROVINCE | 21 | REGULAR | 4.87 |
| 99 | RANK | 21 | BATTALIONS | 4.86 |
| 100 | STATES | 21 | EXCISE | 4.86 |

The *office(r)(s) of (the) clerk* is an interesting cluster given the question of whether clerks are generally officers. We will explore that more below.

G. Officer(s) of the United States

One of the advantages of using a corpus for analysis, as opposed to a dictionary, is the ability to drill down on the most relevant context. We thus searched for every instance of the phrase *officer(s) of the United States*.²⁴¹ The phrase appeared about twice as often in Hein and Founders as in the Evans Corpus.²⁴² We then looked for the specific officer being mentioned, if any, in a sample of fifty from Hein and Founders, and all of the results from Evans, since the phrase occurred fewer than fifty times there.

| EVANS | FOUNDERS | HEIN |
|----------------------------|--------------------------|------------------------------|
| Congressmen ²⁴³ | President ²⁴⁴ | Loan Officers ²⁴⁵ |

241. This included alternative spelling of *United States*, such as *U. States* or *U.S.*

242. Number of occurrences: Evans (48), Founders (113), and Hein (98).

243. JAMES MONROE, OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT. WITH AN ATTEMPT TO ANSWER SOME OF THE PRINCIPAL OBJECTIONS THAT HAVE BEEN MADE TO IT. / BY A NATIVE OF VIRGINIA (1788), reprinted in EVANS EARLY AM. IMPRINT COLLECTION, quod.lib.umich.edu/e/evans?type=bib&q1=N16547&rgn1=citation&Submit=Search [https://perma.cc/A9XT-EQJH] (last visited Mar. 9, 2019); JOEL BARLOW, JOEL BARLOW TO HIS FELLOW CITIZENS, OF THE UNITED STATES OF AMERICA. A LETTER ON THE SYSTEM OF POLICY HITHERTO PURSUED BY THEIR GOVERNMENT (Philadelphia, William Duane 1800) (1799), reprinted in EVANS EARLY AM. IMPRINT COLLECTION, quod.lib.umich.edu/e/evans?type=bib&q1=N27679&rgn1=citation&Submit=Search [https://perma.cc/4KRZ-M6WB] (last visited Mar. 9, 2019); CONDIE, *supra* note 92. *But see* JAMES THOMSON CALLENDER, SKETCHES OF THE HISTORY OF AMERICA (1798), reprinted in EVANS EARLY AM. IMPRINT COLLECTION, quod.lib.umich.edu/e/evans?type=bib&q1=N25270&rgn1=citation&Submit=Search [https://perma.cc/J767-9U5B] (last visited Mar. 9, 2019) (seemingly excluding senators from officers of the United States by stating “[t]he governors, senators, and all officers of the United States to be liable to impeachment for mal and corrupt conduct; and, upon conviction, to be removed from office, and disqualified for holding any place of trust and profit”).

| | | |
|---|--------------------------|----------------------------|
| Elected Officers ²⁴⁶ | Marshalls ²⁴⁷ | Marshalls ²⁴⁸ |
| Comptroller General ²⁴⁹ | Governor ²⁵⁰ | Ambassadors ²⁵¹ |
| Judges/Judicial Officers ²⁵² | Attorney ²⁵³ | Ministers ²⁵⁴ |

244. Letter from James Leander Cathcart to John Adams, (Mar. 25, 1797), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Adams/99-02-02-1908> [[https://perma.cc/ES5J-BB\]W](https://perma.cc/ES5J-BB]W)] (last visited Feb. 22, 2019); Edmund Randolph's Notes on the Common Law (ca. Sept. 1799), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Madison/01-17-02-0170> [<https://perma.cc/JTM6-32TH>] (last visited Feb. 22, 2019)

245. 27 JOURNALS OF THE CONTINENTAL CONGRESS 365–564 (1784).

246. TENCH COXE, A VIEW OF THE UNITED STATES OF AMERICA, IN A SERIES OF PAPERS, WRITTEN AT VARIOUS TIMES, BETWEEN THE YEARS 1787 AND 1794 (Ann Arbor, 1794), reprinted in EVANS EARLY AM. IMPRINT COLLECTION quod.lib.umich.edu/e/evans?type=bib&q1=N20452&rgn1=citation&Submit=Search [<https://perma.cc/9YFR-JH6A>].

247. Letter from Timothy Pickering to John Adams (May 1, 1797), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Adams/99-02-02-1955> [<https://perma.cc/24CJ-H4NX>] (last visited Feb. 22, 2019).

248. 8–9 ANNALS OF U.S. CONG. (1798–1799).

249. JOHN MASON, SELF KNOWLEDGE: A TREATISE, SHEWING THE NATURE AND BENEFIT OF THAT IMPORTANT SCIENCE, AND THE WAY TO ATTAIN IT. : INTERMIXED WITH VARIOUS REFLECTIONS AND OBSERVATIONS ON HUMAN NATURE (1793), reprinted in EVANS EARLY AMERICAN IMPRINT COLLECTION quod.lib.umich.edu/e/evans?type=bib&q1=N19727&rgn1=citation&Submit=Search [<https://perma.cc/68NC-QYM7>] (last visited Mar. 9, 2019).

250. Letter from Henry Lee to Thomas Jefferson (Oct. 24, 1792), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Jefferson/01-24-02-0487> [<https://perma.cc/7FN9-YD47>] (last visited Feb. 22, 2019).

251. H. TUCKNISS, AMERICAN REMEMBRANCER; OR, AN IMPARTIAL COLLECTION OF ESSAYS, RESOLVES, SPEECHES, &C. RELATIVE, OR HAVING AFFINITY, TO THE TREATY WITH GREAT BRITAIN (1795).

252. ALEXANDER JAMES DALLAS, FEATURES OF MR. JAY'S TREATY. TO WHICH IS ANNEXED A VIEW OF THE COMMERCE OF THE UNITED STATES, AS IT STANDS AT PRESENT, AND AS IT IS FIXED BY MR. JAY'S TREATY (1795), reprinted in EVANS EARLY AM. IMPRINT COLLECTION quod.lib.umich.edu/e/evans?type=bib&q1=N21681&rgn1=citation&Submit=Search [<https://perma.cc/25MT-LFBS>] (last visited Mar. 9, 2019); IMPORTANT DOCUMENTS AND DISPATCHES, WHICH ACCOMPANIED THE MESSAGE OF THE PRESIDENT OF THE UNITED STATES, TO BOTH HOUSES OF CONGRESS (1798), reprinted in EVANS EARLY AM. IMPRINT COLLECTION, quod.lib.umich.edu/e/evans?type=bib&q1=N26194&rgn1=citation&Submit=Search

| | | |
|--|----------------------------------|------------------------------------|
| Marshall ²⁵⁵ | Loan Officer ²⁵⁶ | Judges ²⁵⁷ |
| Attorney ²⁵⁸ | Treasurer ²⁵⁹ | Accountant ²⁶⁰ |
| Surveyor of the Revenue ²⁶¹ | Receiver of Taxes ²⁶² | Commissioner ²⁶³ |
| Commissioner of Loans ²⁶⁴ | Customs Officers ²⁶⁵ | Cabinet Secretaries ²⁶⁶ |
| | Treaty | Attorney General ²⁶⁸ |

[<https://perma.cc/TM2C-MBGF>] (last visited Mar. 9, 2019); THE ANNUAL REGISTER, AND VIRGINIAN REPOSITORY, FOR THE YEAR 1800 (1799), reprinted in EVANS EARLY AM. IMPRINT COLLECTION, quod.lib.umich.edu/e/evans?type=bib&q1=N26403&rgn1=citation&Submit=Search [<https://perma.cc/6MEN-NB6W>] (last visited Mar. 9, 2019).

253. Edmund Randolph, *Opinion on the Theft of Slaves from Martinique* (Nov. 1, 1792), in FOUNDERS ONLINE, NAT’L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Jefferson/01-24-02-0508> [<https://perma.cc/436Z-N75Z>] (last visited Feb. 22, 2019).

254. TUCKNISS, *supra* note 251.

255. IMPORTANT DOCUMENTS AND DISPATCHES, WHICH ACCOMPANIED THE MESSAGE OF THE PRESIDENT OF THE UNITED STATES, TO BOTH HOUSES OF CONGRESS, *supra* note 252.

256. Letter from Henry Lee to Alexander Hamilton (Apr. 12, 1793), in FOUNDERS ONLINE, NAT’L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Hamilton/01-14-02-0204> [<https://perma.cc/32FR-6ACH>] (Feb. 22, 2019).

257. American Remembrancer, *supra* note 252.

258. THE ANNUAL REGISTER, AND VIRGINIAN REPOSITORY, FOR THE YEAR 1800, *supra* note 252 (from a list of “Officers of the United States for North Carolina,” so arguably the U.S. Attorney for the District of North Carolina). [<https://perma.cc/D7JY-38DK>].

259. Letter from Andrew G. Fraunces to Alexander Hamilton (June 10, 1793), in FOUNDERS ONLINE, NAT’L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Hamilton/01-14-02-0364> [<https://perma.cc/B8YJ-3BT7>] (last visited Feb. 22, 2019).

260. 34 JOURNALS OF CONTINENTAL CONGRESS 201–400 (1788–1789).

261. THE ANNUAL REGISTER, AND VIRGINIAN REPOSITORY, FOR THE YEAR 1800, *supra* note 252.

262. Letter from Andrew G. Fraunces to Alexander Hamilton, *supra* note 259.

263. 3 U.S. (3 Dall.) 191–390 (1796–1798).

264. THE ANNUAL REGISTER, AND VIRGINIAN REPOSITORY, FOR THE YEAR 1800, *supra* note 252.

265. Letter from Alexander Hamilton to Robert Purviance (Aug. 22, 1794), in FOUNDERS ONLINE, NAT’L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Hamilton/01-17-02-0098> [<https://perma.cc/FTG7-WUL7>] (last visited Feb. 22, 2019).

266. 1 CARPENTER, *supra* note 133, at 201–352 (addressing secretaries of state, treasury, and war).

| | | |
|--|---|--|
| | Commissioners ²⁶⁷ | |
| | Territorial Superintendent of Indian Affairs ²⁶⁹ | Postmaster General ²⁷⁰ |
| | | Treasurer ²⁷¹ |
| | | Comptroller of the Treasury ²⁷² |
| | | Commissioner of the Revenue ²⁷³ |
| | | Auditor ²⁷⁴ |
| | | Register ²⁷⁵ |
| | | Assistant Postmaster ²⁷⁶ |
| | | Keeper of Military Stores ²⁷⁷ |
| | | Foreign Diplomats ²⁷⁸ |
| | | Personal Secretaries to Foreign Diplomats ²⁷⁹ |
| | | Foreign Ministers ²⁸⁰ |
| | | Treasury Board Members ²⁸¹ |
| | | Deputy Auditor |

267. *Id.*

268. Camillus, *The Defence No. XXXVII* (Jan. 6, 1796), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Hamilton/01-20-02-0006> [<https://perma.cc/4PBD-MTH4>] (last visited Feb. 22, 2019).

269. Letter from Timothy Pickering, Sec'y of State, to George Washington, President (May 9, 1796), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/99-01-02-00505> [<https://perma.cc/34FK-XCEF>] (last visited Feb. 22, 2019).

270. 1 CARPENTER, *supra* note 133, at 201–352.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*; 10 JOURNALS OF THE CONTINENTAL CONGRESS 207–406 (1778).

275. 1 CARPENTER, *supra* note 133, at 201–352.

276. *Id.*

277. *Id.*

278. 22 JOURNALS OF THE CONTINENTAL CONGRESS 1–200 (1782).

279. *Id.*

280. 24 *id.* at 1–200 (1783).

281. 10 *id.* at 207–406 (1778).

| | | |
|--|--|--------------------------------|
| | | General ²⁸² |
| | | Clerks ²⁸³ |
| | | Geographer ²⁸⁴ |
| | | Revenue Officer ²⁸⁵ |

The majority of the specific officers named in the context of *officer(s) of the United States* were officers who seemed to exercise significant government authority. But some did not appear to fit that definition, such as loan officers, clerks, and personal secretaries to foreign diplomats.

H. Officers and Clerks

One way to get leverage on the scope of the term *officer* in the Founding era would be to see whether clerks were considered officers. We first looked at what the *office of clerk*²⁸⁶ referred to, reporting also a few instances that are not of the public/civil sense of *officer*:

| |
|----------------------------------|
| Office(s) of clerk |
| unknown ²⁸⁷ |
| to/of a/the Court ²⁸⁸ |

282. *Id.*

283. *Id.*

284. 32 *id.* at 201–384 (1787); U.S. SENATE, 1 DOCUMENTS LEGISLATIVE AND EXECUTIVE OF THE CONGRESS OF THE UNITED STATES, IN RELATION TO THE PUBLIC LANDS (1834).

285. 1798 R.I. PUB. LAWS.

286. Doing the same kind of search with *office of the clerk* returned very similar results.

287. 1786–1799 MASS. ACTS AND LAWS (“Any person being chosen and [us]ually serving one whole year, in the office of Clerk, Treasurer, Selediman, Overseer of the Poor, A[ss]e[s]sor, Constable, or Collector of taxes”); 1791 N.C. LAWS; PETER LONGUEVILLE, THE HERMIT: OR THE UNPARALLELED SUFFERINGS AND SURPRISING ADVENTURES OF PHILIP QUARLL, AN ENGLISHMAN (1795), *reprinted in* EVANS EARLY AM. IMPRINT COLLECTION, quod.lib.umich.edu/e/evans?type=bib&q1=N21527&rgn1=citation&Submit=Search [<https://perma.cc/H9B6-NEDZ>]; 1780–1782 MA. LAWS; Letter from Thomas Boylston Adams to William Cranch (July 15, 1799), *in* FOUNDERS ONLINE, NATIONAL ARCHIVES, <http://founders.archives.gov/documents/Adams/99-03-02-0425> [<https://perma.cc/35FT-DPEL>] (last visited Feb. 22, 2019).

288. 2 U.S. (2 Dall.) 1–198 (1781–1793); 1692–1788 MD. LAWS; 1770–1776 MA. LAWS; 1 THOMAS GREENLEAF, LAWS OF THE STATE OF NEW YORK COMPRISING THE

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| of the Supreme Court ²⁸⁹ |
| of the County ²⁹⁰ |
| of the quarter Sessions ²⁹¹ |
| of the Orphans Court ²⁹² |
| of the peace ²⁹³ |
| of the checque (or paymaster) ²⁹⁴ |
| of the legislature ²⁹⁵ |
| of the market ²⁹⁶ |
| of the Court of Common Pleas ²⁹⁷ |
| to the secretary of foreign affairs ²⁹⁸ |

CONSTITUTION AND THE ACTS OF THE LEGISLATURE, SINCE THE REVOLUTION, FROM THE FIRST TO THE FIFTEENTH SESSION, INCLUSIVE (1792); Reports of Cases Adjudged 1798; Kentucky 5 ("Kentucky 5" is the name of text a file in the Hein corpus, *see supra* note 74).

289. Letter from Abigail Smith Adams to Mary Smith Cranch (Feb. 12, 1800), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Adams/99-03-02-0578> [<https://perma.cc/P2NX-HDSU>] (last visited Feb. 22, 2019).

290. Letter from Gideon Granger to Thomas Jefferson (June 4, 1800), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Jefferson/01-32-02-0003> [<https://perma.cc/9583-VG4V>] (last visited Feb. 22, 2019).

291. *Id.*

292. *Id.*

293. ACTS OF GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA (1782).

294. Letter from Jean Claude de La Métherie to Thomas Jefferson (May, 12 1789), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Jefferson/01-15-02-0125> [<https://perma.cc/7DA7-7J35>] (last visited Feb. 22, 2019).

295. 4 ANNALS OF U.S. CONG. (1793–1795); 1792 LAWS PASSED IN THE TERRITORY OF THE U.S. NORTH-WEST OF THE RIVER OHIO; 1794 LAWS OF THE TERRITORY OF THE UNITED STATES NORTH-WEST OF THE OHIO; 1799 LAWS OF THE MISS. TERRITORY; American State Papers – Misc., *supra* note 173.

296. 1776 DEL. SESSION LAWS; 2 LAWS OF THE STATE OF DEL. (1797); 1788–1799 MD. LAWS; 1 LAWS OF THE STATE OF N.Y. (1792); Letter from George Washington to Brigadier General John Sullivan (Jan. 20, 1776), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/03-03-02-0108> [<https://perma.cc/2PPW-MWTT>] (last visited Feb. 22, 2019).

297. 1786–1799 MASS. ACTS AND LAWS; Letter from George Hazard Peckham to George Washington (July 29, 1790), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Washington/05-06-02-0066> [<https://perma.cc/UR8Q-3A3E>] (last visited Feb. 22, 2019).

298. Letter from David Stuart to George Washington (July 14, 1789), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN.,

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| of the house of representatives ²⁹⁹ |
| of any superior court ³⁰⁰ |
| of county courts ³⁰¹ |
| of the vestry ³⁰² |
| of the provincial court ³⁰³ |
| of the city ³⁰⁴ |
| for the congregation ³⁰⁵ |
| of the district court ³⁰⁶ |
| of the circuits ³⁰⁷ |
| of the elections ³⁰⁸ |
| of the military company ³⁰⁹ |

Clearly sometimes a clerk can be an officer, though the patterns here indicate that when referring to the office of a clerk, it

<http://founders.archives.gov/documents/Washington/05-03-02-0105>
[<https://perma.cc/CY56-BRVS>] (last visited Feb. 22, 2019).

299. Letter from Richard Cranch to Abigail Smith Adams (Nov. 10, 1800), *in* FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Adams/99-03-02-0788> [<https://perma.cc/58KA-XVFM>] (last visited Feb. 22, 2019); American State Papers – Misc., *supra* note 173.

300. JAMES DAVIS, COMPLETE REVISAL OF ALL THE ACTS OF ASSEMBLY, OF THE PROVINCE OF NORTH-CAROLINA NOW IN FORCE AND USE (1773).

301. THOMAS NICOLSON & WILLIAM PRENTIS, COLLECTION OF ALL SUCH PUBLIC ACTS OF THE GENERAL ASSEMBLY, AND ORDINANCES OF THE CONVENTIONS OF VIRGINIA, PASSED SINCE THE YEAR 1768, AS ARE NOW IN FORCE (1785); 1792 ACTS PASSED AT THE GEN. ASSEMB. FOR THE COMM. OF KY.

302. DAVIS, *supra* note 300.

303. 1692–1788 MD. LAWS.

304. 1776–1779 CONN. ACTS AND LAWS.

305. Subscription to Support a Clerk of the Congregation in Charlottesville (Feb. 1777), *in* FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Jefferson/01-02-02-0005> [<https://perma.cc/T86E-L9QD>] (last visited Feb. 22, 2019).

306. 1 AMERICAN STATE PAPERS: CLAIMS 5 (1789–1823).

307. 1796 N.Y. LAWS 267, 509.

308. AT A SESSION OF THE GENERAL ASSEMBLY OF MARYLAND, BEGUN AND HELD AT THE CITY OF ANNAPOLIS, ON MONDAY, THE 6TH OF NOVEMBER IN THE YEAR OF OUR LORD 1786, AND ENDED THE 20TH DAY OF JANUARY, 1787, THE FOLLOWING LAWS WERE ENACTED; 1788–1799 MD. GEN. ASSEMB.

309. An Act for Forming and Regulating the Militia; and for encouragement of military skill, for the better defence of this State (1779), *in* VERMONT STATE PAPERS 305, 307 (1823).

is usually a singular, specific clerk being referenced, as opposed to clerks generally.

We also came across instances where clerks were contrasted with or referred to distinctly from officers. For instance, in discussing a 1787 bill in New York that would negate all ballots in a district if there was found to be even one extra vote, the bill was condemned because “it was in the power of the clerk or any officer, by putting in an additional ballot, to set aside the votes of 500 persons.”³¹⁰ Yet sometimes clerks were generally referred to as a type of officer. For instance, the Continental Congress required that

each Member of the Board of Treasury, the Auditor, and Deputy Auditor General and Clerks before entering upon their office, shall respectively take an Oath, to be administered to the Board by the president of Congress, and to the other officers by some one or more of the Members of the Board.³¹¹

In sum, sometimes a clerk was an officer. Sometimes not. The most we can say based on the evidence we have seen is that.

IV. CAVEATS

There are limits to the analysis we have conducted above. First, as previously noted, frequency of references to actual officers is not as good as sense frequency, which we were mostly unable to do (except somewhat in the case of *public employment*). Such frequency data can be overread to create a narrower sense—e.g., birds can fly—than is accurate. We view factual instances of a sense to better be used to create a complete, composite picture of the sense.

Additionally, we sampled the search results rather than examining them all. Certainly, that means one can miss things. So future research could look at all of the results COFEA produces. Finally, secondary tools of a corpus, such as collocates, clusters, and raw frequency data, are only weak evidence at best of

310. N.Y. Assembly, *Motion on an Act for Regulating Elections* (January, 24 1787), in FOUNDERS ONLINE, NAT'L ARCHIVES & RECORDS ADMIN., <http://founders.archives.gov/documents/Hamilton/01-04-02-0010> [<https://perma.cc/ET78-GG2K>] (last visited Feb. 22, 2019).

311. 10 JOURNALS OF THE CONTINENTAL CONGRESS 351 (1778).

meaning. These tools are more exploratory than confirmatory, and should not be overread. Still, they have some value to the extent they provide stark patterns.

V. CONCLUSION

We explored the potential meaning of *officers of the United States* in the Constitution using the full Corpus of Founding-Era American English, which had not been fully used by previous scholarship. Our findings are muddy. But we believe they undermine the Supreme Court's narrow definition of officer as one exercising significant government authority. There are enough instances of people called officers who would seem to fall outside of the Supreme Court's definition that a broader definition is warranted. Where exactly to draw the line, however, was not made clear by the data, other than to say that it does not appear that everyone hired by the government is an officer. Thus, based on the murkiness of our results, the best we can say is that an *officer of the United States* should be defined more broadly than one exercising significant government authority, but not as broadly as everyone working for the government. Future research will have to come up with a more precise definition.

GIVE VETERANS THE BENEFIT OF THE DOUBT: CHEVRON, AUER, AND THE VETERAN'S CANON

As the Civil War drew to a close, President Lincoln spoke of the nation's duty "to care for him who shall have borne the battle and for his widow and his orphan."¹ Congress's attempts to fulfill that duty have created some hard questions for the courts. *Hayburn's Case*,² now better known for what it reveals about Founding-era ideas of judicial review and the separation of powers,³ originated in a Revolutionary War veteran's efforts to claim benefits.⁴ For about 200 years thereafter, however, Congress exempted decisions concerning veterans' benefits from judicial review.⁵ Congress changed that in 1988 when it passed the Veterans' Judicial Review Act (VJRA).⁶ The VJRA created the Court of Appeals for Veterans Claims (CAVC), a non-Article III court with jurisdiction over decisions made by officials within the Department of Veterans Affairs (VA),⁷ and gave the Federal Circuit power to review CAVC decisions on questions of law.⁸ Thus judicial review of veterans' benefits decisions returned. With it came more hard questions for the courts.

1. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), http://avalon.law.yale.edu/19th_century/lincoln2.asp [<https://perma.cc/WE43-E8EK>].

2. 2 U.S. (2 Dall.) 408, 409 (1792).

3. *See, e.g.,* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) ("*Hayburn's Case* . . . stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."); *see also* RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 81–87 (7th ed. 2015).

4. FALLON ET AL., *supra* note 3, at 82.

5. James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 253–56 (2010) (discussing the aftermath of *Hayburn's Case* and congressional choices to exempt veterans' benefits decisions from judicial review).

6. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended in various parts of 38 U.S.C.).

7. 38 U.S.C. §§ 7251–7252 (2012).

8. *Id.* § 7292 (granting the Federal Circuit jurisdiction over any CAVC decision with respect to "a rule of law or of any statute or regulation . . . or any interpretation thereof" with limited exceptions).

Courts face one such question when doctrines of deference like *Chevron*⁹ and *Auer*¹⁰ conflict with the veteran's canon—the Supreme Court's "rule that interpretive doubt is to be resolved in the veteran's favor."¹¹ When a statute or regulation is ambiguous,¹² should a reviewing court defer to the VA under agency deference doctrines, or follow the veteran's canon and resolve the doubtful language in favor of the veteran? The Federal Circuit has yet to answer that question.¹³ And though a case involving this conflict¹⁴ led the Supreme Court to grant certiorari on whether the Court should overrule *Auer*, the Court declined to address the conflict between the veteran's canon and agency deference.¹⁵ So the question remains a live one.

This Note answers that question by arguing that in those interpretive battles, the veteran's canon should triumph over *Chevron* and *Auer*. The veteran's canon is a traditional tool of interpretation,¹⁶ and as such, it should be applied to resolve

9. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (holding that when statutory language is ambiguous, courts should defer to the interpretation of the agency charged with administering the statute so long as the agency's interpretation is reasonable).

10. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (holding that courts should defer to an agency's interpretation of its own regulation unless it is plainly erroneous or inconsistent with the regulation).

11. *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

12. Professor Solan prefaced his discussion of ambiguity by observing that "[l]egal writers, and judges in particular, use the word 'ambiguity' to refer to all kinds of indeterminacy, whatever their source. Because this Article focuses heavily on what judges say, I will generally use the word ambiguity in this looser, legal sense." Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L. REV. 859, 860 (2004). This Note will do the same.

13. See *Procopio v. Wilkie*, 913 F.3d 1371, 1387 (Fed. Cir. 2019) (O'Malley, J., concurring) (noting "the court's failure—yet again—to address and resolve the tension between the pro-veteran canon and agency deference.")

14. *Kisor v. Shulkin*, 880 F.3d 1378, 1379–80 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of en banc hearing) (noting that the majority's holding granted deference to the VA because of *Auer* and arguing that the veteran's canon should prevail in such situations).

15. The petitioners in *Kisor* presented both the question of whether *Auer* should be overruled and the question of whether *Auer* should yield to the veteran's canon. See Petition for a Writ of Certiorari in *i*, *Kisor v. O'Rourke*, No. 18-15 (U.S. June 29, 2018), 2018 WL 3239696 (listing both questions presented by petition for certiorari); *Kisor v. Wilkie*, 139 S. Ct. 657 (Mem.), No. 18-15, 2018 WL 6439837, at *1 (U.S. Dec. 10, 2018) (granting certiorari only on the first question presented).

16. See, e.g., *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) ("We have long applied 'the canon that provisions for benefits to members of the Armed Services

ambiguity before courts defer to the VA's views on a statute or regulation.¹⁷ This use of the veteran's canon reflects Congress's general intent in providing judicial review of the VA's decisions,¹⁸ and its specific intent in legislating in the area of veterans' benefits.¹⁹

Moreover, several elements of veterans law support this result. As a practical matter, because veterans sometimes

are to be construed in the beneficiaries' favor.'"); *Gardner*, 513 U.S. at 118 (1994) (noting "the rule that interpretive doubt is to be resolved in the veteran's favor"); *Coffv v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) ("The statute is to be liberally construed for the benefit of the returning veteran."); *Fishgold v. Sullivan Drvdock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits."); *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.").

17. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (noting that "under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning.") (citations omitted). In the context of *Auer*, the Court has not explicitly stated that traditional tools of statutory interpretation apply, but *Auer* analysis appears to have been shaped by this element of *Chevron*. See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 307 (2017) (observing that in *Auer* as well as *Chevron* cases, "the 'traditional tools of statutory construction' can be used to determine whether there is ambiguity at all.") (internal citations omitted) (emphasis added); Kristin E. Hickman, *Contemplating a Weaker Auer Standard*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 23, 2016), <http://yalejreg.com/nc/contemplating-a-weaker-auer-standard-by-kristin-e-hickman/> [https://perma.cc/R2QU-E2AB] (noting that in the aftermath of the Court's decision in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), several circuit court opinions have used traditional tools of statutory construction in determining whether a regulation is ambiguous and triggers *Auer* deference).

18. Ridgway, *supra* note 5, at 256 (explaining that the goal of the VJRA was increased accountability).

19. See *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21 n.9 (1991) (discussing the veteran's canon and the Court's presumption that Congress legislates against the background of such rules of construction); see also *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."). This argument does not depend on individual members of Congress knowing about the veteran's canon. Cf. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1124 (2017) ("We can say that an enacting Congress 'understood' or 'knew' or 'accepted' all these rules, but that's true only of Congress-the-legal-entity, the artificial construct of our legal rules. The natural persons we call 'members of Congress' didn't have to know these rules at all, and it seriously confuses matters to pretend that they did.").

endure injuries or illnesses unique to the conditions of war, those maladies are often not well-understood. The veteran's canon helps ensure that veterans are not denied benefits when science moves at a slower pace than suffering.²⁰ As a structural matter, the single chain of review established by the VJRA erases the uniformity concern that may support deference elsewhere.²¹ For all those reasons and more, courts should apply the veteran's canon before *Chevron* or *Auer* and thereby give veterans the benefit of the doubt in the law.

This Note makes that case in three parts. Part I provides some background on *Chevron*, *Auer*, and the veteran's canon. Part II illustrates the tension between *Chevron*, *Auer*, and the veteran's canon through the story of "blue water" Navy veterans' litigation involving Agent Orange legislation and regulation,²² and briefly surveys the positions scholars have taken on how to resolve this conflict. Finally, Part III concludes by arguing that where such conflict exists, the veteran's canon should take priority in the interpretation of statutes and regulations in veterans' benefits schemes.

20. See *On the Agent Orange Trail*, N.Y. TIMES, July 5, 1979, at A16 (noting that veterans who approached the Veterans Administration with concerns about Agent Orange exposure "were told there was no such thing as Agent Orange poisoning, nor any conclusive evidence that the chemical harmed anything other than vegetation"); Clyde Haberman, *Agent Orange's Long Legacy, for Vietnam and Veterans*, N.Y. TIMES (May 11, 2014), <https://www.nytimes.com/2014/05/12/us/agent-oranges-long-legacy-for-vietnam-and-veterans.html> [https://nyti.ms/1ouNfIT] (noting that "[s]tudies on Agent Orange's effects tend to use language that is less than absolute").

21. See, e.g., Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121–22 (1987) (framing *Chevron* as a way to enhance the likelihood of uniform administration of statutes).

22. The "blue water" Navy refers to Vietnam-era Navy veterans who served offshore (as contrasted with "brown water" Navy veterans, who served in Vietnam's inland waterways). See Ann E. Marimow, *The "blue water" Navy veterans of the Vietnam War battle Agent Orange*, WASH. POST (Dec. 28, 2018), https://www.washingtonpost.com/local/legal-issues/the-blue-water-navy-veterans-of-the-vietnam-war-battle-agent-orange/2018/12/28/d9f8a9ea-ff09-11e8-ad40-cdfd0e0dd65a_story.html?utm_term=.25c08364f048 [https://perma.cc/Q39Q-YB26].

I. CHEVRON, AUER, AND THE VETERAN'S CANON: AN INTRODUCTION

Veterans law exists in an odd, long-isolated outpost of law's empire.²³ Even so, administrative law atmospheric affect the whole realm.²⁴ As such, this Part situates this particular puzzle of veterans law within the broader conversation about *Chevron* and *Auer*.²⁵

A. Chevron's Revolution and Evolution

In *Chevron*, the Supreme Court handed down a decision it believed to be a restatement of "well-settled principles" of "deference to administrative interpretations."²⁶ The Court's distillation of those principles seemed simple: When interpreting statutes administered by an agency, unless Congress had "directly spoken to the precise question at issue," courts should defer to agency interpretations "based on a permissible construction of the statute."²⁷ For a construction to be permissible, the Court noted that it need not be "the only one [the court] permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."²⁸

23. See James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 135–36 (2011) (discussing the history of veterans' benefits law in the United States, and noting that judicial review was generally unavailable for benefits decisions prior to the Veterans' Judicial Review Act of 1988).

24. Cf. Victoria Hadfield Moshiaswili, *The Downfall of Auer Deference: Veterans Law at the Federal Circuit in 2014*, 64 AM. U. L. REV. 1007, 1008 (2015) ("The 2014 veterans benefits case law of the U.S. Court of Appeals for the Federal Circuit mirrored a growing trend at the U.S. Supreme Court to question the well-established tradition of judicial deference to a federal agency's interpretation of its own regulations.").

25. This Note tries to give readers a general sense of the debate, but those seeking a more in-depth exploration of the conversation should look elsewhere. For a collection of criticisms of the current regime, see Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018). For a leading defense of *Auer*, see Sunstein & Vermeule, *supra* note 17. For Prof. Sunstein's most recent defense of *Chevron*, see Cass R. Sunstein, *Chevron as Law*, GEO. L.J. (forthcoming), available at <https://ssrn.com/abstract=3225880> [<https://perma.cc/AM6E-65KP>].

26. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

27. *Id.* at 842–43.

28. *Id.* at 843 n.11.

Instead, when faced with ambiguity or silence in a statute,²⁹ agencies should get deference for any reasonable interpretation.³⁰ Thanks to the papers of Justice Blackmun, we know that this rule reflected the disposition of the *Chevron* opinion's author, Justice Stevens—"When I am so confused, I go with the agency."³¹

The *Chevron* Court justified that rule by casting ambiguous statutory provisions as congressional delegations of policy-making power to the agencies tasked with administering those statutes.³² Where Congress expressed no specific intent, the Court assumed that Congress intended for the agency to work out the details.³³ As such, those interpreting an ambiguous provision were making a "policy choice."³⁴ Per the Court, those choices should be made by expert agencies who answer to the President (and thus to the people), not by generalist judges with life tenure.³⁵

Perhaps accidentally, *Chevron* transformed administrative law.³⁶ Members of the Executive branch quickly recognized its potential power. According to Professor Eskridge and Lauren Baer, "Reagan Administration officials and appointees

29. For the sake of simplicity and brevity, this Note refers to *Chevron's* threshold inquiry as one of ambiguity, and thus does not repeat the Court's point about silence as an alternative or additional sufficient condition to trigger deference to reasonable agency interpretations.

30. *Chevron*, 467 U.S. at 844.

31. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1086 n.7 (2008).

32. *Chevron*, 467 U.S. at 843–44.

33. *Id.* at 865–66.

34. *Id.* at 866.

35. *Id.* at 865–66 (contrasting agencies with "[j]udges [who] are not experts in the field, and are not part of either political branch of the Government"). Justice Kagan's scholarship suggests that the political accountability rationale of *Chevron* could lead to a spectrum of deference with more or less deference being granted according to the degree of presidential involvement. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2376–78 (2001). Tying deference to accountability has significant ramifications for independent agencies. See generally *id.*; see also Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429, 432 (2006) ("*Chevron's* political accountability rationale should imply that statutory interpretations of independent agencies receive less judicial deference.").

36. See Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 282–83 (2014).

proclaimed a 'Chevron Revolution.'"³⁷ Why would Reaganites celebrate this accidental revolution? Because *Chevron's* political accountability rationale supported and enabled greater presidential control of administrative agencies.³⁸ For members of the Reagan Administration, *Chevron* came as a gift.

Members of the judiciary also took notice of *Chevron*, and yet they disagreed about how it should be applied. Judge Kenneth Starr of the D.C. Circuit praised *Chevron* for its "simple, two-step framework."³⁹ He understood *Chevron* to mean that "absent direct evidence of legislative intent, the Agency's interpretation should be allowed if it is a reasonable reading of the statute."⁴⁰ With that test, Judge Starr contended, the *Chevron* Court "eliminated a significant ambiguity in the law"⁴¹ and returned "the power to set policy to democratically accountable officials."⁴² By shifting power from courts to agencies, Judge Starr reasoned, *Chevron* undermined a foundational assumption of other jurisprudential regimes—that "federal courts have a general duty to supervise agencies in much the same way that the Supreme Court supervises lower federal courts."⁴³ Not so, Judge Starr argued. That supervisory duty belonged to Congress and the President. *Chevron* made that clear.⁴⁴

That same year, then-Judge Stephen Breyer of the First Circuit criticized those who read *Chevron* as a simple, widely applicable rule.⁴⁵ Such interpretations of the decision, he maintained, were "seriously overbroad, counterproductive and sometimes senseless."⁴⁶ Judge Breyer specifically criticized the

37. See Eskridge & Baer, *supra* note 31, at 1087.

38. See Jonathan Adler, *Restoring Chevron's Domain*, 81 MO. L. REV. 983, 986 (2016); see also Kagan, *supra* note 35, at 2373–74 (noting that "political accountability, within the gaps left by Congress, attaches to and resides in choice by the President").

39. Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 288 (1986).

40. *Id.* at 285.

41. *Id.* at 284.

42. *Id.* at 312.

43. *Id.* at 284.

44. *Id.* at 312.

45. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986).

46. *Id.*

D.C. Circuit's emerging *Chevron* jurisprudence for reading *Chevron* as a simple test.⁴⁷ Treating *Chevron* as a rule, he argued, represented "a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or an administrative perspective."⁴⁸ For Judge Breyer, the judicial duty to interpret the law required consideration of more factors than *Chevron*-as-a-rule accounted for.⁴⁹ Although skeptical of the judiciary's capacity to police agencies' substantive policy decisions,⁵⁰ Judge Breyer believed courts should "build a jurisprudence of 'degree and difference' into *Chevron*'s word 'permissible.'"⁵¹ Otherwise, the country would be left with a legal regime which "requires courts to defer to agency judgments about *matters of law*, but . . . also suggests that courts conduct independent, 'in-depth' reviews of agency judgments about *matters of policy*. Is this not the exact opposite of a rational system?"⁵²

Fast-forward to last year's decision in *SAS Institute Inc. v. Iancu*⁵³ to glimpse how much the world has changed since 1986. In that case, the administrator argued in part that he should receive *Chevron* deference because the statutory language was

47. *Id.*

48. *Id.* at 381. Notably, then-Judge Breyer also suggested that "*Chevron*, too, might be limited to its factual and statutory context, where it is well suited." *Id.*

49. *Id.* at 373 ("[T]here are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow 'proper' judicial attitudes about questions of law to be reduced to any single simple verbal formula.").

50. *Id.* at 390. In particular, then-Judge Breyer noted that judges are often pressed for time and may not be able to sufficiently familiarize themselves with the record, and that even when judges can familiarize themselves with the record, ex post judicial evaluations of a decision are likely to be far removed from the realities faced by administrators ex ante. *See id.* at 389–90.

51. *Id.* at 382.

52. *Id.* at 397. In the early years of the *Chevron* regime, members of the academy also questioned *Chevron*'s constitutional legitimacy. *See, e.g.,* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 467 (1987) (arguing that the separation of powers means "that foxes should not guard henhouses—an injunction to which *Chevron* appears deaf"); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 465 (1989) (describing *Chevron* as a "siren's song" and asserting that "[t]he danger of *Chevron*'s song lies in its apparent obliviousness to the fundamental alterations it makes in our constitutional conception of the administrative state.").

53. 138 S. Ct. 1348 (2018).

unclear.⁵⁴ Justice Gorsuch, no great fan of *Chevron*,⁵⁵ declined the invitation to reconsider *Chevron* or apply it to the matter at hand. Instead, he applied the “traditional tools of statutory construction” and found that the statute’s language resolved the question.⁵⁶ Justice Breyer’s dissent revealed that although his view of *Chevron* has remained remarkably consistent over the decades—for him, *Chevron* is and ever was a context-sensitive “rule of thumb” rather than a sweeping mandate—much else had changed.⁵⁷ Where jurists like Judge Starr had once praised *Chevron* as a doctrine of judicial restraint,⁵⁸ the

54. *Id.* at 1358. The specific administrator involved was the Director of the Patent and Trademark Office. *Id.* at 1354.

55. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that *Chevron* and its extensions raise significant separation of powers issues and appear to conflict with the plain text of the Administrative Procedure Act); see also Trevor W. Ezell & Lloyd Marshall, *If Goliath Falls: Judge Gorsuch and the Administrative State*, 69 STAN. L. REV. ONLINE 171 (2017) (surveying Justice Gorsuch’s administrative law jurisprudence from his time on the Tenth Circuit).

56. *SAS, Inst. Inc.* at 1358–59.

57. Compare *Iancu*, 138 S. Ct. at 1364 (Breyer, J., dissenting) (“In referring to *Chevron*, I do not mean that courts are to treat that case like a rigid, black-letter rule of law, instructing them always to allow agencies leeway to fill every gap in every statutory provision . . . Rather, I understand *Chevron* as a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have.”) (citations omitted) with Breyer, *supra* note 45, at 373–82 (encouraging a flexible understanding of *Chevron* and suggesting that “the word ‘permissible’ is general enough to embody the range of relevant factors”).

58. Starr, *supra* note 39, at 308; see also John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 764–67 (2017) (explaining Justice Scalia’s defenses of *Chevron* as efforts to cabin judicial discretion). But insofar as the threshold ambiguity inquiry remains irreducibly squishy, *Chevron* may promise more restraint in theory than it can deliver in practice. Cf. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 572 (Stevens, J., dissenting) (2005) (noting that “‘ambiguity’ is a term that may have different meanings for different judges”); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016) (contending that “there is often no good or predictable way for judges to determine whether statutory text contains ‘enough’ ambiguity to cross the line beyond which courts may resort to the constitutional avoidance canon, legislative history, or *Chevron* deference.”); Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 59 (2010) (“[W]ithout guidance to help judges understand the threshold inquiry into ambiguity that is supposed to constrain them, the benefits of curbing judicial discretion vanish.”); Solan, *supra* note 12, at 859 (“The problem, perhaps ironically, is that the concept of *ambiguity* is itself perniciously ambiguous.”).

doctrine is now damned as an abdication of the judicial duty to say what the law is.⁵⁹

Several current and former Justices have criticized *Chevron* or its extensions.⁶⁰ Some lower court judges have expressed skepticism about the current regime.⁶¹ And the Court has restricted *Chevron*'s domain—for instance, it does not apply to criminal statutes,⁶² nor “extraordinary cases” where Congress likely did not intend to delegate significant questions to an agency,⁶³ nor when agency interpretations emerge from circumstances that do not suggest “delegation meriting *Chevron* treatment.”⁶⁴ For now, though, *Chevron*

59. See, e.g., *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring) (observing that “*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.”). For some, this is why *Chevron* has become known as the “counter-*Marbury* of the administrative state.” See Aditya Bamzai, *Marbury v. Madison and the Concept of Judicial Deference*, 81 MO. L. REV. 1057, 1057–58 (2016). For a potentially complementary argument that due process requires judges to render independent interpretations of the law, see Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1250 (2016) (arguing that when “when judges defer to agency judgments about statutory interpretation, the judges abandon their very office or duty as judges”).

60. See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (“The type of reflexive deference exhibited in some of these cases is troubling.”); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (“*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is ‘the best reading of an ambiguous statute’ in favor of an agency’s construction.”); *City of Arlington v. FCC*, 569 U.S. 290, 312 (2013) (Roberts, C.J., dissenting) (“A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference.”). Note that Chief Justice Robert’s dissent in *City of Arlington* also includes a defense of *Chevron*. *Id.* at 317. For then-Judge Gorsuch’s assessment of *Chevron*, see *supra* note 55. As for Justice Kavanaugh’s views, see Kavanaugh, *supra* note 58, at 2150–52 (2016) (arguing that *Chevron* “has no basis in the Administrative Procedure Act” but noting that “*Chevron* makes a lot of sense in certain circumstances”).

61. See, e.g., *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027–28 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (arguing that *Chevron* does not apply to statutes that have both criminal and civil applications); Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 323–26 (2017) (observing that *Chevron*'s secondary effects can include judicial laziness and administrative sloppiness).

62. *Abramski v. United States*, 573 U.S. 169, 191 (2014) (“[C]riminal laws are for courts, not for the Government, to construe.”).

63. *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015).

64. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

remains the law of the land,⁶⁵ and “a powerful weapon in an agency’s regulatory arsenal.”⁶⁶

B. Auer Deference

In its “canonical formulation,” *Auer* deference requires courts to “enforce an agency’s interpretation of its own rules unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’”⁶⁷ According to Justice Scalia, who authored the Court’s opinion in *Auer*,⁶⁸ “[i]n practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes.”⁶⁹ Its roots run back to a pre-APA decision, *Bowles v. Seminole Rock & Sand Co.*,⁷⁰ and for many years, it generated little of the controversy produced by *Chevron*.⁷¹

That changed when Professor Manning attacked *Auer* as a unique threat to the separation of powers. Unlike *Chevron*, which grants deference to agencies interpreting ambiguities in the statutes that Congress writes, *Auer* gives agencies the power of self-interpretation—the agency gets to say what its own regulation means.⁷² By allowing “agencies both to write

65. *Pereira v. Sessions*, 138 S. Ct. 2105, 2129 (2018) (Alito, J., dissenting) (“[U]nless the Court has overruled *Chevron* in a secret decision that has somehow escaped my attention, it remains good law.”). One should also consider Professor Vermeule’s contention that something like *Chevron* “would persist in *de facto* form even if *Chevron* were overruled *de jure*.” ADRIAN VERMEULE, *LAW’S ABNEGATION* 13 (2016).

66. *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting).

67. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) (citations omitted).

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

69. *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part).

70. 325 U.S. 410, 414 (1945) (holding that the administrative agency’s interpretation controls “unless it is plainly erroneous or inconsistent with the regulation”). Both *Auer* and *Seminole Rock* are used to refer to this form of deference. But the two decisions might not be as similar as this practice would suggest. See Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 *GEO. J.L. & PUB. POL’Y* 87, 88 (2018) (arguing that “*Auer* deference is an anachronistic reading of *Seminole Rock* through *Chevron*-filtered lenses.”)

71. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 *COLUM. L. REV.* 612, 614 (1996) (“Until quite recently, the Supreme Court and most of the academic community have accordingly been content to treat *Seminole Rock* as uncontroversial.”).

72. *But see* Aneil Kovvali, Note, *Seminole Rock and the Separation of Powers*, 36 *HARV. J.L. & PUB. POL’Y* 849 (2013) (arguing that only some regulations—those that create liability not found in the statutory source—generate the kind of separation of powers concerns raised by Dean Manning’s critique of *Auer*).

regulations and to construe them authoritatively, *Seminole Rock* effectively unifies lawmaking and law-exposition—a combination of powers decisively rejected by our constitutional structure.”⁷³ In this way, *Auer* unites that which the Constitution divided.

Moreover, the argument goes, that unification of powers gives agencies the incentive (and ability) to evade the costs of notice-and-comment rulemaking.⁷⁴ Under *Auer*, an agency can promulgate unclear or incomplete regulations that the agency can later interpret as it pleases.⁷⁵ Insofar as *Auer* incentivizes such regulatory chicanery, that creates two more problems—mushy regulations deprive the public of notice,⁷⁶ and law gets made without the benefit of public input.⁷⁷ So to preserve the separation of powers, protect due process, and promote public participation in lawmaking, Manning recommended replacing *Auer* with “an independent judicial check on agency interpretations of agency rules.”⁷⁸

Justice Scalia came to agree. Having authored the Court’s opinion in *Auer*, he later argued that *Auer* “contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.”⁷⁹ As it stands, several other

73. Manning, *supra* note 71, at 631; *see also* United States v. Havis, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring) (explaining that “just as a pitcher cannot call his own balls and strikes, an agency cannot trespass upon the court’s province to ‘say what the law is.’”).

74. *See* Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1464 (2011) (noting that unqualified *Auer* deference could enable “agencies to issue binding legal norms while escaping both procedural constraints and meaningful judicial scrutiny”).

75. Manning, *supra* note 71, at 618 (1996) (“By providing the agency an incentive to promulgate imprecise and vague rules, *Seminole Rock* undercuts important deliberative process objectives of the APA, and it creates potential problems of inadequate notice and arbitrariness in the enforcement of agency rules.”).

76. *Id.* at 662 (“[W]hen an agency adopts an empty regulation . . . the commenting public will have little idea—indeed, no idea—of what it will be getting until the agency gives its rule content in application.”).

77. *Id.* at 661–62.

78. *Id.* at 696.

79. *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 621 (2013) (Scalia, J., concurring in part and dissenting in part). After Justice Scalia’s death, Justice Thomas recalled one exchange they had about *Auer*:

[S]o we were sitting on the bench one day, and [Scalia] leans over to me. He said, “Clarence. *Auer*—A-U-E-R. *Auer* is one of the worst opinions in the history of this country.”

“Yeah, Nino. Nino?”

Justices have expressed concern about *Auer*.⁸⁰ As for the more recently confirmed Justices, Justice Gorsuch's criticisms of *Chevron* would seem to apply with even more force to *Auer*.⁸¹ For his part, then-Judge Kavanaugh gave a speech about Justice Scalia's legacy in which he suggested that *Auer* would one day be overruled.⁸² Maybe that day has come.⁸³

But maybe not. Professors Sunstein and Vermeule have argued that the separation of powers concerns raised by *Auer* would, if carried to their logical ends, "require declaring unconstitutional dozens of major federal agencies."⁸⁴ Moreover, they contend that because the interpretation of ambiguous

"Yeah."

"You wrote it."

Clarence Thomas & John Malcolm, *Joseph Story Distinguished Lecture: A Conversation with Clarence Thomas*, HERITAGE FOUND. (Nov. 22, 2017), <https://www.heritage.org/courts/report/joseph-story-distinguished-lecture-conversation-clarence-thomas> [<https://perma.cc/WV34-TFG8>].

80. *Decker*, 568 U.S. at 616 (2013) (Roberts, C.J., concurring, joined by Alito, J.) (declining to reconsider *Auer* in the instant case but noting that the "issue is a basic one going to the heart of administrative law."); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process.").

81. Hence Justice Gorsuch joined Justice Thomas's dissent from denial of certiorari in a case that would have raised the question of *Auer*'s status. *See Garco Const., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

82. Patrick Gregory, *Kavanaugh: 3 Scalia Dissents Will Become Law of Land*, BLOOMBERG LAW (June 9, 2016), <https://www.bna.com/kavanaugh-scalia-dissents-n57982073854/> [<https://perma.cc/9S26-4SLR>].

83. Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effect on Agency Rules*, 119 COLUM. L. REV. 85, 91 (2019) (noting that "the Court now appears to be on the verge of overturning or significantly limiting *Auer* deference"). As some have noted, the coalition pushing for *Auer* to be overturned also includes immigration rights groups and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). *See* Alison Frankel, *Everybody hates Auer: Supreme Court challenge to agency deference draws 25 amicus briefs*, REUTERS (Feb. 1, 2019, 4:23 PM), <https://www.reuters.com/article/us-otc-auer/everybody-hates-auer-supreme-court-challenge-to-agency-deference-draws-25-amicus-briefs-idUSKCN1PQ5TZ> [<https://perma.cc/4AUN-2MWX>].

84. Sunstein & Vermeule, *supra* note 17, at 299. Some might agree with that premise, but disagree with the implication that *Auer* should therefore not be overruled. And there is always the possibility that concerns will not be carried to their logical ends. *Cf.* ALBERT CAMUS, *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 3 (Justin O'Brien trans., Vintage Books 1955) (1942) ("It is always easy to be logical. It is almost impossible to be logical to the bitter end.").

regulations—much like the interpretation of ambiguous statutory provisions—requires making complex decisions involving judgments of fact and value, agencies' expertise and political accountability make them better suited for that task.⁸⁵ In contrast to earlier arguments for *Auer* based on an agency's relative epistemological advantages in interpretation,⁸⁶ Sunstein and Vermeule's defense of *Auer* highlights an agency's comparative advantages as a policy-maker.⁸⁷ They conclude that just as "*Chevron* is the best fictional default rule for statutory construction, so too *Auer* is the best fictional default rule for interpretation of agency regulations."⁸⁸

Finally, Professors Sunstein and Vermeule suggest that the perverse incentives critique of *Auer* is "intuitively appealing, but wildly unrealistic."⁸⁹ When writing regulations, "agencies have a wide range of incentives, cutting in different directions, and the most important of these have nothing at all to do with *Auer*."⁹⁰ Two examples: First, other government actors and regulated parties will push for clarity so they can act in accord with the regulation,⁹¹ and second, for agencies with political orientations, ambiguity creates the possibility that future agency actors will exploit that language for different ends—something drafters would therefore presumably strive to avoid.⁹² Even when ambiguity appears in a regulation, *Auer* might not be to blame, because many writers of agency regulations do not know of the doctrine.⁹³ Moreover, some who

85. Sunstein & Vermeule, *supra* note 17, at 305.

86. For some time, courts justified *Auer* deference with "the idea that the agency, as the entity that originally drafted and enacted the regulation in question, has special insight into its meaning." Stephenson & Pogoriler, *supra* note 74, at 1454. Yet that assumption is questionable, especially when an agency offers an interpretation of a regulation long after it was drafted, or when a later agency interpretation contradicts one contemporaneous to the regulation's drafting. *Id.* at 1454–58.

87. If one thinks that agencies are less accountable to political actors than they should be, it remains true that agencies have greater accountability than do unelected, life-tenured federal judges.

88. Sunstein & Vermeule, *supra* note 17, at 307.

89. *Id.* at 299.

90. *Id.* at 308.

91. *Id.* at 309.

92. *Id.*

93. *Id.* See also Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1061–66 (2015) (comparing drafter knowledge of *Auer* to knowledge of other doctrines of deference). Although regulation drafters

accept the theoretical critique of *Auer's* incentive structure might think its associated problems (vague regulations) better than the alternative (transition costs and reduced agency flexibility).⁹⁴ Finally, some empirical research suggests that *Auer* has not led to more vague agency regulations.⁹⁵

What exactly the Court will do in *Kisor* is hard to predict.⁹⁶ Commentators have suggested a wide range of options, with some arguing that *Auer* should be overruled,⁹⁷ others that it should be reformulated,⁹⁸ and still others that it should simply be affirmed.⁹⁹ One recent piece even contends that "*Auer* deference is an anachronistic reading of *Seminole Rock* through *Chevron*-filtered lenses," and that the Court should abandon *Auer's* error for a faithful reading of *Seminole*

exhibited less familiarity with *Auer* than other doctrines (like *Chevron*), Walker suggests that "the fact that two in five rule drafters surveyed indicated that they are using *Auer* deference when drafting regulations may well persuade many that it is not worth preserving, as such a doctrine should play no role at the initial regulation-drafting stage." *Id.* at 1066.

94. See Conor Clarke, *Why the Supreme Court Might Not Overrule Seminole Rock*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 21, 2016), <http://yalejreg.com/nc/why-the-supreme-court-might-not-overrule-seminole-rock-by-conor-clarke/> [https://perma.cc/9X99-DJHH].

95. See Walters, *supra* note 83 (examining a dataset of federal rules from 1982 to 2016 and finding that agencies did not increase the vagueness of their rules in response to *Auer*).

96. Cf. Galen Druke, *How The Supreme Court Could End Extreme Partisan Gerrymandering This Month*, FIVETHIRTYEIGHT (June 7, 2018, 6:00 AM), <https://fivethirtyeight.com/features/how-the-supreme-court-could-end-extreme-partisan-gerrymandering-this-month/> [https://perma.cc/GXN6-9V2H] ("Predicting the high court's decisions is a fool's errand, in part because there are many paths the justices can take.").

97. Allyson N. Ho, *Why Seminole Rock Should Be Overruled*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 19, 2016), <http://yalejreg.com/nc/2039-2/> [https://perma.cc/FQV3-K3KN].

98. Hickman, *supra* note 17. Hickman also notes that "several circuit court opinions since *Christopher* have approached the question of whether an agency's interpretation of a regulation is 'plainly erroneous or inconsistent with the regulation' by employing traditional tools of *statutory* construction to analyze—in very *Chevron*-like terms—whether the regulation being interpreted is 'ambiguous' or 'unambiguous.'" *Id.*

99. Cass R. Sunstein & Adrian Vermeule, *Auer, Now and Forever*, 36 YALE J. ON REG.: NOTICE & COMMENT (Sept. 19, 2016), <http://yalejreg.com/nc/auer-now-and-forever-by-cass-r-sunstein-adrian-vermeule/> [https://perma.cc/BXW2-XXEK]. Professors Sunstein and Vermeule also stated that "we have low confidence in Supreme Court prognostication, either by ourselves or by others." *Id.*

Rock.¹⁰⁰ Analysis of oral arguments suggests that the question of what to do with *Auer* may split the Court.¹⁰¹ Whatever happens, because *Auer*'s modern justifications closely track those of *Chevron*,¹⁰² *Kisor*'s outcome will also interest those who wonder about *Chevron*'s future.¹⁰³

C. The Veteran's Canon

Perhaps less familiar to most than *Chevron* or *Auer* is the veteran's canon—"the rule that interpretive doubt is to be resolved in the veteran's favor."¹⁰⁴ Some call the veteran's canon "*Gardner's* Presumption," a reference to the 1994 decision in which the Court articulated the rule in that way.¹⁰⁵ There, the Court faced the case of a Korean War veteran whose surgery at a VA facility left him with lasting infirmities in his left calf, ankle, and foot.¹⁰⁶ He claimed disability benefits under

100. Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J.L. & PUB. POL'Y 87, 88 (2018).

101. Amy Howe, *Argument analysis: Justices divided on agency deference doctrine*, SCOTUSBLOG (Mar. 27, 2019, 4:07 PM), <https://www.scotusblog.com/2019/03/argument-analysis-justices-divided-on-agency-deference-doctrine/> [<https://perma.cc/CJU3-TZ6B>].

102. See Stephenson & Pogoriler, *supra* note 74, at 1458 (noting that "the *Chevron*-like rationale for *Seminole Rock*—a pragmatic concern about institutional competence, coupled with a legal fiction about implied congressional delegation—is the dominant modern account of *Seminole Rock* deference."). For an argument that *Auer* lacks *Chevron*'s justification of implicit delegation and thus could fall without bringing *Chevron* down, see Jonathan Adler, *Symposium: Government agencies shouldn't get to put a thumb on the scales*, SCOTUSBLOG (Jan. 31, 2019, 2:36 PM), <https://www.scotusblog.com/2019/01/symposium-government-agencies-shouldnt-get-to-put-a-thumb-on-the-scales/> [<https://perma.cc/98PP-Q95U>].

103. Perhaps awareness of that possibility has led administrative law professors to file an amicus brief in support of neither party that strives to distinguish *Auer* from *Chevron*. See Brief of Professors of Administrative Law and Federal Regulation as Amicus Curiae, *Kisor v. Wilkie* (No. 18-15), available at https://www.supremecourt.gov/DocketPDF/18/18-15/87583/20190208102133472_18-15%20ac%20Professors%20of%20Administrative%20Law%20and%20Federal%20Regulation%20-Corrected.pdf [<https://perma.cc/6F8K-WS2M>].

104. *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

105. See, e.g., Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption That Interpretive Doubt Be Resolved in Veterans' Favor with Chevron*, 61 AM. U. L. REV. 59, 61 n.3 (2011) (using the term "*Gardner's* Presumption" and noting that this is the author's term, not the courts' phrase); Carolyn Ryan, *The Common Law Solution to Gardner's Presumption*, 8 VETERANS L. REV. 24 (2016) (using the same term).

106. *Gardner*, 513 U.S. at 116.

a statute providing for such benefits when an injury was “the result of hospitalization, medical or surgical treatment” under laws administered by the VA and not due to that “veteran’s own willful misconduct.”¹⁰⁷ The VA denied his claim, citing its own regulation interpreting that statute. That regulation required the injury to be the result of the VA’s negligence or an accident.¹⁰⁸ After losing at the Court of Veterans Appeals and the Federal Circuit, the VA appealed to the Supreme Court.¹⁰⁹

In affirming the decision against the VA, the Court noted that the VA’s claims to be interpreting ambiguity in the statute could only succeed if such ambiguity remained “after applying the rule that interpretive doubt is to be resolved in the veteran’s favor.”¹¹⁰ Given that the *Gardner* Court twice cited *Chevron*,¹¹¹ that sequencing hardly seems accidental. In this way, *Gardner* suggests that courts should apply the veteran’s canon before finding ambiguity sufficient for deference to an agency.

The veteran’s canon has been justified in terms of congressional intent and statutory context. In *King v. St. Vincent’s Hospital*,¹¹² a National Guardsman sought a leave of absence from his civilian employer (the hospital) so that when he returned from his three-year tour of duty, he could go back to work at the hospital.¹¹³ King, the Guardsman and hospital employee, based his claim on the Veterans’ Reemployment Rights Act,¹¹⁴ and the question for the Court was whether the Act’s employment protections had an implicit time limit that would allow the hospital to deny King’s request for a three-year leave of absence.¹¹⁵ The Court held that it did not.¹¹⁶ In so

107. *Id.* See 38 U.S.C. § 1151 (2012).

108. *Gardner*, 513 U.S. at 116–17 (citing 38 C.F.R. § 3.358(c)(3) (1993)).

109. *Gardner*, 513 U.S. at 117. The Court of Veterans Appeals was the former name of the Court of Appeals for Veterans Claims. Congress changed the court’s name in 1998. See *U.S. Court of Appeals for Veterans Claims, 1999–Present*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/courts/u.s.-court-appeals-veterans-claims-1999-present> [<https://perma.cc/AW8J-943S>] (last visited May 8, 2019).

110. *Gardner*, 513 U.S. at 117–18 (emphasis added).

111. *Id.* at 120, 122.

112. 502 U.S. 215 (1991).

113. *Id.* at 216–17.

114. *Id.* at 216. The relevant section of the act was codified at 38 U.S.C. § 2024(d).

115. *King*, 502 U.S. at 216.

116. *Id.*

holding, the Court dismissed one potential argument by noting that even if ambiguity had arisen as a result of conflicting provisions, the Court would have read those provisions in light of “the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.”¹¹⁷ As a result of its long history, the veteran’s canon forms a part of the backdrop against which Congress legislates, and the Court explained that it relied on “congressional understanding of such interpretive principles.”¹¹⁸ In context, then, the best reading of the statute’s language would have been the veteran-friendly one.

The veteran’s canon also has a normative justification. As the Court explained in 1946, veterans’ benefits statutes should be “liberally construed for the benefit of those who left private life to serve their country in its hour of great need.”¹¹⁹ While not going beyond what the text can bear, courts interpreting the different parts of veterans’ benefits schemes should “give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.”¹²⁰ Only a few years before, the Court had noted that “[t]he Soldiers’ and Sailors’ Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.”¹²¹ These uses of the canon reflect an awareness of the sacrifices veterans have made for the United States, and the country’s corresponding obligations to them. Given that three of the justices at the time of that decision were World War I veterans themselves,¹²² and that all surely knew how poorly veterans had been treated in

117. *Id.* at 221–22 n.9.

118. *Id.* (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). Cf. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 125 (2001) (discussing “the textualists’ practice of reading statutes in light of established background conventions.”); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583 (1989) (discussing strict construction rules and noting that “[o]nce they have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language.”).

119. *Fishgold*, 328 U.S. at 285.

120. *Id.*

121. *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

122. James D. Ridgway, *Toward A Less Adversarial Relationship Between Chevron and Gardner*, 9 U. MASS. L. REV. 388, 404 (2014).

the near past,¹²³ one might think that the veteran's canon originated as a "value-based canon created by veteran-justices."¹²⁴ However it might have originated, the canon has been in use for nearly eighty years, and in 2011, a unanimous Court noted that "[w]e have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'"¹²⁵ Simply put, the veteran's canon is a traditional tool of interpretation.

II. THE CONFLICT AS IT STANDS, AND POSSIBLE SOLUTIONS

When a court reviews a veteran's case involving ambiguous language in a statute or regulation, it faces a choice—follow the veteran's canon, or defer to the VA under *Chevron* or *Auer*.¹²⁶ Assuming that the same level of uncertainty triggers both deference doctrines and the veteran's canon,¹²⁷ that leaves courts with what appears to be an irreconcilable conflict. Justice Scalia, in a speech to the Judicial Conference of the Court of Appeals for Veterans Claims, suggested that *Chevron* and the

123. In 1932, thousands of veterans and their families went to Washington, D.C., to protest congressional inaction on veterans' benefits. They were removed from the city by use of tear gas and tanks, and the shantytown where they had been living was burned down. For a more complete telling of the story of the "Bonus Army," see James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 176–79 (2011).

124. Ridgway, *supra* note 122, at 404.

125. *Henderson v. Shinseki*, 562 U.S. 428, 440–41 (2011) (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220–21 n.9 (1991)).

126. This framing assumes that the interpretation offered by the VA meets the various thresholds required for these deference doctrines to apply. *Cf.* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 247 (2006) (discussing "*Chevron Step Zero*—the inquiry into whether the *Chevron* framework applies at all"); Hickman, *supra* note 17 (observing that some lower courts have instituted an *Auer Step Zero*); William Yeatman, Note, *An Empirical Defense of Auer Step Zero*, 106 GEO. L.J. 515, 524 (2018) ("Notwithstanding the similarities between *Chevron* and *Auer* deference, the Supreme Court has not set forth a *Step Zero* for its *Auer* framework.").

127. The *Gardner* Court did not flesh out the meaning of "interpretive doubt," but after articulating the veteran's canon, it noted that "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), perhaps suggesting that the terms were being used interchangeably. But nailing down a precise definition for either term is probably impossible. *Cf.* Ward Farnsworth, Dustin F. Guzior, & Anup Malani, *Ambiguity about Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 258 (2010) (noting that "ambiguity" is itself an ambiguous word).

veteran's canon simply could not co-exist.¹²⁸ Judge O'Malley of the Federal Circuit summed up one front in the conflict by simply saying, "Where there is a conflict between an agency's reasonable interpretation of an ambiguous regulation and a more veteran-friendly interpretation, it is unclear which interpretation controls."¹²⁹ So it remains.¹³⁰

A. *Agent Orange and the Blue Water Navy: A Case Study of the Conflict*

To see what this doctrinal confusion means in practice, consider the litigation involving blue water Navy veterans and Agent Orange exposure. These Navy veterans served in the off-shore waters of Vietnam while millions of tons of herbicides like Agent Orange were sprayed in that country, and they have long contested their exclusion from the presumptions of service-connection¹³¹ and Agent Orange exposure that the VA has granted other veterans.¹³² For decades, the VA has declined to extend that presumption to blue water Navy veterans, citing high costs and a lack of scientific consensus.¹³³

The Federal Circuit's recent decision in *Procopio v. Wilkie*¹³⁴ brought that sad, long story to an end, and in so doing,

128. See Justice Scalia *Headlines the Twelfth CAVC Judicial Conference*, VETERANS L.J. 1, 1 (2013).

129. *Johnson v. McDonald*, 762 F.3d 1362, 1367 (Fed. Cir. 2014) (O'Malley, J., concurring).

130. See *Procopio v. Wilkie*, 913 F.3d 1371, 1387 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring) (criticizing "the court's failure—yet again—to address and resolve the tension between the pro-veteran canon and agency deference.")

131. To qualify for certain disability benefits within the VA, a veteran must establish that his disability is connected to his service in the military. For a thorough explanation of this process and the evidentiary issues involved in proving service connection, see Jessica Lynn Wherry, *Interminable Parade Rest: the Impossibility of Establishing Service Connection in Veterans Disability Compensation Claims When Records Are Lost or Destroyed*, 83 BROOK. L. REV. 477 (2018).

132. See generally Marimow, *supra* note 22.

133. See, e.g., Nikki Wentling, *Last-ditch effort to pass Blue Water Navy bill fails in Senate*, STARS & STRIPES (Dec. 11, 2018), <https://www.stripes.com/news/veterans/last-ditch-effort-to-pass-blue-water-navy-bill-fails-in-senate-1.560126> [<https://perma.cc/228M-YQD3>] (reporting that VA officials expressed concerns about the costs of expanding benefits to more veterans and the uncertain state of medical research on this veteran population and Agent Orange exposure). In terms of costs, the Congressional Budget Office estimated that benefits to blue water Navy veterans would cost \$1.1 billion over the next ten years, but the VA contested that figure and suggested the total cost could be billions more. *Id.*

134. *Procopio*, 913 F.3d 1371.

recounted its origins. In 1991, Congress passed the Agent Orange Act, codified at 38 U.S.C. § 1116.¹³⁵ That legislation created a presumption of service connection for specific diseases ailing veterans who “served in the Republic of Vietnam.”¹³⁶ Another part of the statute created a presumption of exposure to Agent Orange for veterans with qualifying service unless affirmative evidence showed otherwise.¹³⁷ For many veterans the critical question then became, “what counts as serving in the Republic of Vietnam?” In a regulation and a subsequent General Counsel opinion, the VA defined serving in the Republic of Vietnam in terms of either: (a) setting foot on the landmass of Vietnam or (b) sailing on its inland waterways.¹³⁸ That created an uphill battle for blue water Navy veterans trying to get benefits.¹³⁹

In *Haas v. Peake*,¹⁴⁰ one such veteran challenged the VA’s interpretation at the Federal Circuit.¹⁴¹ The court in *Haas* followed the *Chevron* framework. At Step One, it held that “the statutory phrase ‘served in the Republic of Vietnam’ is ambiguous as applied to” off-shore service,¹⁴² and then at Step Two, the court held that the VA’s own regulation was “sufficiently ambiguous” such that it did not resolve the issue.”¹⁴³ That uncertainty brought *Auer* deference into play, and the court deferred to the position outlined in the VA’s General Counsel opinion.¹⁴⁴ Thus the veteran lost in a case in which a kind of fractal of deference doctrines led the court to agree with the VA. In arriving at that conclusion, the court never mentioned the veteran’s canon.

In January of 2019, an en banc sitting of the Federal Circuit overruled *Haas* in *Procopio v. Wilkie* and found that the Agent

135. *Id.* at 1373.

136. *Id.* (quoting 38 U.S.C. § 1116(a) (2012)).

137. *Id.*; see 38 U.S.C. § 1116(f).

138. *Procopio*, 913 F.3d at 1373. For the regulation, see 38 C.F.R. § 3.307(a)(6) (1993). For the General Counsel opinion interpreting that regulation, see Gen. Counsel Prec. 27-97 (July 23, 1997); 62 Fed. Reg. 63,603, 63,604 (Dec. 1, 1997).

139. See Marimow, *supra* note 22.

140. 525 F.3d 1168 (Fed. Cir. 2008), *overruled by* *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir 2019) (en banc).

141. *Haas*, 525 F.3d at 1172.

142. *Id.* at 1184.

143. *Id.* at 1186.

144. *Id.* at 1195.

Orange Act unambiguously extended the presumption of service connection to blue water Navy veterans.¹⁴⁵ Still, though the court in *Procopio* asked for briefing on the tension between the veteran's canon and deference doctrines,¹⁴⁶ it did not resolve that tension in its opinion.¹⁴⁷ So although the plight of some Vietnam veterans improved with this decision, the doctrinal confusion endures.

B. *Some Possible Solutions to the Conflict Between Chevron, Auer, and the Veteran's Canon*

What should the Federal Circuit do? Scholars and veterans law practitioners have offered various solutions to the problem.¹⁴⁸ In her article discussing the issue, Professor Jellum lamented the way that “the [Supreme] Court transformed [the veteran's canon] from liberal construction canon to a trump card that veterans could assert to defeat reasonable agency interpretations.”¹⁴⁹ In part, Jellum theorized, this stemmed from the Supreme Court's failure to recognize the conflict with *Chevron* that *Gardner* could create.¹⁵⁰ Ultimately, Jellum recommended that at the very least the veteran's canon be restored to its status as a liberal construction canon,¹⁵¹ and that ideally, the veteran's canon “might be viewed as a duty belonging to the VA rather than as an interpretive tool belonging to courts.”¹⁵² Per Jellum, that transformation of the veteran's canon would settle the conflict with *Chevron* and encourage the VA to make policy with all veterans in mind, instead of running the risk that a single veteran might use the

145. *Procopio*, 913 F.3d at 1375.

146. *Id.* at 1374.

147. *Id.* at 1380 (noting that because the issue was resolved at *Chevron* Step One, the court did not need to decide what “role the pro-veteran canon should play in this analysis.”).

148. See Jellum, *supra* note 105, at 59–60; Ridgway, *supra* note 122, at 391–92; Ryan, *supra* note 105, at 26.

149. Jellum, *supra* note 105, at 68.

150. *Id.* at 73–74.

151. *Id.* at 106. That development would be unlikely to satisfy those who see a search for a “liberal construction” as “an open invitation to engage in ‘purposive’ rather than textual interpretation.” See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 364–65 (2012).

152. Jellum, *supra* note 105, at 103.

veteran's canon to "hijack the interpretive process from the VA."¹⁵³

Professor Ridgway suggested that a reconciliation of the values of agency deference and veteran-friendliness could be achieved by conditioning the application of either deference or the veteran's canon on "the overall strength of the arguments on a systemic level."¹⁵⁴ That is, veterans would need to demonstrate that their interpretation would be more beneficial to veterans as a whole, and the VA would need to show "the systemic considerations and policy judgments" that informed their decision.¹⁵⁵ That approach would not involve a "rigid *ex ante* hierarchy" between the veteran's canon and deference doctrines.¹⁵⁶ Instead, it would allow judges greater flexibility to evaluate the strengths and weaknesses of each litigant's case. Moreover, Ridgway reasoned, that approach would create an incentive for parties to give the courts more information so as to better understand the wider effects of any given decision. Ultimately, Professor Ridgway argued, that incentive structure would lead to a more informed judicial oversight of the system.¹⁵⁷

III. COURTS SHOULD RECOGNIZE THE VETERAN'S CANON AS A TRADITIONAL TOOL OF INTERPRETATION

This Note argues for a different course: Courts should resolve this conflict by holding that the veteran's canon is a traditional tool of interpretation that applies before agency deference doctrines come into play. That is, at *Chevron* Step One, or when interpreting an ambiguous VA regulation, courts should apply the veteran's canon to resolve ambiguity before deferring to the VA's interpretation. Such an approach has already received the imprimatur of several veterans' organizations—in the *Procopio* litigation, several veterans

153. *Id.* at 113.

154. Ridgway, *supra* note 122, at 417.

155. *Id.*

156. *Id.*

157. *See id.* at 417–18. For an extended argument that judicial oversight of high volume administrative adjudication systems like the VA's can be beneficial, see Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097 (2018).

organizations argued for this result with regards to *Chevron*.¹⁵⁸ And in *Procopio*, Judge O'Malley authored a concurrence advocating this solution.¹⁵⁹ It is time to give veterans the benefit of the doubt in cases where the veteran's canon collides with *Chevron* and *Auer*.

A. *The Veteran's Canon is a Traditional Tool of Interpretation*

Courts should recognize that the veteran's canon is a traditional tool of interpretation. That would simplify veterans law because it maps onto the interpretive framework courts already use. In *Chevron*, the Court noted that "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."¹⁶⁰ *Auer* might be similarly formulated—only after the use of traditional tools of interpretation should any remaining ambiguity be resolved by deferring to an agency's interpretation of its own regulation.¹⁶¹

Writing for a unanimous Court in *Henderson*, Justice Alito observed that the Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'"¹⁶² Unquestionably, that is so. For almost eighty years, the veteran's canon has maintained a place in Supreme Court jurisprudence.¹⁶³ One

158. See, e.g., Brief for Disabled American Veterans as Amicus Curiae Supporting Claimant-Appellant, *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (No. 2017-1821); Brief for the National Veterans Legal Services Program and the Veterans of Foreign Wars of the United States as Amici Curiae Supporting Claimant-Appellant, *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (No. 2017-1821). Note that veterans' organizations did not take a uniform approach to this question. See Brief for the American Legion as Amicus Curiae Supporting Claimant-Appellant, *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (No. 2017-1821) (arguing that the veteran's canon should operate as a limitation on what counts as a "reasonable" interpretation under *Chevron*).

159. *Procopio*, 913 F.3d at 1382 (O'Malley, J., concurring).

160. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

161. See Sunstein & Vermeule, *supra* note 17, at 321 ("Use the conventional tools of interpretation, and if ambiguity remains, the agency's interpretation prevails.").

162. *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011).

163. *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.").

would think that this long history demonstrates that the veteran's canon is a traditional tool of interpretation.

Yet the Court has not offered much guidance about what constitutes a traditional tool of interpretation. In the *Chevron* context, that led then-Judge Gorsuch to complain, "In deciding whether Congress has 'directly spoken' to a question or left it 'ambiguous,' what materials are we to consult? The narrow language of the statute alone? Its structure and history? Canons of interpretation? Committee reports? Every scrap of legislative history we can dig up?"¹⁶⁴ The answers to those questions were not clear then, and they are not perfectly clear now.

But since arriving at the Supreme Court, Justice Gorsuch has given some guidance to lower courts. In *Epic Systems Corp. v. Lewis*,¹⁶⁵ he explained that one reason for rejecting the agency's *Chevron* argument was that "the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, '*Chevron* leaves the stage.'"¹⁶⁶

In developing that answer, the Court also relied on "the usual rule that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'"¹⁶⁷ Both those canons reflect presumptions about how Congress legislates.¹⁶⁸ Similarly, the veteran's canon reflects a presumption about how Congress legislates in veterans law. The Court has recognized that the "pattern of legislation

164. *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1157 (10th Cir. 2016) (Gorsuch, J., concurring).

165. 138 S. Ct. 1612 (2018).

166. *Id.* at 1630 (quoting *Nat'l Labor Relations Bd. v. Alternative Entm't, Inc.*, 858 F.3d 393, 417 (6th Cir. 2017) (Sutton, J., dissenting)).

167. *Id.* at 1626–27 (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). The Court also used the *ejusdem generis* canon to make sense of the statutory language. *Id.* at 1625.

168. *Id.* at 1624 (explaining that "in approaching a claimed conflict, we come armed with the stron[g] presum[ption] that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.") (internal quotation marks omitted); *id.* at 1627 (observing that "[i]t's more than a little doubtful that Congress would have tucked into the mousehole of Section 7's catchall term an elephant that tramples the work done by these other laws").

dealing with this subject” shows that the “solicitude of Congress for veterans is of long standing.”¹⁶⁹ Hence “Congress’s understandable decision to place a thumb on the scale in the veteran’s favor in the course of administrative and judicial review of VA decisions.”¹⁷⁰ In light of Congress’s abiding concern for veterans and Congress’s pattern of legislation in veterans law, the veteran’s canon reflects a reasonable presumption about how Congress legislates in this context. Like the canons used in *Epic Systems*, the veteran’s canon should be applied before deference doctrines come on stage.¹⁷¹

The veteran’s canon resembles another traditional canon that courts have applied to resolve ambiguity before turning to deference doctrines—the so-called “Indian canon.”¹⁷² As Judge O’Malley has noted, the veteran’s canon resembles the traditional canon of construction that calls for ambiguity in Indian law to be resolved in favor of Native American tribes.¹⁷³ Both canons reflect the unique relationships between particular

169. *United States v. Oregon*, 366 U.S. 643, 647 (1961).

170. *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting).

171. *Epic Systems* was certainly not the first time the Court had applied traditional canons and therefore found *Chevron* inapplicable. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574–75 (1988) (noting that *Chevron* deference would normally apply unless the agency’s construction failed Step Two, but resolving the case by reference to the canon of constitutional avoidance); *see also* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 *YALE L.J.* 64, 77–78 (2008) (collecting additional examples of canons prevailing over *Chevron*).

172. *See generally* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 *HARV. L. REV.* 381 (1993); Note, *Indian Canon Originalism*, 126 *HARV. L. REV.* 1100 (2013). Because it is the standard practice of judges and scholars to use the term “Indian canon,” this Note follows suit. But note that although some indigenous people consider themselves “Indian” or “American Indian,” others prefer to identify with their specific tribes and nations. *See* Amanda Blackhorse, *Do You Prefer “Native American” or “American Indian”?*, *INDIAN COUNTRY TODAY* (May 22, 2015), <https://newsmaven.io/indiancountrytoday/archive/blackhorse-do-you-prefer-native-american-or-american-indian-kHWRPjqlIGU6X3FTVdMi9EQ/> [<https://perma.cc/TFD8-89YU>] (interviewing individuals with varied approaches to questions of identity); Amanda Blackhorse, *Native American? American Indian? Nope.*, *INDIAN COUNTRY TODAY* (Aug. 14, 2017), https://newsmaven.io/indiancountrytoday/archive/blackhorse-native-american-american-indian-nope-hNAQB_MRSk-07Cw1hAF8Xw/ [<https://perma.cc/F2W5-LLCS>] (same).

173. *Procopio v. Wilkie*, 913 F.3d 1371, 1386 (Fed. Cir. 2019) (en banc) (O’Malley, J., concurring).

groups and the government, and the duties owed by the government to those groups.¹⁷⁴ Both canons are traditional tools of interpretation,¹⁷⁵ and both canons can help hold the government to its promises.¹⁷⁶

Indeed, Justice Gorsuch has observed that the application of the Indian canon is a particular instantiation of a broader principle from contract law—“we normally construe any ambiguities against the drafter who enjoys the power of the pen.”¹⁷⁷ Admittedly, the contract analogy fits imperfectly with veteran’s law.¹⁷⁸ But politicians often speak of what we owe to our veterans,¹⁷⁹ and the gross asymmetry of power between veterans and the government suggests that the principles underlying the rule of *contra proferentem* could support the use of the veteran’s canon, too.¹⁸⁰ Relying on these rationales,

174. *Id.* at 1386–87.

175. For the proposition that the Indian canon is a traditional tool of statutory interpretation, see *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (Scalia, J.) (noting that the Indian canon is “a principle deeply rooted in this Court’s Indian jurisprudence”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) (M’Lean, J., concurring) (“The language used in treaties with the Indians should never be construed to their prejudice.”).

176. See, e.g., *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016–22 (2019) (Gorsuch, J., concurring) (construing the treaty in favor of tribe to hold government to terms of treaty); *Procopio*, 913 F.3d at 1387 (O’Malley, J., concurring) (explaining that the veteran’s canon flows from the conviction that “those who served their country are entitled to special benefits from a grateful nation”).

177. *Cougar Den, Inc.*, 139 S. Ct. at 1016 (Gorsuch, J., concurring); see also Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 152 (2010) (discussing the Indian canon’s origins in treaty interpretation as “essentially a rule of contract interpretation”).

178. See *Levy v. Brown*, 6 Vet. App. 23, 24 (1993) (“It is well settled that veterans have no contractual or vested right to an initial receipt of VA benefits. VA benefits involve no agreement of the parties and may be redistributed or withdrawn at any time in the discretion of Congress.” (internal quotation marks omitted)).

179. See, e.g., 130 Cong. Rec. 29,944 (1984) (statement of Sen. Alan Simpson) (“America has always recognized a special responsibility to care for those whose injuries or illnesses are a consequence of military service. An extraordinary varied network of veterans programs and benefits is proof of our regard for the sacrifices rendered by men and women in uniform—past and present. The compensation program fulfills the nation’s promise to veterans disabled in the line of duty. The rules and regulations for this program are designed to make certain no veteran’s reasonable claim of disability resulting from military service is overlooked or ignored.”).

180. *Turner Const. Co. v. United States*, 367 F.3d 1319, 1321 (Fed. Cir. 2004) (describing “the rule of *contra proferentem*, which requires that ambiguous or

courts have found that in the context of Indian law, “the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes.”¹⁸¹ Like the Indian canon, the veteran’s canon has deep roots in our jurisprudence, reflects the unique relationship between the government and a particular population, and helps the government fulfill the obligations flowing from that relationship. Like the Indian canon, the veteran’s canon should be applied as a traditional tool of interpretation before courts turn to *Chevron* or *Auer*.

Moreover, this interpretive order of operations—applying the veteran’s canon before relying on *Chevron* or *Auer*—follows from the Supreme Court’s decision in *Gardner*. The language and logic of that opinion suggest that courts should apply the veteran’s canon before turning to deference doctrines.¹⁸² Admittedly, the decision did not depend on that interpretive hierarchy.¹⁸³ But in dismissing one of the VA’s arguments for deference, the Court relied in part on *Chevron* itself.¹⁸⁴ In light of that use of *Chevron*, consider the Court’s statement that ambiguity triggering deference to the VA’s interpretation would only arise if such ambiguity existed *after* the application of the veteran’s canon.¹⁸⁵ That indicates that courts should only defer to the VA’s interpretation when neither a text’s plain language nor the veteran’s canon can decide the case. As the

unclear terms that are subject to more than one reasonable interpretation be construed against the party who drafted the document.”).

181. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997); *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (same). *But see Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989) (explaining that the Ninth Circuit does not apply the Indian canon in such cases “in light of competing deference given to an agency charged with the statute’s administration”).

182. *See Jellum, supra* note 105, at 73 (discussing the *Gardner* Court’s treatment of the veteran’s canon and describing it as “a directive to courts to resolve any interpretive doubt in the veteran-litigant’s favor—even in the face of a contrary agency interpretation”).

183. Instead, the Court found that VA’s regulation contradicted “the plain language of the statutory text,” and that “exempt[ed] courts from any obligation to defer to it.” *Brown v. Gardner*, 513 U.S. 115, 122 (1994).

184. *Id.*

185. *Id.* at 117–18 (“The most, then, that the Government could claim on the basis of this term is the existence of an ambiguity to be resolved in favor of a fault requirement . . . assuming that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran’s favor.”) (citation omitted).

Gardner Court also explained, "Ambiguity is a creature not of definitional possibilities but of statutory context."¹⁸⁶ In the statutory context of veterans' benefits, the Court's precedent offers an answer to the question of how to resolve ambiguity: Courts, following *Gardner's* logic, should apply the veteran's canon before looking to *Chevron* or *Auer*.

Applying the veteran's canon as a traditional tool of interpretation would also accord with Congress's design of judicial review of veteran's claims. As Justice Alito explained in *Henderson*, courts should understand the veterans benefits system in light of "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims."¹⁸⁷ As a general matter, "[t]he contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic."¹⁸⁸ For example, veterans seeking benefits do not face the statutes of limitations governing most claims in civil litigation, and the first rounds of adjudication with the VA are "informal and nonadversarial."¹⁸⁹ The VA must help veterans collect the evidence for their claims, and when weighing that evidence, "the VA must give the veteran the benefit of any doubt."¹⁹⁰ If the veteran does not prevail at that first stage, she can appeal to the Board of Veterans Appeals, and if she loses there, she can appeal to the Veterans Court.¹⁹¹ In contrast, if the VA loses at the Board, that decision is final.¹⁹² Finally, if a veteran exhausts his options, the claim

186. *Id.* at 118.

187. *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011).

188. *Id.*

189. *Id.* Congress certainly designed the VA process to be a non-adversarial one, but many veterans do not experience it as such. See Stacey-Rae Simcox, *Thirty Years after Walters the Mission Is Clear, the Execution Is Muddled: A Fresh Look at the Supreme Court's Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process*, 84 U. CIN. L. REV. 671, 727 (2016) (observing that the "oft repeated comment on the VA's attitude towards veterans 'delay, deny until I die' is heard echoed by veterans at many of these town halls"); Seth Harp, *Veterans Go Back to Court Over Burn Pits. Do They Have a Chance?*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/magazine/burn-pits-veterans.html> [<https://nyti.ms/2Gr7p4K>] (discussing the difficulties faced by some veterans in VA adjudications).

190. *Henderson*, 562 U.S. at 440.

191. *Id.* at 440-41.

192. *Id.* at 441.

can be reopened if the veteran presents “new and material evidence.”¹⁹³ As Justice Breyer has observed, “Congress has made clear that the VA is not an ordinary agency.”¹⁹⁴

So even if one thinks agencies should ordinarily enjoy the benefit of the doubt in interpretation, the substantive and procedural protections Congress gave veterans in designing the benefits adjudication system support an exception to that rule. Criminal law provides a useful analogy on this point. In that system, “ambiguity typically favors the defendant. If there is reasonable doubt, no conviction . . . And if a statute is ambiguous, courts construe the statute in the criminal defendant’s favor.”¹⁹⁵ In veterans law, veterans already receive the benefit of the doubt in weighing evidence.¹⁹⁶ Just as criminal law’s reasonable doubt standard pairs well with the rule of lenity, the claimant-friendly evidentiary standard of veterans law pairs well with the veteran’s canon. These complementary elements of veterans law fit with the veteran-friendly scheme Congress has designed. In light of that design, Justice Scalia was wrong to think that it would be anomalous for the VA to receive a different level of deference than other agencies.¹⁹⁷ If anything, the truly anomalous result would be the VA getting the same sort of deference that other agencies receive.

This application of the veteran’s canon would also line up with Congress’s rationale for introducing judicial review of VA decisions. In response to a movement led by Vietnam veterans who believed judicial review would help them receive benefits for post-traumatic stress disorder and exposure to Agent Orange,¹⁹⁸ Congress made judicial review of VA decisions available in 1988.¹⁹⁹ As a part of that process, Congress has

193. *Id.*

194. *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009) (Breyer, J.) (internal citations omitted).

195. *United States v. Havis*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring) (citations omitted).

196. *Henderson*, 562 U.S. at 440.

197. See *Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, *supra* note 128, at 12.

198. James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1046 (2013).

199. James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans’ Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 135–36 (2011).

commanded the CAVC to “decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Administrator.”²⁰⁰ Furthermore, in reviewing CAVC decisions, Congress has instructed the Federal Circuit to “decide all relevant questions of law, including interpreting constitutional and statutory provisions.”²⁰¹ Congress introduced two layers of independent review of interpretive questions to the veterans’ benefits adjudication system because the VA was struggling to meet the needs of veterans. Given that historical context, Congress’s underlying rationale for instituting judicial review supports applying the veteran’s canon as a conventional tool of interpretation.

For all these reasons—the long history of the veteran’s canon, its similarity to other traditional canons, its place within *Gardner’s* suggested order of operations, and its close fit with the design and rationale of the VJRA—the veteran’s canon should be recognized as a traditional tool of interpretation. Having argued that this is the right result, this Note now makes the case that it is also a good one.

B. The Veteran’s Canon Addresses Recurring Problems of Proof in Veterans Law

The veteran’s canon addresses recurring evidentiary problems faced by veterans. Veterans law often involves unique problems of proof.²⁰² Sometimes, for instance, medical research takes decades to find the link between a veteran’s service and a disease or disorder. The saga of veterans exposed to Agent Orange provides one example of that dynamic. The U.S. military stopped using Agent Orange almost fifty years

200. Veterans’ Judicial Review Act, Pub. L. No. 100–687, § 301(a), 102 Stat. 4115, § 4061 (1988) (codified at 38 U.S.C. § 7261(a)(1) (2012)).

201. *Id.* at 102 Stat. 4120, § 4092 (1988) (codified at 38 U.S.C. § 7292(d)(1)); see also *Shinseki v. Sanders*, 556 U.S. 396, 411 (2009) (“Statutes limit the Federal Circuit’s review to certain kinds of Veterans Court errors, namely, those that concern ‘the validity of . . . any statute or regulation . . . or any interpretation thereof.’”).

202. Cf. Daniel L. Nagin, *The Credibility Trap: Notes on a VA Evidentiary Standard*, 45 U. MEM. L. REV. 887, 898 (2015) (observing that “substantial gaps in time between a veteran’s military service and the adjudication of his or her claim can create difficult evidentiary questions”).

ago,²⁰³ and yet scientific uncertainty about who was exposed and the effects of such exposure persists even now.²⁰⁴ Some VA officials used that uncertainty to argue against extending benefits to blue water Navy veterans like Mr. Procopio until after further study could be completed.²⁰⁵ The problems with that wait-and-see approach are threefold. First, scant evidence exists to help researchers know precisely who was serving in a particular operational area when Agent Orange was being dropped.²⁰⁶ Second, decades of studies about Agent Orange have returned uncertain results,²⁰⁷ and so it is perhaps unduly optimistic to think one more study will settle the question. Third, as all that research goes on, many veterans suffer and wait, and some die without ever receiving any help.

Sometimes history rhymes. As veterans from Iraq and Afghanistan develop diseases that may have been caused by exposure to toxic materials at burn pits—places where all kinds of trash was doused in jet fuel and burned—they too are finding that the VA denies their claims and cites a lack of scientific backing and evidentiary support.²⁰⁸ That kind of scientific uncertainty, combined with the chronic problem of

203. Agent Orange was used as a part of Operation Ranch Hand, a mission that ran from 1962 to 1971, in which millions of gallons of herbicides were sprayed on the Vietnamese mainland. See Haberman, *supra* note 20.

204. See Marimow, *supra* note 22; see also SIDATH VIRANGA PANANGALA & DANIEL T. SHEDD, CONG. RESEARCH SERV., VETERANS EXPOSED TO AGENT ORANGE: LEGISLATIVE HISTORY, LITIGATION, AND CURRENT ISSUES 1–14 (2014), <https://fas.org/sgp/crs/misc/R43790.pdf> [<https://perma.cc/F8BY-LZCS>] (discussing some of the studies on Agent Orange’s effects and the uncertain conclusions of those studies).

205. See Marimow, *supra* note 22.

206. See Haas v. Peake, 525 F.3d 1168, 1176 (Fed. Cir. 2008) (noting “the many uncertainties associated with herbicide spraying during that period which are further confounded by lack of precise data on troop movements at the time”) (internal citations omitted) *overruled on other grounds by* Procopio v. Wilkie, 913 F.3d 1371 (Fed. Cir. 2019) (en banc).

207. See Charles Ornstein, *Agent Orange Act Was Supposed to Help Vietnam Veterans — But Many Still Don’t Qualify*, PROPUBLICA (July 17, 2014, 4:00 PM), <https://www.propublica.org/article/agent-orange-act-was-supposed-to-help-vietnam-veterans-but-many-still-dont-> [<https://perma.cc/JYZ6-K4QC>].

208. Jennifer Steinhauer, *Congress Poised to Help Veterans Exposed to ‘Burn Pits’ Over Decades of War*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/us/politics/veterans-burn-pits-congress.html> [<https://nyti.ms/2UWKtlv>].

service records being lost or destroyed,²⁰⁹ means veterans often fight an uphill battle to get benefits.²¹⁰ When such cases are caught in legal limbo, the veteran's canon could help some veterans escape by ensuring that linguistic uncertainty does not compound the problems generated by evidentiary uncertainty. Certain problems of proof are endemic to veterans law, and courts should consider how the veteran's canon might offset them.

C. *This Use of Veteran's Canon Improves VA's Incentives and Simplifies Adjudication*

Applying the veteran's canon before deferring to agencies would also change the VA's incentives at lower levels of adjudication. VA officials would know that if a close case made it to court, they could not count on *Auer* or *Chevron* to win the day.²¹¹ That, in turn, could lead the VA to grant more veteran's claims in close cases at lower levels of adjudications, thereby reducing the number of appeals veterans make and cutting down on the backlog in the system.²¹² The VA has a host of

209. Wherry, *supra* note 131, at 480 ("Lost records are a well-known and widespread challenge to veterans seeking disability compensation.").

210. Some of the health risks faced by servicemembers are not limited to wartime service, nor to servicemembers alone. See, e.g., *Public Health*, U.S. DEPT OF VETERANS AFF. (Feb. 22, 2019), <https://www.publichealth.va.gov/exposures/camp-lejeune/> [<https://perma.cc/WH6R-MWJR>] ("From the 1950s through the 1980s, people living or working at the U.S. Marine Corps Base Camp Lejeune, North Carolina, were potentially exposed to drinking water contaminated with industrial solvents, benzene, and other chemicals.").

211. The suggestion is not that the front-line adjudicators in the VA's system are (or even should try to be) sensitive to shifts in the controlling interpretive regime. Instead, the contention is that insofar as higher-level agency officials and attorneys consider likely legal outcomes in their decisionmaking, a change in this area of the law would then have downstream effects within the VA.

212. The backlog in the system is caused in part by the procedural asymmetries that benefit veterans. Though some reforms have been made, the backlog remains substantial, and a recent investigation found that the VA had underreported the number of backlogged cases. See Leo Shane III, *Watchdog report: The VA benefits backlog is higher than officials say*, MILITARY TIMES (Sept. 10, 2018), <https://www.militarytimes.com/news/2018/09/10/watchdog-report-the-va-benefits-backlog-is-higher-than-officials-say/> [<https://perma.cc/FDF6-GTH7>]. Sadly, it also appears that the VA's internal quality control regime has failed to provide an accurate accounting of its error rate. See Daniel E. Ho & David Marcus, *When the VA misrepresents performance, veterans suffer*, THE HILL (Mar. 5, 2019, 7:30AM), <https://thehill.com/opinion/national-security/432196-when-the-va-misrepresents-performance-veterans-suffer> [<https://perma.cc/Z7FX-PPLW>] (reporting the results of

pressures it must respond to, but all else being equal, this doctrinal shift would at least alter the agency's litigation calculus in favor of veteran-friendly resolutions.

Moreover, this sequencing of the veteran's canon with the agency deference doctrines does not entirely eliminate the VA from the process of interpretation. Nor should it.²¹³ So where the veteran's canon cannot resolve ambiguity, courts could then turn to those deference doctrines. That might be a rare situation, as "the veteran's interpretation will almost always be the most veteran-friendly."²¹⁴ But when it is not clear which interpretation best serves veterans,²¹⁵ courts could still defer to agency analysis on the issue. Instead of removing the VA from the interpretive process entirely, this approach channels VA's decisionmaking and litigation efforts toward the agency's goal of serving veterans. That would be good for the VA, and good for veterans.

This approach is also conceptually simpler than alternatives which involve balancing a host of factors. That could help non-lawyers making decisions at the Regional Office level of the VA, as well as the many veterans who navigate the system

extensive analysis and finding that the Board of Veterans' Appeals "is seriously misrepresenting its performance.").

213. It is worth noting that about one third of VA employees are veterans themselves. See Leo Shane III, *VA by the numbers: Has the department made progress?*, MILITARY TIMES (Jan. 16, 2017), <https://www.militarytimes.com/veterans/2017/01/16/va-by-the-numbers-has-the-department-made-progress/> [<https://perma.cc/UW3H-7A5S>]. Moreover, many within the VA are doing about as well as anyone could pursuing a challenging mission within the constraints of a complex system. As Professor Ridgway has pointed out, critics of the current system should avoid falling "into the easy trap of demonizing and blaming people who do their best to make it work That lazy mental shortcut harms not only public servants who are doing their best, but also veterans" Mark Hay, *America Has Been Screwing Over Its Veterans Since the Revolutionary War*, VICE NEWS (Feb. 20, 2017), https://www.vice.com/en_us/article/ezqzdm/america-has-been-screwing-over-its-veterans-since-the-revolutionary-war [<https://perma.cc/Y9CG-PVDZ>] (quoting Professor Ridgway).

214. Jellum, *supra* note 105, at 110. Insofar as one worries that this solution shifts power from an expert agency to an inexpert court, one should recognize that the veteran's canon empowers veterans themselves—and it seems safe to say that veterans have a particular kind of expertise when it comes to assessing their own needs.

215. In such cases, veterans service organizations could also present their positions as amici (as they often do now in significant cases) and help courts know when there is no clear answer to the question of what will best serve veterans.

without counsel.²¹⁶ To whatever extent the perverse incentives critique of *Auer* applies here, this interpretive order of operations would also encourage the VA to draft regulations with greater clarity and precision. In both adjudication and regulation, this use of the veteran's canon could simplify and clarify veterans law.

D. *Concerns About Stability, Cost, and Uniformity Should Not Keep Courts from Taking this Approach*

This Note's suggested approach could be attacked along at least three lines, and this section addresses potential counter-arguments sounding in stability, cost, and uniformity. Although some of these concerns carry more weight than others, none should dissuade courts from treating the veteran's canon as a traditional tool of interpretation.

Stability is a central value of our legal order.²¹⁷ Taking that as a point of departure, one might argue that this Note's approach would destabilize veterans law by calling into question decisions that relied on *Auer* or *Chevron* without addressing the veteran's canon.²¹⁸ At least two factors should mitigate that concern. First, courts should recognize that *Auer* and *Chevron* themselves introduce some instability into the law because (within certain limits) those doctrines allow agencies to change their minds about the meaning of a statute or regulation.²¹⁹ A

216. James D. Ridgway, *Why So Many Remands: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VETERANS L. REV. 113, 132, 160 (2009) (observing that many veterans proceed pro se or with the help of a non-attorney from a veterans service organization).

217. Cf. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

218. Concerns about stability and the place of precedent played a major role in *Kisor's* oral argument. For instance, Justice Ginsburg raised questions about the potential effects of overturning *Auer* on lower court decisions that relied on that doctrine. See Transcript of Oral Argument at 29–30, *Kisor v. Wilkie*, No. 18-15 (argued Mar. 27, 2019).

219. See *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework."); *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) (noting that "if [certain] pitfalls are avoided, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1207 (2015) (observing

jurist might conceive of that phenomenon as a good thing insofar as it leaves an agency with flexibility to respond to changing circumstances. Some measure of instability, under that view, is the price paid for flexibility.²²⁰ But even under that view, the relevant choice is not between a status quo with a stable body of law and some brave new world; the choice is between forms of instability. Moreover, in veterans law in particular, the confused and confusing state of the doctrine on this issue means that almost any resolution of this particular issue would make this body of law relatively more stable than it is now.²²¹ Stability in law can be a great virtue. But the inherent instability (or flexibility) of *Auer* and *Chevron* and the uncertain state of the doctrine in veterans law mean that stability does not necessarily weigh against using the veteran's canon as a traditional tool of interpretation. For the same reasons, stability may well weigh in favor of exactly that resolution.

Just as courts should not consider the doctrinal transition costs of this approach against an unreal baseline, so they should not consider the fiscal costs of this approach in a vacuum. To be sure, giving veterans the benefit of the doubt could increase costs.²²² Moreover, having the best of intentions does nothing to prevent the worst of results,²²³ and a lack of

that "Congress decided to adopt standards that permit agencies to promulgate freely [interpretive] rules—whether or not they are consistent with earlier interpretations").

220. See *United States v. Mead Corp.*, 533 U.S. 218, 247 (2001) (Scalia, J., dissenting)

(praising the *Chevron* regime for avoiding ossification in law because "[w]here *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification.").

221. Jellum, *supra* note 105, at 102 ("In sum, the Federal Circuit has approached the *Chevron/Gardner* conflict somewhat inconsistently."). For a similar criticism of the Veterans Court's inconsistent jurisprudence on the issue, see *id.* at 84–85.

222. See, e.g., Wentling, *supra* note 133 (discussing the increased costs of allowing blue water Navy veterans to claim benefits related to Agent Orange exposure).

223. Cf. James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1044–45 (2013) ("[t]he proliferation of procedures intended to make the system more 'veteran friendly' has, in fact, made the system forbidding to claimants and caused increasingly painful delays."). Given the ever-present potential for unintended consequences stemming from legal reforms, those of us in the law might do well to consider the medical concept of "iatrogenic" harm—from the Greek "*iatros*," meaning "healer," it refers to unintentional injury caused by a medical professional who is trying to

reliable empirical data on the veterans' benefits system makes it hard to anticipate what the full consequences of any given change will be.²²⁴ But courts should not ignore the costs of maintaining the status quo.

Part of that status quo is the staggeringly high rate of suicide among veterans. We lose about twenty veterans to suicide every day.²²⁵ At that rate, more than 7,000 veterans take their own lives each year.²²⁶ To make visible what is too often invisible—the price of doing nothing—imagine a world in which some enemy of the United States killed 7,000 servicemembers each year. How much money would Congress pour into making war on that enemy? Or to illustrate the point another way, consider that statistic in terms of the value the government usually assigns a human life when carrying out cost-benefit analysis (roughly nine million dollars).²²⁷ Doing that grim math (7,000 lives × \$9,000,000 per life) yields this figure: \$63,000,000,000, or 63 billion dollars. That war hypothetical and the reductionist cost-benefit analysis are offered only to give some idea of the urgent need for reform. Certainly, this Note's suggested approach will come with certain costs, and it may only make marginal contributions to addressing many of the pressing issues facing veterans today. But when evaluating the relative costs and benefits of that approach, the price of inaction should be considered, too.

Finally, one of the strongest arguments in favor of *Chevron* and *Auer*—uniformity—does not apply in the context of

help. See Paul B. Klaas et al., *When Patients Are Harmed, But Are Not Wronged: Ethics, Law, and History*, 89 MAYO CLINIC PROCEEDINGS 1279, 1279–80 (2014).

224. Ridgway, *supra* note 223, at 1053 (“Unfortunately, veterans law currently lacks a resource for reliable information on many of the complexities that would be important to making well crafted [sic] policy.”).

225. Jennifer Steinhauer, *V.A. Officials, and the Nation, Battle an Unrelenting Tide of Veteran Suicides*, N.Y. TIMES (April 14, 2019), <https://www.nytimes.com/2019/04/14/us/politics/veterans-suicide.html> [<https://nyti.ms/2DbEZgk>].

226. A host of factors contribute to that tragic figure. See *id.* For one veteran's perspective on the issue, see Danny O'Neel, *I survived combat in Iraq and a suicide attempt at home. But many veterans aren't so lucky.*, USA TODAY (Jan. 16, 2019, 6:00 AM), <https://www.usatoday.com/story/opinion/voices/2019/01/16/veteran-affairs-suicide-military-iraq-war-column/2580957002/> [<https://perma.cc/GZ99-YQVB>].

227. See CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* 39 (2018) (noting that the government uses that figure for the value of a statistical life when performing cost-benefit analysis).

veterans law. Proponents of *Chevron* and *Auer* argue that without these doctrines, circuit splits would force agencies and regulated parties to track the opinions of various courts throughout the country in order to know what law governs in any particular area.²²⁸ That is a fair point, and one that critics of the current regime must answer.²²⁹ But it has no weight here. Like a state court system with “a single line of appellate courts and thus no real prospect for a split of judicial authority,”²³⁰ the structure of veterans law ensures uniformity. With the Court of Appeals for Veterans Claims (CAVC) having exclusive jurisdiction over decisions of the Board of Veterans’ Appeals,²³¹ and the Federal Circuit having exclusive jurisdiction to review CAVC decisions,²³² uniformity can be maintained through judicial review.

IV. CONCLUSION

Ambiguity in the language of the law is perhaps inevitable. As James Madison wrote, “When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.”²³³ Indeed, Stanley Fish observed that even the clearest divine commands can be muddled—in his reading of *Paradise Lost*, temptation begins with ambiguation.²³⁴ In more prosaic

228. See *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 621 (2013) (Scalia, J., concurring in part and dissenting in part) (“*Auer* deference has the same beneficial pragmatic effect as *Chevron* deference: The country need not endure the uncertainty produced by divergent views of numerous district courts and courts of appeals as to what is the fairest reading of the regulation, until a definitive answer is finally provided, years later, by this Court.”).

229. For Justice Scalia’s attempt to do so, see *id.* (arguing that uniformity presents less of a problem in the context of regulations because agencies can simply craft new rules).

230. *Hughes Gen. Contractors, Inc. v. Utah Labor Comm’n*, 322 P.3d 712, 718 (Utah 2014) (Lee, J.).

231. 38 U.S.C.A. § 7252 (2012) (“The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans’ Appeals.”).

232. See *id.* § 7292.

233. THE FEDERALIST NO. 37, at 215 (James Madison) (Bantam Classic ed., 1982).

234. STANLEY FISH, WINNING ARGUMENTS 24 (2016). In discussing Milton’s depiction of the Fall, Fish explains how God’s perfectly clear rule—*do not eat the fruit of this one tree*—became clouded by diabolical rhetoric. “Satan opens up a

matters, although reformers have tried to promote clear writing in regulations,²³⁵ it remains true that ambiguity exists in many statutes and regulations.²³⁶ And where the language of the law is dim and doubtful, it can have enormous consequences for parties to a case.²³⁷

That is true in veterans law, where courts face a hard choice when dealing with dim and doubtful language in statutes and regulations. The veteran's canon would lead courts to follow the veteran-friendly interpretation, and *Chevron* and *Auer* would lead courts to defer to the VA. This Note has made the case that courts should recognize the veteran's canon as a traditional tool of interpretation, and apply it to resolve ambiguity before turning to deference doctrines. That would ensure that veterans get the benefit of the doubt in the interpretation of veterans law, and give veterans more of a voice in the system as a whole.²³⁸ We have much more to do to fulfill our duties to veterans; we ought not do less.

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space of doubt that he then fills with alternative readings of God's utterance." *Id.* For Milton's telling of the tale, see JOHN MILTON, *PARADISE LOST* bk. IX, 655–58 (Barnes & Noble Classics 2004) (1674). For the Biblical source material, see *Genesis* 2:15–3:6.

235. The plain language movement has had some success in changing how government communicates with citizens, but much work remains to be done. See Lisa Rein, *Plain writing in government: Agencies, plainly speaking, aren't there yet*, WASH. POST (Nov. 19, 2013), https://www.washingtonpost.com/news/federal-eye/wp/2013/11/19/plain-writing-in-government-agencies-plainly-speaking-arent-there-yet/?utm_term=.d2587a009fa2 [<https://perma.cc/3RP8-83QU>].

236. And reform efforts can only do so much to eradicate ambiguity from the law. See Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 287–88 (2017) (noting that "[a]mbiguity is pervasive in English" and that sometimes, legal texts contain irreducible ambiguity).

237. See Ward Farnsworth et al., *supra* note 127, at 257–58.

238. There is good reason to think the entire system needs an overhaul. See Nagin, *supra* note 202, at 887–90. And given the particular expertise veterans have on the issues they face, their voices should feature prominently in any conversation about how to reform veterans law. Cf. Nathan Jerauld, *A Veteran's Message to Congress: "I Am Not Honored. I Am Disgusted."*, THE ATLANTIC (Mar. 23, 2019), <https://www.theatlantic.com/letters/archive/2019/03/us-army-veteran-argues-against-afghan-service-act/585316/> [<https://perma.cc/9VA2-4ZB2>] (arguing that Congress could help veterans by, among other things, funding more research into the effects of burn pits, hiring more judges and staff for the veterans' appeals court system, and increasing funding for programs for survivors of sexual trauma and those struggling with mental health issues).

THE ORIGINAL MEANING AND SIGNIFICANCE OF EARLY STATE PROVISOS TO THE FREE EXERCISE OF RELIGION

INTRODUCTION

The Supreme Court held in *Employment Division v. Smith* that the Free Exercise Clause does not generally protect religiously motivated conduct from neutral laws of general applicability.¹ But the Supreme Court has never determined whether this holding reflects the original meaning of the Free Exercise Clause. Justice Scalia's *City of Boerne* concurrence provides the strongest argument issued by any member of the Court defending *Smith* on historical grounds.² He defends *Smith*'s historical foundation by relying in part upon the provisos to the free exercise guarantees found in the early state constitutions.³ These provisos withheld protection from, *inter alia*, conduct that violated the "public peace" or "safety" of the state.⁴ Justice Scalia's argument supporting *Smith* on the basis of these state provisos is twofold. First, he argues that these provisos generally withheld protection from conduct that violated any neutral, generally applicable law that a legislature might enact. That is because any violation of law would necessarily be understood to constitute a violation of the "peace" or "safety" of the state.⁵ Second, he concludes that this

1. See *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

2. See *City of Boerne v. Flores*, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring). *But see id.* at 548–64 (O'Connor, J., dissenting) (arguing that the original understanding of the Free Exercise Clause requires some religious-based exemptions). For the primary academic sources relied upon by Justices Scalia and O'Connor, see Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) (arguing that religious-based exemptions were not constitutionally required under the Free Exercise Clause's original meaning); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425 (1990) (arguing that the historical record suggests that the Free Exercise Clause's original meaning required at least some religious-based exemptions).

3. See *City of Boerne*, 521 U.S. at 539–40 (Scalia, J., concurring).

4. *Id.*

5. *Id.*

limited understanding of the free exercise of religion was the one that the federal Free Exercise Clause adopted.⁶ In short, Justice Scalia concludes the state free exercise provisos suggest that *Smith's* rule is on firm historical footing.

This Note offers a different conclusion. It focuses on the provisos to the state free exercise guarantees to advance a two-step argument against Justice Scalia's historical argument for *Smith*. First, the state free exercise provisos did not withhold protection from all religiously motivated conduct that violated any neutral, generally applicable law that a legislature might enact. Instead, these state provisos represented specifically enumerated, compelling state interests that were narrow exceptions to an otherwise broad free exercise right. And second, the Free Exercise Clause—which *lacks* any express proviso—should be read to protect religious exercise at least as broadly as the proviso-laden state constitutions. To present its argument, this Note proceeds in three parts. Part I contextualizes this Note within both the broader historical tradition of American protections for religious liberty and the academic debate over the scope of the Free Exercise Clause. Part II focuses on the most important types of free exercise provisos—those relating to peace and safety, morality and licentiousness, and injury to others' rights—to argue that the provisos had narrow, bounded scopes. Part III then turns to the federal Free Exercise Clause. It suggests that the Free Exercise Clause should be read to protect religious exercise at least as broadly as the state constitutions—and likely with even fewer qualifications.⁷

I. CONTEXTUALIZING THE PROVISOS: HISTORY AND DEBATE OVER THE FREE EXERCISE OF RELIGION

The Religion Clauses provide that “Congress shall make no law respecting an establishment of religion or prohibiting the

6. *Id.*

7. This Note has important limitations. It does not address what religiously motivated conduct fell within the “free exercise [of religion].” Nor does it analyze whether the free exercise of religion in the state constitutions was enforceable or merely precatory. Nevertheless, its discussion of the three types of provisos addressed here should still aid understanding of the Free Exercise Clause and the soundness of *Smith's* core holding.

free exercise thereof.”⁸ One tool for determining the scope of the “free exercise [of religion]” is the term’s historical meaning. That historical meaning is relevant for originalists and non-originalists alike. For originalists, history may identify, fix, and constrain the semantic and legal meaning of the Constitution’s text.⁹ But even for non-originalists, history may still remain important, whether because it informs textual meaning¹⁰ or provides persuasive evidence of how the people of the past applied constitutional norms to the pressing issues of their day. Assuming history’s ecumenical importance,¹¹ this Part contextualizes this Note’s later discussion of the state free exercise provisos by providing an overview of the colonial and early statehood protections for religious liberty and the key contemporary debates over the federal Free Exercise Clause.

A. *Evolving Colonial and Early Statehood Protections*

The Free Exercise Clause did not emerge *ex nihilo*. Rather, it evolved from the longstanding protections for religious liberty found in the early colonial charters and state constitutions—which, in turn, reflected the states’ complex relationships with their Old World heritage.¹²

8. U.S. CONST. amend. I (emphasis added).

9. See, e.g., Antonin G. Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015). But see, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (“Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in INTERPRETING THE CONSTITUTION—THE DEBATE OVER ORIGINAL INTENT 23, 25 (Jack N. Rakove ed., 1990) (describing originalism as “little more than arrogance cloaked as humility”).

10. See *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”).

11. See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1117 n.32 (1990) (finding that originalists and non-originalists have acknowledged history’s significance).

12. See McConnell, *supra* note 2, at 1421–24 (discussing religious strife and accommodation in English history, with particular focus on the English Civil War, the Test Act of 1672, the Toleration Act of 1688, and targeting of Catholics); see also Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770, 777 (2013) (discussing the narrow “toleration” of the Toleration Act and the Framers’

Religious liberty enjoyed deep and longstanding protection in the early colonial charters and state constitutions. Professor McConnell describes the purposes animating the Framers' protection for religious liberty in the following way:

[The Framers maintained] that coercion in matters of conscience could breed only hypocrisy and not sincere belief, that civil magistrates are unreliable judges of religious truth, that religious repression causes discord and civil dissension and makes enemies of peaceful citizens, that coercion impedes the search for truth, that it is contrary to the example of Jesus Christ, that it weakens religion by encouraging indolence in the clergy, and that religious intolerance impedes trade and industry [But] by far the most common argument, especially in America, and the argument most pointedly establishing religious freedom as a special case, was based on the inviolability of conscience. Most natural rights were surrendered to the polity in exchange for civil rights and protection, but inalienable rights—of which liberty of conscience was the clearest and universal example—were not.¹³

Taken as true, the view that liberty of conscience was fundamental and inalienable—and that duty to God necessarily superseded obligations to Caesar¹⁴—suggests that any potential provisos to the free exercise right would likely present narrow and reluctant (albeit necessary) exceptions.

Nearly all of the colonial charters protected religious liberty as a fundamental, inviolable right.¹⁵ These protections took the form of broad, open-ended guarantees of liberty of conscience, freedom of worship, free exercise of religion, or immunity from discrimination on account of creed. These colonial-era protections are reproduced in Table I.¹⁶ The colonial charters also included more specific protections against expected areas

rejection of the term “toleration” because the term “impl[ied] an act of legislative grace”).

13. See Michael McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 823 (1997).

14. See generally James Madison, *Memorial and Remonstrance* (1785), in 8 THE PAPERS OF JAMES MADISON 295 (Robert A. Rutland et al. eds., 1973).

15. See McConnell, *supra* note 11, at 1118; McConnell, *supra* note 2, at 1421–30.

16. See app. tbl. I, <https://perma.cc/8V74-DK8D>.

of conflict between religious liberty and state power, most importantly through providing religious-based exemptions against conscription and sworn oaths.¹⁷ To be sure, there were limits to the charters' protections. For example, among other things, protections were often limited to particular groups.¹⁸ However, viewed in context and at an appropriate level of generality, these protections were fairly expansive for the time—and would be significantly expanded over the early statehood period.

Nearly every state constitution that preceded the federal Constitution similarly contained protections for liberty of conscience or the free exercise of religion.¹⁹ These protections

17. See *id.* New Jersey and Pennsylvania are two examples. See FUNDAMENTAL CONSTITUTION FOR THE PROVINCE OF EAST N.J. OF 1683, reprinted in 5 THE FEDERAL AND STATE COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2574, 2576–78 (Francis N. Thorpe ed., 1909) [hereinafter THORPE] (“[N]o man that declares he cannot for conscience sake bear arms, whether Proprietor or planter, shall be at any time put upon so doing in his own person, nor yet upon sending any to serve in his stead.”); PA. FRAME OF GOVERNMENT OF 1696, reprinted in 5 THORPE, *supra*, at 3070–71 (protecting liberty of “conscience” by permitting affirmations instead of sworn oaths for those who, “cannot, for conscience sake, take an oath”).

18. There were significant differences in which groups received protection from these charters. For charters protecting all persons, see MA. BAY CHARTER OF 1691, reprinted in 1 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 942, 950, 952 (Benjamin P. Poore ed., 2d ed. 1878) [hereinafter POORE]; WEST N.J. CHARTER, OR FUNDAMENTAL LAWS, OF 1676, reprinted in 5 THORPE, *supra*, at 2548–49; CHARTER OF R.I. AND PROVIDENCE PLANTATIONS OF 1663, reprinted in 6 THORPE, *supra*, at 3211–13. For charters protecting all deists, see FUNDAMENTAL CONSTITUTION FOR THE PROVINCE OF EAST N.J. OF 1683, reprinted in 5 THORPE, *supra*, at 2574, 2579–80 (“[a]ll persons living in the Province who confess and acknowledge the one Almighty and Eternal God”); FUNDAMENTAL CONSTITUTIONS OF N.C. OF 1669, reprinted in 5 THORPE, *supra*, at 2722, 2783–84 (extending protection to “Jews, heathens, and other dissenters”); DEL. CHARTER OF 1701, reprinted in 1 POORE, *supra*, at 270–71 (extending protection to those “who shall confess and acknowledge One almighty God”). Other charters extended religious liberty to Christians in particular. See, e.g., MD. TOLERATION ACT OF 1649, reprinted in THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 376 (1986) (extending protection to those “professing to believe in Jesus Christ”). Some excluded Catholics. See, e.g., GA. CHARTER OF 1732, reprinted in 1 POORE, *supra*, at 369, 375 (excluding “papists”).

19. McConnell, *supra* note 2, at 1455 (“With the exception of Connecticut, every state, with or without an establishment, had a constitutional provision protecting religious freedom by 1789, although two states confined their protections to Christians and five other states confined their protections to theists.”).

are reproduced in Table II.²⁰ These state constitutional protections for religious liberty took the form of broad clauses protecting religious liberty, as well as express exemptions for anticipated areas of conflict between the state and religious liberty (such as oaths and conscription).²¹ While state protections for religious liberty were not absolute (religious tests and compulsory oaths, for example, persisted in some states),²² the overarching protections for religious liberty continued to broaden the protection afforded by the colonial charters—confirming the fundamental, longstanding, and ubiquitous nature of religious protections at the Framing.

B. *Debate over Scope and Enforceability*

Two fundamental questions are essential for fully determining the meaning of the Free Exercise Clause but are left aside for purposes of this Note. One question relates to what the “free exercise” of religion encompassed. The possible scope of protection could be either narrow (purely ceremonial conduct) or broad (all religiously motivated conduct).²³ A second question relates to whether the state free exercise

20. See app. tbl. II, <https://perma.cc/8V74-DK8D>.

21. See, e.g., DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES OF 1776, § 10, reprinted in 5 THE FOUNDERS' CONSTITUTION 70 (Phillip B. Kurland & Ralph Lerner eds., 1987) [hereinafter KURLAND] (conscription exemption); DEL. CONST. OF 1776, art. XXII, 1 POORE, *supra* note 18, at 273, 276 (oath exemption); GA. CONST. OF 1777, art. LVI, reprinted in 1 POORE, *supra* note 18, at 383 (oath exemption); MD. CONST. OF 1776, art. XXXVI, reprinted in 1 POORE, *supra* note 18, at 820 (oath exemption); MASS. CONST. OF 1780, ch. 6, reprinted in 1 POORE, *supra* note 18, at 971 (oath exemption); N.H. CONST. OF 1784, pt. 1, art. XIII, reprinted in 2 POORE, *supra* note 18, at 1281 (conscription exemption); N.J. CONST. OF 1776, art. XXIII, reprinted in 2 POORE, *supra* note 18, at 1313 (oath exemption); N.Y. Const. of 1777, art. VIII, XL, reprinted in 2 POORE, *supra* note 18, at 1334, 1339 (conscription and oath exemptions); PA. CONST. OF 1776, art. VIII, X, reprinted in 2 POORE, *supra* note 18, at 1540–42 (limited conscription exemption and implied oath exemption).

22. See DEL. CONST. OF 1776, art. XXII, reprinted in 1 POORE, *supra* note 18, at 276 (religious test); GA. CONST. OF 1777, art. VI, reprinted in 1 POORE, *supra* note 18, at 379 (religious test); N.C. CONST. OF 1776, art. XXXI–II, reprinted in 2 POORE, *supra* note 18, at 1413 (religious test and barring clergy from office); PA. CONST. OF 1776, § 10, reprinted in 2 POORE, *supra* note 18, at 1543 (limiting religious test to require deism); S.C. CONST. OF 1778, art. III, XXI, XXII–XXIII, XXXVI, reprinted in 2 POORE, *supra* note 18, at 1621–24, 1626 (religious test and barring clergy from office).

23. Compare McConnell, *supra* note 2, with Hamburger, *supra* note 2.

guarantees were judicially enforceable or merely precatory.²⁴ These questions are relevant for this Note's focus on the state free exercise provisos because the provisos' practical impact and doctrinal scope become most apparent once the base free exercise right itself—and its enforceability—are understood.²⁵ Nonetheless, this Note's limited focus requires leaving aside, as far as possible, extended discussion of these questions to prioritize directly focusing on the state provisos themselves.

II. FREE EXERCISE PROVISOS IN THE STATE CONSTITUTIONS

The early state constitutions drew from the colonial charters to broadly protect the free exercise of religion. But the right was not unlimited. Most early state constitutional free exercise guarantees also contained express provisos. These provisos took several forms: they denied protection for conduct that was not "peaceable" or that violated the "peace or safety of the state" (nine states), that was "licentious[]" or "immoral[]" (four states), that resulted in "civil injury or outward disturbance of others" (one state), that violated "good order" (one state), or that violated the "happiness," as well as the peace and safety,

24. Compare McConnell, *supra* note 2, with Vincent P. Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might It Mean? The Founders' Constitutionalism of the Inalienable Rights of Religious Liberty*, 91 NOTRE DAME L. REV. 1387 (2016).

25. These questions are not completely isolated from determining what the state free exercise provisos excepted. At a conceptual level, the Free Exercise Clause might be described in terms of its reach ("free exercise") or its limits (provisos, whether express or implied and whether inherent or imposed). Cf. Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 593 (2009). At a practical level, finding that the provisos were relatively narrow might (or might not) suggest that the free exercise right itself protected a relatively limited range of conduct. See McConnell, *supra* note 11, at 1116. Moreover, once the question of what the "free exercise" of religion protects has been answered, disagreements between opposing sides of the proviso debate may disappear. See, e.g., *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) (unanimous Court finding "ministerial exception" against neutral, generally applicable law); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (holding that Free Exercise Clause protects against religious-based discrimination). Nonetheless, this Note's decision to focus on the provisos while leaving aside (as far as possible) questions of "scope" and "enforceability" is justified by considering the extent to which this Note's core analysis should remain largely applicable regardless of how one answers the "scope" and "enforceability" questions.

of society (one state).²⁶ Table II displays the state free exercise guarantees and their provisos.²⁷ This Part argues, contrary to Justice Scalia's view in *City of Boerne*, that these provisos did not withhold protection from the free exercise of religion whenever religiously motivated conduct violated any neutral, generally applicable law that a legislature might enact. Instead, these provisos constituted limited exceptions to an otherwise broad free exercise right and only withheld protection from religious exercise that violated expressly and narrowly enumerated compelling state interests. This Part analyzes the three most common free exercise provisos in the state constitutions to support this conclusion: provisos against violating the peace and safety of the state, provisos against licentiousness and immorality, and provisos against civil injury to others.

A. *Peace and Safety*

Nine state constitutions or declarations of rights contained provisos that the free exercise of religion would not excuse acts that violated the "peace" or "safety" of the state. These states included Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, South Carolina, and Virginia.²⁸ These provisos generated extensive debate and used nearly identical language ("peace or safety" or "peace and safety"), suggesting that the framers of the state constitutions picked their language carefully and shared a common conception of what the "peace and safety" provisos meant.²⁹

The debate over the meaning and scope of the peace and safety provisos is well-traveled ground. Indeed, Justice Scalia's discussion of the state free exercise provisos in his *City of Boerne* concurrence and Professor McConnell's response focus primarily on these peace and safety provisos. Restating Justice Scalia's view here may be helpful. As discussed above, Justice

26. See app. tbl. II, <https://perma.cc/8V74-DK8D>; see also McConnell, *supra* note 2, at 1462–63.

27. See app. tbl. II, <https://perma.cc/8V74-DK8D>.

28. See *id.*

29. See Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2168–69 (2003); McConnell, *supra* note 2, at 1462–63.

Scalia argues in *City of Boerne* that the free exercise of religion did not generally protect conduct that violated any neutral law of general applicability that a legislature might enact. That was because the state free exercise provisos withheld protection from violations of the peace, and any violation of the law was considered a breach of the peace.³⁰ Professor Hamburger takes a similarly broad view of the peace and safety provisos. He argues that any breach of law would be a violation of the public peace because, *inter alia*, “the criminal offenses over which common law courts had jurisdiction were said to be ‘*contra pacem*.’”³¹ Founding-era lawyers and judges generally agreed that “every breach of law is against the peace,”³² and “eighteenth-century lawyers could distinguish ‘actual’ breaches of the peace when they wanted to.”³³ Thus, he concludes, “the disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions.”³⁴

This Section will build on Professor McConnell’s arguments to suggest that the view shared by Justice Scalia and Professor Hamburger is likely against the weight of the evidence.³⁵ Not every violation of law would have been considered a violation of the peace and safety of the state. Rather, the peace and safety provisos likely constituted narrow, compelling state interests that were narrow exceptions to an otherwise broad free exercise right.

1. Limited Scope of Government

The first challenge to Justice Scalia’s broad view of the “peace and safety” provisos rests on the extent to which the government’s power to pursue “peace and safety” was

30. See *City of Boerne v. Flores*, 521 U.S. 507, 539–40 (1997) (Scalia, J., concurring).

31. Hamburger, *supra* note 2, at 917.

32. *Id.* at 918 (relying on *Queen v. Lane*, 6 Mod. 128, 87 Eng. Rep. 884 (Q.B. 1704), and 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN, ch. 8, § 38, at 40 (1726)).

33. Hamburger, *supra* note 2, at 918 n.15.

34. *Id.* at 918–19.

35. See generally McConnell, *supra* note 2.

necessarily qualified by the Lockean-influenced, limited scope of government presupposed by the framers of the state constitutions.³⁶ As Table III demonstrates, essentially every state constitution expressly adopted Locke's core thesis that government derives all its power from the consent of the people and necessarily enjoys only a limited mandate.³⁷

The meaning of the "peace and safety" provisos was a function of the states' limited mandate. Under the prevailing Lockean view of government, that mandate was primarily to secure the physical security of society and to protect negative liberty and property interests.³⁸ The people retained all rights not surrendered to the state—including certain rights, like the free exercise of religion, that were "by their nature inalienable."³⁹ Even should "natural rights have natural limits,"⁴⁰ the state could only infringe religious liberty pursuant to the "peace and safety" of the state when religiously motivated conduct violated the physical security of society or harmed the negative liberty or property rights of others. Any statute that exceeded the state's legitimate sphere of action was no law at all.⁴¹ Moreover, the state's limited mandate to pursue

36. McConnell, *supra* note 2, at 1465 ("Obvious connections exist between the scope of the free exercise right defined by these provisions and the wider liberal political theory of which they are an expression. The central conception of liberalism, as summarized in the Declaration of Independence, is that government is instituted by the people in order to secure their rights to life, liberty, and the pursuit of happiness. Governmental powers are limited to those needed to secure these legitimate ends Even in the absence of a free exercise clause, liberal theory would find the assertion of governmental power over religion illegitimate, except to the extent necessary for the protection of others."); *see also* McConnell, *supra* note 13, at 828–830, 836; *cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) (emphasizing relevance of legal backdrops for legal construction); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

37. *See* app. tbl. III, <https://perma.cc/8V74-DK8D>.

38. *See id.*; *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT chs. 8–9 (Mark Goldie ed., 2016) (1698).

39. *See* app. tbl. III, <https://perma.cc/8V74-DK8D>; *see also* LOCKE, *supra* note 38.

40. *See* Muñoz, *supra* note 24, at 1407.

41. *See* McConnell, *supra* note 2, at 1447–48 (noting that "[William] Penn went on to deny that the Quakers had violated any laws, properly so called, even though '[i]f the enacting any Thing can make it lawful,' it was true that the Quakers had violated the 'law' against unlawful assemblies."). The idea of *lex*

the common good necessarily presupposed individual liberty as an element of that good. Thus, “[m]ore limited interpretations of ‘public peace or safety’ are consistent . . . with the Lockean origin of these ideas.”⁴² For the Lockean-dominated Framing period, “the principal protection for religious conscience [was] the restriction of government to certain limited objectives.”⁴³

iniusta non est lex is a common theme that must be kept in mind to properly contextualize the state provisos against their natural law and Lockean backdrops.

42. McConnell, *supra* note 13, at 836.

43. *Id.* Locke’s view on religious exemptions warrants brief attention here. Taken at face value, Locke’s view likely disfavors religious-based accommodations—or at least places their viability in doubt. Under a reading of Locke that disfavors religious liberty, “the government’s perception of public need defines the boundaries of freedom of conscience” because liberal theory requires “render[ing] unto Caesar whatever Caesar demands and to God whatever Caesar permits.” See McConnell, *supra* note 2, at 1434–35 (internal quotations omitted). But Locke’s historically situated views on religious liberty do not defeat the case for exemptions for four reasons. First, Locke conceived of limitations on government primarily in terms of the limited scope of government’s authority, rather than in terms of individual rights. Government was instituted to secure life, liberty, and property. The limited scope of government, rather than express, individually held exemptions from its power, provided the means for securing individual liberty from state coercion. See McConnell, *supra* note 13, at 826, 828–30. Second, Locke would view clashes between conscience and state power as exceedingly rare because laws reflected the Judeo-Christian moral framework shared by the citizenry and its legislators. See *id.* at 829–30. Lockean theory and Christian theology shared remarkably similar views of the resulting relationship that should exist between religious liberty and state power (despite important differences in many of their theoretical underpinnings). See McConnell, *supra* note 2, at 1466. It is unclear how Locke would respond to contemporary clashes between religious liberty and state power. Indeed, a state bringing a discrimination claim on behalf of homosexual couples against religious business owners would have been unimaginable both because people in Locke’s day did not imagine private religion and state morality ever conflicting, nor would they have anticipated the state’s adoption of a moral framework at such odds with the traditional Judeo-Christian one. Third, the Founding generation seems to have accepted Locke’s views of limited government but not his specific views on religion. American treatment of religious liberty (save, perhaps, the early North Carolina Fundamental Constitution) was far more generous—and it only expanded during the Revolutionary period. See McConnell, *supra* note 2, at 1435–43. And fourth, Locke’s views on religious liberty, assuming parliamentary supremacy and legislative responsibility for protecting rights, did not anticipate the revolutions of judicial review or written constitutionalism as they developed in the American context. For a discussion of these arguments, see, e.g., McConnell, *supra* note 2, at 1434–35, 1466; McConnell, *supra* note 13, at 826, 828–30.

2. Historical Definitions and Practices

A second problem with Justice Scalia's view of the "peace and safety" provisos is that the terms "peace" and "safety" were historically defined by colonial charters and Founding-era dictionaries and commentaries to fall short of encompassing "all laws." The peace and safety provisos thus likely had at least some boundaries short of including *any* violation of law.

a. Charter "Peace and Safety" Provisos

State charters provide one source of support for a limited understanding of the "peace and safety" provisos. As Professor McConnell has argued, the Rhode Island charter provides a particularly probative illustration of this point. In *The Origins and Historical Understanding of Free Exercise of Religion*, Professor McConnell compares a 1641 Rhode Island statute providing that "none be accounted a delinquent for doctrine, provided that it be not directly repugnant to the government or laws established"⁴⁴ with a 1662 Rhode Island charter proviso withholding protection from conduct that was licentious, profane, injured others, or violated the "civill peace."⁴⁵ Based on the narrowed scope of the 1662 proviso (compared to the broader proviso in 1641), Professor McConnell argues that "believers were not required to obey all 'laws established,' but only those directed to maintaining the 'civill peace' and preventing licentiousness and profaneness, or the injury of others."⁴⁶ In short, violation of the "peace" did not encompass violation of any law.

Professor Hamburger contests McConnell's reliance upon the Rhode Island Charter. He argues that "the precise words of . . . the Rhode Island Charter, were that—notwithstanding any law to the contrary—persons may enjoy 'their own judgments and consciences, in matters of religious concernments . . . ; they behaving themselves peaceable.'"⁴⁷ In

44. McConnell, *supra* note 2, at 1426.

45. R.I. CHARTER OF 1663, *supra* note 18, at 3211–23.

46. McConnell, *supra* note 2, at 1426. Rhode Island's approach did not command immediate respect. *See id.* It would, however, become the dominant approach later on. *See id.* at 1427.

47. *See* Hamburger, *supra* note 2, at 817 n.8 (quoting 6 NATHAN O. THORPE, THE FEDERAL AND STATE CONSTITUTIONS 3213 (1990)).

his view, given that England had various laws prohibiting certain religious meetings and otherwise penalizing dissenters, provisions like the Rhode Island Charter merely freed colonists from complying with laws that restrained individuals “*in matters of religious concernments*.”⁴⁸ But this interpretation is potentially problematic. As an initial matter, it is not clear that “matters of religious concernment” would necessarily represent a narrow category limited to religious meetings or ceremonial worship. Given the broad description of religious conscience in Part I and the integration between religious belief and temporal conduct in Christian theology, there may be good reasons to conclude that a broader set of religiously motivated conduct would be of “religious concernment[],” barring some reason to presume otherwise. Moreover, the state’s power to infringe on religiously motivated conduct still remained limited by the relatively narrow, Lockean scope of government. At the very least, McConnell’s point regarding the limited scope of the peace and safety provisos likely remains standing, regardless of one’s view of the precise scope of the base free exercise right itself (assuming that the resulting arrangement does not lead to absurd results).

Despite its initial rejection by many other colonies, the Rhode Island charter’s protection for religious liberty and its narrow proviso would eventually be mirrored in several other colonies and become “the most common pattern in the constitutions adopted by the states after the Revolution.”⁴⁹ As Professor McConnell observes in regards to the general tenor of these protections:

Three features of these early provisions warrant attention. First, the free exercise provisions expressly overrode any “Law, Statute or clause, usage or custom of this realm of England to the contrary.” Second, they extended to all “judgments and consciences in matters of religion”; they were not limited to opinion, speech and profession, or acts of worship. Third, they limited the free exercise of religion only as necessary for the prevention of “Lycentiousnesse” or the

48. See *id.*; see also McConnell, *supra* note 2, at 1426–27.

49. See McConnell, *supra* note 2, at 1426.

injury or “outward disturbance of others,” rather than by reference to all generally applicable laws.⁵⁰

The speeches of religious freedom advocates of the day similarly support a limited understanding of the peace and safety provisos. In contrast to Professor Hamburger’s reliance upon these religious liberty advocates to argue that any violation of law would constitute a violation of the public peace (and therefore that the free exercise of religion did not require religious exemptions from neutral, generally applicable laws), Professor McConnell argues that these advocates do not undermine the view that exemptions were sometimes required for at least four reasons.⁵¹ First, the types of offenses that they discussed as not being protected by the free exercise of religion—robbery, theft, and other acts of violence or violations of the negative liberty or property interests of others—reflect a limited category of violations of the public peace which largely mirrored the categories of offenses that were described as “against the public peace” in Blackstone’s *Commentaries*.⁵² Second, these advocates for religious liberty presupposed limits not only for religion but also for government.⁵³ Government was restrained in its authority to secure the public peace; in the Lockean framework, the public peace the government was empowered to pursue primarily focused upon protection for physical safety, negative liberty, and private property.⁵⁴ Third, many proponents of exemptions, such as William Penn and John Leland, may have assumed that at least some religiously motivated conduct would enjoy exemptions even from many neutral laws of general applicability that Lockean-influenced governments might promulgate.⁵⁵ And fourth, religious conduct was anticipated to

50. *Id.*

51. See McConnell, *supra* note 13, at 825–26, 828–30 (citing Leland, Penn, Madison, and Williams).

52. *Id.* at 825–26; see also 4 WILLIAM BLACKSTONE, COMMENTARIES *142–153.

53. See McConnell, *supra* note 2, at 1465.

54. McConnell, *supra* note 13, at 828–29 (citing John Locke, *A Letter Concerning Toleration*, in 6 THE WORKS OF JOHN LOCKE 5, 5–9 (photo. reprint 1963) (London 1823) (“[The] business of laws is not to provide for the truth of opinions, but for the safety and security of the commonwealth, and of every particular man’s goods and person.”)); see also *id.* at 826 (citing Williams for similar proposition).

55. See McConnell, *supra* note 2, at 1447–48.

conflict only rarely with neutral, generally applicable laws because legislators and citizens shared a similar view of religion, morality, and the limited role of government—and in cases of anticipated conflicts, including in areas as important as military conscription, the colonial charters and later state constitutions generally actively extended specific accommodations.⁵⁶ The extent to which civil society and even dissenting religious traditions shared the same overarching political and moral convictions—and the resulting infrequency of conflicts between religious liberty and legitimate state interests—is critical for understanding the practical scope of the peace and safety provisos.⁵⁷

b. Founding-era Dictionaries

Founding-era dictionaries also support a limited understanding of the “peace and safety” provisos.⁵⁸ The definitions of “peace” generally included freedom from foreign war, domestic commotion or civil war;⁵⁹ harmony, accommodation, and healing of differences in society;⁶⁰ or, protection from physical violence or unnatural harm.⁶¹ These definitions suggest that, provided religiously motivated conduct did not further foreign conflict, civil war, tumultuous

56. See McConnell, *supra* note 13, at 825–26.

57. See McConnell, *supra* note 11, at 1118; McConnell, *supra* note 2, at 1466.

58. The use of Founding-era dictionaries has come under increasing attack in recent years. See, e.g., Thomas R. Lee, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018); Solum, *supra* note 9, at 1638–43. This Note utilizes Founding-era dictionaries because their relevance is widely accepted; however, this Note also acknowledges their potential limits and the benefits that could flow from utilizing other research sources and methodologies. See generally Lee, *supra*.

59. See NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining “peace” to mean “freedom from war with a foreign nation,” “freedom from internal commotion or civil war,” “public tranquility; that quiet, order, and security . . . guaranteed by the laws”); JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1828) (“free from war,” “free from tumult”); JAMES BARCLAY, UNIVERSAL ENGLISH DICTIONARY 426 (1792) (“a respite from war”; “rest from any commotion or disturbance”; “reconciliation”).

60. See ASH, *supra* note 59 (“accommodation of differences,” “quiet,” “reconciliation”); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (18th ed. 1781) (“composing or healing of differences”); WEBSTER, *supra* note 59 (“harmony”); BARCLAY, *supra* note 59 (“inclined to peace,” “mild,” “undisturbed”).

61. See WEBSTER, *supra* note 59 (“[n]ot violent, bloody or unnatural”).

social disharmony, or physical violence, the conduct would not be in violation of the “peace.”⁶² If anything, suppression of religiously motivated conduct would be more likely to cause the violence, civil strife, and public tumult that would upset the public peace. Turning to “safety,” Founding-era dictionaries generally defined it to mean “freedom from danger or hazard.”⁶³ “Hurt” and “harm” were generally defined to refer primarily to physical injury, such as “hurt to [the] person,” “a wound or bruise”;⁶⁴ a “wound, maim[ing], or damage [to] a man’s person or reputation”;⁶⁵ “harm, mischief, injury [or a] wound”;⁶⁶ and “a contusion, pressure, or any violence to the body.”⁶⁷ But, as suggested by one of the above definitions, hurt could also extend to include damage to a man’s “reputation” or “property.”⁶⁸ Thus, while the primary definition of “safety” most naturally lent itself to mean protection from physical injury, it also likely protected the rights to property and reputation long enshrined at common law. While injury to the traditional rights that the Lockean state protected might violate the public peace or safety based on these definitions, not every violation of law would necessarily do so.

62. Professor McConnell critiques Justice Scalia’s use of dictionaries on this point. See McConnell, *supra* note 13, at 833–35 (noting that Scalia relies upon “Noah Webster’s 1828 dictionary, which gave as the eighth (eighth!) definition of ‘peace’: ‘Public tranquility; that quiet, order and security which is guaranteed by the laws; as, to keep the peace; to break the peace.’”).

63. WEBSTER, *supra* note 59 (defining “safety” as “freedom from danger or hazard”).

64. BARCLAY, *supra* note 59 (defining “hurt” as “damage, mischief, or harm . . . [or a] wound or bruise, applied to the body” and defining “harm” as “an action by which . . . [a] person may receive damage in his goods or hurt to his person; mischief; hurt; or injury; . . . a degree of hurt without justice . . . to either character or property.”).

65. DYCHE & PARDON, *supra* note 60 (defining “hurt” as “to wound, maim, or damage a man’s person or reputation”).

66. ASH, *supra* note 59 (defining “hurt” as “harm, mischief, injury, [or] a wound” and defining “injury” as “hurt, injustice, annoyance, [or] contumely”).

67. WEBSTER, *supra* note 59 (defining “hurt” as “[t]o bruise; to give pain by a contusion, pressure, or any violence to the body”).

68. See *id.* (defining “hurt” to mean “[t]o harm; to damage; to injure by occasioning loss[;] . . . [to] hurt a man by destroying his property”); see also DYCHE & PARDON, *supra* note 60 (defining “hurt” to include “damage [to] a man’s person or reputation”).

c. *Legal Commentators and Contemporary Legal Practice*

Legal commentators around the time of the Founding—presumptively reflecting standard legal practices—provide further evidence that “peace” and “safety” represented well-understood, limited categories that did not necessarily encompass all violations of law. The peace and safety provisos most likely reflected the ancient concept of “breach of the peace” rooted in the history and common law practices of the Founding. Critically, “breach of the peace” was a limited concept—it only included certain violations of law. As Professor McConnell notes, Blackstone’s *Commentaries* provides thirteen specific offenses that constituted breaches of the peace at common law. These included “riotous assembly of twelve or more,” “unlawful hunting,” “letter[s] without name demanding money or threatening,” “break[ing] lock[s] or floodgate[s] on [a] river erected by authority of parliament,” “affray[s],” “riots, routs, and unlawful assemblies of three or more,” “tumultuous petitioning,” “forcible entry,” “riding or going armed with dangerous or unusual weaponry (terrifying the people of the land),” “spreading false news,” “false and pretended prophesies,” “anything that incites someone else to break the public peace” (incitement and fighting words), and “libels.”⁶⁹ Thus, breach of the peace constituted a distinct category of unlawful conduct; it did not include all violations of law.⁷⁰ Justice Story’s *Commentaries on the Constitution of the United States* reinforce the view that violations of the public peace included only a subset of conduct in violation of general laws. Justice Story juxtaposed “public peace” with “foreign or domestic violence,” and under his broadest definition he considered breach of the public peace to include acts of “violence” and other acts prohibited at common law, such as libel, which were “constructive breaches of the peace of the government, inasmuch as they violate[d] its good order.”⁷¹ Critically, Justice Story’s conception of “good order” was tied to his Lockean conception of government’s role (protection of

69. BLACKSTONE, *supra* note 52. Professor McConnell utilizes this argument in McConnell, *supra* note 13, at 835.

70. See BLACKSTONE, *supra* note 52.

71. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 308–09, 332, 335 (Carolina Academic Press 1987) (1833).

property and negative liberties).⁷² Moreover, common law offenses such as libel were generally considered breaches of the peace both because they directly injured one's reputation (a form of personal injury) and tended to incite violent responses.⁷³ The violation of the public "peace" was therefore a likely a bounded concept.

Similarly for public "safety," legal commentators maintained a bounded conception of what harms the state had an interest in protecting individuals from suffering. Blackstone identified three types of wrongs: injuries to the personal security of individuals (including threats, assaults, batteries, wounding, mayhem, injuries to health, and injuries to reputation), injuries to personal liberty (involving false imprisonment), and injuries to private property.⁷⁴ Similarly, Justice Story understood the

72. *Id.* at 704 (noting that the First Amendment's protections are limited such that no one may "injure any other person in his *rights, person, property, or reputation*; and so always, that [one] does not thereby disturb the public peace, or attempt to subvert the government" (emphasis added)). This constitutes Story's acceptance of Blackstone's framework in this area. Story also embraced a Lockean-influenced conception of limited government. *See id.* at 501.

73. Some legal historians have contended that any violation of law constituted a violation of the public peace. Professor Wilgus contends that "every indictable offense was constructively a breach of the peace" and that "disobeying any act of parliament was a breach of the peace." *See* Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 574 (1924). The Queen's Bench opinion relied upon by Justice Scalia in *City of Boerne* for this conclusion is similarly broadly worded. *See City of Boerne v. Flores*, 521 U.S. 507, 539 (1997) ("Every breach of law is against the peace.") (Scalia, J., concurring) (quoting *Queen v. Lane*, 6 Mod. 128, 87 Eng. Rep. 884, 885 (Q.B. 1704)). But there are at least two alternative reasons why the public peace provisos should not be viewed to withhold protection from religiously-motivated conduct that violated any law that a legislature might enact. First, the extent to which the broad language captured in a Queen's Bench opinion nearly a century before the Framing actually influenced or reflected the Framers can be contested. It likely swept too broadly. Blackstone's narrower, enumerated list of what constituted a "breach of the peace," which presumably better reflected the Framers' understanding of the English common law tradition, did not extend the concept to include any violation of law. *Compare* 4 BLACKSTONE, *supra* note 52, at *142-53, *with* Locke, *supra* note 54, at 5-9. And second, laws enacted by Parliament (and state legislatures) were focused on preserving the Lockean "peace"—that is, the safety, security, and harmony of the state. This limited conception of state power necessarily contextualizes the sweeping language of the oft-cited Queen's Bench opinion.

74. *See* 4 BLACKSTONE, *supra* note 52, at *115-43. This limited category of injuries is consistent with Blackstone's understanding "rights." *See* 1 BLACKSTONE, *supra*, at *129 ("[T]he rights of the people of England . . . may be reduced to three principal or primary articles; the right of personal security, the right of personal

First Amendment to be limited to prevent any man from “injur[ing] any other person in his rights, person, property, or reputation.”⁷⁵ And even the Baptist preacher Professor Hamburger relies upon for his argument against constitutionally compelled exemptions confirm this limited scope of harm insofar as they understood injuries to include injuries to “[one’s] neighbor, either in person, name, or estate.”⁷⁶ Consequently, violation of the public “safety” was similarly a limited concept as well.

3. Backdrop Principles

A third problem with Justice Scalia’s view of the “peace and safety” provisos is the extent to which denying religious protection for violation of any law would undermine three deeply rooted core principles that animated the American relationship with religion: (1) broadly protecting religious liberty,⁷⁷ (2) avoiding the religious persecution and strife that

liberty, and the right of private property.”). It also reflects Blackstone’s general embrace of a Lockean vision of government:

For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like) then they become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of states and societies . . .

Id. at *124–25.

⁷⁵ STORY, *supra* note 71, at 704.

⁷⁶ Hamburger, *supra* note 2, at 918 n.15 (quoting Caleb Blood, *A Sermon* 35 (Vt. election sermon [1792]) (Evans 24126)).

⁷⁷ See, e.g., app. tbls. I–II, <https://perma.cc/8V74-DK8D>. To avoid the question-begging problem of assuming its own conclusion, this Note’s point here is simply that American practice tended to reflect a general tendency to protect religious conscience through both broad, open-ended guarantees and specific guarantees

had splintered the pre-Westphalian Old World,⁷⁸ and (3) crafting societies designed to spread the voluntary acceptance of the Gospel.⁷⁹ All three principles—which provide a potentially helpful backdrop for analyzing the state constitutions⁸⁰—caution against a broad reading of the provisos that would withhold free exercise protection from religiously motivated conduct any time it violated any law that a legislature might enact. First, withholding exemptions from violation of any law would problematically subordinate religious conscience to the power of the state, even where the law does not pertain to the safety, negative liberty, or property rights of others. That result conflicts with the broad rationales

targeted to expected areas of conflict between the state and religion, and these protections support a default presumption favoring a narrow view of the provisos in cases of doubt over their construction.

78. See Douglas Laycock, *Text, Intent, and the Religion Clauses*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 683, 691–92 (1990) (“The religion clauses had two great defining controversies. One was the long history of religious persecution and civil and international religious wars in Western societies Religious conflicts were carried to the English colonies in America, and took new form with the growth of new denominations The history of post-Reformation religious conflict was more recent to the founders than the history of slavery is to us. It is surely reasonable to infer that the founders intended the religion clauses of state and federal constitutions to prevent a renewal of these conflicts The second great defining controversy for the religion clauses was the fight over disestablishment in the states.”); McConnell, *supra* note 2, at 1421–24 (emphasizing the extent to which the English Civil War, English persecution, and limited accommodations by Parliament, along with the early colonial approaches, influenced the state constitutions’ free exercise guarantees).

79. Nearly every colonial charter stated that the colony’s purpose was furthering Christianity. See, e.g., NEW ENGLAND CHARTER OF 1620, *reprinted in* 3 THORPE, *supra* note 17, at 1827–41 (expressing “Hope . . . to advance the enlargement of Christian Religion”); COMMISSION OF JOHN CUTT OF 1680, *reprinted in* 4 THORPE, *supra* note 17, at 2446 (expressing hope that the “infidel may be invited & desire to partake of ye Christian Religion”); MD. CHARTER OF 1632, *reprinted in* 4 THORPE, *supra* note 17, at 1669–86 (expressing “pious Zeal for extending the Christian Religion”); CHARTER OF CAROLINA OF 1663, *reprinted in* 5 THORPE, *supra* note 17, at 2743–55 (expressing “laudable and pious zeal for the propagation of the Christian faith”); FIRST CHARTER OF VIRGINIA OF 1606, *reprinted in* 7 THORPE, *supra* note 17, at 3783–89 (aiming for the “propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God”). Professor McConnell writes elsewhere about the powerful influence of evangelism in catalyzing and shaping the American conception of religious liberty and the free exercise protections in the early state constitutions. See McConnell, *supra* note 2, at 1437–43.

80. See Laycock, *supra* note 78, at 690, 696–97 (“It is nearly always helpful to ask what problem the founders were trying to solve.”).

for religious conscience discussed above and is potentially in tension with the general impulses animating the ubiquitous and longstanding accommodations encapsulated in American legislative, executive, and constitutional practice.⁸¹ Second, construing the peace and safety provisos to deny free exercise so broadly would potentially contribute to religious strife by fueling violent dissent and creating a competition between sects for power to define the public peace in a way that suppresses rival sects while avoiding being burdened by others. Significantly, inter-sect competition for power would disproportionately harm minority religious groups, the very groups that religious liberty protections were primarily designed to protect.⁸² And third, while Americans' missionary zeal led them to seek to construct their societies in accord with Biblical norms, many colonial charters and state constitutions noted that subjugating opponents' religious liberty would actually hinder the process of converting unbelievers and fail to comport with the example of Jesus Christ.⁸³ In any event, the

81. See McConnell, *supra* note 2, at 1466–73 (noting that conflict between religious belief and state power was rare but that in the few areas of conflict—oaths, conscription, and religious assessments—religious belief was usually accommodated).

82. See Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 136 (1992) (“Those groups most vocal in demanding protection for religious freedom—the Quakers, the Presbyterians, and above all the Baptists—were precisely those groups whose practices were out of keeping with the majoritarian culture and who had borne the brunt of governmental hostility and indifference.”).

83. The relationship between religious liberty and evangelization is reflected in the early charters, the Framers' philosophy, and the early state constitutions. The most explicit support for this is found in the Fundamental Constitutions of North Carolina of 1669. See FUNDAMENTAL CONSTITUTIONS OF N.C. OF 1669, reprinted in 5 THORPE, *supra* note 17, at 2783–85 (protecting the “liberty of conscience” and providing that “[n]o man shall use any reproachful, reviling, or abusive language against any religion of any church or profession; that being the certain way of disturbing the peace, and of *hindering the conversion* of any to the truth”) (emphasis added). Less explicit but nonetheless powerful support is offered in many charters' structural practice of stating one of the government's guiding purposes as the propagation of Christianity and then proximately granting religious liberty rights. See COMMISSION OF JOHN CUTT OF 1680, reprinted in 4 THORPE, *supra* note 17, at 2446; FIRST CHARTER OF VIRGINIA OF 1606, *supra* note 79, at 3783–89. Similar sentiments emerged in the later state constitutions. See, e.g., S.C. CONST. OF 1778, art. XXXVIII, reprinted in 2 POORE, *supra* note 21, at 1626–27. The Founders' philosophical commitments to the relationship between religious

generally shared political and moral commitments between legislators and citizens—viewed at an appropriate level of generality—meant that conflicts between religiously minded citizens and state power would arise only rarely.⁸⁴ But when they did, policies favoring religious liberty, opposing strife, and furthering evangelization resulted in a broad impulse to extend accommodations.

4. State Constitutional Structure

A fourth problem with Justice Scalia's view of the peace and safety provisos derives from state constitutional structure. Three distinct problems arise for Justice Scalia's view.

a. Scope of State Power and Proviso "Gap"

One structural problem with Scalia's view of the "peace and safety" provisos is that the scope of early state governments' constitutional powers extended beyond securing the "peace and safety" of the state.⁸⁵ As McConnell argues, because the states were empowered to enact laws beyond securing public peace and safety, not every violation of law would be a violation of the "peace and safety" of the state.⁸⁶ Table III illustrates this point by reproducing the scope of each state's constitutional powers alongside its respective peace and safety proviso.⁸⁷ Comparing the constitutional power grants with the provisos suggests that "peace and safety" occupied a relatively limited scope of the states' plenary power to pursue societal "happiness," "goodness," and "blessings."⁸⁸ Because the constitutional power grants expressed other enumerated

liberty and conversion are reflected in the works of James Madison. See Madison, *supra* note 14.

84. See McConnell, *supra* note 11, at 1118 ("[T]he need for exemptions did not often arise. Because the vast majority of the inhabitants were Protestant Christians and the laws tended to reflect the Protestant viewpoint, clashes between conscience and law were rare. It is significant, however, that exemptions were seen as a solution to the conflict when it occurred.").

85. See McConnell, *supra* note 13, at 835–36 ("If the intention of the framers of the state free exercise provisions had been to subordinate the rights of conscience to 'every law,' then they would have used familiar language of this sort.").

86. See *id.*

87. See app. tbl. III, <https://perma.cc/8V74-DK8D>.

88. See *id.*

purposes in addition to securing the “peace and safety,” there is a powerful argument that the “peace and safety” provisos should be read to represent a limited category that did not, as a matter of text and structure, extend to include all laws.⁸⁹

b. Differing Proviso Formulations

Another structural problem for the Scalia view is that states “formulated their provisos in different ways, some including acts of ‘licentiousness’ or infringements upon the laws of morality, some including disturbance of the religious practice of others, and one including acts contrary to the ‘[h]appiness of society.’”⁹⁰ That many states added additional categories to their provisos in addition to violations of the “peace and safety” suggests that they did not understand “peace and safety” to encompass all laws.⁹¹ Any other reading renders the additional formulations accompanying the “peace and safety” provisos superfluous in violation of the well-accepted canons relating to the construction of disjunctive phrases, the presumption against superfluity, and the presumption of consistency across the *corpus juris*. As the heated debates over the wording of the provisos in Virginia and New York demonstrate, the state framers drafted their free exercise provisos very carefully—and the meaning of their carefully chosen language should be taken seriously.

89. See *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (discussing *expressio unius* canon). Two potential counterarguments may be raised. First, perhaps the *expressio unius* canon is unreliable or inapplicable here. But given that the “peace and safety” provisos are frequently listed alongside other types of provisos, the *expressio unius* canon likely has particularly likely application here. And second, while not all state laws were intended to secure the public peace, perhaps *violation* of those laws would necessarily unsettle the peace and safety of the state. But that counterargument is unavailing for the reasons that will be discussed in this section below. Most problematically, it fails to explain the pairing of “peace and safety” provisos with other types of provisos.

90. See McConnell, *supra* note 13, at 837.

91. See app. tbl. II, <https://perma.cc/8V74-DK8D>. South Carolina and New York also included prohibitions against licentiousness. Massachusetts and New Hampshire added prohibitions against violating the rights of others. Maryland added both of these formulations. South Carolina also included a requirement that the citizen live “faithfully” (in obedience to law). *Id.*

c. *Structural Use of “Peace” and “Safety”*

A final structural problem for Scalia’s view is that the way state constitutions use the words “peace” and “safety” supports interpreting the “peace and safety” provisos as primarily focused on acts of violence or injury to the physical person—not to encompass any violation of law.

Start with the term “peace.” Within the constitutions that had peace and safety provisos, the term “peace” was used in five different ways. On the whole, though with some complications and ambiguities, these uses support the view that not all violations of law were violations of the public peace. The first two types of uses strongly favor a narrow reading of the term “peace.” The first type of use juxtaposes “peace” with war and violence from a foreign enemy. At least eight states use “peace” in this way.⁹² “Peace” was also used to refer to peaceable petition for redress, peaceful elections, and the peaceful transition of power. These uses suggest a juxtaposition with riotous petition, violence at the ballot box, and succession through physical force. At least five states use “peace” in this way.⁹³

92. See DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES OF 1776, § 21, reprinted in 5 KURLAND, *supra* note 21, at 71 (quartering of soldiers); MD. DECLARATION OF RIGHTS OF 1776, art. XXVIII, reprinted in 1 POORE, *supra* note 18, at 819 (quartering of soldiers); MASS. CONST. OF 1780, art. XVII, XXVII, reprinted in 1 POORE, *supra* note 18, at 959 (quartering of soldiers and right to bear arms); N.H. CONST. OF 1784, pt. 1, art. XXVII, reprinted in 2 POORE, *supra* note 18, at 1283 (quartering of soldiers); N.Y. CONST. OF 1777, pmbl., art. XXXVII, XL reprinted in 2 POORE, *supra* note 18, at 1328, 1338–39 (state of war with Britain, foreign relations, and militia conscription); N.C. CONST. OF 1776, art. XVII, reprinted in 2 POORE, *supra* note 18, at 1410 (arms); S.C. CONST. OF 1778, pmbl., art. XII, XIII, XXXIII, reprinted in 2 POORE, *supra* note 18, at 1622–23, 1625–26 (war and wartime powers); VA. BILL OF RIGHTS OF 1776, § 13, reprinted in 2 POORE, *supra*, at 1909 (wartime).

93. See DEL. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES OF 1776, § 9, reprinted in 5 KURLAND, *supra* note 21, at 71 (right of redress); DEL. CONST. OF 1776, art. XXVIII, reprinted in 1 POORE, *supra* note 18, at 277 (elections and juxtaposed with having military force present at ballot box); GA. CONST. OF 1777, art. XXIV, reprinted in 1 POORE, *supra* note 18, at 380–81 (governor’s oath and promise to peaceably and quietly resign when his term expired); MD. DECLARATION OF RIGHTS OF 1776, art. XI, reprinted in 1 POORE, *supra* note 18, at 818 (right of petition for redress); MD. CONST. OF 1776, art. XIV, XLII, reprinted in 1 POORE, *supra* note 18, at 822, 826 (election provisions); MASS. CONST. OF 1780, art. XIX, reprinted in 1 POORE, *supra* note 18, at 959 (right to peaceably assemble and petition for redress of grievances); N.H. CONST. OF 1784, pt. 1, art. XXXII, reprinted in 2 POORE, *supra* note 18, at 1283 (right to peaceably assemble and petition representatives).

The third use of the term—discussing “peace” as a foundational principal for government—provides limited support for a narrow reading of the term in the free exercise provisos.⁹⁴ The probative value of this use is limited because while it highlights the compelling state interest in peace, the term “peace” is never defined in these contexts. However, the listing of “peace” alongside other *raison d’être* for the state is probative evidence that “peace” did not include everything that the state was empowered to do.

The fourth use of the term—in the context of the titles “justice of the peace” and “clerks” or “conservators” “of the peace”⁹⁵—does not clearly support either the narrower or broader readings of the peace provisos. Whether the title was a mere formality or a probative portion of the text that substantively informed the public meaning of “peace” in the provisos is unclear.⁹⁶ And even if the titles provide support for the broader reading (for reasons similar to those relating to Hamburger’s reliance on the ceremonial “*contra pacem*” phrasing discussed above),⁹⁷ the meaning of “peace” was still limited by the extent to which government occupied only a limited scope at the Framing—a particularly powerful manifestation of the influences of Locke’s *Second Treatise* and Blackstone’s *Commentaries* and the natural coherence of these

94. See MASS. CONST. OF 1780, pmbl., reprinted in 1 POORE, *supra* note 18, at 956–57; N.H. CONST. OF 1776, pmbl., reprinted in 2 POORE, *supra* note 18, at 1279–80.

95. See DEL. CONST. OF 1776, art. XII, XVIII, reprinted in 1 POORE, *supra* note 18, at 275–76; GA. CONST. OF 1777, art. XIII, XVII, LIII, reprinted in 1 POORE, *supra* note 18, at 380, 383; MD. CONST. OF 1776, art. XLIV, reprinted in 1 POORE, *supra* note 18, at 826–27; MASS. CONST. OF 1780, ch. 3, art. III, ch. 6, art. II, reprinted in 1 POORE, *supra* note 18, at 968–69, 971–72; N.J. CONST. OF 1776, art. XII, XX, reprinted in 2 POORE, *supra* note 18, at 1312–13; N.Y. CONST. OF 1777, art. XXVIII, reprinted in 2 POORE, *supra* note 18, at 1328, 1337. Cf. N.C. CONST. OF 1776, art. XXXIII, XXXV, reprinted in 2 POORE, *supra* note 18, at 1413–14; S.C. CONST. OF 1778, art. XXVI, reprinted in 2 POORE, *supra* note 18, at 1625; VA. CONSTITUTION OF 1776, reprinted in 2 POORE, *supra* note 18, at 1909–11.

96. These titles may also have nuclear relevance for the provisos. Cf. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes”). But they still may be probative.

97. See Hamburger, *supra* note 2, at 917.

works with the religiously grounded, anti-strife policies that animated the early states.⁹⁸

The fifth use of the term “peace”—to refer to at least some violations of law—provides the strongest structural hook for Justice Scalia’s view. But, read properly, it should still favor a reading of the peace provisos that does not encompass all violations of law. Some of these uses associated violations of the public peace with serious, largely violent, offenses.⁹⁹ This use supports a limited reading of the term “peace.” More complex is the use in five constitutions (Delaware, Maryland, New Jersey, North Carolina, and Virginia) of the term “peace” in the context of indictments (a usage briefly discussed above). In these five states, all indictments were to “conclude” with some variation of the phrase “[a]gainst the peace and dignity of the state.”¹⁰⁰ This ceremonial phrasing may be taken to support Justice Scalia’s view that every indictable offense was a violation of the peace for purposes of the provisos. But there are two arguments that marshal against relying too heavily on these indictment clauses to embrace a broad reading of the “peace and safety” provisos.

First, the indictment clauses themselves suggest limits to what offenses were indictable.¹⁰¹ As an initial matter, not all

98. See *supra* Part II.A.3.

99. See GA. CONST. OF 1777, art. XXXIX, reprinted in 1 POORE, *supra* note 18, at 382 (“breach[es] of the peace, felon[ies], murder[s], and treason against the state”); S.C. CONST. OF 1790, art. I, § 1, reprinted in 2 POORE, *supra* note 18, at 1628, 1632–33 (absence of parliamentary privilege for “treason, felony, or breach of the peace”).

100. See DEL. CONST. OF 1776, art. XX, reprinted in 1 POORE, *supra* note 18, at 276; MD. CONST. OF 1776, art. LVII, reprinted in 1 POORE, *supra* note 18, at 828; N.J. CONST. OF 1776, art. XV, reprinted in 2 POORE, *supra* note 18, at 1313; N.C. CONST. OF 1776, art. XXXVI, reprinted in 2 POORE, *supra* note 18, at 1414; VA. CONSTITUTION OF 1776, reprinted in 2 POORE, *supra* note 18, at 1910–12.

101. An indictment was “a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury.” 4 BLACKSTONE, *supra* note 52, at *302; WEBSTER, *supra* note 59 (defining “indictment” as “a written accusation or formal charge of a crime or misdemeanor, preferred by a grand jury under oath to a court.”). The limited scope of the indictment clauses is particularly probative support for this Note’s thesis to the extent that the indictment clauses represent a floor rather than a ceiling for what offenses constituted a violation of the peace (perhaps by way of *expressio unius*). That assumption is certainly contestable. But even if it is rejected, the indictment clauses still do not necessarily require a broad reading of the peace and safety provisos for the reasons set forth below in the following discussion—perhaps

violations of law were indictable.¹⁰² Presumably, pettier offenses entitled to summary proceedings (and therefore not subject to indictment) would not violate the peace of the state based on these indictment clauses. Moreover, the expense, effort, and time required to gather a grand jury comprised of twenty-four peers also suggest that crimes required sufficient gravity in practice in order to warrant indictment. And even when gathered, the practical protections afforded by grand juries to defendants from overzealous prosecution were quite important, particularly during the Revolutionary Era. It should also be noted that laws setting out felonies and misdemeanors drew heavily from the prevailing Lockean conception of government when defining the types of conduct that were prohibited. These prohibitions focused on conduct that violated the negative liberties, personal security, reputation, and property of others.¹⁰³ And, finally, the indictable felonies and misdemeanors that were presented to grand juries necessarily constituted only public offenses. Private, civil actions would not be indictable. If the meaning of “peace” is informed at least in part by the indictment clauses, then this suggests that conduct giving rise merely to merely civil, private

most importantly, government’s limited scope was an important backdrop principle contemplated by the early state free exercise provisos.

102. See STORY, *supra* note 71, at 660 (“[It was] regularly true at the common law of all offences, above the grade of common misdemeanors . . . [that there be] the interposition of a grand jury, by way of presentment or indictment, before the party accused can be required to answer to any capital and infamous crime, charged against him.”); HENRY HALLAM, THE CONSTITUTIONAL HISTORY OF ENGLAND 231 (1877) (noting that “[t]reason, felonies, and misdemeanors are all indictable offences—every indictable offense falls under one of these three heads,” but that “below these indictable offenses there was springing up a class of pettier offences, . . . which could be punished without trial by jury by justices of the peace”). But indictments at the federal level were reserved for “capital, or otherwise infamous crime[s].” U.S. CONST. amend. V.

103. To the extent that the state also criminalized immoral conduct in the context of securing the peace, the regulations criminalized conduct that the major religious tradition at the Founding (including dissenters) condemned, and these prohibitions focused extensively on combatting the secondary effects of, for example, public drunkenness and bawdyhouses. See *infra* Part II.B (noting practical limits on legislation that were imposed by Lockean theory, Blackstonian common law concepts, and shared moral consensus); see also 1 BLACKSTONE, *supra* note 52, at *124 (noting the extent to which some practices could harm others if they were made “public” because they became, “by the bad example they set, of pernicious effect[] to society”).

actions would not constitute breaches of the peace for purposes of the indictment clauses.

Second, even if “peace” in the context of the indictment clauses encompassed any breach of law, there are several reasons why this definition should not necessarily be transported into the peace and safety provisos (let alone the proviso-free federal Free Exercise Clause). First, relying on the indictment clauses alone without incorporating in the external definitions of peace ignores the political and legal context in which the indictment clauses and the state provisos were enacted. The works of Blackstone and Locke discussed above—which deeply influenced the state and federal Framers¹⁰⁴—support relatively limited definitions of the concept of “public peace.”¹⁰⁵ That any indictable offense might be a violation of the public peace simply reflects the extent to which the state Framers presumed the backdrop of a relatively limited system of government. Second, less than half of the states had these indictment formulations.¹⁰⁶ The extent to which these indictment clauses influenced the other states’ constitutions—or the proviso-free federal Free Exercise Clause—is therefore subject to challenge. And third, these indictment provisions may be insufficiently probative for purposes of interpreting the “peace and safety” provisos. As an initial matter, the indictment formulations may have been largely symbolic, traditional language inherited from historical practice that did not reflect the practical conception of the public peace.¹⁰⁷ Moreover, the linguistic formulations of the provisos and the indictment clauses diverge in ways that are potentially significant if the terms are taken to represent distinct, legal terms of art. While the indictment clauses often instruct that indictable offenses (felonies and indictable misdemeanors) are “*against* the public peace,” many of the free exercise provisos

104. See, e.g., MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 23–24 (1991); Jeffrey D. Jackson, *Blackstone’s Ninth Amendment*, 62 OKLA. L. REV. 167, 202 (2010).

105. See 4 BLACKSTONE, *supra* note 52, at *142–53 (discussing “offenses against the public peace” as representing thirteen types of offenses, rather than any violation of law).

106. See *supra* note 100 (listing state constitutions of Delaware, Maryland, New Jersey, North Carolina, and Virginia).

107. Cf. Lee, *supra* note 58, at 89 (discussing linguistic drift).

(though not all) withhold protection from conduct that “disturbs” the public peace. This third point does not necessarily resolve whether or not the indictment provisions support a broad or narrow reading of the “peace and safety” provisos. Instead, it merely suggests that more research into the original linguistic meaning of the indictment clauses may be required before relying on them too heavily.¹⁰⁸

Briefly considering the use of the term “safety” may be helpful as well. The use of the term “safety” throughout the state constitutions focuses on security from physical injury. “Safety” appears in two general contexts throughout these texts. The first, announcing “safety” as a foundational interest of government, does not define the meaning of the term and is therefore of limited probative value for purposes here.¹⁰⁹ The second, however, utilizes “safety” in juxtaposition to war, civil unsettlement, violence, and blights to public health (primarily disease).¹¹⁰ This second reading favors a definition of safety as security from actual or threatened physical injury.

B. *Licentiousness and Immorality*

Three state constitutions—less than a third of the original states—provided that the free exercise of religion would not excuse “acts of licentiousness” or infringements of “the laws of morality.”¹¹¹ This Section will argue that these “licentiousness and immorality” provisos did not necessarily empower states to prohibit (religious) conduct that violated any standard of morality that the legislature might adopt. Instead, the “licentiousness and immorality” provisos drew their meaning from ecumenically defined, historically rooted standards that enjoyed widespread acceptance by the major religious

108. Cf. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (proposing one potential approach for conducting this type of analysis).

109. See GA. CONST. OF 1777, pmbl., reprinted in 1 POORE, *supra* note 18, at 377–78; N.Y. CONST. OF 1777, pmbl., reprinted in 2 POORE, *supra* note 18, at 1328, 1338.

110. See DEL. CONST. OF 1776, art. XXIII, reprinted in 1 POORE, *supra* note 18, at 273–78; MD. DECLARATION OF RIGHTS OF 1776, art. XIV, reprinted in 1 POORE, *supra* note 18, at 818 (sanguinary laws); N.Y. CONST. OF 1777, pmbl., art. VI, XL, XXXVII, reprinted in 2 POORE, *supra* note 18, at 1328–1338 (elections, Indian relations, defense).

111. See McConnell, *supra* note 2, at 1465.

denominations and dissenters of which the state framers were cognizant—resulting in few (if any significant) clashes between free exercise and the “licentiousness and immorality” provisos. Notwithstanding the potential for moral standards to evolve over time, the “licentiousness and immorality” provisos did not originally have the meaning, understanding, or effect of granting the state blanket authority to announce morality and compel obedience in all cases.¹¹²

1. *Limited Scope of Government*

The first reason for considering a limited reading of the “licentiousness and immorality” provisos relates to the extent that the state governments primarily conceived of themselves as Lockean in nature.¹¹³ Under this model, power derived from the people, the people retained all rights not expressly surrendered to the state (with certain rights being by their nature inalienable), and the state only enjoyed a limited mandate.¹¹⁴ As a result, any limitation on individual liberty—including the free exercise of religion—from prohibitions on licentious and immoral conduct must at least take account of the dominant conception of limited government that prevailed at the time. To be sure, the licentiousness and morality provisos present the potential to raise significant tensions with the Lockean conception of the state’s mandate as limited to protecting property and negative liberties. But the tension can be mitigated (if not completely resolved). First, morality legislation can be seen as serving the Lockean mandate in the same way that traditional nuisance law did. By targeting the secondary effects of vices such as public drunkenness, prostitution, and adultery, for example, morality legislation protected society from tangible harms associated with the

112. *Id.* (“As Jefferson wrote to the Reverend Samuel Miller, ‘The government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises.’ That their internal practices may seem unjust or repugnant to the majority should be of no moment.” (quoting Letter from Thomas Jefferson to the Rev. Samuel Miller (Jan. 23, 1808))).

113. See LOCKE, *supra* note 38, chs. 8–9.

114. See *id.*; McConnell, *supra* note 13, at 828–830, 836; McConnell, *supra* note 2, at 1464.

prohibited conduct.¹¹⁵ Second, morality legislation was rooted in the shared moral framework embraced by the major religious traditions of the day; consequently, clashes between Lockean theory and morality legislation, though perhaps theoretically problematic, would have only limited practical significance for purposes of religious liberty.¹¹⁶ This moral consensus would later unravel, of course (consider, *inter alia*, the ban on polygamy at stake in *Reynolds v. United States*¹¹⁷). But at the Framing, the widespread moral consensus generally resulted in few conflicts between religious exercise and the state's interest in morality.¹¹⁸ And finally, the licentiousness and morality provisos can be viewed as limited, historically grounded exceptions to the prevailing Lockean model—failing to amount to a *carte blanche* grant of authority to government over morality and liberty in all cases.

2. Historical Definitions and Practices

The second reason for considering a limited reading of the “licentiousness and immorality provisos” is that the types of “licentiousness” and “immorality” that could be proscribed by state power represented an historically grounded set of conduct that was limited in terms of both its scope and why it was proscribed.

115. Compare 1 BLACKSTONE, *supra* note 52, at *124 (discussing regulation of, *inter alia*, public morality as relating to the secondary effects vices posed to the productivity, security, or general welfare of society), with *Renton v. Playtime Theatres*, 475 U.S. 41 (1986) (discussing “secondary effects” targeted by regulations of pornography). For a general discussion of the links between morality and liberty and why morality regulations could further liberty, see generally NORTHWEST ORDINANCE OF 1787, *reprinted in* 1 UNITED STATES CODE, at LVLVII (Office of the Law Revision Counsel of the House of Representatives ed., 2006); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve ed., 2000); John Adams, Letter from John Adams to Massachusetts Militia (Oct. 11, 1798), in FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/99-02-02-3102> [<https://perma.cc/9LL4-C5RL>] (“Our Constitution was made only for a moral and religious People. It is wholly inadequate to the government of any other.”).

116. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003).

117. 98 U.S. 145 (1878).

118. See McConnell, *supra* note 2, at 1465. *But see* Muñoz, *supra* note 24, at 1408.

a. Colonial “Licentiousness and Immorality” Provisos

One probative source suggesting that the morality provisos in the state constitutions covered only a limited domain comes from the morality provisos in the early colonial charters. New Jersey and Pennsylvania provide two helpful examples of colonial morality provisions. In New Jersey, the Fundamental Constitution for the Province of East New Jersey in America (1683) contained a morality proviso that permitted the government to “preserv[e] . . . the people in diligence and . . . good order” by prohibiting the people from “practic[ing] cursing, swearing, drunkenness, prophaness, whoring, adultery, murdering or any kind of violence, or indulging themselves in stage plays, masks, revells or such like abuses.”¹¹⁹ Similarly, the Pennsylvania Frame of Government provided a similar set of morality regulations:

[T]hat as a careless and corrupt administration of justice draws the wrath of God upon magistrates, so the wildness and looseness of the people provoke the indignation of God against a country: therefore, that *all such offences against God*, as swearing, cursing, lying, prophane talking, drunkenness, drinking of healths, obscene words, incest, sodomy, rapes, whoredom, fornication, and other uncleanness (not to be repeated); all treasons, misprisions, murders, duels, felony, seditions, maims, forcible entries, and other violences, to the persons and estates of the inhabitants within this province; all prizes, stage-plays, cards, dice, May-games, gamesters, masques, revells, bull-baitings, cock-fightings, bear-baitings, and the like, which excite the people to rudeness, cruelty, looseness, and irreligion, shall be respectively discouraged, and severely punished, according to the appointment of the Governor and freemen in provincial Council and General Assembly; as also all proceedings contrary to these laws, that are not here made expressly penal.¹²⁰

These charter morality provisos—which focused on morality legislation as a means of encouraging religion, conforming community morality to the laws of God, and fostering the

119. FUNDAMENTAL CONSTITUTION FOR THE PROVINCE OF EAST N.J. OF 1683, reprinted in 5 THORPE, *supra* note 17, at 3052–36.

120. PA. FRAME OF GOVERNMENT OF 1682, art. XXXVII, reprinted in 2 THORPE, *supra* note 17, at 1518–20 (emphasis added).

necessary moral preconditions for securing God's blessings over the colony (and avoiding His indignation)—were thus limited both in terms of both what conduct was prohibited and what purposes undergirded those prohibitions. That the early state charters could express robust commitment to religious liberty while affirming their deep interest in morality suggests that, for the early colonies and states, moral legislation and religious belief went hand-in-hand.

b. Founding-Era Dictionaries and Religious Dissenters

Another source suggesting a limited reading of the state morality provisos comes from Founding-era dictionaries and religious dissenters. These sources suggest that "licentiousness" and "immorality," rather than referring to any conduct that the legislature might find objectionable, referred to a set of conduct that was historically proscribed, contrary to the law of God, and rejected by the widespread consensus of the major religious denominations and dissenters of the day. Founding-era dictionaries defined licentiousness as referring broadly to freedom "unrestrained" by just limits of "law or morality," followed by an elaboration on what the standards of justice, morality, and law required.¹²¹ These limits were defined as conduct that was "lewd, wild, extravagant, [and] disorderly,"¹²² "loose,"¹²³ and contrary to what was "honest, virtuous, innocent, and [e.g.,] pure."¹²⁴ The definitions' focus on personal vices found resonance with legal commentators of the day, who tended to focus their discussions of licentiousness on prostitution, drunkenness, and sexual impropriety.¹²⁵

121. WEBSTER, *supra* note 59.

122. DYCHE & PARDON, *supra* note 60.

123. WEBSTER, *supra* note 59.

124. ASH, *supra* note 59.

125. See RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 71 (1792); JACOB GILES, A NEW LAW DICTIONARY 178 (6th ed., 1750). Hamburger disagrees that the definition of "licentious" should be as limited as this section proposes. He suggests that "licentiousness" referred "to immoral and, sometimes, merely prohibited behavior." See Hamburger, *supra* note 2, at 917 n.8 (drawing from WILLIAM ROBERTSON, PHRASEOLOGICA GENERALIS 823–24 (1681)). But this would not mean that anything could be considered "licentious." Understandings of licentious behavior (and what the state could prohibit) were rooted in the laws of God, historical practice, the limited scope of government, and the understandings of the day reflected by leading dictionaries and legal commentators.

Definitions of morality tended to reach further, but they were by no means broad enough to encompass all legislation. Morality was always defined by reference to the static and objective moral law of God enshrined in the shared, predominantly Judeo-Christian doctrine of the day. Webster's dictionary provides the leading definition of morality, defining "moral" to mean:

Relating to the practice, manners or conduct of men as social beings in relation to each other, and with reference to right and wrong. The word *moral* is applicable to actions that are good or evil, virtuous or vicious, and has reference to *the law of God as the standard* by which their character is to be determined. The word however may be applied to actions which affect only, or primarily and principally, a person's own happiness.¹²⁶

He elaborated that the "[m]oral law, the law of God . . . prescribes the moral or social duties, and prohibits the transgression of them."¹²⁷ Even the Baptist dissenters upon whom Professor Hamburger relies to argue that the free exercise of religion did not protect religious dissenters from punishment for violating the laws of morality establish this point. Caleb Blood, a leading proponent of religious liberty, observed:

[The free exercise of religion] by no means prohibits the civil magistrate from enacting those laws that shall enforce the observance of those precepts in the christian religion, the violation of which is a breach of the civil peace . . . ; viz. such as forbid murder, theft, adultery, false witness, and injuring our neighbor, either in person, name, or estate. And among others, that of observing the Sabbath, should be enforced by the civil power.¹²⁸

Thus, the laws of morality—and the scope of the provisos against "licentiousness and immorality"—was coextensive

126. WEBSTER, *supra* note 59 (second emphasis added).

127. *Id.* Ash similarly defined morality to mean "the doctrine or system of duties respecting the conduct of life; uprightness, sobriety; that which renders an action subject to reward or punishment." ASH, *supra* note 59.

128. See Hamburger, *supra* note 2, at 918 n.15 (quoting Caleb Blood, *A Sermon* 35 (Vt. election sermon [1792]) (Evans 24126)).

with the law of God which the state framers assumed was accepted by the larger society.

c. Legal Commentators and Contemporary Legal Practice

A third probative source suggesting a limited reading of the morality provisos is the body of law inherited and promulgated by the state framers. At English common law, Blackstone's *Commentaries* (which had a significant influence on the American legal regime) suggests that morality legislation covered a fixed set of conduct—including swearing, sabbath breaking, public drunkenness and lewdness, and fornication, prostitution, and adultery. Such conduct was both contrary to the laws of God and detrimental to the larger social order. To the extent that American legislators who were influenced by Blackstone's *Commentaries* continued to proscribe a similar set of immoral conduct, there are powerful reasons to conclude that the "licentiousness and morality" provisos would likely have been understood to only withhold protection from a limited set of conduct that was both historically prohibited and contrary to the laws of God.

3. Backdrop Principles

A third reason for adopting a limited reading of the "licentiousness and immorality" provisos relates to the background principles undergirding morality policy and the relationship between morality policy and religion at the Framing.

One principle that may have limited the scope of these provisos is the extent to which the states' interest in harmoniously ordering society and avoiding inter-sectarian strife qualified the states' interest in morality. As Professor McConnell has argued, the state framers were about as proximate to the inter-sectarian Thirty Years War and religious persecution under the English Uniformity and Test Acts as Americans today are to slavery.¹²⁹ Notwithstanding many colonies' early efforts to form commonwealths centered on a particular religious denomination and to persecute religious dissenters, religious liberty continually expanded during the

129. See McConnell, *supra* note 2, at 1421–24.

colonial period and the post-Independence state framers were animated to at least some extent by a desire to reduce inter-sectarian strife.¹³⁰ The states' interest in avoiding this strife informed their pursuit of public morality. As a result, the types of moral legislation that were enacted reflected widespread areas of consensus generally accepted by the majority of faiths and dissenters at the time, rather than moral commands particular to a given majoritarian denomination in a state (e.g., liturgical customs). The mainstream moral legislation that resulted found deep resonance with Quakers and Jews, Baptists and Congregationalists, and Anglicans and Catholics alike—resulting in little (if any) strife between sects or tensions between religious exercise and public morality enforced by law.¹³¹

A second principle that potentially limited the scope of the “licentiousness and immorality” provisos was, paradoxically, the states' interest in evangelism. The colonial charters consistently expressed the colonies' mission to further the Christian religion and order society in conformity with Christian doctrine.¹³² This evangelizing impulse carried over

130. *See id.* at 1421, 1515–16.

131. *See id.* at 1466–69, 1471–73; McConnell, *supra* note 11, at 1118. It may also be worth noting that, even if conflicts had arisen, religious liberty may have been considered a critical part of the desired harmonious ordering that the state existed to secure.

132. For Connecticut, see CHARTER OF CONNECTICUT OF 1662, *reprinted in* 1 THORPE, *supra* note 17, at 534 (stating that government existed so that “People Inhabitants there, may be so religiously, peaceably and civilly governed, as their good Life and orderly Conversation may win and invite the Natives of the Country to the Knowledge and Obedience of the only true GOD, and the Savior of Mankind, and the Christian Faith”). For Maryland, see CHARTER OF MARYLAND OF 1632, *reprinted in* 3 THORPE, *supra* note 17, at 1677 (exercising its “pious Zeal for extending the Christian Religion”). For Massachusetts, see CHARTER OF NEW ENGLAND OF 1620, *reprinted in* 3 THORPE, *supra* note 17, at 1839 (seeking the “principal [] Effect [of] . . . the Conversion and Reduction of the People in those Parts unto the true Worship of God and Christian Religion”); CHARTER OF MASSACHUSETTS BAY OF 1629, *reprinted in* 5 THORPE, *supra* note 17, at 1846–60 (setting up government “whereby our said People, Inhabitants there, may be so religiously, peaceably, and civilly governed, as their good Life and orderly Conversation, may win and invite the Natives of Country, to the Knowledge and Obedience of the only true God and Savior of Mankind, and the Christian Faith, which . . . is the principal End of this Plantation”). For New Hampshire, see AGREEMENT OF THE SETTLERS AT EXETER IN NEW HAMPSHIRE OF 1639, *reprinted in* 4 THORPE, *supra* note 17, at 2445 (constituting “Laws and Civil Government” in

into the early state context in a manner that lent itself to prioritizing religious liberty.¹³³ Notwithstanding early colonial efforts to compel religious belief, the impulse to protect religious conscience and exercise was viewed as important for catalyzing the Gospel's spread and preventing the inter-sectarian strife that threatened the social harmony that virtuous government ought to build. The permissible scope of the state's interest in morality—and the scope of the morality provisos—

accord with “the holy Will of God” and “in the name of Christ and in the sight of God” to order society “agreeable[y] to the Will of God” and binding its citizens “by the Grace and Help of Christ and in His Name and fear to submit [] to such Godly and Christian Lawes” which shall be enacted “according to God that [they] may live quietly and peaceably together in all godliness and honesty”). For New Jersey, see FUNDAMENTAL CONSTITUTIONS FOR THE PROVINCE OF WEST N.J. OF 1681, *reprinted in* 5 THORPE, *supra* note 17, at 2565–67 (“Forasmuch as it hath pleased God, to bring us into this Province of West New Jersey, and settle us here in safety, that we may be a people to the praise and honor of his name, who hath so dealt with us, and for the good and welfare of our posterity to come, we . . . do make and constitute these our agreements to be as fundamentals to us and our posterity.”). For the Carolinas, see FUNDAMENTAL CONSTITUTIONS OF CAROLINA OF 1669, *reprinted in* 5 THORPE, *supra* note 17, at 2772–86 (constituting government such that “the natives of that place, who will be concerned in our plantation, [whom] are utterly strangers to Christianity . . . and also that Jews, heathens, and other dissenters from the purity of Christian religion may not be scared and kept at a distance from it, but, by having an opportunity of acquainting themselves with the truth and reasonableness of its doctrines, and the peaceableness and inoffensiveness of its professors, may, by good usage and persuasion, and all those convincing methods of gentleness and meekness, suitable to the rules and design of the gospel, be won over to embrace and unfeignedly receive the truth.”). For Pennsylvania, see CHARTER FOR THE PROVINCE OF PENNSYLVANIA OF 1681, *reprinted in* 5 THORPE, *supra* note 17, at 3035–44 (“to reduce the savage Natives by gentle and just manners to the Love of Civil Societie and Christian Religion”); CHARTER OF PRIVILEGES OF 1701, *reprinted in* 5 THORPE, *supra* note 17, at 3076–81 (“But because the Happiness of Mankind depends so much upon the Enjoying of Liberty of their Consciences as aforesaid, I do hereby solemnly declare, promise and grant, for me, my Heirs and Assigns, That the First Article of this Charter relating to Liberty of Conscience, and every Part and Clause therein, according to the true Intent and Meaning thereof, shall be kept and remain, without any Alteration, inviolably for ever.”). For Virginia, see FIRST CHARTER OF VIRGINIA OF 1606, *supra* note 79, at 3783–90 (“We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of his Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government: do, by these our Letters Patents, graciously accept of, and agree to, their humble and well-intended Desires.”).

133. See McConnell, *supra* note 2, at 1437–43.

should therefore be understood in reference to the key policies of American evangelism that religious belief ought not (and could not) be compelled and that moral legislation could best facilitate conversion and virtuous societies by respecting religious liberty (within bounds).

4. *Shared Moral Consensus*

A fourth reason for considering a limited understanding of the “licentiousness and immorality” provisos is that states’ moral legislation generally reflected widespread and near-universal consensus.

Contemporary morality enactments—which centered on violations of God’s law—reflected a shared moral framework that was generally shared by and accessible to both majority denominations and dissenting denominations alike. Essentially all of the states’ founding charters explicitly premised both the legitimacy of the state and its reason for being on religious conceptions of God’s will.¹³⁴ Religion continued to permeate the early Republic during Ratification. Anti-establishment principles served to prevent sectarian exclusivity, while shared conceptions of God stemming from a shared Judeo-Christian religious framework continued to saturate the writings, speeches, and laws of the Framing generation. Congressional chaplains, national days of prayers, consistent government support for religion generally, and intentional blending of religion and rhetoric all served to underscore the relatively ecumenical and religiously inspired moral framework that operated in the Founding period.

Moral legislation during this period—enshrined in early charters and contemporary legislation—drew from the shared moral framework embraced by society generally across sectarian lines. For that reason, morality legislation did not generally conflict with the religious traditions of which the Framers were cognizant. Notwithstanding the potential for some conflicts between the state’s conception of morality and religion, the most salient feature of moral legislation during this period is the extent to which these prohibitions enjoyed relatively robust consensus amongst the major religious

134. *See supra* notes 132–133.

majorities and dissenters of the day.¹³⁵ This consensus is likely relevant for understanding the pragmatic context and practical operation of the provisos against licentiousness and immorality.

C. *Civil Injury or Outward Disturbance of Others' Rights*

The provisos against civil injury or outward disturbance of others were fairly rare—suggesting that they had little to no impact on the federal Free Exercise Clause.¹³⁶ Only one state had a proviso that denied protection to religiously motivated conduct that “injur[ed] others, in their natural, civil, or religious rights.”¹³⁷ And only two other states explicitly provided that the free exercise of religion would not permit religious conduct to “obstruct” or “disturb others in their religious worship.”¹³⁸ But even on their own terms, these provisos against injuring others were relatively limited in their scope.

1. *Limited Scope of Government*

The first and most important limit on the provisos against causing civil injuries must make reference to the politico-philosophical context in which the provisos were written. As

135. The potential for some conflict between religiously motivated conduct and the state’s conception of morality is not fatal to this Note’s argument. As an initial matter, such conflicts do not establish that the concept of licentiousness and immorality were boundless concepts—they still were conceived to apply to a set of historically prohibited practices. Moreover, despite the potential for some conflict between religious conduct and the state’s conception of morality (consider, *inter alia*, the potential for a diverging set of marital practices violating laws against incest or polygamy or the hypothetical but analytically helpful potential for a Bacchanalian cult), it remains significant that, as a general matter, the conception of licentiousness and immorality embraced by the early states included practices that both majority denominations and (often unpopular) dissenting religious groups united in condemning. This consensus is particularly salient when viewed against the dominant Founding-era interest in avoiding inter-sectarian strife, see *supra* note 78, and in providing generous exemptions in anticipated areas of conflict between the state and religious conscience, see *supra* Part I.A.

136. See app. tbl. II, <https://perma.cc/8V74-DK8D>.

137. MD. DECLARATION OF RIGHTS OF 1776, art. XXXIII, reprinted in 1 Poore, *supra* note 18, at 817, 819.

138. MASS. CONST. OF 1780, art. II, reprinted in 1 POORE, *supra* note 17, at 1647; N.H. CONST. OF 1784, art. V, reprinted in 2 Poore, *supra* note 18, at 1280–81.

explained above, at the time these “rights” provisos were written, Lockean¹³⁹ sentiments dominated political thought.¹⁴⁰ Government was largely conceived of as existing to maximize protections for property and negative liberty.¹⁴¹ Individual liberty was therefore ideally only to be limited insofar as necessary to preserve the negative liberties of others.¹⁴² As such, civil injuries were generally limited to direct interference with other individuals’ negative liberties (including their free exercise rights) and directly injuring others in their persons, reputations, or property.¹⁴³ The types of injuries covered by the provisos were therefore likely limited, deeply entrenched, and well-understood—they were not simply for the legislature to define at-will (even in a neutral, generally applicable law).¹⁴⁴

139. See LOCKE, *supra* note 38, chs. 8–9.

140. See McConnell, *supra* note 13, at 828, 830, 836. *But see* Vincent P. Muñoz, *George Washington on Religious Liberty*, 65 REV. OF POL. 11, 23–25, 32, 33 (2013) (arguing that republican ideology motivated at least some Founders).

141. See LOCKE, *supra* note 38, chs. 8–9.

142. See McConnell, *supra* note 2, at 1464, 1447–48.

143. See LOCKE, *supra* note 38, chs. 8–9.

144. Some of the rights and duties owed under the common law may initially seem to conflict with the Lockean model. For example, in the context of public accommodations law, innkeepers at common law were prohibited from refusing any individual’s effort to stay at the inn (save for sufficient cause, such as vices like drunkenness) because doing so would be disorderly and defeat the purpose of the inn-keeping institution: to provide shelter to strangers traveling long distances in unfamiliar regions who might have no other option for shelter. See 4 BLACKSTONE, *supra* note 52, at *167–68. But the potential for such common law duties—which arguably vested positive “rights” in others—does not necessarily mean that the legislature could override free exercise rights in all cases. Several considerations limit the relevance of the common law duties that existed alongside the state free exercise guarantees. First, these common law duties may have represented fixed, static exceptions to the otherwise dominant Lockean conception of good government. Defined at an appropriately specific level of generality, their expansion to further limit negative liberty (whether related to religion or not) may therefore raise new constitutional questions. Second, these common law duties did not cause any significant conflict between religious liberty and state power at the time. Their extension to new, more contentious contexts might present difficult translation problems. Third, these common law duties may be consistent with the Lockean framework. On the one hand, innkeepers who held themselves out to the public may have undertaken an implied contractual obligation to serve travelers whose reliance the innkeepers’ operations had presumably induced. Alternatively, if Locke’s framework is reconceptualized as a framework for weighing both negative and positive liberty interests, it may be possible that the “positive liberty” benefits accruing to travelers may outweigh the “negative liberty” costs experienced by innkeepers.

2. Historical Definitions and Practices

A second reason for favoring a limited reading of the provisos against injuring others considers the historically limited scope of what constituted “harms” to private “rights.” Put simply, there is substantial evidence that the concepts of both individual “rights” and “wrongs” were bounded concepts limited to the common law rights of security, liberty, and property.

a. Founding-Era Legal Definitions

Founding-era legal commentators provide probative evidence supporting a limited construction of “rights” and “wrongs.” Perhaps most critical for informing our understanding of Founding-era practice is Blackstone’s *Commentaries*, which was “the law book” for the Founding generation and the main source of Americans’ understanding of their inherited English legal traditions.¹⁴⁵ Blackstone reflected the prevailing, bounded conception of “rights” and “wrongs” through his division of wrongs into three categories: harms to personal security (involving physical security, health, and reputation), personal liberty (involving, e.g., false imprisonment), and to private property (involving, e.g., trespass, nuisance, and disturbance).¹⁴⁶ This tripartite schema reflected a fixed conception of both the categorization and

And fourth, these common law duties may have simply represented an instance in which the state’s interest was sufficiently compelling (and its means sufficiently narrowly tailored) to permit it to override individual liberty. Regardless, for purposes of this Note, it suffices to conclude that such common law duties did not necessarily always override free exercise claims. For a general discussion of the ordinary agreement between Lockean theory, political practice, and religious liberty, see McConnell, *supra* note 2, at 1465. *But see* Hamburger, *supra* note 2, at 917 n.8 (suggesting that civil injury “could refer to any injury under civil law”). Ultimately, the debate may devolve into a question of how to translate the Framing-era terms and expectations to the present. That translation requires, *inter alia*, defining the level of generality to assess “rights” and “wrongs,” determining whether those categories are static or dynamic, and determining how to account for Framing-era expectations (particularly the Lockean nature of government and the English common law tradition described by Blackstone’s *Commentaries*) into the present.

145. See *supra* note 104. Cf. Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

146. See 1 BLACKSTONE, *supra* note 52, at *121–45 (“rights”); 4 BLACKSTONE, *supra*, at *115–43 (“wrongs”).

nature of what constituted a “right” and an “injury” or “harm” to that right.

b. Founding-Era State Practice

Blackstone’s tripartite, bounded conception of “rights” and “wrongs” was also reflected by Lockean-influenced, Framing-era state practices.¹⁴⁷ As an initial matter, state law causes of actions and remedies enforceable at common law closely followed the tripartite Blackstonian conception of the rights of security, liberty, and property.¹⁴⁸ Indeed, the Supreme Court in *Marbury v. Madison* (perhaps reflecting wider judicial practice) immediately elaborated upon its claim that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury” by turning to consider the framework of “rights,” “wrongs,” and “remedies” proposed by Blackstone’s *Commentaries*.¹⁴⁹ This tripartite framework of “rights” and “wrongs” found expression in other areas of state action as well. For example, early state constitutions guaranteed rights to redress for violations of the rights of persons, liberty, and property.¹⁵⁰ Similarly, many state conventions responsible for ratifying the federal Constitution urged the federal government to acknowledge an individual right to bring suit to seek redress for civil injuries that were defined along Blackstonian lines.¹⁵¹ To be sure, “rights” and “privileges” were not necessarily

147. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 531–49, 559–68 (2005).

148. Compare *id.* (discussing state law causes of action), with 4 BLACKSTONE, *supra* note 52, at *115–43 (discussing types of “wrongs”).

149. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); see also *supra* note 104 (discussing deep influence of Blackstone’s *Commentaries* on the Framing-era generation of lawyers and judges).

150. See Goldberg, *supra* note 147, at 560–64 (noting that “[f]ive early state constitutions included explicit guarantees of redress” and observing that Maryland’s 1776 Declaration of Rights provided a right to redress to “every freeman, for any injury done him in his *person or property*” (emphasis added)).

151. See *id.* (noting that several states—including Virginia and North Carolina—urged for the Constitution to protect the right to bring suit and that Virginia’s proposal included a declaration of the “essential and unalienable Right that every freeman ought to find a certain remedy by recourse to the laws for *all injuries and wrongs he may receive in his person, property or character*” (emphasis added)).

always negative liberties found in a state of nature—they could be (and often were) vested in individuals by state legislatures (or the common law, as the example of innkeepers' duties discussed above illustrates).¹⁵² But there were likely limits presumed to govern the legislature's attempt to significantly expand the scope of the "rights" provisos by creating "new rights." First, from a political perspective, the creation of certain rights imposing duties or restrictions on others were likely limited by the Lockean conception of the legitimate role of good government.¹⁵³ And second, from a legal perspective, Blackstone's tripartite rights/wrongs framework suggests historically based, qualitative limits on what those "rights" and "wrongs" could (or should) be.¹⁵⁴ While determining the relevance of these expectations requires analyzing what to make of settled expectations¹⁵⁵ and whether those common law backdrops were static or mutable,¹⁵⁶ at the very least it suggests that there were originally important historical limits on the conception of the scope of these "rights" provisos and that these provisos were not therefore necessarily amenable to unlimited expansion by the legislature.¹⁵⁷

152. See *supra* note 144; 1 BLACKSTONE, *supra* note 52, at *124–25 (observing extent to which "rights" could include both negative "[and primary] absolute rights" and positive "[but secondary] social and relative rights").

153. See *infra* Part III.C.1; see also Sachs, *supra* note 145.

154. See *supra* note 146; see also Sachs, *supra* note 145.

155. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

156. See Sachs, *supra* note 145, at 1828–34.

157. For a related and relevant debate on the extent to which Congress can confer standing by creating "rights," see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556, 578 (1992) (arguing that there must be a prior "de facto," concrete injury before Congress can create standing); *id.* at 580 (Kennedy, J., concurring) (advancing view that Congress must merely identify the injury it seeks to prevent and identify the class it wishes to protect); see also *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550–54 (2016) (Thomas, J., concurring) (proposing an originalist position that is centered on distinguishing public rights from private rights). On the subject of personal rights compared to private rights, Justice Thomas asserts, "'Private rights' are rights 'belonging to individuals, considered as individuals.'" "Private rights" have traditionally included rights of personal security (including security of reputation), property rights, and contract rights. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *2). This distinction between public and private rights may also be helpful for understanding the "rights" provisos.

c. Founding-Era Dictionaries

Founding-era dictionaries provide further evidence that the concepts of “rights” and “wrongs” were bounded concepts that constrained the scope of the “rights” provisos—though their probative value is potentially significantly weaker than the legal definitions provided by legal commentaries (such as Blackstone’s *Commentaries*). Definitions of “injury” and “harm” provide probative evidence for what types of rights the state framers understood people to enjoy when they wrote the provisos against violating others’ rights. Dictionaries defining “injury” and “harm” tended to restrict their definitions to refer to damage to property, physical damage to the person, and damage to reputation. Burn’s legal dictionary defined “injury” to refer to “a wrong or damage to [a] man’s person or goods,” and he listed as an example of civil injury common law torts such as libel.¹⁵⁸ Similarly, Barclay defined “harm” as “an action by which . . . [one] may receive damage in his goods or hurt to his person; mischief; hurt; or injury; . . . a degree of hurt without justice, and refer[ring] to either character or property.”¹⁵⁹ And the leading non-legal dictionary definition provided by Webster primarily defined “hurt” as a physical wound or injury, but it also extended it to encompass the “hurt [enacted upon] a man by destroying his property.”¹⁶⁰ These dictionary definitions are limited (as is the general probative value of relying on Founding-era dictionaries), but they provide modest evidence supporting the conclusion that the scope of civil rights that could be injured included the well-understood, historically rooted rights to person, reputation, and property. In other words, these “rights” were not boundless.

* * *

To summarize Part II, the state free exercise provisos did not likely withhold protection from religious exercise whenever it violated any neutral, generally applicable law that a legislature might enact. Instead, the provisos communicated a bounded

158. BURN & BURN, *supra* note 125.

159. BARCLAY, *supra* note 59, at 529.

160. WEBSTER, *supra* note 59.

rather than an unlimited exception to the free exercise of religion. Part III now turns to consider the relevance of these state free exercise provisos to the federal Free Exercise Clause.

III. FEDERAL FREE EXERCISE CLAUSE

The free exercise provisos in the early state constitutions strengthen the case for interpreting the Free Exercise Clause to require religious-based exemptions for at least some religiously motivated conduct for two reasons.¹⁶¹ First, the absence of an express proviso in the Free Exercise Clause suggests that no limitation external to the right itself existed. Second, even if a proviso were implied, its scope would necessarily remain at least as limited as the state constitutional provisos that provided the models for the federal Constitution—and the scope of this federal proviso was probably even more limited.

A. *Free Exercise Clause Lacks a Clear Proviso*

There is no express proviso to the federal Free Exercise Clause. The absence of such a proviso supports the conclusion that no proviso operated on the federal Free Exercise Clause.

Several textual, structural, historical, and philosophical considerations support this intuition. First, the text of the Free Exercise Clause itself is broad and unqualified. The absence of a proviso means that the right conferred is bounded only by

161. That the state constitutions—including their free exercise provisos—have at least some relevance for interpreting the original meaning of the federal Free Exercise Clause is assumed by many of the scholars and judges within the debate engaged in by this Note. *See, e.g.*, Scalia, *supra* note 9, at 851, 860 (noting validity of relying on state constitutions and English background norms to construe federal Constitution); McConnell, *supra* note 2 (relying in part on state constitutions); Hamburger, *supra* note 2 (same). To be sure, there is some difference of opinion over the use of state constitutions to interpret the federal Constitution. Some scholars debate which state constitutions matter most. *See* Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L. J. 929, 982 (2002). And some scholars, such as Professor Muñoz, argue that state declarations of rights were often not judicially enforceable and were intended primarily as precatory, educational provisions. *See* Vincent Phillip Muñoz, *Church and State in the Founding-Era State Constitutions*, 4 AM. POL. THOUGHT 1, 3–4 (2015). But the generally accepted wisdom in contemporary scholarship favors turning to state constitutions to interpret the federal Constitution. *See, e.g.*, McConnell, *supra* note 2; Hamburger, *supra* note 2.

the terms of the right itself.¹⁶² The right would not be boundless by its own terms, but limited to the types of religiously motivated conduct that were deeply rooted and well-accepted at the Founding.

Second, the structure of the Constitution also supports interpreting the absence of an express proviso as the omission of any implied proviso external to the right itself. The federal Free Exercise Clause adopted broad, unqualified language in stark contrast to the provisos found in other parts of the First Amendment: the Assembly and Petition Clauses of the First Amendment (which provided that the rights must be exercised “peaceably”).¹⁶³ The Framers’ decision to attach provisos to the Assembly and Petition Clauses, but not to the Free Exercise Clause found in the very same amendment, suggests that no such proviso was originally understood to exist.¹⁶⁴ The lack of any conditional clause (or other qualification) also makes the Free Exercise Clause distinct from other provisions in the Bill of Rights outside of the First Amendment.¹⁶⁵ The Third

162. It might be argued that Congress can abridge the free exercise of religion as long as it does not “prohibit” it and that the term “prohibit” incorporates in the state proviso limitations. But this is unpersuasive. As an initial matter, incorporating such limits by using the term “prohibit” would be a textually odd and relatively unclear means of doing so. Had the Framers wanted a proviso, they could have simply borrowed the express language of the state constitutions. Moreover, implicitly incorporating a proviso through the term “prohibit” would be a poor way to do so because it would lack the careful textual tailoring of the state provisos. And finally, the term “prohibit” denotes and connotes robust limits on state power. Any limiting of the “free exercise” of religion would amount to a prohibition on the “freeness” of the exercise. *Cf.* Laycock, *supra* note 78, at 687–88 (“The primacy of text is relevant to the meaning of the religion clauses. First, the word ‘exercise’ is powerful textual evidence that the protection extends beyond mere belief and reaches religious conduct. Second, the text of the religion clauses is absolute. It says ‘no law,’ not ‘no unreasonable law,’ or ‘no badly motivated law.’ We have learned that we cannot literally enforce the absolutism of the first amendment, but neither should we ignore it. Implied exceptions to a textually absolute constitutional right should be an extraordinary thing; the Supreme Court’s recent free exercise jurisprudence implies exceptions far too readily and gives insufficient weight to the absoluteness of the text.”).

163. *See* U.S. CONST. amend. I.

164. For a contrasting discussion of just what the “free exercise” right included, see generally McConnell, *supra* note 2; Hamburger, *supra* note 2; Muñoz, *supra* note 24, at 1387.

165. *See* McConnell, *supra* note 11, at 1116 (comparing the “absolute terms” of the First Amendment to the “unreasonable” standard of the Fourth Amendment and the “due process” standard of the Fifth Amendment to conclude that “[a]ny

Amendment modifies the absolute nature of its guarantee to provide that it may be limited, “in time of war . . . in a manner to be prescribed by law.”¹⁶⁶ The Fourth Amendment “limits itself to prohibitions that are ‘unreasonable.’”¹⁶⁷ And the Fifth Amendment permits “deprivations of liberty” with “due process of law” and provides an exception to the grand jury indictment requirement “in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.”¹⁶⁸ The absence of any such conditional qualification to the Free Exercise Clause suggests that no proviso to the federal free exercise guarantee was entailed.¹⁶⁹

Third, the history of the Constitution supports the argument against an implied proviso as well. Nearly all of the state constitutions had free exercise provisos. Had the Framers intended to create such a proviso in the federal Free Exercise Clause, they could have simply drawn from the readily available state constitutional models. Yet, they chose not to do so.¹⁷⁰

And fourth, the philosophical underpinnings of the Constitution that informed the public meaning and understanding of its text marshal against finding an implied proviso to the federal free exercise guarantee. The free exercise of religion was considered inalienable and precedent to the state’s power.¹⁷¹ Moreover, because the Constitution operates

limitation on the absolute character of the freedom guaranteed by the First Amendment must be implied from necessity, since it is not implied by the text.”).

166. U.S. CONST. amend. III.

167. See McConnell, *supra* note 11, at 1116.

168. U.S. CONST. amend. V.

169. See McConnell, *supra* note 11, at 1116.

170. See app. tbl. II, <https://perma.cc/8V74-DK8D>, for the relevant state models. The Framers’ omission of a proviso should not be dismissed as a legal drafting error. First, the Convention records—which reflect numerous different drafts and modifications of the First Amendment’s text—suggest that Congress drafted the First Amendment’s language carefully. See generally Vincent P. Muñoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL’Y 1083. Second, the short, resulting text appears unlikely to implicate either the mistake canon (typographical) or absurdity canon (substantive). And third, the Bill of Rights—the promise of which arguably constituted an important means of ensuring Ratification—had sufficiently high stakes to warrant presuming both a careful drafter and an attentive ratifying public (significantly, the proviso-free text was uncontroversial).

171. See Madison, *supra* note 83.

as a social contract between the people of the several states and the federal government, any natural liberties (or powers) not surrendered remain in the people (and the states).¹⁷² The Constitution's structure—to the extent it creates a presumption of liberty—cuts against finding an unwritten proviso.

B. Any Implied Proviso Constitutes a Narrow Exception

Even if the federal Free Exercise Clause—which lacks any express proviso—is interpreted to have an implied proviso, any implied limitation on the federal free exercise right constitutes a narrow, bounded exception. It should not sweep as far as *Smith* and withhold protection from violation of *any* neutral, generally applicable law that legislature might enact.

At its broadest, any implied proviso to the Free Exercise Clause likely reaches no further than the state free exercise provisos. As discussed in Part I, these provisos were not boundless—instead, they represented narrowly enumerated, compelling state interests that were specific exceptions to an otherwise broad free exercise right. Assuming that the implied proviso in the federal Free Exercise Clause drew from the state constitutional provisos, the only religious-based conduct that would be denied free exercise protection would be conduct that fell within the original meaning of the major provisos: (1) violation of the “peace or safety,” (2) licentious conduct against the laws of morality, or (3) conduct causing civil injury or outward disturbance of others. The limited scope of these state provisos suggests that any implied proviso to the federal Free Exercise Clause should be construed similarly narrowly.

Furthermore, any implied proviso to the Free Exercise Clause should be construed even more narrowly for at least two reasons. First, only the “peace and safety” provisos commanded approval from a majority of states.¹⁷³ For the reasons discussed above, these provisos did not withhold protection from conduct that violated any law that a legislature might enact—the provisos' scope was more limited. Second, an

173. See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) (proposing presumption in favor of liberty). *But see* Edward Whelan, *The Presumption of Constitutionality*, 42 HARV. J.L. & PUB. POL'Y 17 (2018) (discussing Thayer's presumption of constitutionality).

173. See app. tbl. II, <https://perma.cc/8V74-DK8D>.

implied exception should not swallow the expressed rule against “prohibit[ing] the free exercise [of religion].”¹⁷⁴ Perhaps the best understanding of any “implied” proviso rests upon the doctrine of “necessity.” As Professor McConnell has observed,

Any limitation on the absolute character of the freedom guaranteed by the First Amendment must be implied from *necessity*, since it is not implied by the text. And while I do not deny that there must be implied limitations, it is more faithful to the text to confine any implied limitations to those that are indisputably necessary. It is odd, given this text, to allow the limitations to swallow up so strongly worded a rule.¹⁷⁵

The scope of the “necessity” exception would potentially be narrower than the scope of the provisos embodied in the state constitutions but left unexpressed in the federal Constitution. That narrowness might be expressed by further restricting the types of state interests that count, heightening the required strength of those interests, and demanding some form of “least-restrictive” narrow tailoring. Regardless, the important conclusion for purposes here is that any limitation on the Free Exercise Clause—whether express or implied—would be relatively limited.¹⁷⁶ The *Smith* decision likely sweeps too far.

C. *Problems of Relevance, Absurdity, and Superfluity*

There are several potential counterarguments to this Part’s conclusion that the state free exercise provisos favor the conclusion that the Free Exercise Clause provided at least some exemptions for religiously motivated conduct. This Note concludes by addressing three of the most important critiques.

One argument against this Part’s conclusion is that the state free exercise guarantees may not be relevant for informing our reading of the Free Exercise Clause insofar as they articulated precatory, nonjusticiable aspirations rather than “precise rules of constitutional law” enforced by judicial review.¹⁷⁷ But that argument presents several problems. First, the state free

174. See McConnell, *supra* note 11, at 1116.

175. *Id.* (emphasis added).

176. The limited scope of the proviso, however, may suggest a limited free exercise right. See *id.*

177. See Muñoz, *supra* note 24, at 1390–92.

exercise guarantees were likely not merely precatory. Unlike the provisions in the state constitutional preambles (guaranteeing, e.g., “free government”),¹⁷⁸ the free exercise guarantees represented fundamental, individual natural liberties. Moreover, each department had an obligation to enforce them in its sphere. As Professor McConnell observes,

When constitutional principles are enforced through legislatures rather than judicial review, it is usually impossible to distinguish between legislative policy and legislative constitutionalism. [That religious exemptions were obligatory] is enhanced by the fact that the appeals for exemption were often framed in terms of natural or constitutional rights.¹⁷⁹

Although early records leave the precise contours of judicial review unclear, the free exercise guarantees had important, substantive meaning. Second, even if the state free exercise guarantees were judicially unenforceable, they still provided an important, probative model for the drafting of the binding, proviso-free federal Free Exercise Clause.¹⁸⁰ And third, refusing to consider the relevance for the state constitutional free exercise provisos because of their judicially unenforceable nature risks proving too much—particularly because the ability of state constitutional guarantees of, *inter alia*, speech, association, and property to inform our reading of the federal Constitution would be subject to similar limitations. In short, the free exercise guarantees in the early state constitutions remain relevant for the federal Free Exercise Clause.

178. *See id.* at 1391.

179. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 714 n.127 (1992); McConnell, *supra* note 13, at 830 (“Each such provision affirms the rights of conscience or free exercise of religion subject to the fundamental peacekeeping functions of the state. The difference is that, as constitutional provisions, they entrust the boundary-keeping function to an institution of government other than the legislature. The existence of these peace and safety provisos strongly suggests that the state constitutional provisions were understood to require exemptions for religious conscience.” (relying on THE FEDERALIST NO. 78, at 438–39 (Alexander Hamilton) (Isaac Kramnick ed., 1987))).

180. *But see* Muñoz, *supra* note 24, at 1415 (suggesting that the state provisos’ “presence and absence” in some state constitutions but not others can be explained by their function of “communicat[ing] the natural law limits on the natural right of religious free exercise”).

A second argument against this Part's conclusion may suggest that interpreting the Free Exercise Clause to have either no proviso or an overly narrow one risks creating absurd results.¹⁸¹ But that problem is overstated (leaving aside the level of negative liberty that would be "absurd" to the founding generation).¹⁸² As an initial matter, given that the federal government occupied a relatively limited station and states retained primary plenary power over most affairs, the Free Exercise Clause's further limitation of the federal government's power was relatively modest (particularly given the rarity of conflicts between religion and governmental power). Moreover, the federal government would still retain power to override religious exercise given sufficiently important need to do so. If the Free Exercise Clause lacked any proviso, the federal government could override religious exercise under the doctrine of necessity. But if the Free Exercise Clause incorporated an implied proviso of similar scope to the state provisos, the federal government could simply override religious exercise in those important, enumerated areas.¹⁸³ Finally, were religious practices to become sufficiently harmful but not subject to federal override, the state governments could preserve good order by changing their constitutional structures to permit greater restrictions on the free exercise right, subject to some natural law limits. Of course, the practical operation of state action in this way would be limited both by states'

181. *See id.* at 1411.

182. *See supra* Parts II.A.1, .B.1, .C.1.

183. This comports with the contemporary treatment of other, absolutely phrased constitutional guarantees. For example, although the federal Free Speech and Free Press guarantees contained no express limits within the text of the Constitution, they had limits rooted in the history and nature of the rights themselves. *Cf.* Thomas G. West, *Free Speech in the American Founding and in Modern Liberalism* 310, 325 n.33, in *FREEDOM OF SPEECH* (Ellen Paul, Fred Miller, and Jeffrey Paul eds., 2004) (citing PA. CONST. OF 1790, art. IX, § VII, reprinted in KURLAND, *supra* note 21, at 71, which provided that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, *being responsible for the abuse of that liberty*") (emphasis added). Fighting words, libel, and incitement are notable examples in the speech context. *See, e.g.,* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement). *But see* *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari) (questioning *New York Times v. Sullivan*).

political incentives to resist enlarging federal power and the changes brought by the Fourteenth Amendment.

A third argument against this Part's conclusion may point to the debate over religious exemptions in the Second Amendment. As Professor Muñoz argues,

[T]he drafting of the Free Exercise Clause sheds almost no light on the text's original meaning. In drafting what would become the Second Amendment, however, the First Congress directly considered and rejected a constitutional right to religious-based exemption from militia service. When it considered conscientious exemption, moreover, no member of Congress suggested that such an exemption might be part of the right to religious free exercise. The records of the First Congress therefore provide strong evidence against the exemption interpretation of the Free Exercise Clause.¹⁸⁴

But this argument encounters a series of potential problems. First, the debate record may be insufficiently clear to shed much light on the Free Exercise Clause. That possibility is heightened by considering that recorded speakers' views may not be representative of the larger Congress or ratifying public, that the record is ultimately inconclusive on the question of why the Framers rejected an express, religious-based exemption to conscription, and that the congressional debate over the Second Amendment (which, in the House, immediately followed its adoption of the Free Exercise Clause) both lacked knowledge of what the eventual Bill of Rights would include and which provisions would eventually be ratified.¹⁸⁵ Second, the debate also fails to demonstrate that an express religious exemption would be superfluous or redundant if the Free Exercise Clause already afforded general exemptions. Instead, the power over military conscription may have been understood—by virtue of either its historical pedigree or the compelling government interests it represented—to override general religious exemptions

184. See Muñoz, *supra* note 170, at 1086.

185. Compare Muñoz, *supra* note 24, with Brief for Center for Constitutional Jurisprudence and National Organization for Marriage as Amici Curiae Supporting Petitioners, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4005665.

afforded by the Free Exercise Clause in the absence of an additional, express exemption. And third, even if an express religious exemption to conscription would overlap with the scope of the religious exemptions under the Free Exercise Clause, legislatures often enact legal provisions *ex abundanti cautela* to make “doubly sure” that the legislature’s purpose is accomplished (here, protecting religious liberty).¹⁸⁶

IV. CONCLUSION

This Note has deployed a two-step argument to suggest that, contrary to Justice Scalia’s concurrence in *City of Boerne*, the state free exercise provisos do not support *Smith*’s holding that the Free Exercise Clause provides no protection for religiously motivated conduct against neutral laws of general applicability.¹⁸⁷ First, these state provisos did not withhold protection from religiously motivated conduct any time it violated a neutral, generally applicable law that a legislature might enact. Instead, these provisos merely represented narrowly enumerated, historically grounded areas in which the free exercise of religion could be overridden by sufficiently important state interests. And second, the Free Exercise Clause—which *lacks* any express proviso—should be read to protect religious freedom at least as broadly as the state constitutions. In sum, rather than vindicating *Smith*, the early state free exercise provisos undermine its historical foundations.¹⁸⁸

186. See U.S. CONST. amend. IX; THE FEDERALIST NO. 84, at 531–33 (Alexander Hamilton) (B. Wright ed., 1961) (“I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.”); Abbe R. Gluck & Lisa S. Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 933–35 (2013) (suggesting that the canon against superfluity is “known, but rejected”). Cf. WILLIAM SHAKESPEARE, *MACBETH* act 4, sc. 1 (Alan Durband ed., Stanley Thorns, Ltd. 1984) (1623) (modern English translation) (“I have no reason to fear [Macduff]. But even so, I’ll make doubly sure. I’ll guarantee my own fate by having you killed, Macduff.”).

187. *City of Boerne v. Flores*, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring).

188. This Note has left aside the implications of its conclusions for *Smith*’s *stare decisis* value. But to the extent that *Smith*’s holding is in tension with the historical

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meaning of the Free Exercise Clause, those implications could be significant—particularly given *Smith's* failure to offer a comprehensive historical defense of its holding. See *Janus v. Am. Fed'n of State, Cty., & Mun. Emps.*, 138 S. Ct. 2448, 2478–86 (2018).