

HARVARD JOURNAL
of
LAW & PUBLIC POLICY

VOLUME 43, NUMBER 1

WINTER 2020

THE RESURGENCE OF ECONOMIC LIBERTY

THE THIRTY-EIGHTH ANNUAL FEDERALIST SOCIETY
NATIONAL STUDENT SYMPOSIUM ON
LAW AND PUBLIC POLICY—2019

THREE KEYS TO THE ORIGINAL MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE <i>Randy E. Barnett</i>	1
IS THE FEDERAL JUDICIAL CURE FOR PROTECTIONISM WORSE THAN THE DISEASE? <i>Roderick Hills</i>	13
THE PERILS OF CIVIL ASSET FORFEITURE <i>Erik Luna</i>	23
ECONOMIC LIBERTY AND CRIMINAL JUSTICE <i>Beth A. Colgan</i>	31
TURNING ENTREPRENEURS INTO OUTLAWS <i>Christina Sandefur</i>	45
BITCOIN’S NATURE AND ITS FUTURE <i>John O. McGinnis</i>	59
THE CONSTITUTIONAL BEDROCK OF DUE PROCESS <i>Allan Ides</i>	67
ARE STATES PROTECTING ECONOMIC LIBERTY? <i>Dana Berliner</i>	77

ARTICLES

ARE CRIMINALS BAD OR MAD? PREMEDITATED MURDER, MENTAL ILLNESS, AND <i>KAHLER V. KANSAS</i> <i>Paul J. Larkin, Jr. & GianCarlo Canaparo</i>	85
THE CONSCIENCE OF CORPORATIONS AND THE RIGHT NOT TO SPEAK <i>William E. Lee</i>	155
CONSENT OF THE GOVERNED: A CONSTITUTIONAL NORM THAT THE COURT SHOULD SUBSTANTIALLY ENFORCE <i>David Schoenbrod</i>	213

NOTE

COUNTERACTING <i>MARBURY</i> : USING THE EXCEPTIONS CLAUSE TO OVERRULE SUPREME COURT PRECEDENT <i>Brian Kulp</i>	279
--	-----

HARVARD JOURNAL of LAW & PUBLIC POLICY

Editor-in-Chief
NICOLE M. BAADE

Deputy Editor-in-Chief
R.J. McVEIGH

Articles Chair
JACOB THACKSTON

Senior Articles Editors
AARON HSU
KEVIN KOLJACK
RYAN MAK
JAMES MCGLONE
JOEY MONTGOMERY

Articles Editors
NICK CORDOVA
JAMIN DOWDY
AARON HENRICKS
JASON MUEHLHOFF
ALEX RIDDLE
OLIVER ROBERTS
JAY SCHAEFER
JESSICA TONG
TRUMAN WHITNEY
VINCENT WU

Website Manager
MARK GILLESPIE

Executive Editors
OTHON ALVES
DAVID BENDER
ALEX CAVE
DOUGLAS COLBY
RICARDO CRUZAT
ANASTASIA FRANE
JOSHUA HA
ADAM KING
BRIAN KULP
WHITNEY LEETS
ANNA LUKINA
MICHELLE MIAO
JOHN MITZEL
ELIZABETH PYJOV
JASJAAP SIDHU
BRYAN SOHN
DOUG STEPHENS IV
MATTHEW WEINSTEIN

Notes Editors
DAVIS CAMPBELL
BRIAN KULP

Senior Editors

PAYTON ALEXANDER
JOHN BAILEY
NICK CORDOVA
JAMIN DOWDY
ROBERT FARMER
COOPER GODFREY

ALEXANDER GUERIN
AARON HENRICKS
JOHN MORRISON
JASON MUEHLHOFF
ALEXANDRA MUSHKA
TERRENCE OGREN

ALEX RIDDLE
OLIVER ROBERTS
JAY SCHAEFER
ISAAC SOMMERS
JESSICA TONG
AARON WARD

VINCENT WU
YIFENG YUAN
WENTAO ZHAI

Editors

JOHN ACTON
JASON ALTABET
MATT BENDISZ
AUGUST BRUSCHINI
ALAN CHAN
CATHERINE COLE
JONATHAN DeWITT
RYAN DUNBAR

WILLIAM FLANAGAN
CHRISTOPHER HALL
JACOB HARCAR
CHRISTIAN HECHT
ROSS HILDABRAND
OWEN HOSSEINZADEH
COURTNEY JONES
ALEXANDER KHAN

JEREMY LEWIN
MAGD LHROOB
KEVIN LIE
PRANAV MULPUR
DANIEL MUMMOLO
ELI NACHMANY
CARSON PARKS
HUNTER PEARL

BRYAN POELLOT
JACOB RICHARDS
BENJAMIN SALVATORE
ADAM SHARF
ASHLEY VAUGHAN
DUNN WESTHOFF
JUSTIN YIM

Managing Editors
HUGH DANILACK
AARON GYDE

Deputy Managing Editors
MAX BLOOM
CHASE BROWNDORF
JOHN KETCHAM
STUART SLAYTON

Chief Financial Officer
DYLAN SOARES

Deputy Chief Financial Officer
COOPER GODFREY

Communications Manager
WENTAO ZHAI

Events Manager
TRUMAN WHITNEY

Social Chair
JAY SCHAEFER

Founded by E. Spencer Abraham & Steven J. Eberhard

BOARD OF ADVISORS

E. Spencer Abraham, Founder

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

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

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

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

Copyright © 2020 by the Harvard Society for Law & Public Policy, Inc.

PREFACE

The recent trade war between the United States and China has highlighted arguments between free-market principles and protectionism nationally. At the state and local level too, judges, lawmakers, and scholars have debated the proper balance between individual economic liberty and governmental interests on issues like civil asset forfeiture, licensing, and home-sharing laws. Consideration of these issues, however, is not a recent invention. The quest for economic liberty in response to tyrannical restrictions on trade and taxes was central to the American Revolution and to debates leading to the Constitution's ratification. In a similar vein, the theme of the Thirty-Eighth Annual Federalist Society Student Symposium was inspired by Frédéric Bastiat's maxim: "Life, liberty, and property do not exist because men have made laws. On the contrary, it was the fact that life, liberty, and property existed beforehand that caused men to make laws in the first place." Many of the nation's finest scholars and judges came together at the Symposium to discuss how factions, relations among the states, congressional powers, and constitutional structure affect economic liberty.

We have the honor of presenting eight Essays from the Symposium in this Issue of the *Harvard Journal of Law & Public Policy*. In the first, Professor Randy Barnett analyzes three key historical data points to determine the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause. Next, Professor Roderick Hills examines whether economic protectionism is a legitimate state interest. In three thought-provoking Essays, Professor Beth Colgan, Professor Erik Luna, and Christina Sandefur discuss the interplay between criminal justice and individual economic liberty. Then, Professor John McGinnis remarks on the nature of Bitcoin and its future as a currency. Finally, Professor Allan Ides and Dana Berliner each explore the contributions of federalism and constitutionalism to economic liberty.

Additionally, we are pleased to present three Articles addressing current constitutional issues. The first Article of this Issue, by Paul Larkin and GianCarlo Canaparo, considers the case *Kahler v. Kansas*, currently pending before the Supreme

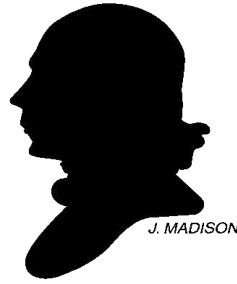
Court. They argue that neither the Due Process Clause nor the Cruel and Unusual Punishments Clause requires criminal law to offer an insanity defense. Next, Professor William Lee analyzes the Supreme Court's struggle with corporate identity through an in-depth look at the Justices' papers in First Amendment cases over the past forty years. He argues that government efforts to fine-tune the flow of information by compelling private speech should be rejected because they promote government-defined orthodoxy. Finally, Professor David Schoenbrod argues that Congress and the Supreme Court should enforce the consent-of-the-governed norm, more broadly known as the nondelegation doctrine.

We are happy to close this Issue with a Note from one of our own. Brian Kulp argues that the Constitution grants Congress near-plenary power to curb the Supreme Court's appellate jurisdiction, but this power should only be used with bipartisan support after attempting to use the amendment process.

This Issue would not have been possible without the hard work and dedication of the *Journal* and Symposium editors. I cannot thank them enough. In particular, Deputy Editor-in-Chief R.J. McVeigh revitalized our editing process and provided wise counsel. Articles Chair Jacob Thackston has been irreplaceable in managing our submissions and article selection process. Hugh Danilack served as National Symposium Editor and Managing Editor, excelling at both. Aaron Gyde, also a Managing Editor, put in countless hours doing exceptional editing work. Dylan Soares, our Chief Financial Officer, generously undertook the time-consuming work of managing the *Journal's* business affairs. Aaron Hsu made himself available every day to help in the final rounds of editing, answering all my tricky editing questions. And Dallin Earl was always around to listen and brainstorm ideas to improve the *Journal*. These individuals—and all those who worked on this Issue—exemplify the *Journal's* excellence.

Nicole M. Baade
Editor-in-Chief

THE FEDERALIST SOCIETY



presents

*The Thirty-Eighth Annual National Student Symposium
on Law and Public Policy*

The Resurgence of Economic Liberty

March 15–16, 2019

Arizona State University

Sandra Day O'Connor College of Law

The staff acknowledges the assistance of the following members of the
Federalist Society in preparing this Symposium for publication:

National Editor

Hugh Danilack
Harvard Law School

Executive Editors

Isabel Redleaf
*University of Pennsylvania
Carey Law School*

Cole Wintheiser
*University of Pennsylvania
Carey Law School*

Michael R. Wajda
Duke University School of Law

Timothy J. Whittle
University of Virginia School of Law

General Editors

Jacob M. Abrahamson
*University of Pennsylvania
Carey Law School*

Cameron L. Atkinson
Quinnipiac University School of Law

Alexander Belica
University of Michigan Law School

Brennan A.R. Bowen
*Arizona State University
Sandra Day O'Connor College of Law*

Will Brantley
University of Virginia School of Law

Sarah Christensen
*George Mason University
Antonin Scalia Law School*

Austin Cromack
*Arizona State University
Sandra Day O'Connor College of Law*

Laura Flint
Emory University School of Law

Mary-Colleen Fowler
University of Kansas School of Law

Abbey Lee
University of Kansas School of Law

Stacy Hanson
University of Illinois College of Law

Ethan Hoffman
*George Mason University
Antonin Scalia Law School*

John Kill, Jr.
University of Texas School of Law

Kelly Krause
Marquette University Law School

Brandon Mayhew
*University of Pennsylvania
Carey Law School*

Kellie Majcher
University of Michigan Law School

Cody Ray Milner
*George Mason University
Antonin Scalia Law School*

Andrew Mitchell
University of Texas School of Law

Rachel Neumann
*University of Denver
Sturm College of Law*

Ashle Page
University of North Carolina Law School

Steven Petrillo
Rutgers Law School—Camden

Adam T. Steinhilber
University of Michigan Law School

Cynthia Tanner
Georgetown University Law Center

Sebastian Torres
*Northern Kentucky University
Samuel P. Chase College of Law*

Chris Underwood
*Arizona State University
Sandra Day O'Connor College of Law*

Nicholas J. Walter
*Arizona State University
Sandra Day O'Connor College of Law*

Jennifer Weinberg
*George Washington University
Law School*

THREE KEYS TO THE ORIGINAL MEANING OF THE PRIVILEGES OR IMMUNITIES CLAUSE

RANDY E. BARNETT*

Establishing the original meaning of the Fourteenth Amendment's Privileges or Immunities Clause requires a wealth of evidence. But three key data points are crucial to identifying the core of its meaning. First, Supreme Court Justice Washington's explanation of the meaning of "privileges and immunities" in *Corfield v. Coryell*;¹ second, the rights protected by the Civil Rights Act of 1866; and third, Michigan Senator Jacob Howard's speech explaining the content of the Privileges or Immunities Clause when introducing the Fourteenth Amendment to the United States Senate in 1866. Any theory of the Privileges or Immunities Clause and its original meaning that cannot comfortably accommodate these three items is highly questionable.

I. *CORFIELD V. CORYELL*

We begin with data point number one. The Privileges and Immunities Clause of Article IV, Section 2, provides, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."² This clause protected the rights of citizens of one state when traveling in another state. Although it was generally taken by courts to bar discrimination against out-of-staters, antislavery activists insisted that it guaranteed to every American citizen the

* Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center; Director, Georgetown Center for the Constitution. This Essay is based on remarks delivered at the Federalist Society National Student Symposium at the Arizona State University, Sandra Day O'Connor College of Law, on March 15, 2019. I am grateful to Evan Bernick, with whom I am coauthoring a series of articles and a book on the original meaning of the Fourteenth Amendment. Permission to distribute for classroom use is hereby granted.

1. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

2. U.S. CONST. art. IV, § 2, cl. 1.

protection of a set of fundamental rights when traveling in another state.³

For example, the imprisonment of free black sailors from Northern states by Southern authorities while in Southern ports became a cause célèbre in the North.⁴ Antislavery activists protested this denial of privileges and immunities under Article IV, Section 2, despite the Southerners' assertion that they were treating out-of-state blacks in the same manner as they treated their own free blacks and hence were not discriminating against them.⁵ For the Northerners, the issue was not how a state treated its own citizens, but whether a fundamental right of all citizens was being denied to an out-of-state citizen.⁶

What were the fundamental rights to which all citizens were entitled under the Privileges and Immunities Clause of Article IV? In 1823, Supreme Court Justice Bushrod Washington, George Washington's nephew, was called upon as a Circuit Judge to address the scope of the rights protected by Article IV, Section 2.⁷ He began by identifying the "fundamental" privileges and immunities protected by the clause. He explained:

We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; *the enjoyment of life and liberty,*

3. See, e.g., Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 104–07 (2011).

4. See, e.g., David R. Upham, *The Meanings of the "Privileges and Immunities of Citizen" on the Eve of the Civil War*, 91 NOTRE DAME L. REV. 1117, 1133 (2016); see also, e.g., Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822–1848*, 1 J. SOUTHERN HIST. 3, 21 (1935) ("The enforcement of the Negro seaman acts was a grievance against which northerners . . . protested." (footnote omitted)).

5. See Upham, *supra* note 4, at 1141–48.

6. See Hamburger, *supra* note 3, at 105.

7. *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

*with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.*⁸

For Justice Washington, “privileges and immunities” are rights that (1) “are, in their nature, fundamental”; (2) “belong, of right, to the citizens of all free governments”; and (3) can be found in the positive law in the states, which included common law rights.⁹ Justice Washington then proceeded to list some examples, such as the rights to travel, to claim the writ of habeas corpus, to maintain lawsuits, and others.¹⁰

In the highlighted passage of Justice Washington’s description of these privileges and immunities, he included nearly verbatim the canonical formulation of natural rights penned by George Mason for the Virginia Declaration of Rights, which was replicated in four state constitutions. In his May 27, 1776, committee draft, Mason wrote:

T[hat] all men are born equally free and independent, and have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity; among which are, *the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.*¹¹

Mason’s description of “natural rights” are the same words used by Justice Washington in *Corfield*.¹²

It was upon similar language in Article I of the Massachusetts Constitution that the Supreme Judicial Court of Massachusetts based its 1783 ruling that slavery was unconstitutional

8. *Id.* at 551–52 (emphasis added).

9. *Id.* at 551.

10. *Id.* at 552.

11. George Mason, Committee Draft of the Virginia Declaration of Rights and edited by the Virginia Convention (May 27, 1776) (emphasis added), <https://consource.org/document/committee-draft-of-the-virginia-declaration-of-rights-and-edited-by-the-virginia-convention-1776-5-27/20130122081535/> [<https://perma.cc/4E74-LZH2>]. I discuss the evolution of Mason’s draft and its influence on the Declaration of Independence, written by Thomas Jefferson just a couple weeks later, and on the constitutions of other states in RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 32–40, 66–69 (2016).

12. *Corfield*, 6 F. Cas. at 551–52.

in that state:¹³ “All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”¹⁴

If, therefore, the Privileges or Immunities Clause of the Fourteenth Amendment provided federal protection to the same set of fundamental rights to which the Privileges and Immunities Clause of Article IV refers, then these privileges or immunities include, inter alia, the natural right to “the enjoyment of life and liberty, with the [natural] right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.”¹⁵

II. THE CIVIL RIGHTS ACT OF 1866

Data point number two: On April 9, 1866, Congress passed the Civil Rights Act of 1866, officially styled as an act “to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.”¹⁶ Commonly known as the Civil Rights Act of 1866, the act was passed pursuant to Congress’s enumerated power to enforce the Thirteenth Amendment’s ban on involuntary servitude.¹⁷ It began by declaring “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States”¹⁸ It then proceeded to guarantee that all such persons:

shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties,

13. The case itself is preserved in the archival materials of various Massachusetts figures. For a description of this case and its historical record, see generally John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the “Quock Walker Case,”* 5 AM. J. LEGAL HIST. 118 (1961).

14. MASS. CONST., art. I, annulled by MASS. CONST., art. CVI.

15. *Corfield*, 6 F. Cas. at 551–52.

16. Ch. 31, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1982 (2012)).

17. *The Civil Rights Cases*, 109 U.S. 3, 22 (1883) (“Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted undertook to wipe out these burdens and disabilities, the necessary incidents of slavery . . .”).

18. Civil Rights Act of 1866, ch. 31, § 1.

*and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.*¹⁹

After its passage, President Andrew Johnson vetoed the bill as beyond the power of Congress to enact under the Thirteenth Amendment.²⁰

Congress responded by overriding the veto with a supermajority vote,²¹ but some members were concerned about whether such a measure really was within congressional power.²² Others had a different concern. What would happen to this statutory guarantee once the Democrats from the Southern states resumed their seats in Congress? Democrats were loudly proclaiming that it was their intent to repeal the bill as soon as they got the chance.²³ Who could say if they might one day have the votes to do so? In addition, what would the courts say about Congress trying to reverse, by a mere statute, the Supreme Court's decision in *Dred Scott v. Sandford*²⁴ denying the descendants of African slaves could ever be citizens of the United States?²⁵

For all of these reasons, many in Congress supported a parallel effort to adopt a constitutional amendment to make the freedmen United States citizens and to protect the fundamental rights of all United States citizens from being abridged by state

19. *Id.* (emphasis added).

20. CONG. GLOBE, 39th Cong., 1st Sess. 1679–81 (1866) (veto message of President Johnson).

21. Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 10 (2012).

22. See, e.g., MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 80 (1986) (describing how Representative John Bingham argued that Congress lacked the power to pass the 1866 Civil Rights Act before the ratification of the Fourteenth Amendment); see also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 361 n.131 (2006).

23. Barnett, *supra* note 21, at 10–11.

24. 60 U.S. (19 How.) 393 (1857).

25. *Id.* at 404 (“We think [African slaves] are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”).

governments, as Southern states were commonly violating the rights of both freed blacks and white Republicans.²⁶ Which fundamental rights were protected? At least the rights listed in the Civil Rights Act, including the rights “to make and enforce contracts, . . . to inherit, purchase, lease, sell, hold, and convey real and personal property”²⁷—rights that correspond to the description of natural rights by Justice Washington in *Corfield*.

If it was the Privileges or Immunities Clause of the Fourteenth Amendment that protected these rights, then these rights are among “the privileges or immunities of citizens of the United States.”²⁸

III. SENATOR JACOB HOWARD’S SPEECH TO SENATE

This leads us to data point number three: Senator Jacob Howard’s speech to the Senate explaining the meaning of the Privileges or Immunities Clause during the debate over the Fourteenth Amendment. Six weeks after passing the Civil Rights Act, on May 23, 1866, Michigan Senator Jacob Howard introduced the Fourteenth Amendment in the Senate as its designated sponsor.²⁹ On that day, he delivered a comprehensive and widely reported address in which he explained the meaning of the amendment.

Howard began with the Privileges or Immunities Clause, which he described as “very important.”³⁰ By this clause, he said, citizens of the United States “are, by constitutional right, entitled to these privileges and immunities, and may assert this right and these privileges and immunities, and ask for their

26. See Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment’s Original Meaning*, 49 CONN. L. REV. 1069, 1084 (2017) (“[A]fter the Civil War, the Southern States were systematically denying civil rights to former slaves.”); see also Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95, 99–100 (2016) (discussing post-Civil War violence against and murders of Texan blacks and white Republicans that went largely unpunished).

27. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1982 (2012)).

28. U.S. CONST. amend. XIV, § 1.

29. CONG. GLOBE, 39th Cong., 1st Sess. 2764–67 (1866) (statement of Sen. Howard). For a discussion of the significance of Howard’s speech, see Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 499–503 (2020).

30. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard).

enforcement whenever they go within the limits of the several States of the Union.”³¹ In other words, no state shall abridge the fundamental rights of a citizen of the United States. The question then becomes: What are these fundamental rights?

According to Howard, the privileges or immunities—or in his words the “fundamental guarantees”³²—of United States citizenship can be found in two textual sources in the Constitution. The first source was “the privileges and immunities spoken of in the second section of the fourth article of the Constitution,”³³ that is, the Privileges and Immunities Clause of Article IV. Howard noted that he was “not aware that the Supreme Court have ever undertaken to define either the nature or extent of the privileges and immunities thus guaranteed.”³⁴ Nevertheless, he said, “we may gather some intimation of what probably will be the opinion of the judiciary by referring to a case adjudged many years ago in one of the circuit courts of the United States by Judge Washington”³⁵—referring to our first data point: Justice Washington’s opinion in *Corfield v. Coryell*.

Howard then read “what that very learned and excellent judge says about these privileges and immunities of the citizens of each State in the several States”³⁶ including the language I highlighted above: “protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.”³⁷ In his handwritten notes for his senate speech, Howard described all of these *Corfield* privileges and immunities as “these *fundamental civil rights* of citizens”³⁸

31. *Id.*

32. *Id.* at 2766.

33. *Id.* at 2765.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230)) (internal quotation marks omitted).

38. Handwritten Notes, Jacob Howard, Senator, U.S. Senate, Fourteenth Amendment’s Privileges or Immunities Clause 3 (1866) [hereinafter Handwritten Notes] (emphasis on second word added), <http://www.tifis.org/sources/Howard.pdf> [<http://perma.cc/V6HA-X2YK>]. On page “2” of his notes, Howard discussed *Corfield*. On page “3,” which presumably originally followed immediately after page “2,” he described them as “these *fundamental civil rights* of citizens, whatever may be their nature or extent.” At some point in advance of his

which connects this passage of his speech to the Civil Rights Act of 1866. But Howard was not yet finished.

He then located a second source of fundamental rights: “To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution”³⁹ After reading a list that included most of the rights listed in these amendments, Howard then summarized his understanding of these two textual sources of privileges or immunities.⁴⁰ “Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution”⁴¹

It is important that Howard did not indicate that these were two distinct categories of rights to be protected in different ways. For example, he did not privilege the enumerated rights in the first eight amendments at the expense of the *Corfield* rights. Rather, he described them all as “a mass of privileges, immunities, and rights” to which the text of the Constitution already refers.⁴² In addition, although he relied on the text of the Constitution for authority, he did not rely solely on the enumeration in the Constitution of certain rights. The fundamental rights to which the Privileges and Immunities Clause of Article IV refers are not themselves “enumerated” in the text.

Howard then explained that a constitutional amendment was necessary to protect all these rights because, at present, “[t]hey do not operate in the slightest degree as a restraint or prohibition upon State legislation.”⁴³ So “[t]he great object of the first section of this amendment is, therefore, to restrain the

speech, Howard inserted pages “2a” and “2b”—after page 2 and before page 3—which referred to the rights in the first eight amendments.

39. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). Howard apparently added his reference to the rights in the first eight amendments as pages “2a” and “2b” of his notes. See Howard, Handwritten Notes, *supra* note 38.

40. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

41. *Id.*

42. *Id.* (emphasis added).

43. *Id.*

power of the States and compel them at all times to respect these great fundamental guarantees.”⁴⁴

In a speech delivered three years later, Howard offered this summary of the Privileges or Immunities Clause:

The occasion of introducing the first section of the fourteenth article of amendment into that amendment grew out of the fact that there was nothing in the whole Constitution to *secure absolutely* the citizens of the United States in the various States against an infringement of *their rights and privileges under the second section of the fourth article of the old Constitution*. That section declares that—“The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States.”⁴⁵

On this occasion, Howard did not feel the need to make special reference to the first eight amendments presumably because, along with *Corfield* rights, these too were among the privileges and immunities of United States citizens to which, he believed, Article IV, Section 2 referred. Chief Justice Taney had made the same assumption in *Dred Scott* when he wrote that Southern states would never have agreed that free blacks could be citizens of the United States, because that would entail that Article IV, Section 2 “would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”⁴⁶

CONCLUSION

We can summarize the original meaning of the Privileges or Immunities Clause that is derived from these three key data points in a single run on sentence:

No state shall make or enforce any law which shall abridge
(1) those privileges and immunities (a) which are, in their nature, fundamental; (b) which belong, of right, to the citi-

44. *Id.* at 2766.

45. CONG. GLOBE, 40th Cong., 3d Sess., 1003 (1869) (emphases added) (quoting U.S. CONST. art. IV, § 2, cl. 1).

46. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

zens of all free governments; and (c) which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign,

(2) such as the protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, and

(3) the right to make and enforce contracts, to sue, be parties, give evidence, inherit, purchase, lease, sell, hold, and convey real and personal property as well as

(4) the personal guarantees contained in the first eight amendments.

The idea that Congress and the federal courts can protect this “mass of privileges, immunities, and rights”⁴⁷ from abridgment by state governments may seem like a radical proposition. And there is no doubt that the Fourteenth Amendment did alter the nature of our federalism by design. But it is not nearly as radical as it sounds.

Recall that Justice Washington added that “the enjoyment of life and liberty” and “the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety” was “subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.”⁴⁸ In other words, states have the just power to regulate the exercise of these rights—which is called the police power—provided that such regulations are actually adopted to serve an end to which legislators are competent—such as the protection of the health and safety of the public.

As Justice Bradley explained in his dissenting opinion in the *Slaughter-House Cases*,⁴⁹ “The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted,”⁵⁰ but still, “there are certain fundamental rights which this right of regulation cannot infringe.”⁵¹ He then made the following distinction: “It may

47. CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).

48. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).

49. 83 U.S. (16 Wall.) 36 (1873).

50. *Id.* at 114 (Bradley, J., dissenting).

51. *Id.*

prescribe the manner of their exercise, but it cannot subvert the rights themselves.”⁵² Prescribing “the manner of their exercise” is regulation; subversion is violation and abridgment.

Under this approach, identifying the rights, privileges, or immunities of citizens is of less significance than identifying the proper basis for regulating them and ensuring a fit between a proper end and the means adopted to achieve it. After the adoption of the Fourteenth Amendment, this was accomplished by the development of a theory of the police power of states.⁵³ Evan Bernick and I discuss this theory elsewhere in great detail.⁵⁴ But the bottom line of our analysis is that regulations are proper if they rationally relate to an end within the competence of state legislatures.

Astute readers will recognize this test as “rational basis scrutiny,” and it is what rationality review was until the New Deal Court. As the Court said in *United States v. Carolene Products*:⁵⁵

no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts by applying opprobrious epithets to the prohibited act, and that a statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis.⁵⁶

This type of rationality review is not the *conceivable* basis scrutiny that was adopted by the Warren Court in *Williamson v. Lee Optical of Oklahoma, Inc.*,⁵⁷ which only requires judges to imagine why a legislature “might” have restricted liberty.⁵⁸

52. *Id.*

53. See Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019).

54. See *id.*

55. 304 U.S. 144 (1938).

56. *Id.* at 144 (emphases added); see also *id.* at 153 (“Where the existence of a *rational basis* for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.” (emphasis added) (citation omitted)).

57. 348 U.S. 483 (1955).

58. See, e.g., *id.* at 487 (“The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses.”); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 309 (1993) (“The question before us is whether there is any conceivable ra-

Rather the traditional rationality review articulated by the Court in *Carolene Products* was the approach employed by the three-judge lower court panel in *Lee Optical of Oklahoma, Inc. v. Williamson*,⁵⁹ which the Supreme Court reversed.⁶⁰

The careful analysis conducted by that panel demonstrated that, if there is the will to restore the original meaning of the Privileges or Immunities Clause's protection of fundamental rights, there is also a feasible way.

tional basis justifying this distinction for purposes of the Due Process Clause of the Fifth Amendment.”).

59. 120 F. Supp. 128 (W.D. Okla. 1954), *rev'd*, 348 U.S. 483 (1955).

60. *Id.*; see Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of Lee Optical*, 19 GEO. MASON L. REV. 845 (2012).

IS THE FEDERAL JUDICIAL CURE FOR PROTECTIONISM WORSE THAN THE DISEASE?

RODERICK HILLS*

I have three points that I will try to make as quickly as possible about whether or not the federal judiciary should become involved in the effort to end state and local protectionism.

First, certainly the best view of the doctrine is that protectionism is not a legitimate state interest as an end in itself. But it is a legitimate state mechanism by which it can accomplish other ends. So you have to distinguish between protectionism as a means and protectionism as an ends. That is the first point—the definitional point.

Second, and less certainly, having federal courts try to figure out whether protectionist means are actually protectionist ends is a fool's game. It probably is a game not worth the candle because the costs of the inquiry are probably greater than the benefits. And such federal judicial efforts could conceivably lead to even worse regulation.

And third, the solution, therefore, is federalism and separation of powers. I will give a few examples of why I think Professor Todd Zywicki is absolutely wrong to say that the political process is so hopelessly infected with special interest capture that you cannot trust institutions like the Federal Trade Commission, like Governor John Kasich of Ohio, or like the SEC to deregulate and to get rid of protectionist legislation. I will give you a few examples of deregulatory innovations that have been far more effective than anything that can likely be delivered by the federal courts.

First, why do I say that protectionism is a legitimate means but not a legitimate end? This assertion requires a definition of "protectionism," which I will stipulate is the providing of a subsidy to a private party by means of limiting competition

* William T. Comfort III Professor of Law, New York University School of Law.

against that party.¹ Is that sort of subsidy legitimate as a means? Of course it is. Protecting businesses with legally conferred monopolies as a way of subsidizing those businesses to serve the public interest has been used since the founding of the republic. Alexander Hamilton created the First Bank of the United States, giving it an exclusive right to serve as the federal government's fiscal agent.² Nicholas Biddle was president of the Second Bank of the United States.³ Both had legally protected monopolies. Every bridge company, every grist mill company, every corporation before 1838—when New York enacted the free corporation law and the free banking law—had some sort of monopoly.⁴ The bar association of this state and New York State and every other state enjoys a legally protected monopoly. Every zoning regulation creates noncumulative zones in which industrial users do not have to bid against residential users for the purpose of subsidizing the former with cheaper rents.⁵ The medallion system in New York City is a legally protected monopoly,⁶ and every union's collective bargaining agreement is a legally protected monopoly.

If you are going to strike those things down, you are going to be very busy, indeed. And you will not have troops behind you, because the people you offend will greatly outnumber the people who you please, depriving you of political support. And so the notion that a federal court is going to go around striking down those protectionist devices is ludicrous. Those

1. I think that my definition is superior to the more general definition of protectionism as any effort to limit competition, even if the limits do not provide the competitors so protected with any benefit. See, e.g., *Protectionism*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (desk ed. 2012) ("Protectionism is the use of tariffs, import controls, or other import regulations, or the use of subsidies in some forms, to limit foreign competition in a domestic market for goods or services."). Implicit in the idea of protectionism, after all, is that someone is protected.

2. BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 114 (1957).

3. *Id.* at 291.

4. Bray Hammond, *Free Banks and Corporations: The New York Free Banking Act of 1838*, 44 J. POL. ECON. 184, 184–85 (1936) (explaining how the Act of 1838 signified a departure from the prevailing view of corporations and banks as monopolies).

5. Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 249 (2010) ("[A]reas that are zoned non-cumulatively allow only manufacturing uses and bar any residential (and sometimes even commercial uses) of property.").

6. See Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 128 (2013).

protectionist devices, of course, are always justified as a means to an end. What is the end? The end is something like “protecting workers from exploitation,” or “providing a reliable fiscal agent for the United States” as a justification for the Bank of the United States, or simply, “providing a subsidy for consumer welfare.” The medallion system in New York City is an abomination, but it is justified as a way of ensuring that taxi cab drivers have revenue sufficient to “hack up”—that is to say, to spend a lot of money to bring their cabs up to the Taxi and Limousine Commission standards. The official justification for the medallion system is that we give taxis a subsidy to serve the public, not by appropriating tax money for that purpose but simply by giving them a monopoly through which they can charge higher rates.⁷ If you do not like that idea, then you must strike down the copyright and patent laws, because they use exactly the same mechanism of exchanging an exclusive right for a public benefit.

Copyright and patent laws give somebody a monopoly, usually for a limited time, in order to put money in the pockets of the copyright or patent owners so that these owners have incentive to benefit the public. Is there a deadweight cost associated with it? Of course. And my colleague here, Yaron Brook, will explain what that deadweight cost is. But you know what taxes do? They also impose a deadweight cost. Property taxes deter sales of property. Sales taxes have inefficiently discouraged sales. Income taxes have discouraged people from working. There is no way you can avoid the deadweight cost of a public subsidy except through revenue measures that are almost never used—a lump-sum head tax charged to every person regardless of their actions or inaction. Is the deadweight cost of the “monopoly tax” bad? Sure. But it is an economic question about whether it is worse than the deadweight costs of the income tax—an economic question that no judge will feel comfortable answering. At a certain level, I much prefer the medallion system than, say, another layer of absurdly structured property of taxes in New York City.⁸ And you would

7. *See id.* (“By inflating fares and limiting the availability of taxis, expensive licenses likely harm taxi consumers . . .”).

8. Ethan Geringer-Sameth, *An Old, Unfair System: New York City’s Property Tax Conundrum—Part II—Deep and Complex Inequities*, GOTHAM GAZETTE (Aug. 2,

need to have a Ph.D. in economics to figure out which measure imposes more excess burden.

So as a means, protectionism is perfectly acceptable if what you mean by protectionism is a limit on competition to secure other ends. As an end in itself, however, it has always been forbidden. And this is where I disagree with Professor Paul Bender. Since long before *Griswold*⁹ and its protection of privacy, long before *Brown v. Board of Education*¹⁰ and its prohibition on race discrimination, the courts have always recognized that class legislation—laws that have the sole goal of taking from A to give to B—serve only a forbidden state interest.¹¹ Such an end is forbidden either under the Due Process Clause or the Equal Protection Clause or perhaps the Privileges and Immunities Clause (the particular textual hook being practically unimportant). So it hardly is a wild innovation, to say that taking from A merely for the purpose of giving to B is forbidden by the Constitution. To say otherwise is to essentially cast doubt on virtually every interpretation of the Equal Protection Clause and the Due Process Clause from the mid-nineteenth century forward. From 1868 until the turn of the twentieth century, all the major Classical Liberal constitutional treatise writers—John Dillon, Christopher Tiedeman, and Thomas Cooley—agreed that to take assets from A merely to subsidize B because you prefer B when you have no other reason in benefiting the public, is unconstitutional.¹² That ban on class legislation existed

2019), <https://www.gothamgazette.com/state/8713-old-unfair-system-new-york-city-property-tax-conundrum-part-ii-classes> [<https://perma.cc/AZ8C-EGZT>].

9. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. 347 U.S. 483 (1954).

11. See, e.g., *Calder v. Bull*, 3 (3 Dall.) 386, 388–89 (1798).

12. See 1 CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES, at vii–viii (1900) (describing the purpose of the treatise as an “attempt to awaken the public mind to a full appreciation of the power of constitutional limitations to protect private rights against the radical experimentations of social reformers” who are proponents of the redistribution of private property); John F. Dillon, *Property—Its Rights and Duties in Our Legal and Social Systems*, 29 AM. L. REV. 161, 173 (1895) (“But when taxes, so-called, are imposed, not as mere revenue measures, but . . . as a means of distributing the rich man’s property among the rest of the community—this is class legislation of the most pronounced and vicious type Such schemes of pillage are . . . violative of the constitutional rights of the property owner”); Robert Allan Olender, *From Commonwealth to Constitutional Limitations: Thomas Cooley’s Michigan, 1805–1886*, at 230, SJD DISSERTATIONS (2014), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1004&context=sjd> [<https://>]

eons (in constitutional terms) before anybody dreamed of privacy's being a fundamental right.

Furthermore, it is no good to say that this ban on class legislation cannot be found in the text of the Constitution. The same can be said for the prohibitions on regulation of speech and racial discrimination. Neither of these prohibitions are in the text of the Constitution as far as state governments are concerned. The First Amendment says *Congress* shall make no law.¹³ It is a purely non-textual inference, far younger than the inference against protectionism, that the First Amendment should be incorporated against the states.¹⁴ So I disagree with Professor Bender that protectionism is a legitimate state interest as an end. Protectionism has never been a legitimate state interest.

Which brings me to my second point. Can courts get rid of protectionism as an end in itself? Well, in theory, yes. But in practice, I think the game is just not worth the candle.

There are two difficulties that federal courts face in enforcing a prohibition on protectionism as an end in itself. First of all, you're going to have to make decisions about when protectionism is a means rather than an end. And that involves casting stones, in a way that is likely to be politically polarizing in an era where we can ill afford more polarization.

Let me give you an example from my own experience. A group of N.Y.U. law professors went to the New York State Court of Appeals and said the third year of law school is a protectionist waste of money.¹⁵ It serves no purpose whatsoever, except to protect New York lawyers from more competition. So let the students take the law school exam in the third year, before they finish their third year of law school classes.

perma.cc/ZJW7-52MP] ("Cooley then held to principles requiring limited government that did not have the power to redistribute wealth.").

13. U.S. CONST. amend. I.

14. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding for the first time that "[f]or present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

15. See Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 606–11 (2012) (explaining the Working Group's proposal to the New York Court of Appeals to allow students to sit for the bar after two years in law school).

Our effort was a dismal failure. We were roundly drowned out by the county bar associations, especially from upstate. Now, did our opponents say, well, we just cannot stand the influx of more competition? No. They said, “the third year is critical for law students’ education. How can they be confident lawyers? How can consumers be protected from poor legal counsel unless they take yet one more seminar from Professor Hills?” Now, I was flattered. But although insincere, such flattery is legally effective. The patently pretextual justification being offered in defense of the third year of law school would easily survive review in any federal court. There is zero chance that any federal court would ever strike down as unconstitutionally pretextual the third year of law school, even if we filed in a federal court a lawsuit citing Professor Zywicki’s scholarship and even got an amicus brief from him. And part of that likely response from federal judges is simply—I am going to say this in the nicest possible way, because Judge Jones is in the room—federal judges’ natural class interest. Federal judges are part of a scholarly profession the members of which expect to be swaddled in layers and layers of protective education. We require a four-year liberal arts degree in most states, in addition to three years of law school. Do you realize that by that American standard, every lawyer in Germany and, indeed, in continental Europe is unqualified to practice law, because most of them earn their law degree in an undergraduate college? If they do not need to go through four years of college unrelated to law before they earn a law degree, then why do we? Why cannot students just go right to law school as an undergraduate?

Judges are likely, in short, to tolerate obviously protectionist regulation to benefit the legal profession. How, then, can they with a straight face strike down occupational licensing for beauticians as protectionist? Of course, such licensing *is* obviously protectionist—but no more so than rules for bar admission. So are federal judges really entitled to draw such distinctions between different types of protectionist legislation on the ground that some such rules protect members of a scholarly profession? How could anybody not see that that drawing such distinctions is outrageous class bias? Why would we put federal judges in the position of picking and choosing among occupational licensing like that? They cannot do it and sustain their political legitimacy, and so they should not try.

Is it possible to strike down at least some very narrowly defined types of protectionist laws without engaging in such professional favoritism? Yes, but this brings me to another danger of judicial review aside from manifesting class bias: judges could actually make things worse.

It is possible for federal judges to strike down laws so underinclusive in their pursuit of non-protectionist ends that those ends are plainly pretextual. My favorite example is provided by the judge for whom I had the honor of clerking, Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit. He is a great judge, was a great lawyer, and wrote a great opinion in *St. Joseph's Abbey*.¹⁶ *St. Joseph's Abbey* held that no conceivable non-protectionist purpose could be attributed to a state law regulation that required casket sellers to be licensed funeral home directors.¹⁷ Why could not the state law be justified as a way to insure that casket sellers were properly trained to serve customers buying caskets? The funeral homes argued that people who purchase caskets need grievance counseling to make sure they do not make a rash decision in a very vulnerable moment of grief. The problem with this argument, however, was that the state licensing scheme for funeral home directors did not require them to be trained in grievance counseling. The underinclusive character of the law branded the law's non-protectionist purpose as obviously pretextual.

But, of course, striking down laws because their underinclusiveness indicates pretext gives lawmakers an incentive to make such laws less underinclusive. *St. Joseph's Abbey* incentivized state lawmakers seeking to benefit state funeral home directors to require funeral home directors to undergo grievance counseling, for instance. Eliminating underinclusiveness, however, simply makes such laws even more expansive and inefficient, by layering on extraneous educational or other licensing requirements. Let me give you an example from New York, my last example. And then of course, I will end with a moral of the story, which is blessedly brief.

16. *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

17. *Id.* at 226.

In New York City, we have noncumulative industrial zones.¹⁸ That is to say, you can only have manufacturing in these zones. You cannot have residential or commercial uses. You cannot have hotels. You cannot have all sorts of uses that don't impose any harm such as noise or excessive traffic or odors on anyone. Now, what justification is offered for these zones? Well, the usual justification in New York City is that such noncumulative zones provide cheap land for manufacturing, and manufacturing provides good union jobs.¹⁹ If you don't have residential real estate developers bidding on the lots in noncumulative zones, the elimination of bidders radically lowers the prices of the lots, allowing manufacturers to use the land.

One could imagine an argument that such laws are too underinclusive to be justified as bona fide means for protecting union jobs, because manufacturers do not have to provide good union jobs as a condition for enjoying the benefits of land exclusively zoned for manufacturing. Actually, many of these manufacturing jobs in New York City stink. Warehouses count as manufacturing uses in these zones, but warehouse workers need not be unionized.²⁰ Striking down noncumulative manufacturing zones because they are underinclusive, however, just encourages the City Council to amend the Zoning Resolution to permit only unionized industrial uses in these zones, an amendment that would make these zones even more obstructive to sensible land use. The dilapidated industrial zones that used to plague New York City's waterfront, before Mayor Bloomberg's Administration rezoned them, would be all over the place and there would not be anything in them, because permitted uses would have to be not only industrial but also unionized.

18. Hills & Schleicher, *supra* note 5, at 250 ("Since 1961, the city's zoning resolution has barred residential uses from manufacturing zones, and 30 percent of the city's shoreline is presently zoned for industrial use.").

19. *Id.* at 251.

20. Noam Scheiber, *Amazon and Union at Odds Over Firing of Staten Island Warehouse Worker*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/business/economy/amazon-warehouse-labor.html> [<https://nyti.ms/2URWrNP>]. For a survey of unionization rates in New York City, see RUTH MILKMAN & STEPHANIE LUCE, THE STATE OF THE UNIONS 2018: A PROFILE OF ORGANIZED LABOR IN NEW YORK CITY, NEW YORK STATE, AND THE UNITED STATES (2018), https://slu.cuny.edu/wp-content/uploads/2018/08/Union_Density-2018-FINAL1.pdf [<https://perma.cc/EEN4-JP47>].

So I really think there are grave dangers to federal judges getting involved in this area, because judicial review is likely affected by class bias and because review for underinclusiveness encourages even more burdensome regulation. But fortunately, the moral of the story—this is my third and final point—is that there are other institutions that can be involved. Rather than rely on federal judges, consider relying on federal agencies, state politicians, and even state courts.

Federal agencies play an important deregulatory role. *St. Joseph's Abbey* critically relied on Federal Trade Commission regulations. The FTC has already eliminated many of the most outrageous protectionist funeral home practices. Likewise, between 1975 and 1980 the federal government deregulated brokers, truckers, airlines, and telecommunications—all through initiatives from people who were chairing agencies allegedly captured by the industry.²¹ Apart from federal agencies, one can rely on state politicians. Governor John Kasich has, for instance, launched as one of his last initiatives a major effort to limit occupational licensing. Governor Kasich's reform requires that the state must check out the commissions that provide these monopolies every six years and decommission them.²²

Sometimes critics of agencies claim that they are inevitably captured by the industries that they regulate.²³ This is untrue. My father, in fact, was chair of the Securities and Exchange Commission at the time that the SEC undertook a major initiative to deregulate brokers' commissions. So the idea that, somehow, agencies cannot deregulate industries because they will be captured by those industries strikes me as false: Dad was never captured by the brokers.

Assume, however, that you think that my dad *was* captured by the brokerage industry: why do you think federal judges are

21. See Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1179 (2012); Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 325 n.2 (1990).

22. Nick Sibilla, *New Ohio Law Takes Aim At Occupational Licenses, Which Cost State \$6 Billion*, FORBES (Jan. 9, 2019, 3:15 PM), <https://www.forbes.com/sites/nicksibilla/2019/01/09/new-ohio-law-takes-aim-at-occupational-licenses-which-cost-state-6-billion/#5f12b64e6e95> [<https://perma.cc/W9Q9-3RJY>] (describing the new licensing regime in Ohio).

23. See, e.g., Michael A. Livermore & Richard V. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L. J. 1337, 1340 (2013).

not going to be captured? If you distrust the political process because of the influence of regulated businesses on politicians, then it strikes me as ludicrous to rely on federal judges as our salvation, because judges are appointed by politicians.

So trust in politics. We have federalism and separation of powers for many reasons; one of which is that they can be used to solve many of these problems that centralized judicial review is not well suited to solving. I think, at the margin, the federal courts probably will not reduce protectionist laws very much and might make them a lot worse by making them more consistent. Because federal courts have to accept protectionism as a means and cannot practically distinguish between means and ends, their efforts to strike down underinclusive means may very likely induce lawmakers to amend the law to make them more inclusive—and that could make the regulations even worse than they already are.

Thanks.

THE PERILS OF CIVIL ASSET FORFEITURE

ERIK LUNA*

My presentation will focus on civil asset forfeiture, which is the law enforcement seizure of private property suspected of involvement in criminal activity and the use of civil or administrative proceedings to forfeit such property to the government.¹ Typically, the actions are brought against the property in rem rather than against the owner in personam,² which, combined with the civil classification, allows the government to dispense with a number of rights that are typically provided to defendants in criminal proceedings.³

Over the years, this type of forfeiture has generated a series of troubling cases. Let me tell you about one such incident, the case of poor Tina Bennis.⁴ One evening, her husband, John Bennis, failed to return home as expected, prompting his worried wife to call a missing persons line.⁵ As it turned out, Tina's husband had gone on a forbidden frolic.⁶ Police officers had observed a woman flagging down motorists from a street corner until John stopped to pick her up.⁷ Further surveillance found the two involved in a sex act, and John Bennis was subsequently convicted of gross indecency.⁸

* Amelia D. Lewis Professor of Constitutional and Criminal Law, Sandra Day O'Connor College of Law at Arizona State University.

1. DRUG POLICY ALL., ABOVE THE LAW: AN INVESTIGATION OF CIVIL ASSET FORFEITURE IN CALIFORNIA 3 (2015), https://www.drugpolicy.org/sites/default/files/Drug_Policy_Alliance_Above_the_Law_Civil_Asset_Forfeiture_in_California.pdf [<https://perma.cc/4P5A-X6HW>].

2. *Id.* at 8.

3. *Id.* at 3.

4. Michigan *ex rel.* Wayne Cty. Prosecutor v. Bennis, 527 N.W.2d 483 (Mich. 1994), *aff'd sub nom.* Bennis v. Michigan, 516 U.S. 442 (1996).

5. *Bennis*, 516 U.S. at 468.

6. *Bennis*, 527 N.W.2d. at 486.

7. *Id.*

8. *Id.*

For Tina, it was bad enough that she had been betrayed by her husband, caught with a prostitute in the family car.⁹ But then law enforcement sought to take Tina Bennis's secondhand 1977 Pontiac—a car purchased primarily through Tina's babysitting earnings—because it was the site of her husband's illicit sex act.¹⁰ To the state courts, it did not matter that Tina was patently innocent, as the relevant statute did not require any showing with respect to her knowledge of criminal activity.¹¹

In a 1996 case, *Bennis v. Michigan*,¹² the U.S. Supreme Court rejected Tina's claim that the forfeiture of her interest in the car was unconstitutional in light of her acknowledged innocence.¹³ While recognizing the considerable appeal of Ms. Bennis's claim, the Court reasoned that, "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."¹⁴ In effect, the Court placed its imprimatur on a type of strict vicarious liability where an innocent individual can be penalized for the wrongs of someone else. In a dissenting opinion, Justice Stevens argued that "[t]he logic of the Court's analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property."¹⁵

As it turns out, the long line of cases referenced by the *Bennis* majority was based on, among other things, the ancient common law fiction of "deodand," the idea that property itself can be guilty.¹⁶ In a 1974 case, the Supreme Court described this history as follows:

At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a deodand. The origins of the deodand are traceable to Biblical and pre-Judeo-Christian

9. *Id.*

10. *Bennis*, 516 U.S. at 443–45; Brief for Petitioner at 2, *Bennis*, 516 U.S. 442 (No. 94-8729).

11. *Bennis*, 527 N.W.2d. at 495.

12. 516 U.S. 442 (1996).

13. *Id.* at 443.

14. *Id.* at 446.

15. *Id.* at 458 (Stevens, J., dissenting).

16. *See id.* at 472 (Kennedy, J., dissenting).

practices, which reflected the view that the instrument of death was accused and that religious expiation was required. The value of the instrument was forfeited to the King, in the belief that the King would provide the money for Masses to be said for the good of the dead man's soul, or insure that the deodand was put to charitable uses.¹⁷

Under the deodand fiction, the property—not the property owner—is considered liable.¹⁸ Now, I am a fan of history as much as anyone in this room, but judicial reliance on this particular fiction offers a dubious historical rationale for forfeiture law in the United States. After all, the English Crown's passion for seizing property caused American colonists to view forfeiture with great suspicion.¹⁹

Worse yet, the deodand fiction allows forfeitures to be characterized as civil remedies rather than criminal penalties. Labeling forfeitures as civil in nature certainly promotes government expedience by freeing the state from the substantial burdens of typical criminal cases. Forfeiture proceedings need not provide property owners many of the constitutional guarantees afforded criminal defendants,²⁰ including, for instance, the right to counsel and the protection against double jeopardy.²¹

Perhaps the most important consequences stem from dispensing with individual culpability and the government's obligation to prove its case beyond a reasonable doubt.²² With respect to culpability, as the *Bennis* decision showed, it is acceptable to hold a property owner strictly liable for the acts of others.²³ As for the burden of proof, forfeiture statutes historically provided a mere preponderance of the evidence as the

17. *Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–81 (1974) (footnotes omitted) (citation omitted).

18. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 25–26 (Paulo J.S. Pereira & Diego M. Beltran eds., 2011) (1881).

19. See James R. Maxeiner, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 776–79 (1977).

20. Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 HARV. L. REV. 2387, 2395–96 (2018) [hereinafter *How Crime Pays*].

21. *Id.* at 2395.

22. Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 278 (1992).

23. See *Bennis v. Michigan*, 516 U.S. 442, 446–47 (1996).

legal standard.²⁴ To be clear, many of the property owners targeted may, in fact, have been guilty of a crime.²⁵ But some have done nothing more than carry a lot of cash while traveling through a particularly pro-forfeiture jurisdiction.²⁶

None of this is to say that individual law enforcement officers are the problem—almost to a person, police and prosecutors are well-intentioned public servants who are trying to do their best to promote public safety.²⁷ Instead, the issue is one of incentive structures of a government institution, encouraging federal, state, and local agencies to confiscate billions of dollars in cash, cars, jewelry, real estate, and other private property over the past several decades through the practice of civil asset forfeiture.²⁸

Many statutes allow law enforcement agencies to keep all—or a substantial portion—of those proceeds,²⁹ a practice that is now described as “policing for profit” and has resulted in the vast increase in forfeitures.³⁰ As detailed in a study by the Institute for Justice, the U.S. Department of Justice took in \$93.7 million

24. Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446, 2484–86 (2016).

25. See, e.g., Press Release, U.S. Dep’t of Justice, Acting Manhattan U.S. Attorney Announces Historic Jury Verdict Finding Forfeiture of Midtown Office Building and Other Properties (June 29, 2017), <https://www.justice.gov/usao-sdny/pr/acting-manhattan-us-attorney-announces-historic-jury-verdict-finding-forfeiture-midtown> [<https://perma.cc/4XDY-YZNA>].

26. See Deanna Paul, *Police seized \$10,000 of a couple’s cash. They couldn’t get it back—until they went public.*, WASH. POST (Aug. 31, 2018, 8:22 PM), <https://beta.washingtonpost.com/nation/2018/09/01/police-seized-couples-cash-they-couldnt-get-it-back-until-they-went-public/?noredirect=on> [<https://perma.cc/4DSA-LEKQ>] (discussing examples of innocent people losing property due to civil forfeiture).

27. See John W. Huber, Opinion, *Civil forfeiture is a useful tool in fighting crime*, SALT LAKE TRIB. (Sept. 30, 2018), <https://www.sltrib.com/opinion/commentary/2018/09/30/commentary-civil/> [<https://perma.cc/V2M2-4DP7>].

28. See Christopher Ingraham, *Law enforcement took more stuff from people than burglars did last year*, WASH. POST (Nov. 23, 2015, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/> [<https://perma.cc/W4AP-ZTLZ>].

29. E.g., 18 U.S.C. § 981(e) (2012) (“Notwithstanding any other provision of the law . . . the Attorney General, the Secretary of the Treasury, or the Postal Service, as the case may be, is authorized to retain property forfeited pursuant to this section . . .”).

30. See generally Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998).

from federal forfeitures in 1986.³¹ Three decades later, that number climbed to \$4.5 billion in forfeitures.³² In fact, between 2001 and 2014, the Justice Department and the Treasury Department combined to take in almost \$29 billion through the forfeiture program.³³

Information from individual states is a little more difficult to come by, but the same Institute for Justice report found that fourteen jurisdictions had a combined forfeiture revenue of more than \$250 million in 2013.³⁴ Interestingly, state and local law enforcement sometimes work with the federal government to forfeit property.³⁵ Through a process known as equitable sharing,³⁶ the federal government can “adopt the seizure” made by state and local officials and then seek to forfeit those proceeds back to the seizing agency through federal law—thus avoiding state and local laws that might be more restrictive than their federal analogs.³⁷ The federal government takes a cut of those proceeds and gives the rest back to the relevant law enforcement agency.³⁸ As described by the Institute for Justice report, from 2000 to 2013, the Justice and Treasury Departments’ equitable sharing programs generated over \$5.8 billion in revenue for state and local law enforcement.³⁹

All this forfeited property can distort police behavior. By allowing agencies to keep the property they seize, law enforcement can circumvent the processes of legislative budgeting and thereby avoid a primary check wielded by state and local law-

31. DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 10 (2d ed. 2015), <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> [<http://perma.cc/4QFM-EKBR>].

32. *Id.*

33. *Id.*

34. *Id.* at 11 (compiling criminal forfeiture data from Arizona, California, Hawaii, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, Texas, Virginia, and Washington).

35. *Id.* at 25.

36. See Jefferson E. Holcomb, Tomislav V. Kovandzic & Marian R. Williams, *Civil asset forfeiture, equitable sharing, and policing for profit in the United States*, 39 J. CRIM. JUST. 273, 274 (2011); see also Blumenson & Nilsen, *supra* note 30, at 51–52.

37. Holcomb et al., *supra* note 36, at 274.

38. Blumenson & Nilsen, *supra* note 30, at 51–52.

39. CARPENTER ET AL., *supra* note 31, at 25.

makers.⁴⁰ This self-funding, as Professor Beth Colgan has written, allows law enforcement agencies to set priorities that counter or impede the goals of those democratically elected officials.⁴¹ On a tangible level, the financial gain from civil asset forfeiture may encourage police departments to shift their practices, as is best seen in the war on drugs.⁴² Rather than the conventional drug sting, where an undercover officer poses as a potential buyer of drugs, law enforcement now frequently opts for “reverse stings,” where the undercover officers act as drug dealers who can then seize and seek to forfeit the cash they obtain during the controlled drug buy.⁴³

In a somewhat similar fashion, law enforcement agencies have admitted to focusing their interdiction efforts on the southbound lanes of freeways rather than the northbound lanes.⁴⁴ Why, you ask? Well, drug traffickers heading north will

40. See Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL'Y REV. 293, 306–07 (2009); see also Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 944 (2015).

41. Beth A. Colgan, *Fines, Fees, and Forfeitures*, CRIMINOLOGY CRIM. JUST. L. & SOC'Y, Dec. 2017, at 22, 24 (“Allowing law enforcement and prosecutors to retain funds . . . set[s] priorities that may contradict or interfere with crime-control aims of the legislative branch or the public at large.”); see also Nick Sibilla, *Civil Forfeiture Now Requires A Criminal Conviction In Montana And New Mexico*, FORBES (July 2, 2015, 8:45 AM), <https://www.forbes.com/sites/instituteofjustice/2015/07/02/civil-forfeiture-now-requires-a-criminal-conviction-in-montana-and-new-mexico/#62aca9d45ee3> [<http://perma.cc/5H35-DU65>].

42. Benson, *supra* note 40, at 306–07 (“[L]aw enforcement agencies focused more resources on drug control because of the financial gains for the agencies arising from forfeitures. . . . [A]gencies focus on confiscations as opposed to criminal convictions . . .”).

43. See Blumenson & Nilsen, *supra* note 30, at 67 (“The shift in law enforcement priorities, from crime control to funding raids, is perhaps best revealed by the advent of the ‘reverse sting,’ a now common police tactic that rarely was used before the law began channeling forfeited assets to those who seized them.”); see also J. Mitchell Miller & Lance H. Selva, *Drug Enforcement's Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313, 325 (1994) (“This strategy [reverse stings] was preferred by every agency and department . . . because it allowed agents to gauge potential profit before investing a great deal of time and effort.”).

44. See Richard Minter, *Ill-Gotten Gains*, REASON, Aug. 1993, at 34 (quoting former New York City Police Commissioner Patrick Murphy that police have “a financial incentive to impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs. After all, seized cash will end up forfeited to the police department, while seized drugs can only be destroyed.” (internal quotation marks omitted)).

be carrying drugs for distribution while those heading south will be in possession of cash proceeds from the drug sales.⁴⁵ For law enforcement, any seized drugs must be destroyed, but the cash may be kept pursuant to forfeiture proceedings.⁴⁶ More generally, as Professor Colgan and others have argued, the financial benefit from seizing and forfeiting cash and property related to the drug trade may encourage law enforcement to prioritize drug crimes, both big and small, over crimes of violence.⁴⁷ This, in turn, may undermine public safety and the community's belief in the legitimacy of law enforcement efforts.⁴⁸

Let me close on a positive note: in the new millennium, civil asset forfeiture has been an area of sustained bipartisan reforms.⁴⁹ A majority of U.S. jurisdictions have modified their forfeiture statutes.⁵⁰ A few states have abolished civil asset forfeiture altogether,⁵¹ while others now require criminal convictions to precede any civil asset forfeiture actions.⁵² Other states have raised the burden of proof in civil asset forfeiture.⁵³ Here in Arizona, for instance, the burden of proof was increased

45. See *id.*; Jolie McCullough, Acacia Coronado & Chris Essig, *Texas police can seize money and property with little transparency. So we got the data ourselves.*, TEX. TRIB. (June 7, 2019), <https://apps.texastribune.org/features/2019/texas-civil-asset-forfeiture-counties-harris-webb-reeves-smith/> [<https://perma.cc/2C7A-Y9ZE>] (discussing how local cops keep an eye on the drug proceeds heading south and typically make more cash seizures in southbound lanes than northbound lanes).

46. Minitzer, *supra* note 44, at 34.

47. See Colgan, *supra* note 41, at 24.

48. Eric Moores, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 784–85 (2009).

49. See, e.g., Nick Sibilla, *Bipartisan Bill in Congress Would Dramatically Reform Civil Forfeiture*, INST. FOR JUST. (Mar. 27, 2019), <https://ij.org/press-release/bipartisan-bill-in-congress-would-dramatically-reform-civil-forfeiture/> [<https://perma.cc/5V5F-6S5L>] (noting that civil asset forfeiture reform transcends party lines and that thirty states and the District of Columbia have enacted such reforms since 2014).

50. JASON SNEAD, AN OVERVIEW OF RECENT STATE-LEVEL FORFEITURE REFORMS 3–9 (Heritage Found. Backgrounder, No. 3132, 2016), <https://thf-reports.s3.amazonaws.com/2016/BG3132.pdf> [<https://perma.cc/D8WL-CM4L>].

51. *Id.* at 9.

52. See, e.g., CAL. HEALTH & SAFETY CODE § 11470.1(c) (West Supp. 2020); see also Anne Teigen & Lucia Bragg, *Evolving Civil Asset Forfeiture Laws*, NAT'L CONF. ST. LEGISLATURES LEGISBRIEF, Feb. 2018, at 2, <https://www.ncsl.org/LinkClick.aspx?fileticket=F0TZDb4JtYs%3d&tabid=32059&portalid=1> [<https://perma.cc/MW4Z-BFZ7>].

53. SNEAD, *supra* note 50, at 5–7.

from preponderance of the evidence to the higher standard of clear and convincing evidence.⁵⁴ Today, most jurisdictions have also adopted an innocent owner defense, with some shifting the burden of proof to the government when property owners raise claims of innocence.⁵⁵

In addition, some jurisdictions provide a degree of transparency through law enforcement reporting requirements for seizures and forfeitures.⁵⁶ A handful of jurisdictions have also passed laws limiting the practice of equitable sharing, at least when it is done by the process of adoption by federal law enforcement.⁵⁷ A few jurisdictions, such as New Mexico, require that the forfeiture proceeds go to the state's general fund rather than to the seizing agency, thereby blunting much of the incentive to police for profit.⁵⁸

All told, however, most jurisdictions have charted a middle course, adding some procedural protections for property owners while retaining civil asset forfeiture as a tool for law enforcement.⁵⁹ But if nothing else, the people and their governments are trying to strike a balance in this area, which I believe to be a worthwhile endeavor.

54. ARIZ. REV. STAT. ANN. § 13-4305(E) (Supp. 2019).

55. See, e.g., 18 U.S.C. § 983(d)(1) (2012) ("An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute."); see also *How Crime Pays*, *supra* note 20, at 2389–90.

56. See, e.g., COLO. REV. STAT. ANN. § 16-13-701(4)(a) (West Supp. 2019).

57. See, e.g., NEB. REV. STAT. § 28-1603 (2016); see also *Civil Forfeiture Reforms on the State Level*, INST. FOR JUST., <https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/> [<https://perma.cc/2KN5-JYBX>] (last visited Sept. 16, 2019).

58. N.M. STAT. ANN. § 31-27-7(B)(3), (C) (2019); see also Nick Sibilla, *Cops Can't Ignore New Mexico's Ban On Civil Forfeiture, Court Rules*, FORBES (Dec. 19, 2018, 9:35 AM), <https://www.forbes.com/sites/nicksibilla/2018/12/19/cops-cant-ignore-new-mexicos-ban-on-civil-forfeiture-court-rules/#656b484c6a7d> [<https://perma.cc/LT7C-KDQS>].

59. SNEAD, *supra* note 50, 5–8.

ECONOMIC LIBERTY AND CRIMINAL JUSTICE

BETH A. COLGAN*

Thank you for having me. I'm going to be talking about non-forfeiture economic sanctions and just to make sure we are all on the same page, I am going to give a quick overview of the basic types of economic sanctions that are most prevalently used around the country.

So, obviously, a statutory fine is the most common type of economic sanction,¹ although we also have what are called surcharges in many jurisdictions.² Surcharges are essentially fines on top of fines that are typically targeted at particular funds.³ For example, if you are ticketed for a traffic violation, you might pay a surcharge to fund night court, to fund teen court, or to fund public services like public parks.⁴ Often, a surcharge funds things that have literally nothing to do with the criminal justice system.

In addition to those fines and surcharges, there is a common use of administrative fees, sometimes called user fees.⁵ For example, you might have to pay more if you opt for a jury trial,⁶ you might have to pay for the cost of your pretrial incarcera-

* Professor of Law, UCLA School of Law.

1. See Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 285 (2014) [hereinafter *Reviving the Excessive Fines Clause*].

2. *Id.*

3. *Id.*; see also Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 33 (2018) [hereinafter *Challenging the Modern Debtors' Prison*].

4. LAWYERS' COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 10 (2015), <https://lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf> [https://perma.cc/JPP6-GZM8]; Tyler Whitson & Joy Diaz, *Why Your Speeding Ticket Doesn't Pay For What You Think it Does*, KUT NEWS (Apr. 22, 2015), <https://www.kut.org/post/why-your-speeding-ticket-doesn-t-pay-what-you-think-it-does> [https://perma.cc/YH9F-E25K].

5. See Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 3, at 35–36.

6. See Colgan, *Reviving the Excessive Fines Clause*, *supra* note 1, at 286.

tion, or you might have to pay for your post-conviction incarceration.⁷ You might have to pay for things like—and this one usually surprises people—the cost of the public defender you only qualify for because you are too indigent to pay.⁸ As a result, these fees get tacked on and add up, and at times can surpass the amount of the fine in question.⁹

Another type of economic sanction that is in use in some but not all cases is victim restitution,¹⁰ which has a very different purpose that creates some interesting policy and constitutional questions that I'm happy to talk about.

Taken together, those are the general forms of economic sanctions we use. And we use them at all levels of cases, from traffic and low-level ordinance violations all the way up to the most serious of felonies. And we use them in juvenile courts as a form of punishment as well.¹¹

What happens if you cannot pay economic sanctions? For those who cannot pay immediately, the consequences can result in more debt. Oftentimes you have to pay collections costs and interest costs, and in many jurisdictions you have to pay a fee to be set up on a payment plan.¹² There can be additional fees if you cannot pay in the form that is preferred. If you are late on a payment, the fees may be so high that it effectively doubles the principal at stake.¹³ There are also other sanctions that can occur if you are unable to pay immediately. Your pro-

7. Steven Hale, *Pretrial Detainees Are Being Billed for Their Stay in Jail*, APPEAL (July 20, 2018), <https://theappeal.org/pretrial-detainees-are-being-billed-for-their-stay-in-jail/> [<https://perma.cc/2BZY-WXUX>]; Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, ATLANTIC (July 5, 2016), <https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026/> [<https://perma.cc/NND8-VU9W>].

8. See Colgan, *Reviving the Excessive Fines Clause*, *supra* note 1, at 286–87; see also Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 329–34 (2009).

9. See Colgan, *Reviving the Excessive Fines Clause*, *supra* note 1, at 286, 288–89.

10. *Id.* at 285.

11. JESSICA FEIERMAN, JUVENILE LAW CTR., DEBTORS' PRISONS FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM 6 (2016), <https://debtorsprison.jlc.org/documents/JLC-Debtors-Prison.pdf> [<https://perma.cc/Q6YE-EWDW>]; Colgan, *Reviving the Excessive Fines Clause*, *supra* note 1, at 285–86, 285 n.25.

12. Colgan, *Reviving the Excessive Fines Clause*, *supra* note 1, at 288–91.

13. *Id.* at 289, 291.

bation and parole might be extended¹⁴ and therefore the fees accompanying being on probation and parole increase as well. You may lose your driver's license in many states,¹⁵ which has serious repercussions for people's financial well-being.¹⁶ In some places, if you have been disenfranchised because of the nature of the conviction, the inability to vote is extended because you cannot pay.¹⁷ In many places, the response to non-payment is incarceration.¹⁸

Now, all of those responses are arguably, and in some cases flatly, unconstitutional,¹⁹ but they are very prevalent across the United States.

The reality is that many people cannot pay. To give you a picture of what we are talking about here, the 2017 Supplemental Poverty Measure showed that fourteen percent of people in the United States are living below the federal poverty line.²⁰ Even if they are earning minimum wage, in most states the minimum wage rate is so low that even adjusted for the earned income tax credit, a family of three would be unable to meet their basic needs.²¹ What we know from the Federal Reserve's Report on

14. See, e.g., ALA. CODE § 15-18-62 (2018); ARIZ. REV. STAT. ANN. § 13-915 (Supp. 2019); CAL. PENAL CODE § 1203.2(a) (Supp. 2020); COLO. REV. STAT. ANN. § 18-1.3-702(3) (Supp. 2019); MO. REV. STAT. § 559.100 (2016); N.Y. CRIM. PROC. LAW § 420.10(3) (McKinney Supp. 2019); TEX. CODE CRIM. PROC. ANN. art. 43.03(a) (West 2018).

15. ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 24 (2010), <https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf> [<https://perma.cc/JJ5Y-Z6EP>]; MARIO SALAS & ANGELA CIOLFI, LEGAL AID JUSTICE CTR., DRIVEN BY DOLLARS: A STATE-BY-STATE ANALYSIS OF DRIVER'S LICENSE SUSPENSION LAWS FOR FAILURE TO PAY COURT DEBT 1-4 (2017), <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf> [<https://perma.cc/S4J6-TVQ5>].

16. See SALAS & CIOLFI, *supra* note 15, at 5.

17. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55 (2019); Karin Martin & Anne Stuhldreher, *These people have been barred from voting today because they're in debt*, WASH. POST (Nov. 8, 2016, 3:00 AM), <https://www.washingtonpost.com/posteverything/wp/2016/11/08/they-served-their-time-but-many-ex-offenders-cant-vote-if-they-still-owe-fines/> [<https://perma.cc/SA7C-FLBA>].

18. See BANNON ET AL., *supra* note 15, at 19.

19. See *infra* notes 72-80 and accompanying text.

20. LIANA FOX, U.S. CENSUS BUREAU, THE SUPPLEMENTAL POVERTY MEASURE: 2017, at 1-2 (2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-265.pdf> [<https://perma.cc/2QF8-B5RS>].

21. David Cooper, *The Minimum Wage Used To Be Enough To Keep Workers Out Of Poverty—It's Not Anymore*, ECON. POL'Y INST. (Dec. 4, 2013), <https://www.epi.org/>

the Economic Well-Being of U.S. Households in 2017 is that about a quarter of adults cannot pay their monthly bills, so they are skipping things like basic necessities, food, housing, hygiene, etc.²² About a quarter are skipping necessary medical needs, so they are not able to access medication or other types of care.²³ Nearly half of adults in the United States—four out of ten—would be unable to pay an unexpected \$400 expense without having to either sell off personal property or take out loans.²⁴ Because nine million households in the United States are unbanked,²⁵ that means going to more expensive options like payday loans.²⁶ If you cannot pay, you end up in a Kafkaesque position—costs continue to stack up pushing you further into a hole and the cycle of not being able to pay and the risks that creates continues on.

This is particularly difficult for people with felony convictions or who are returning from periods of incarceration.²⁷ Now, why might that be? You heard in the last panel a little bit about occupational licensing restrictions.²⁸ In many states, one of the collateral consequences of a conviction is restrictions on occupational licensing.²⁹ For instance, you might not be able to

publication/minimum-wage-workers-poverty-anymore-raising/ [https://perma.cc/R9CS-HDEM]; Carey Anne Nadeau & Amy K. Glasmeier, *Bare Facts About the Living Wage in America 2017–2018*, LIVING WAGE (Aug. 30, 2018), <http://livingwage.mit.edu/articles/31-bare-facts-about-the-living-wage-in-america-2017-2018> [https://perma.cc/VC6U-FFHQ].

22. BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017, at 5–7 (2018), <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf> [https://perma.cc/9LUN-NJXC].

23. *Id.* at 23.

24. *Id.* at 21.

25. *Id.* at 25.

26. *Id.*

27. BETH A. COLGAN, BROOKINGS INST., ADDRESSING MODERN DEBTORS' PRISONS WITH GRADUATED ECONOMIC SANCTIONS THAT DEPEND ON ABILITY TO PAY 8–9 (2019), https://www.brookings.edu/wp-content/uploads/2019/03/Colgan_PP_201903014.pdf [https://perma.cc/8E68-CHVT].

28. See Panel Discussion at the Federalist Society National Student Symposium, *Is Economic Protectionism a Legitimate State Interest?* (Mar. 16, 2019).

29. See Alec C. Ewald, *Barbers, Caregivers, and the "Disciplinary Subject": Occupational Licensure for People with Criminal Justice Backgrounds in the United States*, 46 FORDHAM URB. L.J. 719, 732–33 (2019) (discussing broad collateral consequences of criminal convictions on state occupational licensing and providing an in-depth examination in the fields of barbering and nursing).

get a driver's license that allows you to operate commercial vehicles,³⁰ you might not be able to become a barber,³¹ and you might not be able to engage in all sorts of occupations that have literally nothing to do with the crime of conviction.³² In many jurisdictions, that marginalization continues until you complete your sentence. Therefore, if you can't complete probation and parole because you can't pay off the economic sanctions that are a condition of your probation and parole, you are still excluded from the economy.³³

Of course, there are also other limitations on occupations for people coming out of incarceration, including straightforward employer reluctance to hire.³⁴ But also employer reluctance may be in part because in many states, one of the collection mechanisms is garnishment, which creates another hurdle because employers have to deal with the administrative hassle of garnishment processes.³⁵ Of course, this is particularly bad for

30. See Adam Edelman, *Inmates who learn trades are often blocked from jobs. Now something's being done.*, NBC NEWS (May 26, 2018, 7:09 AM), <https://www.nbcnews.com/politics/politics-news/inmates-who-learn-trades-are-often-blocked-jobs-now-something-n877666> [<https://perma.cc/8MP6-S8QG>] (discussing licensing barriers that people face when reentering the workforce in particular fields).

31. See Ewald, *supra* note 29, at 732–33; see also, Elizabeth Hardison, *Ex-offenders in Pa. can be denied professional licenses because of old convictions. Bipartisan lawmakers want to change that*, PA. CAP.-STAR (May 23, 2019), <https://www.penncapitalstar.com/criminal-justice/ex-offenders-in-pa-can-be-denied-professional-licenses-because-of-old-convictions-bipartisan-lawmakers-want-to-change-that/> [<https://perma.cc/4F7L-RJQB>] (explaining how people can be denied occupational license under current Pennsylvania law).

32. *Barriers to Work: People with Criminal Records*, NAT'L CONF. ST. LEGISLATURES, (July 17, 2018), <http://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx> [<https://perma.cc/4E6J-3MYF>].

33. See, e.g., TARA GAMBOA-EASTMAN, W. CTR. ON LAW & POVERTY, *THE PROBLEM WITH PROBATION: A STUDY OF THE ECONOMIC AND RACIAL IMPACT OF PROBATION FEES IN CALIFORNIA 4* (2018), https://wclp.org/wp-content/uploads/2018/06/TheProblemWithProbation_GamboaEastman_ForWCLP_Final.pdf [<https://perma.cc/DNT4-QDWT>] (the inability to pay off criminal justice fees can lead to insurmountable debts, lower credit scores that affect one's ability to secure housing and employment, and re-incarceration).

34. Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), <https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html> [<https://nyti.ms/1C8KVBq>].

35. See, e.g., BANNON ET AL., *supra* note 15, at 11, 27 (mentioning garnishment as a collection tool for criminal justice debt); Randall J. Groendyk, *Garnishments: A*

people of color who are more likely to be returning to communities with stagnant economies.³⁶

There are strong arguments that the imposition of unmanageable criminal debt is incompatible with criminal justice goals in the United States. One of the main goals of criminal justice is equality in sentencing.³⁷ But one of the things we know is that in the context of economic sanctions, we're effectively punishing not just the individual who committed the offense, but the entire family. It is often family members who are paying the debt rather than the person who was incarcerated.³⁸ If you are incarcerated, if you are lucky enough to be able to get a job in prison—which is not true for most people—your wages could be cents per hour.³⁹ That's not going to make much of a dent in these kinds of bills, and so families end up paying. It's not obvious that we're getting to the criminal justice goal that people convicted of the same offense should be treated equally if people who haven't been convicted at all are paying.

Another criminal justice goal is deterrence. There are some studies that investigate the effect of recidivism with respect to the use of fines. As a general matter, what we see is that this research indicates that the imposition of higher rates of economic

Trap for Employers, NAT'L L. REV. (Dec. 17, 2011), <https://www.natlawreview.com/article/garnishments-trap-employers> [https://perma.cc/6JHL-BTF9] (describing how garnishment affects employers under Michigan law).

36. See Breanne Pleggenkuhle, *The Financial Cost of a Criminal Conviction*, 45 CRIM. JUST. & BEHAV. 121, 124 (2018); see also CHRISTIAN E. WELLER, JARYN FIELDS & FOLAYEMI AGBEDE, CTR. FOR AM. PROGRESS, *THE STATE OF COMMUNITIES OF COLOR IN THE U.S. ECONOMY* 1–3 (2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/01/pdf/comm_of_color.pdf [https://perma.cc/3MLN-ZHQA] (describing how the Great Recession of 2007 to 2009 further perpetuated economic disparities and insecurity for communities of color).

37. See, e.g., Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 127 (2010) (positing that the United States has a commitment to equality in sentencing regardless of a defendant's race or gender).

38. ELLA BAKER CTR. FOR HUMAN RIGHTS ET AL., *WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES* 7, 9 (2015), <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> [https://perma.cc/N4B9-6S8B]; Mary Fainsod Katzenstein & Maureen R. Waller, *Taxing the Poor: Incarceration, Poverty Governance, and the Seizure of Family Resources*, 13 PERSP. ON POL. 638, 638–40 (2015).

39. *State and federal prison wage policies and sourcing information*, PRISON POL'Y INST. (Apr. 10, 2017), https://www.prisonpolicy.org/reports/wage_policies.html [https://perma.cc/W6V5-CW7U].

sanctions or imposition of sanctions beyond a manageable amount leads to recidivism.⁴⁰ That result is found in studies that aren't attending to just unmanageable sanctions, but the use of economic sanctions overall. For example, a recent study analyzing the use of economic sanctions in juvenile court found that both imposing restitution and increasing the overall sanction amounts contributed to recidivism.⁴¹ The study also found that the continuation of the debt beyond the scope of the juvenile court—because in many jurisdictions the debt rolls over into adulthood even if you can otherwise not be under juvenile court jurisdiction—significantly contributed to later recidivism.⁴²

A few additional recent studies, based on self-reporting, focus on people with unmanageable criminal debt. What these studies show is that a significant percentage of people are engaging in criminal activity for the specific purpose of paying past criminal debt.⁴³ This usually involves crimes like drug sales, prostitution, and theft.⁴⁴ It is not unsurprising that, in many cases, unmanageable criminal debt is criminogenic because of the consequences I was talking about earlier.⁴⁵ It makes it less likely that you're going to have a driver's license that allows you to drive to work, it makes it less likely you'll be employed, it makes it less likely that you'll have housing, and it

40. See COLGAN, *supra* note 27, at 9–11 (summarizing research on the implications of economic sanctions for deterrence).

41. Alex R. Piquero & Wesley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 325, 334 (2017).

42. *Id.*

43. See ALA. APPLESEED CTR. FOR LAW & JUSTICE ET AL., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE 31 (2018), <http://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf> [<https://perma.cc/YB5F-EBRZ>]; FOSTER COOK, THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT STUDY 11–12 (2014), https://www.prisonpolicy.org/scans/uabtasc/the_burden_of_criminal_justice_debt_in_alabama-part_1_main_report.pdf [<https://perma.cc/EQ5Z-W2T5>]; Alexis Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1785 (2010).

44. ALA. APPLESEED CTR. FOR LAW & JUSTICE ET AL., *supra* note 43, at 31.

45. See *supra* notes 12–18 and accompanying text.

even interrupts family connections. That is all criminogenic; studies routinely tie those circumstances to increased recidivism.⁴⁶

One note of caution about relying on deterrence is that, as a theory, deterrence depends on the concept that people are making a choice about whether or not to behave within the confines of the law. But many of the offenses that we are talking about here are crimes of poverty.⁴⁷ A common punitive response, for instance, to people who are sleeping outdoors because they're homeless, and therefore are convicted of trespass is a fine. The idea that that person had the choice not to engage in the criminal activity is illusory.

This undermining of deterrence and all of these other problems I've discussed create a massive problem with respect to system legitimacy.⁴⁸ This, of course, blew up in the public consciousness after Ferguson,⁴⁹ but the idea that there are municipal and county and state governments that prize revenue generation over fairness in the criminal justice system has legitimacy consequences, both for people who are criminal justice involved and the broader community.⁵⁰ Perhaps unsurprisingly, then, we've seen a bipartisan pushback to these kinds of practices.⁵¹

46. See JOCELYN FONTAINE & JENNIFER BIESS, URBAN INST., HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED PERSONS 13 (2012), <https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF> [<https://perma.cc/5SQC-A9EM>] ("Housing . . . for formerly incarcerated persons is a critical component in the reentry process."); CATERINA GOUVIS ROMAN & JEREMY TRAVIS, URBAN INST. & FANNIE MAE FOUND., TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY 8 (2004), <https://www.urban.org/sites/default/files/publication/58121/411096-Taking-Stock.PDF> [<https://perma.cc/8F8M-UZPV>] ("[P]arole violation and rearrest may be more likely for those prisoners with no place to go upon release."); Joe Graffam et al., *Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals*, 40 J. OFFENDER REHABILITATION 147, 165 (2004) (recognizing the importance of family reunification and employment in successful reentry); Travis C. Pratt & Francis T. Cullen, *Assessing Macro-Level Predictors and Theories of Crime: A Meta-Analysis*, 32 CRIME & JUST. 373, 412–13 (2005) (finding both absolute and relative economic deprivation contribute to criminal conduct).

47. See ALA. APPLESEED CTR. FOR LAW & JUSTICE ET AL., *supra* note 43, at 30.

48. COLGAN, *supra* note 27, at 11.

49. See, e.g., Raven Rakia, *It's Not Just Ferguson: Cities nationwide are criminalizing black people to pay the bills*, NATION (Mar. 5, 2015), <https://www.thenation.com/article/its-not-just-ferguson/> [<https://perma.cc/UBV6-EALC>].

50. See Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 3, at 57–61.

51. Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 60 n.46 (2017) [hereinafter *Graduating Economic Sanctions*] (docu-

At the same time, we're seeing that many municipalities and even state governments are dependent on these economic sanctions for funding all kinds of public services.⁵² Interestingly, even cities that are not particularly dependent—in other words, that the money generated does not make up a significant part of their budget—heavily employ economic sanctions. One recent study has shown that the use of economic sanctions increases along with the percentage of the community that's African American.⁵³

What about outside of the criminal justice system? What are the consequences of these practices? Well, as I mentioned, there's decreased economic stability for both debtors and their families.⁵⁴ There have been, for instance, studies that suggest that these practices result in decreased child support payments.⁵⁵ There is also a recent study in Alabama that showed that eighty-three percent of the respondents had to skip basic needs for themselves and their families.⁵⁶ All of this, of course, affects credit records, which, in turn, makes it harder to find stable housing and employment, trapping people and their families in a cycle of punishment and poverty.⁵⁷

There are all of these problems with this system, and so we need to think about solutions and I'm going to throw a handful of both policy and constitutional law issues out, and if you want to talk about these things in Q and A, I'm happy to do so.

menting bipartisan and nonpartisan support for reforming current economic sanctions regime).

52. See, e.g., Mike Maciag, *Addicted to Fines: Small towns in much of the country are dangerously dependent on punitive fines and fees*, GOVERNING (Sept. 2019), <https://www.governing.com/topics/finance/gov-addicted-to-fines.html> [<https://perma.cc/5P2Y-K3UZ>].

53. Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1090 (2017).

54. See *supra* notes 12–18 and accompanying text.

55. See RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUSTICE CTR., *REPAYING DEBTS 2* (2007), https://csgjusticecenter.org/wp-content/uploads/2012/12/repaying_debts_summary.pdf [<https://perma.cc/WNM9-RJWG>]; see also Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 645 (2012) (discussing how incarceration, penalties, and fees lead to an accumulation of child support arrearages that are inevitably not paid off).

56. ALA. APPLESEED CTR. FOR LAW & JUSTICE ET AL., *supra* note 43, at 4.

57. BANNON ET AL., *supra* note 15, at 27; Applebaum, *supra* note 34.

The first one I think you're going to love and it's raise taxes.⁵⁸ Now, I know, I know, you've let a progressive into the room, and this is what happens. Okay, so here's the deal: we have grossly underfunded our court systems, our law enforcement, our prosecutors, and especially our public defenders over time.⁵⁹ That has real consequences including that there are no attorneys in the room to make the kinds of constitutional arguments I'm going to talk about in a moment.⁶⁰ Now, one way to begin fixing these problems is to raise taxes—that's just the honest answer. And keep in mind, these economic sanctions *are* regressive taxes.⁶¹

Of course, if fewer things were crimes, then we would have fewer expenses related to collections of criminal debt, incarceration, probation, and parole. So another potential reform is legalization. And I'm not just talking about marijuana; there are all sorts of crimes on the books that are arguably more about social control than public safety.⁶² We have to talk about that.

58. E.g., Lisa Foster & Joanna Weiss, Opinion, *American Courts should not be turned into revenue machines*, HILL (June 8, 2018), <https://thehill.com/opinion/judiciary/391449-american-courts-should-not-be-turned-into-revenue-machines> [<https://perma.cc/T2AB-J5S8>] (explaining how fines and fees damage public safety and harm low-income communities of color, and suggesting that New York should raise taxes on all citizens and eliminate fines and fees).

59. See John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 27, 2011, at 18; see also Maura Dolan & Victoria Kim, *Budget cuts to worsen court delays; Extended waits for suits to reach court, longer custody fights and lengthy traffic ticket battles are seen*, L.A. TIMES, July 20, 2011, at A1.

60. See *infra* notes 72–80 and accompanying text.

61. See COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 1–3 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [<https://perma.cc/LRP7-FCSZ>].

62. See, e.g., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 62–78 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/C3RK-YVYR>] (describing law enforcement targeting of African Americans through the use of offenses such as “Manner of Walking in Roadway” and failure to comply); Coty R. Miller & Nuria Haltiwanger, *Prostitution and the Legalization/Decriminalization Debate*, 5 GEO. J. GENDER & L. 207, 229 (2004) (discussing the status of the law regarding the sex trade in various states and examining the ongoing legalization debate).

We need to talk about graduating economic sanctions according to ability to pay.⁶³ Now, this is something that's increasingly used.⁶⁴ I'm happy to talk about institutional design,⁶⁵ but it's something that people on the right are really getting behind. So, the American Legislative Exchange Council (ALEC), for example, passed a resolution not long ago calling for this policy response.⁶⁶

We can talk about things like reforming collateral consequences, including through strict limitations on occupational and driver's license restrictions that I was talking about earlier.⁶⁷

We need to have a conversation about the scope of probation and parole. In the last panel, the panelists were talking about arbitrary bureaucracy.⁶⁸ If you want arbitrary bureaucracy, you should look at the way probation and parole are managed in the United States.⁶⁹ If any of you are looking for a law review comment to write, present a conservative approach to reforming that practice. That would be incredible.

63. See generally Colgan, *Graduating Economic Sanctions*, *supra* note 51 (exploring institutional design of a system of graduating economic sanctions). For a discussion of the difficulties of designing a system for graduation to avoid racial injustice, see Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175 (2019).

64. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 42.15 (West 2018); *Can't Afford to Pay*, SUPERIOR CT. CAL. COUNTY S.F., <https://www.sfsuperiorcourt.org/divisions/traffic/cant-afford-pay> [<https://perma.cc/V2NT-X5G3>] (last visited Sept. 16, 2019).

65. See Colgan, *Graduating Economic Sanctions*, *supra* note 51, at 73–103 (discussing key institutional design concerns including artificial inflation, consideration of income sources, and statutory maximum caps).

66. *Resolution on Criminal Justice Fines and Fees*, AM. LEGIS. EXCHANGE COUNCIL (Sept. 12, 2016), <https://www.alec.org/model-policy/resolution-on-criminal-justice-fines-and-fees> [<https://perma.cc/DVR9-LRA9>] (“Therefore Be It Resolved that when imposing fines and fees the offender’s ability to pay should be taken into account as one factor . . .” (emphasis omitted)).

67. See *supra* notes 12–18 and accompanying text.

68. See *supra* note 28.

69. See *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets*, COUNCIL ST. GOV'TS JUST. CTR., <https://csgjusticecenter.org/confinedandcostly/> [<https://perma.cc/4TP4-57LB>] (last visited Sept. 16, 2019); *Statement on the Future of Community Corrections*, COLUM. JUST. LAB (May 17, 2018), <https://justicelab.columbia.edu/statement-future-community-corrections> [<https://perma.cc/WDF8-GCZ3>].

We also need to talk about alternative methods of responding to what are now criminal justice issues.⁷⁰ We don't have to incarcerate everyone, we don't have to put everyone on probation and parole, and we don't have to fine people into poverty. There are alternative responses, and I'm happy to talk about some examples of that in Q and A.

Now, one of the problems here is because of the economic dependence that many lawmakers have on these practices, they may not be willing to move forward without a push and so that's where constitutional litigation can come in.⁷¹ I'm just going to tell you about, without detail, four quick arguments you could make that, again, I'm happy to talk about in the Q and A.

One claim is based on a series of due process cases dating back to the 1920s that say that it is a violation of due process for the judge that is imposing the economic sanction to have a conflict of interest.⁷² In other words, where judges are dependent either for their own purposes—their own salary—or to fund the courts generally. That's what's happening in many of these jurisdictions.

There's also a longstanding case from the 1980s, *Bearden v. Georgia*,⁷³ which is a combined equal protection and due process case that makes it flatly unconstitutional to incarcerate someone for nonpayment when they have no ability to pay unless there is no other way for the state to satisfy its penal interest.⁷⁴ That is a high bar, so in nearly all cases, if we're revoking or extending the terms of probation or parole or incarcerating someone for nonpayment, that is just unconstitutional.⁷⁵

There are also Excessive Fines Clause arguments,⁷⁶ which would be arguments made at sentencing. I'm sure you all saw

70. See, e.g., DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003).

71. See Colgan, *Graduating Economic Sanctions*, *supra* note 51, at 61.

72. See, e.g., *Connally v. Georgia*, 429 U.S. 245, 250 (1977); *Ward v. Village of Monroeville*, 409 U.S. 57, 59 (1972); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

73. 461 U.S. 660 (1983).

74. *Id.* at 672–73.

75. *Id.*

76. U.S. CONST. amend VIII; Colgan, *Challenging the Modern Debtors' Prison*, *supra* note 3, at 2.

about *Timbs v. Indiana*,⁷⁷ where the Excessive Fines Clause was just incorporated against the states thanks to the good work of the Institute for Justice.⁷⁸ There are all sorts of issues there including that the states are now trying to reverse progress made under the Excessive Fines Clause regarding civil asset forfeiture. But there are also other questions, such as does ability to pay matter for the excessiveness inquiry. Again, I'm happy to talk about those things.

All of this really also comes down to the right to counsel, which is currently under attack by some of the Justices on the Supreme Court.⁷⁹ The Sixth Amendment right to counsel does not apply if only fines or forfeitures are at issue.⁸⁰ That doesn't mean that the right couldn't be extended. But if there's no attorney in the room to preserve issues for appeal, that question or any other constitutional issue doesn't get to the Supreme Court, and so that's a real problem here.

The last thing I'll say is the Constitution is a floor and not a ceiling. One of the things that we've seen in a lot of conservative states recently is a push for statutory right to counsel, as opposed to a constitutional right to counsel,⁸¹ in order to make sure that these kinds of claims can be preserved and that people are treated fairly in the system. Some conservative lawmakers are taking the lead on that, and I hope to see that work extend further.

I'll end there.

77. 139 S. Ct. 682 (2019).

78. *Id.* at 687; see *Timbs v. Indiana: There are Limits: IJ Takes Excessive Fines Case to the U.S. Supreme Court*, INST. FOR JUST., <https://ij.org/case/timbs-v-indiana/> [<https://perma.cc/7UKQ-LAZA>] (last visited Sept. 16, 2019).

79. See *Garza v. Idaho*, 139 S. Ct. 738, 756–59 (2019) (Thomas, J., dissenting).

80. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979).

81. See, e.g., Alysia Santo, *How Conservatives Learned to Love Free Lawyers for the Poor*, MARSHALL PROJECT (Sept. 22, 2017, 1:15 PM), <https://www.themarshallproject.org/2017/09/24/how-conservatives-learned-to-love-free-lawyers-for-the-poor> [<https://perma.cc/JS8G-2Q83>].

TURNING ENTREPRENEURS INTO OUTLAWS

CHRISTINA SANDEFUR*

When first asked to participate on a panel about “economic crimes,” I thought I was not really equipped to opine on criminal law since I spend my time in court litigating civil cases to protect constitutional rights. Then I thought a little more about the types of cases I had been working on. I realized, quite to my dismay, that I *am* qualified to discuss criminal law because I have observed our governments at all levels engaging in a disturbing trend of criminalizing innocuous, peaceful economic activities, simply because those activities involve the exchange of money.

I will discuss a local and a federal example of these attacks on economic liberty. At the local level, cities across the nation are turning responsible homeowners into criminals, simply for renting out their homes to overnight guests.¹ Home sharing, often facilitated via platforms like Airbnb² or HomeAway,³ involves hosts opening their homes to overnight guests in exchange for money. You might think of it as a short-term rental or vacation rental. Despite technology making this practice more apparent and prevalent today, it has actually existed since the country’s Founding.

People have allowed overnight guests to stay in their homes for centuries—sometimes in exchange for money, but also in exchange for chores, meals, or other work or goods.⁴ This gives

* Executive Vice President, Goldwater Institute.

1. See, e.g., PACIFIC GROVE, CAL., MUN. CODE §§ 7.40.010–7.40.200 (2019); CHL, ILL., MUN. CODE §§ 4-13-100, 4-13-260(a)(9), 4-13-270(c), 4-14-010, 4-14-040(b)(8)–(9), 4-14-060(d)–(f), 4-14-080, 4-14-090, 4-14-100, 4-16-230 (2019); MIAMI BEACH, FLA., CODE OF ORDINANCES §§ 142-905(b)(5), 142-1111 (2019); SEATTLE, WASH., MUN. CODE §§ 6.600.010–6.600.150 (2019).

2. *About Us*, AIRBNB NEWSROOM, <https://press.airbnb.com/about-us/> [https://perma.cc/EW56-DGC7] (last visited Sept. 10, 2019).

3. *Company Information*, HOMEAWAY, <https://www.homeaway.com/info/about-us/company-info> [https://perma.cc/3HED-C6CB] (last visited Sept. 10, 2019).

4. See Jamila Jefferson-Jones, *Airbnb and the Housing Segment of the Modern “Sharing Economy”: Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42

homeowners additional money, which they can use to pay their bills or make improvements to their homes.⁵ It also gives travelers a wider variety of options in terms of price, location, and style of housing, and it allows them to experience local communities more intimately. The only thing that has changed between the Founding period and today is the burst of technology that has allowed homeowners and visitors to use online platforms to communicate. This development has made the practice of home sharing easier than ever before. This practice is also more accountable than ever before because all parties have access to more information. For instance, it is easier than ever for renters or neighbors who have a bad experience to leave feedback.⁶ Further, homeowners can be more selective about who stays in their homes, and they are able to make sure that those people are knowledgeable about local laws.

Cities, however, are responding to the growth in home sharing in a very different way. Rather than welcoming this economic activity, officials are instead imposing draconian new rules on this long-established practice.⁷ It has always been legal to allow an overnight guest to stay in your home for free, to let a friend to sleep on your couch, to have house sitters, or to have someone stay in your home and take care of your pets while you are out of town. However, in a growing number of cities, it is now not just illegal, but in many jurisdictions it is an

HASTINGS CONST. L.Q. 557, 562–64 (2015); *see also* WALT WHITMAN, A COLLECTION OF RECENTLY DISCOVERED WRITINGS 22–24 (Joseph Jay Rubin & Charles H. Brown eds., 1950).

5. Christopher Koopman, *Airbnb ruling deprives struggling New Yorkers of a steady income*, N.Y. POST (Oct. 21, 2016, 10:58 PM), <https://nypost.com/2016/10/21/airbnb-ruling-deprives-struggling-new-yorkers-of-a-steady-income/> [<https://perma.cc/P7QE-ST6E>].

6. *See, e.g., How can I Stay Neighborly as a community member*, HOMEAWAY, <https://help.homeaway.com/articles/how-can-i-stay-neighborly-as-a-community-member> [<https://perma.cc/2TEH-LRKH>] (last visited Sept. 10, 2019); *Trust & Safety: Hosting*, AIRBNB, <https://www.airbnb.com/trust/> [<https://perma.cc/R2M7-9V8T>] (follow “Hosting” hyperlink) (last visited Sept. 10, 2019).

7. *See, e.g., Ben Lane, Airbnb takes Boston to court over city “draconian” short-term rental rules*, HOUSINGWIRE (Nov. 16, 2018, 11:49 AM), <https://www.housingwire.com/articles/47424-airbnb-takes-boston-to-court-over-citys-draconian-short-term-rental-rules/> [<https://perma.cc/US86-GM3Y>]; Ally Marotti, *Chicago’s Airbnb home-sharing rules are ‘draconian,’ lawsuit says*, CHI. TRIB. (Nov. 16, 2016, 6:30 AM), <https://www.chicagotribune.com/business/ct-airbnb-shared-housing-lawsuit-1116-biz-20161115-story.html> [<https://perma.cc/3EFF-MPMM>].

actual crime, to rent your home short term in exchange for money.⁸

These cities treat home sharing itself as the crime—regardless of whether a particular guest is causing any kind of nuisance like making excessive noise, littering the yard with trash, or parking where they should not.⁹ These are very difficult laws for cities to enforce.¹⁰ Of course, the reason for that difficulty is the exact reason why the practice should not be a crime—although there are occasional problems with short-term rentals (as is true of long-term rentals, or owner-occupied homes), most of the time there are not. Usually, neighbors cannot tell whether somebody is renting their home to a short-term renter because the guest uses that home for a residential use—in the same manner a homeowner or long-term renter would—and goes about his business in a residential way. Unless the guest causes a disturbance, neighbors usually do not have reason to know whether somebody is staying in that home in a short-term manner (and thus violating the law) or a long-term manner (and is not). Therefore, cities have a difficult time enforcing these laws outside of the very small number of instances where occupants are actually causing nuisances (and thus are already violating other laws), so they have to resort to drastic measures.¹¹ And cities get away with such extreme actions because anti-home-sharing laws are laws prohibiting economic activity. Law schools teach students that, in the eyes of courts, economic rights are not really rights at all.¹² Courts are

8. See, e.g., PACIFIC GROVE, CAL., MUN. CODE § 7.40.140 (2019); CHARLOTTE, N.C., CODE OF ORDINANCES § 13-44(a) (2019); ARLINGTON, VA., CTY. CODE OF ORDINANCES § 64-12 (2011); SEATTLE, WASH., MUN. CODE § 6.600.130 (2019).

9. *Supra* note 8.

10. See Associated Press, *Honolulu Adds Inspectors to Help Enforce Vacation Rental Law*, U.S. NEWS (Aug. 16, 2019, 11:45 AM), https://www.usnews.com/news/best-states/hawaii/articles/2019-08-16/honolulu-adds-inspectors-to-help-enforce-vacation-rental-law?src=usn_tw [<https://perma.cc/T3GM-G8SJ>]; see also Kyra Gurney & Taylor Dolven, *Huge fines, midnight busts: Inside Miami Beach's war on short-term rentals*, MIAMI HERALD (Mar. 11, 2019, 1:47 PM), <https://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article226269295.html> [<https://perma.cc/4KJC-G6FZ>]; *Protecting Your Right to Share Your Home: Mendez v. Chicago*, GOLDWATER INST. (Nov. 15, 2016), <https://goldwaterinstitute.org/mendez-v-chicago/> [<https://perma.cc/KVS5-ENX3>].

11. See Associated Press, *supra* note 10.

12. See, e.g., Louis Henkin, *Economic Rights Under the United States Constitution*, 32 COLUM. J. TRANSNAT'L L. 97, 102–03, 107–09, 112–13, 119 (1994).

willing to rubber stamp infringements on economic rights, treating them more like mere privileges and permissions from the government.¹³

This problem is compounded when cities impose massive fines on anyone who violates these anti-home-sharing laws. The City of Miami Beach, which was founded on tourism¹⁴ and depends on tourism as its lifeblood, has decided to outlaw and criminalize the renting of one's home to short-term overnight guests in almost every place in the city.¹⁵ If you violate that law and have somebody stay in your home overnight, you can be fined up to \$100,000 per night.¹⁶ This is not an overnight guest who is causing any sort of problem—the violation is simply that you've let somebody stay in your home overnight. A fee for home sharing just a few nights could quickly add up to the entire value of a host's home.

Cities look at this as a way to increase revenue,¹⁷ and it is a win-win for them because they get to outlaw the activity and also intimidate residents into giving up their property rights because of the serious consequences. And then, of course, city governments get to pocket the money (if they're actually able to recover it—many people owe the City of Miami Beach large sums of money and are unable to pay it¹⁸). These people will eventually lose their homes and their livelihoods because the city is going to go after them for those unpaid fines.¹⁹

This is not only abhorrent public policy—it is also unconstitutional. My colleagues at the Goldwater Institute are challenging these excessive fines in Florida state court under the Excessive Fines Clause of the Constitution of the State of Florida.²⁰ Many

13. *See id.*

14. *See* Andres Viglucci, *The 100-year story of Miami Beach*, MIAMI HERALD (Mar. 21, 2015, 11:32 PM), <https://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article15798998.html> [<https://perma.cc/XA33-ZGDL>].

15. MIAMI BEACH, FLA., CODE OF ORDINANCES §§ 142-905(b)(5), 142-1111 (2019).

16. *Id.*

17. Kristine Phillips, *A Florida woman was fined \$100,000 for a dirty pool and overgrown grass. When do fines become excessive?*, USA TODAY (July 22, 2019, 5:40 PM), <https://www.usatoday.com/in-depth/news/politics/2019/07/19/florida-city-hits-homeowners-massive-penalties-supreme-court-excessive-fines/1691703001/> [<https://perma.cc/7CJB-JD4Y>].

18. Gurney & Dolven, *supra* note 10.

19. Phillips, *supra* note 17.

20. FLA. CONST. art. I, § 17; *Challenging the Highest Home-Sharing Fines in the Nation*: Nichols v. City of Miami Beach, GOLDWATER INST. (June 27, 2018), <https://>

state constitutions protect individual liberties to a greater extent than the U.S. Constitution, and the state constitutions have their own provisions protecting individual liberty and stopping government overreach.²¹ Florida's Excessive Fines Clause protects people from fines that are "grossly disproportional" to the person's action.²² If it is not grossly disproportional to be charged \$100,000 for peacefully exercising your property rights and letting somebody stay in your home overnight, then I do not know what is. That is the argument the Goldwater Institute will be making in Florida state court.²³

One might ask why advocates for economic rights have been turning to the courts instead of the city councils and the state legislatures. There is a legal reason and a practical reason. As a legal matter, it is the responsibility of the courts to uphold their state constitutions and the U.S. Constitution, and citizens should never have to go to a city council or a state legislature and beg them to respect their constitutional rights.²⁴ That is the job of judges upholding the constitutions, that is why we have constitutions, and that is why we go to court.²⁵ And as a practical matter, citizens have a tough fight against special interests before city councils and state legislatures. The hotel industry, for example, had an incentive to go to the Mayor and City Commission of the City of Miami Beach and convince them to outlaw and criminalize home sharing.²⁶

goldwaterinstitute.org/challenging-the-highest-home-sharing-fines-in-the-nationnichols-v-city-of-miami-beach/ [https://perma.cc/8TT9-VFXR]. One reason the Goldwater Institute chose to litigate using Florida's Excessive Fines Clause is that the lawsuit began before the Supreme Court had decided *Timbs v. Indiana*, 139 S. Ct. 682 (2019), which finally incorporated the U.S. Constitution's Excessive Fines Clause of the Eighth Amendment against the states. *Id.* at 686–87.

21. Clint Bolick, *State Constitutions: Freedom's Frontier*, 16 CATO SUP. CT. REV. 15, 15–17 (2017).

22. FLA. CONST. art. I, § 17.

23. Since this speech was delivered, a Florida trial court struck down Miami's home sharing ban and its accompanying \$20,000 to \$100,000 fines on state statutory grounds. The court did not reach the constitutional claim. *Miami Beach's \$100,000 Home-sharing Fines Struck Down*, GOLDWATER INST.: DEF. LIBERTY BLOG (Oct. 7, 2019), <https://indefenseofliberty.blog/2019/10/07/miami-beachs-100000-home-sharing-fines-struck-down/> [https://perma.cc/8V3W-D3T2].

24. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 177, 180 (1803).

25. *Id.*

26. Katie Benner, *Inside the Hotel Industry's Plan to Combat Airbnb*, N.Y. TIMES (Apr. 16, 2017), <https://www.nytimes.com/2017/04/16/technology/inside-the-hotel-industrys-plan-to-combat-airbnb.html> [https://perma.cc/3EMA-557Z].

Here are a couple of interesting examples from Arizona. The Town of Jerome, Arizona, is a small, beautiful tourist town that outlawed short-term rentals before the Goldwater Institute and its allies stepped in and fixed the problem.²⁷ The Jerome Town Council defended its decision to outlaw home sharing by warning that people who are only staying for a short term might put their trash out on the wrong day, which could cause wild javelinas to eat away at the trash and make a mess.²⁸ No matter that a reasonable person might recognize that residents or the city government could tell these visitors when trash day is, and visitors could probably put their trash out on that day.

Another of the city council's arguments was that the potholes all over the Town of Jerome might hurt short-term guests who do not know they are there.²⁹ Never mind that the town could just fix the potholes. And the most entertaining argument was that allowing short-term rentals would result in a lack of housing for people who want to serve in city government.³⁰ I can't make this stuff up.

Even worse, the City of Sedona, another beautiful, popular tourist location, also decided to criminalize home sharing, again before the Goldwater Institute came in and fixed the problem.³¹ The city did not argue that there were nuisances, like noise, traffic, or trash problems. Rather, the City of Sedona responded to the aesthetic desires of a few local residents, who argued that the city ought to preserve the community for local artists and families, rather than allowing visiting outsiders in

27. Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-Home-Sharing Regulations Chip Away at the Foundation of an American Dream*, 39 U. HAW. L. REV. 395, 431–33 (2017); Glenn Odegard, *Preserving History with Home-Sharing in Jerome, Arizona*, GOLDWATER INST.: DEF. LIBERTY BLOG (Aug. 16, 2018), <https://indefenseofliberty.blog/2018/08/16/preserving-history-with-home-sharing-in-jerome-arizona/> [https://perma.cc/7982-64V2].

28. See CHRISTINA SANDEFUR & TIMOTHY SANDEFUR, GOLDWATER INST., PROTECTING PRIVATE PROPERTY RIGHTS: THE PROPERTY OWNERSHIP FAIRNESS ACT 17 (2016), https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2016/2/9/Final%20Property%20Rights%20paper.pdf [https://perma.cc/F3VU-2QPE].

29. *Id.*

30. *Id.*

31. *Sedona Grand, LLC v. City of Sedona*, 270 P.3d 864, 866 (Ariz. Ct. App. 2012); *Sedona Grand v. City of Sedona*, GOLDWATER INST. (Aug. 2, 2017), <https://goldwaterinstitute.org/sedona-grand-v-city-of-sedona/> [https://perma.cc/MB92-BHAM].

their neighborhoods.³² Never mind that a tourist city's economy is built on outsiders visiting.³³

Can you imagine a city criminalizing the peaceful use of its residents' property because neighbors don't want outsiders in the community?³⁴ While that might be the role of a homeowner association when people contract to determine how to use their properties, a city government should not have that power. It is a dangerous proposition that government not only should be able to decide who is desirable and who is not in a particular community, but also that it should be able to criminalize violations of that judgment. Miami Beach,³⁵ Nashville,³⁶ and cities across the country³⁷ are not only fining people excessively, but

32. See, e.g., SANDEFUR & SANDEFUR, *supra* note 28, at 17 ("Despite vague references to 'the peace, safety and general welfare of the residents,' city records showed that officials adopted the rental ban in order to protect its 'small-town character' and 'scenic beauty,' not to prevent any public dangers. The complaints officials received from residents all related to general grievances about roadside parking or traffic, or neighbors expressing a desire to live in a 'small town' where 'you know most everyone.' These residents urged the city to ban short-term rentals in order to maintain 'a quiet, friendly, family' neighborhood—not to protect public safety."); Joe Dana, *Sedona's quality of life impacted by home-sharing economy, locals say*, 12NEWS (Aug. 1, 2019, 2:40 PM), <https://www.12news.com/article/news/local/arizona/sedonas-quality-of-life-impacted-by-home-sharing-economy-locals-say/75-50af04a0-bd55-4092-a7a9-b4ee6773385d> [<https://perma.cc/C9GH-FS8D>].

33. See *Tourism revenue increases*, SEDONA RED ROCK NEWS (Sept. 23, 2016), <https://www.redrocknews.com/news/88888896-city-news/42973-tourism-revenue-increases> [<https://perma.cc/R3Y3C-HAVK>]; *Tourism's Community Impact*, SEDONA CHAMBER COM. & TOURISM BUREAU, <https://sedonachamber.com/why-tourism/tourisms-community-impact/> [<https://perma.cc/38J6-4N4T>] (last visited Aug. 26, 2019).

34. Christina Sandefur, *Building Community Shouldn't Mean Slamming the Door to Visitors*, GOLDWATER INST.: DEF. LIBERTY BLOG (May 2, 2019), <https://indefenseofliberty.blog/2019/05/02/building-community-shouldnt-mean-slamming-the-door-to-visitors/> [<https://perma.cc/5JS8-XLBQ>].

35. MIAMI BEACH, FLA., CODE OF ORDINANCES §§ 142-905(b)(5), 142-1111 (2019); Taylor Dolven, *The punishment for running an illegal Airbnb in Miami Beach is likely to get a lot worse*, MIAMI HERALD (Aug. 2, 2019, 1:32 PM), <https://www.miamiherald.com/news/business/tourism-cruises/article233436012.html> [<https://perma.cc/9S37-W64U>].

36. NASHVILLE, TENN., CODES OF ORDINANCES § 17.16.070(U) (2019); Sandy Mazza & Adam Tamburin, *Man sentenced to jail after city officials said he operated an illegal Airbnb*, TENNESSEAN (Feb. 26, 2019, 3:30 PM), <https://www.tennessean.com/story/news/2019/02/26/nashville-airbnb-operator-jail-sentence-layton-jones-city-code/2993986002/> [<https://perma.cc/MUD7-4DRQ>].

37. See, e.g., Kate Gibson, *Illegal Airbnb rentals get San Francisco couple \$2.25M fine*, CBS NEWS (Nov. 5, 2018, 6:16 PM), <https://www.cbsnews.com/news/illegal-airbnb-rentals-get-san-francisco-couple-2-25m-fine/> [<https://perma.cc/WEG2-T3TY>]; Sam Tabachnik, *Denver couple charged with felonies for short-term rental violation as city*

they're even putting them in jail for violating these anti-home-sharing rules. Cities are taking away people's livelihoods and taking away their liberties for the "crime" of allowing people to stay overnight in their homes.

This criminalization of harmless economic activity has implications far beyond economic liberty and property rights. Some cities are even outlawing home sharing advertisements, and they're compelling online platforms to turn those homeowners and advertisements over to the police and city government.³⁸ How are cities able to outlaw these advertisements? Isn't truthful speech protected by the First Amendment? It typically is, but not always when the underlying activity is illegal—especially not when the underlying activity is a crime.³⁹ If the underlying activity is a crime, then the cities argue that they're also able to outlaw and criminalize the speech because it's speech about something that is criminal and perpetuates that illegal activity.⁴⁰ Although courts sometimes embrace this type of reasoning, such an argument can be taken too far. As the Fifth Circuit observed in *Byrum v. Landreth*,⁴¹ if the government can criminalize harmless behavior to empower itself to censor

moves to tighten reins on vacation rentals, DENVER POST (June 14, 2019, 10:37 AM), <https://www.denverpost.com/2019/06/11/denver-short-term-rental-airbnb-arrest/> [<https://perma.cc/NMC4-KJ9B>].

38. Greg Bensinger, *New York Governor Signs Bill Authorizing Fines for Airbnb Rentals*, WALL ST. J. (Oct. 21, 2016, 3:55 PM), <http://www.wsj.com/articles/new-york-governor-signs-bill-authorizing-fines-for-airbnb-rentals-1477079740> [<https://perma.cc/S9SM-QQG8>]; Emma Whitford, *It's Now Illegal To Advertise Your Apartment Short-Term On Airbnb*, GOTHAMIST (Oct. 21, 2016, 3:35 PM), <https://gothamist.com/2016/10/21/airbnb-behave.php> [<https://perma.cc/G2DU-RZF3>].

39. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1948).

40. Kia Kokalitcheva, *Airbnb Threatens to Sue New York If Gov. Signs New Home-Sharing Bill*, FORTUNE (Sept. 7, 2016), <http://fortune.com/2016/09/07/airbnb-sues-new-york-state/> [<https://perma.cc/2H22-CR6Q>] (Assemblywoman Deborah Glick was surprised that the New York law was controversial, because "You can't advertise an illegal activity." (internal quotation marks omitted)); Jessica Soultanian-Braunstein, *Legislation Proposed in NY State Assembly Would Put an End to Online Advertising of Illegal Short-Term Apartment Rentals*, CITYLAND (Mar. 1, 2016), <http://www.citylandnyc.org/23749-2/> [<https://perma.cc/EW4M-MJCU>] (Assemblywoman Linda Rosenthal, who sponsored New York's ban on home sharing advertisements said, "This legislation targets serial illegal hotel kingpins who advertise and rent out multiple units by providing enforcement entitles [sic] with strong new tools to crack down on this egregious law breaking." (internal quotation marks omitted)); Mike Vilensky, *Albany Approves Airbnb Penalties*, WALL ST. J. (June 17, 2016, 7:29 PM), <http://www.wsj.com/articles/albany-approves-airbnb-penalties-1466206171> [<https://perma.cc/MDC5-6YAF>].

41. 566 F.3d 442 (5th Cir. 2009).

people or to intrude on other rights, then our constitutional rights are doubly at risk.⁴² We at the Goldwater Institute are certainly making that argument in courts across the country as we stand up to excessive bans and the criminalization of home sharing.

The federal government is also intruding on the economic rights of Americans. The U.S. Food and Drug Administration (FDA) is applying rules to pure speech that were instead designed to regulate economic actions. It is doing this by pursuing strict liability criminal penalties against people in the healthcare industry for doing no more than simply speaking the truth in a way that can ultimately help patients.

Under federal law, a pharmaceutical company that manufactures drugs or medical devices can be charged with a *crime* for simply telling a doctor about a legal, safe, and alternative use for a particular medicine.⁴³ This is the federal off-label speech rule, also called the FDA gag rule.⁴⁴ Most readers have used a medical treatment off label. An off-label treatment occurs when a doctor prescribes a drug that is legally on the market after going through the FDA approval process—which in and of itself is a daunting task⁴⁵—for a purpose, patient population, or dose other than what the FDA approved it for.⁴⁶ This is perfectly lawful, it happens all the time, and it's legal, safe, and common.⁴⁷

42. *Id.* at 447 (finding state's assertion that calling oneself an "interior designer" without receiving a government license is unprotected speech to be circular and would "authorize legislatures to license speech and reduce its constitutional protection by means of the licensing alone").

43. 21 U.S.C. §§ 331, 333, 352 (2012 & Supp. V 2018); *see also* Christina Sandefur, *The FDA's Approach to Off-Label Communications: Restricting Free Speech in Medicine?*, REG. TRANSPARENCY PROJECT (May 10, 2018), <https://regproject.org/wp-content/uploads/RTP-FDA-Health-Working-Group-Paper-Off-Label-Communications.pdf> [<https://perma.cc/6K4S-F9E2>].

44. *See* U.S. FOOD & DRUG ADMIN., GOOD REPRINT PRACTICES FOR THE DISTRIBUTION OF MEDICAL JOURNAL ARTICLES AND MEDICAL OR SCIENTIFIC REFERENCE PUBLICATIONS ON UNAPPROVED NEW USES OF APPROVED DRUGS AND APPROVED OR CLEARED MEDICAL DEVICES (2009).

45. *Id.*; *see also* MARK FLATTEN, GOLDWATER INST., DEAD ON ARRIVAL: FEDERAL "COMPASSIONATE USE" LEAVES LITTLE HOPE FOR DYING PATIENTS 4 (2016), <https://goldwaterinstitute.org/wp-content/uploads/2016/02/Dead-On-Arrival-Report.pdf> [<https://perma.cc/8F99-8PYR>].

46. U.S. FOOD & DRUG ADMIN., *supra* note 44.

47. *See* Carolyn M. Clancy, *Off-Label Drugs: What You Need to Know*, AGENCY FOR HEALTHCARE RES. & QUALITY (Apr. 21, 2009), <https://archive.ahrq.gov/news/>

One in five of all prescriptions are for off-label uses.⁴⁸ But here's the oddity in the law: although the treatment is legal and prescribing the off-label treatment is legal, it is often a crime for a manufacturer of that treatment to share truthful, nondeceptive information about off-label treatments with a provider.⁴⁹

Because the manufacturer is usually the party with the most up-to-date information about the treatment, it is in a position to share alternate uses and negative side effects with doctors to guide their off-label treatments.⁵⁰ So the FDA gag rule not only harms the companies themselves by depriving them of their free speech rights, but it also harms doctors who may not know about all of the tools available to treat patients. Ultimately, that harms patients because they have less information and their doctors are not fully equipped to help heal them.

Black letter First Amendment case law teaches that commercial speech receives less protection than many other types of speech, like political speech.⁵¹ Note that the text of the First Amendment does not make such distinctions.⁵² Speech is speech, and it is all protected the same way as far as our Founding Fathers were concerned.⁵³ However, recent cases have confirmed that commercial speech is still protected speech,⁵⁴ so one might wonder how the FDA is able to outlaw, and even criminalize, truthful speech about a lawful practice. From the FDA's perspective, this is speech that is somehow tainted because it is performed to facilitate an economic activity.

columns/navigating-the-health-care-system/042109.html [https://perma.cc/RS6R-7GBR]; see also Sandefur, *supra* note 43.

48. Clancy, *supra* note 47; Sandefur, *supra* note 43.

49. See Paul Howard & James Copland, *Off-Label, Not Off-Limits: The FDA Needs To Create a Safe Harbor For Off-Label Drug Use*, 110 MO. MED. 106, 108 (2013) ("Companies' fear of federal criminal action to enforce off-label drug promotion is not merely hypothetical. Claims of illicit off-label drug promotion have been among the most commonly asserted Medicaid fraud allegations in federal enforcement actions."); see also Sandefur, *supra* note 43.

50. Howard & Copland, *supra* note 49, at 107.

51. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561–63 (1980).

52. U.S. CONST. amend. I.

53. *Id.*

54. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (dealing with a restriction on sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001) (dealing with a ban on tobacco ads and sales of tobacco within 1,000 feet of schools and playgrounds).

Courts that have heard challenges to this ban on speech regarding off-label uses have stepped up to strike down the FDA gag rule.⁵⁵ A prime example of this comes from *United States v. Caronia*,⁵⁶ in which the Second Circuit overturned the criminal conviction of a pharmaceutical representative whose only crime was to share truthful information about lawful treatments—all without the presence of fraud or other misrepresentation.⁵⁷ The Second Circuit in *Caronia* overturned the conviction on the ground that speech, including speech used in pharmaceutical marketing, cannot be prosecuted under the First Amendment.⁵⁸ In other words, the court held that if the conduct is lawful, then the speech is also lawful, and as long as it is not false or misleading, then neither the conduct nor speech may be prosecuted.⁵⁹

In response, the FDA essentially ignored the Second Circuit's ruling and has continued to argue that prosecuting off-label speech does not automatically violate the First Amendment because such speech may be used as evidence of the crime of misbranding under the U.S. Federal Food, Drug, and Cosmetic Act.⁶⁰

55. See *United States v. Caronia*, 703 F.3d 149, 160 (2d Cir. 2012) (vacating conviction on First Amendment grounds); *Amarin Pharma, Inc. v. FDA*, 119 F. Supp. 3d 196, 198, 226 (S.D.N.Y. 2015).

56. 703 F.3d 149 (2d Cir. 2012).

57. *Id.* at 160 (“Because we conclude from the record in this case that the government prosecuted Caronia for mere off-label promotion and the district court instructed the jury that it could convict on that theory, we vacate the judgment of conviction.”).

58. *Id.* at 160–63 (finding that the government prosecuted directly based on speech and did not use speech as mere evidence of intent to misbrand in violation of United States Federal Food, Drug, and Cosmetic Act (FDCA)); see also *Sorell*, 564 U.S. at 557 (“Speech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment.”).

59. *Caronia*, 703 F.3d at 160 (“[U]nder the principle of constitutional avoidance, . . . we construe the FDCA as not criminalizing the simple promotion of a drug’s off-label use because such a construction would raise First Amendment concerns.”).

60. See 21 U.S.C. § 352(f)(1) (2012) (defining misbranding as lacking directions for approved use); 21 U.S.C. § 352(q)(1) (2012) (defining misbranding as false or misleading advertising); 21 C.F.R. § 201.5 (2019) (defining intended use as “directions under which the layman can use a drug safely and for the purposes for which it is intended”); 21 C.F.R. § 201.128 (2019) (defining intended use as “the objective intent of the persons legally responsible for the labeling of drugs[, which is] . . . determined by such persons’ expressions or circumstances surrounding the distribution”); see also Ralph Hall & Eric Marshall, *FDA Explains Decision Not to Seek Rehearing in Caronia*, BEYOND HEALTHCARE REFORM (Jan. 23, 2013), <https://>

That is a distinction that only a lawyer can love, but that is how the FDA operates.⁶¹

The FDA takes this distinction even further by using the off-label gag rule to convict individuals of criminal conspiracy, including conspiracy to misbrand pharmaceuticals and send them into interstate commerce.⁶² Although, as the Second Circuit held in *Caronia*, it is legal for a salesperson to speak honestly about off-label uses, it is legal for doctors to prescribe the product, and it is legal for a company to ship the product to the doctor, when those three things together come together, they become the crime of criminal conspiracy.⁶³

In *United States v. Park*,⁶⁴ the Supreme Court held that the government can not only hold individual sales representatives liable, but it can actually extend that liability all the way up to the executives of the company.⁶⁵ The Court's holding means that executives who do not order improper conduct, or even know about it, could be held liable merely because they have the potential authority to stop it. By creating criminals out of people who are trying to sell off-label products to patients who need treatment, the FDA is preventing customers from getting the help they need.

In closing, consider this guiding principle: if it is legal and safe to perform an activity, it should be legal to do that activity

s3.amazonaws.com/documents.lexology.com/8a57dab3-d96f-40d3-8e45-5a473c69ed43.pdf [https://perma.cc/25LY-LUX5].

61. Further, FDA guidance construes nondeceptive off-label promotion as evidence of misbranding if it can demonstrate that the drug is being sold for an unapproved intended use. See, e.g., U.S. FOOD & DRUG ADMIN., *supra* note 44 ("An approved drug that is marketed for an unapproved use (whether in labeling or not) is misbranded because the labeling of such drug does not include 'adequate directions for use.'").

62. See, e.g., 21 U.S.C. § 331(a) (2012); 18 U.S.C. § 371 (2012); *United States v. Scully*, 877 F.3d 464, 468 (2d Cir. 2017) (involving charges against defendants for conspiracy to misbrand pharmaceuticals while sending into interstate commerce in violation of 18 U.S.C. § 371 and 21 U.S.C. § 331); *United States v. Ellis*, 326 F.3d 550, 553 (4th Cir. 2003); *United States v. Haas*, 171 F.3d 259, 264 (5th Cir. 1999); *United States v. Mitcheltree*, 940 F.2d 1329, 1332 (10th Cir. 1991); *United States v. Torigian Labs., Inc.*, 577 F. Supp. 1514, 1517–18, (E.D.N.Y. 1984).

63. See e.g., MARK FLATTEN, GOLDWATER INST., GAGGED: FEDS USE CRIMINAL CHARGES, THREATS TO SILENCE DRUGMAKERS 2–3 (2019), <https://goldwaterinstitute.org/wp-content/uploads/2019/02/Gagged-Report-2019-02-26-Flatten.pdf> [https://perma.cc/9FKT-9F8T].

64. 421 U.S. 658 (1975).

65. *Id.* at 670–71 (citations omitted).

in exchange for money.⁶⁶ If it is lawful to allow an overnight guest in one's home for free, it should be lawful to allow an overnight guest in one's home in exchange for money. If it is lawful to share truthful, helpful information about a product, then it should be lawful to exchange that information to facilitate a transaction. Money does not magically transform a harmless activity into a harmful activity, and money certainly should not transform a harmless activity into a crime.

66. *See, e.g.*, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 80, 82, 213–16 (rev. ed. 2014); JOHN STUART MILL, *ON LIBERTY* 75–76 (Stefan Collini ed., Cambridge Univ. Press 8th prt. 2012) (1859) (“As soon as any part of a person’s conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person’s conduct affects the interests of no persons besides himself or needs not affect them . . .”).

BITCOIN'S NATURE AND ITS FUTURE

JOHN O. MCGINNIS*

When I became a member of the small band that the Federalist Society was thirty-seven years ago, it would have been impossible to imagine discussing the subject of cryptocurrency as part of its proceedings, let alone before such a substantial crowd.¹ But ultimately, the Society and the Constitution that it celebrates are concerned with the relation of liberty and the state. And there's no issue of modern technology more appropriate for us to consider, with cryptocurrency on the cutting edge of the divide between liberty and the state—between a centralized, coercive order, and a decentralized, voluntary one. And that divide, here, comes in that most important matter of money.

Modern fiat currency, like the dollars in your pocket and bank account, is quintessentially a creature of the state. Early in the twentieth century, Georg Frederick Knapp, the father of modern monetary theory, wrote, "The soul of currency is not in the material of the pieces, but in the legal ordinances which regulate their use."² Knapp argued that currency must be constituted by law, since only government could confer the requisite legitimacy to gain acceptance and public trust.³ Thus, the underlying value of a currency is intrinsically tied to a public's trust in that legal system.

Of course, some citizens have little trust in their legal system, particularly when it comes to currency. Nation states can manipulate their currency, printing more money to fund projects for their favorite supporters. Savings then lose their value, as

* George C. Dix Professor in Constitutional Law, Northwestern University Pritzker School of Law.

1. This is a lightly edited version of Professor McGinnis's remarks. It draws heavily on John O. McGinnis & Kyle Roche, *Bitcoin: Order Without Law in the Digital Age*, 94 IND. L.J. 1497 (2019).

2. GEORG FRIEDRICH KNAPP, *THE STATE THEORY OF MONEY* 2 (Macmillan & Co. English ed. 1924) (1905).

3. *See id.* at 1–3.

prices are driven up by inflation.⁴ Citizens become less certain of money as a store of value and economic growth suffers.⁵ Government control over money thus can be a form of oppression no less than the denial of civil liberties. Because, for instance, of its hyperinflation today, Venezuela is about the most extreme example of what I would call a monetarily oppressive regime.⁶

The recent advent of cryptocurrencies, Bitcoin chief among them, poses both a practical challenge to such monetarily oppressive regimes, and a theoretical challenge to the view that the public law of currency is the necessary foundation of money. Thus, while the creation of Bitcoin and other cryptocurrencies is impressive as a technological innovation, their central innovation is in trust, the essential characteristic of any currency that will have long-term success.⁷ Bitcoin does not require faith in any public institution, such as the Federal Reserve, a monarch, or any other central authority, but rather, trust in the computer logic and the effectiveness of a decentralized order that maintains it.⁸

4. See N. GREGORY MANKIW, *MACROECONOMICS* 130 (9th ed. 2016).

5. K. Peren Arin & Tolga Omay, *Inflation and Growth: An Empirical Study for the Comparison of the Level and Variability Effects*, in *TRENDS IN INFLATION RESEARCH* 207, 212 (Barbara T. Credan ed., 2006).

6. See, e.g., Emma Graham-Harrison, Patricia Torres & Joe Parkin Daniels, *Barter and dollars the new reality as Venezuela battles hyperinflation*, *GUARDIAN* (Mar., 14, 2019, 2:00 AM), <https://www.theguardian.com/world/2019/mar/13/venezuela-hyperinflation-bolivar-banknotes-dollars> [<https://perma.cc/PGH5-4VAQ>] (describing the extreme economic hardships in Venezuela, as a result of hyperinflation, such as power outages disrupting electronic transactions and a lack of plastic to make debit and credit cards).

7. See, e.g., *The promise of the blockchain: The trust machine*, *ECONOMIST* (Oct. 31, 2015), <https://www.economist.com/leaders/2015/10/31/the-trust-machine> [<https://perma.cc/WY58-7UHR>] [hereinafter *The trust machine*] (describing how the blockchain, the core technology underlying the Bitcoin innovation, enables transactions between individuals who do not have an established trust relationship, in the absence of a third party).

8. In traditional bank-to-bank transactions, trust is created by a third party. In the United States, the automated clearinghouse (ACH) system is a network through which banks send each other “batches of electronic credit and debit transfers.” *Automated Clearinghouse Services*, BOARD GOVERNORS FED. RES. SYS., https://www.federalreserve.gov/paymentsystems/fedach_about.htm [<https://perma.cc/2BWx-WZT8>] (last visited Sept. 11, 2019). The ACH was responsible for moving \$51.2 trillion worth in financial transactions in 2018. *What is ACH*, NACHA, <https://www.nacha.org/content/what-is-ach> [<https://perma.cc/7UUY-VRPK>] (last visited Sept. 11, 2019). However, centralized trust comes at a cost: transaction fees processed by the ACH range between \$0.15 and \$0.95, costing financial institutions

Thus, Bitcoin is nothing less than a fundamental assault on the idea that a public law of currency is a necessary prerequisite of the modern monetary order. In fact, Bitcoin has the *potential* to outperform the currencies produced by legal regimes as a store of value, precisely because it requires no trust in political process, but rather trust in a transparent set of rules and transactions that follow those rules. The basic problem for public or fiat currencies is that a legal system cannot generally make the precommitments necessary to completely isolate the governance of its money supply from all political pressure.⁹ Bluntly, no one can insulate the stability claimed by public law from the hurly burly of politics.

To be sure, the U.S. dollar is the world's most trusted currency.¹⁰ Despite its many critics, the dollar has formed the basis for 90 percent of international trade over the last thirty years.¹¹ Companies, consumers, and central banks around the world trust in the relative stability of the Federal Reserve and the U.S. government.¹² Yet, the dollar has been subject to periods of severe and unexpected inflation. In fact, since the creation of the Federal Reserve, the purchasing power of the dollar

roughly \$20 billion a year. *ACH Processing Fees*, FIRST ACH, <https://www.firstach.com/front/ACH-Processing-Fees.html> [<https://perma.cc/TFA9-LAJA>] (last visited Sept. 11, 2019). Conversely, the Bitcoin blockchain is essentially a transaction database that contains every transaction ever executed in the currency, which is publicly available on the internet where one can find out how much value belonged to each Bitcoin address at any point in history. See AJ, *Blockchain 101: Beginners Guide to Understanding the Technology*, COINMONKS (Apr. 11, 2018), <https://medium.com/coinmonks/blockchain-101-beginners-guide-to-understanding-the-technology-75a75f863ec2> [<https://perma.cc/D8EN-SNH8>]; see also *The trust machine*, *supra* note 7.

9. This impossibility in the United States stems from the inability of legislatures to bind future legislatures. See John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 388–89 (2003). Thus, legislation can change the structure of the Federal Reserve or its objectives.

10. John Waggoner, *U.S. dollar is still the world's most trusted currency*, USA TODAY (Mar. 12, 2010, 8:41 PM), http://usatoday30.usatoday.com/money/economy/2010-03-12-dollar12_CV_N.htm [<https://perma.cc/TH79-8MKS>].

11. See Yalman Onaran, *Dollar Dominance Intact as U.S. Fines on Banks Raise Ire*, BLOOMBERG (July 16, 2014, 3:54 AM), <http://www.bloomberg.com/news/articles/2014-07-15/dollar-dominance-intact-as-u-s-fines-on-banks-raise-ire> [<https://perma.cc/2C48-J23M>].

12. *Id.*

has fallen by 97 percent.¹³ And that's not a surprise. Since the Progressive Era, the Federal Reserve has had, by law, other political objectives than maintaining the value of the currency, such as getting to full employment.¹⁴ But individuals only have one desire for a currency: that it maintain its value.¹⁵ The basic divergence between the social objectives of fiat money and the individual's objectives of maintaining value is what necessarily limits the trust that any fiat currency can enjoy.¹⁶

I emphasize that I have only spoken of Bitcoin's potential, not its current reality. If Bitcoin succeeds as a currency, it will do so only by climbing the rungs left open by the frailties of the public law of money. It has already gained strength and stability by competing successfully against monetarily oppressive regimes, and performing payment functions for the poor that the bank regulations have made difficult. Looking at its past history, Bitcoin has been an enormous success. It has had substantial volatility of late, but if one had been an investor early on, one could be a millionaire, indeed even a billionaire today.¹⁷

Bitcoin could become even more competitive, and climb other open rungs, because even the best currencies are subject to the political risks built into any public law of currency. But while Bitcoin is used as a currency in monetarily oppressive regimes (the people of Venezuela are using it right now),¹⁸ it does not

13. *Consumer Price Index for All Urban Consumers: Purchasing Power of the Consumer Dollar in U.S. City Average*, FED. RES. BANK ST. LOUIS, <https://fred.stlouisfed.org/series/CUUR0000SA0R> [<https://perma.cc/J586-S35T>] (last visited Aug. 23, 2019).

14. 12 U.S.C. § 225a (2012).

15. See George Melloan, *Only a Crisis Will Bring Money Reform*, 32 CATO J. 279, 279 (2012); Lewis D. Solomon, *Local Currency: A Legal and Policy Analysis*, 5 KAN. J.L. & PUB. POL'Y 59, 74 (1996).

16. See Melloan, *supra* note 15, at 279–81.

17. See, e.g., David Enrich, *Spend Some Time with the Winklevii*, N.Y. TIMES (Mar. 21, 2019) (reviewing BEN MEZRICH, *BITCOIN BILLIONAIRES: A TRUE STORY OF GENIUS, BETRAYAL, AND REDEMPTION* (2019)), <https://www.nytimes.com/2019/05/21/books/review/ben-mezrich-bitcoin-billionaires.html> [<https://perma.cc/C5S8-EGV7>] (describing an example of Bitcoin's volatility and the fortune made by two early investors); Gene Marks, *\$100 of bitcoin in 2010 is worth \$75 million today*, WASH. POST (Mar. 23, 2017, 2:51 PM), <https://www.washingtonpost.com/news/on-small-business/wp/2017/05/23/100-of-bitcoin-in-2010-is-worth-75-million-today/> [<https://perma.cc/7623-M3B6>].

18. See, e.g., Kamilia Lahrichi, *Growing number of Venezuelans trade bolivars for bitcoins to buy necessities*, GUARDIAN (Dec. 16, 2016, 6:15 AM), <https://www.theguardian.com/technology/2016/dec/16/venezuela-bitcoin-economy-digital-currency-bolivars> [<https://perma.cc/C8FE-Y6XR>].

function as a currency in more established regimes.¹⁹ That does not mean that people don't hold it in the United States. Some do, but even most of those hold it only for small investments, and use it to pay for a few items—often as a kind of hobby.²⁰ The vast majority of us hold most of our investments in dollar denominated assets, and use cash to pay day-to-day expenses.²¹ For most people, Bitcoin is not yet a good enough store of value. It's simply too volatile compared to the dollar, and risk-averse people don't want to hold their cash or assets in a unit account so volatile.²²

I conclude by outlining what needs to happen for Bitcoin, or possibly some other cryptocurrency, to gain greater market share against more mature currencies—and ultimately against the dollar itself. It needs to continue to gain in price to attract investors, but also to lessen in volatility to attract people who would like to hold it for general purposes of payment. For a cryptocurrency with a fixed supply, like Bitcoin, these two forces may sometimes be in tension. For instance, although rampant speculation may drive up a currency's value, the inherent volatility that comes along with such upward swings can be destabilizing for a currency. But that might not be a fatal

19. See, e.g., Olga Kharif, *Bitcoin is rallying again, but it's still not used to buy much of anything*, L.A. TIMES (May 31, 2019, 1:48 PM), <https://www.latimes.com/business/la-fi-bitcoin-rally-blockchain-speculation-20190531-story.html> [<https://perma.cc/V9U4-NKKE>].

20. See, e.g., Spencer Bogart, *Bitcoin is a Demographic Mega-Trend: Data Analysis*, BLOCKCHAIN CAP. BLOG (Apr. 30, 2019), <https://medium.com/blockchain-capital-blog/bitcoin-is-a-demographic-mega-trend-data-analysis-160d2f7731e5> [<https://perma.cc/2CP4-H6XM>] (showing that 9 percent of Americans own Bitcoin); Alex Lielacher, *How Many People Use Bitcoin in 2019?*, BITCOIN MKT. J. (Feb. 11, 2019, 8:00 AM), <https://www.bitcoinmarketjournal.com/how-many-people-use-bitcoin/> [<https://perma.cc/55N5-XBLG>] (showing that there are 32 million bitcoin wallets, but only 11 percent of total bitcoin owners use wallets for payment); *Why haven't we all bought cryptocurrency yet?*, FINDER (June 13, 2018), <https://www.finder.com/why-people-arent-buying-cryptocurrency> [<https://perma.cc/X97F-RVUF>] (showing that the average amount of bitcoin owned is \$3,453.89).

21. See, e.g., Kharif, *supra* note 19; James Royal, *Survey: Real estate is back as American's favorite long-term investment*, BANKRATE (July 17, 2019), <https://www.bankrate.com/investing/financial-security-july-2019/> [<https://perma.cc/78S2-FZLE>] (showing only 4 percent of Americans said Bitcoin, or cryptocurrencies, were their favored long-term investments).

22. See, e.g., Michelle Singletary, *I don't care how high the price for bitcoin gets, it's still too risky for the average investor.*, WASH. POST (June 27, 2019, 7:30 AM), <https://www.washingtonpost.com/business/2019/06/27/i-dont-care-how-high-price-bitcoin-gets-its-still-too-risky-average-investor/> [<https://perma.cc/AX8U-YKZK>].

flaw.²³ If Bitcoin comes to enjoy steady growth and demand, it will be able to attain an acceptable level of volatility, while at the same time reaching a broader market.

To become more successful and widely used, Bitcoin does not need to become less volatile and more accepted than the dollar. There are many less successful currencies against which it could compete, and it would gain much value simply by replacing, or even complementing, gold as the basic hedge against currency devaluation.²⁴ There are two important conditions to facilitate such developments. First, there have to be monetarily oppressive currencies so as to give substantial impetus to the use of Bitcoin as an alternate currency. Given the renewed enthusiasm about socialism throughout the world,²⁵ this condition is already being satisfied. When socialists run out of other people's money, they print more of it for themselves.

The second condition is more open ended. There has to be continued strength in the "Bitcoin ecosystem." Most people don't have the skills to use Bitcoin directly. There are amusing stories about people somehow losing their Bitcoin key, and looking around for it in some of their papers, having lost a million dollars.²⁶ Bitcoin owners need to keep an open key wallet. They need mechanisms to ensure the security of dealing with Bitcoin. Thus, they need cryptocurrency wallets and exchanges. Fortunately, these institutions have gotten a lot more profes-

23. Vildana Hajric, *With its volatility on the decline, is Bitcoin fading away or just maturing?*, L.A. TIMES (Oct. 5, 2018, 3:55 PM), <https://www.latimes.com/business/la-fi-bitcoin-volatility-20181005-story.html> [<https://perma.cc/M33J-W6MG>].

24. See, e.g., Mathew Di Salvo, *Why are Venezuelans seeking refuge in cryptocurrencies?*, BBC (Mar. 19, 2019), <https://www.bbc.com/news/business-47553048> [<https://perma.cc/JD6Y-KDNX>] (demonstrating that Bitcoin is already competing against the Venezuelan Bolivar); Alex Lielacher, *Is Bitcoin a Better 'Safe Haven' than Gold?*, BTCMANAGER (Dec. 5, 2016), <https://btcmanager.com/is-bitcoin-a-better-safe-haven-than-gold> [<https://perma.cc/D99L-BR3E>] (suggesting investors flocked to Bitcoin after currency-destabilizing geopolitical events).

25. See, e.g., Frank Newport, *Democrats More Positive About Socialism than Capitalism*, GALLUP (Aug. 13, 2018), <https://news.gallup.com/poll/240725/democrats-positive-socialism-capitalism.aspx> [<https://perma.cc/7RNT-K93F>] (acknowledging that both Americans under twenty-nine and Democrats statistically have a more positive view of socialism than capitalism).

26. Alison Sider & Stephanie Yang, *Good News! You are a Bitcoin Millionaire. Bad News! You Forgot Your Password*, WALL ST. J. (Dec. 19, 2017, 11:34 AM), <https://www.wsj.com/articles/good-news-you-are-a-bitcoin-millionaire-bad-news-you-forgot-your-password-1513701480> [<https://perma.cc/4R98-7L2Y>].

sional since the day Mt. Gox lost hundreds of millions of dollars' worth of Bitcoin.²⁷

Even more importantly, there needs to be continued growth in the markets around Bitcoin. Futures and forward markets make the price discovery process for Bitcoin, and other cryptocurrencies, more efficient and help dampen volatility.²⁸ Permitting funds that invest in Bitcoin, and other cryptocurrencies, will allow more people to hold Bitcoin or cryptocurrencies as part of their portfolio. That will also thicken the market, and have a stabilizing effect.²⁹

Now, note that these wallets, futures markets, and investment funds are not order without law. They are institutions regulated by our law, and by our administrators.³⁰ And indeed, the SEC recently rejected—in my view wrongly—the Winklevoss twins' application for an ETF investment fund that would have been devoted to Bitcoin.³¹

Thus, paradoxically, the success of Bitcoin may depend on the state's willingness to apply the neutral principles of its laws to an innovation that may itself turn out to be a competitor to one of the greatest powers of the state: its ability to print fiat money. That

27. Robin Sidel, Eleanor Warnock & Takashi Mochizuki, *Almost Half a Billion Worth of Bitcoins Vanish*, WALL ST. J. (Feb. 28, 2014, 7:16 PM), <https://www.wsj.com/articles/mt-gox-to-hold-news-conference-1393579356> [<https://perma.cc/D3XY-8U2V>] (describing Mt. Gox losing 750,000 Bitcoins worth \$470 million).

28. Hajric, *supra* note 23.

29. Luke Graham, *How bitcoin could overcome its wild reputation*, CNBC (Sept. 21, 2017, 11:37 AM), <https://www.cnbc.com/2017/09/21/bitcoin-volatility-how-digital-currency-can-overcome-wild-reputation.html> [<https://perma.cc/FYL8-Q7YB>].

30. See, e.g., Jacek Czarnecki, *No, the EBA's Bitcoin Regulation Proposals Aren't All Bad*, COINDESK (Aug. 19, 2016, 5:51 PM), <https://www.coindesk.com/defense-ebas-proposed-bitcoin-regulation> [<https://perma.cc/UF23-KXFC>] (describing the executive branch of the European Union advising that wallet providers be brought under the scope of its anti-money laundering and countering terrorist financing regulations); Garrett Keirms, *From First Filing to Final Decision: The Journey of the Winklevoss Bitcoin ETF*, COINDESK (May 17, 2017, 7:10 PM), <https://www.coindesk.com/the-journey-of-the-winklevoss-bitcoin-etf> [<https://perma.cc/GU3C-QGMS>] (explaining that ETFs are regulated and evaluated by the SEC); IRS reminds taxpayers to report virtual currency transactions, IRS (Mar. 23, 2018), <https://www.irs.gov/newsroom/irs-reminds-taxpayers-to-report-virtual-currency-transactions> [<https://perma.cc/5UVA-VD6G>] (explaining that taxes must be paid on any trading profits from virtual cryptocurrency transactions); Phillip Stafford, *US regulator gives green light for bitcoin futures trading*, FIN. TIMES (Dec. 1, 2017), <https://www.ft.com/content/43d69af8-d6b0-11e7-8c9a-d9c0a5c8d5c9> [<https://perma.cc/C9D7-QLW5>].

31. Bats BZX Exch., Inc., Exchange Act Release No. 34-83723, 2018 WL 3596768 (July 26, 2018).

shows why cryptocurrency is directly in the Federalist Society's wheelhouse. Its success depends, ultimately, on the rule of law and the constitutional respect for a new form of property.

THE CONSTITUTIONAL BEDROCK OF DUE PROCESS

ALLAN IDES*

Rather than discussing economic liberty as a product of federalism, I will address economic liberty as a product of constitutionalism. This idea is based on three key principles of our constitutional system. The first pertains to the relationship between democracy and republicanism, the second is the practice of judicial review, and the third is the fundamental idea of due process. And I will attempt to show how these seemingly disparate principles are all closely related to one another.

It is well known that the Constitution reflects a profound distrust of popular democracy.¹ One of the motivating forces behind the Constitutional Convention was a perception that democracy at the state level had become excessively abusive.² The Convention sought to temper those perceived democratic excesses by filtering the method of democracy through a government structure built on the principles of republicanism with an aim toward promoting civic virtue.³ Thus, we have the separation of powers among the three branches of the federal government, the separation of governmental authority between the states and the federal government, and a series of important checks on those who temporarily hold the reins of federal

* Professor of Law and Christopher N. May Chair, Loyola Law School, Loyola Marymount University.

1. See, e.g., U.S. CONST. amends. I–II (denying Congress the authority to interfere with fundamental human liberties); THE FEDERALIST NO. 10, at 76 (James Madison) (Clinton Rossiter ed., 2003) (“[I]t may be concluded that a pure democracy . . . can admit of no cure for the mischiefs of faction.”).

2. See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 454–61 (1934) (Sutherland, J., dissenting) (explaining the Contract Clause was inserted in response to state debtor relief); Michael B. Rappaport, Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918, 931–32 (1984).

3. See John Adams, *Thoughts on Government* (1776), reprinted in 4 PAPERS OF JOHN ADAMS 65, 86–93 (Robert J. Taylor & Gregg L. Lint eds., 1979).

power, including bicameralism,⁴ presentment,⁵ and the state-based composition of the Senate.⁶

The body of the original Constitution also included specific limits on the states' democratic impulses, with the most important being the Contract Clause, which prohibits states from passing laws that impair the obligation of contracts.⁷ Although it is now rarely taught in introductory constitutional law courses, the Contract Clause was a key motivator for the Constitutional Convention because states had been forgiving debts incurred during the War of Independence, thus impairing the contractual rights of creditors.⁸ The Contract Clause specifically limits the states' democratic authority to do that.

In tension with republicanism is, of course, the principle of democracy, a principle that was reflected more in the *Anti-Federalist Papers* than in the *Federalist Papers*.⁹ This may be a silly quibble, but I always thought the Federalist Society should have been named the Anti-Federalist Society, because that's really the states' rights society. Regardless, the value of democracy was reflected in the *Anti-Federalist Papers*, and it is also reflected in certain essential Founding-era and historical documents. President Abraham Lincoln's Gettysburg Address is distinctly democratic,¹⁰ and I take as my definition of democracy President Lincoln's apt description of the ideal government as being "of the people, by the people, and for the people."¹¹

4. U.S. CONST. art. I, §§ 1–3.

5. U.S. CONST. art. I, § 7, cl. 2–3.

6. U.S. CONST. art. I, § 3, cl. 1.

7. U.S. CONST. art. I, § 10, cl. 1.

8. See James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 699–702 (2008) (discussing the problematic practice of states enacting debt-relief laws that violated contracts prior to the Convention, while also noting that despite the issue's great importance, attendees gave it little attention at the Convention).

9. See, e.g., Akhil Reed Amar, *Anti-Federalists, The Federalist Papers, and the Big Argument for Union*, 16 HARV. J.L. & PUB. POL'Y 111, 112–15 (1993) (explaining that the Anti-Federalists argued for a weaker central government, the inclusion of a Bill of Rights, and more direct democratic participation by citizens); see also SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 1, 29–31 (1999).

10. See Abraham Lincoln, *Gettysburg Address* ("Bliss Copy") (Nov. 19, 1863) (proclaiming "that government of the people, by the people, for the people, shall not perish from the earth").

11. *Id.*

According to this view, the Declaration of Independence is much more democratic than the Constitution.¹² The Bill of Rights is also the product of the democratic impulse. It is a reaction to what the Anti-Federalists saw as the Constitution's excessive obeisance to republicanism.¹³ The Anti-Federalists wanted a democratic guarantee.¹⁴ Many of the amendments in the Bill of Rights are directed toward rights of the people that would be essential for an effective democracy: the First Amendment's protection of freedom of speech;¹⁵ the Second

12. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . ."); see also Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 415–31 (2006) (recounting the reliance that leaders of various popular movements—including abolition of slavery, civil rights, women's suffrage, and pro-life—have placed on the natural law principles of the Declaration of Independence in galvanizing support).

13. See Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1232 (2015) (noting that "a sufficient number of moderate Anti-Federalists dropped their opposition to the Constitution in return for the promise of a Bill of Rights that would provide such constraints"); see also Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 616 (2006) (asserting that since Anti-Federalists were likely "[i]nfluenced by Montesquieu's maxim that republican government can encompass only a small territory and that rule in large territories necessarily tends towards tyranny, [they] claimed that the new constitution would result in centralization, consolidation, and—through enforced uniformity—despotism" (footnote omitted)); Nils Gilbertson, Note, *Return of the Skeptics: The Growing Role of the Anti-Federalists in Modern Constitutional Jurisprudence*, 16 GEO. J.L. & PUB. POL'Y 255, 258 (2018) (citing Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 6 (1955) (observing that "Anti-Federalist opposition to increased centralization of power in the national government was the belief that republican government was possible only for a relatively small territory and a relatively small homogeneous population"))).

14. See William A. Aniskovich, Note, *In Defense of the Framers' Intent: Civic Virtue, The Bill of Rights, and the Framers' Science of Politics*, 75 VA. L. REV. 1311, 1328–29 (1989) (noting that "close examination of the Federalist/Anti-Federalist debate reveals . . . an unresolved tension at the Founding between those who believed proper institutional arrangements could alone protect individual rights in a democratic society and those who believed that, in addition, government had to play some role in promoting those American civic virtues that could guide popular sentiments").

15. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free-

Amendment's protection of the right to bear arms,¹⁶ if you accept the Supreme Court's interpretation of the Second Amendment in *District of Columbia v. Heller*;¹⁷ the Fourth Amendment's protection of the right of the people to be free from unreasonable searches and seizures;¹⁸ and the Fifth Amendment's guarantee of due process of law.¹⁹ So while the Constitution emphasizes antidemocratic, very republican perspectives, the Bill of Rights provides a strong democratic response to that.

Some might argue that the Bill of Rights is antidemocratic to the extent that it allows the unelected and undemocratic Supreme Court to limit the power of representative institutions. Judicial review is often perceived as deviating from what is an otherwise democratic system. But such a perception presumes a state of affairs that is more theoretical than real. Certainly, at the federal level, neither Congress nor the Executive are truly representative of the people—that is, if we take “the people” to mean a majority of the electorate nationwide. Rather, the judicial enforcement of rights is a check on power invested through

dom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

16. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

17. 554 U.S. 570, 582, 595, 618, 635 (2008) (noting the connection between the First and Second Amendments); *id.* at 579–92 (discussing the Second Amendment generally); *id.* at 580–81 (“Reading the Second Amendment as protecting only the right to ‘keep and bear Arms’ in an organized militia therefore fits poorly with the operative clause’s description of the holder of that right as ‘the people.’ We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”).

18. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”); *Heller*, 554 U.S. at 579 (noting that the Fourth Amendment’s Searches and Seizures Clause is regarded as a “right of the people”).

19. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”); *see Heller*, 554 U.S. at 616; *see also* U.S. CONST. amend. XIV (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

a non-majoritarian republican structure. The enforcement of the Bill of Rights is a—somewhat ironic—republican promise to democracy.

Based on that understanding of the democratic role of the Bill of Rights, I disagree with the standard perception of judicial review drawn from Professor Alexander Bickel's statement that "judicial review is at least potentially a deviant institution in [American] democratic society."²⁰ Judicial review is a republican part of American democracy. It is meant to ensure that the structure of government is honored, that Congress operates within and only within its enumerated powers, and that the branches of government operate according to their design. The Supreme Court's discussion of bicameralism in *INS v. Chadha*²¹ demonstrates this.²² In other words, in many contexts, and especially those involving structure, judicial review is republican for the sake of being republican.

Though judicial review is republican in design, it is not necessarily deviant from a democratic perspective—for although it is part of a republican institution, the judiciary is potentially the most democratic institution. To the extent that judges engage in the enforcement of rights against republican power, they play a role in the enforcement of the democratic Bill of Rights and the highly democratic Reconstruction Amendments. This does not just mean the principle of one person, one vote or issues pertaining to gerrymandering. Rather, all enforcements of liberty and equality are inherently democratic. To conclude otherwise would be to presume that legislative judgments are universally or even usually democratic, which is not the case, according to my thicker understanding of democracy.

So the judiciary is not a deviant institution, nor is judicial review merely a device of republicanism designed to enforce the structure of government. It exists in between those two poles, and it offers the best of both worlds. It is republican in nature but potentially democratic in operation. And that brings us to the Due Process Clause. The Due Process Clause can be traced

20. Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47 (1961).

21. 462 U.S. 919 (1983).

22. See *id.* at 948–51.

directly to the *Magna Carta's* "law of the land" principle,²³ which evolved over several centuries into the phrase "due process of law."²⁴ And the law of the land principle is a principle that objects to the arbitrary application of law.²⁵ Due process was meant as a bulwark against arbitrary exercises of power. As such, it provides both procedural and substantive protections.²⁶ To conclude otherwise would be to presume that the substance of the law is never arbitrary.²⁷

I have a slightly different view of the Supreme Court's decisions in *Lochner v. New York*²⁸ and the more modern economic substantive due process cases such as *Ferguson v. Skrupa*,²⁹ *Williamson v. Lee Optical of Oklahoma, Inc.*,³⁰ and *New Orleans v. Dukes*.³¹ The holding of *Lochner*, that economic legislation must rest upon reasonable grounds, was correct in theory.³² If the law does not rest on reasonable grounds, by which I mean some fact-premised grounds, then it is arbitrary. The criticism that the *Lochner* era embraced an antidemocratic judicial activism is fair.³³ While *Lochner* was right in theory, it was wrong in fact. The reason for this can be found in Justice John Marshall Harlan's masterful dissent, where he considered the scientific information then available that supported the proposition that

23. J.C. HOLT, *MAGNA CARTA* 389 (George Garnett & John Hudson eds., 3d ed. 2015) ("No free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land." (quoting *MAGNA CARTA*, ch. 39 (1215)) (internal quotation marks omitted)).

24. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Carta*."); see Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 287-94 (2012).

25. See Christine N. Cimini, *Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare*, 57 RUTGERS L. REV. 451, 467-68 (2005).

26. See *id.* at 460-61.

27. See *id.* at 479-82.

28. 198 U.S. 45 (1905).

29. 372 U.S. 726 (1963).

30. 348 U.S. 483 (1955).

31. 427 U.S. 297 (1976).

32. *Lochner*, 198 U.S. at 61.

33. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2615-16 (2015) (Roberts, C.J., dissenting) ("In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*"); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11-12 (1971).

the job of being a baker was a particularly unhealthful and dangerous one.³⁴

Unlike Justice Harlan in dissent, the majority embraced its own imagined set of facts, saying that it is common knowledge that being a baker is not that tough of a job.³⁵ But Justice Harlan's opinion observed that the material available to the legislature could lead a reasonable legislator to conclude that the law in question was a reasonable protection of bakers.³⁶ The contrast between the two opinions is remarkable. The majority held that the law just needed to rely on some reasonable grounds, but decided that common sense dictated there were no reasonable grounds.³⁷ But judges should not be simply applying their common sense. They should have common sense, of course, but they should defer to a legislative judgment that is built on facts.

Often placed in contrast to *Lochner* are cases like *New Orleans v. Dukes*, which is a combined Due Process Clause and Equal Protection Clause case.³⁸ The City of New Orleans passed an ordinance that gave one hotdog vendor—Lucky Dogs, which you can still visit on Bourbon Street—the right to operate a hotdog stand on Bourbon Street and in the French Quarter.³⁹ All other curbside vendors were banned from the French Quarter.⁴⁰ The law was designed and written to exclude everyone except Lucky Dogs without explicitly mentioning Lucky Dogs,⁴¹ which allows us to conclude that it was designed for the benefit of Lucky Dogs.

An individual who, prior to the enactment of the ordinance, had been operating a curbside food stand in the French Quarter challenged the ordinance in the United States District Court for the Eastern District of Louisiana.⁴² Applying a deferential rational basis test, rather than the more intrusive *Lochner* model, the court found that the city could do whatever it wanted in

34. *Lochner*, 198 U.S. at 69–71 (Harlan, J., dissenting).

35. *Id.* at 59 (majority opinion).

36. *Id.* at 68–73 (Harlan, J., dissenting).

37. *Id.* at 56, 59 (majority opinion).

38. *See* 427 U.S. 297, 298 (1976).

39. *Dukes v. New Orleans*, 501 F.2d 706, 709 (5th Cir. 1974).

40. *Id.*

41. *Id.*

42. *Dukes*, 427 U.S. at 299.

this area.⁴³ A liberal panel of the Court of Appeals for the Fifth Circuit applied a form of economic substantive due process and concluded that the peculiarity of the statute was enough to raise a suspicion that this was, in general, a rent-seeking statute designed to create a monopoly.⁴⁴ As such, the Fifth Circuit held the ordinance unconstitutional as a matter of substantive due process.⁴⁵

The Fifth Circuit's opinion was very carefully reasoned. It recognized that although courts usually defer to the legislative judgment at the national level, the state level, and the local level, there was enough in this ordinance to trigger a court's suspicion.⁴⁶ One of the judges in the case, Judge Minor Wisdom, was a resident of New Orleans, and he was familiar with the way the New Orleans City Council operated.⁴⁷

The Supreme Court's reversal of the Fifth Circuit⁴⁸ was wrong in theory and wrong in fact. It did not adopt the *Lochner* theoretical model of demanding a reasonable justification for the ordinance, nor did it apply a standard form of deferential basis review. Rather, the Court embraced a conceivability standard,⁴⁹ which is based not on the facts of the case, but rather on anything a court might imagine that the lawmakers could have considered in supporting the ordinance. The Court also got the facts wrong, because the facts were imagined facts. The Court held that if the New Orleans City Council had thought in the way the Court imagined it could have thought, then the ordinance would be constitutional. This is troubling because judges—especially Article III judges—are supposed to apply the law to the facts of the case, not to an imagined set of facts.⁵⁰

43. *Dukes*, 501 F.2d at 709.

44. *Id.* at 712–13.

45. *Id.* at 713.

46. *Id.*

47. See *Wisdom, John Minor*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/wisdom-john-minor> [<https://perma.cc/4ZPP-LVYP>] (last visited Dec. 30, 2019).

48. *Dukes*, 427 U.S. at 299.

49. *Id.* at 303–04.

50. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 59 (July 13, 2009) (statement of J. Sonia Sotomayor) (“The task of a judge is not to make law, it is to apply the law. . . . In each case I have heard, I have applied the law to the facts at hand.”); *Our Government: The Judicial Branch*,

The Due Process Clause does have a role in securing economic substantive due process. Rational basis should not be based on a hypothetical set of facts, but on the actual facts as likely (not conceivably) relied on by the lawmakers. This approach reflects a prodemocratic impulse that would lead a court to examine carefully the sometimes-corrupted democratic practices that lead to laws that offer rent-seeking or are irrational in terms of the legitimate interests of a city council, a state legislature, or the federal government. Courts should not be actively involved in striking down statutes—they should defer to the judgment of the legislative branch. That deference has less to do with democracy and republicanism than it does with the locus of responsibility placed in the legislative branch. We might say that courts should not invade the realm of discretionary power. But there should be a judgment of the legislative branch to examine. Not a conceived set of facts, but a real set of facts. That means *Lochner's* standard, applied with deference and considered judgment.

ARE STATES PROTECTING ECONOMIC LIBERTY?

DANA BERLINER*

A lot of people have referred to, and Justice Clint Bolick just talked about, the *Patel* case.¹ It is definitely true that much of the action right now in economic liberty is in state constitutions, state judicial decisions, and state legislation, and we do a lot of that at the Institute for Justice. I am going to talk about some of those developments. I have to respond to Professor Roderick Hills, even though he is not here, who said very strongly that we should pursue only state constitutional litigation, because there's no federal protection whatsoever for economic liberty.

I do not agree at all with the conclusion that there is no federal constitutional protection for economic liberty, but there is a lot of opportunity for state constitutional litigation now. First, it is important to realize that state constitutional texts are not little copies of the U.S. Constitution. Some of them were written even before the U.S. Constitution.² Some were written in the 1970s.³ The rest were written in between.⁴ Some are based on the Northwest Ordinance.⁵ Some have due course of law provi-

* Senior Vice President and Litigation Director, Institute for Justice. She has worked as a lawyer at the Institute for Justice since 1994.

1. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015).

2. Albert L. Sturm, *The Development of American State Constitutions*, 12 *PUBLIUS* 57, 58 (1982) (showing that the constitutions of Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, and Virginia were written prior to the United States Constitution).

3. *Id.* (listing Georgia, Illinois, Louisiana, Montana, North Carolina, and Virginia as states with constitutions written in the 1970s).

4. *Id.*

5. Matthew J. Hegreness, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 *YALE L.J.* 1820, 1855 (2011) (discussing which state constitutions originated from the Northwest Ordinance).

sions.⁶ Some have anti-monopoly clauses.⁷ Some have anti-gift clauses.⁸ Some have anti-favoritism clauses.⁹ They contain various provisions that are not in the U.S. Constitution, and Professor Steven Calabresi is someone who writes about that and catalogs different kinds of state constitutional provisions in his work.¹⁰

In addition, most states have at least two, and often as many as four, different lines of interpretation of the rational basis test, or the equivalent thereof.¹¹ So most states are a total mess on this. There will be one line of cases that strictly follows federal law under the state constitution. There will be one line of cases that uses, perhaps, the real and substantial test, which was an influential test that a lot of states used in the middle of the 1900s.¹² And that, like you might think, involves real evidence and a real and substantial relationship.

6. Michael J. DeBoer, *The Right to Remedy by Due Course of Law—A Historical Exploration and an Appeal for Reconsideration*, 6 FAULKNER L. REV. 135, 135 n.3 (2014) (listing state constitutions with due course of law provisions).

7. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1067 n.516 (2013) (listing state constitutions with anti-monopoly clauses).

8. Nicholas J. Houpt, Note, *Shopping for State Constitutions: Gift Clauses as Obstacles to State Encouragement of Carbon Sequestration*, 36 COLUM. J. ENVTL. L. 359, 379–80 nn.117–18 (2011) (listing state constitutions with anti-gift clause provisions).

9. John Martinez, *Getting Back the Public's Money: The Anti-Favoritism Norm in American Property Law*, 58 BUFF. L. REV. 619, 649–59, 653 n.144, 657 n.162 (2010) (describing the four different types of favoritism clauses—state taxing and spending clauses, state just compensation clauses, state due process clauses, and uniquely state constitutional prohibitions—listing example state constitutions); see also DeBoer, *supra* note 6, at 135 n.3.

10. See, e.g., Steven Gow Calabresi, et al., *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in A Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49 (2018); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008); Calabresi & Leibowitz, *supra* note 7; Steven G. Calabresi, et al., *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J.L. & LIBERTY 685 (2015).

11. See, e.g., *Schultz v. Lakewood Elec. Corp.*, 841 N.E.2d 37, 42–43 (Ill. 2005) (describing the rational basis test for Illinois); *People v. Idziak*, 773 N.W.2d 616, 628–29 (Mich. 2009) (describing the three levels of the rational basis test Michigan employs); 11A ILLINOIS LAW AND PRACTICE CONSTITUTIONAL LAW §§ 257, 305 (2019) (describing the different lines of the rational basis test for Illinois); 5 MICHIGAN CIVIL JURISPRUDENCE CONSTITUTIONAL LAW §§ 262–263 (2019) (describing the rational basis test for Michigan).

12. See, e.g., *Caviglia v. Royal Tours of America*, 842 A.2d 125, 132–33 (N.J. 2004); *Gambone v. Commonwealth*, 101 A.2d 634, 636–37 (Pa. 1954).

There are other states that have a line of reasonable relationship cases, which do not tend to be rational basis.¹³ Then there are states that have things in between. As I said, most states have several of these different lines of cases going on at once that involve complicated tests with multiple factors. In Texas, the way that we were granted Supreme Court review was by saying, “You have three lines of cases that are all in conflict with each other and never cite each other. You should resolve that.” And they did.¹⁴

But that is true of virtually every state court right now, which means there is a huge opportunity to develop economic liberty jurisprudence and unique state tests. I do want to talk for a second about what the *Patel* test is, because it is not the federal test. First, the court looks at legitimate government interest, but not just a conceivable government interest.¹⁵ The court instead looks to what the government interest for the law actually was. Then the court looks at actual facts—real facts in the real world—to determine if there is a relationship between those facts and the actual purpose of the statute.¹⁶ Then, even if there is a real relationship, the court looks to see whether the law is so oppressive or burdensome to the individual that it does not justify the achievement of its supposed public purpose.¹⁷

Patel is a completely different test. It is a three-part test. I do not think any other state has that exact formulation, but they could. So we are litigating in many different state high courts. We currently have one case at the Pennsylvania Supreme Court.¹⁸ Pennsylvania is usually more protective of economic liberty than other states. We also had one recent case at the Illinois

13. See, e.g., *Tip Top Foods, Inc. v. Lyng*, 104 Cal. Rptr. 718, 723 (Cal. Ct. App. 1972) (describing how California uses the reasonable relationship test); *Home Builders Ass’n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349, 354–56 (Ohio 2000) (applying a reasonable relationship test to property questions in Ohio); *Gary Concrete Prods., Inc. v. Riley*, 331 S.E.2d 335, 338–39 (S.C. 1985) (using the reasonable relationship test for a contracts case in South Carolina); 19 SOUTH CAROLINA JURISPRUDENCE CONSTITUTIONAL LAW § 89 (2019) (describing how South Carolina uses the rational basis test in some circumstances and the reasonable relationship test in other circumstances).

14. *Patel v. Tex. Dep’t of Licensing & Regulation*, 469 S.W.3d 69, 86–87 (Tex. 2015).

15. *Id.* at 87.

16. *Id.*

17. *Id.*

18. Brief for Appellants, *Ladd v. Real Estate Comm’n*, No. 33 MAP 2018 (Pa. Oct. 9, 2018).

Supreme Court.¹⁹ Illinois is usually not more protective of economic liberty than other states, and it rubber stamped the law in question.²⁰ Both of those cases are really about the question of whether economic protectionism is a legitimate government interest, a question that has largely not been decided by almost any state court. It is a wide-open area.

There is currently one other case, which is in South Carolina, where we are essentially bringing *Lee Optical*²¹ again and saying, “Do not follow the U.S. Constitution on this. Go with your own constitution.”²² Under the South Carolina constitution, in *Lee Optical*, the plaintiffs would have won. That is a fun case. I cannot wait to see what happens.

This is what is currently happening in state constitutional law. I also want to point out the influx of activity right now with state statutes. For one thing, we previously talked a lot about licensing laws. Licensing is extremely varied across states. The Institute for Justice completed a study called *License to Work* where we catalogued the statutory requirements to practice 102 lower-income occupations.²³ Of those, only thirteen are licensed in every state, and only twenty-three are licensed in forty states.²⁴ For almost every occupation, there are at least a few states that do not license it. And the burdens and requirements to obtain a license vary widely from state to state.

In almost every state, there is no experience requirement for the licensing of residential landscapers, with the exception of four states where it takes an individual four years to get the license.²⁵ This difference is something that states can use to de-

19. *Chicago Foot Trucks: Sweet Home Chicago?: Food Trucks Get the Cold Shoulder in the Windy City*, INST. FOR JUST., <https://ij.org/case/chicagofoodtrucks/> [https://perma.cc/XL8E-AW2F].

20. Since this speech was delivered, the Illinois Supreme Court issued its ruling in this case, holding that favoring restaurants and protecting them from competition was a proper governmental purpose in Illinois. See *LMP Servs., Inc. v. Chicago*, No. 123123, 2019 WL 2218923, at *3–4, *8 (Ill. 2019).

21. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).

22. Plaintiff’s Motion for Summary Judgment, *Opternative v. S.C. Bd. of Med. Exam’rs*, No. 2016-CP-40-06276 (S.C. Ct. Com. Pl. Sept. 6, 2017).

23. DICK M. CARPENTER II ET AL., INST. FOR JUSTICE, *LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING* (2d ed. 2017), https://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf [https://perma.cc/RJ8U-KXJP].

24. *Id.* at 6, 13.

25. See *id.* at 7.

termine whether they actually need the licenses they are imposing, and whether they need them at that level of burden. Two states have now passed laws to do exactly that.²⁶ Nebraska and Ohio have passed the broadest economic liberty legislation in recent years. Both states are doing what is called sunset review where, on a rolling basis, they review all licensing laws and determine whether the regulation is truly necessary, and whether the regulation is the least restrictive way of achieving the health and safety purpose it was designed to achieve.²⁷

Ohio has passed sunrise review, which means each time a whole new set of regulations is proposed, a government body will assess whether it is, in fact, necessary.²⁸ This is important because there is always pressure to have new licensing regulations. Right now, there are nationwide lobbying efforts on music therapy, interior design, and lactation consultants to make licensing of those occupations much more restrictive, and to make it difficult for those not already in these occupations to enter. Under these proposed laws, the existing practitioners, of course, will get to continue their occupations, but newcomers will be excluded or severely limited.²⁹

Nebraska and Ohio have the broadest recent statutes that improve economic liberty. But it is not always possible to get bills passed, as extensively discussed in the earlier panel today. Florida has been trying to pass a bill to repeal licenses for twelve occupations, including things like auctioneer and interior design, and some other even more uncommon occupations, but the legislature has not managed to pass it. They have already failed three years in a row to get it passed.³⁰ They are trying again this year. We will see.

26. See Occupational Board Reform Act, NEB. REV. STAT. §§ 84-933 to -948 (Supp. 2018); Nick Sibilla, *New Ohio Law Takes Aim At Occupational Licenses, Which Cost State \$6 Billion*, FORBES (Jan. 9, 2019, 3:15 PM), <https://www.forbes.com/sites/nicksibilla/2019/01/09/new-ohio-law-takes-aim-at-occupational-licenses-which-cost-state-6-billion/#2ffb6b996e95> [<https://perma.cc/DJ9K-ZLD5>].

27. See CARPENTER ET AL., *supra* note 23, at 38–39.

28. Sibilla, *supra* note 26.

29. CARPENTER ET AL., *supra* note 23, at 29; see also J. Justin Wilson, *Ga. Lactation Consultants Sue to Save Their Jobs and End Unconstitutional Licensing Law*, INST. FOR JUST. (June 25, 2018), <https://ij.org/press-release/ga-lactation-consultants-sue-to-save-their-jobs-and-end-unconstitutional-licensing-law/> [<https://perma.cc/4K7T-KTAT>].

30. See H.B. 7047, 2017 Leg. Reg. Sess. (Fla. 2017); H.B. 15, 2018 Leg. Reg. Sess. (Fla. 2018); see also S.B. 1640, 2019 Leg. Reg. Sess. (Fla. 2019) (died on the calendar May 3, 2019, attempting to repeal licensing for twenty-three occupations).

It is difficult to get such repeals passed because of the intense pressure from the people who are benefiting from the licensing laws. One area in which there has been significant improvement, which we heard about in the panel in the middle of the day today, is that many states—twenty-eight in the last four years—have reduced the barriers for ex-offenders to get licenses in different occupations.³¹ In some states, where it is uncertain if one might be excluded from an occupational license, the state provides an early opportunity to find out whether past offenses would prevent the person from getting the license. This is extremely useful, as it avoids the situation where someone has completed the educational and testing requirements only to find out that the license will be denied anyway.

Other states have promulgated statutes requiring the crime to be related to the occupation before you can prohibit someone from going into the field. That would seem obvious, but it is not. We have a case in Pennsylvania where a woman has an assault conviction from twenty years ago as part of a domestic dispute and she is not being allowed to become an esthetician.³² There is absolutely no relationship—and no claim even of a relationship—between the original offense and doing makeup and facials, but she nevertheless was prohibited from working.

The change from preventing ex-offenders from entering licensed occupations is a really interesting development. I believe significant legislative pressure to make that change exists—probably more even than licensing change overall, but I am hoping it bleeds over into licensing change too.

One other area where there has been significant development is in food freedom and the ability of people to make food in their homes to then sell. Three states—Wyoming, North Dakota, and Utah—have passed sweeping reforms that, in essence, say that as long as it is not meat then you can produce the food in your

31. See *State Occupational Licensing Reforms for Workers with Criminal Records*, INST. FOR JUST., <https://ij.org/activism/legislation/state-occupational-licensing-reforms-for-people-with-criminal-records/> [https://perma.cc/F2VN-N92N] (last visited Sept. 11, 2019).

32. *Pennsylvania Fresh Start: Law Denies Women Right to Work Because of Irrelevant Criminal Convictions*, INST. FOR JUST., <https://ij.org/case/pennsylvania-collateral-consequences/> [https://perma.cc/7EYA-8DVH] (last visited Dec. 25, 2019).

home and sell it.³³ This includes perishable items, including foods like pies that contain milk.

Since those laws have gone into effect—the first one four years ago—there has not been one single report of a foodborne illness from one of these home-prepared foods.³⁴ This showcases that these incredible barriers for home food preparation are likely not necessary. States could have significantly fewer regulations to achieve the same result (to the extent they are achieving any result).

That change has been made, and many states also have made it possible to sell shelf stable foods, like cookies and cakes, directly from your home. This has a huge impact, of course, on people who can finally work. I hope the more regulated states will observe that the less regulated states are doing something totally different and less restrictive, and that there have been absolutely no adverse consequences from it.

I would love for this to spread as a legislative matter. It is something we are working on and that I am hopeful about. At the same time though, we cannot escape the need for actual judicial constitutional decisions protecting economic liberty at the state and federal level. That is the only way that these rights are truly guaranteed, and not subject to repeal.

Thank you.

33. See Home Consumption and Homemade Food Act, UTAH CODE ANN. §§ 4-5a-101 to -105 (LexisNexis Supp. 2019); Wyoming Food Freedom Act, WYO. STAT. ANN. §§ 11-49-101 to -103 (2019); N.D. CENT. CODE §§ 23-09.5-01 to -02 (Supp. 2019); see also MODEL FOOD FREEDOM ACT (INST. FOR JUST. 2018).

34. Nick Sibilla, *Hundreds Of Homemade Food Businesses Flourish Under State Food Freedom Laws*, FORBES (Jan. 22, 2019, 10:00 AM), <https://www.forbes.com/sites/nicksibilla/2019/01/22/hundreds-of-homemade-food-businesses-flourish-under-state-food-freedom-laws/#37eab6e12226> [https://perma.cc/S93R-5FYG].

ARE CRIMINALS BAD OR MAD?

PREMEDITATED MURDER, MENTAL ILLNESS, AND *KAHLER V. KANSAS*

PAUL J. LARKIN, JR.* & GIANCARLO CANAPARO**

INTRODUCTION	86
I. <i>KAHLER V. KANSAS</i>	91
A. The Treatment of Mental Disease under Kansas's Criminal Law	91
B. Kahler Shoots Four Members of His Family at Close Range in Different Locations in His Grandmother-in-Law's Home	93
C. The Kansas Supreme Court's Decision	95
II. THE DUE PROCESS CLAUSE AND THE INSANITY DEFENSE	96
A. The Text of the Due Process Clause	96
B. The History of the Due Process Clause	100
C. The Supreme Court's Interpretation of the Due Process Clause	103
1. The Supreme Court and Mens Rea	103
2. Procedural Versus Substantive Due Process	110
D. The Rationality of Kansas's Approach to Criminal Responsibility	114
III. THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE AND THE INSANITY DEFENSE	131

* John, Barbara, and Victoria Rumpel Senior Legal Research Fellow, The Heritage Foundation; M.P.P. George Washington University, 2010; J.D., Stanford Law School, 1980; B.A., Washington & Lee University, 1977.

** J.D., Georgetown Law Center, 2014; B.A., University of California at Davis, 2011. We want to thank John Malcolm and Amy Swearer for invaluable comments on an earlier version of this Article. We also want to thank Alexis Huggins for invaluable research assistance. The views expressed in this Article are our own and should not be construed as representing any official position of The Heritage Foundation. Any mistakes are ours.

A. The Text of the Cruel and Unusual Punishments Clause.....	132
B. The History of the Cruel and Unusual Punishments Clause.....	134
C. Judicial Interpretations of the Cruel and Unusual Punishments Clause.....	136
1. The Cruel and Unusual Punishments Clause and Sentencing	136
2. The Cruel and Unusual Punishments Clause and Criminal Responsibility.....	139
D. The Purpose of the Cruel and Unusual Punishments Clause.....	145
CONCLUSION.....	152

INTRODUCTION

Murder, it is sad to say, is an ancient phenomenon.¹ Each one is a profound assault on its immediate victim, but also has the same far-reaching, rippling effect as a stone thrown into a still body of water. Among other consequences, felt both immediately and over the long term, murder corrodes the perception of communal security that any society needs to remain cohesive.²

In the earliest days of Anglo-American law, society found punishment of murderers necessary to avoid the violent inter-clan retaliation that would otherwise follow and to restore, as far as possible, the peace of the realm.³ The criminal law has always been civilization's principal defense against crime; it protects society against such mayhem, whatever its cause might be. As Professors Joseph Goldstein and Jay Katz put it, the criminal law seeks "to protect the life, liberty, dignity, and property of the community and its members by threatening to deprive those who . . . contemplate [antisocial] conduct and

1. See *Genesis* 4:8 (King James) (the story of Cain murdering Abel); Thomas A. Green, *The Jury and the English Law of Homicide, 1200–1600*, 74 MICH. L. REV. 413, 415 (1976) ("Homicide was a daily fact of life in medieval England. Brawling was common; serious physical violence routine.").

2. See, e.g., Matt Ford, *What's Causing Chicago's Homicide Spike?*, ATLANTIC (Jan. 24, 2017), <https://www.theatlantic.com/politics/archive/2017/01/chicago-homicide-spike-2016/514331/> [https://perma.cc/562Y-FG8S].

3. See Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 328 (2016).

by inflicting sanctions upon those who engage in proscribed activity.”⁴ That understanding is why the English common law ultimately came to treat all felonies, particularly murder, not only as a harm done to the victim, but also as an act “*contra coronam et dignitatem regis*” (an act contrary to the peace and dignity of the crown), which the sovereign may punish himself.⁵

Mental illness is almost as old as murder,⁶ and sometimes they occur in tandem.⁷ When a murderer is mentally ill, the problems he generates for society increase in complexity. Deciding precisely what the response should be has been the subject of vigorous debate throughout the legal community, the medical profession, and the legislatures on each side of the Atlantic.⁸ It is,

4. Joseph Goldstein & Jay Katz, *Abolish the “Insanity Defense”—Why Not?*, 72 YALE L.J. 853, 853 (1963).

5. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 8–9 (4th ed. 2002); THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800, at 5–6 (1985); EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW: FROM THE EARLIEST TIMES TO THE END OF THE YEAR 1911, at 7–10 (1913); FREDERIC W. MAITLAND & FRANCIS C. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 15 (James F. Colby ed., 1915); Note, *Legal Effect of a Pardon*, 13 COLUM. L. REV. 418, 418 (1913).

6. See, e.g., 1 Samuel 21:12–15 (King James) (describing how David, pretending to be insane, pounded his head on the city gate and foamed at the mouth); Mark 5:1–20 (King James) (describing Jesus’s interactions with a man described as “possessed with the devil” but whose symptoms closely match those associated with mental illness); ROY PORTER, MADNESS: A BRIEF HISTORY 10 (2002); ANDREW SCULL, MADNESS IN CIVILIZATION: A CULTURAL HISTORY OF INSANITY FROM THE BIBLE TO FREUD, FROM THE MADHOUSE TO MODERN MEDICINE 16–47 (2015).

7. See, e.g., DAVID ABRAHAMSEN, CONFESSIONS OF SON OF SAM (1985); RICHARD J. BONNIE, JOHN C. JEFFRIES, JR. & PETER W. LOW, A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. (3d ed. 2008); RICHARD MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN (1981). See generally CHARLES PATRICK EWING, INSANITY: MURDER, MADNESS, AND THE LAW (2008).

8. See, e.g., Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, §§ 401–406, 98 Stat. 1837, 2057–68 (1984) (codified as amended at 18 U.S.C. §§ 17, 4241–4247 (2012)); ROYAL COMM’N ON CAPITAL PUNISHMENT, 1949–1953 REPORT 128 (1953); MODEL PENAL CODE § 4.01 (AM. LAW INST. 1985); EWING, *supra* note 7; HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY (1979); ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE (Greenwood Press 1980) (1967); THOMAS MAEDER, CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE (1985); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982); THE INSANITY DEFENSE: MULTIDISCIPLINARY VIEWS ON ITS HISTORY, TRENDS, AND CONTROVERSIES (Mark D. White ed., 2017); Joseph Goldstein & Jay Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225 (1960); Jerome Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761 (1956); Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535 (1917); Edwin R. Keedy et

as Professor Francis Allen once put it, “a task of great difficulty.”⁹ The reason, as Chief Justice Burger explained, is that the issue of whether—and, if so, how—a mentally ill offender should be held responsible for his conduct is “complicated” by the “inter-twining moral, legal, and medical judgments” that a judge or jury must make.¹⁰

Tasked with the responsibility to decide concrete cases, however, the Anglo-American courts have long designed rules defining the consequences of mental illness for the trial, conviction, and punishment of an offender.¹¹ That process has gone forward

al., *Insanity and Criminal Responsibility*, 3 J. AM. INST. CRIM. L. & CRIMINOLOGY 890 (1912); Edwin R. Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956 (1952); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985); Vicki L. Plaut, *Punishment versus Treatment of the Guilty but Mentally Ill*, 74 J. CRIM. L. & CRIMINOLOGY 428 (1983).

9. Francis A. Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494, 496 (1962).

10. *Burks v. United States*, 437 U.S. 1, 17 n.11 (1978) (quoting *King v. United States*, 372 F.2d 383, 389 (D.C. Cir. 1967)) (internal quotation marks omitted). Numerous other courts have held that the issue of mental illness is fundamentally a moral, not medical, judgment. See, e.g., *United States v. Murdoch*, 98 F.3d 472, 478 (9th Cir. 1996); *United States v. Freeman*, 357 F.2d 606, 619 (2d Cir. 1966); *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954), *abrogated by United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc); *State v. Chase*, 480 P.2d 62, 69 (Kan. 1971); *People v. Schmidt*, 110 N.E. 945, 948–49 (N.Y. 1915); see also Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257 (1987) (discussing how far the law should follow moral considerations in defining conditions that will excuse criminal liability including insanity).

11. See, e.g., *Clark v. Arizona*, 548 U.S. 735, 749–53 (2006); *Leland v. Oregon*, 343 U.S. 790, 798–801 (1952); *Fisher v. United States*, 328 U.S. 463, 472–75 (1946); *Guiteau's Case*, 10 F. 161, 182–86 (D.C. 1882) (prosecution of Charles A. Guiteau for the murder of President James Garfield); *M'Naghten's Case* (1843) 8 Eng. Rep. 718, 722–23; 10 Cl. & Fin. 200, 209–11 (HL); *Arnold's Case* (1724) 16 How. St. Tr. 695, 764. Before Congress created a local court system for the District of Columbia in 1970, the federal government prosecuted common law crimes like murder and robbery in the District's Article III courts. See *Palmore v. United States*, 411 U.S. 389, 392 n.2 (1973). For decades, therefore, the District of Columbia Circuit tinkered with or completely revised the insanity test in that jurisdiction. See, e.g., *Brawner*, 471 F.2d at 973 (adopting the American Law Institute Model Penal Code insanity test); *McDonald v. United States*, 312 F.2d 847, 850–51 (D.C. Cir. 1962) (en banc) (per curiam); *Durham*, 214 F.2d at 874–75 (ruling that a defendant is not criminally responsible if his criminal conduct was “the product of mental disease or mental defect”); *Smith v. United States*, 36 F.2d 548, 549 (D.C. Cir. 1929) (ruling that a mentally ill offender is not criminally liable if his “reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong”). For some state court decisions on the subject of insanity, see *People v. Wells*, 202 P.2d 53 (Cal. 1949); *Commonwealth v. Eddy*, 73 Mass. (7 Gray) 583 (1856); *Schmidt*, 110 N.E. 945.

for centuries in much the same manner that Oliver Wendell Holmes used to describe the evolution of the common law: as a matter governed by experience, rather than logic.¹²

The criminal law has traditionally used a multistage process to adjudicate cases involving a defendant's claim that he is not criminally responsible because of insanity based on a severe mental illness.¹³ The trial in such cases worked as follows: A jury would first decide whether the defendant was guilty of the charged offense.¹⁴ In making that determination, the jury could not consider any evidence that, because of a mental disorder, the defendant could not formulate the scienter or mens rea elements of the charged offense.¹⁵ Under the law or practice in the states,¹⁶ the jury could consider evidence of a defendant's severe mental illness only at a separate, post-guilt stage devoted entirely to the issue of his sanity, known as the insanity stage.¹⁷ At that phase, a defendant could offer evidence that he suffered from a disabling mental disease or defect and should not be

12. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

13. See GOLDSTEIN, *supra* note 8, at 106–21, 171–90; David W. Louisell & Geoffrey C. Hazard, Jr., *Insanity as a Defense: The Bifurcated Trial*, 49 CAL. L. REV. 805 (1961) (discussing the process of adjudicating an insanity claim at trial).

14. Louisell & Hazard, *supra* note 13, at 809 n.12.

15. *Id.* at 813–15.

16. Kathryn S. Berthot, *Bifurcation in Insanity Trials: A Change in Maryland's Criminal Procedure*, 48 MD. L. REV. 1045, 1046 n.5 (1989).

17. *Id.* at 1046 n.5, 1059; Louisell & Hazard, *supra* note 13, at 809 n.12. At one time, some states, California in particular, permitted a defendant to present evidence of mental illness at the guilt stage of a case to raise a reasonable doubt of guilt pursuant to a diminished capacity defense. See, e.g., *People v. Gorshen*, 336 P.2d 492, 498–99 (Cal. 1959); *People v. Wells*, 202 P.2d 53, 64–66 (Cal. 1949); GOLDSTEIN, *supra* note 8, at 199–202. In *Fisher v. United States*, 328 U.S. 463 (1946), a case arising from a homicide in the District of Columbia, the Supreme Court rejected the argument that a defendant should be able to assert a diminished capacity defense in federal court. *Id.* at 473. Influencing the Court in *Fisher* were its precedents stating that the District of Columbia courts should fashion their own common law of crimes. See *id.* at 476 (“Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.”). Most states agreed with that ruling as a matter of their own state laws. See *id.* at 473 n.12 (collecting cases accepting and rejecting a diminished capacity defense). For discussions of the diminished capacity defense, see, e.g., HENRY F. FRADELLA, *FROM INSANITY TO DIMINISHED CAPACITY: MENTAL ILLNESS AND CRIMINAL EXCUSE IN CONTEMPORARY AMERICAN LAW* (2007); Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977).

held criminally responsible for his conduct.¹⁸ If the jury agreed with the defendant, the jury would return a verdict of “not guilty by reason of insanity,” which ordinarily resulted in his commitment to a mental institution, instead of his imprisonment.¹⁹

Within the last two decades, Kansas decided to try a new approach. The state revamped when and how it allows a jury to consider evidence of a defendant’s mental illness. Historically, Kansas followed the widely used practice of conducting a separate, post-guilt stage to resolve a defendant’s claim that he is not guilty of a crime because of a mental disease or defect. Now, Kansas has switched around its procedure for raising any such defense. A defendant may still argue that the jury should not hold him responsible for a crime because of mental illness. Under the new law, however, he may introduce that evidence only at the guilt stage and then only to raise a reasonable doubt that he possessed a mental state defined by state law as an element of the offense.²⁰

This term, the Supreme Court will decide whether the Constitution restrains a legislature’s decision to decide how mentally ill offenders should be held responsible. Offenders twice argued that the new Kansas procedure is unconstitutional, and the Kansas Supreme Court twice rejected their arguments.²¹ The Court granted review in *Kahler v. Kansas*²² to decide whether the Kansas state legislature acted arbitrarily by

18. See, e.g., Louisell & Hazard, *supra* note 13, at 806–13.

19. *Id.*

20. See *infra* Part I.A.

21. *State v. Kahler*, 410 P.3d 105, 124–25 (Kan. 2018); *State v. Bethel*, 66 P.3d 840, 844–52 (Kan. 2003). The state courts disagree whether a legislature may abolish an insanity defense. See Brian E. Elkins, *Idaho’s Repeal of the Insanity Defense: What Are We Trying to Prove?*, 31 IDAHO L. REV. 151 (1994); Recent Development, *Due Process—Insanity Defense—Idaho Supreme Court Upholds Abolition of Insanity Defense Against State and Federal Constitutional Challenges—State v. Searcy*, 118 *Idaho* 632, 798 P.2d 914 (1990), 104 HARV. L. REV. 1132 (1991). Compare *Finger v. State*, 27 P.3d 66, 84 (Nev. 2001) (ruling that the legislature’s decision to abolish the insanity defense violated the federal and state constitutions), with *State v. Searcy*, 798 P.2d 914, 916–19 (Idaho 1990), *State v. Korell*, 690 P.2d 992, 998–1002 (Mont. 1984) (upholding the abolition of an insanity defense in favor of the diminished capacity or mens rea defense), and *State v. Herrera*, 895 P.2d 359, 364–69 (Utah 1995).

22. 139 S. Ct. 1318 (2019) (order granting certiorari).

choosing to experiment with a new approach for resolving that issue.²³

This Article maintains that Kansas's decision was constitutionally permissible. The Due Process Clause does not require the criminal law to offer an insanity defense. The Eighth Amendment prohibits cruel and unusual punishment, but says nothing about the definition of crimes. Ultimately, the Constitution allows the states to determine the relevance of mental illness to the substantive criminal law and requires only that a state's chosen approach be rational, which Kansas's approach certainly is.

The discussion below proceeds as follows: Part I explains how Kansas law treats mental illness, describes James Kahler's crimes, and summarizes the decision of the Kansas Supreme Court. Part II addresses Kahler's claim that the Kansas procedure violates the Due Process Clause of the Fifth and Fourteenth Amendments. Part III addresses that issue from the perspective of the Eighth Amendment Cruel and Unusual Punishments Clause.

I. *KAHLER V. KANSAS*

A. *The Treatment of Mental Disease under Kansas's Criminal Law*

At least as early as 1884, Kansas adopted the formulation of the insanity defense known as the M'Naghten rule.²⁴ Established by the House of Lords in 1843, the M'Naghten rule required a jury to acquit a criminal defendant if it found that he was "not sensible" at the time he committed the crime because, by reason of a "disease of the mind," he suffered "under such a defect of reason" that he did not know "the nature and quality" of his act or that it was "wrong."²⁵

23. *Id.*; see also Petition for a Writ of Certiorari at i, *Kahler v. Kansas*, No. 18-6135 (U.S. Sept. 28, 2018) (Question Presented: "Do the Eighth and Fourteenth Amendments permit a state to abolish the insanity defense?").

24. See *State v. Nixon*, 4 P. 159, 163-64 (Kan. 1884) (holding that if a defendant lacks sufficient mental capacity to distinguish between right and wrong, then he cannot be held criminally liable).

25. M'Naghten's Case (1843) 8 Eng. Rep. 718, 722; 10 Cl. & Fin. 200, 210 (HL) ("[T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on

The M’Naghten rule remained undisturbed in Kansas until 1995.²⁶ Following years of growing public concern over the insanity defense after John Hinckley, Jr.’s attempt to assassinate President Ronald Reagan,²⁷ the Kansas legislature revisited the insanity defense and revised state law to refocus it.²⁸ The new law, section 22-3220 of Kansas Statutes Annotated, provided as follows: “It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense.”²⁹ The effect of the revision allows a defendant to use evidence of a mental disease to raise a reasonable doubt that he did or could

the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.”).

26. See, e.g., *State v. Baker*, 819 P.2d 1173, 1187 (Kan. 1991); *State v. Hollis*, 731 P.2d 260, 269 (Kan. 1987); *State v. Pyle*, 532 P.2d 1309, 1322 (Kan. 1975); *State v. Chase*, 480 P.2d 62, 67–68 (Kan. 1971); *State v. Coltharp*, 433 P.2d 418, 424 (Kan. 1967); *State v. Mendzlewski*, 299 P.2d 598, 600 (Kan. 1956); *Nixon*, 4 P. at 163–64.

27. See BONNIE ET AL., *supra* note 7, at 121–26. For a sense of the fever pitch of public backlash against the insanity defense, see *The Insanity Defense: Hearings Before the S. Comm. on the Judiciary*, 97th Cong. (1982). At that hearing, the Judiciary Committee considered eight bills that would have, in one way or another, limited the insanity defense. *Id.* at 485–566. Senator Orrin Hatch proposed adding a new section to Title 18 of the United States Code that would read: “It shall be a defense to a prosecution under any Federal statute, that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense.” *Id.* at 507–08 (statement of Sen. Orrin Hatch). Kansas’s law, enacted thirteen years later, closely mirrored Senator Hatch’s proposed language.

28. The Question Presented in *Kahler* asks whether a state may abolish the insanity defense. Petition for a Writ of Certiorari, *supra* note 23, at i. That question does not accurately describe Kansas’s law, which reshaped an insanity defense into a diminished capacity defense. Ultimately, however, *Kahler*’s framing of the issue is far less important than how Kansas permits a defendant to make use of evidence of mental illness at trial. The issue is whether—and, if so, how—a defendant can present evidence of mental illness as a defense. Kansas opted for a diminished capacity defense instead of an insanity defense. As explained below, that choice is a reasonable one.

29. KAN. STAT. ANN. § 22-3220 (2007) (repealed 2011). The legislature slightly revised the wording of the statute in 2011 when it moved the statute from section 22-3220 to section 21-5209. The relevant text remains substantively the same. Compare § 22-3220 with § 21-5209 (Supp. 2018) (“It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense.”).

have formed the mens rea required for conviction.³⁰ That statute was on the books when Kahler was tried and convicted of capital murder for killing four members of his family.

B. Kahler Shoots Four Members of His Family at Close Range in Different Locations in His Grandmother-in-Law's Home

In the summer of 2008, Kahler's wife, Karen, told him that she wanted to have a sexual relationship with a female colleague of hers.³¹ Kahler consented to the relationship but grew embarrassed by public displays of affection between his wife and her lover, one of which led to a shoving match between the Kahlers.³² The two attempted marriage counseling, but the effort proved unsuccessful.³³ By January 2009, Karen had filed for divorce.³⁴ Kahler maintained that these events threw him into severe depression.³⁵ He was unable to cope with the divorce, and, in March 2009, he was publicly arrested and charged with domestic abuse against Karen.³⁶ Karen then left the family home and took with her their three children, Emily, Lauren, and Sean.³⁷

Kahler's marriage and family relationships disintegrated.³⁸ His colleagues noted that he became increasingly preoccupied by his personal problems and paid less and less attention to his job.³⁹ By August 2009, he was fired.⁴⁰ His parents were concerned about his well-being and moved Kahler into their home.⁴¹

The family had a tradition of spending the weekend after Thanksgiving at the home of Karen's grandmother, Dorothy.⁴² Sean had been staying with Kahler and his parents in the days beforehand, and he asked Karen if he could remain there for

30. See § 21-5209 (formerly § 22-3220).

31. State v. Kahler, 410 P.3d 105, 113 (Kan. 2018).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 114.

36. *Id.* at 113.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

the weekend.⁴³ Karen said that Sean should spend the holiday at her grandmother's house instead.⁴⁴ That evening, Kahler drove to Dorothy's house with a Remington .223 caliber rifle,⁴⁵ carried it with him as he entered through the back door, saw and passed by Sean, and, moving throughout the house, shot and killed Karen, Emily, Lauren, and Dorothy.⁴⁶ He did not harm Sean, who, after seeing his father, fled to a neighbor's house.⁴⁷ When officers arrived, they found Karen in the kitchen, Emily and Dorothy in the living room, and Lauren upstairs.⁴⁸ They were dead or died later.⁴⁹

Kahler eluded law enforcement until the next morning when he was spotted walking down a country road.⁵⁰ When law enforcement later searched his car, they found an empty box for a Remington .223 caliber rifle.⁵¹ Although the gun was never found, the serial number on the box matched the serial number of a rifle registered to Kahler.⁵²

At trial, Kahler did not deny that he shot his family members.⁵³ Instead, he argued that his severe depression prevented him from forming the intent and premeditation necessary for capital murder.⁵⁴ A defense psychiatric expert testified that, at the time Kahler shot his family members, "his capacity to manage his own behavior had been severely degraded so that he couldn't refrain from doing what he did."⁵⁵ The trial judge instructed the jury that it could consider any evidence that Kahler was mentally ill in deciding whether he premeditated on the intent to kill his victims.⁵⁶ Because Kansas's law prohib-

43. *Id.*

44. *Id.*

45. *See id.* at 119.

46. *Id.* at 113–14.

47. *Id.* at 113.

48. *Id.* at 114.

49. *Id.*

50. *Id.*

51. *Id.* at 119.

52. *Id.*

53. *Id.* at 114.

54. *Id.*

55. *Id.*

56. Joint Appendix at 177, *Kahler v. Kansas*, No. 18-6135 (U.S. May 31, 2019). The jury instructions were as follows:

Evidence has been presented that the defendant was afflicted by mental disease or defect at the time of the alleged crime. Such evidence is to be

ited him from using evidence of mental illness for any other purpose, Kahler could not also defend on the ground that he was not guilty by reason of insanity.

The jury convicted Kahler of capital murder and recommended the death sentence, which the trial judge imposed.⁵⁷

C. *The Kansas Supreme Court's Decision*

On appeal to the Kansas Supreme Court, Kahler argued that section 22-3220 of Kansas Statutes Annotated violated the Due Process Clause of the Fourteenth Amendment because it abolished the insanity defense.⁵⁸ Relying on its 2003 decision in *State v. Bethel*,⁵⁹ the Kansas Supreme Court rejected Kahler's claim.⁶⁰ In *Bethel*, the defendant killed his father because, he maintained, God had ordered him to do so.⁶¹ Like Kahler, Bethel had argued that the insanity defense was "a fundamental element of our criminal justice system."⁶² The Kansas Supreme Court disagreed, holding that an insanity defense is a creature of state law, not federal constitutional law.⁶³ It relied on the United States Supreme Court's decisions in *Powell v. Texas*⁶⁴

considered only in determining whether the defendant had the state of mind required to commit the crimes.

When considering capital murder, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked premeditation and/or the intent to kill.

When considering murder in the first degree, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked premeditation and/or the intent to kill.

When considering murder in the second degree, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked the intent to kill.

When considering aggravated burglary, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked the intent to commit capital murder.

Id.

57. *Kahler*, 410 P.3d at 112.

58. *Id.* at 125.

59. 66 P.3d 840 (Kan. 2003).

60. *Kahler*, 410 P.3d at 124–25 (citing *Bethel*, 66 P.3d at 853).

61. *Bethel*, 66 P.3d at 853.

62. *Id.* at 844.

63. *Id.* at 850–51.

64. 392 U.S. 514 (1968).

and *Leland v. Oregon*.⁶⁵ The Kansas Supreme Court interpreted those cases as holding that the Constitution does not mandate any particular approach to insanity but rather leaves it to the states.⁶⁶ In neither *Bethel* nor *Kahler* did the Kansas Supreme Court expressly consider whether section 22-3220 violates the Eighth Amendment's Cruel and Unusual Punishments Clause.

II. THE DUE PROCESS CLAUSE AND THE INSANITY DEFENSE

A. *The Text of the Due Process Clause*

The Due Process Clause is an odd place to look for a limitation on a state's power to define crimes or defenses to a criminal charge. All that its Delphic text states (in the case of the Fourteenth Amendment) is that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ."⁶⁷ Those sixteen words do not refer to, let alone define, any conduct that should be made an offense or provide a defense to one. In fact, they give no indication that they do anything more than refer to substantive criminal law that is defined elsewhere. To treat those bare words as creating an insanity defense without any need for supplemental judicial creativity is like saying that the Sistine Chapel painted itself.

That conclusion becomes even more apparent when one compares the text of the Due Process Clause with several other constitutional provisions that, expressly or impliedly, *do* directly address a legislature's substantive legislative criminal lawmaking authority. Those provisions define the elements of a specific offense, empower Congress to carry out that function, or expressly limit federal or state criminal lawmaking authority. One must look to those provisions, not the Due Process Clause, to discern whether the Constitution abridges elected officials' ability to represent the moral judgments of their communities.

65. 343 U.S. 790 (1952); *Bethel*, 66 P.3d at 847–51 (citing *Leland*, 343 U.S. at 797–99 (ruling that a state can require a defendant to bear the burden of persuasion beyond a reasonable doubt on an insanity defense); *Powell*, 392 U.S. at 535–36 (holding that conviction for public drunkenness where the defendant suffered from a compulsion to drink did not violate the Eighth Amendment)).

66. *Bethel*, 66 P.3d at 847–51.

67. U.S. CONST. amend. XIV, § 1; see also *id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

Start with the Article III Treason Clause, the only provision in the Constitution that actually defines a specific crime. The clause defines “Treason against the United States” as “consist[ing] only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.”⁶⁸ The Framers went out of their way to define that crime in the Constitution because they did not trust elected officials to protect political dissent.⁶⁹ The Framers remembered the English history of using a charge of treason to prosecute not rebels and revolutionaries for violent insurrection or sedition, but rather the average person for merely uttering “expressions” of dissent or possessing “mere mental attitudes” of disagreement with the governing authorities.⁷⁰ The Framers’ decision to ensure that only conduct specifically defined by the Constitution as treason can serve as the basis for such a charge demonstrates that the Framers left the authority to define *other* crimes and defenses to the normal democratic process. The Treason Clause is the exception to the rule that the Constitution does not define specific crimes. It therefore strongly suggests that the Due Process Clause performs no such function.

Other constitutional provisions expressly authorize Congress to define offenses and affix punishments. The Article I Coinage and Counterfeiting Clauses appear in sequence⁷¹ and clearly address different parts of the same problem. No nation can operate a modern economy without a uniform national currency, and there has been a strong need to protect the integrity of banknotes against counterfeiting for probably as long as there

68. U.S. CONST. art. III, § 3.

69. For the historical background to the Treason Clause, see generally *Cramer v. United States*, 325 U.S. 1, 8–15 (1945); J.G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* (1970); JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* (1971); Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 226 (1944); Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395 (1945); Charles Warren, *What Is Giving Aid and Comfort to the Enemy*, 27 YALE L.J. 331 (1918); Sanford Jay Rosen, *The Law of Treason*, 51 TEX. L. REV. 817 (1973) (reviewing J.G. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* (1970) and JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* (1971)).

70. *Cramer*, 325 U.S. at 28.

71. U.S. CONST. art. I, § 8, cl. 5–6.

have been coins or paper money.⁷² Thus the Coinage Clause authorizes Congress to establish a national currency and define its value,⁷³ and the Counterfeiting Clause empowers Congress to punish falsification of currency.⁷⁴ For another example, the Define and Punish Clause permits Congress to define the crime of “Piracy” along with “Offences against the Law of Nations.”⁷⁵ Finally, the Military Regulation Clause authorizes Congress to establish a separate criminal justice system, including a distinct military penal code, for the armed forces.⁷⁶ These clauses expressly authorize Congress to define offenses, thereby relying on the political process to establish punishments for crimes other than treason.⁷⁷

72. See CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 52 (2014); MALCOLM GASKILL, CRIME AND MENTALITIES IN EARLY MODERN ENGLAND 125 (2000).

73. U.S. CONST. art. I, § 8, cl. 5 (“[The Congress shall have Power] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures . . .”).

74. U.S. CONST. art. I, § 8, cl. 6 (“[The Congress shall have Power] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States . . .”).

75. U.S. CONST. art. I, § 8, cl. 10 (“[The Congress shall have Power] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . .”). “Piracy” is essentially robbery and murder on the high seas. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 157–62 (1820).

76. U.S. CONST. art. I, § 8, cl. 14 (“[The Congress shall have Power] To make Rules for the Government and Regulation of the land and naval Forces . . .”); see also 10 U.S.C. §§ 801–946 (2018).

77. Other clauses implicitly authorize Congress to define crimes. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13–15 (Ox Bow Press 1985) (1969) (arguing that Congress has the inherent authority to protect the federal interests embodied in the substantive guarantees of federal law-making power in Article I, Section 8). The Commerce Clause power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” carries with it the power to punish criminally anyone who violates those restrictions. U.S. CONST. art. I, § 8, cl. 3. A classic example is the Sherman Act, which makes illegal conspiracies to fix prices and output in interstate commerce. See 15 U.S.C. § 1 (2012). The Excise Tax Clause enables Congress to raise revenue via “Taxes, Duties, Imposts and Excises,” U.S. CONST. art. I, § 8, cl. 1, and Congress has made smuggling a federal offense, 18 U.S.C. § 545 (2012). Finally, the Seat of Government Clause permits the federal government to use land ceded by Virginia and Maryland as the nation’s capital. U.S. CONST. art. I, § 8, cl. 17. Implicitly, then, Congress is authorized to define common law crimes and otherwise use criminal law to exercise police powers over the federal district. See, e.g., 18 U.S.C. § 7(3) (2012); D.C. CODE §§ 22-101 to -5215 (2013 & Supp. 2019). Even if the powers enumerated in the clauses of Article I, Section 8, did not, on their own, implicitly leave it to Congress to decide whether and how to use the criminal law as an en-

The constitutional text also creates certain express defenses to crimes. Consider the Bill of Attainder and Ex Post Facto Clause.⁷⁸ The first half bars a legislature from enacting a law that names and convicts someone of a crime without a trial.⁷⁹ The second half forbids a legislature from retroactively applying a statute defining a new crime or enhancing the penalty for an old one.⁸⁰ The First Amendment also takes away from Congress the authority to “make . . . [any] law” trespassing on certain civil liberties, which naturally includes any law making it a crime to engage in the conduct that the provision safeguards.⁸¹ Defendants in both federal and state criminal cases may defend against a charged federal offense on the ground that the statute violates the First Amendment.⁸²

The clauses discussed above have this in common: they all address aspects of substantive criminal law. One defines a crime in the text of the Constitution. Some describe the type of conduct that the government should outlaw. Others place certain primary conduct entirely out of bounds. The Due Process Clause does none of those things. Instead, as we will explain in the next Section, it ensures that no one can be criminally punished unless he has committed a criminal offense defined by a different positive law and then only in compliance with whatever procedural restraints the law elsewhere requires.

forcement tool, the Article I Necessary and Proper Clause would serve that function. *See* U.S. CONST. art. I, § 8, cl. 18.

78. U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); *id.* § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder . . . [or] ex post facto Law . . .”).

79. *See, e.g.*, *Nixon v. Adm’r Gen. Servs.*, 433 U.S. 425, 468–84 (1977); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323–25 (1866); 2 WILLIAM BLACKSTONE, COMMENTARIES *388. Common law bills of attainder ordinarily imposed the death penalty. *See Nixon*, 433 U.S. at 473–74. When such laws fixed lesser punishments, they were known as bills of pains and penalties. *Id.* The Bill of Attainder prohibition forbids laws that impose those sanctions too. *See id.*; *United States v. Brown*, 381 U.S. 437, 441–77 (1965); *United States v. Lovett*, 328 U.S. 303, 315 (1946).

80. *See, e.g.*, *Collins v. Youngblood*, 497 U.S. 37, 41–44 (1990); *Weaver v. Graham*, 450 U.S. 24, 28–31 (1981).

81. U.S. CONST. amend. I.

82. *See, e.g.*, *United States v. Eichman*, 496 U.S. 310, 319 (1990); *Texas v. Johnson*, 491 U.S. 397, 420 (1989). A defendant can also argue that the statute underlying the charge exceeds Congress’s powers under the Constitution, *see, e.g.*, *United States v. Lopez*, 514 U.S. 549, 551 (1995), or violates principles of federalism, *see, e.g.*, *Bond v. United States*, 564 U.S. 211, 225–26 (2011).

B. *The History of the Due Process Clause*

Justice Holmes once remarked that “a page of history is worth a volume of logic.”⁸³ His aphorism is particularly germane when the subject has deep roots in Anglo-American legal history, like the Due Process Clause.

The phrase “due process of law” comes from a fourteenth century act of Parliament, stating that “no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.”⁸⁴ That provision, in turn, traces its lineage to Chapter 39 of Magna Carta of 1215, a document that rivals our own Constitution in the protections it affords against arbitrary government conduct.⁸⁵

Magna Carta was born as a peace treaty during a time of great political tumult. Angry because of King John’s military failures in expensive overseas wars, never-ending political intrigue, arbitrary exercise of royal power, and repeated personal cruelties, the English barons renounced their feudal obligations

83. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

84. Liberty of Subject Act 1354, 28 Edw. 3 ch. 3; see also A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 15 (rev. ed. 1998) (“[A]s early as 1354 the words ‘due process’ were used in an English statute interpreting Magna Carta, and by the end of the fourteenth century ‘due process of law’ and ‘law of the land’ were interchangeable.”); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911). The English Petition of Right of 1628 reaffirmed the 1354 act and again used the term “due process of law,” instead of “the law of the land.” LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 4 (1999).

85. For a concise discussion of the provenance, meaning, and effect of Magna Carta, see THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 22–25 (Liberty Fund 2012) (5th ed. 1956). For in-depth discussions, see DAVID CARPENTER, *MAGNA CARTA* (2015); DANNY DANZIGER & JOHN GILLINGHAM, *1215: THE YEAR OF MAGNA CARTA* (2003); J.C. HOLT, *MAGNA CARTA* (George Garnett & John Hudson eds., 3d ed. 2015); HOWARD, *supra* note 84; A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968); WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (2d ed. 1914); JAMES K. WHEATON, *THE HISTORY OF THE MAGNA CARTA: A BRIEF HISTORY WITH THE ORIGINAL MAGNA CARTA* (2011); R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297 (1999); Larkin, *supra* note 3, at 333–39; C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27 (1914); Charles E. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 HARV. L. REV. 365 (1891).

to the crown and gathered their forces in rebellion.⁸⁶ King John acceded to the barons' demands in 1215 "in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of [his] reign."⁸⁷

The most relevant provision in Magna Carta is Chapter 39.⁸⁸ Chapter 39 is perhaps the closest an English law has ever come to being tantamount to a written constitution.⁸⁹ Chapter 39 provided that "[n]o free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land."⁹⁰ Coke construed "the law of the land" to refer to "the Common Law, Statute Law, or Custom of England."⁹¹ Over time, the phrase "law of the land" became "due process of law," but that revision "did not alter its meaning, effect, or significance."⁹² As Professors Nathan Chapman and Michael McConnell have written, "Fundamentally, 'due process' meant that the government may not interfere with established rights without legal authorization and according to law, with 'law' meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of

86. See CARPENTER, *supra* note 85, at 70 ("The financial burdens placed on England to defend and recover the continental empire were the single most important cause of Magna Carta. Had John been content with ruling England and dominating Britain and Ireland, there would have been no Charter."); PLUCKNETT, *supra* note 85, at 22–25; THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY: FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 82 (Philip A. Ashworth ed., 7th ed. 1911) ("In disposition and character John was an oriental despot, a tyrant of the worst sort. . . . [He] was guilty of acts of cruelty rivaling those of Nero.").

87. CARPENTER, *supra* note 85, at 69 (quoting signature section of Magna Carta) (internal quotation marks omitted); see *id.* at 117–18, 315–23; Larkin, *supra* note 3, at 333–34.

88. See HOWARD, *supra* note 84, at 14.

89. See 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 173 (2d ed. reprinted 1911).

90. HOLT, *supra* note 85, at 389 (quoting MAGNA CARTA ch. 39 (1215)) (internal quotation marks omitted).

91. Ellis Sandoz, *Introduction* to THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 25 (Ellis Sandoz ed., 1993). Coke thought that the terms "due process of law" and "the law of the land" were interchangeable. See 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (London, E. & R. Brooke 1797) (1642).

92. Larkin, *supra* note 3, at 338.

Parliament.”⁹³ The first Congress proposed adding the Fifth Amendment Due Process Clause to the Constitution, and the state ratifying conventions agreed.⁹⁴

The provenance of the Due Process Clause reveals a concern with preventing the arbitrary deprivation of someone’s life, liberty, or property by a government official acting in a wanton, lawless fashion.⁹⁵ The thrust of that history is that the purpose of the Due Process Clause is to limit the government’s ability to act oppressively by forcing it to prove whatever elements the substantive rules of criminal liability demand. It does not also suggest that courts may add to the government’s burden by adopting additional elements in derogation of whatever law Parliament, Congress, or a state legislature deems sufficient.

To be sure, English and American courts have created, shaped, and reshaped defenses to crimes as part of their perceived judicial authority to carry forward the common law and to fashion that law as reason dictates.⁹⁶ There is, however, substantial reason to doubt that federal courts may use the Due Process Clause to accomplish that result. The history of the clause offers no warrant for doing so, and, as explained in the

93. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012).

94. James Madison was principally responsible for the wording of the Fifth Amendment. Why he chose the phrase “due process of law,” not “the law of the land,” no one precisely knows. See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 445–46 (2010). Some scholars have speculated that he used the former to avoid implying that, given the text of the Article VI Supremacy Clause, the term “the law of the land” could permit Congress to escape being subject to the clause because federal legislation would be deemed “the supreme Law of the Land.” See Chapman & McConnell, *supra* note 93, at 1723–24. That explanation is a sensible one, but whatever its persuasiveness might be, it does not matter. The Supreme Court has consistently interpreted “due process of law” to mean the same as “law of the land.” See, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Hovey v. Elliott*, 167 U.S. 409, 415–17 (1897); *Hurtado v. California*, 110 U.S. 516, 543 (1884) (Harlan, J., dissenting); *Davidson v. New Orleans*, 96 U.S. 97, 101 (1878); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

95. See *Daniels*, 474 U.S. at 331 (noting that the Framers adopted the Due Process Clause to “secure the individual from the arbitrary exercise of the powers of government” (quoting *Hurtado*, 110 U.S. at 527) (internal quotation marks omitted)); see also *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government.” (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889))).

96. See, e.g., *United States v. Bailey*, 444 U.S. 394, 409–11 (1980) (construing the duress defense).

next Section, the Supreme Court to date has repeatedly refused to use that clause as a basis for creating a constitutionally based doctrine defining criminal responsibility.

C. *The Supreme Court's Interpretation
of the Due Process Clause*

This Section addresses the Supreme Court's interpretation of the Due Process Clause. The first Subsection focuses on the Court's treatment of the use of scienter or mens rea elements to avoid the conviction of morally blameless parties. As explained below, the Court has been willing to read federal statutes to require proof of intentional wrongdoing when the text of a federal offense allows that interpretation. At the same time, the Court has refused to construe the Due Process Clause to demand that legislatures always incorporate some mens rea element into every criminal law. Rather than "constitutionalize" a law of moral responsibility, the Court has gone out of its way to make it clear that legislatures bear the burden of making that judgment.

The second Subsection explains that Kahler's claim rests on substantive due process principles. Kahler does not cite the principal Supreme Court decisions in that area of the law, but his argument challenges the substantive definition of criminal responsibility in Kansas's law, not the adequacy or fairness of the trial procedures that Kansas has adopted to adjudicate that issue. He therefore cannot avoid relying on substantive due process case law as the basis on which his claim must rest.

1. *The Supreme Court and Mens Rea*

In his appeal, Kahler argues that an insanity defense is critical to any fundamentally fair definition of criminal liability.⁹⁷ To prove that point, he scours the common law and collects numerous statements by luminaries such as William Blackstone, Supreme Court Justices Story and Robert Jackson, Professor Francis Bowes Sayre, and others from which he maintains that the ability to know what the law prohibits and to distinguish "good" from "evil" or "right" from "wrong" is essential to the moral legitimacy of the criminal law.⁹⁸ As shown by that evi-

97. Brief for Petitioner at 16–17, *Kahler v. Kansas*, No. 18–6135 (U.S. May 31, 2019).

98. *Id.* at 16–29.

dence, he argues that Anglo-American legal history demands “some mechanism to excuse a defendant who, because of mental disease or defect, is not morally culpable.”⁹⁹ The insanity defense, he submits, is the only historically proven guarantee for that task.¹⁰⁰ By adopting section 22-3220, Kansas has eliminated that protection, rendering the judgment entered against him unconstitutional.¹⁰¹

Kahler is correct, in part. Tort law often uses liability without fault as a means of guaranteeing compensation to injured parties and forcing employers (and others) to maximize their safety efforts.¹⁰² The criminal law, on the other hand has traditionally limited criminal responsibility to people who are morally blameworthy, acquitting the blameless even when they cause harm. Oliver Wendell Holmes’s aphorism that “even a dog distinguishes between being stumbled over and being kicked” makes the point in a homely manner.¹⁰³ The law achieves that result by requiring that the prosecution establish that a person committed a forbidden act with a “guilty mind” or an “evil intent.” “*Actus non facit reum nisi mens sit rea*”¹⁰⁴—or, said differently, a crime consists of “a vicious will” and “an unlawful act consequent upon such vicious will.”¹⁰⁵ By defining crimes to require the prosecution to prove that a party had a mental state indicative of blameworthiness, contemporary criminal law car-

99. *Id.* at 16.

100. *Id.* at 16–29.

101. *Id.* at 28–29.

102. See, e.g., *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 196, 208 (1917) (upholding a no-fault state workers’ compensation law); *Second Emp’rs’ Liab. Cases*, 223 U.S. 1, 49–51 (1912) (upholding congressional repeal of the fellow-servant rule); *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U.S. 281, 294–96 (1908) (upholding a railroad safety requirement).

103. HOLMES, *supra* note 12, at 7.

104. Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932). In English, the maxim means that an act does not make one guilty unless the mind is guilty.

105. 4 WILLIAM BLACKSTONE, COMMENTARIES *21; see also, e.g., *Dixon v. United States*, 548 U.S. 1, 6–7 (2006); *United States v. Bailey*, 444 U.S. 394, 402 (1980); Roscoe Pound, *Introduction to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW*, at xxxvi–xxxvii (1927) (“Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”).

ries forward the principle that there is a difference between being ignorant, careless, or clumsy and being evil.¹⁰⁶

But the Due Process Clause does not *require* this result. For more than a century, the Supreme Court has consistently held that Congress and state legislatures may, if they so choose, dispense with proof of any mens rea element by adopting so-called “strict liability” or “public welfare” offenses.¹⁰⁷ In a series

106. The common law courts were able to ensure that some form of evil intent was an element of every crime because they had the authority to create offenses and define their elements. Today, there are no federal common law offenses; every one is a creature of statute. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33–34 (1812); see also, e.g., *Dixon*, 548 U.S. at 7 (“[T]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.” (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)) (internal quotation marks omitted)). Nonetheless, because careless drafting can give rise to uncertainty whether and how a statute requires proof of scienter, the Supreme Court uses a presumption that “Congress intends to require a defendant to possess a culpable mental state regarding ‘each of the statutory elements that criminalize otherwise innocent conduct.’” *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)); see also, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015); *Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009) (construing an identity theft statute to require proof that the defendant knew that the identifying information belonged to another person); *X-Citement Video*, 513 U.S. at 78 (construing a federal child pornography statute to require proof that the defendant knew that the actor was a minor); *Staples v. United States*, 511 U.S. 600, 603–04, 619 (1994) (construing a federal law regulating firearms to require proof that the defendant knew that the weapon was capable of automatic fire); *Liparota*, 471 U.S. at 433 (construing the federal food stamp laws to require proof that the defendant knew that his possession was not authorized by law); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 435–36 (1978) (construing section 1 of the Sherman Act as requiring proof of knowledge); *Morissette v. United States*, 342 U.S. 246, 265–73 (1952) (construing theft statute to require proof that the defendant knew the property belonged to the federal government). The presumption helps ensure that only morally blameworthy parties are subject to conviction. The optimal way to satisfy that requirement, of course, is to force the prosecution to prove that a defendant knew he committed a crime—that is, to prove that he acted “willfully” by voluntarily and intentionally violating a known legal duty. The Supreme Court has consistently read the term “willful” in that manner. See, e.g., *Bryan v. United States*, 524 U.S. 184, 192 (1998); *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994); *Cheek v. United States*, 498 U.S. 192, 200 (1991); *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973). As a general matter, however, statutes requiring proof of willfulness are a rarity in federal and state penal codes. Ordinarily, the prosecution need prove only that a defendant acted “knowingly” or “intentionally.” For most crimes, proof of either element is sufficient to avoid convicting a morally blameless party.

107. See, e.g., *Graham Hughes, Criminal Omissions*, 67 *YALE L.J.* 590, 595–96 (1958); *Francis Bowes Sayre, Public Welfare Offenses*, 33 *COLUM. L. REV.* 55, 63–67 (1933).

of cases decided between 1910 and 1975—*Shevlin-Carpenter Co. v. Minnesota*,¹⁰⁸ *United States v. Balint*,¹⁰⁹ *United States v. Dotterweich*,¹¹⁰ *United States v. Freed*,¹¹¹ *United States v. International Minerals & Chemical Corp.*,¹¹² and *United States v. Park*¹¹³—the Court rejected due process challenges to the constitutionality of various federal and state laws creating strict liability crimes.¹¹⁴ In each case, the relevant statute made it a crime to commit the actus reus elements of an offense without regard for the defendant's state of mind. In each case, the defendant argued that the statute violated the Due Process Clause because it did not require the government to prove that the defendant acted with a "guilty mind," however defined. And in each case, the Supreme Court rejected that argument and declined to impose a mens rea requirement on the criminal law under the federal constitution.¹¹⁵ In fact, despite the impressive pedigree that the mens rea doctrine had at common law and in the Supreme Court's twentieth century case law,¹¹⁶ the Court's opinions in its strict

108. 218 U.S. 57, 68–70 (1910) (holding that a corporation can be convicted for trespass without proof of criminal intent).

109. 258 U.S. 250, 254 (1922) (holding that a real person can be convicted of the sale of narcotics without a tax stamp even absent proof that he knew that the substance was a narcotic); *see also* *United States v. Behrman*, 258 U.S. 280, 288 (1922) (companion case to *Balint*, holding that a physician can be convicted of distributing a controlled substance not "in the course of his professional practice" even without proof that he knew that his actions exceeded that limit).

110. 320 U.S. 277, 278, 284–85 (1943) (holding that a company president can be convicted of distributing adulterated or misbranded drugs in interstate commerce without proof that he even was aware of the transaction).

111. 401 U.S. 601, 609 (1971) (holding that a defendant can be convicted of the unlicensed possession of hand grenades).

112. 402 U.S. 558, 563–65 (1971) (holding that a defendant can be convicted of the unlicensed interstate transportation of sulfuric acid).

113. 421 U.S. 658, 660, 672–73 (1975) (holding that a company president can be convicted of violating the Federal Food, Drug, and Cosmetic Act without proof that he was aware of unsanitary conditions in a food warehouse).

114. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 429–36, 431–35 nn.70–79 (1958); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 111–19.

115. As explained below, the Supreme Court has also refused to use the Eighth Amendment Cruel and Unusual Punishments Clause to create a constitutional mens rea defense. *See* *Powell v. Texas*, 392 U.S. 514, 535–37 (1968); *infra* Part III.C.2.

116. *See, e.g.,* *Morrisette v. United States*, 342 U.S. 246, 250–51 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some

liability decisions from *Shevlin-Carpenter Co.* to *Park* gave surprisingly short shrift to the defendants' due process claims.¹¹⁷

The strict liability doctrine certainly is, and has always been, a controversial one. Scholars who could fill out a Criminal Law Hall of Fame lineup—such as Professors Lon Fuller, H.L.A. Hart, Sanford Kadish, Herbert Packer, and Herbert Wechsler—have consistently denounced strict criminal liability on a variety of grounds.¹¹⁸ The common denominator to their criticisms is that strict liability offenses turn morally blameless parties into

mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized." (footnotes omitted).

117. See, e.g., *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 66 (1910).

118. See, e.g., MODEL PENAL CODE § 2.05 cmt. 1 (AM. LAW INST., Tentative Draft No. 4, 1955); LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 71 (2009) ("We are not morally culpable for taking risks of which we are unaware."); ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE 178–84 (2009); LON L. FULLER, THE MORALITY OF LAW 77 (1964) ("Strict criminal liability has never achieved respectability in our law."); H.L.A. HART, *Negligence, Mens Rea, and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 136, 152 (2d ed. 2008) ("[S]trict liability is odious . . ."); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 130–31 (1968); Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 742–48 (1981); Gary V. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322 (1966); Joel Feinberg, *The Expressive Function of Punishment*, in PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 25 (Gertrude Ezorsky ed., 1977); Hart, *supra* note 114, at 422–25; Hughes, *supra* note 107, at 602–03; Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 267–68 (1987); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401 (1993); Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067, 1067–70 (1983); Paul Roberts, *Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions*, in APPRAISING STRICT LIABILITY 180, 182, 191 (A.P. Simester ed., 2005); Alan Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978); Sayre, *supra* note 107, at 56; A.P. Simester, *Is Strict Liability Always Wrong?*, in APPRAISING STRICT LIABILITY, *supra* at 21, 21 (noting broad consensus that strict liability is wrong because it "leads to conviction of persons who are, morally speaking, innocent"); Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1109 (1952).

criminals.¹¹⁹ In so doing, strict liability flips on its head the criminal law tenet that “it is better that ten guilty persons escape than that one innocent suffer”¹²⁰ because it sacrifices a morally blameless party for the sake of others. Nonetheless, the Supreme Court has showed no sign of abandoning those precedents.¹²¹ Strict criminal liability is likely to be with us for quite some time.¹²²

Indeed, it has not gone unnoticed that the criticisms advanced by those scholars of strict liability offenses bear a strong similarity to the same type of criticisms that Kahler (and others) have leveled against criminal prosecution of the mentally ill. As Professor Kent Greenawalt put it, one challenge to holding the mentally ill responsible for a crime is that “it is objectionable to punish someone for an antisocial act performed by him but over which he has no real control.”¹²³ Yet, if that is true, he noted, “it is also objectionable to punish someone who supposes, after exercising all possible care, that the act he performs is socially beneficial and permitted by law, even though he turns out to be mis-

119. See Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065, 1079–80 (2014).

120. *Coffin v. United States*, 156 U.S. 432, 456 (1895) (quoting 2 BLACKSTONE, *supra* note 79, at *358) (internal quotation marks omitted); see also, e.g., Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997).

121. Despite substantial support for substantive federal criminal law reform, see John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 TEX. REV. L. & POL. 254–57 (2016), Congress has also given no indication that it will repeal, or even modify, those laws for fear (to some) that doing so would jeopardize “progressive” reforms. Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 829 n.89 (2017) (noting opposition to reform of the federal criminal laws to eliminate strict liability on the ground that any mens rea reform “could undermine public safety and harm progressive goals”).

122. See Larkin, *supra* note 119, at 1078–79 (“The result is this: Regulatory criminal laws have become a settled feature of modern-day statutory codes, and they often impose criminal liability for a host of actions that historically would have been considered only civil infractions. Rather than use the administrative state to sanction regulatory violations only through penalties such as fines, debarment, or license revocation, legislatures have conscripted the criminal justice system—police officers, prosecutors, judges, and jailers—to regulate business by punishing as crimes a broad range of conduct not considered inherently evil, dangerous, or blameworthy. Strict liability, although a relatively recent addition, is no longer a complete oddity in the criminal law. It is just another tool in the toolkit. The result is that we have reached the point where it can be difficult to distinguish the substantive criminal law from tort law save for one distinguishing feature of the former: Only the criminal law is used to incarcerate offenders.”).

123. Kent Greenawalt, “Uncontrollable” Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927, 963 (1969).

taken.”¹²⁴ Perhaps, that should be the law, as he and others have argued,¹²⁵ but, as he and others have recognized, it is not. The Supreme Court has reiterated for more than a century that a mistake of law is no defense to a federal crime.¹²⁶ Given the pedigree and number of Supreme Court decisions rejecting a mistake of law defense as a basis for exculpating someone for a nonviolent regulatory crime, it is not likely that the Supreme Court will overrule that line of authority any time soon. And if that is true, it is difficult to see why the Due Process Clause would be thought to contain a mens rea element that would exculpate someone, such as Kahler, on the ground that he did not know that murder is wrongful.¹²⁷

124. *Id.*

125. Federal criminal law conclusively presumes that everyone knows the law. That ancient rule made sense at common law, when there were few felonies and they mirrored the crimes listed in the Decalogue. Today, there are thousands of federal statutes creating criminal offenses and hundreds of thousands of pertinent federal regulations. Under those circumstances, to refuse to reexamine the common law rule that everyone knows the criminal law is a crime all by itself. *See, e.g.,* Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335 (2018); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 777–81 (2013); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725 (2012).

126. *See, e.g.,* Rehaif v. United States, 139 S. Ct. 2191, 2198 (2019); Shaw v. United States, 137 S. Ct. 462, 467–68 (2016); McFadden v. United States, 135 S. Ct. 2298, 2304 (2015) (“ignorance of the law is typically no defense to criminal prosecution”); Heien v. North Carolina, 574 U.S. 54, 67 (2014); Bryan v. United States, 524 U.S. 184, 193 (1998); Ratzlaf v. United States, 510 U.S. 135, 137 (1994); Cheek v. United States, 498 U.S. 192, 199 (1991); Hamling v. United States, 418 U.S. 87, 119–24 (1974); United States v. Int’l Minerals & Chem. Corp., 402 U.S. 558, 563 (1971); Lambert v. California, 355 U.S. 225, 228 (1957); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912); Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910); Armour Packing Co. v. United States, 209 U.S. 56, 85 (1908); Reynolds v. United States, 98 U.S. 145, 167 (1878) (“Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law.”); Barlow v. United States, 32 U.S. (7 Pet.) 404, 411 (1833) (“It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.”); The Joseph, 12 U.S. (8 Cranch) 451 (1814); Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75 (1908); Rollin M. Perkins, *Ignorance and Mistake in Criminal Law*, 88 U. PA. L. REV. 35 (1939). The only exception is where a federal statute requires that a crime be committed “willfully.” *See, e.g.,* Ratzlaf, 510 U.S. at 137; Cheek, 498 U.S. at 200.

127. Professor Greenawalt’s argument undermines Kahler’s submission in another way. In the professor’s opinion, “[c]ertain forms of strict liability can be defended as consistent with the principle that an actor should be punished only if morally blameworthy.” Greenawalt, *supra* note 123, at 964–65. As an example, he offers the following hypothetical: someone convicted of murder “because death,

2. Procedural Versus Substantive Due Process

Only a modern day Rip Van Winkle would be unaware of the ongoing debate whether the Due Process Clause merely imposes procedural restraints on executive and judicial action or also limits a legislature's substantive lawmaking power.¹²⁸ The contemporary dispute began no later than the Supreme Court's 1965 decision in *Griswold v. Connecticut*,¹²⁹ which held unconstitutional a state law ban on the use of contraceptive drugs or devices by married couples.¹³⁰ The debate has continued apace to the present. Ordinarily, the debate focuses on the legitimacy of the Supreme Court's later decisions in *Roe v. Wade*¹³¹ and *Obergefell v. Hodges*,¹³² cases in which the Court held that the clause imposes a substantive limitation on legislation affecting the areas of "marriage, family, procreation, and the right to bodily integrity."¹³³ Kahler does not expressly ask the Court to rule in his favor on substantive due process grounds, and he does not cite the *Roe* or *Obergefell* decisions as authority to limit Kansas's criminal lawmaking power.¹³⁴ Nevertheless, because of the nature of Kahler's claim as a challenge to the substantive content of Kansas criminal law, there is no

despite his precautions, occurs as a consequence of his felony." That person, he writes, "has committed an illegal and blameworthy act," so "[h]is only real complaint is that his penalty is disproportionate to his blameworthiness." *Id.* at 965. Kahler cannot make that argument because he hardly took "precautions" to prevent his four victims from dying. On the contrary, he intentionally killed each one.

128. See, e.g., Chapman & McConnell, *supra* note 93, at 1676 nn.5–6 (collecting authorities); Larkin, *supra* note 3, at 298–300 (same). For a description of this "Tastes Great!—Less Filling!" contest between the two theories, see Larkin, *supra* note 3, at 297–99.

129. 381 U.S. 479 (1965).

130. *Id.* at 485.

131. 410 U.S. 113 (1973).

132. 135 S. Ct. 2584 (2015).

133. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–49 (1992)).

134. Kahler does, however, cite the Supreme Court's plurality opinion in *Moore v. City of East Cleveland*, 431 U.S. 494 (1972), see Brief for Petitioner, *supra* note 97, at 16, which is also a substantive due process decision, see *Moore*, 431 U.S. at 502–03. Perhaps he did not see the irony between the ruling in *Moore* that the government cannot forbid a grandmother from living with her children and grandchildren, *id.* at 506, and the use he tried to make of it as support for the argument that someone who murdered a grandmother, her daughter, and two of her grandchildren should be able to escape criminal responsibility.

realistic way that he and the Justices can avoid considering the Court's substantive due process case law.

Kahler does not argue that Kansas law made it unduly difficult for him to prove that he did not know the difference between right and wrong. Nor does he contend that the Kansas legislature has biased the trial process against someone like him who seeks to assert that claim. Either of those contentions would sound in procedural due process because their rationale would be that the state has unfairly engineered the conviction of an innocent person. That, however, is not the gravamen of Kahler's argument. Instead, he argues that Kansas's substantive criminal law does not allow him to show that he is morally blameless *at all* because it redefined moral responsibility to focus exclusively on the issue whether he premeditated on the intent to kill his victims.¹³⁵ In so doing, he says, Kansas denied him *any* opportunity to prove that he is morally blameless for murder by virtue of a mental illness that kept him from knowing that murder is *wrongful*.¹³⁶ *This*, he submits, Kansas cannot do—and that is an argument sounding in substantive due process.

Like any argument that rests so heavily on history, Kahler's submission presents a host of familiar interpretive problems that have no obvious nonarbitrary solutions.¹³⁷ How many jurisdictions with a particular practice make a consensus, how long a consensus must stand to become a well-settled tradition, and at what point a tradition is so entrenched that different approaches no longer pass muster, to list a few examples, are questions that defy easy answers. Should other states find the new Kansas approach preferable to their own, there would also be no easy answer for deciding how many states, in what period of time, would be enough to turn the Jayhawk State from an outlier to a trendsetter. Finally, as Professor John Hart Ely has noted, there is more than one past example of community conduct that we now would find unacceptable, even toward its

135. See Brief for Petitioner, *supra* note 97, at 12–13.

136. See *id.*

137. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 60–63 (1980) (explaining why tradition-based solutions do not supply a decisionmaker with an objective means of limiting the reach of substantive due process).

most disfavored members.¹³⁸ Clearly enough, expanse over time and space cannot make a practice into a hallowed constitutional rule, but the distinction between “good” traditions to be constitutionalized and “bad” ones to be abandoned can be elusive. Without answers to these questions, however, we cannot be certain we know what we need to know to create a constitutional right based on history and tradition.

The Supreme Court’s decisions in *Roe* and *Obergefell* involved issues regarding “marriage, family, procreation, and the right to bodily integrity.”¹³⁹ *Kahler v. Kansas* involves murder. Extending the substantive due process doctrine to embrace cases like *Kahler v. Kansas* would be transformative. As explained above (and below), the Supreme Court has refused to use either the Due Process or Cruel and Unusual Punishments Clause as a vehicle for constitutionalizing the criminal law. In fact, less than two decades ago the Court relied on the diverse approaches that Anglo-American law has adopted to the problem of defining criminal responsibility in refusing to specify a particular type of insanity test.¹⁴⁰

The Supreme Court’s 1991 decision in *Chapman v. United States*¹⁴¹ is instructive in this regard. Three defendants were convicted of selling ten sheets (containing 1,000 doses) of blotter paper containing lysergic acid diethylamide, a controlled substance colloquially known as LSD, in violation of the federal controlled substances laws.¹⁴² Under those laws, the length of a defendant’s sentence rests on the weight of the “mixture or substance” containing a detectable amount of a controlled substance.¹⁴³ The defendants argued that, because the weight of the LSD was miniscule compared to the weight of the LSD-laced blotter paper (50 milligrams versus 5.7 grams), the relevant statute should not be read to require counting the weight of the blotter paper or any other transport medium (such as orange

138. *Id.* at 60 (“Running men out of town on a rail is at least as much an American tradition as declaring unalienable rights.” (quoting GARRY WILLIS, *INVENTING AMERICA*, at xiii (1978) (internal quotation marks omitted))).

139. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847–49 (1992)).

140. *Clark v. Arizona*, 548 U.S. 735, 752 (2006) (quoted *infra* at text accompanying note 182).

141. 500 U.S. 453 (1991).

142. *Id.* at 455.

143. *See* 21 U.S.C. § 841(b)(1)(B)(v) (2012).

juice) when calculating their sentences.¹⁴⁴ Counting the weight of an inactive substance, they also argued, was so arbitrary as to violate the Due Process Clause.¹⁴⁵

The Supreme Court rejected those arguments. LSD-infused blotter paper, the Court concluded, was a “mixture” under the controlled substances laws because the LSD and paper were “commingled” or “blended together.”¹⁴⁶ That reading of federal law, the Court also ruled, did not render the controlled substances laws unconstitutionally arbitrary.¹⁴⁷ The defendants had asserted that, because “the right to be free from deprivations of liberty as a result of arbitrary sentences is fundamental,” the federal controlled substances laws could be upheld as applied to LSD “only if the Government has a compelling interest in the classification in question.”¹⁴⁸ The Court quite emphatically rejected both the premise and conclusion of that argument: “we have never subjected the criminal process to this sort of truncated analysis, and we decline to do so now.”¹⁴⁹ The Due Process Clause, the Court explained, regulates *how* the prosecution must prove the essential predicates for punishment, not *what* elements Congress must legislate to define a crime.¹⁵⁰ “Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees.”¹⁵¹ Once the prosecution satisfies that burden, the Court concluded, the government may impose whatever penalty is authorized by law so long as it does not violate either the Eighth Amendment Cruel and Unusual Punishments Clause or the equal protection principles implicit in the Fifth Amendment Due Process Clause.¹⁵²

144. *Chapman*, 500 U.S. at 456.

145. *Id.* at 464–65.

146. *Id.* at 461–62.

147. *Id.* at 464–65.

148. *Id.*

149. *Id.* at 465.

150. *See id.*

151. *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16, 536 (1979)).

152. *Id.* (citing *McMillan v. Pennsylvania*, 477 U.S. 79, 92 n.8 (1986); *Jones v. United States*, 463 U.S. 354, 362 n.10 (1983); *Meachum v. Fano*, 427 U.S. 215, 224 (1976)); *see also* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Kahler's argument boils down to the proposition that this case is like *Obergefell*. The two cases, however, are materially different. There is no remote similarity between the conduct involved in *Obergefell* (same-sex marriage) and in *Kahler* (murder), so the Court's analysis in *Chapman* should apply here as well. In *Chapman*, the Court was unwilling to import into criminal law the same type of "fundamental right" and interest balancing that it has used in cases like *Obergefell*. Instead, the Court concluded that the Due Process Clause simply seeks to ensure that a defendant receives whatever other procedural guarantees the Constitution elsewhere requires at his trial. The *Chapman* case teaches that substantive due process is inapposite when the underlying conduct does not independently qualify for constitutional protection. *Chapman*, accordingly, is fatal to Kahler's claim.

D. *The Rationality of Kansas's Approach
to Criminal Responsibility*

Kahler argues that the Kansas statute is unconstitutional because it irrationally dispenses with an insanity defense, thereby preventing him from showing he did not know that murder was wrongful.¹⁵³ Kansas has a legitimate interest in defining criminal responsibility and in shaping an insanity defense so that only offenders so disturbed that they cannot distinguish right from wrong can invoke it. Kahler argues, however, that, by eliminating the insanity defense altogether, Kansas has gone too far. Kahler relies on the admittedly longstanding Anglo-American law practice of fashioning the metes and bounds of an insanity defense to allow a defendant to assert that, because of a severe mental illness, he did not know that his conduct was wrongful.¹⁵⁴ No jurisdiction has ever done what Kansas

153. See Brief for Petitioner, *supra* note 97, at 32–36.

154. A state can rationally limit a defense to individuals who suffer from a profound mental disease or defect, for several reasons, one being the interest in deterring fraudulent or false claims. For all their differences, various tests for insanity share one common feature: they aim to encompass only severe mental illnesses—for good reason. If any form of mental illness could prove exculpatory, an enormous number of defendants might be acquitted. Consider the test of *Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954), which exculpated a defendant because his unlawful act was the "product" of a mental disease or defect. *Durham* set off a firestorm of debate on that ground. See Abe Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J.

did with section 22-3220, he maintains, and, largely for that reason, Kansas cannot do so now.

Section 22-3220 does *not* eliminate all consideration of a defendant's mental illness, though. Rather, the law channels a jury's consideration of mental illness into the guilt stage, where the jury must decide whether it raises a reasonable doubt that the accused could have formed the intent defined by a crime.¹⁵⁵ In effect, Kansas's law has substituted a diminished capacity defense for an insanity defense. The Constitution does not require the States to recognize either defense. In fact, the Supreme Court twice expressly refused to create a diminished capacity defense. In *Fisher v. United States*,¹⁵⁶ the Court declined the invitation to create such a defense for use in criminal prosecution in the District of Columbia courts.¹⁵⁷ More recently, the Court again rejected a plea to create a diminished capacity defense, this time in *Clark v. Arizona*.¹⁵⁸ Kansas's choice is essentially the mirror image of the one that Arizona made, and that the Supreme Court upheld, in *Clark*—with one important difference. A state can require the defendant to bear the burden of proof on an

905, 905 n.3 (1961) (collecting the “formidable” literature that had developed in the seven years since *Durham*). The National Institute of Mental Health (NIMH) estimates that “[n]early one in five U.S. adults live with a mental illness.” *Mental Health Information, Statistics, Mental Illness*, NAT'L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> [<https://perma.cc/LT9R-BRVP>] (last visited Oct. 19, 2019). Part of the reason is that the mental health profession has defined a “mental illness” to mean virtually everything from an eating disorder to a violent psychosis, in part to allow federal social welfare programs to fund their treatment. “Anxiety disorders” are the most commonly diagnosed mental illnesses, and NIMH estimates that almost a third of U.S. adults have one sometime in their lives. *Mental Health Information, Statistics, Any Anxiety Disorder*, NAT'L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/any-anxiety-disorder.shtml> [<https://perma.cc/DDD8-L57D>] (last visited Oct. 19, 2019).

155. KAN. STAT. ANN. § 22-3220 (2007) (repealed 2011).

156. 328 U.S. 463 (1946).

157. *Id.* at 470, 476–77. “Criminologists and psychologists have weighed the advantages and disadvantages of the adoption of the theory of partial responsibility as a basis of the jury's determination of the degree of crime of which a mentally deficient defendant may be guilty.” *Id.* at 475. Noting that Congress had already divided the offense of murder into separate degrees, the Court said that the matter was one for Congress to resolve. *Id.* at 475–76. “It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends.” *Id.* at 476. That type of “radical departure from common law concepts is more properly a subject for” Congress or the District of Columbia courts. *Id.*

158. 548 U.S. 735, 756–79 (2006).

insanity defense.¹⁵⁹ Kansas, however, has decided to bear the burden of proof on the issue of criminal responsibility by allowing a defendant to use proof of a mental disease to raise a reasonable doubt of his premeditation on an intent to kill. Kansas has therefore done more than just substitute one type of mental illness-based defense for another. The state has assumed the risk of nonpersuasion.

It turns out that Anglo-American legal history is rich with that type of experimentation. During the early years of the common law, the number of crimes was small, and the nature of the criminal law was rudimentary.¹⁶⁰ For instance, the law did not distinguish between murder in the first and second degree or between murder and manslaughter, differences that the criminal law developed over time.¹⁶¹ Nor did the early common law recognize justifications and excuses as defenses to crime.¹⁶² Because all murders were capital crimes,¹⁶³ the royal prerogative of mercy was the only means of "flexibility."¹⁶⁴ People who killed in cold blood ordinarily went to the gallows,¹⁶⁵ but not everyone responsible for homicide was executed. To spare

159. *Id.* at 769 ("[A] jurisdiction may place the burden of persuasion on a defendant to prove insanity as the applicable law defines it, whether by a preponderance of the evidence or to some more convincing degree." (citing ARIZ. REV. STAT. ANN. § 13-502(C) (2001); *Leland v. Oregon*, 343 U.S. 790, 798 (1952) (ruling that a state can require a defendant to prove insanity beyond a reasonable doubt))).

160. See CHRISTOPHER BROOKE, FROM ALFRED TO HENRY III: 871-1272, at 45 (3d ed. 1969) ("The written laws of Anglo-Saxon kings were not comprehensive codes. The main body of the law was customary and unwritten."); Larkin, *supra* note 3, at 327 ("Early English 'law' reflected the Anglo-Saxon-Jute-Dane customs of the local community and was rudimentary at best, both 'rough and crude.'" (quoting FREDERICK POLLOCK, THE EXPANSION OF THE COMMON LAW 139-40 (1904))). In the thirteenth century, for instance, there were only a handful of felonies and misdemeanors. See PLUCKNETT, *supra* note 85, at 442-62.

161. See Green, *supra* note 1, at 473-87.

162. See, e.g., GASKILL, *supra* note 72, at 206 ("Although homicide had been punishable at common law since the Norman Conquest, observing different degrees of the offense was a comparatively late development."); *id.* at 206-07; Green, *supra* note 1, at 426-56.

163. *Tison v. Arizona*, 481 U.S. 137, 159 n.2 (1987) (quoting MODEL PENAL CODE § 210.2 cmt. n.74, at 31 (AM. LAW INST. 1980)). By 1800, the number of capital offenses exceeded 200. DAVID BENTLEY, ENGLISH CRIMINAL JUSTICE IN THE NINETEENTH CENTURY 2, 11 (1998).

164. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 479 (1977).

165. See, e.g., J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 433-34 (1986).

morally blameless parties from execution, kings granted pardons to people who committed accidental, excusable, and justifiable homicides, particularly if they were children.¹⁶⁶ Among the offenders traditionally pardoned were the insane, on the ground that they could not make their peace with God before meeting Him.¹⁶⁷ Over time, the common law courts began to address issues of “madness” in the criminal law themselves. By the late eighteenth century, insanity became a defense for excusing a mentally ill defendant from responsibility.¹⁶⁸

Since then, the issue of how the criminal law should treat a mentally ill defendant has arisen in two very different contexts: mental illness at the time of trial and at the time of the offense. The first context raises the question of whether the accused’s mental illness is sufficiently severe that the government can bring him to trial for a crime, regardless of his mental responsibility at the time of the alleged offense.¹⁶⁹ The Supreme Court

166. See NAOMI D. HURNARD, *THE KING’S PARDON FOR HOMICIDE BEFORE A.D. 1307*, at vii–viii, 152–53 (1969); Duker, *supra* note 164, at 479 (describing the need to pardon a four-year-old child who “accidentally pushed a younger child into a vessel of hot water” simply by opening a door).

167. See, e.g., Ford v. Wainwright, 477 U.S. 399, 406–08 (1986); Solesbee v. Balkcom, 339 U.S. 9, 17–20 (1950) (Frankfurter, J., dissenting); Bateman’s Case (1685) 11 How. St. Tr. 474, 475 (“[N]othing is more certain law, than that a person who falls mad after a crime supposed to be committed, shall not be tried for it; and if he falls mad after judgment he shall not be executed”); 4 BLACKSTONE, *supra* note 105, at **24–25; 2 HENRY DE BRACON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 384 (Samuel E. Thorne trans. & ed., Harvard Univ. Press 1968) (c. 1235); 1 JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW* *619–20 (Philadelphia, Isaac Riley 1819); COKE, *supra* note 91, at 4, 6; 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 2 (Thomas Leach ed., London, Thomas Whieldon 6th ed. 1787); HURNARD, *supra* note 166, at vii–xiv, 68–170; 1 NIGEL WALKER, *CRIME AND INSANITY IN ENGLAND* 194–218 (1968); HENRY WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 463–70 (1954); Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 382–89 (1962). See generally Paul J. Larkin, Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980) (discussing the issue of whether a mentally ill, condemned prisoner could be executed).

168. See BONNIE ET AL., *supra* note 7, at 8; MORRIS, *supra* note 8, at 54–55; Homer D. Crotty, *The History of Insanity as a Defence to Crime in English Criminal Law*, 12 CALIF. L. REV. 105, 110–15 (1924).

169. In a different context, the Court has ruled that the Eighth Amendment Cruel and Unusual Punishment Clause prohibits the execution, but not the imprisonment, of a condemned prisoner, who, because of a mental disease or defect, cannot understand that he will be executed and why. See, e.g., Madison v. Alabama, 139 S. Ct. 718, 720 (2019) (ruling that an offender’s inability to remember the events underlying his crime do not justify forestalling his execution, but his dementia might); Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (ruling that a

has concluded that the Due Process Clause prohibits a mentally ill offender from standing trial or pleading guilty unless he has “a rational as well as factual understanding of the proceedings against him” and “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.”¹⁷⁰

By contrast, when the issue is the responsibility of a mentally ill offender for a crime, there has been anything but uniformity. English and American courts have created an assortment of different tests to distinguish a “bad” from a “mad” offender.¹⁷¹ Among them were the “total defect of understanding” test,¹⁷² the “wild beast” test,¹⁷³ the “right and wrong” test,¹⁷⁴ the M’Naghten test,¹⁷⁵ the “irresistible impulse” test,¹⁷⁶ the “product of mental illness” test,¹⁷⁷ and the American Law Institute test.¹⁷⁸ Some states¹⁷⁹ have chosen a different approach by au-

mentally ill and condemned prisoner cannot be executed if he is incapable of understanding that he will be executed).

170. *Dusky v. United States*, 362 U.S. 402, 402 (1960) (internal quotation marks omitted); *see also Godinez v. Moran*, 509 U.S. 389, 391 (1993) (ruling that the standard of competency to plead guilty or waive representation by counsel is the same as the standard for competency to stand trial); *cf. Indiana v. Edwards*, 554 U.S. 164, 167 (2008) (ruling that a state may deny a mentally ill defendant the right to represent himself at trial if the defendant is not competent to defend himself, even if he is sufficiently competent to be tried).

171. *See Clark v. Arizona*, 548 U.S. 735, 749–52 (2006); *BONNIE ET AL.*, *supra* note 7, at 8–21 (describing the various insanity tests).

172. *See* 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 14–15 (George Wilson & Thomas Dogherty eds., London, E. Rider new ed. 1800) (1736).

173. *See Arnold’s Case* (1724) 16 How. St. Tr. 695, 764–65.

174. *See* Anthony Platt & Bernard L. Diamond, *The Origins of the “Right and Wrong” Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227 (1966).

175. *M’Naghten’s Case* (1843) 8 Eng. Rep. 718, 722; 10 Cl. & Fin. 200, 210 (HL) (ruling that a defendant pleading insanity must prove that, at the time of the act, he suffered from a mental disease or defect of reason so as not to know the nature of the act or, if he did know it, that it was wrong).

176. *See, e.g., Parsons v. State*, 2 So. 854, 863 (Ala. 1887); *State v. Thompson*, Wright 617, 622 (Ohio 1834); *Regina v. Burton* (1863) 176 Eng. Rep. 354, 357; 3 F. & F. 772, 780; *Regina v. Oxford* (1840) 173 Eng. Rep. 941, 950; 9 Car. & P. 525, 546 (“If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible.”); *Hadfield’s Case* (1800) 27 How. St. Tr. 1281 (KB) 1314–15, 1354–55.

177. *See, e.g., Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954); *State v. Jones*, 50 N.H. 369, 369–70 (1871); *State v. Pike*, 49 N.H. 399, 402 (1870); John Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 YALE L.J. 367, 369–70 (1960).

178. *See* MODEL PENAL CODE § 4.01 (AM. LAW INST. 1962) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental

thorizing a jury to return a verdict of “guilty but mentally ill.”¹⁸⁰ Other states have abandoned the insanity defense but, like Kansas, allow evidence of a mental illness to defeat a mens rea element of a crime.¹⁸¹ As the Supreme Court summarized in *Clark v. Arizona*:

With this varied background, it is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal

disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”).

179. Most of the Supreme Court’s decisions involving the insanity defense arose from federal criminal prosecutions. *See, e.g., Jones v. United States*, 463 U.S. 354, 370 (1983) (ruling that the government may confine a defendant who proves that he was insane until the defendant proves that he is no longer mentally ill or a danger to himself or others, even if that period lasts longer than the confinement authorized for conviction of the offense); *Lynch v. Overholser*, 369 U.S. 705, 719 (1962) (ruling that a mentally competent defendant can refuse to interpose an insanity defense); *Fisher v. United States*, 328 U.S. 463, 464–77 (1946) (rejecting the argument that a defendant should be free to use evidence of mental disease short of insanity to disprove the elements of premeditation and deliberation necessary to establish murder); *Davis v. United States*, 160 U.S. 469, 484–93 (1895) (discussing the common law rule that a defendant must be acquitted if there is a reasonable doubt of his sanity). A few, however, involved federal constitutional challenges to the substance of, or procedure for invoking, state-law insanity defenses. *See, e.g., Clark v. Arizona*, 548 U.S. 735, 747–49 (2006) (rejecting arguments that a state must include an inability to comply with the law in an insanity defense and that the state must allow a defendant to use evidence of insanity to disprove an element of the offense); *Rivera v. Delaware*, 429 U.S. 877, 877 (1976) (ruling that the state may place the burden of proof of a preponderance of the evidence on the defendant as to a claim of insanity); *Leland v. Oregon*, 343 U.S. 790, 798–801 (1952) (same, beyond a reasonable doubt; also rejecting the argument that the Due Process Clause requires some form of the “irresistible impulse” test).

180. *See, e.g., Clark*, 548 U.S. at 756–79; *cf. Fisher*, 328 U.S. at 466–67 (refusing to adopt a diminished capacity defendant as a matter of federal common law).

181. *See, e.g., IDAHO CODE* § 18-207 (2016); *KAN. STAT. ANN.* § 21-5209 (Supp. 2018); *MONT. CODE ANN.* §§ 46-14-102, 46-14-311 (2017); *UTAH CODE ANN.* § 76-2-305 (LexisNexis 2017); *Clark*, 548 U.S. at 752 & n.20 (collecting state statutes). In 1964, then-Judge Burger suggested the same approach. *See Warren E. Burger, Psychiatrists, Lawyers, and the Courts*, *FED. PROB.*, June 1964, at 3, 9. Then-Judge Burger argued that “perhaps we should consider abolishing what is called the ‘insanity defense’; the jury would decide within the traditional framework of drawing inferences as to intent from the accused’s conduct only whether he committed the overt acts charged.” *Id.* Under then-Judge Burger’s proposal, “if some mental disorder or illness appears to have precluded the accused from forming a criminal intent, the court alone would deal with that question after a special jury verdict on whether the accused committed the act charged.” *Id.* Thereafter, the judge would then decide the best course balancing protection for society, and protection and rehabilitation for the defendant. *Id.*

offenses, is substantially open to state choice. Indeed, the legitimacy of such choice is the more obvious when one considers the interplay of legal concepts of mental illness or deficiency required for an insanity defense, with the medical concepts of mental abnormality that influence the expert opinion testimony by psychologists and psychiatrists commonly introduced to support or contest insanity claims. For medical definitions devised to justify treatment, like legal ones devised to excuse from conventional criminal responsibility, are subject to flux and disagreement.¹⁸²

Foreign nations, including countries such as Canada and Australia that share English legal heritage with the United States, also use different approaches. Canada, for instance, replaced the “not guilty by reason of insanity” verdict with the verdict “not criminally responsible on account of mental disorder.”¹⁸³ And Australia’s nonbinding Model Criminal Code recommends for Australia’s states a test following *M’Naghten*, but also requires that the defendant prove that he was unable to control his behavior.¹⁸⁴ Some Australian states, meanwhile have created a secondary defense applicable only in murder cases called the “diminished responsibility defense.”¹⁸⁵ Among the other former British colonies, too, there is little uniformity.¹⁸⁶ And among nations that do not share a common British legal heritage, the approaches differ even more dramatically.¹⁸⁷ In

182. *Clark*, 548 U.S. at 752.

183. Canada Criminal Code, R.S.C. 1985, c C-46 § 16; RITA J. SIMON & HEATHER AHN-REDDING, *THE INSANITY DEFENSE, THE WORLD OVER* 15–16 (2006). Under that approach, a judge has significant discretion to determine whether a defendant’s mental illness prevented him from appreciating the nature of his act or knowing that it was wrong.

184. SIMON & AHN-REDDING, *supra* note 183, at 221.

185. *Id.* at 221–23. If a defendant convicted of murder successfully proves this defense (by satisfying a relaxed insanity standard), his conviction will be deemed one for manslaughter instead.

186. *See id.* at 233–34.

187. French courts will acquit a defendant whose mental illness “destroyed his discernment or his ability to control his actions,” but will still criminally punish those with diminished discernment or control. *Id.* at 65 (quoting CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 121-3) (internal quotation marks omitted). The Netherlands uses a guilty but mentally ill verdict that considers the defendant’s degree of culpability when determining an appropriate punishment. *Id.* at 100–02. Some Brazilian states use a verdict similar to “guilty but mentally ill” whereby a mentally ill defendant is convicted but treated. *Id.* at 57–58. Poland considers mental illness when determining a defendant’s culpability, which, in turn, determines the proper punishment. *Id.* at 131. Japan has no specialized law governing mentally ill crimi-

short, when it comes to determining how the criminal law should account for insanity, diversity reigns. Accordingly, even if a longstanding, uniform consensus could establish a due process-based definition of criminal responsibility, there is no such basis here.

That conclusion, however, poses a question: Why do we see uniformity in the case of a standard for determining whether a defendant is competent to stand trial, but variety in the case of the insanity defense? Why has the Supreme Court invoked the Constitution to define the effect of mental illness in the one case but not the other? The reason is twofold. Although medical knowledge is relevant to each problem, the legal response to each problem is fundamentally different from the other. First, the text of the Constitution bears on the issue of competency, but not criminal responsibility. Second, moral (and not only medical) considerations play an important role in deciding criminal responsibility, but not competency.

The Sixth Amendment expressly guarantees every federal defendant a “speedy and public trial,”¹⁸⁸ and the Fourteenth Amendment provides every state defendant with the same right.¹⁸⁹ By the time that the Sixth Amendment had become law, the concept of a “trial” had acquired a meaning that excluded certain practices, including ones previously used to decide guilt or innocence.¹⁹⁰ One forbidden practice was a trial in

nal defendants. *Id.* at 191–92. Nevertheless, it forbids punishment for the “incompetent,” but permits mitigated punishment for those with “diminished competence.” *Id.* at 191. Lastly, Sweden abolished the insanity defense in 1965 and (as of 2006) has never replaced it. *Id.* at 109–10. There, a convicted mentally ill defendant is sentenced to psychiatric incarceration based on the severity of his crime, his age, and his mental state. *Id.* The alternatives summarized here are not exhaustive, but just a few of the many used by different nations. Many countries recognize that the criminal law should treat mentally ill offenders differently, but their approaches differ substantially. They show that the insanity defense as articulated by many United States jurisdictions is but one of many reasonable ways to approach the relationship between mental illness and the criminal law.

188. U.S. CONST. amend. VI.

189. *See* *Klopfer v. North Carolina*, 386 U.S. 213, 223–26 (1967) (ruling that the Fourteenth Amendment Due Process Clause incorporates the Sixth Amendment Speedy Trial Clause).

190. *See, e.g.*, JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 63–66 (2003); PLUCKNETT, *supra* note 85, at 424–41; John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 123–26 (1983); John H. Langbein, *The Criminal Trial before the Lawyers*, 45 U. CHI. L. REV. 263, 274–77 (1978). For example, at one time the common law resolved

absentia.¹⁹¹ That principle is relevant here. Trying a defendant who, because of mental illness, does not know what is happening is tantamount to trying him when he is physically absent from the courtroom.¹⁹² Because the courts are responsible for defining the type of “trial” guaranteed by the Constitution, it makes sense to have a uniform rule to determine a defendant’s competency.

The problem of defining the criminal responsibility of the mentally ill raises different considerations. As explained above, there is no term comparable to a “trial” that the Constitution uses to define criminal responsibility.¹⁹³ The only crimes and defenses defined by the Constitution—for example, “Treason” and “Bills of Attainder”—have a meaning that does not demand any consideration of mental illness. Moreover, although moral considerations are inapposite to the issue whether a defendant can understand that he is on trial and what that entails, moral considerations are critical to the definition of crimes and defenses.¹⁹⁴ Understanding that one is on trial is largely a medi-

criminal charges through ordeal, trial by combat, or *peine forte et dure*, a form of torture in which heavier and heavier stones were placed on a defendant until he confessed or died. See, e.g., JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 3 (paperback ed. 2006); MAITLAND & MONTAGUE, *supra* note 5, at 49–50; Andrea McKenzie, “This Death Some Strong and Stout Hearted Man Doth Choose”: The Practice of *Peine Forte et Dure* in Seventeenth- and Eighteenth-Century England, 23 L. & HIST. REV. 279, 281–82 (2005). None of those options would have been acceptable in the colonies or new nation.

191. See *Diaz v. United States*, 223 U.S. 442, 445 (1912); *Hopt v. Utah*, 110 U.S. 574, 577–79 (1884).

192. See *Thomas v. Cunningham*, 313 F.2d 934, 938 (4th Cir. 1963); Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960) (“The competency rule did not evolve from philosophical notions of punishability, but rather has deep roots in the common law as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.”); see also *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975) (“[T]he prohibition [of trials *in absentia*] is fundamental to an adversary system of justice.”).

193. See *supra* Part II.A.

194. See *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (plurality opinion) (“The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.” (quoting *Powell v. Texas*, 392 U.S. 514, 535–36 (1968) (plurality opinion)) (internal quotation marks omitted)); *Martin v. Ohio*, 480 U.S. 228, 232 (1987) (recognizing “the preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to

cal (in particular, psychiatric or psychological) matter. Knowing whether killing is wrongful is predominantly a moral issue, and moral issues inevitably arise when the government seeks to hold someone criminally responsible for his past conduct. To be sure, medical and psychiatric learning is clearly relevant to criminal responsibility, but they are “intertwined” with moral and legal judgments, as Chief Justice Burger once noted.¹⁹⁵ The criminal law has not turned over to psychiatrists the moral judgments that are the jury’s prerogative.

The result is this: the most that due process can demand is that the state’s judgment regarding criminal responsibility not be irrational. There are numerous available options for treating the effect of mental illness on criminal responsibility, and there is no one optimal penal code that every state must use. The Supreme Court has all but admitted as much. In *Clark v. Arizona*, the Supreme Court, after canvassing the history summarized above, concluded that history has not witnessed the universal adoption of any “particular formulation” of mental responsibility that could arguably create “a baseline for due process.”¹⁹⁶ The result is to leave the matter “substantially open

disturb a State’s decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion” (citing *Patterson v. New York*, 432 U.S. 197, 201–02 (1977)); *Patterson*, 432 U.S. at 201 (“It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government” (citing *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion))); see also HOLMES, *supra* note 12, at 36 (“The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.”).

195. See *supra* text accompanying note 10; see also GOLDSTEIN, *supra* note 8, at 91 (“So long as we do not know what really ‘causes’ crime, the insanity defense will have to be framed in a way which permits juries to express the feelings of the community on the subject of responsibility. . . . [L]egislatures and courts have fixed the insanity standard in ways which enable jurors to make moral judgments about blame, but informed as much as possible by relevant fact and medical opinion. And because moral judgments are involved about matters calling for widespread acceptance by the public, it is entirely fitting that they be made by a jury. Thus viewed, the insanity test is merely the organizing principle of a process of decision which uses a ‘political’ solution to advance subtle social objectives. It is a normative standard applied to conflicting clusters of fact and opinion by a jury, an institution which is the traditional embodiment of community morality and, therefore, well suited to determining whether a particular defendant, and his act, warrant condemnation rather than compassion.”).

196. 548 U.S. 735, 752 (2006).

to state choice.”¹⁹⁷ To the extent that the Due Process Clause plays any limiting role regarding the choices that a legislature may make in this regard, that role is the limited one of making sure that states do not act arbitrarily. Why? Because that was the rationale for the adoption of Magna Carta and its lineal descendant, the Due Process Clause.¹⁹⁸

Has Kansas acted arbitrarily? To answer that question, one must start by asking what Kansas has done.

Kansas has done what every jurisdiction has always done: use its penal code to prevent *bellum omnium contra omnes*—“war of everyone against everyone.”¹⁹⁹ Along with the responsibility of defining rules and punishments comes the task of identifying who should be exempt from those proscriptions or punishments and why. Kansas has exempted from criminal responsibility people whose mental illness keeps them from forming the premeditation and intent to kill that are elements of the Kansas law of murder. In Kahler’s case, Kansas law, as well as the instructions that his jury received, permitted him to adduce whatever evidence he could muster of mental illness to escape any liability for murder by raising a reasonable doubt about his ability to act intentionally and with premeditation.²⁰⁰ Kahler’s mental illness-based defense to murder failed not because the state arbitrarily chose to define that crime in a manner that entraps morally blameless parties, but because he failed to satisfy the fair and reasonable terms of the defense available to him under Kansas law. To understand why that is so, consider how Kansas’s law applied to Kahler’s claim of mental illness. Three features of this case stand out as being particularly important in that regard.

First, Kahler was convicted of capital murder for shooting and killing his wife, from whom, because of her infidelity, he had been estranged.²⁰¹ Kahler also killed his two daughters,

197. *Id.*

198. See *supra* Part II.B.

199. THOMAS HOBBES, *LEVIATHAN* 80 (Edwin Curley ed., Hackett Publ’g Co. 1994) (1651).

200. KAN. STAT. ANN. § 21-5209 (Supp. 2018) (“It shall be a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the crime charged. Mental disease or defect is not otherwise a defense.”); see also Joint Appendix, *supra* note 56, at 163–79.

201. *State v. Kahler*, 410 P.3d 105, 112–14 (Kan. 2018).

whom he believed had taken his wife Karen's side in the divorce proceedings, and finally Karen's grandmother Dorothy, the woman who gave refuge to his other three victims.²⁰² These facts helped to establish a powerful *motive* for killing them: retribution. Although proof of motive is not an element of murder at common law or in Kansas, establishing a defendant's motive nonetheless can be "crucial in determining whether or not the defendant has committed a given crime," particularly one involving proof of intent, like murder.²⁰³

Second, in accordance with Kansas's law and the guilt stage jury instructions given at Kahler's trial, the prosecution had to prove that he *intentionally* killed his four victims.²⁰⁴ The evidence establishing that element was conclusive. An "intentional" murder is a homicide that is "purposeful and willful," rather than "accidental."²⁰⁵ To shoot his family members, Kahler used a civilian version of the rifle used by the United States military for the last 50 years.²⁰⁶ His use of that weapon alone proves that Kahler intended to kill his victims.

Third, Kansas law and the jury instructions in this case also required the state to establish that Kahler acted with *premeditation*,²⁰⁷ which means that Kahler "thought the matter over beforehand" and "formed the design or intent to kill before" shooting his victims.²⁰⁸ Although there is no fixed period required for someone to premeditate, premeditation "requires more than the instantaneous, intentional act of taking another's life."²⁰⁹ Some reflection is necessary. Here, there was plenty. The police found an empty rifle box in Kahler's car and discovered the victims lying in three separate parts of the home; Karen was lying in the kitchen, Emily and Dorothy were in the living

202. *Id.*

203. WAYNE R. LAFAYE, CRIMINAL LAW § 5.3(a), at 273 (5th ed. 2010).

204. Joint Appendix, *supra* note 56, at 164–73.

205. *Id.* at 175.

206. Kahler, 410 P.3d at 119; see Todd South, *More than a rifle: How a new 6.8mm round, advanced optics will make soldiers, Marines a lot deadlier*, MILITARY TIMES (Dec. 10, 2018), <https://www.militarytimes.com/news/your-army/2018/12/10/more-than-a-rifle-how-a-new-68mm-round-advanced-optics-will-make-soldiers-marines-a-lot-deadlier/> [https://perma.cc/WAY8-VF4D].

207. Joint Appendix, *supra* note 56, at 163.

208. *Id.* at 176.

209. *Id.*

room, and Lauren was upstairs.²¹⁰ Together, that evidence showed that Kahler took his rifle from his car into Dorothy's home and moved throughout the house to shoot his four victims—virtually a textbook case of premeditation.

To succeed with his due process challenge, a defendant like Kahler would have to show that the law permitted the state to convict him arbitrarily, that is, without the necessary finding of blameworthiness.²¹¹ But the record in this case is clear that, even without a formal insanity defense, the jury had ample opportunity to weigh all the appropriate evidence and assess Kahler's responsibility before handing down its verdict. People who premeditate on an intent to kill are not morally blameless by any stretch of the imagination. The jury convicted Kahler because the state's proof established beyond peradventure that Kahler chose to take four lives with no remote justification or excuse. That conduct has been immoral since Cain killed Abel²¹² and has been a crime since Moses came down from Mount Sinai with the Ten Commandments,²¹³ conduct that traditionally has been, and is in Kansas today, punishable by the death penalty.²¹⁴

A state does not act irrationally by relying on long-standing, widely accepted principles defining conduct like Kahler's as immoral. As historians have noted, "the early criminal law appears to have been well integrated with the mores of the time, out of which it arose as 'custom.'"²¹⁵ Those mores and customs represented a local consensus that certain conduct should be prohibited and certain offenders treated as outlaws.²¹⁶ Mem-

210. *Kahler*, 410 P.3d at 114.

211. *See supra* Part II.C.2.

212. *Supra* note 1.

213. *See, e.g., Exodus* 20:13 (King James) ("Thou shalt not kill.").

214. *See, e.g., KAN. STAT. ANN.* § 21-6617 (Supp. 2018); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019) ("The Constitution allows capital punishment. In fact, death was 'the standard penalty for all serious crimes' at the time of the founding." (citations omitted)).

215. Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 644 (1941); *see also* ROBERT KELHAM, *THE LAWS OF WILLIAM THE CONQUEROR*, at v-xii (London, Edward Brooke 1779) (William the Conqueror maintained pre-Norman English customs); LAFAVE, *supra* note 203, at 78-80.

216. *See, e.g., BAKER, supra* note 5, at 8-9; JENKS, *supra* note 5, at 3 ("The so-called Anglo-Saxon Laws date from a well-recognized stage in the evolution of law. They reveal to us a patriarchal folk, living in isolated settlements, and leading lives regulated by immemorial custom."); F.W. MAITLAND, *THE CONSTITUTIONAL*

bers of the community had knowledge of what the law prohibited. For one thing, as Holmes noted, “crimes are also generally sins,” so if you knew the Decalogue, you knew the penal code.²¹⁷ Moreover, “The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right.”²¹⁸ For that reason, “If not to his knowledge lawless, he is at least dishonest and unjust. He has little ground of complaint, therefore, if the law refuses to recognise his ignorance as an excuse, and deals with him according to his moral deserts.”²¹⁹ In fact, there has long been a consensus that the crimes defined at common law reflect harmful and wrongful conduct.²²⁰ That consensus was not a transient phenomenon; it remains strong today.²²¹

HISTORY OF ENGLAND 1–4 (reprt. 1913); FREDERICK POLLOCK, THE EXPANSION OF THE COMMON LAW 139–40 (1904); Larkin, *supra* note 3, at 327 (“Early English ‘law’ reflected the Anglo-Saxon-Jute-Dane customs of the local community and was rudimentary at best, both ‘rough and crude.’ The laws of the folk, the ‘folk-right,’ could vary among ancestors and from community to community.” (footnote omitted)); *id.* at 328–29; *supra* text accompanying notes 4–5.

217. HOLMES, *supra* note 12, at 100.

218. JOHN W. SALMOND, JURISPRUDENCE 374–75 (2d ed. 1907).

219. *Id.* at 375.

220. As Professor Lawrence Friedman has written about property crimes:

Perhaps the most primitive and basic rules in the criminal justice system were those that protected property rights. . . . The laws against theft, larceny, embezzlement, and fraud are familiar friends. People may not know every technical detail, but they get the general point. Probably all human communities punish theft in one way or another; it is hard to imagine a society that does *not* have a concept of thievery, and some way to punish people who help themselves to things that “belong” to somebody else.

LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 108–09 (1993).

221. Professor Wesley Skogan explained that agreement as follows:

In the case of common crime, a large body of research indicates that there *is* in fact a value consensus. People of all races and classes agree we should shun theft, violence, sexual assault, and aggression against children. They give very similar ratings to the seriousness of various kinds of offenses, and they agree to a surprising extent on how stiff the punishments ought to be for violations of the law. The issue of what is criminal has been settled politically in debate over the criminal code, and within law-abiding society there is broad consensus on such matters.

These middle-class values are just about everyone’s values.

WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 5 (1990).

Not surprisingly, murder has always been at the top of that list. Every colony and every state has treated murder as a heinous offense. In the words of Professor Mark Yochum, "evil is fundamentally known. . . . Ignorance that murder is a crime is no excuse for the crime of murder."²²² What Kansas has done, at bottom, is make the decision that anyone who premeditates on an intent to kill should be held morally responsible for that crime, regardless of whether he knew that murder is wrongful.²²³

Finally, it would be a mistake to assume that every aspect of section 22-3220 works solely to a defendant's disadvantage. Traditionally, the insanity defense "has not threatened" a state's interest in public safety because it rested "upon the concept of mental disease," and that concept has long been regarded as a restrictive one, "extending only to those who had obviously lost touch with reality."²²⁴ The Kansas statute, however, does not require that a defendant be so severely disturbed before he can offer evidence of a mental illness to defeat the state's proof of intent and premeditation. The statute, section 22-3220 of Kansas Statutes Annotated, uses the term "mental disease or defect," but it does not define that term to include only the type of severe mental disorders that rob someone of knowing who he is, what he is doing, and whether (and, if so how) his actions have consequences. Nor did the jury instructions in Kahler's own case limit the jury's consideration of the type of proof that Kahler offered to such severe diseases.²²⁵ Those instructions

222. Mark D. Yochum, *The Death of a Maxim: Ignorance of Law Is No Excuse (Killed by Money, Guns and a Little Sex)*, 13 ST. JOHN'S J. LEGAL COMMENT. 635, 636 (1999).

223. Consider that point from another perspective. In *United States v. Freed*, 401 U.S. 601 (1971), the Supreme Court held that Congress could prohibit the possession or receipt of unregistered hand grenades without including a mens rea element. *Id.* at 609. The likelihood of convicting a morally blameless person, the Court noted, was small because "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.*; see also *id.* at 616 (Brennan, J., concurring in the judgment) ("Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it."). The same is true of intentional, premeditated murder.

224. GOLDSTEIN, *supra* note 8, at 19.

225. The trial judge instructed the jury in *Kahler* as follows:

Evidence has been presented that the defendant was afflicted by mental disease or defect at the time of the alleged crime. Such evidence is to be considered only in determining whether the defendant had the state of mind required to commit the crimes.

actually were a benefit for Kahler because he does not maintain that he suffered from the type of mental disease that leads someone to lose touch with the world.²²⁶

The result is that section 22-3220 has a benefit for a mentally ill defendant that a traditional insanity defense would not: it allows him to use evidence of mental illness to disprove the necessary mens rea for murder in circumstances where he could not hope to prevail if he could use that evidence only to support an insanity defense. That would be particularly true if, as the Supreme Court has held, a state can require a defendant to prove his insanity beyond a reasonable doubt.²²⁷ It should be far easier for a defendant to use evidence of mental illness to disprove an element of the offense that the state must prove beyond a reasonable doubt than it would be to prove his insanity under that standard. At the very least, it was certainly rational for the Kansas state legislature to conclude that the balance struck by section 22-3220 is a reasonable one.²²⁸

When considering capital murder, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked premeditation and/or the intent to kill.

When considering murder in the first degree, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked premeditation and/or the intent to kill.

When considering murder in the second degree, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked the intent to kill.

When considering aggravated burglary, you are instructed the defendant is not criminally responsible for his acts if, because of mental disease or defect, the defendant lacked the intent to commit capital murder.

Joint Appendix, *supra* note 56, at 177.

226. See Brief for Petitioner, *supra* note 97, at 6–9.

227. See *Leland v. Oregon*, 343 U.S. 790, 798–801 (1952).

228. One class of defendants adversely affected by the change of law are those represented by the defendant in *Bethel*: killers who believe they are acting on a divine command. Defendants like those suffer from a form of mental illness that does not cast doubt on premeditation, but has historically found some recognition in the law. See *People v. Schmidt*, 110 N.E. 945 (N.Y. 1915). The issue has arisen in other cases too. See, e.g., *Lundgren v. Mitchell*, 440 F.3d 754, 784 (6th Cir. 2006) (Merritt, J., dissenting) (collecting cases where a deific decree claim served as the basis for an insanity defense); *Guiteau's Case*, 10 F. 161, 182 (D.C. 1882) (dictum stating hypothetical in jury instructions); *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 503 (1844) (same); *Moett v. New York*, 85 N.Y. (40 Sickels) 373, 380 (1881) (same). This issue is academically interesting but vanishingly rare in the real world. According to some amici supporting *Kahler*, the insanity defense itself

* * * * *

Where does that leave us? With this: The Due Process Clause neither defines a crime nor creates a defense to one. In fact, it does not speak to the substantive criminal law at all. That does not mean the clause is unimportant; it is, because it prevents the government from punishing someone outside the bounds of the law. Summary execution, imprisonment, or fines are forbidden. But the clause leaves to the political process—federal and state legislators, and the electorate of each—the responsibility to define the substantive criminal code, both in terms of its offenses and defenses. The Constitution created only one exception to that rule: treason. The Framers defined that crime in the Constitution because they feared that even the new American Congress could be susceptible to the same impulse for self-preservation that drove the English Crown and Parliament

is rarely an issue in criminal cases and is raised in less than one percent of federal and state trials. See Brief of *Amicus Curiae* 290 Criminal Law and Mental Health Law Professors in Support of Petitioner's Request for Reversal and Remand at 19, 21, *Kahler v. Kansas*, No. 18-6135 (U.S. June 7, 2019) (less than one percent of criminal cases); Brief of *Amici Curiae* the American Civil Liberties Union and the ACLU Foundation of Kansas in Support of Petitioner at 19, *Kahler v. Kansas*, No. 18-6135 (U.S. June 7, 2019) [hereinafter Brief of ACLU] (collecting citations that defendants rarely claim insanity); Brief of American Psychiatric Ass'n et al. as *Amici Curiae* in Support of Petitioner at 10, *Kahler v. Kansas*, No. 18-6135 (U.S. June 7, 2019). Although the precise number of instances of these cases is unknown, the majority in *Lundgren* was satisfied that it was so small that defense counsel's failure to raise a deific decree insanity defense did not establish ineffective assistance of counsel. *Lundgren*, 440 F.3d at 773 n.6. Even in the famous case of *People v. Schmidt*, Schmidt's claim was of dubious validity; he later admitted that his asserted delusion was a lie. *Schmidt*, 110 N.E. at 945-46. One possible resolution is that the people of a state like Kansas, through their lawmakers, have simply decided, quite reasonably, not to extend the same protection for such conduct as they do to other forms of homicide under the influence of mental disturbance. If so, that is well within the state legislature's historically broad discretion on the issue. In *Powell v. Texas*, the Supreme Court blanched at the prospect of allowing a mentally ill defendant to go free for murder when his illness compelled him to commit that crime. 392 U.S. 514, 534-35 (1968) (plurality opinion); see *id.* at 548-54 (White, J., concurring in the result); *infra* text accompanying notes 316-318. *Powell* suggests that the Court would not be receptive to such a claim. But whatever the outcome might be for such a defendant's claim, *Kahler v. Kansas* does not give the Supreme Court an opportunity to resolve it. *Kahler* does not contend that God commanded him to slaughter his family. Nowhere in his own description of how his mental illness affected his actions does *Kahler* even hint that God gave him any such order. See Brief for Petitioner, *supra* note 97, at 6-9. Nor does *Kahler* suggest that, because God told him that his family members were, for example, in league with Satan, he inferred that God wanted them dead. Whatever the outcome might be were a different defendant to raise such a claim, *Kahler v. Kansas* does not give the Supreme Court an opportunity to resolve it.

to treat political dissenters as tantamount to armed insurrectionists. Otherwise, the Founders trusted the elected members of Congress and state assemblies with the responsibility of defining the penal code. Neither the text, the history, the judicial interpretation, nor the purpose of the Due Process Clause justifies casting aside the Framers' trust in the democratic process.

III. THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE AND THE INSANITY DEFENSE

Kahler argues that, however the Supreme Court resolves his due process claim, the Cruel and Unusual Punishments Clause also prohibits Kansas from defining murder and insanity as section 22-3220 provides.²²⁹ In his view, any punishment that an offender receives by virtue of the application of that statute is both "cruel" and "unusual."²³⁰ It would be "cruel," he contends, to punish someone who was "wholly unable to comprehend the nature and quality" of an act when he committed it.²³¹ Doing so serves no legitimate justification for punishment, he contends, and partakes of being "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; [and] unrelenting."²³² It would also be "unusual" to punish such an individual, Kahler maintains, because "both England and the Colonies universally recognized" that someone incapable of distinguishing right from wrong should not be criminally punished.²³³ The appropriate response, Kahler concludes, is to use a verdict of not guilty by reason of insanity to civilly commit an offender until he "has regained his sanity or is no longer a danger to himself or society."²³⁴

Kahler's argument rests on a faulty premise, confusing guilt and punishment issues that are properly treated separately. Kahler starts with the rule that the state cannot try or execute a

229. Brief for Petitioner, *supra* note 97, at 29–36.

230. *Id.* at 30–31.

231. *Id.* at 30 (quoting *Sinclair v. State*, 132 So. 581, 583 (Miss. 1931) (per curiam)) (internal quotation marks omitted).

232. *Id.* at 31 (first alteration in original) (quoting *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (quoting 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773))).

233. *Id.* at 30.

234. *Id.* at 36 (quoting *Jones v. United States*, 463 U.S. 354, 370 (1983)) (internal quotation marks omitted).

mentally incompetent offender.²³⁵ To that rule, he adds the conclusion that Kansas's law has eliminated the issue of whether an offender can distinguish right from wrong at the time of the offense, an issue that might be the only one that can save an offender from the gallows.²³⁶ Together, the two halves of that argument, Kahler submits, not only make section 22-3220 an outlier in Anglo-American law, but also render unconstitutional any punishment imposed on a defendant unaware that his conduct was unlawful.²³⁷ As explained in this Part, however, materially different constitutional terms apply to the guilt and sentencing stages, foreclosing any elision of the two.

A. *The Text of the Cruel and Unusual Punishments Clause*

If the Due Process Clause is an odd place to look for a limitation on a state's power to define crimes, the Cruel and Unusual Punishments Clause is a positively bizarre choice. Its text focuses expressly and exclusively on "punishment,"²³⁸ and, as explained above, the Constitution prohibits the state from imposing *any* punishment on someone until after he has pleaded or been found guilty.²³⁹ The Supreme Court's 1991 decision in *Chapman v. United States* made that point well.²⁴⁰ Accordingly, the text of the Cruel and Unusual Punishments Clause alone proves that it has no bearing on the antecedent issue of a defendant's guilt or innocence. The definition of criminal responsibility is a matter for the substantive criminal law, and perhaps the Fifth and Sixth Amendments, but certainly not the Eighth. By the time that the Cruel and Unusual Punishments Clause comes into play, a party is no longer "accused" of a crime, as the Sixth Amendment would treat him;²⁴¹ he has been "convicted" of committing it. His status has changed; he now may be penalized however the law provides, so long as that punishment is not cruel and unusual. Put differently, by the time of sentencing, the government's power to define crimes

235. *Id.* at 12–14.

236. *Id.* at 14–15.

237. *Id.* at 29–36, 39–43.

238. U.S. CONST. amend. VIII.

239. See *supra* text accompanying notes 148–152.

240. 500 U.S. 453, 465 (1991).

241. U.S. CONST. amend. VI.

has dropped out of the picture; what matters is its power to punish.

The scenario in *Kahler* is analogous to the one in *United States v. Marion*.²⁴² There, the defendants argued that the federal government violated their Sixth Amendment Speedy Trial Clause right to a prompt trial²⁴³ by waiting three years after the occurrence of the alleged fraud before obtaining an indictment charging them with a crime.²⁴⁴ The Supreme Court made short work of that argument. In an opinion by Justice Byron White, the Court explained that the Speedy Trial Clause “has no application” until an offender “in some way becomes an ‘accused,’” which did not happen in *Marion* until the grand jury returned its indictment.²⁴⁵ “On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been ‘accused’ in the course of that prosecution,” Justice White explained.²⁴⁶ “These provisions would seem to afford no protection to those not yet accused” he added, “nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.”²⁴⁷

Marion recognized that constitutional terms—like “accused”—matter because they define and limit the reach of the law. For that reason, the Court held that the Speedy Trial Clause does not apply to someone not yet charged with a crime because, until a person has been charged, he has been “accused” of nothing.²⁴⁸ The methodology and logic of *Marion* apply directly to *Kahler*. The term “punishments” matters for purposes of the Cruel and Unusual Punishments Clause because it limits the reach of that clause. To adopt a phrase from *Marion*, a clause devoted to regulating the legality of a punish-

242. 404 U.S. 307 (1971).

243. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

244. *Marion*, 404 U.S. at 308–09.

245. *Id.* at 313.

246. *Id.*

247. *Id.*; cf. *Parke v. Raley*, 506 U.S. 20, 27 (1992) (“We have said before that a charge under a recidivism statute does not state a separate offense, but goes to punishment only.” (citing *Oyler v. Boles*, 368 U.S. 448, 452 (1962); *Graham v. West Virginia*, 224 U.S. 616, 623–24 (1912); *McDonald v. Massachusetts*, 180 U.S. 311, 313 (1901))).

248. *Marion*, 404 U.S. at 313–14.

ment “has no application”²⁴⁹ to the logically and legally antecedent issue of how a crime can be defined.

In sum, just as Marion could not force the Speedy Trial Clause to play a role at a preindictment stage because its text did not permit that reading, Kahler should not be able to force the Cruel and Unusual Punishments Clause to play a role at the preconviction stage. In each case, the text does not allow for that reading. That conclusion should end any discussion of the use of the latter clause to define an offense.

B. *The History of the Cruel and Unusual Punishments Clause*

The history of the Cruel and Unusual Punishments Clause confirms the evident meaning of its text.²⁵⁰ The clause is the direct offspring of the English Bill of Rights of 1689²⁵¹ and section 9 of the 1776 Virginia Declaration of Rights²⁵²—both of which (except for unimportant spelling differences) prohibited “cruel and unusual punishments.”²⁵³ Historians generally agree that what prompted Parliament to adopt the English Bill of Rights were the sentences imposed by the infamous King’s Bench Lord Chief Justice Jeffreys during the Stuart reign of King James II.²⁵⁴ Historians differ only over what precise atrocities Lord Chief Justice Jeffreys committed that outraged Parliament.²⁵⁵ One

249. *Id.* at 313.

250. *Cf. id.* at 313–14 (noting that “nothing in the circumstances surrounding the adoption of the Amendment indicat[es] that it does not mean what it appears to say”). For discussions of the history of the Cruel and Unusual Punishments Clause, see *Harmelin v. Michigan*, 501 U.S. 957, 966–75 (1991) (opinion of Scalia, J.); 4 BLACKSTONE, *supra* note 105, at *369–72; 1 CHITTY, *supra* note 167, at *712; LOIS G. SCHWOERER, *DECLARATION OF RIGHTS, 1689*, at 279, 295–98 (1981); *SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS* 236–38 (Richard L. Perry & John C. Cooper eds., rev. ed. 1978); 1 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 490 (1883); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 750–51 (Boston, Hilliard, Gray & Co. 1833); Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*,” 57 CALIF. L. REV. 839 (1969); Note, *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54 (1910). For an example of cases interpreting that clause or state counterparts, see *Barker v. People*, 20 Johns. 457 (N.Y. Sup. Ct. 1823), *aff’d*, 3 Cow. 686 (N.Y. 1824).

251. An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M. c. 2, § 10 (Eng.).

252. VA. CONST. of 1776 (Bill of Rights), § 9.

253. See *Harmelin*, 501 U.S. at 966–74 (opinion of Scalia, J.).

254. *Id.* at 967.

255. See *id.* at 967–74 (summarizing the different theories).

theory focuses on the vicious sentences that Lord Chief Justice Jeffreys handed down during the “Bloody Assizes” following the Duke of Monmouth’s unsuccessful 1685 rebellion.²⁵⁶ Lord Chief Justice Jeffreys sentenced hundreds of insurgents to death via disemboweling, beheading, and drawing and quartering.²⁵⁷ The other theory is that Lord Chief Justice Jeffreys imposed punishments unauthorized by statute and unknown to the common law.²⁵⁸ In 1685, Titus Oates, a Protestant cleric, was convicted of committing perjury for making false accusations against fifteen Catholics who were executed for organizing the 1679 “Popish Plot” to overthrow King Charles II.²⁵⁹ Capital punishment was no longer an authorized penalty for that crime, but Lord Chief Justice Jeffreys decided to take the law into his own hands.²⁶⁰ He orchestrated a novel sentence for Oates of two floggings and life imprisonment accompanied by five exposures on pillory a year, perhaps believing (perhaps hoping) that Oates would “be scourged to death.”²⁶¹ Though Oates was not a sympathetic character, there was considerable contemporary agreement that, however much he may have deserved the punishment he received, the law did not authorize his sentence, so Lord Chief Justice Jeffreys’s judgment was illegal.²⁶²

Either way, the history offers no support for Kahler’s argument. The Framers understood that the Cruel and Unusual Punishments Clause would prohibit hideously painful or unauthorized sentences. There is nothing to suggest that it would also serve as a restraint on Congress’s ability to define crimes, to say nothing of Congress’s power to decide what defenses to recognize and how they should be adjudicated. Indeed, concern that the *courts*, not Congress, might exceed their authority by going on a frolic and detour to take “special care” of an of-

256. *Id.* at 968.

257. *Id.* Picture the “Freedom!” scene in BRAVEHEART (Paramount Pictures 1995).

258. See *Harmelin*, 501 U.S. at 968 (opinion of Scalia, J.).

259. *Id.* at 969.

260. *Id.* at 970.

261. 1 LORD MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 478, 482 (Charles Harding Firth ed., Macmillan & Co. 1913) (1849); see also Second Trial of Titus Oates (1685) 10 How. St. Tr. 1227 (KB) 1314–17; *Harmelin*, 501 U.S. at 967–71 (opinion of Scalia, J.).

262. See *Harmelin*, 501 U.S. at 973–74 (opinion of Scalia, J.).

fender was a prominent feature of at least one of the explanations why that clause became law.²⁶³

C. *Judicial Interpretations
of the Cruel and Unusual Punishments Clause*

1. *The Cruel and Unusual Punishments Clause and Sentencing*

The Supreme Court's precedents confirm the teaching of the text and history of the Cruel and Unusual Punishments Clause.²⁶⁴ Nearly all of the Court's decisions focus on one aspect or another of the punishment of convicted offenders. Those decisions address one or more of the following types of questions: Are some punishments impermissible regardless of the facts and circumstances of the crime and offender?²⁶⁵ Are some penalties impermissible only for certain crimes²⁶⁶ or offenders?²⁶⁷ Can recidivists be more severely punished than first time

263. *Second Trial of Titus Oates*, 10 How. St. Tr. at 1316.

264. Nineteenth century lower court decisions are to the same effect. They read state counterparts to the Cruel and Unusual Punishments Clause as forbidding only certain punishments. *See, e.g.*, *Jackson v. United States*, 102 F. 473, 487–90 (9th Cir. 1900); *Whitten v. State*, 47 Ga. 297, 301–02 (1872); *Hobbs v. State*, 32 N.E. 1019, 1020–21 (Ind. 1893); *State v. White*, 25 P. 33, 33–35 (Kan. 1890); *Garvey v. Whitaker*, 19 S. 457, 458–59 (La. 1896); *Commonwealth v. Hitchings*, 71 Mass. (5 Gray) 482, 486 (1855); *Cummins v. People*, 3 N.W. 305, 305 (Mich. 1879); *State v. Williams*, 77 Mo. 310, 312–13 (1883); *State v. Driver*, 78 N.C. 423, 426–28 (1878); *State v. Becker*, 51 N.W. 1018, 1022 (S.D. 1892); *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449–50 (1824).

265. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (prohibiting prison officials from exhibiting “deliberate indifference” to a prisoner’s serious medical needs); *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (upholding use of capital punishment as a penalty for murder); *Trop v. Dulles*, 356 U.S. 86, 91 (1958) (prohibiting the federal government from denaturalizing and expatriating a citizen as the punishment for a crime); *Weems v. United States*, 217 U.S. 349, 382 (1910) (prohibiting Philippine punishment of “*cadena temporal*”).

266. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 419–47 (2008) (prohibiting execution of an offender for the offense of raping a minor); *Harmelin*, 501 U.S. at 957 (upholding mandatory imposition of a sentence of life imprisonment without possibility of parole for crime of possessing more than 650 grams of cocaine); *Coker v. Georgia*, 433 U.S. 584, 591–600 (1977) (prohibiting execution of an offender for the offense of raping an adult).

267. *See, e.g.*, *Hall v. Florida*, 572 U.S. 701, 709 (2014) (prohibiting execution of a condemned prisoner suffering from intellectual disability); *Roper v. Simmons*, 543 U.S. 551, 560–79 (2005) (prohibiting execution of an offender who was younger than eighteen at the time of the crime); *Atkins v. Virginia*, 536 U.S. 304, 311–21 (2002) (same, a mentally disabled offender); *Tison v. Arizona*, 481 U.S. 137, 146–58 (1987) (ruling that parties who planned a violent prison escape were aware that life could be taken and are therefore eligible for the death penalty); *Ford v.*

offenders?²⁶⁸ Do juvenile offenders merit special treatment?²⁶⁹ Is it permissible to carry out a particular punishment in some ways, but not others?²⁷⁰ Are there special procedures that a trial²⁷¹ or

Wainwright, 477 U.S. 399, 405–10 (1986) (prohibiting the execution of a condemned prisoner incapable of understanding that he will be executed); *Enmund v. Florida*, 458 U.S. 782, 788–801 (1982) (prohibiting mandatory imposition of death penalty on an offender who did not intend to kill and did not contemplate that lethal force would be used in commission of the crime).

268. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (upholding two consecutive terms of twenty-five-years-to-life imprisonment for a repeat offender under a state's "three strikes" law); *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (upholding a sentence of twenty-five-years-to-life imprisonment under a state's "three strikes" law); *Solem v. Helm*, 463 U.S. 277, 279, 303 (1983) (prohibiting a sentence of life imprisonment without possibility of parole for a repeat but nonviolent offender); *Rummel v. Estelle*, 445 U.S. 263, 264–65 (1980) (upholding a sentence of life imprisonment on a recidivist); *see also Parke v. Raley*, 506 U.S. 20, 26 (1992) ("Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times. . . . Such laws currently are in effect in all 50 States and several have been enacted by the Federal Government, as well." (citations omitted)); *Spencer v. Texas*, 385 U.S. 554, 559–60 (1967) (citations omitted). It is difficult to reconcile *Solem* and *Rummel* in anything approaching an honest, intelligent fashion. Given the Court's later decisions in *Andrade* and *Ewing*, however, there is no reason to try.

269. *See, e.g., Graham v. Florida*, 560 U.S. 48, 82 (2010) (prohibiting a sentence of life imprisonment without possibility of parole on a juvenile offender for a non-homicide crime).

270. *See, e.g., Bucklew v. Precythe*, 139 S. Ct. 1112, 1118–19 (2019) (rejecting challenge to use of injected chemicals to execute a condemned prisoner); *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (same); *Baze v. Rees*, 553 U.S. 35, 41 (2008) (same); *Francis v. Resweber*, 329 U.S. 459, 465–66 (1947) (upholding second attempt at execution after first attempt failed); *In re Kemmler*, 136 U.S. 436, 437, 447 (1890) (upholding execution by electric chair); *Wilkerson v. Utah*, 99 U.S. 130, 131, 137 (1879) (same, firing squad).

271. *See, e.g., Miller v. Alabama*, 567 U.S. 460, 465 (2012) (prohibiting mandatory sentence of life imprisonment without possibility of parole on an offender who was younger than eighteen at the time of the crime); *Kansas v. Marsh*, 548 U.S. 163, 165–66 (2006) (upholding state law directing jury to impose a capital sentence if aggravating and mitigating factors are in equipoise); *Shafer v. South Carolina*, 532 U.S. 36, 39–40 (2001) (ruling that a defendant must be able to inform jury that he will be ineligible for parole if the state makes "future dangerousness" a relevant capital sentencing factor); *Jones v. United States*, 527 U.S. 373, 375–76 (1999) (ruling that jury need not be informed about consequences of its inability to reach a capital sentencing decision); *Loving v. United States*, 517 U.S. 748, 773–74 (1996) (ruling that the President can specify aggravating factors for a military court-martial panel to consider in a capital case); *Payne v. Tennessee*, 501 U.S. 808, 817–30 (1991) (upholding use of "victim impact" evidence at sentencing stage of a capital case); *McCleskey v. Kemp*, 481 U.S. 279, 282–83, 291 (1987) (rejecting the argument that state had improperly discriminated on the basis of the race of defendants or victims); *Gardner v. Florida*, 430 U.S. 349, 355–62 (1977) (ruling that state must disclose to a defendant before sentencing any evidence on which the sentencer might rely to impose the death penalty).

appellate²⁷² court must follow before imposing or upholding a particular type of punishment? Must a state grant a trial judge or jury discretion to consider the aggravating and mitigating factors in a particular case, or can a state impose the identical sentence on everyone convicted of the same crime?²⁷³ Are there limitations on the type of factors that a state can say aggravate or mitigate the nature of an offense?²⁷⁴ Finally, how much punishment is too much?²⁷⁵ All of those inquiries address different aspects of the “punishment” that the Cruel and Unusual Punishments Clause was designed to regulate. They do not tell a state how to draft its criminal code.

272. See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149, 149 (1990) (ruling that state is not required independently to review legality of a capital sentence that defendant decided not to challenge); *Pulley v. Harris*, 465 U.S. 37, 44–54 (1984) (ruling that state supreme court need not conduct a state-wide review of proportionality of capital sentences); *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (ruling that condemned prisoner may waive any and all federal constitutional challenges to his sentence).

273. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 285–305 (1976) (prohibiting mandatory imposition of death penalty for murder); *Jurek v. Texas*, 428 U.S. 262, 268–79 (1976) (upholding state capital sentencing scheme that directed jury to answer two or three questions when deciding whether to impose the death penalty); see also *Sumner v. Shuman*, 483 U.S. 66, 77–85 (1987) (prohibiting mandatory imposition of death penalty for murder committed while serving a sentence of life imprisonment without possibility of parole); *Roberts v. Louisiana*, 431 U.S. 633, 633–34, 637 (1977) (per curiam) (same, for the murder of a police officer).

274. See, e.g., *Tuilaepa v. California*, 512 U.S. 967, 971–80 (1994) (upholding state capital sentencing aggravating factor over argument that it is unconstitutionally vague); *Johnson v. Texas*, 509 U.S. 350, 352–53 (1993) (upholding state sentencing scheme over the challenge that it did not allow adequate consideration of the mitigating effect of the offender’s youth); *Godfrey v. Georgia*, 446 U.S. 420, 432 (1980) (plurality opinion) (holding unconstitutional the overbroad interpretation of an aggravating factor permitting the death penalty to be imposed for an “outrageously or wantonly vile, horrible or inhuman” murder); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (“[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” (footnote omitted)).

275. See, e.g., *Hutto v. Davis*, 454 U.S. 370, 371–72, 375 (1982) (per curiam) (upholding sentence of forty years’ imprisonment for the possession of marijuana with the intent to distribute it); *supra* note 268 (collecting cases rejecting the argument that life-without-parole sentences imposed on recidivists were disproportionate).

2. *The Cruel and Unusual Punishments Clause and Criminal Responsibility*

In truth, only two Supreme Court decisions are relevant to Kahler's claim. The first one is *Robinson v. California*.²⁷⁶ It suggested that the Eighth Amendment might prohibit a state from punishing someone who could not control his conduct.²⁷⁷ The second decision, *Powell v. Texas*, quite explicitly refused to construe (or extend) *Robinson* to create an involuntariness defense.²⁷⁸ *Powell* eliminates any basis for asserting that the Cruel and Unusual Punishments Clause regulates how the state can define the criminal responsibility of the mentally ill.

Robinson held unconstitutional a California law making it a crime to be a narcotics addict and imposing a punishment of no less than 90 days' incarceration for conviction of that offense.²⁷⁹ The statute did not criminalize the purchase, possession, or use of narcotics.²⁸⁰ In fact, the California law did not punish *any* conduct *at all*; the only offense was the *status* of being addicted to narcotics.²⁸¹ In theory, the statute would have allowed the state to arrest and convict anyone who admitted to being an addict at a Narcotics Anonymous meeting. Because the law imposed a criminal punishment for addiction, rather than authorizing involuntary commitment of addicts, it is likely that the rationale for the statute was to simplify narcotics prosecutions.²⁸² Nonetheless, the result was that, under California law,

276. 370 U.S. 660 (1962).

277. *See id.* at 666–67.

278. *Powell v. Texas*, 392 U.S. 514, 548–54 (1968).

279. *Robinson*, 370 U.S. at 660 n.1, 667.

280. *Id.* at 666.

281. *Id.*

282. *See* Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 70 (1968) (“California, surely, sought to punish ‘being an addict’ not from any abhorrence for the status but because addicts *act*, that is, they use drugs, and some are tempted to commit crimes to obtain money to buy drugs.”); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600–03 (1981); Note, *Public Intoxication Convictions and the Chronic Alcoholic*, 82 HARV. L. REV. 103, 107 n.19 (1968) (“A state may well have valid reasons for punishing the status of being an addict, since it simplifies the problem of enforcement by making proof of actual use of drugs unnecessary and at the same time anticipates future antisocial acts almost certain to occur.”).

if you were addicted to narcotics, you were guilty. It was unnecessary for the prosecution to prove anything else.²⁸³

The Court acknowledged that a state could regulate and punish narcotics trafficking.²⁸⁴ The Court also noted that, as a general matter, a state could involuntarily confine a narcotics addict for treatment.²⁸⁵ California, however, had chosen neither option in Robinson's case. Instead, California had chosen to make the mere *status* of being a drug addict into a crime.²⁸⁶ That clearly troubled the Court because it was tantamount to making it a crime to suffer from a disease that "may be contracted innocently or involuntarily."²⁸⁷ That was a bridge too far. A state could no more make it a crime to become involuntarily addicted to narcotics, the Court reasoned, than it could outlaw becoming involuntarily afflicted with a physical or mental illness.²⁸⁸ That the punishment for being a narcotics addict was only 90 days' confinement did not save the California law from invalidity. As Justice Stewart put it, "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual."²⁸⁹ "But the question cannot be considered in the abstract," he cautioned.²⁹⁰ He then penned the famous line: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."²⁹¹ Because the California law made it a crime to become ill without requiring any voluntary action on someone's part, the Court held the California statute unconstitutional.²⁹²

283. The jury instructions in Robinson's case made that point quite clear. *See Robinson*, 370 U.S. at 662–63; *id.* at 665 ("Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's 'status' or 'chronic condition' was that of being 'addicted to the use of narcotics.' And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding.").

284. *Id.* at 664.

285. *Id.* at 664–65.

286. *Id.* at 666.

287. *Id.* at 667. The state conceded that narcotics addiction was an "illness." *Id.*

288. *Id.* at 666.

289. *Id.* at 667.

290. *Id.*

291. *Id.*

292. *See id.*

The *Robinson* decision created quite a stir in the legal and medical communities because it suggested that the Cruel and Unusual Punishments Clause effectively barred criminal liability for involuntary conduct. In the years immediately following that decision, the courts²⁹³ and academic community²⁹⁴ debated that issue in the contexts of alcohol and drug use. Two federal courts of appeals went so far as to rule that the government could not punish an alcoholic for the crime of *public* intoxication because alcoholism is a disease beyond an alcoholic's voluntary control.²⁹⁵ To resolve that confusion, the Supreme Court granted review in the other Eighth Amendment case relevant here, *Powell v. Texas*.²⁹⁶ *Powell* took back any suggestion that *Robinson* constitutionalizes an involuntariness defense or creates a mental illness-based defense in one form or another.

Powell was convicted in a Texas state court of being intoxicated in public, in violation of state law.²⁹⁷ Citing *Robinson*, *Powell* argued that he could not be held criminally responsible for the offense of public intoxication because he was an alco-

293. See, e.g., *Sweeney v. United States*, 353 F.2d 10, 11 & n.2 (7th Cir. 1965) (questioning whether, in light of *Robinson*, it is permissible to revoke an alcoholic's probation for violating a condition of his probation that he refrain from alcohol use); *United States ex rel. Swanson v. Reincke*, 344 F.2d 260, 260-63 (2d Cir. 1965) (concluding that *Robinson* did not immunize an alleged narcotics addict from the crime of unlawfully possessing narcotics); *State ex rel. Blouin v. Walker*, 154 So. 2d 368, 371-72 (La. 1963) (same, for the crime of habitually using narcotics); *People v. Hoy*, 143 N.W.2d 577, 578 (Mich. 1966) (concluding that it is not a cruel and unusual punishment to imprison an alcoholic for the crime of being drunk and disorderly); *City of Seattle v. Hill*, 435 P.2d 692, 698-99 (Wash. 1967) (concluding that *Robinson* did not immunize an alcoholic from the crime of public intoxication); *Browne v. State*, 129 N.W.2d 175, 179 (Wis. 1964) (concluding that *Robinson* did not immunize an alleged narcotics addict from the crime of using narcotics).

294. See, e.g., Peter Barton Hutt, *Recent Forensic Developments in the Field of Alcoholism*, 8 WM. & MARY L. REV. 343 (1967); Fred L. Lieb, *Cruel and Unusual Punishment and the Durham Rule*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 227 (1968); John M. Murtagh, *Arrests for Public Intoxication*, 35 FORDHAM L. REV. 1 (1966); John B. Neibel, *Implications of Robinson v. California*, 1 HOUS. L. REV. 1 (1963); John A. Lowe, Note, *The Criminal Responsibility of Chronic Alcoholics*, 52 CORNELL L. REV. 470 (1967); James P. Manak, Recent Decision, *The Narcotics Problem: Outlook For Reform*, 12 BUFF. L. REV. 605 (1963); Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

295. See, e.g., *Easter v. District of Columbia*, 361 F.2d 50, 55 (D.C. Cir. 1966) (en banc) (ruling that Cruel and Unusual Punishments Clause forbids punishing an alcoholic for the crime of public drunkenness); *Driver v. Hinnant*, 356 F.2d 761, 765 (4th Cir. 1966) (same).

296. 392 U.S. 514 (1968).

297. *Id.* at 517 (plurality opinion).

holic and could not prevent himself from drinking.²⁹⁸ To prove his case, Powell testified at trial and detailed his inability to overcome his drinking problem.²⁹⁹ Powell also offered the testimony of a psychiatrist that “a ‘chronic alcoholic’ is an ‘involuntary drinker,’ who is ‘powerless not to drink,’ and who ‘loses his self-control over his drinking.’”³⁰⁰ Based on that proof and relying on *Robinson*, Powell argued that he could not be held criminally liable for public intoxication because, as an alcoholic, he could not refrain from drinking to intoxication and appearing in public in that state.³⁰¹

The Supreme Court rejected Powell’s argument.³⁰² After discussing shortcomings regarding the then-current legal and medical knowledge about alcoholism,³⁰³ the plurality opinion by Justice Marshall turned to the issue of whether *Robinson* prohibited the state from punishing alcoholics for any conduct that was the involuntary product of their disease.³⁰⁴ The *Powell* plurality concluded that *Robinson* did not so hold and declined to extend *Robinson* to reach cases like Powell’s.³⁰⁵

Justice Marshall distinguished *Robinson* on the ground that Texas law punished Powell, not for the status of being an alcoholic, but for his conduct of being publicly intoxicated.³⁰⁶ The holding in *Robinson*, the plurality explained, “brings this Court but a very small way into the substantive criminal law” because it disallowed a state only from making the status of ad-

298. *Id.* at 532.

299. *Id.* at 519–20.

300. *Id.* at 518 (quoting the psychiatrist’s trial testimony). The defense psychiatrist added that, when intoxicated, Powell “is not able to control his behavior . . . because he has an uncontrollable compulsion to drink” and lacks “the willpower to resist the constant excessive consumption of alcohol.” *Id.* (same) (internal quotation marks omitted). The psychiatrist conceded that Powell knew the difference between right and wrong when he was sober, but concluded that Powell’s knowledge during sobriety was beside the point because Powell could not keep himself from becoming drunk. *See id.* (same).

301. *See id.* at 521, 532.

302. *See id.* at 531–37; *see also id.* at 548–54 (White, J., concurring in the result).

303. The plurality found that the trial and public records failed to resolve a host of relevant issues, such as whether Powell could refrain from taking his *first* drink, even if he could not stop drinking afterwards; whether the medical profession believed that alcoholism was a “disease”; and whether there were differences among the types of alcoholics. *Id.* at 521–26 (plurality opinion).

304. *Id.* at 532.

305. *Id.* at 532–37.

306. *Id.* at 532.

diction into a crime.³⁰⁷ Reading the holding in *Robinson* any more broadly, the plurality acknowledged, would make the Court, “under the aegis of the Cruel and Unusual Punishment Clause,” into “the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.”³⁰⁸ Justice Marshall explained that *Robinson* does not stand for the proposition that the state cannot outlaw conduct that a defendant cannot stop himself from committing.³⁰⁹ “The entire thrust of *Robinson*’s interpretation of the Cruel and Unusual Punishment Clause” is that the state may criminally punish someone only if he “has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.”³¹⁰ *Robinson*, Justice Marshall reasoned, did not address “the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, ‘involuntary’ or ‘occasioned by a compulsion.’”³¹¹

The plurality also declined the invitation, offered by Justice Fortas in dissent,³¹² to extend the holding in *Robinson* to include cases in which a defendant has involuntarily acquired a “status” or “condition” that forced him to commit the conduct that lead to his prosecution.³¹³ Extending *Robinson* that far would require the Court to create and define “the scope and content of what could only be a constitutional doctrine of criminal responsibility.”³¹⁴ Only by “fiat” could a court limit any such defense to conduct that is both “a characteristic and involuntary” part of conduct caused by a mental illness.³¹⁵

Atop that, “If Leroy Powell cannot be convicted of public intoxication” the plurality reasoned, “it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a ‘compulsion’ to kill, which is an ‘exceedingly strong in-

307. *Id.* at 532–33.

308. *Id.* at 533.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 567 (Fortas, J., dissenting).

313. *Id.* at 533–34 (plurality opinion).

314. *Id.* at 534.

315. *Id.* (quoting *id.* at 559 n.2 (Fortas, J., dissenting)).

fluence,' but 'not completely overpowering.'"³¹⁶ Given the "centuries-long evolution" of the various "interlocking and overlapping" aspects of the concept of criminal responsibility, there was no good reason to conclude that the Due Process Clause forced the states to adopt any one particular answer to that issue.³¹⁷ "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case."³¹⁸

In an opinion concurring in the judgment, Justice White agreed with the plurality that the statute in *Powell* was materially different from the one in *Robinson* because Texas law did not make it a crime simply to be an alcoholic.³¹⁹ His opinion, together with the Marshall plurality opinion, eliminates any basis for asserting that the clause creates a constitutional rule for the law of criminal responsibility.

The Supreme Court's decision in *Powell* dooms Kahler's Eighth Amendment claim. The Court refused to use the Constitution as a mechanism for displacing legislative judgments regarding criminal responsibility, concluding that the legislatures were the better forum to resolve the relationship between a mental disease and criminal responsibility. The Court declined the invitation, implied by Justice Fortas in dissent, to become "the ultimate arbiter of the standards of criminal responsibility, in

316. *Id.*

317. As the plurality put it:

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Id. at 535–36 (footnote omitted).

318. *Id.* at 536.

319. *Id.* at 550 (White, J., concurring in the result) ("I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who would be punished for driving a car but not for his disease.").

diverse areas of the criminal law, throughout the country.”³²⁰ All that the Eighth Amendment requires—the “thrust” of its decision in *Robinson*—is that a defendant “has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.”³²¹ Murder certainly qualifies. Indeed, the Court went out of its way to emphasize that a consequence of treating Powell like Robinson would be to make difficult the conviction for murder of someone whose mental disease *compelled* him to kill—a claim that even Kahler does not advance.³²²

The only ground left for making that claim would be that the purpose of the clause—preventing the gratuitous infliction of pain—justifies reading the clause to regulate a state’s definition of criminal responsibility. As explained below, however, that argument is also unpersuasive.

D. The Purpose of the Cruel and Unusual Punishments Clause

Kahler’s last argument is that criminally punishing an insane offender serves no legitimate purpose and therefore amounts to the type of gratuitous infliction of pain that the Cruel and Unusual Punishments Clause bans.³²³ As he sees it, punishing someone who could not and did not know right from wrong serves “none of the four accepted penological justifications for punishing criminal conduct—retribution, deterrence, incapacitation, or rehabilitation.”³²⁴ Punishing an offender who cannot understand that his conduct was wrongful is like punishing a tree for falling on someone. Neither one comprehends why he or it was punished. The prospect of criminal punishment also cannot deter a deranged individual from committing a crime any more than the availability of a fire extinguisher can deter a blaze from consuming a home. Punishment “is a poor tool for incapacitating the insane” because an offender’s term of im-

320. *Id.* at 533 (plurality opinion).

321. *Id.*

322. *Id.* at 534.

323. Brief for Petitioner, *supra* note 97, at 31. Kahler also argues that punishing an insane offender is “grossly disproportionate,” but that argument is a make-weight. He committed not one but four murders, so the death penalty is not remotely disproportionate for his crimes.

324. *Id.* at 32 (citing *Graham v. Florida*, 560 U.S. 48, 71 (2010)).

prisonment is ordinarily too short or too long relative to his crime.³²⁵ Finally, punishment is unlikely to rehabilitate the insane because prisons are not mental institutions.³²⁶ Under those circumstances, he concludes, punishing an offender who could not and did not know right from wrong is simply wanton cruelty.

Precedent does not support the result Kahler seeks. Kahler cites Justice Kennedy's opinion in *Graham v. Florida*³²⁷ for the proposition that the four penological goals he discusses are exclusive.³²⁸ *Graham*, however, held no such thing. *Graham* concluded only that there was no penological justification for sentencing juveniles to life imprisonment without parole for nonhomicide offenses.³²⁹ In so ruling, *Graham* did not purport to define an exclusive set of justifications for punishment. *Graham* also did not walk back the Court's recognition only seven years beforehand that "the Constitution 'does not mandate adoption of any one penological theory.'"³³⁰ After all, as Justice Kennedy explained in his separate opinion in *Harmelin v. Michigan*,³³¹ "[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. . . . [D]iffering attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes."³³² In fact, *Graham* noted that "Criminal punishment can have different goals, and choosing among them is within a legislature's discretion."³³³

325. *Id.* at 34.

326. *Id.* at 34–35.

327. 560 U.S. 48 (2010).

328. Brief for Petitioner, *supra* note 97, at 32–33 (citing *Graham*, 560 U.S. at 71); see also Brief of ACLU, *supra* note 228, at 10–14; Brief of Amicus Curiae National Ass'n of Criminal Defense Lawyers in Support of Petitioner at 4–6, *Kahler v. Kansas*, No. 18-6135 (U.S. June 7, 2019).

329. *Graham*, 560 U.S. at 73–74.

330. *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

331. 501 U.S. 957 (1991).

332. *Id.* at 999–1000 (Kennedy, J., concurring in part and concurring in the judgment).

333. 560 U.S. at 71. *Graham* also did not reject what Justice Stewart wrote in *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976), that repressing vigilantism and expressing society's moral indignation are legitimate justifications for punishment. See *infra* text accompanying notes 339–341.

Reason also does not support Kahler's claim. His argument rests on several curious assumptions that he makes no effort to justify. The first one is that the purposes of the Cruel and Unusual Punishments Clause matter more than its text. The history discussed above reveals that the Framers sought to prohibit use of hideously painful punishments, such as boiling someone in oil, as the penalty for crime.³³⁴ The Framers' use of the term "cruel," read against the English and American background to the clause, proves as much. But the clause ties its concern with cruelty to the punishments that the government may impose, not to the government's definition of the offenses that could lead to those punishments. The clause prohibits the imposition of "cruel and unusual *punishments*," not the definition of "cruel and unusual *crimes*."

The second mistaken assumption is that the government must *justify* its punishment decisions. The Cruel and Unusual Punishments Clause does not require justifications for punishment; it only bans punishments that are "cruel and unusual" regardless of their rationale. Boiling child rapists in oil might well effectively deter that crime, and many people might conclude that a child rapist deserves to suffer in that manner. The clause forbids that punishment, however, even if its use would eradicate that offense. The same point can be made in the other direction. Perhaps the reason why prisoners wear orange jumpsuits (or the old-fashioned, black-and-white, vertically striped jacket and pants) rather than blue jeans is that wardens believe orange jumpsuits are humiliating. That rationale might be childish, but that does not mean the practice is forbidden or that wardens must justify their decisions about prisoners' wardrobes. Even making the heroic assumption that forcing a prisoner to wear an orange jumpsuit to satisfy a warden's ego is a "punishment," it is hardly a "cruel and unusual" one, whatever the underlying rationale might be. Requiring the government to justify a punishment by proving that it promotes one or more judge-created penological rationales gets the Cruel and Unusual Punishments Clause backwards. A punishment that is neither cruel nor unusual is permissible even if there is no rational explanation why a legislature authorized it or a judge imposed it.

334. See, e.g., *Harmelin*, 501 U.S. at 966–75 (opinion of Scalia, J.).

The third assumption is that there are only *four* legitimate rationales for punishment—retribution, deterrence, incapacitation, and rehabilitation (and punishing Kahler, quite conveniently, advances none of them). This assumption ignores what history teaches, how government works, what punishments accomplish, and what courts may do.

At early common law, local English clans sanctioned offenders to prevent the violent retaliation that would follow if murders, assaults, and thefts were left unpunished and uncompensated.³³⁵ That rationale has little in common with the ones that Kahler contends are exclusive. However “unappealing” to some it might appear today to maintain that forestalling private vigilantism is a legitimate justification for punishment, that is the ground on which modern Anglo-American criminal law rested.³³⁶ If you think that America has outgrown any need to use punishment to prevent vigilantism, think again.³³⁷ People have changed since King Ethelbert drafted the first criminal code in (about) 600 A.D.,³³⁸ but their nature has not. “The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.”³³⁹ Having the government take up that function, the Supreme Court noted in *Gregg v. Georgia*,³⁴⁰ “is essential in

335. See, e.g., BAKER, *supra* note 5, at 2–3; JENKS, *supra* note 5, at 3 (“The so-called Anglo-Saxon Laws date from a well-recognized stage in the evolution of law. They reveal to us a patriarchal folk, living in isolated settlements, and leading lives regulated by immemorial custom.”); Larkin, *supra* note 3, at 329 (“English King Ethelbert drafted the first written code in approximately 600 A.D. . . . The hoped-for goal was to forestall violent retaliation and intertribal warfare.” (footnote omitted)); Frederick Pollock, *The King’s Peace in the Middle Ages*, 13 HARV. L. REV. 177, 177 (1899) (“All existing civilized communities appear to have gone through a stage in which it was impossible to say where private vengeance for injuries ended and public retribution for offences began, or rather the two notions were hardly distinguished.”).

336. *Gregg*, 428 U.S. at 183 (Stewart, J., lead opinion) (citing *Furman*, 408 U.S. at 308 (Stewart, J., concurring)).

337. See PAUL H. ROBINSON & SARAH M. ROBINSON, *SHADOW VIGILANTES: HOW DISTRUST IN THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS* (2018).

338. See BAKER, *supra* note 5, at 2–3; MAITLAND, *supra* note 216, at 1.

339. *Gregg*, 428 U.S. at 183 (Stewart, J., lead opinion) (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring) (internal quotation marks omitted)).

340. 428 U.S. 153.

an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.”³⁴¹

How about three other justifications: educating the public about the importance of obeying the law, recognizing the importance of crime’s victims, and expressing moral outrage at particular crimes and criminals? The government must have punishments available to advertise the importance of compliance, and the government must inflict those punishments on offenders to display its enforcement resolve and thereby educate the public that it means what it says.³⁴² Punishing offenders is also critical to demonstrate societal concern for the damage that offenders inflict on their victims. The legislative budgetary process demonstrates that people are important by funding their interests; the criminal justice system demonstrates that people are important by punishing their victimizers. As for expressing moral outrage: *Gregg* noted that “capital punishment is an expression of society’s moral outrage at particularly offensive conduct.”³⁴³ In some cases—say, mass or torture murders—only the death penalty may adequately express the community’s belief regarding the heinousness of the offense.³⁴⁴

There might be other justifications as well. Our point is not that our list *is* exclusive but that Kahler’s list is *not* and that, even if it were, it is beside the point. There might be scores of

341. *Id.* at 183 (Stewart, J., lead opinion); *see also id.* at 226 (White, J., concurring in the judgment) (referring to his opinion in *Roberts v. Louisiana*, 428 U.S. 325, 355 (1976) (White, J., dissenting) (“It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere.”)).

342. To the inevitable responses that allowing education to serve as a rationale for punishment enables the government both to avoid defending the rationality of its punishment decisions and to use whatever punishments it finds necessary, we plead “Guilty” and “Not guilty.” Yes, an education rationale enables the government to avoid proving that a punishment advances retribution, deterrence, incapacitation, and rehabilitation. But the relevant question—is that punishment cruel and unusual?—remains unchanged. Whether that punishment “works,” as explained below, is beside the point. Whether or not the government finds a punishment necessary to advance those ends is also beside the point. The government might believe that amputating a pickpocket’s hands is the only way to prevent him from recidivating. The Eighth Amendment nonetheless prohibits that penalty.

343. 428 U.S. at 183 (Stewart, J., lead opinion).

344. *See id.* at 184 & n.30.

reasons why a particular sanction could be a legitimate punishment. Investigating their rationality would be a reasonable inquiry for a penologist or a philosopher. The only relevant inquiry for a court, however, is whether a punishment is “cruel and unusual.” Spending time inquiring *why* society punishes offenders—an undertaking neither expressly nor impliedly required by anything in the text or history of the Cruel and Unusual Punishments Clause—serves no legitimate purpose.

Kahler’s last curious assumption, perhaps the least justifiable of the three, is that a punishment must be *effective* to avoid being gratuitous.³⁴⁵ The Constitution grants the federal government specific powers in the hope that elected officials will use them wisely, maybe even effectively. Congress has the power to borrow money, to regulate interstate commerce, and to declare war.³⁴⁶ Congress acts improvidently, but not unconstitutionally, if it runs up a backbreaking debt, if the economy goes into the tank, and if the nation loses a military conflict. If that happens, the public has the chance to replace its elected officials every two, four, and six years.

Punishment decisions are no different. There too, the remedy for failure is political, not legal. No other approach would be workable. Think of the questions that must be answered to do that job properly.³⁴⁷ Are all justifications of equal importance or do some—say, deterrence—carry more weight than others—say, retribution? How do you measure a punishment’s effectiveness? How effective must a punishment be? How do you trade off short-term versus long-term effectiveness? Are some successes—such as uncovering espionage plots or intercepting terrorist attacks—worth more than others are—such as apprehending mass murderers (or serial killers) or convicting senior members of an organized crime family? There are no easy answers to those questions, let alone objective ones. To evaluate the effectiveness of the decisions that legislators and executive officials make, we use the ballot box, not a courtroom.

Unless the Cruel and Unusual Punishments Clause requires an elitist perspective for resolving those questions, how the *public* would answer them is critical. Courts are better

345. See Brief for Petitioner, *supra* note 97, at 31–36.

346. U.S. CONST. art. I, § 8, cls. 2, 3, 11.

347. See Paul J. Larkin, Jr., *Essay: A New Law Enforcement Agenda for a New Attorney General*, 17 GEO. J.L. & PUB. POL’Y 231, 242–45 (2019).

equipped than the public to resolve the legal issues involved in any interpretation of the terms of the Cruel and Unusual Punishments Clause. Law schools train embryonic lawyers, and law school graduates obtain experience in construing legal documents, like constitutions. For that reason, lawyers are better equipped than the public to answer a question involving the meaning of ancient legal texts. But a law degree does not make an attorney into a more qualified decisionmaker for every issue that could arise in a criminal case, even one involving an issue of mental illness. For example, a psychiatrist is more qualified than a lawyer or judge to decide whether a prisoner is mentally ill and would benefit from medication.³⁴⁸ Whether a punishment advances society's interests in retribution, deterrence, incapacitation, and rehabilitation is a question involving moral and political considerations, not an issue of law.³⁴⁹ Judges are no better equipped to evaluate the effectiveness of government than are the people chosen to sit on a jury at trial.³⁵⁰ Kahler, in effect, asks the Supreme Court Justices to serve as amateur criminologists and undertake the "tantalizing aspect" of their profession by deciding the effectiveness of punishment.³⁵¹

The public would likely say that executing Kahler would readily promote the public interest in each of the first three ra-

348. See *Washington v. Harper*, 494 U.S. 210, 228–31 (1990) (concluding that "an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge").

349. *Gore v. United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding the severity of punishment, whether one believes in its efficacy or futility, these are peculiarly questions of legislative policy." (citation omitted)); see also *Graham v. Florida*, 560 U.S. 48, 97 (2010) (Thomas, J., dissenting) ("I am unwilling to assume that we, as Members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority."); *supra* note 10.

350. As Justice Frankfurter once put it:

Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.

Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of the judgment).

351. *Gore*, 357 U.S. at 393.

tionales that Kahler identifies. Retribution “build[s] on the widely held feeling that the criminal owes the community a measure of suffering comparable to that which he has inflicted.”³⁵² Kansas can legitimately believe that capital punishment has a deterrent effect, and the state does not need to prove that point with respect to each individual capital defendant. As for incapacitation: capital punishment ensures that result. Finally, given the nature of his crimes, the public would likely be willing to trade any interest it might have in rehabilitating him for the hope of securing greater protection for potential victims. The state legislature made that judgment, and it is in a better position to represent what Kansans think than any federal court.

One could label punishing Kahler and others like him in different ways: as giving Kahler and any future multiple murderers their just deserts, as deterring other people who have also hit rock bottom from committing murder, as avoiding the suffering of future victims, or just as increasing respect for the law. However you describe it, punishing murderers is a legitimate use of governmental power.

* * * * *

We find ourselves in the same position now that we did at the end of our analysis of the Due Process Clause. The Cruel and Unusual Punishments Clause serves an eminently valuable role, but that role comes into play only after a legislature has defined an offense and a jury has convicted a defendant of committing it. The text, the history, and the judicial interpretations of the clause limit its relevance to the punishment that a state has authorized for a crime.

CONCLUSION

Neither the Due Process Clause nor the Cruel and Unusual Punishments Clause contains a directive ordering the federal or state governments to define the substantive criminal law in any particular fashion. The Due Process Clause prohibits the government from punishing someone until he has been convicted of a crime under the governing jurisdiction’s laws, but it does not instruct legislatures how to define those crimes and whether

352. GOLDSTEIN, *supra* note 8, at 11–12.

or how to recognize defenses to them. The Cruel and Unusual Punishments Clause has even less relevance to the content of the substantive criminal law. It only comes into play after an offender has been convicted of a crime and focuses entirely on the punishments that he can receive. The criminal law recognizes various defenses—self-defense, defense of others, duress, necessity, consent, and so forth—but the Framers did not incorporate any of them into the text of the Constitution. Indeed, with the exception of the Treason Clause, the Constitution leaves entirely to the political process the definition of the penal code because the judgments involved in drafting it involve precisely the type of moral decisions that the public and its elected representatives are fully competent to make. The most that could be required of the federal or state governments is to make a nonarbitrary choice. The judgment that Kansas made easily passes that test.

THE CONSCIENCE OF CORPORATIONS AND THE RIGHT NOT TO SPEAK

WILLIAM E. LEE*

INTRODUCTION

The right to refrain from speaking is part of a broader concept the Supreme Court describes as “individual freedom of mind.”¹ But do corporations have protection from compelled speech under the freedom of mind concept? It is bizarre to ascribe human characteristics to corporations, yet the Court has held that newspaper publishing corporations are protected by the freedom of mind concept from state-imposed requirements that interfere with their ability “to decide what to print or omit.”² In reaching this conclusion, the Court ignored the corporate identity of the publishing company and instead emphasized the burden on editors.³ Later cases rejecting a First Amendment distinction between press and non-press corporations, such as *Citizens United v. FEC*,⁴ raise the question whether the Court should also ignore the corporate form of non-press entities and instead assess a law’s burden on management, employees, and shareholders. Stated differently, do non-press corporations have standing to assert that compelled speech vio-

* Professor, Grady College of Journalism and Mass Communication, University of Georgia. The author gratefully acknowledges the assistance of John Jacob, Archivist of the Lewis F. Powell, Jr. Archives, housed at the School of Law at Washington & Lee University, and Jeff Flannery, Head of the Reference and Reader Services Section in the Manuscript Division of the Library of Congress.

1. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)) (internal quotation marks omitted).

2. *Id.*

3. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 244, 257 (1974) (arguing that law requiring newspapers to publish replies by candidates whom they had criticized would cause editors to conclude “the safe course is to avoid controversy”).

4. 558 U.S. 310, 351 (2010) (citing *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 707 (1990) (Kennedy, J., dissenting)) (noting that the speech of media corporations is not entitled to greater protection than that of other corporations).

lates the “freedom of mind” of the humans affiliated with the corporation?

Although the first principle of corporate law is that for-profit corporations have a legal identity separate from their shareholders, management and employees,⁵ in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,⁶ the bakery downplayed its corporate identity when challenging the commission’s decision that refusing to design a custom wedding cake for a same-sex couple violated the state’s antidiscrimination law.⁷ *Masterpiece* emphasized the law’s burden on the First Amendment rights of Jack Phillips, a co-owner and cake designer who was described as “a cake artist.”⁸ Compelling Phillips to create a cake for a same-sex wedding forces him to “speak” in violation of his sincerely held religious beliefs.⁹ Conversely, Colorado downplayed Phillips’s artistry by asserting the commercial conduct of the bakery Phillips owned with his wife was at issue; “a business’s decision of whom not to serve is not ‘speech.’”¹⁰

During the oral argument of *Masterpiece Cakeshop*, only Justice Sotomayor probed the link between Phillips’s beliefs and the corporation’s actions. Noting that “the seller of the cakes is not

5. See *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (“[I]ncorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.” (citing *United States v. Bestfoods*, 524 U.S. 51, 61–62 (1998); *Burnet v. Clark*, 287 U.S. 410, 415 (1932))); see also *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006) (“[I]t can be said [that] the whole purpose of corporation and agency law . . . [is] that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation’s contracts.”).

6. 138 S. Ct. 1719 (2018).

7. *Masterpiece* describes itself as a “small Colorado corporation” owned by Jack and Debra Phillips. Brief for Petitioners at ii, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

8. Petition for a Writ of Certiorari at i, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111). The corporate identity of *Masterpiece Cakeshop* was completely absent from the petitioner’s framing of the question. The petitioners wrote that the question presented was whether “applying Colorado’s public accommodations law to compel *Phillips* to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.” *Id.* (emphasis added).

9. *Id.* at 13–14.

10. Brief for Respondent Colorado Civil Rights Commission at 19, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

Mr. Phillips, it's Masterpiece Corporation," and that corporations are separate entities from their shareholders, Justice Sotomayor asked "who controls the expression here, the corporation or its shareholders?"¹¹ Masterpiece's attorney Kristen Waggoner emphasized that in the context of a closely held corporation, Phillips and Masterpiece Cakeshop were in effect the same as both are "speaking when they're creating" cakes.¹² Justice Sotomayor interrupted, again asking "But who makes a decision for the corporation?"¹³ Waggoner responded that the shareholders in a small, family-held corporation would decide.¹⁴ "And that's exactly what's at stake in this case. Mr. Phillips owns Masterpiece Cakeshops [sic]. He designs most of the wedding cakes himself"¹⁵ In other words, forcing Masterpiece Cakeshop to create and sell a wedding cake that expresses a message in support of a same-sex marriage "violates Mr. Phillips's religious convictions."¹⁶

The case presented novel and difficult questions about the definition of speech¹⁷ and whether a closely held corporation's decisions, animated by a co-owner's personal beliefs, may be exempt from generally applicable laws.¹⁸ The Court side-

11. Transcript of Oral Argument at 99, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

12. *Id.* at 100.

13. *Id.*

14. *Id.* at 101.

15. *Id.*

16. *Id.* at 105.

17. During oral argument, the Justices pursued at length the distinction between selling an existing cake and the sale of a custom-designed cake, *id.* at 5–10, whether the actions of others contributing to a wedding, such as florists, hair stylists, jewelers, and makeup artists, could be regarded as "speech," *id.* at 10–20, and how to define "speech" where the creation, such as food, has a utilitarian function, *id.* at 35–42. Justice Kennedy's opinion noted the free speech aspect of the case was "difficult" but was an "instructive example" of the proposition that new contexts can deepen our understanding of the meaning of constitutional freedoms. *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

18. First Amendment experts were sharply divided on how to answer these questions. Compare Brief of Floyd Abrams et al. as *Amici Curiae* in Support of Respondents at 3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing First Amendment does not protect a right to choose customers based on sexual orientation), with Brief of *Amicus Curiae* The First Amendment Lawyers Association in Support of Petitioners at 12, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111) (arguing First Amendment prohibits state action compelling creation of artistic works, including wedding cakes).

stepped these questions and instead found that the commission showed clear hostility to Phillips's sincere religious beliefs in violation of the Free Exercise Clause.¹⁹ The Court's acknowledgement of the beliefs of a shareholder in *Masterpiece Cakeshop* mimics *Burwell v. Hobby Lobby Stores, Inc.*²⁰ where the Court held the religious beliefs of the shareholders of three closely held corporations justified exempting those corporations from a mandate to provide contraceptives to employees.²¹

The issues raised in *Masterpiece Cakeshop* were not unique to that business; other businesses have also raised conscience-based objections to the enforcement of state antidiscrimination laws and the Court has avoided the substantive questions in those cases as well.²² Thus, the conflict between conscience and antidiscrimination laws remains unresolved. For example, in the aftermath of the *Masterpiece Cakeshop* decision, Phillips and his bakery settled with Colorado regarding a transgender woman's claim of discrimination,²³ but the woman initiated a

19. *Masterpiece Cakeshop*, 138 S. Ct. at 1729. While the Colorado proceedings against *Masterpiece* were ongoing, the state commission found that three other bakers acted lawfully in declining to create cakes that demeaned same-sex marriages. *See id.* at 1730. The Court found the treatment of these conscience-based objections "sen[t] a signal of official disapproval of Phillips' religious beliefs." *Id.* at 1731.

20. 573 U.S. 682 (2014). *Hobby Lobby* did not involve free exercise rights under the First Amendment, but protections afforded under the Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997). *Hobby Lobby*, 572 U.S. at 687–88.

21. *Hobby Lobby*, 572 U.S. at 733–36.

22. *See Klein v. Or. Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019) (petition granted, judgment vacated, and case remanded for further consideration in light of *Masterpiece Cakeshop*); *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (petition granted, judgment vacated, and case remanded for further consideration in light of *Masterpiece Cakeshop*). Recently, on remand the Washington Supreme Court found there was no religious animus in the state's treatment of the *Arlene's Flowers* case and reaffirmed its earlier ruling *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017), rejecting First Amendment defenses raised by a florist who refused to create custom floral arrangements for a same-sex wedding. *State v. Arlene's Flowers, Inc.*, 441 P.3d 1203, 1209, 1212, 1224–31 (Wash. 2019). Attorneys for *Arlene's Flowers* announced they would ask the United States Supreme Court to review the state supreme court's 2019 ruling. David Gutman, *Washington Supreme Court rules once more against Richland florist who refused flowers for same-sex wedding*, SEATTLE TIMES (June 6, 2019, 9:34 PM), <https://www.seattletimes.com/seattle-news/politics/washington-supreme-court-rules-once-more-against-richland-florist-who-refused-flowers-for-gay-wedding/> [<https://perma.cc/Z283-BVUC>].

23. Shortly after the Supreme Court issued its ruling in *Masterpiece Cakeshop*, the Colorado Civil Rights Division found there was sufficient evidence to support a

lawsuit on her behalf because of Phillips's refusal to design a cake that reflected her transgender status.²⁴ Justice Kennedy's assurance in *Obergefell v. Hodges*²⁵ that "those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction" their opposition to same-sex marriage, and presumably other contentious social changes,²⁶ is unfulfilled, unless advocacy is defined as having little or nothing to do with the operation of a business.

Conscience arguments were also presented in two other October 2017 Term cases, *Janus v. American Federation of State, County, and Municipal Employees*²⁷ and *National Institute of Family and Life Advocates v. Becerra* (NIFLA).²⁸ *Janus* involved an individual who was forced to contribute to a public sector union whose positions on public policy he opposed.²⁹ The Court

transgender woman's claim that the bakery's refusal to create a custom cake for the anniversary of her gender transition violated the state's antidiscrimination law. *Determination, Scardina v. Masterpiece Cakeshop, Inc.*, Charge No. CP2018011310 (Colo. Civil Rights Div. Aug. 14, 2018). Masterpiece Cakeshop and Phillips filed suit against various Colorado officials, contending that the division's action violated the freedom of religion and free speech rights of both Masterpiece and Phillips. Complaint at 39–45, *Masterpiece Cakeshop, Inc. v. Elenis*, No. 18-cv-02074-WYD-STV (D. Colo. Aug. 14, 2018). On January 4, 2019, Judge Daniel dismissed the defendant's motion that the suit should be dismissed in its entirety on four different abstention grounds. Order at 3, 53, *Masterpiece Cakeshop*, No. 18-cv-02074-WYD-STV (D. Colo. Jan. 4, 2019). Colorado Attorney General Cynthia Coffman's motion to dismiss the claims against her was denied, *id.* at 16, 53, as was the defendant's motion to dismiss the suit for lack of standing. *Id.* The plaintiffs' claims for compensatory, punitive, and nominal damages against the director and members of the division were dismissed, *id.* at 53, as were the claims against Governor John Hickenlooper. *Id.* In both the complaint and Judge Daniel's order, the First Amendment rights of Masterpiece Cakeshop and Phillips were treated as identical. Following Judge Daniel's ruling, the parties settled; Masterpiece Cakeshop and Phillips agreed to dismiss their lawsuit and the civil rights division agreed to dismiss its action. Elise Schmelzer, *Masterpiece Cakeshop, state of Colorado agree to mutual ceasefire over harassment, discrimination claims*, DENVER POST (Mar. 5, 2019, 9:37 PM), <https://www.denverpost.com/2019/03/05/masterpiece-cakeshop-colorado-mutual-ceasefire-over-claims/> [<https://perma.cc/7Z9Y-YWQC>]. Colorado Attorney General Phil Weiser stated, "The larger constitutional issues might well be decided down the road, but these cases will not be the vehicle for resolving them." *Id.*

24. Complaint, *Scardina v. Masterpiece Cakeshop, Inc.*, No. 2019CV32214 (Denver City & Cty. Dist. Ct. June 5, 2019).

25. 135 S. Ct. 2584 (2015).

26. *Id.* at 2607.

27. 138 S. Ct. 2448 (2018).

28. 138 S. Ct. 2361 (2018).

29. *Janus*, 138 S. Ct. at 2461.

found compulsory union dues to be unconstitutional because “individuals are coerced into betraying their convictions.”³⁰ Justice Alito, writing for the *Janus* majority, stated that “[c]ompelling individuals to mouth support for views they find objectionable” violates the “cardinal” command against government-mandated orthodoxy first set out in *West Virginia State Board of Education v. Barnette*.³¹

In *NIFLA*, the Court struck down a California law requiring clinics that primarily serve pregnant women to provide certain notices, such as the availability elsewhere of state-funded abortions.³² The petitioners in *NIFLA*, nonprofit corporations operating pro-life pregnancy clinics as a form of advocacy,³³ asserted that the state-mandated disclosure violated *their* consciences,³⁴ a novel argument Justice Thomas’s opinion for the Court ignored.³⁵ Justice Kennedy, though, in a concurring opinion joined by Chief Justice Roberts and Justices Alito and Gorsuch, conflated the nonprofit corporations with the individuals who work or volunteer at the clinics.³⁶ Justice Kennedy wrote that the law requires pro-life centers “to promote the State’s own preferred message advertising abortions.”³⁷ “This compels *individuals* to contradict their most deeply held beliefs.”³⁸ Justice Kennedy added, “Governments must not be allowed to force *persons* to express a message contrary to their deepest convictions.”³⁹

30. *Id.* at 2464.

31. *Id.* at 2463 (referencing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“[N]o 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.”)).

32. 138 S. Ct. at 2368, 2378.

33. The petitioners in *NIFLA* were “formed primarily to advocate and implement their core pro-life values as well as to express these views publicly and privately.” Brief for Petitioners at 20, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140).

34. *Id.* at 13–14.

35. Justice Thomas did write a concurring opinion in *Masterpiece Cakeshop* emphasizing the impermissible burden Colorado imposed on Phillips’s beliefs by forcing him to create wedding cakes for same-sex couples. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1742–43 (2018) (Thomas, J., concurring in part and concurring in the judgment) (explaining that the creation of custom wedding cakes is expressive).

36. See *NIFLA*, 138 S. Ct. at 2378–79 (Kennedy, J., concurring).

37. *Id.* at 2379.

38. *Id.* (emphasis added).

39. *Id.* (emphasis added).

That Justice Kennedy's concurring opinion in *NIFLA* would use nearly identical language as that in Justice Alito's *Janus* opinion is conspicuous because the *NIFLA* petitioners were corporations. The Court has held that nonprofit advocacy corporations have standing to assert the rights of their members,⁴⁰ but Justice Kennedy did not cite any precedent regarding the nexus between nonprofit corporations and their members. And because the Court in *Hobby Lobby* dismissed the distinction between nonprofit and closely held for-profit corporations,⁴¹ a significant question raised by Justice Kennedy's *NIFLA* concurring opinion is whether a for-profit corporation, which lacks a conscience, may assert harm to the consciences of its shareholders.

The *Janus* and *NIFLA* majority opinions show two quite distinct tracks for assessing compelled speech claims. *Janus* is grounded in harm to freedom of conscience; *NIFLA* emphasizes the risks of content regulation. The latter analytical option, utilized by the Court in some earlier non-press corporate speech cases,⁴² downplays corporate identity and employs traditional content-based analysis such as assessment of tailoring. As shown later in this Article, *NIFLA*'s overriding theme is that the government harms the marketplace of ideas when it compels speech. Stated differently, government efforts to promote a

40. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) ("Petitioner is the appropriate party to assert [the rights of association of its members] because it and its members are in every practical sense identical."); see also *infra* Part IV.B. Because of the range of entities organized as nonprofit corporations, see HOWARD L. OLECK & MARTHA E. STEWART, *NONPROFIT CORPORATIONS, ORGANIZATIONS, & ASSOCIATIONS* 106–69 (6th ed. 1994), not all nonprofits would be treated like the NAACP for First Amendment purposes. See, e.g., *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548–49 (1987) (holding that because Rotary Clubs do not take positions on public questions, membership to women does not interfere with members' right of expressive association).

41. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 709–10 (2014) (stating that the principle of protecting the religious freedom of a corporation to advance individual religious freedom applies equally to nonprofit and closely held for-profit corporations); see also *Citizens United v. FEC*, 558 U.S. 310, 327, 372 (2010) (refusing to carve out an exemption for nonprofit advocacy corporations, and instead holding facially unconstitutional a federal statute that made it illegal for all corporations—including nonprofit advocacy corporations—to expressly advocate for the election or defeat of federal candidates).

42. See, e.g., *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 533–44 (1980) (finding ban on utility bill inserts discussing controversial issues to be content discriminatory).

well-informed public do not justify interfering with speaker autonomy.

Before *NIFLA*, the conflict between a well-informed public and compelled non-press corporate speech was addressed in *Pacific Gas & Electric Co. v. Public Service Commission (PG&E)*.⁴³ Justice Powell's papers, along with the papers of Justices Blackmun, Brennan, Marshall, and Byron White, reveal he had to finesse references to the Court's compelled speech precedents to omit references to conscience in his *PG&E* opinion. The analytical track utilized by Justice Thomas in *NIFLA* has its genesis in *PG&E*. This Article puts *NIFLA* in context by exploring the dialogue within the Court as it was creating the compelled speech doctrine for non-press corporations in *PG&E*.⁴⁴

Part I of this Article provides a summary of the Court's struggles with non-press corporate speech cases and presents the thesis that "forward thinking" government efforts to fine tune the flow of information by compelling corporate speech should be rejected, not on the basis of conscience, but because these efforts promote government-defined orthodoxy. Part II

43. 475 U.S. 1 (1986).

44. Although corporations have frequently challenged restrictions on their commercial speech, *see, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 560 (1980), corporate status has not been a factor in the Court's commercial speech cases. Further, the Court distinguishes comments on public issues from statements made "in the context of commercial transactions." *Id.* at 562 n.5. The former are fully protected and the latter receive diminished protection. *Id.* This Article focuses on fully protected expression by corporations.

California sought to justify the licensed notice disclosure in *NIFLA*, *see infra* notes 221–222 and accompanying text, under the ruling in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which upheld compelled disclosures of factual, noncontroversial information in the commercial speech of professionals. *Id.* at 651–52. The *NIFLA* Court found *Zauderer* to be inapplicable because the licensed notice "in no way relates to the services that licensed clinics provide." *NIFLA*, 138 S. Ct. at 2372. Moreover, abortion is "anything but an 'uncontroversial' topic." *Id.* As for the unlicensed notice, *see infra* note 223 and accompanying text, the Court said that assuming *Zauderer* was the appropriate standard, the notice was unduly burdensome and poorly tailored. *Id.* at 2377–78.

For a recent application of *NIFLA* in the context of compelled commercial speech, *see Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 750, 753 (9th Cir. 2019), which held that an ordinance requiring health warnings in certain sugar-sweetened beverage advertisements likely violates the First Amendment. *See also The Supreme Court 2017 Term—Leading Cases*, 132 HARV. L. REV. 277, 351 (2018) (arguing that *NIFLA* foreshadows greater protection for commercial speech).

takes a close look at the right to receive expression in *First National Bank of Boston v. Bellotti*.⁴⁵ Justice Powell's papers reveal that framing the case in terms of the rights of listeners presented a less complicated path to a majority than if his opinion had addressed the nature of corporations. Part III explains why Justice Powell eliminated conscience from his *PG&E* opinion and created a methodology for compelled speech cases involving non-press corporations that does not require veil piercing or derivative rights analysis. Part IV contrasts Justice Thomas's *NIFLA* opinion with Justice Kennedy's concurring opinion. Although Justice Kennedy's veil piercing is appropriate in the setting of a nonprofit advocacy corporation, the question of which for-profit corporations have standing to assert harm to the consciences of shareholders should be avoided. Analyzing compelled corporate speech cases within the content-based framework raises fewer questions than if conscience arguments are addressed.

I. THE COURT STRUGGLES WITH CORPORATE IDENTITY

The Court has been repeatedly criticized for its analysis in non-press corporate free speech cases,⁴⁶ but *NIFLA*'s aversion to content discriminatory regulation and preference for speaker autonomy offers a theory for corporate speech cases that allows courts to abstain from deciding which corporations are eligible for insider reverse veil piercing,⁴⁷ as the oral argument in

45. 435 U.S. 765 (1978).

46. See, e.g., Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1020 (1998) (arguing that the Court's "constitutional doctrine remains studiously ignorant of state and federal law regulating corporations"). Similarly, after canvassing the Court's approach to corporate constitutional rights since the nineteenth century, Professors Margaret Blair and Elizabeth Pollman conclude the Court "has not carefully analyzed its legal theory of corporate rights, nor has it expressly articulated a framework for thinking about corporations that could guide its decision making in a consistent way." Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1679 (2015); see also Tamara R. Piety, *Why Personhood Matters*, 30 CONST. COMMENT. 361, 364 (2015) ("[M]any scholars have observed [that] the Supreme Court has failed to articulate a theory for corporate rights, relying instead on what could (at best) be described as 'case-by-case adjudication' and (at worst) as something less charitable." (footnote omitted)).

47. Insider reverse veil piercing allows a shareholder of a closely held corporation to ask a court to disregard the corporation's separate legal personality. See Michael J. Gaertner, Note, *Reverse Piercing the Corporate Veil: Should Corporation*

Masterpiece Cakeshop reveals, along with the *Hobby Lobby* opinion, the Court would rather not confront the complexities of insider reverse veil piercing.⁴⁸ Discounting the corporate identity of a speaker in compelled speech cases permits the Court to emphasize concerns broader than harm to conscience.

The Court, however, has a spotty and confusing record in discounting corporate identity in free speech cases. Cases where corporate identity was front and center, such as *Bellotti*,⁴⁹ contrast sharply with those where corporate identity was treated as irrelevant, such as cases involving speech by religious corporations,⁵⁰

Owners Have It Both Ways? 30 WM. & MARY L. REV. 667, 667 (1989) (“Under the reverse pierce, the corporation owner and the corporation become one legal entity . . .”). There is significant criticism of veil piercing. See, e.g., Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1037–38 (1991) (describing the doctrine as incoherent). This doctrine, however, is limited to close corporations. See Robert B. Thompson, *The Limits of Liability in the New Limited Liability Entities*, 32 WAKE FOREST L. REV. 1, 9 (1997) (concluding based on his empirical analysis of piercing cases, that piercing occurs only in corporate groups or close corporations of fewer than ten shareholders; it does not occur in publicly held corporations).

48. In a range of cases challenging the contraceptive mandate of the Affordable Care Act, lower courts reached disparate results on whether corporations had standing to assert the free exercise rights of their owners. Professor Stephen M. Bainbridge concluded that none of the courts offered a coherent doctrinal justification for their holdings, so he proposed a three-pronged test to determine whether reverse veil piercing was appropriate. Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 GREEN BAG 2d 235, 240, 246 (2013). But see *Amicus Curiae* Brief of Corporate and Criminal Law Professors in Support of Petitioners at 16–18, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (No. 13-354) (arguing reverse veil piercing should not be applied). The Court in *Hobby Lobby* did not follow Professor Bainbridge’s test, it merely announced a derivative rights conclusion: “When rights, whether constitutional or statutory are extended to corporations, the purpose is to protect the rights” of shareholders, officers, and employees. 573 U.S. 682, 706–07. Protecting “the free-exercise rights of corporations like *Hobby Lobby* . . . protects the religious liberty of the humans who own and control those companies.” *Id.* at 707. As discussed above, only Justice Sotomayor asked about the petitioners’ reverse veil piercing argument in *Masterpiece Cakeshop*. *Supra* text accompanying notes 11–16.

49. See also *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (holding that the requirement that non-press corporations channel candidate-related advocacy through PACs is justified by advantages conferred by the corporate form).

50. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 448–61 (2011) (finding a damage award against a minister, two of his daughters, and Westboro Baptist Church, Inc. unconstitutional); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Stratton*, 536

press corporations,⁵¹ and corporations in the business of communication such as theatrical productions.⁵² The distinction between non-press corporations and those engaged in communication lacks consistency. In *Consolidated Edison Co. v. Public Service Commission*,⁵³ the Court only two years after *Bellotti* found a restriction on public utility bill inserts to be content discriminatory, employing standard content-based analysis⁵⁴ with no consideration of the utility's corporate status. *NIFLA* again signals that the Court prefers to address speech restrictions as speech restrictions without the added complexity of considering corporate law.

PG&E and *NIFLA* confront two entirely different types of corporations, a publicly traded utility and a nonprofit advocacy group; yet the opinions are linked by aversion to content-based regulation. Together, these cases illustrate that the Court has sufficient analytical tools embedded in its content-based framework to protect speaker autonomy without deriving rights for a corporation from the humans associated with the corporation or addressing the complexities of insider reverse veil piercing.

Both *PG&E* and *NIFLA* entailed "forward thinking" governmental efforts to promote a well-informed public. These cases

U.S. 150, 160–69 (2002) (finding unconstitutional a municipal ordinance requiring a permit before door-to-door canvassing could occur).

51. As Professor Michael McConnell writes, "The vast majority of the Court's press cases involve for-profit corporations . . . and no one, even in dissent, has ever suggested that corporate status mattered in those cases." Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 417 (2013).

52. See, e.g., *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 558–62 (1975) (holding that a corporation "promoting and presenting theatrical productions" successfully asserted harm to its First Amendment rights); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497–506 (1952) (finding that a corporation engaged in the business of distributing motion pictures successfully challenged New York motion picture licensing statute).

53. 447 U.S. 530 (1980).

54. *Id.* at 537–40. The Court, per Justice Powell, held that the restriction limited the means by which Consolidated Edison could participate in public debate. Justice Powell's analysis focused on the content discriminatory effects of the prohibition and spent little effort discussing public utilities or their rate structures. *Id.* at 534 n.1 (stating that Consolidated Edison's status as a government monopoly "does not decrease the informative value of its opinions on critical public matters"). *But see id.* at 549–51 (Blackmun, J., dissenting) (addressing Consolidated Edison's monopoly status and rate structure).

show the danger of using the public's right to receive expression as justification for compelled speech. In the context of corporations, the right to receive expression had its most important application in *Bellotti*, where the Court found a restriction on the speech of non-press corporations unconstitutionally restricted the flow of information to the public.⁵⁵ The right to receive expression was used by Justice Powell in *Bellotti* as a way of avoiding the question of whether corporate First Amendment rights were coextensive with those of individuals; Justice Powell did not intend to signal that governments could compel speech to promote a well-informed public. Justice Powell's *PG&E* opinion is a clear rebuke to governmental efforts that sacrifice speaker autonomy in the interest of a well-informed public. To reach that conclusion, Justice Powell had to shift the concern from harm to conscience to what he termed "broader" concerns, defined as the harm posed by government intervention in speech markets.⁵⁶ In doing so, Justice Powell's *PG&E* opinion creates an analytical track that allows the Court to assess compelled speech requirements without confronting issues of conscience. Stated differently, *PG&E* takes the fact of incorporation out of compelled speech analysis.

II. BELLOTTI

Forty years after glibly announcing in *Grosjean v. American Press Co.*⁵⁷ that newspaper publishing corporations had liberty rights under the Fourteenth Amendment,⁵⁸ the Court in *First*

55. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781–83 (1978).

56. See *infra* note 180.

57. 297 U.S. 233 (1936).

58. *Id.* at 244. In *Grosjean*, the Court announced, without elaboration, that corporations are persons within the meaning of the Equal Protection and Due Process Clauses. *Id.* This holding was a significant development in corporate rights because the Court had held earlier that corporations did not have liberty rights. See ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 253–54 (2018). Professor Charles O'Kelley regards *Grosjean* as relying on the Field rationale, which "requires that corporations be allowed to assert the constitutional rights necessary to protect their business to the same extent as if they were unincorporated." Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after First National Bank v. Bellotti*, 67 GEO. L.J. 1347, 1360 (1979). Professor O'Kelley argues that under this rationale, a court "does not need to deal with the corporate status of a party asserting first amendment rights, as long as the corporation asserts the

National Bank of Boston v. Bellotti ruled by a 5-4 vote that the speech of non-press business corporations could not be restricted to matters affecting corporate property.⁵⁹ The informative value of speech, Justice Powell wrote for the majority, did not depend upon the identity of its source.⁶⁰

Bellotti arose when the Attorney General of Massachusetts informed several corporations, such as the First National Bank of Boston, that he intended to bring criminal prosecutions if they followed through on their plans to spend money opposing a 1976 referendum allowing a graduated income tax on individuals.⁶¹ A Massachusetts statute specified that business corporations could only make expenditures or contributions to influence the vote on ballot propositions that “materially” affected their financial interests.⁶² An amendment specified that no question solely concerning the taxation of individuals shall be deemed to affect the financial interests of a corporation.⁶³ The amendment was added after voters on multiple occasions refused to approve a graduated income tax.⁶⁴

The Massachusetts Supreme Judicial Court rejected a constitutional challenge to the statute, ruling that business corporations do not have First Amendment rights coextensive with

rights in connection with a form of expression that is a part of the corporation’s business.” *Id.* at 1362. Although a newspaper cannot speak, its business requires individual speech and the newspaper corporation may be held legally responsible for the speech of its agents. *Id.* at 1360. Thus, it is entitled to protection under the Field rationale. *Id.*

59. 435 U.S. 765, 766–67, 795 (1978).

60. *Id.* at 777.

61. *Id.* at 769.

62. *See id.* at 769 n.3 (describing the history of the statute). The statute provided for fines against corporations and fines and imprisonment against officers, directors, and agents of corporations. *Id.* at 768; *see also* Francis H. Fox, *Corporate Political Speech: The Effect of First National Bank of Boston v. Bellotti Upon Statutory Limitations on Corporate Referendum Spending*, 67 KY. L.J. 75, 77–80 (1979) (describing judicial interpretations of the statute).

63. *Bellotti*, 435 U.S. at 768. For a discussion of the legislature’s repeated efforts to get voter approval of a constitutional amendment allowing a graduated income tax, and corporate opposition, *see* Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston*, 36 LAW & HIST. REV. 943, 951–62 (2018).

64. Fox notes that each of the four times the legislature passed the proposed amendments concerning a graduated income tax by “top-heavy majorities, but each time the people voted them down by substantial margins.” Fox, *supra* note 62, at 78 n.21.

those of natural persons or associations of natural persons.⁶⁵ The state court held a corporation's property and business interests are entitled to Fourteenth Amendment protection and as an incident of that protection, a corporation may assert First Amendment protection only for speech about a political issue materially affecting its business, property, or assets.⁶⁶

After the Supreme Court heard oral argument, it voted 8-1 on November 11, 1977, to find the amendment unconstitutional.⁶⁷ Chief Justice Burger, concerned that a broad statement of corporate speech rights would undermine laws preventing corporations from participating in candidate elections, initially assigned the opinion to Justice Brennan, who had strongly argued during the conference discussion that only the amendment needed to be addressed.⁶⁸ Justice Brennan, however, quickly concluded that both aspects of the statute had to be addressed and that he would sustain the constitutionality of the general prohibition; a decision invalidating the general prohibition "must inevitably call into question the constitutionality of all corrupt practices acts."⁶⁹

65. *First Nat'l Bank of Boston v. Att'y Gen.*, 359 N.E.2d 1262, 1270 (Mass. 1977).

66. *Id.*

67. Justice Powell's notes for the conference of November 11, 1977, show Justice White as the sole dissenting vote. See Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *First Nat'l Bank of Boston v. Bellotti* (Nov. 11, 1977) [hereinafter *Bellotti* Conference Notes] (on file with the Harvard Journal of Law & Public Policy). Justices Brennan and Stevens said the Court should invalidate only the amendment, fearing that a broader ruling would undermine the corrupt practices acts that prevented corporate expenditures in candidate elections. *Id.* Chief Justice Burger, Justice Blackmun, and then-Justice Rehnquist also focused on the amendment, although not addressing corrupt practices acts. *Id.* At the conference, Chief Justice Burger contended the amendment went "too far." *Id.* However, after the conference he wrote to Justice Brennan that he "had begun to have misgivings about the case, particularly on its potential for undermining the well established Corrupt Practices Act's limitations." Letter from Warren E. Burger, Chief Justice, U.S. Supreme Court, to William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court (Dec. 6, 1977) [hereinafter Dec. 1977 Letter] (on file with the Harvard Journal of Law & Public Policy).

68. Chief Justice Burger assigned the opinion to Justice Brennan because "when a case is to be narrowly written, it should be written by the judge 'least persuaded.'" Burger, Dec. 1977 Letter, *supra* note 67.

69. Memorandum from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to the Justices' Conference 4 (Dec. 1, 1977) (on file with the Harvard Journal of Law & Public Policy).

Justice Powell was assigned the opinion after he wrote to the Justices' Conference that the case "involves only the expression of views on public issues" not support or opposition to political candidates.⁷⁰ "No problem of 'corruption' is involved at all, using that term in the context of the Corrupt Practices Acts."⁷¹ His later opinion noted the appellants were not challenging laws restricting corporate participation in candidate elections and argued that corporate speech regarding ballot propositions does not create the problem of "political debts."⁷² A corporation's right to speak on issues of public interest "implies no comparable right in the quite different context" of candidate election campaigns.⁷³

In spite of Justice Powell's efforts to confine *Bellotti* to ballot propositions, a generation later the Court would reject the distinction between ballot propositions and candidate elections in *Citizens United*. That decision relied heavily upon the concepts set out in *Bellotti*.⁷⁴

A. *The Right to Receive Expression*

The appellants in *Bellotti* argued that the key point of the First Amendment is to protect the right of the listener to receive expression.⁷⁵ In language that Justice Powell's opinion would mimic, the appellants wrote that from the listener's perspective, "it is of little or no significance whether the source of the information is a media or non-media source. It is the right to receive the message which counts."⁷⁶ Justice Powell's papers reveal that from the very outset of his consideration of the case

70. Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to the Justices' Conference 2 (Dec. 6, 1977) (on file with the Harvard Journal of Law & Public Policy).

71. *Id.*

72. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

73. *Id.*

74. *Citizens United v. FEC*, 558 U.S. 310, 347 (2010) (holding that a ban on corporate independent expenditures in candidate elections is unconstitutional under *Bellotti*'s central principle that "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity" (citing *Bellotti*, 435 U.S. at 784-85)). *Citizens United* led to an extensive body of work on political speech by corporations. For a collection of that literature, see WINKLER, *supra* note 58, at 405 n.5.

75. Brief for Appellants at 41-42, *Bellotti*, 435 U.S. 765 (No. 76-1172).

76. *Id.*

during the summer of 1977, the right to receive expression was central to his analytical framework. For example, in an August 1977 memo written after Justice Powell had reviewed the briefs, he noted that regardless of whether a corporation's rights are "co-extensive with or different from the rights of individuals," the case raised the question of whether the statute impinged upon the right to receive information referred to in recent cases.⁷⁷

Justice Powell's clerk Nancy Bregstein prepared a bench memorandum for Justice Powell, concluding the statute to be unconstitutional, but admitting that the "harder task is to choose the best ground or grounds for invalidating the statute."⁷⁸ If one places predominant emphasis on the view that corporations are unique because of their artificial existence and their status as creatures of state law, "it is not difficult to conclude that their rights are not infringed" by the Massachusetts statute.⁷⁹ If, on the other hand, one conceives of the problem as one of "what is prohibited rather than *who* is guaranteed a certain right, . . . then the fact that appellants are corporations takes on a different significance."⁸⁰ Bregstein recommended that the central question in the case should not be whether corporations have First Amendment rights, but whether the law "abridges a kind of expression that the First Amendment was

77. Memorandum, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, No. 76-1172, *First National Bank of Boston, et al. v. Bellotti, Attorney General* 6-8 (Aug. 9, 1977) [hereinafter No. 76-1172, *Bellotti*] (on file with the Harvard Journal of Law & Public Policy). The cases he cited on page six of the memo are *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977); and *Proconier v. Martinez*, 416 U.S. 396 (1974). Powell, No. 76-1172, *Bellotti, supra* at 6. On page eight, he added *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Powell, No. 76-1172, *Bellotti, supra* at 8. All of these cases except *Proconier* were cited in the opinion as illustrating the importance of the right to receive information. See *Bellotti*, 435 U.S. at 783.

78. Bench Memorandum from Nancy Bregstein, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 5 (Sept. 13, 1977) [hereinafter *Bellotti* Bench Memo] (on file with the Harvard Journal of Law & Public Policy).

79. *Id.* at 1. This conclusion derives from "either of two minor premises: that corporations do not have First Amendment rights, or that the scope of their First Amendment rights may be defined by their creator, the state." *Id.* at 2.

80. *Id.* at 2.

meant to protect.”⁸¹ Bregstein said it “puts the cart before the horse to inquire *first* whether a particular speaker ‘has’ First Amendment rights. The better approach is to look first at the speech itself, and then to determine whether the identity of the speaker makes any difference.”⁸² Justice Powell wrote “Yes” in the margin beside this argument.⁸³

After Justice Powell was assigned the opinion in December 1977, Bregstein wrote a memorandum recommending that “The opinion need not address whether corporations’ . . . First Amendment rights are ‘coextensive’ with those of individuals.”⁸⁴ She suggested the heart of the opinion would be the following: “It would be antithetical to the First Amendment to judge whether speech is protected by looking to its *source*. This may be why there is little discussion in the cases of whether corporations ‘have’ First Amendment rights, even when those rights have been afforded corporations. Speech presumptively is protected”⁸⁵

Hence, from the first draft to the published opinion, Justice Powell emphasized that the First Amendment “goes beyond the protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”⁸⁶

Justice Powell’s opinion for the Court shifted the analysis away from the interest in self-expression, which would have required confronting whether corporations can speak, and instead focused on the “informational purpose of the First Amendment.”⁸⁷ Thus, the most memorable passage in *Bellotti* is

81. *Id.* at 11.

82. *Id.* at 14.

83. *Id.* Similarly, he also wrote “Yes” in the margin and underlined a passage stating freedom of speech is “concerned as much with society’s interest as it is with the individual.” *Id.* at 12.

84. Memorandum from Nancy Bregstein, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 1–2, (Dec. 29, 1977) (on file with the Harvard Journal of Law & Public Policy).

85. *Id.* at 9.

86. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978); *see also* Lewis F. Powell, Jr., First Typescript Draft of *First Nat’l Bank of Boston v. Bellotti* Opinion 26 (Jan. 19, 1977) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy) (emphasizing that the public has an interest in access to discussion, debate, and dissemination of information and ideas).

87. *Bellotti*, 435 U.S. at 782 n.18.

the following: “The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”⁸⁸ Additionally, the paramount danger Justice Powell perceived in *Bellotti* was government action that interferes with the ability of audience members to make informed political choices; that is, the self-governing function of free speech.⁸⁹ Massachusetts had “single[d] out one kind of ballot question—individual taxation—as a subject about which corporations may never make their ideas public.”⁹⁰ Legislatures are “constitutionally disqualified from dictating . . . the speakers who may address a public issue,” especially where the suppression “suggests an attempt to give one side of a debatable public question an advantage.”⁹¹

B. Counting to Five

Justice Powell’s *Bellotti* opinion can be criticized for its failure to address questions such as whether human behavior—speech—can be attributed to corporations⁹² and its naïve reliance on “procedures of corporate democracy” to protect dissenting shareholders.⁹³ Justice Powell clearly understood that human beings—management—controlled corporate speech, as he expressed to then-Justice Rehnquist in a private correspond-

88. *Id.* at 777.

89. Justice Powell wrote “[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.” *Id.* at 791; *see also id.* at n.31 (“Government is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves”).

90. *Id.* at 784.

91. *Id.* at 784–85; *see also id.* at 793 (“The fact that a particular kind of ballot question has been singled out . . . suggests . . . the legislature may have been concerned with silencing corporations on a particular subject.”).

92. *See O’Kelley, supra* note 58, at 1351 (stating that speech is a human act and is the product of human thought; to believe that a corporation is capable of physical acts is a “category-mistake”).

93. *See Bowie, supra* note 63, at 967 & nn.147–50 (citing literature criticizing the concept of corporate democracy); Piety, *supra* note 46, at 376–78 & nn.82–88 (same); Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 363–64 (2015) (citing *Bellotti*, 558 U.S. at 362) (asserting that stockholders are not well positioned to constrain managerial use of corporate funds for political purposes they disfavor).

ence,⁹⁴ so it is intriguing that his only reference to management making speech decisions is in a footnote where he discussed the chilling effect created by the statute's "materially affecting" requirement.⁹⁵

Justice Powell looked beyond corporations and framed the case as one involving harm to the public. A related theme was the danger created by legislation determining the participants in public dialogue. By framing the case in this manner, the path to five votes was easier than if it had been framed as a discussion of the nature of corporations.

The corporations faced an uphill battle at the Supreme Court. Their application for a stay of enforcement of the statute in 1976 was denied by the Court.⁹⁶ Justice Blackmun's papers reveal that only Justice Powell voted to grant that application.⁹⁷ When the Court again considered the case at its April 18, 1977, conference, it postponed a decision on jurisdiction and asked the parties for briefs addressing the issue of mootness.⁹⁸ Four justices at that time voted to dismiss for a lack of a substantial

94. Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court 2 (Apr. 17, 1978) (on file with the Harvard Journal of Law & Public Policy) (noting that "management believes the corporation must speak out to protect the long term viability of its business"). During the *Bellotti* oral argument, the attorney for the appellants stated the following in response to a remark that a corporation cannot have opinions: "I had rather say that whatever positions or opinions the corporation may have must really be those of some individuals who are acting in their representational capacity." Transcript of Oral Argument at 7, *Bellotti*, 435 U.S. 765 (No. 76-1172), reprinted in 101 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 265, 273 (Philip B. Kurland & Gerhard Casper eds., 1979). This meant "management." *Id.*

95. *Bellotti*, 435 U.S. at 785 n.21 (stating that valuable information would remain unpublished because management would not be willing to risk the substantial criminal penalties resulting from uncertainty about whether a court would agree that particular referendum issue affected the corporation's business). He also referred to management decisions when he stated that Massachusetts had failed to explain why the interests of shareholders were entitled to greater solicitude in this context than in many others involving controversial management decisions. *Id.* at 794 n.34.

96. *First Nat'l Bank of Boston v. Bellotti*, 429 U.S. 876 (1976).

97. On a memo about the application prepared by Justice Blackmun's clerk, Richard Willard, Justice Blackmun wrote that all the Justices except Justice Powell voted to deny the application. Memorandum from Richard K. Willard, Law Clerk, U.S. Supreme Court, to Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court 4 (Oct. 4, 1976) (on file with the Harvard Journal of Law & Public Policy).

98. *First Nat'l Bank of Boston v. Bellotti*, 430 U.S. 964 (1977).

federal question.⁹⁹ After the Court heard oral argument, Justice Powell was the only Justice who argued at the Court's November 11, 1977, discussion of the case that both provisions of the statute were unconstitutional.¹⁰⁰ Thus, when the opinion was reassigned to Justice Powell after Justice Brennan's announcement that he could not find the general ban on corporate expenditures to be invalid, it was clear there was little support for a broad statement of corporate First Amendment rights.

To be sure, there was a well-established body of cases where the Court found infringement on the speech of corporations in the communication business, such as newspaper publishing,¹⁰¹ but as Justice Powell wrote in the margin of a memo from one of his clerks, "Court has never held [corporations] are included in [First Amendment] freedoms—but this has been assumed."¹⁰² The nature of corporations had been confronted in cases involving other constitutional rights, such as the privilege against self-incrimination,¹⁰³ but the Court in the First Amendment context had never explicitly confronted issues such as Massachusetts's argument that a corporation was a legal fiction that did not possess the "peculiarly personal rights" of human owners and managers.¹⁰⁴ Ignoring this question and focusing on the rights of listeners, which had been established in earlier cases, presented a less complicated path to a majority.

A perverse aspect of a right to receive expression is its use by the government to compel speech to promote a well-informed

99. Bregstein, *Bellotti* Bench Memo, *supra* note 78, at 2 (stating the four votes to "DFWSFQ" (dismiss for want of a substantial federal question) show others have adopted the premise that corporations do not have First Amendment rights or that their First Amendment rights may be defined by the state). Conference notes kept by Justices Brennan, Blackmun, and Powell show the four were Chief Justice Burger and Justices Brennan, Marshall, and Stevens. *See, e.g.*, Conference Notes, William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, *First Nat'l Bank of Boston v. Bellotti* (Feb. 24, 1977) (on file with the Harvard Journal of Law & Public Policy).

100. Powell, *Bellotti* Conference Notes, *supra* note 67.

101. *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971); *see also* cases cited *supra* note 52.

102. Bregstein, *Bellotti* Bench Memo, *supra* note 78, at 3.

103. *Wilson v. United States*, 221 U.S. 361, 372–86 (1911); *Hale v. Henkel*, 201 U.S. 43, 69–70 (1906).

104. Brief for the Appellee at 14, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (No. 76-1172).

public.¹⁰⁵ Justice Powell's *Bellotti* opinion is clear that the government may not limit "the stock of information from which members of the public may draw,"¹⁰⁶ but a right to receive expression that is not strongly grounded in a theory of speaker autonomy supports government efforts to enhance the presentation of different views.¹⁰⁷ It is one thing for the government to add its voice to the public debate,¹⁰⁸ it is quite another when the government compels a private speaker to present a government-mandated message or to serve as a platform for the speech of government-favored speakers. Although the latter actions do not restrict speech in the *Bellotti* sense of limiting the range of views available to the public, these actions nonetheless interfere with the freedom of speakers and promote government-prescribed orthodoxy. The Court addressed a government policy designed to expose the public to divergent views in *PG&E*, and Justice Powell developed a significant limitation on the right to receive expression that strengthens the First Amendment rights of corporations.

III. *PACIFIC GAS & ELECTRIC*

Pacific Gas and Electric Co. v. Public Utilities Commission (*PG&E*) began as a dispute over a utility company publishing political statements in *Progress*, its newsletter included in its monthly billing envelopes.¹⁰⁹ A group called Toward Utility Rate Normalization (*TURN*), which had intervened in ratemaking proceedings, asked the California utility commission to prevent *PG&E* from including political editorials in the bills, but the commission instead ordered *PG&E* to periodically include the

105. See William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303, 306 (noting the right to receive expression has been important in two distinct types of cases: "where the government restricts communication between private parties" and where the government "seek[s] to enhance the flow of expression by limiting the exercise of 'private censorship'").

106. *Bellotti*, 435 U.S. at 783.

107. Lee, *supra* note 105, at 343.

108. See, e.g., *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (stating that instead of compelling private speakers to publish information the state believes to be useful to the public, the state could itself publish the information, and that this "procedure would communicate the desired information to the public without burdening a speaker with unwanted speech").

109. 475 U.S. 1, 5 (1986) (plurality opinion).

expression of TURN in its billing envelopes.¹¹⁰ In those months when TURN was given access to the envelopes, PG&E could include its own newsletter only if it paid additional postage.¹¹¹ The commission maintained that it is “reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E.”¹¹² The utility company countered that it had a First Amendment right not to spread a message with which it disagrees.¹¹³

Justice Powell and his clerk William Stuntz readily concluded that corporations like PG&E have a negative First Amendment right not to disseminate the views of other speakers.¹¹⁴ The difficulty was finding precedents to support this position because PG&E did not have a conscience, nor was it a newspaper publisher. Thus, Justice Powell, Stuntz, and the other Justices engaged in an extensive dialogue about how to fit a corporation like PG&E into the framework established by cases involving newspaper publishers and individuals raising conscience-based objections to compelled speech. To understand this dialogue, it is necessary to briefly explain the precedents Justice Powell relied upon in his *PG&E* opinion.

A. *Miami Herald v. Tornillo* and *Wooley v. Maynard*

In the landmark *Pentagon Papers* case,¹¹⁵ the Court emphasized freedom to publish.¹¹⁶ Freedom *not* to publish was added to the protections afforded the press in *Miami Herald Publishing*

110. *Id.* The regulatory commission maintained that the “extra space” remaining in the billing envelope after inclusion of the bill and any required notices was the property of the rate payers. *Id.* at 5–7. TURN was given access to the space four times a year. *Id.* at 6. The commission reserved the right to grant other groups access to the envelopes, but had denied one group because its speech was not related to ratemaking proceedings. *Id.* at 7 & n.5.

111. *Id.* at 6.

112. *Id.* (internal quotation marks omitted). TURN argued government action increasing the range of sources of information for consumers promotes an “informed citizenry.” Brief for Appellees TURN, et al. at 39, *PG&E*, 475 U.S. 1 (No. 84-1044).

113. Reply Brief of Appellant PG&E at 18–19, *PG&E*, 475 U.S. 1 (No. 84-1044) (arguing that the speech of PG&E could not be restricted to enhance the relative voice of TURN).

114. See *infra* note 155.

115. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

116. *Id.* at 714.

Co. v. Tornillo,¹¹⁷ where the Court rejected a Florida statute granting candidates access to a newspaper that had attacked them.¹¹⁸ The extension of negative speech rights to newspaper corporations in *Miami Herald* basically ignored that corporations were involved;¹¹⁹ at no point in the consideration of the case did any member of the Court comment on the corporate status of the appellant.¹²⁰ As Justice Blackmun wrote in a personal memo he prepared summarizing the case, despite the possibility that the Florida statute encouraged speech:

We are, however, dealing with newspapers here. Much as I detest their deficiencies and their slanting of news, particularly in the East (Washington and New York), the fact is that it has never been the province of the Government to insure that the newspapers present the news fairly. For better or worse, by the First Amendment, we have opted for the free press. This means "free" and not government control of the press.¹²¹

Even Justices White and Rehnquist, the fiercest opponents of First Amendment protection for speech by non-press corporations, contended there was something special about press corporations.¹²² One sees the special regard for newspapers in

117. 418 U.S. 241 (1974).

118. *Id.* at 256–58.

119. As Justice Rehnquist admitted in *PG&E*, this extension occurred "without much discussion." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 33 (1986) (Rehnquist, J., dissenting).

120. In particular, the available notes of the Court's April 19, 1974, conference discussion of *Miami Herald* are bereft of any mention of the corporate ownership of the newspaper. All of the Justices voted to reverse the lower court and many agreed with Chief Justice Burger's statement that, "telling a paper what *to* publish is not too different from saying what *not* to publish." Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Miami Herald Publ'g Co. v. Tornillo* (Apr. 19, 1974) (on file with the Harvard Journal of Law & Public Policy); see also Conference Notes, Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, *Miami Herald Publ'g Co. v. Tornillo* (Apr. 19, 1974) (on file with the Harvard Journal of Law & Public Policy) (reporting Chief Justice Burger's belief that what must be published was equal to what cannot be published).

121. Memorandum, Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, *No. 73-797—Miami Herald Publ'g Co. v. Tornillo* 6–7 (Apr. 15, 1974) [hereinafter *Miami Herald Memo*] (on file with the Harvard Journal of Law & Public Policy).

122. For reasons ranging from their historic role as conveyors of ideas, *PG&E*, 475 U.S. at 33 (Rehnquist, J., dissenting), to freedom being essential to the conduct of their business, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting), or because shareholders have invested in "an enter-

Chief Justice Burger's opinion in *Wooley v. Maynard*,¹²³ which described *Miami Herald* as illustrative of the "freedom of thought" that protects both the right to speak and the right to refrain from speaking at all.¹²⁴ Although a newspaper is a vehicle for humans to express thoughts, the newspaper itself is incapable of thought.¹²⁵ Yet Chief Justice Burger described the statute at issue in *Miami Herald* as depriving a "newspaper of the fundamental right to decide what to print or omit."¹²⁶ Chief Justice Burger's references to the *Miami Herald* newspaper were really references to the humans making editorial decisions.¹²⁷ This language was identical to that used by the newspaper's attorneys who wrote, "Conscientious newspapers will be reluctant to print anything concerning impending elections if in doing so they become obligated to provide free space for 'replies' that may be antithetical to the newspapers' views."¹²⁸ Given this venerated treatment of newspapers, it was not surprising that Massachusetts sought to defend its restriction on the

prise engaged in the business of disseminating news and opinion." *Id.* at 805. (White, J., dissenting).

123. 430 U.S. 705 (1977).

124. *Id.* at 714 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34, 637 (1943)). Justice Brennan also referred to *Wooley* and *Miami Herald* as based on the concept of individual freedom of mind. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988) (quoting *Wooley*, 430 U.S. at 714).

125. As Justice Scalia wrote in his *Citizens United* concurring opinion, "The power to publish thoughts, no less than the power to speak thoughts, belongs only to human beings, but the dissent sees no problem with a corporation's enjoying the freedom of the press." *Citizens United v. FEC*, 558 U.S. 310, 392 n.7 (2010) (Scalia, J., concurring); see also McConnell, *supra* note 51, at 417.

126. *Wooley*, 430 U.S. at 714. He was more to the point in quoting a passage from *Miami Herald* referring to the decisionmaking of editors. *Id.* (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974)).

127. Similarly, Justice White in a concurring opinion in *Miami Herald* used language that ascribed decisionmaking to the newspaper, while obviously referring to editors. 418 U.S. at 261 (White, J., concurring) (stating that the Florida law "runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor"). Justice Blackmun also used similar language in a case memo he prepared, stating that "the statute would force the private newspaper to print material it does not want to print." Blackmun, *Miami Herald Memo*, *supra* note 121, at 5.

128. Jurisdictional Statement at 29, *Miami Herald*, 418 U.S. 241 (No. 73-797), reprinted in 78 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 181, 218 (Philip B. Kurland & Gerhard Casper eds., 1975).

speech of “business corporations” in *Bellotti* in part because communication by corporate members of the press was entitled to greater protection than the same communication by entities such as banks.¹²⁹

In *Wooley v. Maynard*, two Jehovah’s Witnesses covered the motto “Live Free or Die” on the license plates of their cars because the motto was “at odds” with their deeply held religious beliefs.¹³⁰ The district court ruled that the covering up of the motto was protected symbolic speech,¹³¹ but the Court passed on that issue and instead ruled that the government may not force individuals to display ideological messages on their private property.¹³² An individual’s freedom of mind, Chief Justice Burger wrote, includes the right not to “be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”¹³³

Initially, the Court voted 7-2 on May 27, 1976, to summarily affirm the district court’s ruling,¹³⁴ prompting a draft dissent by Justice Rehnquist who feared the majority’s reasoning represented an unwarranted extension of the Court’s symbolic speech cases and imperiled federal statutes which prohibit defacing the words “In God We Trust” on currency.¹³⁵ Justice Rehnquist’s advocacy of setting the case down for oral argument was successful and the Court voted 6-3 to note probable

129. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781, 782 n.18 (1978). The *Bellotti* Court did not address the possible application of the Massachusetts statute to the press because none of the litigants contended to be members of the press, and this issue was not addressed by the lower court. *Id.* at 781 n.17. However, the Court announced that the press “does not have a monopoly on either the First Amendment or the ability to enlighten.” *Id.* at 782.

130. *Wooley*, 430 U.S. at 707–08, 707 n.2.

131. *Maynard v. Wooley*, 406 F. Supp. 1381, 1386 (D.N.H. 1976).

132. *Wooley*, 430 U.S. at 713.

133. *Id.* at 715.

134. Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Wooley v. Maynard* (May 27, 1976) (on file with the Harvard Journal of Law & Public Policy). All of the Justices except Justices Blackmun and Rehnquist voted to summarily affirm the lower court’s judgment. *Id.*

135. William H. Rehnquist, First Typescript Draft of *Wooley v. Maynard* Dissenting Opinion 1 (June 10, 1976) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

jurisdiction at its June 17, 1976, conference.¹³⁶ After hearing arguments, the Court voted 7-2 to affirm with Chief Justice Burger advancing the idea at the conference that the state cannot compel citizens to convey a message contrary to their religious views.¹³⁷

Chief Justice Burger's first draft opinion for the Court had a section arguing that the covering of the motto was not symbolic speech but alternatively found that the individuals may not be forced to disseminate state-mandated ideological messages.¹³⁸ The treatment of symbolic speech prompted Justices Stewart, Brennan, and Marshall to inform Chief Justice Burger that they would not join that part of his opinion.¹³⁹ Chief Justice Burger then canvassed the Justices' Conference, asking for a "show of hands" on deleting the symbolic speech section;¹⁴⁰ Justices Stewart, Brennan, Marshall, Powell, and Stevens voted for de-

136. Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Wooley v. Maynard* (June 17, 1976) (on file with the Harvard Journal of Law & Public Policy). Justices Brennan, Stewart, and Marshall voted to summarily affirm. *Id.*

137. Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Wooley v. Maynard* (Dec. 1, 1976) (on file with the Harvard Journal of Law & Public Policy) (noting that Chief Justice Burger stated that a "license plate may be somewhat different from compelling 'speech' in other ways. But the objection here is based on *religious* grounds[, and the] state can't compel this"); *see also* Conference Notes, William J. Brennan, Jr., *Wooley v. Maynard* (Dec. 1, 1976) (on file with the Harvard Journal of Law & Public Policy) (noting that Chief Justice Burger said the state cannot compel messages).

138. Warren E. Burger, First Printed Draft of *Wooley v. Maynard* Opinion 6-9, (Mar. 10, 1977) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

139. Letter from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 11, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from Thurgood Marshall, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 11, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from Potter Stewart, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 10, 1977) (on file with the Harvard Journal of Law & Public Policy). Justice White informed Chief Justice Burger that he was considering a partial dissent on the issue of affirming the lower court's injunction and that he had "not come to rest with respect to" the symbolic speech section. Letter from Byron R. White, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 14, 1977) (on file with the Harvard Journal of Law & Public Policy).

140. Memorandum from Warren E. Burger, Chief Justice, U.S. Supreme Court, to the Justices' Conference (Mar. 16, 1977) (on file with the Harvard Journal of Law & Public Policy).

letion.¹⁴¹ Justice Rehnquist wrote to Chief Justice Burger that deletion of the symbolic speech section meant the Court was not addressing the issue that the district court decided but was deciding the case on a First Amendment issue that the district court never considered.¹⁴²

The right not to speak in *Wooley* is derived from *West Virginia State Board of Education v. Barnette* where public school students were required to salute the flag of the United States while reciting the Pledge of Allegiance.¹⁴³ Jehovah's Witnesses, who regard the flag as a graven image, refused to participate in the flag salute, and the Court found "individual freedom of mind" was preferred over "officially disciplined uniformity."¹⁴⁴ The Bill of Rights, "which guards the individual's right to speak his own mind," does not allow public authorities "to compel him to utter what is not in his mind."¹⁴⁵

Chief Justice Burger's *Wooley* opinion admitted that the compelled flag salute was "a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree."¹⁴⁶ Justice Rehnquist, in a dissenting opinion joined by Justice Blackmun, criticized Chief Justice Burger's attempt to put this case in the ambit of *Barnette*, noting that there was no affirmation of belief in *Wooley*; the state was not placing citi-

141. Letter from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 16, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from Thurgood Marshall, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 17, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 17, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 17, 1977) (on file with the Harvard Journal of Law & Public Policy); Letter from Potter Stewart, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 16, 1977) (on file with the Harvard Journal of Law & Public Policy).

142. Letter from William H. Rehnquist, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Mar. 16, 1977) (on file with the Harvard Journal of Law & Public Policy).

143. 319 U.S. 624, 626 (1943).

144. *Id.* at 629, 637.

145. *Id.* at 634.

146. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

zens in the position of “asserting as true” the state-mandated message.¹⁴⁷

Justice Rehnquist, however, did not criticize Chief Justice Burger’s use of *Miami Herald* as an illustration of the “individual freedom of mind.” In fact, none of the Justices objected to Chief Justice Burger’s reference to *Miami Herald*. Certainly the opinion drafts were closely scrutinized and Chief Justice Burger was open to changes requested by Justices. For example, Justice Stewart threatened to withdraw his *Wooley* vote because Chief Justice Burger’s early drafts used language stating that a sufficiently compelling interest justified infringement of First Amendment rights.¹⁴⁸ Justice Stewart said he could not agree that any governmental interest could ever justify “infringement” of First Amendment rights.¹⁴⁹ Where “free expression must be subordinated to strong societal policies,” Justice Stewart argued, “there is no infringement of First Amendment rights.”¹⁵⁰ Chief Justice Burger told Justice Stewart that he was “quite willing to modify” the language and rewrote it to secure Justice Stewart’s vote.¹⁵¹

During the Court’s consideration of *Wooley*, Justices Stevens and Blackmun questioned the importance of the case. Justice Stevens wrote to the Justices’ Conference that he could not get over “the fact that the case really involves nothing more than

147. *Id.* at 721 (Rehnquist, J., dissenting).

148. Letter from Potter Stewart, Assoc. Justice, U.S. Supreme Court, to Warren E. Burger, Chief Justice, U.S. Supreme Court (Apr. 14, 1977) (on file with the Harvard Journal of Law & Public Policy).

149. *Id.*

150. *Id.* Justice Stewart and Justice John Harlan for many years carried on a continuing off-the-record dialogue on this subject. *Id.* Justice Stewart said of Justice Harlan, “While he thought, probably quite rightly, that my view was no more than semantic and probably circular, he nonetheless came to agree with it.” *Id.*

151. Letter from Warren E. Burger, Chief Justice, U.S. Supreme Court, to Potter Stewart, Assoc. Justice, U.S. Supreme Court (Apr. 14, 1977) (on file with the Harvard Journal of Law & Public Policy). The modified language appears as the first and second sentences in Part (4)B. *Wooley*, 430 U.S. at 715–16 (“Identifying the Maynards’ interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the State’s countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates.” (citing *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968))).

the masking of two license plates.”¹⁵² Justice Blackmun, in a memo prepared just for his use, wrote the following:

Sometimes I wonder how important cases of this kind are, and I am appalled at the amount of energy that is expended processing them. This seems to me to be an aberration case that is not very important. Yet, in all fairness it may not be a foolish case and could prove to be a very significant one so far as rights to free speech are concerned.¹⁵³

As will be shown, *Wooley* has become a key part of the right not to speak and in particular played a critical role in *PG&E*.

B. Writing the PG&E Opinion

At the Court’s October 11, 1985, conference, the Justices voted 5-3 to reverse the utility commission order.¹⁵⁴ Justice Powell voted to reverse for the following reasons: (1) regulated corporations have First Amendment rights to disseminate their own views under *Bellotti* and *Consolidated Edison*, (2) *Miami Herald* and *Wooley* recognized a “negative” First Amendment right, and (3) counsel for the utility commission admitted at oral argument that the purpose of the order was to afford an opportunity for rate opponents of PG&E to have a forum.¹⁵⁵ Chief

152. Memorandum, John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to the Justices’ Conference (June 10, 1976) (on file with the Harvard Journal of Law & Public Policy).

153. Memorandum, Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, *No. 75-1453—Wooley v. Maynard* 4 (Nov. 29, 1976) (on file with the Harvard Journal of Law & Public Policy).

154. Justice Blackmun did not participate, but he did take notes of the conference discussion. Conference Notes, Harry A. Blackmun, Assoc. Justice, U.S. Supreme Court, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n* (Oct. 11, 1985) [hereinafter *PG&E* Conference Notes] (on file with the Harvard Journal of Law & Public Policy).

155. Justice Powell used notes he had prepared after hearing oral argument. Post-Argument Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n* (undated) (on file with the Harvard Journal of Law & Public Policy). In an earlier memo, Stuntz suggested the access rule was neutral “in the sense that *any* group interested in speech about utility/energy issues is free to apply to use the space.” Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 5 (Oct. 2, 1985) (on file with the Harvard Journal of Law & Public Policy). After counsel’s admission at oral argument, Stuntz wrote to Justice Powell “it appears that the only goal of the access program is to permit groups that *oppose* PG&E in ratemaking proceedings to raise money by using PG&E’s billing envelope. So characterized, the case looks almost easy (and your clerk’s initial views almost dumb).” Memorandum from William Stuntz, Law Clerk, U.S. Supreme

Justice Burger and Justices Brennan and O'Connor agreed with Justice Powell that the utility company had First Amendment rights but could not agree on the relevant precedents or principles.¹⁵⁶ According to Justice Powell's notes, Chief Justice Burger said that compelling PG&E to transmit the "views of others is too troubling" and that "*Miami Herald* is close—but not controlling. Same is true of *Wooley*."¹⁵⁷ Justice Brennan remarked that *Miami Herald* and Justice Powell's concurring opinion in *PruneYard Shopping Center v. Robins*¹⁵⁸ "make clear there is negative [First Amendment right]."¹⁵⁹ Justice O'Connor said there was "no clear answer" but that the utility commission's order was "a form of 'forced association.'"¹⁶⁰ Justice Marshall also voted to reverse, but Justice Powell's notes merely say "On first amend."¹⁶¹ Justices White, Stevens, and Rehnquist voted to af-

Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 2 (Oct. 11, 1985) (on file with the Harvard Journal of Law & Public Policy).

156. As Stuntz wrote to Justice Powell on October 29, after looking at Justice Powell's notes and talking with a few clerks in other chambers, it "isn't clear that the other Justices who voted to reverse agreed on this (or any other) rationale." Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 1-2 (Oct. 29, 1985) (on file with the Harvard Journal of Law & Public Policy).

157. Conference Notes, Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n (Oct. 11, 1985) [hereinafter *PG&E* Conference Notes] (on file with the Harvard Journal of Law & Public Policy); see also Conference Notes, William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n (Mar. 25, 1985) [hereinafter *PG&E* Conference Notes] (on file with the Harvard Journal of Law & Public Policy) (recording that Chief Justice Burger said a requirement like this, whether addressed to a corporation or individual, is "most suspect").

158. 447 U.S. 74, 96-101 (1980) (Powell, J., concurring in part and in the judgment). The Court ruled that individuals who engaged in expressive activities in a privately owned shopping center did not violate the First Amendment rights of the center's owner. *Id.* at 88 (majority opinion). Justice Powell's concurring opinion said that although the record in *PruneYard* did not show that the access burdened the owner's First Amendment rights, there could be circumstances where an impermissible burden occurred. *Id.* at 98-101 (Powell, J., concurring).

159. Powell, *PG&E* Conference Notes, *supra* note 157. Justice Blackmun also recorded Justice Brennan as stating the order was a "trespass" on PG&E's negative First Amendment rights. Blackmun, *PG&E* Conference Notes, *supra* note 154.

160. Powell, *PG&E* Conference Notes, *supra* note 157.

161. *Id.* Notes taken by Justices Blackmun and Brennan do not elaborate on Justice Marshall's reasoning. See Blackmun, *PG&E* Conference Notes, *supra* note 154; Brennan, *PG&E* Conference Notes, *supra* note 157.

firm, arguing that corporations have limited rights that were not violated in this case.¹⁶²

1. *Grappling with the Precedents*

To understand Justice Powell's opinion, it is important to separate the issue of TURN's access to PG&E's billing envelopes (the forced association issue), from the impact of that access on PG&E's publication of *Progress* (the forced response issue). Justice Powell described *Progress* as "no different from a small newspaper" with a blend of energy saving tips, stories about wildlife conservation, and commentary on political issues.¹⁶³ PG&E's publication of *Progress* explains in part the opinion's reliance on *Miami Herald*. TURN's access to the billing envelopes explains the reliance on *Wooley*.

The parties "hotly debated" the applicability of *Wooley* and *Barnette*, the flag salute case.¹⁶⁴ After Justice Powell was assigned the opinion on October 14, he and his clerk William Stuntz grappled with *Wooley* in particular. PG&E, as Stuntz wrote to Justice Powell, "cannot sensibly be said to have a 'conscience' or 'deeply held beliefs' in the sense that the individual claimants in *Wooley* and *Barnette* did."¹⁶⁵ In early drafts of the opinion, Stuntz wrote that it was not necessary to determine whether *Wooley* and *Barnette* provide an "independent basis for prohibiting a state-compelled access to corporate property for purposes of disseminating speech. In our view, the Commission's order is invalid not because it infringes on any right of con-

162. Blackmun, *PG&E* Conference Notes, *supra* note 154; Brennan, *PG&E* Conference Notes, *supra* note 157; Powell, *PG&E* Conference Notes, *supra* note 157.

163. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 5 & n.1, 8 (1986) (plurality opinion).

164. William Stuntz, First Typescript Draft of *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n* Opinion 13 (Oct. 29, 1985) (unpublished draft) [hereinafter *PG&E* First Typescript Draft] (on file with the Harvard Journal of Law & Public Policy).

165. Bench Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, for Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 22 (Sept. 27, 1985) (on file with the Harvard Journal of Law & Public Policy); *see also* Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 7 (Oct. 2, 1985) (on file with the Harvard Journal of Law & Public Policy) (arguing that the freedom of conscience interest is "simply not applicable to a large, publicly traded corporation").

science or belief, but because it constitutes a forced association that impermissibly deters protected speech.”¹⁶⁶

Stuntz relied most heavily on *Miami Herald*, explaining to Justice Powell that simply arguing that sharing envelope space was impermissible begs the question why a publicly traded business corporation has a right not to associate with the speech of others.¹⁶⁷ Stuntz asserted that under *Miami Herald*, a viewpoint-based access scheme can be seen as deterring the property owner from speaking out.¹⁶⁸ “It doesn’t matter who owns the extra space, nor does it matter that PG&E is a corporation rather than an individual.”¹⁶⁹ Justice Powell agreed that no other opinion was as helpful as *Miami Herald*.¹⁷⁰

The draft opinion circulated to the Justices’ Conference on November 14, explicitly stated that the Court was not deciding whether *Wooley* and *Barnette* were applicable.¹⁷¹ Justice Rehnquist responded with a draft dissenting opinion, remarking that “the majority expressly disavows any reliance on the argument that corporations, like individuals, have a right not to speak against their ‘consciences.’”¹⁷² Further, Justice Rehnquist argued that *Miami Herald* was inapplicable: “PG&E is not an individual or a newspaper publisher; it is a regulated

166. Stuntz, *PG&E* First Typescript Draft, *supra* note 164, at 14. Justice Powell deleted the references to conscience in this passage so that the emphasis was on forced association. William Stuntz & Lewis F. Powell, Jr., Second Typescript Draft of *Pac. Gas & Elec. Co. v. Pub. Utils.* Comm’n Opinion 13 (Nov. 9, 1985) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy). He wrote the following in the margin on the second draft: “Bill—I think one can read *Wooley* and *Barnette* broadly enough to lend support to our view. I’d not argue this, but I don’t want to imply that these cases are limited to conscience.” *Id.*

167. Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 3–4 (Oct. 29, 1985) (on file with the Harvard Journal of Law & Public Policy).

168. *Id.* at 4.

169. *Id.* at 5.

170. Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William Stuntz, Law Clerk, U.S. Supreme Court 2 (Oct. 30, 1985) (on file with the Harvard Journal of Law & Public Policy).

171. Lewis F. Powell, Jr., First Printed Draft of *Pac. Gas & Elec. Co. v. Pub. Utils.* Comm’n Opinion 5 n.4 (Nov. 14, 1985) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

172. William H. Rehnquist, First Printed Draft of *Pac. Gas & Elec. Co. v. Pub. Utils.* Comm’n Dissenting Opinion 1 n.1 (Dec. 6, 1985) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

utility. The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.”¹⁷³ Justices White and Stevens quickly joined Justice Rehnquist’s dissent,¹⁷⁴ but Justice O’Connor joined Justice Powell’s opinion.¹⁷⁵

2. *Accommodating Justice Brennan*

After reading both Justice Powell’s and Justice Rehnquist’s draft opinions, Justice Brennan wrote a seven-page letter to Justice Powell, admitting he had struggled with the “difficult”

173. *Id.* at 7.

174. Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Dec. 10, 1985) (on file with the Harvard Journal of Law & Public Policy); Letter from Byron R. White, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Dec. 9, 1985) (on file with the Harvard Journal of Law & Public Policy). Both Justices White and Stevens, however, expressed reservations about Justice Rehnquist’s later drafts and did not join Part II of his dissenting opinion. *See* Letter from John Paul Stevens, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Jan. 31, 1986) (on file with the Harvard Journal of Law & Public Policy); Letter from Byron R. White, Assoc. Justice, U.S. Supreme Court, to William H. Rehnquist, Assoc. Justice, U.S. Supreme Court (Jan. 31, 1986) (on file with the Harvard Journal of Law & Public Policy).

175. Letter from Sandra Day O’Connor, Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Nov. 22, 1985) (on file with the Harvard Journal of Law & Public Policy). Justice Marshall joined the Court’s judgment but did not join Justice Powell’s opinion, finding that the order exceeded the right of access to private property that was permissible under *PruneYard. Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 21–26 (1986) (Marshall, J., concurring in the judgment). Justice Powell sought to get Justice Marshall to join his opinion, writing that he did not see any tension “between our two opinions.” Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to Thurgood Marshall, Assoc. Justice, U.S. Supreme Court (Jan. 21, 1986) (on file with the Harvard Journal of Law & Public Policy). He added, “Your view that the First Amendments [sic] rights of corporations are not identical to those of individuals is also consistent with my opinion. I purposely placed reliance on cases involving corporate and not individual speech: *Bellotti*, *Consolidated Edison*, and of course *Tornillo*.” *Id.* Justice Marshall rejected Justice Powell’s overture, stating that he particularly disagreed with Justice Powell’s application of *Miami Herald*, adding that he did not “believe that the concerns applicable to regulation of the press are so easily expanded to cover a non-media corporation.” Letter from Thurgood Marshall, Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Jan. 22, 1986) (on file with the Harvard Journal of Law & Public Policy).

issues raised by the case.¹⁷⁶ *Miami Herald* was not the appropriate analytical framework for the case; the “cardinal defect” of the order “is that it compels PG&E both to associate with, and carry the messages of, a speaker with which it may violently disagree. . . . My sense is thus that the case is most readily analyzed” under *Wooley* and Justice Powell’s *PruneYard* concurring opinion.¹⁷⁷ It was not necessary “to delineate the precise scope of a corporation’s right not to speak,” but the commission’s order was “well beyond the line of permissible regulation.”¹⁷⁸

Stuntz opposed Justice Brennan’s idea of relying on *Wooley* because it would “needlessly expose us to the argument that (i) *Wooley* rested on individuals’ freedom of conscience, while (ii) a large, publicly traded corporation like PG&E has no ‘conscience’ to protect.”¹⁷⁹ Justice Powell responded that despite his full agreement that “*Wooley* can be viewed as essentially a ‘freedom of conscience’ case, it may not be unreasonable (as an accommodation to WJB’s views!) to recognize that by analogy it also supports our position.”¹⁸⁰ Justice Powell concluded by telling his clerk that “as often happens where the views of five Justices must be met to obtain a Court, the author of an opinion has to make some accommodations.”¹⁸¹ He asked Stuntz to make changes to “satisfy WJB without detracting significantly from the soundness of our opinion.”¹⁸²

Stuntz deleted the section that expressly declined to apply *Wooley* and *Barnett* to the case and added language from *Wooley*

176. Letter from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 1 (Dec. 17, 1985) (on file with the Harvard Journal of Law & Public Policy).

177. *Id.* at 1–2.

178. *Id.* at 6.

179. Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 2 (Dec. 17, 1985) (on file with the Harvard Journal of Law & Public Policy).

180. Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William Stuntz, Law Clerk, U.S. Supreme Court 2 (Dec. 18, 1985) (on file with the Harvard Journal of Law & Public Policy). Justice Powell added, “Although *Wooley*’s primary focus was on freedom of conscience, the decision has broader First Amendment relevance where a state forces one to carry a message with which a speaker may disagree.” *Id.* at 2–3.

181. *Id.* at 3.

182. *Id.* at 3–4.

concerning a right not to speak.¹⁸³ When Justice Powell shared these changes with Justice Brennan he commended Justice Brennan for suggesting that *Wooley* “lends support to our position.”¹⁸⁴ He added:

I have thought it unwise, however, to rely on *Wooley* as a primary authority, and thereby invite a strong dissent. The section of *Wooley* that discusses the Maynards’ right not to speak ties that right to “freedom of thought” and “freedom of mind,” and does not rely in its holding on the Maynards’ affirmative right to speak. In this case, we tie appellant’s affirmative right to be free from forced association with TURN to appellant’s affirmative right to speak. *Tornillo* is plainly the single most relevant authority to such an analysis.¹⁸⁵

The changes made to Justice Powell’s opinion satisfied Justice Brennan and he joined it on December 26.¹⁸⁶ Chief Justice Burger joined the opinion on January 10 but added a concurring opinion stating that *Wooley* was sufficient authority to decide this case.¹⁸⁷

183. These and other changes are outlined in Memorandum from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, Proposed Changes for *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n 1* (Dec. 20, 1985) (on file with the Harvard Journal of Law & Public Policy), sent by Justice Powell to Justice Brennan along with a letter. Letter from Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court, to William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court (Dec. 20, 1985) [hereinafter Dec. 1985 Letter] (on file with the Harvard Journal of Law & Public Policy). On Justice Powell’s copy of the Fourth Printed Draft of the *PG&E* opinion, circulated to the Court on December 23, 1985, Justice Powell wrote on the first page “These changes include many suggested by WJB. See my letter and memo to him.” Lewis F. Powell, Jr., Fourth Printed Draft of *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n Opinion 1* (Dec. 23, 1985) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

184. Powell, Dec. 1985 Letter, *supra* note 183, at 2.

185. *Id.* (citations omitted).

186. Letter from William J. Brennan, Jr., Assoc. Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Dec. 26, 1985) (on file with the Harvard Journal of Law & Public Policy).

187. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 21 (1986) (Burger, C.J., concurring). Chief Justice Burger initially prepared a concurring opinion that disagreed with the notion that the order was a “penalty” for PG&E’s earlier publication of its newsletter. Letter from Warren E. Burger, Chief Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Dec. 20, 1985) (on file with the Harvard Journal of Law & Public Policy). On January 8, 1986, Chief Justice Burger noted that Justice Powell’s fourth draft met “most of my problems.” Letter from Warren E. Burger, Chief Justice, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court (Jan. 8, 1986) (on file with

Justice Rehnquist revised his dissenting opinion to address the new references to *Wooley*, calling the analysis flawed.¹⁸⁸ “This Court has recognized that natural persons enjoy negative free speech rights because of their interest in self-expression; an individual’s right not to speak or to associate with the speech of others is a component of the broader constitutional interest of natural persons in freedom of conscience.”¹⁸⁹ He continued, “Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point.”¹⁹⁰ Stuntz proposed adding material to make clear that the opinion was not giving corporations “conscience” rights, but Justice Powell felt that addition was unnecessary.¹⁹¹

C. Understanding PG&E

Justice Powell’s *PG&E* opinion can be read in two distinct ways. First, the opinion sets out a corporate right to be free from state-imposed burdens on expression. A related but ancillary point concerns the freedom of a corporation to control its property for expressive purposes, including the power to grant or deny access to third parties.¹⁹² Second, the opinion limits the

the Harvard Journal of Law & Public Policy). Chief Justice Burger added, “I don’t want to jeopardize a Court for your opinion so I had decided to join, but still point out that it is sufficient to decide the case on the basis of compelled association, relying entirely on *Wooley v. Maynard*.” *Id.*; see also Warren E. Burger, First Printed Draft of *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n* Concurring Opinion (Jan. 10, 1986) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

188. William H. Rehnquist, Third Printed Draft of *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n* Dissenting Opinion 7 (Jan. 28, 1986) (unpublished draft) (on file with the Harvard Journal of Law & Public Policy).

189. *Id.*

190. *Id.* at 8. Justice Rehnquist added, “To ascribe to such artificial entities an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality.” *Id.*

191. Memorandum from William Stuntz, Law Clerk, U.S. Supreme Court, to Lewis F. Powell, Jr., Assoc. Justice, U.S. Supreme Court 2–3 (Jan. 31, 1986) (on file with the Harvard Journal of Law & Public Policy). Justice Powell wrote that he would prefer not to make any further change unless Justice Brennan was concerned. *Id.* at 3.

192. Although the utility commission maintained that the “extra space” within the billing envelopes belonged to the ratepayers, the envelopes, the bills, and PG&E’s newsletter remained PG&E’s property. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 17 (1986) (plurality opinion). Thus, the access order required PG&E “to use *its* property as a vehicle for spreading a message with which it dis-

power of government to promote diverse views, especially when those actions are viewpoint-based.

Although Justice Powell began the First Amendment analysis by referring to both *Bellotti* and *Consolidated Edison* as cases in which the state sought to abridge *speech* in ways that harm the “public’s interest in receiving information,”¹⁹³ the rhetoric shifted quickly when addressing *Miami Herald*. The Florida statute harmed the *newspaper* by forcing it “to tailor its speech to an opponent’s agenda, and to respond to candidates’ arguments where the newspaper might prefer to be silent.”¹⁹⁴ Justice Powell wrote that the same concerns that invalidated the compelled access rule in *Miami Herald* “apply to appellant as well as to the institutional press.”¹⁹⁵ The state is not free, Justice Powell wrote, to force PG&E “to respond to views that others may hold.”¹⁹⁶

This shift was more than rhetorical. Unlike *Bellotti*, where Justice Powell avoided discussing the rights of corporations, *PG&E* sets out a corporation’s right to be free from state-imposed burdens on expression. PG&E, therefore, had both a right to control how its property is used by others for expressive purposes (the forced association issue) and a right to define what it communicates to the public through an outlet such as *Progress* (the forced response issue). To Justice Powell, the forced association provoked a forced response; because TURN had been given access “to create a multiplicity of views in the envelopes, there can be little doubt that appellant will *feel* compelled to respond to arguments and allegations made by TURN in its messages to appellant’s customers.”¹⁹⁷ Although Justice Powell was well aware of the danger of ascribing a conscience

agrees.” *Id.* To Justice Powell, the implications of the order were extensive; extra space could be found “on billboards, bulletin boards, and sides of buildings, and motor vehicles.” *Id.* at 18 n.15; *see also id.* at 6 n.4 (quoting dissenting Public Utilities commissioner who noted the sweeping ramifications of the order).

193. *Id.* at 8.

194. *Id.* at 10. Although the *Miami Herald* was owned by a corporation, the dominant actors in the Court’s opinion were editors. *See supra* notes 3, 120–121, 127 and accompanying text.

195. 475 U.S. at 11 (plurality opinion).

196. *Id.*

197. *Id.* at 16 (emphasis added).

to a corporation on the forced association issue, he discussed the forced response issue as if he were describing a natural person.

There was also a chilling effect caused by the viewpoint-based access mandated by the utility commission.¹⁹⁸ The public was not given access to the envelopes. Rather, access was limited “to persons or groups—such as TURN—who disagree with appellant’s views as expressed in *Progress* and who oppose appellant in Commission proceedings.”¹⁹⁹ Thus, PG&E “must contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views.”²⁰⁰ As in *Miami Herald*, the “safe course is to avoid controversy.”²⁰¹

Apart from the impact of the access order on PG&E’s speech, Justice Powell also criticized the commission’s order on the ground that it compelled PG&E to be a courier for messages with which it disagreed. Justice Powell relied in part on *Wooley*, absent any reference to conscience, for the idea that the right to speak necessarily includes the right not to speak.²⁰² Justice Powell wrote that if the government were “able to compel corporate speakers to propound political messages with which they disagree, [the First Amendment’s] protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next.”²⁰³

198. *See id.* at 14.

199. *Id.* at 13. Justice Powell stated that TURN was free “to use the billing envelopes to discuss any issue it chooses” and if it argued in favor of legislation that could harm PG&E, the company may be “forced either to appear to agree with TURN’s views or to respond.” *Id.* at 15. This statement reflects the views he stated in his concurring opinion in *PruneYard*. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 98–99 (1980) (Powell, J., concurring in part and in the judgment). Moreover, a disclaimer on TURN’s message “does nothing to reduce the risk that appellant will be forced to respond when there is strong disagreement with the substance of TURN’s message.” 475 U.S. at 15 n.11 (plurality opinion).

200. 475 U.S. at 14 (plurality opinion).

201. *Id.* (quoting *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 257 (1974)) (internal quotation marks omitted).

202. *Id.* at 16 n.13 (“[A] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.” (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977))) (internal quotation marks omitted).

203. *Id.* at 16.

Although Justice Powell sought to read *Wooley* as resting on broader concerns than “individual freedom of mind” at issue in *Barnette*,²⁰⁴ implicit in his analysis is management’s disagreement with the ideas of TURN. Stated differently, although a corporation is incapable of thought, its management may deploy corporate resources to promote certain ideas, and under Justice Powell’s theory, refuse to allow those resources to be used to promote ideas management finds repugnant.

Justice Powell was not the first to look through a corporation and see the humans making choices about speech. As noted above, Chief Justice Burger’s *Wooley* opinion described *Miami Herald* as illustrative of the “freedom of thought” that protects “both the right to speak freely and the right to refrain from speaking at all.”²⁰⁵ Chief Justice Burger’s references to the newspaper’s “fundamental right to decide what to print”²⁰⁶ were surely about the humans making editorial decisions. It is striking that Justice Rehnquist attacked Justice Powell for extending freedom of conscience decisions to PG&E, but accepted the idea that newspapers have freedom of thought.²⁰⁷

Justice Rehnquist also criticized Justice Powell for departing from the “right to receive” rationale of *Bellotti*, stating that because “the constitutional protection of corporate speech” rests on “the societal interest in receiving information and ideas, the constitutional interest of a corporation in not permitting the presentation of other distinct views” is “*de minimis*.”²⁰⁸ To Justice Powell though, the commission’s viewpoint-based order distorted the marketplace. The key statement from his opinion is the following: “By protecting those who wish to enter the mar-

204. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

205. *Wooley*, 430 U.S. at 714. Justice Brennan also referred to *Wooley* and *Miami Herald* as based on the concept of individual freedom of mind. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

206. *Wooley*, 430 U.S. at 714.

207. 475 U.S. at 35 (Rehnquist, J., dissenting) (noting that PG&E is not an individual or a newspaper).

208. *Id.* at 33–34. This rationale was especially true in the case of PG&E, a regulated monopoly. “Any claim it may have had to a sphere of corporate autonomy was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.” *Id.* at 34. *But see id.* at 17 n.14 (plurality opinion) (quoting *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 534 n.1 (1980)) (noting that status as a regulated monopoly does not decrease the informative value of its speech).

ketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information."²⁰⁹ Stated differently, the freedom of a corporation cannot be burdened to enhance the voice of its opponents.

Justice Powell's *PG&E* opinion is the foundation for the ruling in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,²¹⁰ in which the Court unanimously held that the organizers of the St. Patrick's Day-Evacuation Day Parade in South Boston had a First Amendment right to exclude a gay, lesbian, and bisexual group (GLIB) from the parade.²¹¹ Forcing the parade organizers to include GLIB "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."²¹² Quoting *PG&E*, the *Hurley* Court said the principle of speaker autonomy simply meant that "one who chooses to speak may also decide 'what not to say.'"²¹³ Although the Court could have referred to the burden on the consciences of the individuals comprising the unincorporated association that organized the parade,²¹⁴ it did not do so. Instead, it announced that the principle of speaker autonomy applied to the press, business corporations, and "ordinary people engaged in unsophisticated expression."²¹⁵

209. *Id.* at 8 (plurality opinion) (citing *Sazbe v. Wash. Post Co.*, 417 U.S. 863–64 (1974) (Powell, J., dissenting); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

210. 515 U.S. 557 (1995).

211. *Id.* at 560–61, 580–81.

212. *Id.* at 573.

213. *Id.* (quoting *PG&E*, 475 U.S. at 16 (plurality opinion)); see also *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988) (noting that the term "freedom of speech . . . necessarily compris[es] the decision of both what to say and what *not* to say"). *Riley* involved a challenge by a coalition of professional fundraisers, charitable organizations, and potential donors to a law requiring that professional fundraisers disclose to potential donors the percentage of charitable contributions collected during the previous twelve months that were actually turned over to a charity. 487 U.S. at 785–87. Discussion of the corporate identity of some of the challengers was strikingly absent from the Court's discussion of the case. The papers of Justices Blackmun, Brennan, Marshall, Powell, and White do not reveal any consideration of corporate status.

214. The parade organizer, the South Boston Allied War Veterans Council, was comprised of individuals elected from various South Boston veterans groups. *Hurley*, 515 U.S. at 560.

215. *Id.* at 574; see also *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213–21 (2013) (holding that nongovernmental organizations may not be forced to adopt a particular belief as a condition of receiving government funding).

The principle of speaker autonomy having priority over the right to receive expression would be again before the Court in *NIFLA*, but with an unusual conscience argument.

IV. *NIFLA*

According to its author, the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT),²¹⁶ was part of California’s legacy of “forward thinking.”²¹⁷ The law was designed to promote well-informed “personal reproductive health care decisions,”²¹⁸ but the Supreme Court found the law “targets”²¹⁹ pro-life pregnancy centers that seek to discourage women from seeking abortions.²²⁰

FACT required licensed facilities, whose primary purpose was to offer “family planning or pregnancy-related services,”²²¹

216. CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West Supp. 2018), *invalidated in part by* Nat’l Inst. of Family & Life Advocates v. Beccerra, 138 S. Ct. 2361 (2018).

217. *Reproductive FACT Act: Hearing on AB 775 Before the Assembly Comm. on Health*, 2015–2016 Reg. Sess. 3 (Cal. 2015) [hereinafter *Hearing on AB 775*].

218. Reproductive FACT Act, 2015 CAL. LEGIS. SERV. ch. 700, § 2 (AB 775) (West) (codified at CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West Supp. 2018)).

219. *NIFLA*, 138 S. Ct. 2361, 2378 (2018). Although Justice Thomas did not conclude the law was viewpoint discriminatory, *id.* at 2370 n.2, his use of the term “targets” is tied to his finding that the law was underinclusive, which raises the risk of viewpoint discrimination.

220. The author of FACT noted that “unfortunately” there were nearly 200 licensed and unlicensed “crisis pregnancy centers” whose goal “is to interfere with women’s ability to be fully informed and exercise their reproductive rights . . . [and] aim to discourage and prevent women from seeking abortions.” *Hearing on AB 775* at 3, *supra* note 217. Several amici who supported California asserted that crisis pregnancy centers engage in deceptive and misleading tactics. *See, e.g.*, Brief for the City and County of San Francisco, et al. as *Amici Curiae* in Support of Respondents at 6–18, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140); Brief for *Amici Curiae* Equal Rights Advocates, et al. in Support of Respondents at 7–20, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140). At oral argument, California abandoned the assertion that the unlicensed disclosure requirement was to prevent women from being misled. *See infra* note 223.

221. HEALTH & SAFETY § 123471(a). For example, one of the petitioners, Pregnancy Care Center (PCC) is licensed as a free community clinic. Petition for a Writ of Certiorari at 5, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140). “Medical services provided by PCC include: urine pregnancy testing, ultrasound examinations, medical referrals, prenatal vitamins, information on STDs, information on natural family planning, health provider consultations, and other clinical services. Non-medical services . . . include: peer counseling and education, emotional support, maternity clothing, baby supplies, support groups, and healthy family support.”

to disseminate onsite a government-drafted notice stating that California has “free or low-cost access to comprehensive family planning services” including abortion.²²² Unlicensed facilities, which do not offer medical services, were required to distribute to clients onsite and in any print and digital advertising a notice that the facility was not licensed as a medical facility.²²³ Because the unlicensed facility provision of FACT was not attacked on freedom of conscience grounds, this discussion focuses on the licensed facility requirement, which was attacked as a burden on the conscience of clinics.

FACT exempted those licensed clinics enrolled in the State’s Family Planning, Access, Care, and Treatment (PACT) program of family planning and comprehensive reproductive health care including the provision of abortifacients,²²⁴ but the petitioners, incorporated as nonprofit religious organizations to

Id. at 5–6. The staff includes “two doctors of obstetrics and gynecology, one radiologist, one anesthesiologist, one certified midwife, one nurse practitioner, ten nurses, and two registered diagnostic medical sonographers.” Nat’l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 831 (9th Cir. 2016).

222. HEALTH & SAFETY § 123472(a)(1). The notice could be posted “in a conspicuous place,” printed and distributed to all clients, or distributed digitally at the time of check in. HEALTH & SAFETY § 123472(a)(2).

223. HEALTH & SAFETY § 123472(b). Unlicensed facilities do not have a licensed medical provider and consequently do not offer medical services, but merely offer “pregnancy-related services” such as over-the-counter pregnancy tests. HEALTH & SAFETY CODE § 123471(b). One of the petitioners, Fallbrook Pregnancy Resource Center (FPRC), “provides free pregnancy test kits that women administer and diagnose themselves, educational programs, resources and community referrals, maternity clothing, and baby items.” Petition for a Writ of Certiorari, *supra* note 221, at 5–6.

Although California’s brief argued that the unlicensed disclosure “ensures that women who seek state-licensed, professional medical care are not unwittingly diverted to facilities unable to provide it,” Brief for the State Respondents at 18, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140), at oral argument counsel for the state denied that the law’s justification was that women were being misled. *See* Transcript of Oral Argument at 44–45, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140). Writing for the Court, Justice Thomas held that California had not demonstrated any justification for the notice that is more than “purely hypothetical.” *NIFLA*, 138 S. Ct. at 2377. Further, the law covered a “curiously narrow subset of speakers.” *Id.* Finally, because the law required that the notice appear in multiple languages, in some instances as many as thirteen different languages, it “drowns out the facility’s own message.” *Id.* at 2378.

224. HEALTH & SAFETY § 123471(c)(2). The law also did not apply to physicians in private practice, general practice clinics, and a wide variety of clinics, such as student health centers operated by public institutions of higher education, not licensed in the state. HEALTH & SAFETY § 123471(c)(1).

advocate pro-life beliefs,²²⁵ “cannot in good conscience participate in the Family PACT program.”²²⁶ The petitioners vowed to never disseminate the state-mandated message and sought a preliminary injunction before FACT’s effective date.²²⁷ The district court’s denial of the motion was affirmed by the Ninth Circuit, concluding the licensed notice was a permissible regulation of “professional speech.”²²⁸

Unlike the law at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey*²²⁹ that required physicians to communicate government-mandated information to patients,²³⁰ FACT did not refer to physicians or other individuals. Rather, FACT specified that “facilities” shall disseminate the required notice,

225. Petition for a Writ of Certiorari, *supra* note 221, at 5. The petitioners were the National Institute of Family and Life Advocates (NIFLA), PCC, and FPRC. *Id.* NIFLA provides legal counsel, education, and training to more than 1,400 pro-life pregnancy centers. *About NIFLA*, NIFLA, <https://nifla.org/about-nifla/> [<https://perma.cc/Z3GR-VCN7>] (last visited Sept. 30, 2019). As a faith-based nonprofit, NIFLA “seeks to advance the cause and culture of life in America” and “envisions achieving an abortion-free America.” *Id.* “FPRC is committed through Christian advocacy to strengthen the hearts and lives of moms feeling inadequate to carry their babies to birth.” *Hope Clinic for Women*, FPRC, <http://www.fprcforlife.com/About-FPRC/Hope-Clinic-for-Women> [<https://perma.cc/G35V-GDPN>] (last visited Sept. 30, 2019); *see also supra* note 223. PCC describes itself as a “front line ministry supported by local churches and donors.” *Church/Group Volunteer Opportunities*, PREGNANCY CARE CLINIC, <http://www.supportpcc.com/get-involved/church-involvement/> [<https://perma.cc/2V6G-4T2S>] (last visited Sept. 30, 2019); *see also supra* note 221. As summarized by Heartbeat International, pro-life pregnancy centers are “the service arm of the pro-life movement.” Brief of Heartbeat International, Inc. as *Amicus Curiae* in Support of Petitioners at 8, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140) [hereinafter Brief of Heartbeat International].

226. Petition for a Writ of Certiorari, *supra* note 221, at 9.

227. *Nat’l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 833 (9th Cir. 2016).

228. *Id.* at 844.

229. 505 U.S. 833 (1992).

230. *See* 18 PA. CONS. STAT. AND CONS. STAT. ANN. § 3205 (West 2015). This law requires oral disclosures by a physician to a woman concerning the nature of the abortion procedure, the probable gestational age of the unborn child, and the medical risks associated with carrying the child to term. *Id.* (a)(1). In addition, the physician or someone delegated by the physician must inform the woman that printed materials are available which describe, among other things, the unborn child and list agencies which offer alternatives to abortion. *Id.* (a)(2). Physicians who violate this law face suspension or revocation of their medical licenses. *Id.* (c). A plurality of Justices in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, found these requirements did not interfere with the First Amendment right of physicians not to speak. 505 U.S. at 884.

which meant the nonprofit corporations eligible for licenses to operate primary care clinics.²³¹ Furthermore, although the law at issue in *Casey* threatened physicians with suspension or revocation of their licenses for violating the Pennsylvania law, only “facilities” were subject to FACT’s civil penalties.²³² California, though, argued that some physicians were *indirectly* subject to FACT because every licensed clinic had to be directed by a licensed physician who under a separate state regulation was responsible for supervising all interactions between patients and clinic employees.²³³ Thus, California argued the licensed disclosure provision was a permissible burden that “occurs as part of the overall ‘regulation’ of physicians in ‘the practice of medicine.’”²³⁴

Although California’s argument opened up the possibility of arguments about the law’s impact on the conscience of those physicians who were clinic directors, the petitioners chose to challenge the law on the grounds that it violated *their* consciences.²³⁵ Thus, one of the issues raised in the case was whether human traits, such as a conscience, can be found in a nonprofit corporation. At the outset, it is important to reiterate that the petitioners were not arguing FACT burdened the conscience of the individuals who work or volunteer at the clinics. The petitioners’ argument ascribed a conscience to the nonprofit corporations operating the clinics.

None of the Justices, however, addressed the idea of a nonprofit corporation having a conscience. Justice Kennedy’s concurring opinion sidestepped the petitioners’ conscience argument by emphasizing that “[g]overnments must not be allowed to force *persons* to express a message contrary to their deepest convic-

231. See CAL. HEALTH & SAFETY CODE § 1204(a)(1) (West Supp. 2018) (specifying that “community” and “free clinics” are operated by tax-exempt nonprofit corporations and that no natural person shall operate these clinics).

232. *Id.* § 123473.

233. CAL. CODE REGS., tit. 22, § 75027 (2019).

234. Brief for the State Respondents, *supra* note 223, at 34 (quoting *Casey*, 505 U.S. at 884).

235. Petition for a Writ of Certiorari, *supra* note 221, at 9. Despite the petitioners’ lack of any reference to the conscience of physicians, they did agree that FACT was “indirectly” applicable to physicians practicing at certain clinics. Brief for Petitioners, *supra* note 33, at 32 n.14.

tions,”²³⁶ which presumably meant the clinics’ employees and volunteers.²³⁷ Justice Thomas’s opinion for the Court ignored the conscience arguments and applied traditional content-based analysis, finding the law was improperly drawn. The content-regulation issues will be discussed first.

A. *Content-Based Analysis*

The Ninth Circuit, in affirming the lower court’s refusal to grant a preliminary injunction, ruled the notice was “professional speech” defined as “speech that occurs between professionals and their clients in the context of their professional relationship.”²³⁸ Although the appellate court drew heavily upon cases involving the regulation of physician speech,²³⁹ the “professional” it was referring to was the clinic.²⁴⁰ Hence, it did not matter if the licensed notice was disseminated by receptionists in the waiting room or by nurses or doctors in the examining rooms: “All the speech related to the clinics’ professional services that occurs within the clinics’ walls, including within in [sic] the waiting room, is part of the clinics’ professional practice.”²⁴¹

The Ninth Circuit’s extraordinarily broad conception of professional speech was rejected by the Court. As in other Roberts

236. Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

237. Justice Breyer’s dissenting opinion found that other state regulations made FACT applicable to “medical professionals.” *Id.* at 2385 (Breyer, J., dissenting). He believed the notice was permissible under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); see *supra* note 230. He wrote, “If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?” *NIFLA*, 138 S. Ct. at 2385 (Breyer, J., dissenting). For the argument that disclosure requirements are pervasive and do not violate the First Amendment, see Brief of Members of Congress as *Amici Curiae* in Support of Respondents at 7–17, *NIFLA*, 138 S. Ct. 2361 (2018) (No. 16-1140).

238. Nat’l Inst. of Family & Life Advocates v. Harris, 839 F.3d. 823, 839 (9th Cir. 2016).

239. *Id.* at 837–39.

240. *Id.* at 840 (referring to “the professional nature of the licensed clinics’ relationship with their clients”).

241. *Id.* at 840. One may question the Ninth Circuit’s treatment of a clinic as a “professional.” See, e.g., Amicus Curiae Brief of Pregnancy Care Centers in Texas in Support of Petitioners at 24–25, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140) (arguing that a pregnancy center is not a person).

Court decisions that have rejected new categories of unprotected speech,²⁴² the Court in *NIFLA* emphasized that there was no precedential support for the concept of “professional speech.”²⁴³ Most importantly, the FACT requirement went far beyond the permissible regulation of the practice of medicine recognized in *Casey*. Justice Thomas wrote:

The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed. If a covered facility does provide medical procedures, the notice provides no information about the risks or benefits of those procedures.²⁴⁴

Justice Thomas referred to the “dangers” associated with content-based regulations of professional speech, such as the risk that the government is actually seeking to suppress unpopular ideas.²⁴⁵ In language that has powerful implications for other compelled speech cases, Justice Thomas stated that “people lose when the government is the one deciding which ideas should prevail.”²⁴⁶

Justice Thomas found it telling that many other facilities that provide services to pregnant women were not required to provide the licensed notice.²⁴⁷ Shifting to intermediate scrutiny to assess whether the law was “sufficiently drawn” to serve the interest in “providing low-income women with information about state-sponsored services,” Justice Thomas concluded that the law’s exemptions made it “wildly underinclusive.”²⁴⁸ There was no evidence to support, for example, the exemption of

242. See, e.g., *United States v. Alvarez*, 567 U.S. 709, 715–22 (2012); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790–99 (2011); *United States v. Stevens*, 559 U.S. 460, 468–72 (2010).

243. *NIFLA*, 138 S. Ct. at 2371–72.

244. *Id.* at 2373; see also Brief *Amici Curiae* of the American Association of Pro-Life Obstetricians and Gynecologists, et al. in Support of Petitioners at 18–20, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140) (explaining why the mandated disclosure lacks the elements necessary for informed consent).

245. *NIFLA*, 138 S. Ct. at 2374.

246. *Id.* at 2375.

247. *Id.* at 2374.

248. *Id.* at 2375 (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802 (2011)) (internal quotations marks omitted).

Family PACT providers from the licensed notice. “If the goal is to maximize women’s awareness of these programs,” Justice Thomas wrote, “then it would seem that California would ensure that the places that can immediately enroll women also provide this information.”²⁴⁹ The exemptions “demonstrate[d] the disconnect” between the Act’s stated purpose of informing women and its actual scope.²⁵⁰

The petitioners attacked the exemptions in FACT, arguing the law targeted pro-life centers because of hostility to their pro-life views.²⁵¹ Although Justice Thomas did find the exemptions would likely be ruled unconstitutional, and raised the *risk* of viewpoint discrimination,²⁵² he expressly declined to rule on whether FACT was viewpoint discriminatory because the law was unconstitutional either way.²⁵³ In his concurring opinion, Justice Kennedy wrote that “the apparent viewpoint discrimination here is a matter of serious constitutional concern.”²⁵⁴ Justice Kennedy added, “This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression.”²⁵⁵

Finally, Justice Thomas noted that California could inform women through a variety of methods, such as state-funded advertising campaigns, without “co-opt[ing] the licensed facilities to deliver its message for it.”²⁵⁶ Although Justice Thomas maintained that this portion of the opinion applied intermediate scrutiny, he gave no deference to the California legislature’s judgment about the necessity of reaching women at licensed

249. *Id.* at 2376.

250. *Id.*

251. See Brief for Petitioners, *supra* note 33, at 8–10, 31–34; Reply Brief for Petitioners at 4–5, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140).

252. *NIFLA*, 138 S. Ct. at 2376 (“Such “[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” (quoting *Brown*, 564 U.S. at 802)).

253. *Id.* at 2370 n.2.

254. *Id.* at 2378 (Kennedy, J., concurring). Justice Kennedy feared that finding the law viewpoint discriminatory might lead some legislators to infer that “if the law were reenacted with a broader base and broader coverage it then would be upheld.” *Id.* at 2379. (Kennedy, J., concurring).

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

256. *Id.* at 2376.

clinics.²⁵⁷ This portion of *NIFLA* reads just like *Riley v. National Federation of the Blind of North Carolina, Inc.*,²⁵⁸ in which Justice Brennan, applying strict scrutiny, found that North Carolina had “more benign and narrowly tailored options” available²⁵⁹ than requiring “that professional fundraisers disclose to potential donors . . . the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity.”²⁶⁰ Justice Brennan wrote that the state itself could publish the information: “This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation.”²⁶¹

The overriding theme in Justice Thomas’s opinion, like that of *PG&E*, is the impermissible harm to the marketplace of ideas when the government alters the content of a speaker’s speech.²⁶² Stated differently, the autonomy of speakers is more important than the rights of listeners. Justice Thomas’s opinion does not engage in any substantive analysis of corporate free expression rights or the distinct status of nonprofit advocacy corporations. Indeed, Justice Thomas’s opinion does not even acknowledge that the petitioners were corporations; instead, it repeatedly refers to “clinics” or “licensed facilities” affected by the law.²⁶³ *NIFLA* fits with other First Amendment cases, such as *Consolidated Edison* and *Riley*, where the Court focused not on the corporate status of the speaker, but on the dangers of content regulation. If the Court is serious about the dangers of

257. *See id.* at 2375–76. California argued that despite statewide marketing campaigns and other methods to reach vulnerable populations, “many eligible Californians do not know about their publicly funded healthcare options.” Brief for the State Respondents, *supra* note 223, at 5. Pregnancy requires time sensitive decisions, and California argued the licensed notice enhanced awareness of public health programs. *See id.* at 6.

258. 487 U.S. 781 (1988).

259. *Id.* at 800.

260. *Id.* at 795.

261. *Id.* at 800.

262. *See NIFLA*, 138 S. Ct. at 2371 (“By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly ‘alters the content’ of petitioners’ speech.” (quoting *Riley*, U.S. at 795)).

263. *See, e.g., id.* at 2368–72, 2374–76.

compelled speech, the principles applied in *NIFLA* would allow abortion providers to challenge state-mandated disclosures.²⁶⁴

By ignoring the petitioners' conscience arguments,²⁶⁵ Justice Thomas avoided examining the nexus between a nonprofit corporation and its members. Justice Kennedy's brief concurring opinion, though it maintained the law was harmful to individual conscience, raised more questions than answers about which for-profit corporate speakers could assert harm to the conscience of shareholders.

B. Freedom of Conscience

Nonprofit advocacy corporations have standing to assert harm to their members,²⁶⁶ but the petitioners' briefs are striking in that there is no discussion of the burden of the licensed notice on the conscience of individuals, such as physicians, nurses, or volunteers.²⁶⁷ Instead, the petitioners stressed that FACT "forces licensed centers to utter speech that violates their conscience."²⁶⁸ In terms that humanize the nonprofit corporations operating the clinics, the briefs repeatedly refer to "individual freedom of mind."²⁶⁹ For example, the petitioners said the Act "intrudes

264. See, e.g., *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014), cert. denied, *Walker-McGill v. Stuart*, 135 S. Ct. 2838, 2838 (2015) (holding that North Carolina statute requiring "physicians to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions" is unconstitutional compelled speech).

265. Only in the most cursory way did Justice Thomas describe the anti-abortion mission of the petitioners. He quoted the author of a report commissioned by the California State Assembly who described crisis pregnancy centers as run by "pro-life (largely Christian belief-based) organizations" whose goal is to oppose abortion. *NIFLA*, 138 S. Ct. at 2368 (citation omitted) (internal quotation marks omitted); see also *id.* at 2371 (petitioners are "devoted" to opposing abortion). Given that the licensed notice altered the content of the petitioners' speech, see *supra* note 262, an extended discussion of the petitioners' beliefs was unnecessary to his analysis.

266. *Supra* note 40.

267. In contrast, the amicus brief filed by Heartbeat International, a nonprofit whose mission is to support the pro-life cause, emphasized the burden FACT placed on the staff and volunteers of pregnancy centers. See Brief of Heartbeat International, *supra* note 225, at 20 ("[C]ompelled speech violates the deeply held religious beliefs and/or moral convictions of the staff and volunteers of pro-life centers.").

268. Reply Brief for Petitioners, *supra* note 251, at 6.

269. E.g., Brief for Petitioners, *supra* note 33, at 24 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

upon private thought by mandating that Petitioners mouth ideas that contradict their own convictions."²⁷⁰ "This creates duplicity of thought and mental conflict for Petitioners"²⁷¹

If one replaces individuals for clinics, the petitioners' arguments read much like Justice Alito's *Janus* opinion finding compulsory union dues unconstitutional because individuals are coerced into betraying their convictions.²⁷² But by contending that the clinics had consciences, the petitioners were making an assertion that was dismissed out of hand by Justice Stevens when he wrote the following in *Citizens United*:

[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.²⁷³

Justice Stevens's view, though, does not acknowledge that there can be such a close nexus between a nonprofit advocacy corporation and its members that the corporation and its

270. *Id.* at 24.

271. *Id.* at 25. Similarly, the Cato Institute argued that the licensed disclosure burdens the freedom of conscience of pregnancy centers because it "forces them to promote services they morally oppose." Brief for the Cato Institute as *Amicus Curiae* in Support of Petitioners at 12, *Nat'l Inst. of Family & Life Advocates v. Beccerra*, 138 S. Ct. 2361 (2018) (No. 16-1140).

272. *Janus v. Am. Fed'n of State, Cty., and Mun. Emps.*, 138 S. Ct. 2448, 2463–64 (2018).

273. *Citizens United v. FEC*, 558 U.S. 310, 466 (2010) (Stevens, J., dissenting); see also *Greenwood*, *supra* note 46, at 1067 ("[A] corporation is directed not to balance conflicting political and moral goals but rather to pursue one end—profit maximization—without considering alternative or competing goals."); Strine & Walter, *supra* note 93, at 384 (arguing that for-profit corporations are fundamentally different from human beings in terms of their range of concerns; unlike human beings, "corporations must have only one end that motivates their political spending: what will produce the most profit for them in the purely monetary sense"). For a different point of view, see Justice Alito's *Hobby Lobby* opinion which countered the Third Circuit's holding that business corporations "do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014) (quoting *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013)) (internal quotation marks omitted). Justice Alito wrote, "All of this is true—but quite beside the point. Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all." *Id.*

members are in essence identical. Thus, the *NIFLA* petitioners' conscience argument makes more sense if the petitioners are regarded not as a corporation or a clinic, but as an association of individuals who share a pro-life view. In effect, incorporation does not diminish the First Amendment protections of the humans who use the corporate-owned clinics as vehicles for advocacy.

This conclusion may have been what Justice Kennedy meant in his brief concurring opinion that embedded respect for speaker autonomy into a bold rejection of California's assertion that its law was "forward thinking." Without acknowledging that the petitioners were corporations, Justice Kennedy warned of the dangers inherent when government intervenes in the marketplace of ideas:

[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." It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions.²⁷⁴

Justice Kennedy could have omitted the references to individuals and still forcefully rejected compelled speech, à la *PG&E*, without tying it to freedom of conscience. But his references to conscience pierce the corporate veil without acknowledging the most important precedent supporting such action, *NAACP v. Alabama*,²⁷⁵ in which the Court viewed the NAACP and its members as identical.²⁷⁶

The NAACP, a nonprofit membership corporation, engages in expressive activities that make a "distinctive contribu-

274. *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring) (quoting *Wooley*, 430 U.S. at 715).

275. 357 U.S. 449 (1958).

276. *Id.* at 458–59.

tion . . . to the ideas and beliefs of our society."²⁷⁷ During the 1950s, the NAACP, one of the principal advocates of desegregation, angered Alabama officials by actions such as supporting the boycott of the segregated Montgomery bus system.²⁷⁸ Alabama's attorney general, seeking to oust the NAACP from the state, filed suit against the NAACP and received a court order compelling the group to reveal the names and addresses of all its Alabama members.²⁷⁹ The NAACP refused and was held in contempt and fined \$100,000.²⁸⁰

Before the Supreme Court, the NAACP argued that it "may assert, on behalf of its members, a right personal to them" to be protected from disclosure of the membership lists.²⁸¹ The Court agreed because the NAACP and its members "are in every practical sense identical."²⁸² The NAACP "is but the medium through which individual members seek to make more effective the expression of their own views."²⁸³ Given the "manifestations of public hostility" members of the NAACP had previously experienced when their membership had been revealed in the Jim Crow era, the Court concluded compelled disclosure "is likely to affect adversely the ability of *petitioner and its members* to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."²⁸⁴

277. *NAACP v. Button*, 371 U.S. 415, 431 (1963). One of the NAACP's activities, litigation, was described by the Court as "a form of political expression." *Id.* at 429.

278. *NAACP v. Alabama*, 357 U.S. at 452.

279. *Id.*

280. *Id.* at 454.

281. *Id.* at 458.

282. *Id.* at 459.

283. *Id.* The Court said there was a reasonable likelihood that the NAACP would be adversely affected by disclosure of its membership lists. *Id.* at 459–60. This was a "further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members." *Id.*

284. *Id.* at 462–63 (emphasis added); see also *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961) (noting that economic reprisals followed disclosure of membership lists); *Bates v. City of Little Rock*, 361 U.S. 516, 523–24 (1960) (noting that the record shows public identification of NAACP members has been followed by "harassment and threats of bodily harm"). In a later case involving a Virginia law affecting the solicitation of legal business, the Court held that in addition to asserting the associational rights of its members, the NAACP could assert the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringement of their con-

Justice Harlan's opinion in *NAACP v. Alabama* emphasized the "nexus" between the corporation and its members.²⁸⁵ That case, along with others involving the NAACP, show the Court's sensitivity to an organization facing hostility from the government because it was challenging government-enforced norms. Similarly, because California is often described as having the "gold standard" for abortion rights,²⁸⁶ the *NIFLA* petitioners are directly in conflict with government norms.

Moreover, like the NAACP, there is a tight nexus between the clinics and their supporters; the mission-oriented nonprofit corporations are a vehicle through which individuals with shared religious beliefs act upon those beliefs.²⁸⁷ For example, the Pregnancy Care Clinic challenging the law in *NIFLA* does

stitutional rights. *NAACP v. Button*, 371 U.S. 415, 428 (1963). "We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities" curtailed by the statute. *Id.*; see also *In re Primus*, 436 U.S. 412, 427–28 (1978) (describing the similarities between the NAACP and the ACLU).

285. 357 U.S. at 458–59; see also *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 309 (1964) ("This case, in truth, involves not the privilege of a corporation to do business in a State, but rather the freedom of individuals to associate for the collective advocacy of ideas."). Although both Justices White and Rehnquist wrote dissenting opinions in *Bellotti*, both accepted the idea that corporations such as the NAACP had First Amendment protection. Justice White acknowledged that "there are some corporations formed for the express purpose of advancing certain ideological causes shared by all their members Under such circumstances, association in a corporate form may be viewed as merely a means of achieving effective self-expression." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 805 (1978) (White, J., dissenting). In his separate dissent, Justice Rehnquist read *NAACP v. Button* as meaning that, "where a State permits the organization of a corporation for explicitly political purposes, this Court has held that its rights of political expression, which are necessarily incidental to its purposes, are entitled to constitutional protection." *Id.* at 825 n.5 (Rehnquist, J., dissenting) (citing *Button*, 371 U.S. at 415).

286. Lee Romney, *The Abortion Wars: New class of abortion providers helps expand access in California*, L.A. TIMES, (Oct. 23, 2014, 6:30 AM), <https://www.latimes.com/nation/la-na-abortion-california-20141023-story.html> [https://perma.cc/M8G8-QLSV] (quoting the president of National Abortion Federation describing California as "'the gold standard' for access to abortion").

287. As Heartbeat International stated in its amicus brief, the staff and volunteers of pregnancy centers "work and volunteer at pregnancy centers for the very purpose of living out their pro-life convictions." Brief of Heartbeat International, *supra* note 225, at 21; see also Brief of Twenty-Three Illinois Pregnancy Care Centers as *Amici Curiae* in Support of Petitioners at 2–12, *Nat'l Inst. of Family & Life Advocates v. Beccerra*, 138 S. Ct. 2361 (2018) (No. 16-1140) (describing the mission statements of pregnancy care centers).

more than offer medical services; it is a “front line ministry” that also offers religiously-based parenting classes and support groups.²⁸⁸ The staff and volunteers “are trained to present the gospel to the women and men who come to the clinic.”²⁸⁹ For purposes of compelled speech analysis, the nonprofit Pregnancy Care Clinic and its supporters are identical. Thus, in a sense, Justice Kennedy’s comments in *NIFLA* are not out of place in a case where the petitioners, although organized as nonprofit corporations, are in effect a community of believers.²⁹⁰

Given that *PG&E* established that speaker autonomy, rather than conscience, is a sufficient basis for judicial hostility to compelled speech, Justice Kennedy could have disregarded any reference to conscience without blunting the forcefulness of his concurring opinion.²⁹¹ By referencing conscience, however,

288. *Church/Group Volunteer Opportunities*, *supra* note 225.

289. *Id.* Pregnancy Care Clinic’s website states:

Pregnancy Care Clinic is a front line ministry supported by local churches and donors. We ask that your church add us to your list of missionaries that your congregation supports in prayer, financial giving, and involvement. Our volunteers are trained to present the gospel to the women and men who come to the clinic. Once they have accepted Christ, we begin a discipleship program with them and contact a partner church to hand them off to. It is our goal to see these new Christians firmly planted in their own church home.

Id. For additional discussion of the services beyond pregnancy counseling offered by pregnancy care centers, see Brief of 13 Women and The Catholic Association Foundation as *Amici Curiae* in Support of Petitioners at 32–34, *NIFLA*, 138 S. Ct. 2361 (No. 16-1140).

290. In *Burwell v. Hobby Lobby Stores, Inc.*, Justice Ginsburg dissented, contending that Justice Alito did not recognize that for-profit corporations are unlike religious organizations that “exist to foster the interests of persons subscribing to the same religious faith.” 573 U.S. 682, 754 (2014) (Ginsburg, J., dissenting). She criticized the majority’s inability to perceive the “distinction between a community made up of believers in the same religion and one embracing persons of different beliefs.” *Id.*

291. Another way of attacking the compelled speech requirement without referencing conscience comes from Justice Rehnquist’s dissenting opinion in *Bellotti*. Drawing upon *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), where Chief Justice Marshall wrote that a corporation “possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence,” *id.* at 636, Justice Rehnquist maintained that “when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business.” *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting). Similarly, when the state charters a corporation for explicitly political purposes, such as the NAACP, “the rights of political

Justice Kennedy's concurrence is susceptible of two distinct readings. Read narrowly, Justice Kennedy's concurring opinion merely reiterates that nonprofit advocacy corporations have standing to assert harm to affiliated individuals. Read broadly, the harm of compelled speech is not confined to nonprofits and may be challenged by closely held for-profit corporations on behalf of their shareholders. The latter reading has far-reaching implications for the ongoing compelled speech litigation involving Masterpiece Cakeshop and Arlene's Flowers.²⁹² To pierce the veil for these entities, though, would raise a host of significant questions about which corporations could assert the beliefs of their shareholders.²⁹³ By not defining when reverse veil piercing is appropriate, Justice Kennedy's concurring opinion raises more questions than it answers.²⁹⁴

expression, which are necessarily incidental to its purposes, are entitled to constitutional protection." *Id.* at 825 n.5 (citing *NAACP v. Button*, 371 U.S. 415, 428–29 (1963)). Because the petitioners in *NIFLA* were incorporated as religious organizations to advocate pro-life beliefs, dissemination of a state-mandated message about the availability of abortion, runs counter to their purpose. Professor Kent Greenfield asserts that asking what rights are incidental to the very existence of a corporation is the proper analysis of corporate constitutional rights. Kent Greenfield, *In Defense of Corporate Persons*, 30 CONST. COMMENT. 309, 322 (2015).

292. For the ongoing litigation involving Masterpiece Cakeshop and Arlene's Flowers, see *supra* notes 22–24. Although Justice Alito did not define "closely held" corporations in *Hobby Lobby*, the ownership structure of Masterpiece Cakeshop and Arlene's Flowers resembles that of the litigants in *Hobby Lobby*. Masterpiece Cakeshop has two shareholders. See *supra* note 7. Arlene's Flowers, Inc. is solely owned by Barronelle Stutzman. Petition for a Writ of Certiorari at ii, *Arlene's Flowers, Inc. v. Washington*, 138 S. Ct. 2671 (2018) (No. 17-108). The *Klein* case does not present veil piercing arguments as it involves an unincorporated bakery. See Petition for Writ of Certiorari at i, *Klein v. Or. Bureau of Labor & Indus.*, 139 S. Ct. 2713 (2019) (No. 18-547) (describing bakery owned by Melissa and Aaron Klein).

293. See Brief of Amici Curiae Corporate Law Professors in Support of Respondents at 12, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) ("The Court should not assume it can disregard this principle of separateness with closely held companies such as Masterpiece Cakeshop and not cause significant uncertainty, infighting, and litigation with regard to other companies.").

294. Similarly, commentators have criticized the *Hobby Lobby* opinion for not specifying the meaning of "closely held." See, e.g., Stephen Bainbridge, *What is a "close corporation" for purposes of the new Hobby Lobby rule?*, STEPHEN BAINBRIDGE'S J.L. RELIGION POL. & CULTURE (July 1, 2014), <https://www.professorbainbridge.com/professorbainbridgecom/2014/07/what-is-a-close-corporation-for-purposes-of-the-new-hobby-lobby-rule.html> [<https://perma.cc/P3B5-S47P>]; see also *Hobby Lobby*, 573

Although Chief Justice Roberts recently declared that he has replaced Justice Kennedy as the Court's "most aggressive defender" of First Amendment rights,²⁹⁵ and that he believes business corporations have views on public issues,²⁹⁶ it is unlikely he will push veil piercing as a First Amendment doctrine. Compelled speech cases such as *Masterpiece Cakeshop* present sufficiently complex issues, such as whether designing a custom cake is protected artistic expression, which can be answered without the added complexity of veil piercing. Stated differently, the content-based analysis of *PG&E* and *NIFLA* focuses the Court on harm to speaker autonomy irrespective of corporate identity and presents a less problematic analytical track than veil piercing.

CONCLUSION

Throughout its consideration of the First Amendment rights of corporations, the Court has varied the significance it ascribes to corporate identity. *Citizens United* heralds the marginalization of corporate identity to a majority of the Roberts Court,²⁹⁷ and *NIFLA* adds further emphasis to this doctrine. Justice Thomas's *NIFLA* opinion does not even acknowledge the petitioners' statuses as corporations, signaling that the case was a pure free expression case, rather than an intersection of corporate and First Amendment law.

In *Bellotti*, corporate status was front and center in the Court's deliberations, but Justice Powell's opinion avoided addressing the nature of corporations, instead adopting an unsatisfying rationale—listener's rights—that unwittingly opens the door to compelled speech cases such as *PG&E*. In constructing

U.S. at 757 (Ginsburg, J., dissenting) (warning that the logic of *Hobby Lobby* "extends to corporations of any size, public or private").

295. Tony Mauro, *Roberts Declares Himself First Amendment's 'Most Aggressive Defender' at SCOTUS*, NAT'L L.J. (Feb. 13, 2019, 1:56 PM), <https://www.law.com/nationallawjournal/2019/02/13/roberts-declares-himself-first-amendments-most-aggressive-defender-at-scotus> [<https://perma.cc/DDX2-YEN4>].

296. *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1890 & n.5 (2018) (citing the views of Ben & Jerry's Corporation on campaign finance reform and other issues).

297. *Citizens United v. FEC*, 558 U.S. 310, 342–43 (2010) (rejecting the argument that the political speech of corporations or other associations should be treated differently under the First Amendment).

his *PG&E* opinion, Justice Powell downplayed conscience and created a compelled speech doctrine that emphasizes speaker autonomy, regardless of whether the speaker is a business corporation, the press, or an individual. Justice Powell's *PG&E* opinion lays the foundation for *NIFLA* by removing any concern for conscience from compelled speech cases involving corporations.²⁹⁸

Justice Thomas's *NIFLA* opinion does not present the complex questions about veil piercing that Justice Kennedy's concurring opinion raises.²⁹⁹ The methodology used by Justice Thomas, anchored in the Court's longstanding aversion to content discriminatory regulation, focuses the Court's attention on matters it has more competence addressing than veil piercing. In the context of a nonprofit advocacy corporation, veil piercing is an appropriate way of protecting the members, but there are complex line-drawing questions when the shareholders of for-profit corporations seek to pass their beliefs to the corporation.³⁰⁰

Despite the shifting rationales and methodologies of *Bellotti*, *PG&E*, and *NIFLA*, these cases display a consistent aversion to laws that cast certain corporate speakers in a disfavored status. "Forward-thinking" government efforts to fine-tune the flow of information by compelling private speech should be rejected, not on the basis of conscience, but because these efforts promote government-defined orthodoxy.³⁰¹ The First Amendment, "[p]remised on mistrust of governmental power,"³⁰² requires

298. As *Janus* shows, the Court is still open to conscience arguments in compelled subsidy cases involving individuals.

299. That is not to say that Justice Thomas's opinion does not raise questions. His opinion said it was not questioning the legality of "health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." *Nat'l Inst. of Family & Life Advocates v. Beccerra*, 138 S. Ct. 2361, 2376 (2018). Justice Breyer found that this disclaimer "would seem more likely to invite litigation than to provide needed limitation and clarification." *Id.* at 2381 (Breyer, J., dissenting).

300. See *supra* notes 293–294.

301. Indeed, one may say that the value of speaker autonomy mandates that compelled speech cases are not resolved "in favor of those in authority." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636 (1943).

302. *Citizens United*, 558 U.S. at 340; see also *id.* at 335 (stating that the FEC's business is to censor); *id.* at 349 (holding that the "assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure"); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 482 (2007) ("[W]e give the benefit of the doubt to speech, not censor-

that decisions about what views are voiced are best left in “the hands of each of us,”³⁰³ including those who use corporate resources to speak.

ship.”); *Matal v. Tam*, 137 S. Ct. 1744, 1769 (2017) (Kennedy, J., concurring in part and concurring in the judgment) (stating that it is not entrusted to the government’s benevolence to define what trademarks are offensive to some portion of the public).

303. *Cohen v. California*, 403 U.S. 15, 24 (1971).

**CONSENT OF THE GOVERNED:
A CONSTITUTIONAL NORM THAT THE COURT
SHOULD SUBSTANTIALLY ENFORCE**

DAVID SCHOENBROD*

INTRODUCTION	214
I. THE CONSENT-OF-THE-GOVERNED NORM	219
A. The Norm’s Provenance	219
B. What the Original Norm Would Require of Congress	222
II. THE IMPEDIMENTS TO JUDICIAL ENFORCEMENT OF THE ORIGINAL NORM.....	224
A. The Impediments’ Evolution	224
B. The Impediments Today	236
III. CONGRESS FLOUTS THE NORM.....	238
A. Congress’s Duty to Comply with the Norm to the Extent Practical	238
B. Congress Could Comply with the Norm to a Substantial Extent.....	240
C. How Flouting the Norm Benefits Legislators Politically	244
D. How Flouting the Norm Harms the Legislators’ Constituents.....	248

* Trustee Professor, New York Law School; Senior Fellow, Niskanen Center. Ronald A. Cass, Christopher C. DeMuth, Douglas H. Ginsburg, C. Boyden Gray, Philip Hamburger, David R. Johnson, Gary S. Lawson, Michael B. Mukasey, Joseph Postell, Edward A. Purcell, Jr., Lawrence G. Sager, Ross Sandler, James F. Simon, Richard B. Stewart, Jerry Taylor, and Peter J. Wallison provided insightful comments. So too did the participants in the faculty workshop at New York Law School, the research roundtable and symposium on “Delegation, Nondelegation, and Un-Delegation” at the C. Boyden Gray Center for the Study of the Administrative State at George Mason University, a panel at the New Civil Liberties Alliance, a panel at the Federalist Society’s National Lawyers Convention, and Professor E. Donald Elliott’s seminar at Yale Law School. William Mills of the New York Law School Library, Reza Ravangard, New York Law School class of 2019, and Ethan Clarkson, New York Law School class of 2020, solved many difficult research problems. I decline to delegate responsibility for any errors that remain.

IV. WHAT THE COURT SHOULD DO.....	253
A. The Court's Job	253
B. How the Court Could Do Its Job.....	256
V. FAR-FETCHED RATIONALES FOR IGNORING THE NORM.....	265
A. The Constitution Permits Congress to Leave Lawmaking to Agencies	265
B. Even Early Congresses Ignored the Norm	266
C. The Court Enforced the Norm in Only One Year of Hundreds.....	271
D. The Constitution Was Amended to Eliminate the Norm.....	272
E. Delegation Is Consistent with Consent of the Governed	273
F. Canons of Statutory Construction Serve the Purpose of the Norm.....	276
CONCLUSION.....	278

INTRODUCTION

The Declaration of Independence proclaims that governments derive “their just powers from the consent of the governed.”¹ To condition the federal government’s powers upon such consent, the Constitution vested responsibility for exercising certain basic powers, including the power to make rules of private conduct, in the branch of government most directly accountable to the governed, Congress.² Members of Congress would then bear personal responsibility for the exercise of these legislative powers, and the governed could withhold consent by refusing to reelect these legislators. This arrangement was central to the compact that the Framers of the Constitution offered to the people.³ As James Madison wrote in *Federalist No. 51*, “A dependence on the people is, no doubt, the primary control on the government”⁴

1. The Declaration of Independence para. 2 (U.S. 1776).

2. U.S. CONST. art. I, § 8.

3. *See infra* Part I.

4. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

That members of Congress bear such personal responsibility is a constitutional norm. As originally conceived, this norm required Congress to make all the rules of private conduct. Given the quantity of rules now being issued, it is hard to believe Congress could bring itself to make them all.⁵ This limitation on Congress's ability to provide rules impedes the courts from fully enforcing the norm as originally conceived.

The Supreme Court has, however, erred in how it dealt with this impediment to judicial enforcement. It has held that Congress does not delegate its legislative powers so long as it states an "intelligible principle" to guide agency rulemaking.⁶ Thus, though the norm as originally understood required Congress itself to make the rules of private conduct, the "intelligible principle" test allows Congress to leave such rulemaking to agencies so long as Congress says enough about the goals that the agency should pursue in making the rules. "Enough," however, is a question of degree. Judges would inevitably have difficulty in comparing the degree to which statutes guide agency rulemaking given the quite different topics of regulation. The test is therefore mush and, as such, judicially unmanageable and unenforceable. The upshot is that Congress can outsource responsibility for the laws by giving lip service to the vaguest of goals.⁷

Emblematic of this trivializing of the norm, some of the Justices' opinions began a half century ago to call it the "nondelegation doctrine." This label conceals the norm's vital consent-of-the-governed purpose, much as if equal protection of the laws was

5. My past scholarship on delegation minimized the need for Congress to delegate legislative powers, at least after a period of transition. *See, e.g.*, DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 135–52, 165–79 (1993) [hereinafter *POWER WITHOUT RESPONSIBILITY*] (arguing delegation creates incentives for Congress to make regulation more complex and that, without those incentives, Congress could enact a simpler set of rules that would achieve regulatory objectives more effectively and efficiently); *see also* DAVID SCHOENBROD, RICHARD B. STEWART & KATRINA M. WYMAN, *BREAKING THE LOGJAM: ENVIRONMENTAL PROTECTION THAT WILL WORK* (2010) [hereinafter *LOGJAM*]. Nonetheless, I now see that the Court could not enforce the original norm completely without risking overwhelming political opposition, as discussed in Part II of this Article.

6. The "intelligible principle" language first appeared in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Justice Gorsuch's dissent in *Gundy v. United States*, 139 S. Ct. 2116, argues that only later did the Court begin to use it as a test of the constitutionality of statutes. *Id.* at 2139–41 (2019) (Gorsuch, J., dissenting).

7. *See infra* Part II.

called the “nondifferentiation doctrine” or freedom of the press was called the “nonfiltering principle.”⁸

The “nondelegation doctrine” label thus makes congressional responsibility sound like a technicality beloved only by cranks who oppose regulatory protection, although the overwhelming majority of the governed want such protection. In my own experience as an environmental advocate, I concluded that delegation often allows members of Congress to avoid blame for failing to deliver regulatory protection. Because the governed overwhelmingly want both protection and a Congress accountable for the rules of private conduct, I refer to the “consent-of-the-governed norm” rather than the “nondelegation doctrine.”⁹

Yet, if the Court suddenly began enforcing the norm, even a less stringent version than the original norm, the reversal could cast a pall of doubt over the validity of a massive number of rules in the Code of Federal Regulation. It would take many years of litigation to determine the validity of these rules and years more, if not decades, for Congress to repair the resulting chinks in the regulatory system. Thus, our nation’s reliance on massive delegation also impedes enforcement of the norm.

This Article argues that the Court could find a path through the impediments, including Congress’s inability to provide all the needed rules and the present reliance on delegation, to enforce the norm to a substantial, though incomplete, extent. The path should begin by distinguishing between the original norm and the impediments to its full judicial enforcement. The distinction between the norm and the impediments to its judicial enforcement would make clear that, regardless of the inability of the Court to fully enforce the norm, members of Congress, having sworn to uphold the Constitution,¹⁰ are honor bound to comply with the norm to the extent practical.

The Court would then be left with a constitutional duty to follow a path that enables it to enforce the norm to the extent permitted by the impediments to judicial enforcement. One

8. The earliest use of the term “nondelegation doctrine” or “non-delegation doctrine” in a Supreme Court opinion is in a passage citing with approval Professor Kenneth Culp Davis’s call to explicitly abandon the doctrine. *McGautha v. California*, 402 U.S. 183, 274 n.27 (1971) (Brennan, J., dissenting) (citing 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.01–2.05 (1958)).

9. For the points summarized in this paragraph, see *infra* Parts II–III.

10. U.S. CONST. art. VI, cl. 3.

step on this path would be to hold that the Court will strike down significant new regulations whose promulgation the legislative process has not approved. The idea that Congress should vote on significant new regulations has a bipartisan pedigree, yet both parties in Congress—each in its own way—assiduously avoid putting the idea into practice.¹¹ As Part IV.B will show, the Court can construct a test of the significance of regulations that is judicially manageable. The Court should forewarn Congress of its intention to take this step so that Congress could organize itself to vote on the promulgation of these significant new regulations. A subsequent step might be to force Congress to gradually take responsibility for the most important preexisting regulations.

Implicit in this approach is that impediments to judicial enforcement often require the Court to adopt tests that are less stringent than the norms themselves. Such underenforcement of constitutional norms may seem strange because the Court does not exactly advertise it, but it happens nonetheless. An example discussed in Part III.A is the equal protection norm, which forbids states from treating people unequally without fair reason. Impeded by concern for usurping the policymaking prerogatives of states in run-of-the-mill cases, the Court uses a deferential test allowing some violations of the norm. Part IV.A shows that the Court changes the tests it applies when it perceives better ways to skirt impediments to the judicial enforcement of constitutional norms. Thus, by “constitutional norm,” I mean a requirement of the Constitution and by “test” I mean a standard that courts use to avoid impediments to full enforcement of a constitutional norm.

This Article’s proposed approach to judicial enforcement would provide less complete compliance with the consent-of-the-governed norm than the approach advocated in my earlier scholarship.¹² Since my earlier publications, I have had the benefit of private communications with sitting Justices from the left, right, and center—none still on the Court. These discussions gave me the impression that they would have liked to do more to enforce the norm, but given the impediments, they

11. For the points summarized in this paragraph, see *infra* Parts III–IV.B.

12. This Article suggests a method of enforcement quite different than strict enforcement of the norm after a period of transition. See SCHOENBROD, *POWER WITHOUT RESPONSIBILITY*, *supra* note 5, at 170–91.

were unsure of how to do so. This Article responds to such concerns.

The Court's recent disposition of *Gundy v. United States*¹³ suggests five Justices might be willing to revive judicial enforcement of the consent-of-the-governed norm.¹⁴ All Justices should join in reviving the norm, especially now that the Presidency of Donald Trump has made starkly evident what was true before: legislators have long shirked their constitutional duty to take responsibility for the exercise of legislative powers and the result is often harm to their constituents. The Court's failure to enforce the norm has resulted in Congress and Presidents under both parties devising and imposing new ways of delegating power that allow incumbents to take credit for popular promises yet shift blame for unpopular consequences.¹⁵ By so doing, the incumbents avoid the hard choices needed to deliver more effective regulatory protection and reduce pointless regulatory burdens.¹⁶ Examples with deadly consequences for the governed are discussed in Part III.D. Such disgraceful legislative behavior, made possible by the Court's failure to enforce the norm, has contributed to loss of trust in government.¹⁷ Trust in the federal government to do "the right thing" most of time fell from

13. 139 S. Ct. 2116 (2019).

14. The dissent by Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, calls for reinvigorating the norm. *Id.* at 2135 (Gorsuch, J., dissenting). Justice Alito stated in his concurring opinion that, "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support the effort." *Id.* at 2131 (Alito, J., concurring in the judgment). Justice Kavanaugh did not participate in the decision. Later, Justice Kavanaugh wrote an opinion in which he stated that Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases." *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in denial of certiorari). For discussions of the likelihood that *Gundy* would lead to the enforcement of the norm, see Nicholas Bagley, Opinion, 'Most of Government is Unconstitutional', N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html> [<https://nyti.ms/2Y7UsXg>]; David B. Rivkin, Jr. & Lee A. Casey, Opinion, *Alito Teases a Judicial Revolution*, WALL ST. J. (June 23, 2019, 3:10 PM), <https://www.wsj.com/articles/alito-teases-a-judicial-revolution-11561317002> [<https://perma.cc/K8HZ-EPP7>].

15. DAVID SCHOENBROD, DC CONFIDENTIAL: INSIDE THE FIVE TRICKS OF WASHINGTON 39–53, 70–74 (2017).

16. *Id.*

17. See Howard Dean & David Schoenbrod, *Populism is powerful because Washington deserves a kick in the pants*, USA TODAY (Oct. 23, 2017, 6:00 AM), <https://usat.ly/2zwIRnL> [<https://perma.cc/N2X6-RZC7>].

three-quarters of voters in 1964 to one-third in 1980 and only one-fifth in 2015, and one-sixth in 2019.¹⁸

Part I of this Article explains the original concept of the consent-of-the-governed norm. Part II discusses the evolving impediments to judicial enforcement of the norm. Part III shows that members of Congress should comply with the norm to a substantial extent, and their failure to do so causes grievous harm to their constituents. Part IV shows how the Court could and should substantially achieve the purpose of the norm. Part V argues that the many rationales for ignoring the norm are flimsy.

I. THE CONSENT-OF-THE-GOVERNED NORM

A. *The Norm's Provenance*

To require the consent of the governed, the Constitution empowered voters to sack the key policy makers. Article I vests “All legislative Powers herein granted,” including making regulatory law, in a Congress, including a House of Representatives directly elected at two year intervals, legislating in tandem with a President.¹⁹ To make members of Congress personally responsible, Article I requires how they vote—“the Yeas and Nays”—be published when requested by one-fifth of the legislators present.²⁰ So, these directly or indirectly elected officials would be accountable for the hard legislative choices.²¹ Such accountability would enable the governed to withhold their consent in response to the decisions of elected officials.²² That was the deal that the Framers offered the people.

Members of Congress would bear personal responsibility even though voters may pay little attention until a vote for or

18. *Public Trust in Government: 1958–2019*, PEW RES. CTR. (Apr. 11, 2019), <https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/> [<https://perma.cc/2BV8-NDPM>].

19. U.S. CONST. art. I, §§ 1, 2, 7–8.

20. U.S. CONST. art. I, § 5 cl. 3 (“Each House shall keep a Journal of its Proceedings . . . and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.”).

21. The Constitution does not, of course, call for the President to be popularly elected, U.S. CONST. art. II, § 1, cl. 2–3, and did not do so for senators until the ratification of the Seventeenth Amendment. U.S. CONST. art. I, § 3, cl. 1. Nonetheless, even without direct elections, popular sentiment could result in either Presidents or senators failing to get reelected.

22. THE FEDERALIST NO. 50, *supra* note 4, at 314–17 (James Madison).

against a rule directly affects them. As Justice Kagan, quoting James Madison, wrote in a powerful dissent from the Court's refusal to take on political gerrymandering:

To retain an "intimate sympathy with the people," [members of Congress] must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.²³

Debate at the Constitutional Convention proceeded on the premise that Congress had to make the law itself rather than delegate that job to others.²⁴ John Locke, who influenced many of the Framers, thought a people's grant of legislative power was "only to make *laws*, and not to make legislators" because "when the people have said, [w]e will submit to rules, and be governed by *laws* made by such men, and in such forms, no body else can say other men shall make *laws* for them."²⁵

Making the regulatory law meant not just passing statutes but passing statutes that state the rules of private conduct.²⁶ In *Federalist No. 75*, Alexander Hamilton wrote "The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society . . ."²⁷ In *Fletcher v. Peck*,²⁸ decided in 1810, the Supreme Court wrote, "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."²⁹

23. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2512 (2019) (Kagan, J., dissenting) (citation omitted) (second alteration in original) (quoting THE FEDERALIST NOS. 52, 57, at 124, 155 (James Madison) (J. & A. McLean eds., 1788)).

24. JOHN L. FITZGERALD, CONGRESS AND THE SEPARATION OF POWERS 35–39 (1986); see generally JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT (2017).

25. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 87 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690).

26. For an argument to the contrary, see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1733 (2002). Part V.A addresses their argument.

27. THE FEDERALIST NO. 75, *supra* note 4, at 449 (Alexander Hamilton).

28. 10 U.S. (6 Cranch) 87 (1810).

29. *Id.* at 136; see also, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2138 (2019) (Gorsuch, J., dissenting).

And in *Gibbons v. Ogden*,³⁰ decided in 1824, the Court wrote that the power to regulate commerce, which Article I includes in the legislative power, is “to prescribe the rule by which commerce is to be governed.”³¹ It is no wonder then that school civics courses once taught that it is Congress’s job to make the laws and that its members are called “lawmakers.”

In *Cargo of the Brig Aurora v. United States*,³² decided in 1813, the Court recognized in dicta that Congress may not delegate the power to make the rules of private conduct.³³ The statute in question conditioned a rule imposing a maritime embargo on the President’s findings on whether other nations respected American neutrality.³⁴ Based upon the President’s findings, the embargo took effect.³⁵ The attorney for the party charged with violating the embargo argued, “Congress could not transfer the legislative power to the President. To make the revival of a law depend upon the President’s proclamation, is to give to that proclamation the force of a law.”³⁶ The Court responded that the President was not making a rule but rather applying a legislated rule by determining “the occurrence of any subsequent combination of events.”³⁷ This was not rulemaking but rather, as *Fletcher* put it, “the application of [legislated] rules.”³⁸ The Court thus suggested that Congress could not delegate the power to make rules of private conduct to the executive branch.

30. 22 U.S. (9 Wheat.) 1 (1824).

31. *Id.* at 196.

32. 11 U.S. (7 Cranch) 382 (1813).

33. *Id.* at 388.

34. *Id.* at 382–83.

35. *Id.* at 382.

36. *Id.* at 386.

37. *Id.* at 388. The passage in full is:

[W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation, without limitation upon the occurrence of any subsequent combination of events.

Id.

38. 10 U.S. (6 Cranch) 87, 136 (1810).

B. *What the Original Norm Would Require of Congress*

To discharge its responsibility to make the rules of private conduct as the norm originally required, Congress must itself state the rules binding society in understandable terms, such as a rule limiting pollution from designated factories. The rules must be understandable so that voters can hold their representatives responsible in future elections. Understandability is thus essential to serve the bedrock purpose of Article I.

In contrast, a statute like the modern Clean Air Act that tells an agency to make rules to achieve some goal like “protect the public health” with “an adequate margin of safety” states a goal rather than a rule.³⁹ Stating goals is insufficient because Congress can state goals yet avoid responsibility to the governed for how the agency resolves major political controversies in drafting the rule. As such, allowing Congress to do no more than state goals conflicts with the original consent-of-the-governed norm. For example, “protect the public health” is a pleasing goal yet, when this language was inserted in the statute in 1970,⁴⁰ the statute’s chief author, Senator Edmund Muskie, knew that the agency could not fully achieve the goal. As he later admitted after the air pollution problem was safely in the lap of the Environmental Protection Agency (EPA):

Our public health scientists and doctors have told us that there is no threshold, that any air pollution is harmful. The Clean Air Act is based on the assumption, although we knew at the time it was inaccurate, that there is a threshold. When we set the standards [the responsibility for whose setting Congress in fact left to the EPA], we understood that below the standards that we set there would still be health effects.⁴¹

Yet, Congress took credit for unconditionally protecting health.⁴² Nor did Congress decide, in the overwhelming majority of cases, how to allocate the cleanup burden among the sources

39. See 42 U.S.C. § 7409(b)(1) (2012).

40. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 109(b)(1), 84 Stat. 1676, 1680.

41. *Clean Air Act Amendments of 1977: Hearing Before the S. Subcomm. on Envtl. Pollution of the Comm. on Env't & Pub. Works*, pt. 3, 95th Cong. 8 (1977) (statement of Sen. Edmund Muskie).

42. See, e.g., DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE* 70–72 (2005).

that contribute to unhealthy pollution.⁴³ So, the legislators had plausible deniability for almost any unpopular consequences of the rules announced on agency letterhead.

A statute that takes the form of a rule but in fact fails to state a rule of conduct in understandable terms, such as one that bars large factories from emitting “unreasonable” pollution, violates the original consent-of-the-governed norm. What was unreasonable was understandable when early courts instructed juries in tort actions that the standard of reasonable care was how people in their community customarily behaved, but it would not be understandable when applied to a modern factory.⁴⁴ Custom is no guide to the meaning of “unreasonable” when we confront newly understood threats and learn of newly invented means to deal with them. Such a statute fails to achieve the objective of Article I: to make the elected lawmakers responsible for the politically salient choices.

Of course, even a forthright rule will require interpretation in some cases.⁴⁵ Yet, interpreting the law is distinct from policy-making.⁴⁶ Interpretation calls for an inquiry into how the enacting legislature would have clarified the law’s ambiguities; policymaking calls for an inquiry into what makes sense to the policymaker. In deciding how the Congress that passed the statute would have resolved an ambiguity, a judge can get information from many sources. One such source is that, by dictating clear outcomes in most cases, the rule usually reveals the relative weight the legislature gave to conflicting policy

43. *Id.* at 26. The singular exception is that the 1970 statute did require auto manufacturers to reduce emissions from new cars by 90 percent. Clean Air Amendments of 1970, Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690. The 1970 statute called for the EPA and the states to regulate other sources, but in sufficiently general terms that members of Congress could deny responsibility for the specific emission limits imposed. *See, e.g.*, 42 U.S.C. § 7411 (2012) (requiring the EPA Administrator to regulate new stationary sources).

44. *See, e.g.*, *Aldred’s Case* (1610) 77 Eng. Rep. 816, 820–21; 9 Co. Rep. 57 b, 58 b; OLIVER WENDELL HOLMES, *THE COMMON LAW* 87–88 (Mark DeWolfe Howe ed., Little, Brown & Co. 1963) (1881).

45. *See* Ronald M. Dworkin, *Is Law a System of Rules?*, in *ESSAYS IN LEGAL PHILOSOPHY* 25, 52 (Robert S. Summers ed., 1968); *see also* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 156 (tent. ed. 1958).

46. *See, e.g.*, Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1058–60 (1975).

goals, such as enhancing regulatory protection versus avoiding regulatory burdens.⁴⁷

The original consent-of-the-governed norm is thus based upon legal principles that courts routinely apply. The harder question is how courts should deal with modern impediments to the original norm's full enforcement.

II. THE IMPEDIMENTS TO JUDICIAL ENFORCEMENT OF THE ORIGINAL NORM

A. *The Impediments' Evolution*

*Wayman v. Southard*⁴⁸ decided by the Supreme Court in 1825 exemplifies the difficulty Congress encountered in legislating all the rules of private conduct.⁴⁹ The statute at issue instructed the various federal district courts to adopt rules of procedure that track state court procedural rules, but authorized the federal courts to make "alterations and additions."⁵⁰ It would have been arduous for Congress to go through the procedural rules of each state court system and adapt them to the needs of the federal court. The Supreme Court saw no difficulty in allowing the federal courts to adopt the rules regulating the courts rather than private persons:

It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . [Either the courts or Congress,] for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description.⁵¹

47. Congress could call upon an agency to interpret a rule stated in a statute. For example, a statute might require that, starting five years hence, no fossil-fueled power plant may emit sulfur at more than half the current average emission rate for such plants and direct the agency to issue a binding regulation stating the future limit in numerical terms. The agency would need to interpret and apply the statute, but Congress would have faced the salient policy choices. A court could then review the agency's interpretation. 5 U.S.C. § 706(2)(C) (2018). The agency would be applying a rule rather than making it.

48. 23 U.S. (10 Wheat.) 1 (1825).

49. *Id.*

50. *Id.* at 31.

51. *Id.* at 42–43.

The complaint in the case, however, objected to rules that governed private persons—in particular, a rule on the enforcement of judgments.⁵² The Court went on to state:

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.⁵³

So, the opinion continued, other officials could “vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution.”⁵⁴ “Fill up the details” in this context could be understood to be a test to accommodate the inability of Congress to state every last rule—“minor” as well as major—as required by the state-the-rule definition of the norm articulated in *Fletcher v. Peck*, *Brig Aurora*, and *Gibbons v. Ogden*.⁵⁵

Congress’s difficulty in complying with the original norm compounded as the need for new federal rules grew with the growth in the nation’s land area, population, technological prowess, and interstate activity. Take, for example, a problem that came from railroad lines stretching across many states. State-by-state ratemaking and litigation were no way to regulate an interstate railroad. Yet, Congress itself could not set the rates for all the railroads. So, a wide range of interests including the railroads themselves urged Congress to establish an agency to deal with rates.⁵⁶ The result was the Interstate Commerce Act of 1887⁵⁷ establishing the Interstate Commerce Commission.⁵⁸

52. *Id.* at 11.

53. *Id.* at 43.

54. *Id.* at 45.

55. “Fill up the details” might also be a somewhat different statement of the norm. Rather than pausing to analyze which version is better or trying to reconcile them, this Article will use the state-the-rule version. The reason is that Congress now comes nowhere close to complying with either version, as the earlier discussion of the Clean Air Act illustrates, and the point of this Article is to show how the Court could begin to bring Congress much closer to the consent-of-the-governed norm rather than to define it exactly.

56. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920*, at 126–31 (1982).

57. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C. (2012)).

58. *Id.* at 383.

This statute was an early example of a new way of thinking about regulation. The new way was brought on by the Progressive Movement, quite different from what “progressive” means today. As Professor Robert Wiebe’s excellent history of the rise and decline of self-rule in the United States explains, the end of the nineteenth century brought exciting new technologies, as well as firms doing business on a national scale, such as the railroads.⁵⁹ In addition to their national outlook, the firms’ executives prided themselves on the quasi-scientific systems they developed to operate on a national scale.⁶⁰ They hired junior executives from universities that instilled such pride in their students.⁶¹ Professor Wiebe calls the group with this outlook the “national class” as distinguished from the “local middle class,” which comprised the leading lights of the older, more parochial order.⁶² The Ivy League rather than Podunk College was the path to success among the national class.⁶³ According to Professor Wiebe, the national class sought to shift power from the state and local level to the national and from legislatures beholden to voters to commissions and courts insulated from political pressure and staffed by experts—in other words, to people more like themselves.⁶⁴

In empowering federal agencies, the Progressives began to push the republic down a slippery slope towards Congress systematically evading responsibility, but evasion was not the common objective. To the contrary, many of the Progressives believed in separation of powers, including a Congress that makes the law, and thought they were honoring these beliefs.⁶⁵ For example, they conceived of the Interstate Commerce Act as authorizing experts to apply a legislated rule on railroad rates rather than to make rules. Whether the standards in various statutes left so much wiggle room as to constitute delegations of legislative power was not apparent to many of the Progressives because they saw their statutes as empowering experts in agen-

59. ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 141 (1995).

60. *See id.* at 143.

61. *See id.* at 142–43.

62. *Id.* at 145.

63. *See id.* at 142–43.

64. *Id.* at 141–46.

65. *See, e.g.*, SAMUEL FREEMAN MILLER, *LECTURES ON THE CONSTITUTION OF THE UNITED STATES* 25, 86, 89, 449 (New York & Albany, Banks & Bros. 1891).

cies insulated from politics to use scientific methods to find correct ways to apply statutes.⁶⁶ The Court rebuffed assertions that the Progressives' statutes empowering agencies violated the consent-of-the-governed norm.⁶⁷

Whether the Supreme Court failed to notice violations of the norm in cases concerning delegations to expert agencies or decided that they should not enforce it in such cases, the Court did enforce it in other sorts of cases. In *United States v. L. Cohen Grocery Co.*,⁶⁸ decided in 1921, the Court struck down a federal statute on the grounds that it delegated lawmaking power to the courts.⁶⁹ The statute made it a crime to charge "unjust or unreasonable" prices for "any necessities."⁷⁰ With a delegation to the courts rather than experts, there could be no pretense science had made the indefinite definite. The Supreme Court held, "Congress alone has power to define crimes against the United States."⁷¹

Similarly, in two other cases—*Knickerbocker Ice Co. v. Stewart*,⁷² decided in 1920, and *Washington v. W.C. Dawson & Co.*,⁷³ decided in 1924—the Court struck down statutes that instructed federal courts to apply state workman's compensation statutes in admiralty cases.⁷⁴ The Justices reasoned that Congress could not delegate to state legislatures the power to enact the federal law.

The Court first used the "intelligible principle" language in *J.W. Hampton, Jr., & Co. v. United States*⁷⁵ decided in 1928, stating, "If Congress shall lay down by legislative act an intelli-

66. See WIEBE, *supra* note 59, at 175–76.

67. See, e.g., *Field v. Clark*, 143 U.S. 649, 681–94 (1892).

68. 255 U.S. 81 (1921).

69. *Id.* at 91–93.

70. *Id.* at 86.

71. *Id.* at 87–88 (quoting *United States v. L. Cohen Grocer Co.* 264 F. 218, 220 (E.D. Mo. 1920)) (internal quotation marks omitted). Delegation of the power to make rules of private conduct may be particularly concerning when they are backed by criminal sanctions, but many statutes that authorize agencies to make rules of private conduct give these agencies the option of enforcing them criminally. See JOHN G. MALCOLM, CRIMINAL LAW AND THE ADMINISTRATIVE STATE: THE PROBLEM WITH CRIMINAL REGULATIONS 1–2 (Heritage Found., Legal Memorandum No. 130, 2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM130.pdf [<https://perma.cc/H5NR-L7XK>].

72. 253 U.S. 149 (1920).

73. 264 U.S. 219 (1924).

74. *Id.* at 227–28; *Knickerbocker*, 253 U.S. at 166.

75. 276 U.S. 394 (1928).

ble principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”⁷⁶ Justice Gorsuch’s dissent in *Gundy v. United States*, argues that:

No one at the time thought the phrase [“intelligible principle”] meant to effect some revolution in this Court’s understanding of the Constitution. While the exact line between policy and details, lawmaking and factfinding, and legislative and nonlegislative functions had sometimes invited reasonable debate, everyone agreed these were the relevant inquiries. And when Chief Justice Taft wrote of an “intelligible principle,” it seems plain enough that he sought only to explain the operation of these traditional tests; he gave no hint of a wish to overrule or revise them There’s a good argument, as well, that the statute in *J. W. Hampton* passed muster under the traditional tests.⁷⁷

Whether *J.W. Hampton* applied an “intelligible principle” test, it did state, “In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.”⁷⁸ Such fixing sounds like a policy decision better left to the political branches. An editorial in *The Constitutional Review* said that the statute upheld was “the most dangerous advance in bureaucratic government ever attempted in America.”⁷⁹

Nonetheless, Justice Gorsuch’s contention that the “intelligible principle” language was not meant to weaken the test of delegation is buttressed by the Court’s response to the National Industrial Recovery Act⁸⁰ passed only five years later. The statute granted the President sweeping powers to regulate industry in response to the Great Depression but did little to control how he used those powers.⁸¹ The Italian dictator, Benito Mussolini stated admiringly of President Franklin Roosevelt’s sway under the statute, “Ecco un dittatore!”—that is, “Behold a dicta-

76. *Id.* at 409 (internal quotations omitted).

77. *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

78. *J.W. Hampton*, 276 U.S. at 406.

79. J.S. Cotton, *The General Welfare Clause*, 13 CONST. REV. 98, 101 (1929).

80. Pub. L. No. 73-66, 48 Stat. 195 (1933).

81. *Id.*

tor!"⁸² In 1935, in *Panama Refining Co. v. Ryan*,⁸³ a divided Court struck one delegation in the statute.⁸⁴ Later that year, in *A.L.A. Schechter Poultry Corp. v. United States*,⁸⁵ a unanimous Court, including Justices Brandeis, Cardozo, and Stone, struck another of its delegations.⁸⁶ Then, in 1936, in *Carter v. Carter Coal Co.*,⁸⁷ citing *Schechter*, the Court struck down a delegation of rule-making power to an association of coal mining companies.⁸⁸ Thus, the Court struck down three delegations for violating the consent-of-the-governed norm in the seven years after *J.W. Hampton*.

After winning reelection in 1936, President Roosevelt famously struck back at the Court, which had defied him on delegation and other issues, by proposing a statute authorizing him to appoint additional Justices.⁸⁹ Congress did not pass this court-packing plan,⁹⁰ but the President nonetheless prevailed. One of the Court's changes of position was derisively labeled the "switch in time that saved nine," suggesting that change was to protect the Court.⁹¹ Yet, the evidence shows that the change came before the President announced his plan and was made public only afterwards.⁹² Nonetheless, the Justices did seek to insulate the Court from political turmoil.⁹³ The judicial

82. James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 766 (1991) (internal quotation marks omitted) ("dittatore" misspelled in original).

83. 293 U.S. 388 (1935).

84. *Id.* at 419–33.

85. 295 U.S. 495 (1935).

86. *Id.* at 529–42.

87. 298 U.S. 238 (1936).

88. *Id.* at 310–12 (citing *Schechter*, 295 U.S. at 537).

89. See JAMES F. SIMON, *FDR AND CHIEF JUSTICE HUGHES* 312–15 (2012).

90. *Id.* at 333–34.

91. *Id.* at 327.

92. See *id.* The "switch" refers to the Justice Owen Roberts voting to strike a state minimum wage statute in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), but then taking a contrary position in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

93. Chief Justice Hughes worked to frame decisions to minimize the likelihood of the Court's independence being crimped. See SIMON, *supra* note 89, at 299–300, 302–06, 323–29, 332, 335–37, 392. For another example, Justice Frankfurter wrote in a concurrence in a decision not to take on malapportionment of legislative districts, "It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law." *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946) (plurality opinion). For a discussion of im-

unmanageability of the intelligible principle test, of course, let the Court sidestep the potentially troublesome issue of delegation.

With retiring Justices replaced by President Roosevelt appointees and the nation facing the emergencies of the Great Depression and World War II, the Court rejected every constitutional challenge to regulatory statutes on consent-of-the-governed grounds.⁹⁴ Whatever the Court originally meant by “intelligible principle,” it came to mean next to nothing. As Justice Kagan stated in her opinion for the Court in *Gundy v. United States*, “we have over and over upheld even very broad delegations” including “to regulate in the ‘public interest.’”⁹⁵

Professor Bruce Ackerman argues the confrontation between President Roosevelt and the Court, President Roosevelt’s subsequent reelections by overwhelming margins, and the Court’s subsequent rulings constituted a “constitutional moment” that amended the Constitution to, among other things, allow delegation of legislative power.⁹⁶ I dispute this argument in Part V.D. Nonetheless, as Part IV.A shows, sufficiently strong public opinion can, as long as it persists, keep the Court from fully enforcing constitutional norms despite the hope that the Constitution is a counter-majoritarian imperative.

Whatever strong public opinion in favor of delegation there was no longer persists. According to Professor David Mayhew, in polls conducted in 1958, 1977, and 2004 to 2005, by a margin of three to one, voters prefer Congress rather than the President to “make policies.”⁹⁷ A poll taken in January 2019 found that “[e]ighty-two percent (82%) of voters believe Congress should review and approve regulations rather than allowing agencies to set them up on their own.”⁹⁸ In this poll, the support for

pediments to full enforcement of constitutional norms, including “politics,” see LAWRENCE LESSIG, *FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION* 163–68 (2019).

94. *Whitman v. American Trucking*, 531 U.S. 457, 474 (2001) (citing cases).

95. *Gundy v. United States*, 139 S. Ct. 2116, 2129 (2019) (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)).

96. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 306–11 (1991); Bruce A. Ackerman, *The Storrs Lectures: Discovering The Constitution*, 93 *YALE L.J.* 1013, 1053–57, 1070–71 (1984).

97. DAVID R. MAYHEW, *THE IMPRINT OF CONGRESS* 8 (2017).

98. Scott Rasmussen, *82% Say Congress Should Review & Approve Federal Regulations*, SCOTTRASMUSSEN.COM (Jan. 24, 2019), <https://scottrasmussen.com/82-say-congress-should-review-approve-federal-regulations/> [https://perma.cc/W7GD-EVXU]; see also

Congress to shoulder responsibility was much the same regardless of party affiliation, race, or political ideology.⁹⁹

One manifestation of public opinion against congressional buck passing came along with the first Earth Day in 1970. A book documenting a study funded by Ralph Nader had charged that people died from air pollution because Congress, starting with Senator Muskie, had written ineffective air pollution legislation that gave an agency broad discretion to regulate pollution and thereby avoided the hard choices.¹⁰⁰ In response, Senator Muskie authored the 1970 Clean Air Act, which he asserted “faces the air pollution crisis with urgency and in candor. It makes hard choices”¹⁰¹ As a result, he vowed, “all Americans in all parts of the country shall have clean air to breathe within the 1970’s.”¹⁰² Instead of openly granting an agency broad discretion on how to regulate, the new statute supposedly ordered the EPA to make rules fully sufficient to protect health by deadlines and granted citizens the right to enforce this order in federal court.¹⁰³ The statute did not deliver what Senator Muskie maintained it did. It left almost all the hard choices to the agency, as Part III.D will show. Congress’s need to pretend otherwise evidences public opinion against Congress passing the buck.

When the dust settled from the emergencies of the Great Depression, World War II, and the Korean War, Justices expressed concern for the consent-of-the-governed norm. In *Kent v. Dulles*¹⁰⁴ decided in 1958, five Justices invoked it as a reason to narrowly construe a statute that otherwise threatened protected freedoms, and in so doing, the Court limited the authority

Mark Chenoweth, *Florida Voters Join Chevron Revolt And Strike A Blow Against Judicial Bias*, FORBES (Nov. 8, 2018, 8:44 AM), <https://www.forbes.com/sites/markchenoweth/2018/11/08/florida-voters-join-chevron-revolt-and-strike-a-blow-against-judicial-bias/#2cfd60f44fe6> [<https://perma.cc/F7CY-TJNU>] (Florida passes referendum abolishing *Chevron*-like statutory interpretation in state courts).

99. PJ Rasmussen, *Crosstabs Jan. 15–16*, SCOTTRASMUSSEN.COM (Jan. 16, 2019), <https://scottrasmussen.com/crosstabs-jan-15-16-3> [<https://perma.cc/CL8A-QNDJ>].

100. See Ralph Nader, *Foreword* to JOHN C. ESPOSITO & LARRY J. SILVERMAN, VANISHING AIR: THE RALPH NADER STUDY GROUP REPORT ON AIR POLLUTION, at vii–ix, 287 (1970).

101. 116 CONG. REC. 42,381 (1970).

102. *Id.*

103. See Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 108(a), 109(a)(1), 110(i)(2)(b), 84 Stat. 1676, 1678–79, 1683.

104. 357 U.S. 116 (1958).

the statute conferred to the executive branch.¹⁰⁵ Then, in *National Cable Television Ass'n v. United States*,¹⁰⁶ decided in 1974, the Court invoked the norm to reject an interpretation of a statute that gave an agency the power to tax those it regulated to cover the cost of regulation.¹⁰⁷ This was the first time the consent-of-the-governed norm had been applied in a case regarding regulatory control of business in four decades. The Justices citing the norm in these cases and others were from both sides of the political spectrum.

The norm also played a role in the Supreme Court's handling of a challenge to the Occupational Safety and Health Act.¹⁰⁸ It, like the Clean Air Act, was passed in 1970 and made high-sounding promises. It directed the agency to ensure "safe . . . places of employment" and reduce occupational exposure to toxic materials "to the extent feasible," without making clear what these requirements meant.¹⁰⁹ In its decision in *Industrial Union Department, AFL-CIO v. American Petroleum Institute* (often called the *Benzene* case),¹¹⁰ the Court held invalid a regulation that the agency promulgated to limit benzene levels in workplaces.¹¹¹ Arguing that the statute might otherwise be an unconstitutionally broad delegation, three Justices construed the statute to require the agency to base the limit on harms the agency determined are significant.¹¹² The agency had failed to require that the harm be significant. A fifth Justice, then-Justice Rehnquist, voted to declare the Act unconstitutional for dele-

105. *Id.* at 129 ("Where activities . . . often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."). In *Arizona v. California*, 373 U.S. 546 (1963), three Justices dissented on the grounds that the Court should have invoked the norm to construe a statute narrowly. *Id.* at 625–27 (Harlan, J., dissenting in part).

106. 415 U.S. 336 (1974).

107. *Id.* at 342–43.

108. Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2012)).

109. *Id.* §§ 3(8), 6(b)(5) (codified as amended at 29 U.S.C. §§ 652(8), 655(b)(5) (2012)).

110. 448 U.S. 607 (1980).

111. *Id.* at 661–62 (plurality opinion).

112. *Id.*

gating legislative power,¹¹³ a position with which Chief Justice Burger agreed in a later case.¹¹⁴

In 1996, in *Loving v. United States*,¹¹⁵ the Court praised the consent-of-the-governed norm in dicta.¹¹⁶ A soldier sentenced to death invoked the norm to challenge the constitutionality of a statute that empowered the President to establish the criteria for such sentences in military tribunals.¹¹⁷ He lost, in part because of the special authority that the President has in military matters, but the Court stated:

Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking. Ill suited to that task are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control. The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance.¹¹⁸

Yet, the "clear assignment of power" does not result in the Court enforcing the norm in most cases and, where the Court does enforce the norm, it asserts that it is not invoking the consent-of-the-governed norm. Take the case cited, *INS v. Chadha*.¹¹⁹ It struck the legislative veto which, depending upon the statute in which it appears, allowed one or two houses of Congress to veto designated administrative actions.¹²⁰ The stated rationale was that the legislative veto cuts the President out of legislative actions in contravention of the Article I legislative process, which involves the House, the Senate, and the President.¹²¹ Yet, as Justice Byron White argued in dissent, the legislative veto was being struck because it delegates legislative power to

113. *Id.* at 671–88 (Rehnquist, J., concurring).

114. *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543–44 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.).

115. 517 U.S. 748 (1996).

116. *Id.* at 757–58.

117. *Id.* at 751–52.

118. *Id.* at 757–58 (citing *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

119. 462 U.S. 919.

120. *Id.* at 959–60.

121. *See id.* at 946–48.

a process other than that of Article I,¹²² but that reasoning would also invalidate delegation of lawmaking authority to agencies.¹²³ The *Loving* dicta did, however, hint that *Chadha* could be viewed as, in part, a delegation case.

Similarly, in *Clinton v. City of New York*¹²⁴ decided in 1998, Justices from the left and right joined in striking down the line-item veto, which allowed the President to reject line items in appropriations statutes.¹²⁵ The Court reasoned that this procedure contravened Article I's legislative process, which limits the President to accepting or not the entire bill passed by the House and the Senate.¹²⁶ Yet, the line-item veto could also be conceived as delegating some of Congress's power over appropriations to the President acting alone. Concerns of practicality were no barrier in striking a delegation of the appropriations power because Congress likes to hand out the money itself. Spending, after all, usually brings credit to its members. In contrast, Congress often delegates the power to impose rules of private conduct because they bring blame as well as credit.

Thus, the Court faced a case fraught with more political and practical difficulty in *Whitman v. American Trucking Ass'ns*¹²⁷ decided in 2001, in which trade associations had argued that a popular regulatory statute, the Clean Air Act, unconstitutionally delegated legislative power.¹²⁸ Specifically, they argued the "protect the public health" provision delegated legislative power because it gave no guidance as to the extent to which the agency must protect health.¹²⁹ A D.C. Circuit Court of Appeals panel had held that the Clean Air Act as construed by the agency did delegate power unconstitutionally.¹³⁰

122. *Id.* at 984–89 (White, J., dissenting).

123. *See id.* at 985–87.

124. 524 U.S. 417 (1998).

125. *Id.* at 417–20.

126. *Id.* at 436–41.

127. 531 U.S. 457 (2001).

128. *Id.* at 458–59.

129. *See id.* at 463.

130. *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (per curiam), *aff'd in part, rev'd in part, and remanded sub nom. Whitman*, 531 U.S. 457. The Wall Street Journal reported that this aspect of the original court of appeals decision was influenced by SCHOENBROD, POWER WITHOUT RESPONSIBILITY, *supra* note 5. John J. Fialka, *Professor Seeks to Limit Congress Ability to Delegate Tasks to Federal Agencies*, WALL ST. J. (May 20, 1999, 12:01 AM), <https://www.wsj.com/articles/SB927150035434840424> [<https://perma.cc/2XLS-FN9Y>]. The panel held, however, the statute might be

In an opinion by Justice Scalia, the Court stated that the text of the Constitution “permits no delegation of [legislative] powers.”¹³¹ Yet, having seemingly vowed that the Court would stop Congress from abdicating its legislative power, the Court trivialized that vow by stating, “we repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”¹³² Indeed, the opinion, like Justice Kagan’s opinion for the Court in *Gundy* quoted earlier, noted that even goals as mushy as “the public interest” had counted as an “intelligible principle.”¹³³ The opinion concluded by stating that “we have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”¹³⁴ The quotation is from an earlier opinion in which Justice Scalia argued that “intelligible principle” was not a judicially manageable test.¹³⁵ In effect, *Whitman* allows members of Congress to judge whether they have made themselves sufficiently responsible to their constituents, despite their self-interest in avoiding responsibility.¹³⁶ In sum, when it comes to the rules of private conduct, the consent-of-the-governed norm has become a farce.

saved through a narrowing interpretation, but rather than narrowing the interpretation itself, the court called upon the agency to consider a narrowing construction. See *Am. Trucking*, 175 F.3d at 1034–38. The decision seemed to be *Benzene* adapted to the age of *Chevron*. *Chevron U.S.A. Inc. v. Nat. Res. Defense Council*, 467 U.S. 837 (1984). The Court rejected having the agency provide a narrowing interpretation: “The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority.” *Whitman*, 531 U.S. at 473.

131. *Whitman*, 531 U.S. at 472.

132. *Id.* (alteration in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

133. *Id.* at 474.

134. *Id.* at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)) (citing *Mistretta*, 488 U.S. at 373 (majority opinion)).

135. *Id.* (quoting *Mistretta*, 488 U.S. at 416 (1989) (Scalia, J., dissenting)). This passage was cited with approval in the Court’s opinion in *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

136. American Trucking could have won a minor victory for the constitutional norm along the lines of *Benzene* by adopting the argument that Professor Marci Hamilton and I advanced in an amicus brief. Brief of the Manufacturers Alliance/MAPI Inc. et

B. *The Impediments Today*

Believing that Congress cannot fully comply with the consent-of-the-governed norm, the Court has concluded that it cannot enforce the norm as originally understood.¹³⁷ Many, if not most, of the regulatory statutes in the United States Code would fail to comply with the norm as originally understood.¹³⁸

The Court, of course, purports to limit delegation through the “intelligible principle” test, but it is judicially unmanageable and so no limit on delegation in practice. Justice Gorsuch’s dissent in *Gundy* suggests important strides in the direction of the Court overcoming this impediment to enforcing the norm. His dissent calls for discarding the “intelligible principle” test, which he calls a “misadventure,”¹³⁹ and replacing it with a judicially manageable test. The dissent also recognizes that Chief Justice Marshall’s 1825 opinion in *Wayman v. Southard* could provide precedential support for such a test.¹⁴⁰ Justice Gorsuch writes that Chief Justice Marshall’s opinion “distinguished between those ‘important subjects, which must be entirely regulated by the legislature itself,’ and ‘those of less interest, in which a general provision may be made, and power given to

al. as Amici Curiae in Support of Respondents, *Whitman*, 531 U.S. 457 (No. 99-1257). We argued that to reduce the scope of the delegation, the statute should be construed to require the agency to set the standard to protect against harms to health that it found to be significant and in the rulemaking it had expressly refused to make such a finding. *Id.* at 15–20. There was strong support for this reading of the statute in its legislative history. *Id.* Seemingly driven by profits more than constitutional principle, American Trucking preferred to argue that the statute be construed to minimize costs to its members. See David Schoenbrod, *Politics and the Principle That Elected Legislators Should Make the Laws*, 26 HARV. J.L. & PUB. POL’Y 239, 270–75 (2003). Professor Hamilton and I filed amicus briefs on the delegation issue in *Clinton*, *Loving*, and other cases.

137. As stated in *Mistretta v. United States*, “[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” 488 U.S. at 372.

138. See Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 327 (1987). Even if such a ruling were made prospective, Congress and agencies would have to struggle to meet the need for ongoing changes in statutes and regulations.

139. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

140. See *id.* at 2135–36 (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). Justice Gorsuch omitted Chief Justice Marshall’s reference to “minor regulations.” *Id.*; *Wayman*, 23 U.S. (10 Wheat.) at 45.

those who are to act . . . to fill up the details.”¹⁴¹ The dissent goes on to make a convincing case that the statutory provision at issue in *Gundy* left far more than details to the delegate.¹⁴²

Nonetheless, additional strides are needed before the test discussed in the dissent would be a workable test for a majority. If Justice Gorsuch had been writing for the Court, his use of the statutory-invalidation guillotine would threaten huge swathes of the United States Code and the Code of Federal Regulations. His test would be a threat because it would be hard to know in advance how the Court would draw the line between “important subjects, which must be entirely regulated by the legislature itself,” and “those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details.”¹⁴³ This formulation leaves many questions open. Does the test mean that Congress must state the more important rules, the more important goals, or some combination thereof? Whichever it is, it would also be unclear how to define the level of importance. Indeed, it would be much more difficult to construct a judicially manageable test along these lines in 2020 than it would have been in the simpler world of 1825.

Even if the Court could construct a judicially manageable test along the lines that Justice Gorsuch’s dissent suggests, doing so would take many years of case-by-case adjudication. Meanwhile, federal regulators as well as businesses, state and local governments, nonprofits, and others subject to federal regulation have come to rely upon regulation as we now have it. More agencies with more power have produced a Code of Federal Regulations with twelve times more words than it had when first codified in 1938.¹⁴⁴ The reliance is massive.

During the years of uncertainty that Justice Gorsuch’s test would produce, stakeholders would have to predict which regulations would be found valid and which would not. The uncertainty would plague both large organizations and smaller organizations and individuals without ready access to legal

141. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (omission in original) (quoting *Wayman*, 23 U.S. (10 Wheat.) at 43).

142. *See id.* at 2143–48.

143. *Wayman*, 23 U.S. (10 Wheat.) at 43.

144. Email from Ethan Clarkson, Research Assistant, N.Y. Law Sch., to author (Oct. 10, 2019) (on file with author).

advice. After all, individuals who farm, practice dentistry on their own, or operate gas stations, to name just some examples, are subject to many federal regulations. The approval process for many projects, big and small, could take much longer than it does now. On top of the uncertain status of old regulations would come uncertainty in issuing new ones.¹⁴⁵ All this uncertainty would harm the economy generally. Meanwhile, advocates for various regulatory causes would upset voters by saying that the Court had stripped them of essential regulatory protection.¹⁴⁶

To avert such a catastrophe, the Court would need to explain to the governed and elected officials how to transition to what most of the people want—regulatory protection that is both workable and subject to the consent of the governed. I will suggest how the Court could do so but first will discuss what Congress should do on its own.

III. CONGRESS FLOUTS THE NORM

A. *Congress's Duty to Comply with the Norm to the Extent Practical*

Even if impediments prevent even partial judicial enforcement of the consent-of-the-governed norm, members of Congress are honor bound to do their best to comply with it. As Dean Lawrence Sager argues in an article on underenforced constitutional norms, “[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delin-

145. However, Justice Gorsuch suggests, “Congress can also commission agencies or other experts to study and recommend legislative language.” *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting). Yes, it might, but his optimism takes no account of the gridlock in Congress.

146. All the uncertainty and upset would arouse political antagonism against the Court and so add to the current speculation about court packing. James Freeman, Opinion, *Justice Ginsburg Kicks Buttigieg*, WALL ST. J. (July 25, 2019, 4:03 PM), <https://www.wsj.com/articles/justice-ginsburg-kicks-buttigieg-11564084993> [<https://perma.cc/8NMJ-N7JM>]. Indeed, four aspirants to the Democratic Party’s nomination for President—Mayor Pete Buttigieg and Senators Kirsten Gillibrand, Kamala Harris, and Elizabeth Warren—say they are open to court packing. *Id.*

eating only the boundaries of the federal courts' role in enforcing the norm"¹⁴⁷

Dean Sager also calls for courts to distinguish norms from the impediments to their full enforcement.¹⁴⁸ He illustrates the distinction with the "equal protection" norm,¹⁴⁹ which he defines this way: "A state may treat people differently only when it is fair to do so."¹⁵⁰ The impediment to its full enforcement is that federal courts should not second guess policy decisions the Constitution assigns to states.¹⁵¹ To accommodate this impediment, federal courts developed a test for judicial enforcement that differs from the equal protection norm: an inequality is permitted if it bears a "rational relationship" to the government's justification for it, unless the inequality involves a dubious classification such as race.¹⁵² This test ends up crediting some pretextual justifications, thus permitting some unfair inequalities. Dean Sager shows that by recognizing that the rational relationship test allows some violations of the equal protection norm, federal courts can allow state courts and Congress, which do not face the same impediment as do the federal courts, to augment the federal courts' incomplete enforcement.¹⁵³ Thus, the norm and the test for its judicial enforcement differ. As Professor Thomas Nachbar writes, "There is no textual basis in the Constitution to justify reviewing legislation for its rationality."¹⁵⁴

147. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978). Dean Sager also states the following:

This obligation to obey constitutional norms at their unenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins.

Id. at 1227.

148. *Id.* at 1212.

149. U.S. CONST. amend. XIV, § 1.

150. Sager, *supra* note 147, at 1215, 1263–64 (internal quotation marks omitted).

151. *See id.* at 1216.

152. *See id.* at 1216–17.

153. *See id.* at 1212.

154. Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1630 (2016).

Dean Sager's article does not discuss the underenforced consent-of-the-governed norm.¹⁵⁵ He did write, however, that a norm's status as underenforced is "particularly apparent when the absence of 'judicially manageable standards' is cited as a reason for the invocation of the political question doctrine."¹⁵⁶ This is a reason that the Court gives for underenforcing the consent-of-the-governed norm.¹⁵⁷

Because, as Dean Sager argues, underenforced norms are valid to their full conceptual limits and the consent-of-the-governed norm bars delegation of the power to make rules of private conduct, Congress should do its best to take direct responsibility for such rules. Congress would aim too low if it sought to provide no more than an insipid "intelligible principle."

B. *Congress Could Comply with the
Norm to a Substantial Extent*

Congress could do much more than it now does to comply with the consent-of-the-governed norm. One way that Congress could shoulder more of its constitutional responsibility while still making use of agency expertise was suggested by James Landis, once the New Deal's leading expert on administrative law and later dean of Harvard Law School. He suggested that Congress could require new "administrative action . . . of large significance" not take effect until Congress explicitly approves it.¹⁵⁸ He wrote that for administrative officials, "it was an act of

155. Whether the ultimate reason for underenforcement of a norm is an institutional constraint on the courts or on Congress, the consent of the governed should be viewed as an underenforced constitutional norm. See Sager, *supra* note 147, at 1227. A search of law reviews found seven publications that both cited Dean Sager's article and mentioned the "delegation doctrine" or "nondelegation." Email from William Mills, Professor & Assoc. Librarian, N.Y. Law Sch., to author (Nov. 30, 2018) (on file with author). None of these publications discussed the possibility of using Dean Sager's recommendations to improve enforcement of the consent-of-the-governed norm. *Id.*

156. Sager, *supra* note 147, at 1226.

157. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001). The reliance on the lack of a judicially manageable standard is clearer in the opinion that the Court quotes there, *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

158. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 77, 79 (1938). Landis alternatively suggested the legislative veto, which was struck down in *Chadha*. *Id.* at 77.

political wisdom to put back upon the shoulders of Congress” responsibility for such actions.¹⁵⁹

In 1984, Stephen Breyer, then a court of appeals judge, showed how Congress could structure a statute to efficiently implement Dean Landis’s idea.¹⁶⁰ The statute would force Congress to vote on bills to approve agency actions.¹⁶¹ If approved by both houses, the bill would be presented to the President for signature, thus avoiding the objection that doomed the legislative veto in *Chadha*.¹⁶² The statute would set deadlines by which the House and Senate must vote, limit debate, and bar filibusters on such votes.¹⁶³ Instead of using gridlock or statutes mouthing platitudinous goals to avoid responsibility for hard choices, the legislators would have to vote on specific regulations.

Then-Judge Breyer framed his proposal as a way for Congress to reclaim the power that it lost when *Chadha* struck down the legislative veto and so confined it to actions previously subject to a legislative veto.¹⁶⁴ To serve the purpose of the consent-of-the-governed norm, it would be better to aim the proposal at significant regulations. The proposal could target regulations defined as “significant regulatory action” for the purpose of review by the Office of Information and Regulatory Affairs in the Office of Management and Budget.¹⁶⁵ There would be about as many such regulations as current votes on symbolic public laws such as those naming post offices.¹⁶⁶ President William Clinton issued the executive order containing the current definition, and it has remained largely unchanged under Presidents George W. Bush, Barack Obama, and Donald Trump.¹⁶⁷ Voting

159. *Id.* at 76.

160. Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793–96 (1984).

161. *Id.* at 794.

162. *Id.* at 793.

163. *Id.*

164. *Id.* at 793.

165. Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638, 641–42 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2012). President Clinton’s executive order was in turn a variation on one issued by President Reagan. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638.

166. SCHOENBROD, *supra* note 15, at 153.

167. *See* Exec. Order No. 13,789, § 2(a)(iii), 82 Fed. Reg. 19,317, 19,317 (Apr. 21, 2017) (same); Exec. Order No. 13,609, § 4(f), 3 C.F.R. 255, 257 (2013) (referencing the definition in President Clinton’s executive order); Exec. Order No. 13,422, 3 C.F.R. 191 (2008) (implicitly using the same definition by not altering the original

on significant regulations would require legislators to shoulder more responsibility than voting on the names of post offices, but the Constitution includes voting on regulatory rules in Congress's job description, not naming post offices.

Members of Congress could find the time for such work. Starting with House Speaker Newt Gingrich in the late 1990s, congressional leaders began to push their members to spend most of their time back home in their districts to, in effect, campaign for reelection, reserving only two to three days per week in Washington and only in weeks when Congress is in session. Moreover, even when in Washington, party leaders push their members to spend far more time raising campaign contributions (much of which are donated to the party leaders' war chests) and campaigning for reelection rather than working on legislation.¹⁶⁸ The upshot is that most "lawmakers" spend much less time lawmaking than many weekend golfers spend golfing.¹⁶⁹ Were members of Congress responsible for regulations, however, even party leaders would want them to spend more time considering the regulations on which they would cast votes. In voting on regulations, members of Congress and their staffs would have the benefit of the agency's rule-making record.

There will, of course, sometimes be major fights over regulations in Congress, but that is where the fighting is supposed to be. Congress passing the buck does not stop the fights but rather displaces them to other venues, such as hearings over the confirmation of judicial nominees.¹⁷⁰

The statute implementing the Landis-Breyer proposal should make clear that a bill on a regulation would approve the agency's promulgation of it rather than enact it.¹⁷¹ That way, the regulation once approved would still be subject to judicial review,

definition), *revoked by* Exec. Order No. 13,497, 3 C.F.R. 218 (2010), *reprinted in* 5 U.S.C. § 601 note (2012).

168. SCHOENBROD, *supra* note 15, at 89–90.

169. *Id.*

170. *See, e.g.*, Press Release, Senator Ben Sasse, Sasse on Kavanaugh Hearing: "We Can And We Should Do Better Than This" (Sept. 4, 2018), <https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this> [<https://perma.cc/C9Z9-56SN>].

171. *See* David Schoenbrod, *Responsibility for Regulation Act*, DC-CONFIDENTIAL.ORG (2019), <https://www.dc-confidential.org/responsibility-regulation-act/> [<https://perma.cc/D9WB-WSFN>] (outlining such a bill).

especially on whether the agency acted within its statutory authority.¹⁷² Moreover, the agency could amend the regulation on its own if the amendment is not so important as to constitute “significant regulatory action.”

It may seem strange that a regulation reviewed by both houses of Congress and the President could be reviewed again by a court or amended by an agency. Recall, however, that the legislative process has approved the agency’s promulgation of the regulation rather than enacted the regulation. Surely, Congress can approve the promulgation of a single, known regulation when it now has on the books statutes that approve in advance and wholesale the promulgation of future, and thus unknown, regulations. The former, by making Congress accountable, complies with the consent-of-the-governed norm. Moreover, Congress is within its power to approve an action for one purpose but leave it to the courts to decide its legality for other purposes. For example, in *Tennessee Valley Authority v. Hill*,¹⁷³ the Supreme Court rejected the Tennessee Valley Authority’s argument that Congress’s appropriation of money to build the Tellico Dam insulated the project from objection under the Endangered Species Act.¹⁷⁴

Judicial review is desirable because otherwise an agency could increase its own statutory authority by gaining congressional approval of a regulation exceeding its previous authority under the enabling statute. Such increase of authority would shift the initiative in increasing agency authority from Congress to agencies. Moreover, growing the agencies’ authority implicitly by Congress approving a regulation would create uncertainty as to the scope of agencies’ authority in issuing later regulations.¹⁷⁵

For a final wrinkle, the statute might approve the promulgation of all earlier regulations. Such wholesale approval would

172. See 5 U.S.C. § 706(2)(C) (2018).

173. 437 U.S. 153 (1978).

174. See *id.* at 172–73, 189–90. In this case, the Court used tools of statutory construction to find that Congress did not intend to insulate the dam from scrutiny under the Endangered Species Act. See *id.* at 188. The statute implementing the Landis-Breyer proposal could make the courts’ work easier by stating explicitly that judicial review would be preserved. No Justice in *TVA v. Hill* opined that Congress could not decide one issue (appropriation) and leave another issue unresolved (whether building the dam violated the Endangered Species Act).

175. For more on the desirability of preserving judicial review, see Schoenbrod, *supra* note 171.

not do much to make members of Congress accountable for any old regulation but would acknowledge Congress's failure to do its duty for many decades and so be an initial step toward atonement. The wholesale approval would also shield the old regulations from challenge on consent-of-the-governed grounds and thereby greatly reduce the uncertainty and upset that would arise if the Court began to enforce this norm as to significant regulations.

C. *How Flouting the Norm Benefits Legislators Politically*

Let us call the resulting statute the Responsibility for Regulation Act. Congress has failed to adopt a statute forcing it to comply substantially with the consent-of-the-governed norm because the legislators do not want the responsibility. Consider what happened after some members asked me in 1995 to help design a bill that would increase Congress's responsibility for regulations. I suggested the Landis-Breyer proposal. The result was a bill that members of both parties introduced called the Congressional Responsibility Act.¹⁷⁶

When the bill began to get support, the growing possibility of its passage worried party leaders because legislators would end up with responsibility for hard choices. To avoid responsibility while assuaging popular opinion calling for it, Congress passed in 1996 a sound-alike bill, the Congressional Review Act, and President Clinton signed it.¹⁷⁷ It gives Congress the option of voting on regulations, but not surprisingly the legislators hardly ever opt to take that responsibility. All but one of the exceptions came after the Obama Administration postponed controversial regulations until after the 2016 election to avoid angering voters before they went to the polls and, assumedly, elected Hillary Clinton.¹⁷⁸ As a result, the Obama Administration failed to give Congress notice of many regulations in time to safeguard them from annulment by the Republican President

176. Congressional Responsibility Act of 1995, H.R. 2727, 104th Cong. This bill, unlike my present proposal, was not limited to significant regulations.

177. Congressional Review Act, 5 U.S.C. §§ 801–808 (2018).

178. See Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 190–91, 243–44 (2018); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2162 (2009) (describing the Bush Administration's use of the Congressional Review Act to overturn the Clinton Administration's ergonomics rule).

and Congress that took over in 2017.¹⁷⁹ Yet, the leaders of the Republican majorities in Congress allowed votes on only that small portion of these vulnerable regulations that would not require their members to make hard choices.¹⁸⁰

Long before 2017, however, it became apparent that the Congressional Review Act failed to make elected lawmakers responsible to voters. To ward off blame for failing to take responsibility for regulations, Republicans in the House have repeatedly passed a bill based in part upon the original Congressional Responsibility Act.¹⁸¹ Unfortunately, the new bill is another sham, starting with its new title, Regulations from the Executive in Need of Scrutiny (REINS). The title suggests that the regulations stem from overzealous agencies despite the many statutes requiring agencies to promulgate regulations. Worse still, the bill is full of poison pills that ensure it will never get significant Democratic support, thus making its enactment improbable.¹⁸² Indeed, of the thirty-nine cosponsors of the bill in the Senate in the 115th Congress, none was a Democrat.¹⁸³ The upshot is that

179. See Juliet Eilperin & Darla Cameron, *How Trump is rolling back Obama's legacy*, WASH. POST (Jan. 20, 2018), https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.c0ae88396f22 [<https://perma.cc/R6V5-FYE6>].

180. See, e.g., Sheryl Gay Stolberg, *McConnell Promised to End Senate Gridlock. Instead, Republicans Are Stuck in Neutral.*, N.Y. TIMES (Aug. 3, 2019), <https://www.nytimes.com/2019/08/03/us/politics/senate-votes-mcconnell.html> [<https://nyti.ms/2OTvScz>] (noting the Republican-led Senate had the fewest legislative debates in recent memory, including on urgent issues).

181. See Regulations from the Executive in Need of Scrutiny (REINS) Act of 2017, H.R. 26, 115th Cong. (as passed by House, Jan. 5, 2017).

182. One poison pill: all existing regulations would expire in ten years unless expressly approved by Congress. *Id.* § 809(b). Moreover, the bill lacks realistic procedures to consider the immense pile of regulations in that time frame. In the meantime, people, businesses, and governments of the United States will have little idea which of their existing regulatory protections and obligations will drop dead in a decade. Well before then, the uncertainty would crimp the economy.

Another poison pill bars an agency from presenting a regulation to Congress for approval when the same Congress failed to approve another regulation on the same subject. *Id.* § 801(a)(5). So, if the agency discovers that a rejected regulation would have been approved if worded somewhat differently, the agency cannot present a new version to the same Congress. That would keep majorities in both houses from approving a regulation they would otherwise support. This is antiregulation rather than pro-responsibility. I discuss another poison pill in the text.

183. See *S.21—Regulations from the Executive in Need of Scrutiny Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/21/cosponsors> [<https://perma.cc/MYN6-ZGSH>] (last visited Oct. 13, 2019).

REINS's sponsors can contend that they want to be responsible without ever having to take responsibility.

One poison pill requires agencies to cut the cost of existing regulations to offset the cost of new regulations.¹⁸⁴ So, even if REINS were enacted, Republican legislators could take credit with their party's base for wanting to control regulatory costs while shifting blame to agencies for any reduction in regulatory protection. Meanwhile, so long as some version of the Landis-Breyer approach is not enacted, the Democrats who support existing regulatory statutes can take credit with their party's base for wanting regulatory protection while shifting blame to agencies for the regulatory burdens. This stalemate is a perfect recipe for polarization.

If either the Democratic or Republican leaders in Congress really wanted to submit to "the consent of the governed," they could introduce a bill that strips the REINS Act of its poison pills, make clear that it applies to regulations reducing or increasing regulatory protection, and give it a new title. One example would be the Responsibility for Regulation Act described in Part III.B.

Such a statute would make Congress a more functional, less polarized legislature. In voting on specific regulations, members would have to take responsibility for both the level of regulatory protection and the level of regulatory burdens. So, they would have to face hard choices about trade-offs instead of simply spouting slogans about polarizing positions. Now, in contrast, majority leaders of both parties try to keep hard choices off the floor in Congress. For example, former Republican House Majority Leader Dennis Hastert adopted the so-called Hastert Rule that prevented a bill from reaching the floor unless it was supported by a majority of the majority party.¹⁸⁵ The Democrats, for their part, are adept at structuring bills and designing procedures to hide the hard choices.¹⁸⁶

184. H.R. 26 § 808.

185. See MICKEY EDWARDS, *THE PARTIES VERSUS THE PEOPLE: HOW TO TURN REPUBLICANS AND DEMOCRATS INTO AMERICANS* 104 (2012).

186. For example, the Democratic bill to cut emissions of climate change gases was assiduously structured to hide the hard choices to the detriment of controlling climate change. See David Schoenbrod & Richard B. Stewart, Opinion, *The Cap-and-Trade Bait and Switch*, WALL ST. J. (Aug. 24, 2009, 12:42 PM), <https://www.wsj.com/articles/SB10001424052970203609204574314312524495276> [https://perma.cc/2DQV-RTP9]. Democratic Speaker of the House Nancy Pelosi famously

The extra time members of Congress would need to spend on lawmaking in Washington to grapple with the hard choices would be of benefit because, working in Washington only a couple of days a week, members hardly get to know members of the other party.¹⁸⁷ In contrast, before the 1990s, Congress worked longer in Washington, and members and their families lived in Washington and got to know each other, socially as well as at work.¹⁸⁸ Respected observers of Congress argue that its members and their families spending more time in Washington would reduce the nastiness and gridlock that makes Congress so dysfunctional.¹⁸⁹

In sum, by taking responsibility for regulation, members of Congress would have to make hard choices but would gain personally to the extent they ran for office to have the satisfaction of serving their community. Given our understandably jaundiced view of politicians, it is difficult to bear in mind what psychology shows: that evolution has led most people to want to do the right thing (as well as benefit themselves personally) and this is so across the political spectrum, although our views of what is right differ.¹⁹⁰ Yet, members of Congress cannot be knights questing to serve the public because the current regime forces them to be pawns in the campaign of their party's leaders to become and stay the leaders of the majority.¹⁹¹ As columnist Peggy Noonan recently wrote, "Congress knows how hapless it looks, how riven by partisanship and skins-vs.-shirts dumbness. For many of them it takes the tang out of things. They know it lowers their standing in America. They grieve it.

said that "we have to pass the [health care] bill so that you can find out what's in it," but later asserted that she was misunderstood. See Jonathan Capehart, *Opinion, Pelosi defends her infamous health care remark*, WASH. POST (June 20, 2012), https://www.washingtonpost.com/blogs/post-partisan/post/pelosi-defends-her-infamous-health-care-remark/2012/06/20/gJQAqch6qV_blog.html?utm_term=.d119562e2f20 [<https://perma.cc/X8MH-EKL6>] (alteration in original).

187. SCHOENBROD, *supra* note 15, at 89, 94.

188. *Id.* at 93–94.

189. *Id.*

190. See generally JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

191. See generally MORRIS P. FIORINA, *UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE* (2017).

It embarrasses them. They'd like to be part of something that works, something respected."¹⁹²

*D. How Flouting the Norm Harms
the Legislators' Constituents*

Many people believe the public is better served when agencies rather than Congress run regulation.¹⁹³ This belief is understandable because Congress is less knowledgeable than the agencies and given to posturing or worse. However, the choice is not between the agencies or Congress running regulation but rather whether Congress will bear responsibility for the important role it now plays in regulation.

Most current regulatory statutes order agencies to deliver popular promises, such as health protection, but nonetheless sidestep the hard choices.¹⁹⁴ That way, the members of Congress get much of the credit for the popular promises, and the agency gets much of the blame for the burdens needed to deliver on the promises and the failures to deliver.¹⁹⁵

Take, for example, the pollution that came from refiners adding lead additives to gasoline. The statute enacted in 1970 promised that health would be protected from lead completely by 1976.¹⁹⁶ As an attorney for the Natural Resources Defense Council in the 1970s, I won cases that aimed to push the EPA to do its duty of achieving this goal. Nonetheless, because of pressure on the agency from politicians on both the left and right, the EPA, during both Democratic and Republican administrations, failed to act vigorously to abate the health effects of lead in gasoline until the mid-1980s and then only after the big oil refiners found that they could save money if lead additives to gasoline were banned.¹⁹⁷

192. Peggy Noonan, Opinion, *Elijah Cummings and the Little Sisters*, WALL ST. J. (Oct. 24, 2019, 6:27 PM), <https://www.wsj.com/articles/elijah-cummings-and-the-little-sisters-11571956039> [<https://perma.cc/HE4N-U44F>].

193. See, e.g., Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1183 (2018) (arguing that the traditional nondelegation doctrine may not "promote social welfare" based in part upon the superior knowledge of the agencies).

194. See, e.g., SCHOENBROD, *supra* note 15, at 43.

195. See *id.* at 88–94.

196. *Id.* at 44.

197. On the lead litigation and its consequences, see generally SCHOENBROD, *supra* note 42, at 29–38.

To put the consequences in perspective, consider that in 2016, President Obama declared a state of emergency because nearly one-twentieth of the children aged five and under of Flint, Michigan, had blood lead levels of at least five micrograms.¹⁹⁸ In the 1970s, the *average* blood lead level in children across the United States was three times that level.¹⁹⁹ Back in the 1970s, medical experts told me that, although lead in paint caused fatally high lead levels in some children, the population-wide contamination came primarily from lead in gasoline. Congress's unqualified promise that the Clean Air Act would "protect health" was a pious fraud.

I began to wonder what would have happened if Congress had itself enacted the rule that would set the pace at which to cut lead in gasoline. Doing nothing on lead was not an option because in 1970 "Get the Lead Out," as some bumper stickers read, was a popular demand.²⁰⁰ Congress itself, in a singular exception to the statute's general flight from responsibility, decided that new cars had to emit 90 percent less of a list of pollutants by 1975 but left lead off the list.²⁰¹ The statute instead ordered the EPA to fully protect health from airborne lead by 1976.²⁰² If Congress could not have passed the buck on lead, it would have required, I estimated, at least a 50 percent cut in the amount of lead in gasoline by 1975.²⁰³ Using the EPA health data, I showed that this quicker start on lead would have averted about 50,000 deaths in the United States, about equal to American deaths in the Vietnam War.²⁰⁴

It is, of course, politically profitable for Congress to issue statutory orders to agencies that allow legislators to take credit but shift blame—so politically profitable that Congress radically increased the number of orders to the EPA in the 1990 version

198. Yanan Wang, *Untold cities across America have higher rates of lead poisoning than Flint*, WASH. POST (Feb. 4, 2016, 5:53 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2016/02/04/untold-cities-across-america-have-higher-rates-of-lead-poisoning-than-flint> [https://perma.cc/D59P-6VYF].

199. Kathryn R. Mahaffey et al., *National Estimates of Blood Lead Levels: United States, 1976–1980: Association with Selected Demographic and Socioeconomic Factors*, 307 NEW ENG. J. MED. 573, 575 (1982).

200. See SCHOENBROD, *supra* note 42, at 29–30.

201. *Id.* at 34.

202. *Id.* at 35.

203. *Id.* at 36.

204. See *id.* at 36–38.

of the Clean Air Act. The phrase “the administrator . . . shall” appears 940 times.²⁰⁵ Many of the orders must be performed repeatedly. The orders are lengthy, which helps explain why the statute’s text would fill a 450-page book. Long statutes full of complicated orders are not unusual.²⁰⁶

The legislators are sufficiently skilled to issue many lengthy orders, yet still avoid blame for the hard choices. For example, when President Obama’s EPA issued a new ozone standard under the statutory mandate to “protect health” from air pollutants in 2015, Democratic legislators could criticize the regulation as insufficiently tough on pollution and Republican legislators could criticize the regulation as too tough on the economy.²⁰⁷

One result of such narrow delegation is extraordinary complication. As said of the Clean Air Act by Gina McCarthy, whom President Obama appointed assistant administrator of EPA and then administrator, “[E]ach sector has 17 to 20 rules that govern each piece of equipment and you’ve got to be a neuroscientist to figure it out.”²⁰⁸ The complication requires big business to hire staffs of costly experts and suffer even more costly delays in getting permits. The consequences are worse for smaller businesses, farmers, state and local governments, and other entities subject to federal regulation but less able to afford the experts.

Another result is that the statutes’ orders grow obsolete quickly because they are based upon circumstances and understandings that change.²⁰⁹ Yet, because the statutes were de-

205. Email from Iain MacDonald, Research Assistant, N.Y. Univ. Sch. of Law, to author (July 19, 2009) (on file with author).

206. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).

207. See Anthony Adragna, *Republicans Criticize Ozone Rule for Impacts; Democrats Lament Lack of Tougher Standard*, 46 ENV’T REP. 2901 (2015). Some members of Congress asserted the EPA went too far and that “it’ll be important for Congress to fight back,” *id.* at 2901 (quoting Senator Jeff Sessions) (internal quotation marks omitted), but others expressed disappointment with the EPA for the rule being “not as strong as [they] had hoped.” *Id.* (quoting Representative Frank Pallone) (internal quotation marks omitted).

208. Ross Sandler & David Schoenbrod, Opinion, *Holding Congress Accountable*, REG. REV. (Feb. 19, 2018), <https://www.theregreview.org/2018/02/19/sandler-schoenbrod-holding-congress-accountable/> [<https://perma.cc/48QH-UNBU>] (internal quotation marks omitted).

209. *Id.*

signed to shift blame to the agencies, members of Congress have no incentive to revise the statutes, even as they grow increasingly dysfunctional for their constituents.²¹⁰

Consider Congress's failure to update the environmental statutes, almost none of which have been amended for nearly three decades despite rapid changes in our understanding of environmental problems and how to deal with them.²¹¹ In a project organized by New York Law School and New York University School of Law in 2007, some fifty environmental law experts from across the ideological spectrum set out to show Congress how to update these obsolete statutes. The project's leaders—Professor Richard Stewart, former chair of the Environmental Defense Fund, his colleague on the New York University faculty, Professor Katrina Wyman, and I—summarized the results in a book, *Breaking the Logjam: Environmental Protection That Will Work*.²¹² The focus was on how to get more environmental protection at lower cost rather than how clean is clean enough. Our proposals included greater use of market-based alternatives instead of inefficient command-and-control regulation, leaving essentially local issues to state and local government, and imposing direct federal regulation of national issues such as interstate pollution.

Democrats and Republicans on Capitol Hill told us in private they wished our reforms were already in the statutes, but that Congress would not enact them because doing so would require legislators to take responsibility. So, for example, Congress did not adopt the *Breaking the Logjam* proposal to deal with the large stationary sources of interstate major pollutants by enacting a national cap-and-trade system.²¹³ That system would make it profitable to invent and use less expensive ways to cut pollution.²¹⁴ Instead, the current statute requires the EPA to tell

210. *Id.*

211. The exception is the Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601–2697 (2012 & Supp. V 2018)), which was amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 (2016) (codified in scattered sections of 15 U.S.C. §§ 2601–2629).

212. SCHOENBROD ET AL., *LOGJAM*, *supra* note 5.

213. *See id.* at 87–94.

214. *See id.* at 88–89.

the upwind states to limit pollution sufficiently to reduce harm in downwind states.²¹⁵

This wackadoodle system serves members of Congress by interposing the EPA and state officials between them and their constituents, all while making pollution control more expensive. The current system results in more pollution that kills constituents. During the Obama Administration, the EPA calculated that the existing statute would halve ozone and particulate pollution, which are the major air pollution killers, thereby adding six months to the lifespan of the average American. A congressionally imposed national cap-and-trade system could easily halve the pollution again and, based upon the EPA's health analysis, add another three months to the average life.²¹⁶ So, the average young person will die a quarter year sooner under the current statute.

In sum, with Congress exerting power over agencies, the choice is no longer whether experts in agencies or legislators should run regulation. Rather, the choice is whether Congress shall bear responsibility for its role in regulation. By delegating the legislative power to make regulatory law, members of Congress evade responsibility for how they wield power and, as a result, wield it irresponsibly.²¹⁷

Consider how the incentives of members of Congress would change if they had to vote on regulations. They would then bear personal responsibility for the failure to deliver popular benefits and the imposition of unpopular burdens. A challenger in a future election could then blame the incumbent for inflicting bad consequences on voters. It is recorded votes on rules—not debate, sound bites, or votes for popular goals—that would make members of Congress responsible for regulations in future elections. The upshot: although the legislators themselves would spend much less time on each regulation than does the agency and voters would not read the regulations, the legisla-

215. *See id.* at 92.

216. Bill Pedersen & David Schoenbrod, *The Overwhelming Case for Clean Air Act Reform*, 43 ENV'T L. REP. 10,969, 10,969 (2013).

217. They can, however, influence regulation in other ways, such as through the power of the purse and the power to investigate, as Professor Josh Chafetz convincingly shows. *See generally* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS (2017). Such influence can be wielded in ways that allow the legislators to escape responsibility for the hard choices.

tors would still fear the blame that they might come to bear for the consequences of their votes in the next election, or the next, or the next.

As Dean Landis wrote, his suggestion would “have the administrative as the technical agent in the initiation of rules of conduct, yet at the same time to have the legislative share in the responsibility for their adoption.”²¹⁸ Responsibility for significant regulation would better align the interests of legislators and their constituents. With legislators bearing responsibility for the consequences of regulation for constituents, more of the skill that the legislators now employ to make themselves look good would be put in service of producing regulations that better please their constituents. Agency experts would become Congress’s allies in showing how to update statutes to allow agencies to promulgate regulations that produce better consequences for constituents. In sum, the interests of the legislators and their constituents would be better aligned.

Congress will not, of course, construct a monument in memory of the 50,000 victims of its failure on lead in gasoline even though it funded a monument in memory of the like number of American service members who died in the Vietnam War. Nor will it build monuments for the millions of other victims of its shirking. The Court should start to do its job and thereby stop endorsing Congress’s pious frauds.

IV. WHAT THE COURT SHOULD DO

A. *The Court’s Job*

A book published in May 2019 by Professor Lawrence Lessig, *Fidelity & Constraint: How the Supreme Court Has Read the American Constitution*,²¹⁹ helps show how the Court could, and why it should, substantially enforce the consent-of-the-governed norm. In its almost 600 pages, the book provides a model of “the practice of the Supreme Court as it has interpreted our Constitution” that explains the work of Justices from across the ideological spectrum from the early years to modern times.²²⁰

218. LANDIS, *supra* note 158, at 76.

219. LESSIG, *supra* note 93.

220. *Id.* at 2. Professor Lessig asserts that the model describes the behavior of Justices on the Left and Right. *Id.* at 17.

The model has two parts: “fidelity to meaning,” referring to the meaning of the Constitution’s provisions, and “fidelity to role,” referring to the constraints on the enforcement of that meaning imposed by the Court’s role in a republic.²²¹ Professor Lessig writes that decisions prompted by constraints “are instances of *infidelity* (to meaning) in order to preserve or enable the capacity of the judicial institution more generally.”²²²

Professor Lessig does not himself apply this model to the consent-of-the-governed norm. Nonetheless, his analysis of fidelity to role is applicable to the impediments to that norm’s enforcement.²²³

The first impediment to full enforcement of the norm discussed in Part II is the inability of Congress to make all the federal rules of private conduct and thereby to fully conform to the original meaning of the norm. The Court requiring the impossible of Congress would jeopardize the authority of the Court.²²⁴ Originalists could avoid this impossibility by recognizing such impracticality as an impediment to judicial enforcement.²²⁵

The second impediment to enforcement discussed in Part II is the lack of a judicially manageable test. Professor Lessig states the Court bows out when it lacks a judicially manageable

221. See *id.* at 5. Fidelity to meaning asks, according to Professor Lessig, “How does a judge preserve the meaning of the Constitution’s text within the current interpretative context?” *Id.* at 16. Professor Lessig describes the process as one of “translation.” *Id.* at 49–67. He argues that both the Left and Right do it. See *id.* at 257.

222. *Id.* at 451 (emphasis added).

223. Professor Lessig does mention *Schechter* and *Panama Refining*, but does not use his model to analyze them. See *id.* at 88–89, 92–93.

224. As Justices sometimes state, “the Constitution . . . is not a suicide pact.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

225. Jurists who are not originalist could, according to Professor Lessig’s model, translate original meanings to achieve their purposes in the modern context. An example of such a translation is the power to “regulate Commerce . . . among the several States.” U.S. CONST. art. I, § 8, cl. 3. That clause was meant to limit Congress’s power, but as the amount of interstate commerce grew, the original meaning of the clause put no substantial limit on Congress’s power. The Justices, Professor Lessig concludes, came to see this “effectively unlimited power of the federal government as inconsistent with the Framers’ design. They adopted an interpretive strategy to correct for that inconsistency—translation.” LESSIG, *supra* note 93, at 92. Similarly, a jurist who embraced Professor Lessig’s concept of translation might read the consent-of-the-governed norm to have made Congress responsible in a way thought feasible in early times. In our more complicated times, such a jurist could then translate the norm to mean that Congress must make itself responsible to a practical extent.

test because otherwise it would seem to be acting politically, thereby jeopardizing its credibility as a judicial institution.²²⁶ The state-the-rule definition of the norm is judicially manageable because it rides on a difference of kind (lawmaking versus law interpretation and application), but the “intelligible principle” test is not.²²⁷ The question is whether the Justices can come up with a judicially manageable way to deal with the first impediment. The answer will be discussed in Part IV.B.

The third impediment discussed in Part II is strong public opinion in favor of delegation. As was shown, there is no such strong opinion now. When overwhelming political opposition does exist, however, it is another constraint, according to Professor Lessig.²²⁸ That the Court would back down in the face of political opposition may seem strange given that the Constitution is supposedly counter-majoritarian. That is why Professor Lessig notes, “It is in [the nature of this constraint] that its nature cannot be announced.”²²⁹

Professor Lessig goes on to state that because political opposition sufficient to make the Court suppress the meaning of the Constitution “was a kind of *force majeure*, then it follows that when the force is removed, the obligation to return to the Constitution’s . . . meaning returns as well.”²³⁰

The fourth impediment to enforcement of the consent-of-the-governed norm discussed in Part II is reliance on Congress’s ability to delegate. The four impediments are related. The judicially unmanageable “intelligible principle” test was adopted as a way of avoiding giving Congress an impossible task, and in turn, it built reliance on the current regulatory system. The Court’s attempt to enforce the norm without showing how to cope with that reliance could then result in overwhelming political opposition.

226. See LESSIG, *supra* note 93, at 42. Thus, the Court cannot seem to be acting politically rather than judicially. *Id.* at 154–57.

227. David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224 (1985).

228. See LESSIG, *supra* note 93, at 450.

229. *Id.* at 452.

230. *Id.* at 431. Professor Lessig cites other examples. See *id.* at 85–90, 357–63.

Professor Lessig shows that the Court has repeatedly adopted new ways to better enforce constitutional norms.²³¹ As he argues, “[W]hat a court needs when it recognizes failure is the freedom to try again: ‘Our aim is to preserve X. We have tried techniques A and B; they’ve proven too costly. We’ll now try C.’”²³² To enforce the consent-of-the-governed norm, the Court needs a judicially manageable test with which Congress could comply and a way to take account of reliance on the current regulatory system.

Searching for such a test is the Court’s job. The search can succeed.

B. *How the Court Could Do Its Job*

The design of such a test, and the choice of how Congress would comply with it, will have policy implications. To avoid intruding into policy more than necessary to enforce constitutional norms, courts often try to get political branches to tackle such policy choices in a way that is consistent with the norms before themselves taking more intrusive action.²³³ So, in cases where legislative districting violates the one-person, one-vote norm, courts give the state legislature an opportunity to reapportion the districts—a decision with profound effects on who gets elected—in a way that complies with the Constitution. As the Court stated in *Reynolds v. Sims*,²³⁴ “[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.”²³⁵

231. See, e.g., *id.* at 172 (“If [Justice] Jackson’s view was that the Court couldn’t enforce the limits of the Constitution because he couldn’t craft a judicially administrable rule, that left open the possibility that other, more creative, justices could do so later.”); *id.* at 192–94 (discussing the opinion by Chief Justice Roberts concluding that the Affordable Care Act exceeded Congress’s commerce power but upholding it under the taxing power); *id.* at 196–204 (discussing the doctrine of state and federal immunity and the process of translation in the Court’s analysis despite political pressures).

232. *Id.* at 269.

233. See generally ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003). We showed that courts can prompt a political branch to tackle a question of policy in a way that respects consent of the governed. See *id.* at 193–222.

234. 377 U.S. 533 (1964).

235. *Id.* at 586.

The upshot from giving elected officials a chance can be, if all goes well, a division of labor in which the elected officials make most of the policy choices and the judges stick largely to enforcing rights. This approach might help the Court get Congress to take substantial responsibility for regulation even though the legislature in this matter sits high on Capitol Hill and prefers to avoid responsibility. One reason is that, as shown in Part II.A, the Court would have an ally that is even more powerful than Congress: public opinion.

Calling upon elected officials to help decide how, but not whether, to remedy the most significant violations of the consent-of-the-governed norm is better than starting by rolling out the guillotine to kill some statute found to violate the norm. The call should make the following points:

- (1) Members of Congress, having sworn to uphold the Constitution, are duty bound to bring themselves into compliance with the consent-of-the-governed norm to the extent practical;
- (2) It would be practical for them at the very least to vote on the regulations deemed significant under the longstanding executive order;
- (3) The process through which Congress organizes itself to cast such votes is up to Congress, but one option is the Landis-Breyer proposal;
- (4) That process must, however, comply with Article I, including its requirement that “the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal;”²³⁶ and

236. U.S. CONST. art. I, § 5, cl. 3. Compliance with the Journal Clause is vital to make members of Congress personally responsible for the exercise of legislative powers. See *Field v. Clark*, 143 U.S. 649, 670–71 (1892). Such responsibility is in turn vital to achieve the key purposes of Article I, including consent of the governed. *Field v. Clark* goes on to state in dicta that the Court has a duty “to give full effect to the provisions of the Constitution relating to the enactment of laws.” *Id.* at 670. The Court fulfilled that duty in *INS v. Chadha*, 462 U.S. 919 (1983), and *Clinton v. City of New York*, 524 U.S. 417 (1998). In those two cases, the Court insisted that Congress must comply with the Article I legislative process in exercising legislative powers. *Clinton*, 524 U.S. at 438–39; *Chadha*, 462 U.S. at 945. There is no denying that a vote to comply with the consent-of-the-governed norm is the exercise of a legislative power or that the Journal Clause is part of the Article I legislative process. Although *Chadha* and *Clinton* dealt with departures from Article I, Section 7 and the Journal Clause invoked here is in Section 5, that is a distinction without a

- (5) If the Court finds that Congress has failed to do its duty by a date certain, the courts, also duty bound to enforce the Constitution, will act. Such action would be to strike any new rule of private conduct brought before the Court whose promulgation by an agency has not been approved through the Article I legislative process, unless the government shows that the rule is not significant.

Optimally, but not necessarily, the Court would issue the call to Congress in a case that does not directly threaten the reliance interest in delegations to expert agencies. *Chadha* or *Clinton* suggest the kind of case I have in mind. Both involved statutes that, as I have argued, could be described as delegating legislative power but not to an expert agency.²³⁷ Other such cases could come along, as suggested by President Trump's supposed order to American companies to stop doing business in China.²³⁸

If Congress does not respond to the call by the date certain, the Court would replace the judicially unmanageable "intelligible principle" test with one geared to whether the regulation is significant. A test based upon the significance of each rule has a strong foundation in precedent. As already noted, the Court in its 1825 decision in *Wayman v. Southard* stated that Congress may delegate power to issue "minor regulations."²³⁹ This language in *Wayman* does not appear in Justice Gorsuch's dissent in *Gundy*.²⁴⁰

difference. Section 7 also contains a separate Journal Clause applicable to votes to override a presidential veto. U.S. CONST. art. I, § 7, cl. 2. Both Journal Clauses require recording "the yeas and nays" in matters arousing important disagreement. *Id.*; U.S. CONST. art. I, § 5, cl. 3.

The House of Representatives now uses an electronic method to record "the yeas and nays" without the time-consuming process of calling each legislator by name. If, however, there is some practical impediment to comply with the yeas and nays requirement of Article I, Section 5 in every context, Congress can clearly comply with it in implementing a process like the Landis-Breyer proposal because Congress can limit its application to significant regulations and bar amendments. Thus, the requirement is a constitutional norm the courts can enforce in the context of enforcing substantial compliance with the consent-of-the-governed norm.

237. See *supra* Part.II.A.

238. See Keith Bradsher & Alan Rappeport, *Trump Ordered U.S. Companies to Leave China. Is That Possible?*, N.Y. TIMES (Aug. 24, 2019), <https://www.nytimes.com/2019/08/24/business/trump-china-trade.html> [<https://nyti.ms/2zjvTvA>].

239. 23 U.S. (10 Wheat.) 1, 45 (1825).

240. See *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

To define significant regulations in modern circumstances, the Court could rely upon the definition of “significant regulatory action” in the executive order that has been in force for more than a quarter century under two Democratic and two Republican Presidents.²⁴¹ In particular, the Court could rely upon the first part of the executive order’s definition that defines significant regulations as having an “annual effect on the economy of \$100 million or more.”²⁴² So, a regulation would be deemed significant if it increased *or* decreased costs by such amount. The \$100 million test does not, of course, appear in the Constitution, but the Court regularly adopts bright-line tests to make judicially manageable enforcement of norms that the Constitution states in amorphous terms.²⁴³ The Court, however, would not need to adopt such a test if Congress itself adopts a definition that is at least as inclusive. And, even if Congress fails to so do and the Court adopts the \$100 million definition,

241. Exec. Order No. 12,866, § 3(f), 3 C.F.R. 638, 641–42 (1994), *reprinted as amended in* 5 U.S.C. § 601 note (2012).

242. *Id.* § 3(f)(1).

243. Here are some examples. Faced with enforcing the constitutional provision that requires the President to get the consent of the Senate for important appointments except “during the Recess of the Senate” but does not define “recess,” U.S. CONST. art. II, § 2, cl. 3, the Court decided that Senate confirmation is presumptively needed if it is out of session for less than ten days. *NLRB v. Canning*, 573 U.S. 513, 538 (2014). Faced with enforcing the Equal Protection Clause’s requirement that both houses of the state legislature must be apportioned based on population, U.S. CONST. amend. XIV, § 1, but acknowledging that some deviations from population equality may be necessary, the Court decided that population deviations of 10 percent or less were insufficient to make a *prima facie* case of invidious discrimination. *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Faced with enforcing the Sixth Amendment’s right to a jury trial without defining the size of that jury, U.S. CONST. amend. VI, the Court decided that a jury with less than six members would impair the purpose and function of the jury. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978). Faced with enforcing the constitutional provision requiring probable cause for searches and seizures without defining a timeline for providing probable cause, U.S. CONST. amend. IV, the Court decided that determination of probable cause within 48 hours of arrest will as a general matter comply with the promptness requirement of the Fourth Amendment. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). The Court also deals with amorphous constitutional norms by adopting bright-line tests that are not numerical. *See, e.g., Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (holding that police cannot initiate an interrogation after a defendant has requested counsel), *rev’d by* *Montejo v. Louisiana*, 556 U.S. 778 (2009); *Michigan v. Summers*, 452 U.S. 692, 699–701, 704–05 (1981) (finding an exception to the Fourth Amendment’s probable cause requirement for temporary detentions when there is a warrant to search a house for drugs).

Congress could supplant it later by adopting a definition that is at least as inclusive.

The executive order's definition goes on to include additional grounds for finding a regulation significant.²⁴⁴ These additional grounds are, however, amorphous and so would raise problems of judicial manageability. The Court should leave these additional grounds out of its own test of significance. Congress could, however, include them in any statute it passes in response to the Court's call for action or later.

Professors Steven Calabresi and Gary Lawson have also suggested a test based upon the \$100 million figure in the executive order.²⁴⁵ They helpfully point out that although this "line is concededly arbitrary . . . it is not obvious to us why an under-inclusive arbitrary line is worse than no line at all."²⁴⁶

Unlike the "intelligible principle" test, the \$100 million test would be judicially manageable. "Intelligible principle" is unmanageable because it looks to how much the statute says about the goals that the agency must pursue. With statutes calling for agencies to pursue a wide variety of goals—such as protecting health, stopping unfair trade practices, or preventing discrimination—rank ordering how much the statutes say about goals would be like comparing the proverbial apples and oranges. Nor is there any objective scale on which to set a cut-off as to how much intelligibility is enough.²⁴⁷

In contrast, the \$100 million test does provide an objective scale. Of course, determining the economic impact of a regulation does involve estimating, but the courts could put the burden on the agency to show that its regulation has an impact

244. The definition goes on to include regulatory actions that "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities." Exec. Order No. 12,866, § 3(f)(1), 3 C.F.R. at 641. It would be consistent with the consent-of-the-governed norm if the President amended the definition to, say, define as significant regulations with annual benefits of \$100 million or more or adjusted the \$100 million cut-off to take account of inflation.

245. Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 856–57 (2018).

246. *Id.* at 857.

247. See Schoenbrod, *supra* note 227, at 1231, *cited with approval* in *Gundy v. United States*, 139 S. Ct. 2116, 2140 n.62 (2019) (Gorsuch, J., dissenting); *see also* *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 79 (2015) (Thomas, J., concurring in the judgment); *Printz v. United States*, 521 U.S. 898, 927 (1997).

that is below the benchmark. Reviewing such a showing is standard judicial work. Alternatively, Congress could assign the estimation job to the Congressional Budget Office.²⁴⁸

The new test would be judicially manageable even under the strict concept of manageability the majority in *Rucho v. Common Cause*²⁴⁹ used to find that the courts could not judge claims of unfair partisan gerrymandering.²⁵⁰ The majority found that claims of political gerrymandering “have proved far more difficult to adjudicate” than those claiming violations of the one-person, one-vote rule.²⁵¹ “The basic reason is that, although it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, ‘a jurisdiction may engage in [some] constitutional political gerrymandering.’”²⁵² In contrast, the original meaning of the consent-of-the-governed norm is every bit as absolute as that of the one-person, one-vote norm.

There are, however, impediments to complete judicial enforcement of both the one-person, one-vote norm and the consent-of-the-governed norm as originally defined. With one-person, one-vote, the impediment is that the state has a legitimate interest in matters other than complete equality in the populations of legislative districts. One such interest is making legislative boundaries correspond to municipal boundaries. So, courts presumptively uphold the districting if the deviations among the populations of districts do not exceed ten percent.²⁵³ With

248. Calabresi & Lawson, *supra* note 245, at 856 n.163.

249. 139 S. Ct. 2484 (2019).

250. *See id.* at 2500–02.

251. *Id.* at 2497.

252. *Id.* (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999)).

253. *See Brown v. Thomson*, 462 U.S. 835, 842–43 (1983); *see also Reynolds v. Sims*, 377 U.S. 533, 566 (1964); SANDRA M. STEVENSON & WENDY VAN WIE, 6 ANTI-EAU ON LOCAL GOVERNMENT LAW § 86.04(2) (2d ed. 2019); John P. Ludington, Annotation, *Constitutionality of Legislative Apportionment: Supreme Court Cases*, 77 L. ED. 2d 1496 (2012).

The *Rucho* majority goes on to argue that:

Even if we were to accept the dissent’s proposed baseline, it would return us to “the original unanswerable question (How much political motivation and effect is too much?).” Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? . . . The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion.

the original meaning of the consent-of-the-governed norm, one impediment is Congress cannot enact all the rules, as discussed in Part II.

With the one-person, one-vote norm, the impediment to complete judicial enforcement—other legitimate state interests—guides how much deviation from equality to allow. With the consent-of-the-governed norm, the impediment to judicial enforcement—legislative practicality—could guide the choice of a cutoff on the significance of regulations.

Although deciding how best to circumvent the impediments to enforcement of the consent-of-the-norm would require the exercise of some discretion, requiring Congress to vote on significant regulations would circumvent the biggest embarrassment that would result from instructing the lower courts to distinguish between “important subjects which must be entirely regulated by the legislature itself,” and “those of less interest, in which a general provision may be made, and power given to those who are to act . . . to fill up the details.”²⁵⁴ The courts would not be seen to be picking and choosing among regulatory statutes or agency actions. Rather, the norm would apply to all new regulations with an annual effect on the economy of \$100 million or more under all statutes, whether they increase or decrease regulatory protection.

That Congress should vote on all significant regulations already has a certain bipartisan pedigree. As already noted, it came from a leading New Dealer (Dean Landis) and was elaborated by a Supreme Court Justice who is an expert in regulation and was appointed by a Democratic President (Justice Breyer). Subsequently, Republican legislators in the House have repeatedly passed the REINS bill, which incorporates a version of the Landis-Breyer proposal. Yet, as shown in Part III.C, both parties in Congress have worked to avoid subjecting their members to the responsibility the Landis-Breyer approach would impose.

Rolling out the guillotine would be easier after having called upon Congress to address the problem and when single regulations, rather than entire statutes, are to be struck. Previously

Rucho, 139 S. Ct. at 2505 (citations omitted). In contrast, the Court found that there would be conflicting concepts of what constitutes reasonable fairness in legislative districting. *See id.* at 2504–07.

254. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

having discussed the norm and Congress's failure to adhere to it to the extent practical, the Court's constitutional intervention would not come as surprise. Moreover, the Court will have made clear it prefers Congress to make the policy judgments needed to comply with the norm. Indeed, even if Congress initially fails to decide how it will bear responsibility and the Court holds that it will strike significant regulations Congress has not approved, Congress could come up with an alternative way of taking responsibility. Professor Lessig argues that the Court can allow such leeway.²⁵⁵

Congress might respond constructively to a call from the Court to honor the consent-of-the-governed norm despite the credit-claiming, blame-shifting advantage its members now reap from delegation. The call would highlight the clash between their current behavior and, as discussed in Part II.A, the public's overwhelming desire for a government based upon a consent of the governed and, in particular, for a Congress that takes responsibility for policy. As such, failure of the lawmakers in Congress to take responsibility for the laws would bring blame. Still more blame would come from failing to adopt reforms that would remove the cloud of uncertainty as to the validity of existing regulations. If Congress fails to remove that cloud, the Court would have strong justification for itself deciding not to apply the new test to old regulations.²⁵⁶

255. Professor Lessig argues that courts should accede to a legislature's way of complying with the meaning of the Constitution "where the legislature has done the important work of translation itself." LESSIG, *supra* note 93, at 272.

256. The Court could avoid applying the new test to old regulations despite the statement in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), that:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . [W]e now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases.

Id. at 97. Yet, as previously described in Part III.C, applying a new and stronger test of the consent-of-the-governed norm to old regulations would cause great pain given the ensuing uncertainty about the validity of the huge volume of old regulations. Fortunately, however, *Harper* should not control here because the reasons the Court gave in that case either do not apply here or do so very weakly, especially given that *Harper* itself announced its own, new judicially created retroactivity rule. What the Court did there in one direction, it can do again in another direction on another quite distinct issue. One reason offered in Justice Thomas's opinion for the Court in *Harper* is that the judicial function "strips us of the quin-

Moreover, both businesses and advocates of strong regulation would rankle at agencies being unable to change regulations. Incumbents could take credit now for enacting the reform, and responsibility for the hard choices on regulation could be postponed until after the next election. That responsibility would apply to both parties whereas now either party in Congress that unilaterally gives up the credit-claiming, blame-shifting advantages of delegation would put itself at an electoral disadvantage. Finally, a Congress whose approval ratings have dipped as low as the single digits in recent years lacks the credibility with the public to put up much of a fight.²⁵⁷ Moreover, a failure by Congress to respond constructively would legitimate more intrusive judicial action.

Eventual success in getting Congress to take responsibility for significant new rules would tend to reduce the impediments to the Court enforcing the norm and enable it to require Congress to begin gradually to take responsibility for the most important old rules. Moreover, as Christopher DeMuth has

tessentially 'legislat[ive]' prerogative to make rules of law retroactive or prospective as we see fit." *Id.* at 95 (alteration in original) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)). This point is too broad because, as Justice Scalia recognized, "[A] certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action . . ." *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting). Another reason offered in Justice Thomas's opinion is that "selective application of new rules violates the principle of treating similarly situated [parties] the same." *Harper*, 509 U.S. at 95 (alteration in original) (quoting *Griffith*, 479 U.S. at 323) (internal quotation marks omitted). Yet applying the consent-of-the-governed norm retroactively would, given the ensuing uncertainty and upset, harm just about everyone. Moreover, the parties subject to the old regulations did not rely upon the Court applying the new test of the norm to old regulations and so have no reliance interest in the courts' doing so. Finally, Justice Scalia's concurring opinion in *Harper* offers an additional reason for retrospectivity: "Prospective decisionmaking is the handmaid of judicial activism . . ." *Id.* at 105 (Scalia, J., concurring). The Court's earlier carving of a giant exception to the consent-of-the-governed norm constitutes massive judicial activism. In sum, if need be, a strong case can be made that the rule in *Harper* should not apply in the consent-of-the-governed norm's application to old regulations.

257. *Americans' Approval of Congress Drops to Single Digits*, N.Y. TIMES (Oct. 25, 2011), https://archive.nytimes.com/www.nytimes.com/interactive/2011/10/25/us/politics/approval-of-congress-drops-to-single-digits.html?_r=0 [<https://perma.cc/5TL8-8BP8>]. Recent Gallup polls found that voters approved of how the Supreme Court does its job by a margin of 54 to 42 percent but disapprove of how Congress does its job by margin of 68 to 27 percent. Gallup Poll, *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/VQ5H-TLX6>] (last visited Jan. 3, 2020); *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/KH5T-ND69>] (last visited Jan. 3, 2020).

suggested, a President who wants Congress to take responsibility for regulation has diverse means to force Congress to do so.²⁵⁸

V. FAR-FETCHED RATIONALES FOR IGNORING THE NORM

A. *The Constitution Permits Congress to Leave Lawmaking to Agencies*

Professors Eric Posner and Adrian Vermeule contend that “a statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power” and that no authority to the contrary appears until the late 1800s.²⁵⁹ For example, they argue that Locke’s statement that a legislature may not delegate its legislative powers “is fully consistent” with their position that Congress may pass statutes that authorize the executive branch to make law but may not authorize it to pass statutes.²⁶⁰

Professors Posner and Vermeule’s article reveals the weakness of their argument by failing to even mention, let alone trying to distinguish, *Federalist No. 75*, *Fletcher v. Peck*, or *Gibbons v. Ogden*.²⁶¹ The article also reveals its weakness by contending

258. Christopher DeMuth, Presidential Reform of the Regulatory State 18 (Feb. 2019) (unpublished manuscript), <https://ccdemuth.com/wp-content/uploads/2019/05/Presidential-Reform-of-the-Regulatory-State.pdf> [<https://perma.cc/P34Z-Q3TG>].

259. Posner & Vermeule, *supra* note 26, at 1721–22.

260. *Id.* at 1727. Similarly, Professor Cynthia Farina argues that, because the President can delegate, so can Congress. Cynthia R. Farina, *Deconstructing Non-delegation*, 33 HARV. J.L. & PUB. POL’Y 87, 90–93 (2010). For a rousing rebuttal, see Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL’Y 147, 178–81 (2017).

261. Professors Posner and Vermeule do discuss *Brig Aurora* but, in quoting it, omit the language that indicates the Court upheld the statute on the basis that it gave the President the power to apply a rule by finding “the occurrence of any subsequent combination of events” rather than to proclaim a rule. Posner & Vermeule, *supra* note 26, at 1737–38. In particular, they omit the sentence that suggests that the President’s job was to find facts rather than make law: “The 19th section of that act declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation, without limitation upon the occurrence of any subsequent combination of events.” *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813). They may have missed the importance of this language because they looked for evidence of the “intelligible principle” in *Wayman v. Southard* and unsurprisingly not finding it, conclude the Court displayed no definitive signs of a concern with delegation until late 1892. Posner & Vermeule, *supra* note 26, at 1722, 1738–39.

Professor Jerry Mashaw objects to characterizing the President’s role as one of rule application. “The Court’s description of the President’s role, which involved

that its argument is consistent with “[t]he Framers’ principal concern [of] legislative aggrandizement—the legislative seizure of powers belonging to other institutions.”²⁶² That leaves out a concern that is at least as fundamental to the Framers—consent of the governed. As Justice Kagan recently wrote, “If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign.”²⁶³ Yet, Professors Posner and Vermeule do not even mention *Federalist No. 51* and its position that, to repeat, “[a] dependence on the people is, no doubt, the primary control on the government.”²⁶⁴

B. Even Early Congresses Ignored the Norm

Professor Jerry Mashaw contends that, whatever the people were told about consent of the governed in the late 1700s, early elected officials never felt obliged to comply with any such norm.²⁶⁵ He writes, “From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking.”²⁶⁶

He goes on to state that “any claim that early Congresses declined to delegate broad authority to others must . . . conjure with the First Bank of the United States. The Bank’s function, in effect if not in form, was essentially that now served by the

delicate diplomatic negotiations, complex bilateral understandings, and uncertain compliance, was surely a model of understatement concerning the presidential discretion effectively conferred on him to find a fact.” JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 99 (2012). Yes, the President got to set the strategy to get other nations to respect American neutrality, but the President’s job with respect to the rule enforced in *Brig Aurora* was far simpler: to find whether other nations were respecting American neutrality.

262. Posner & Vermeule, *supra* note 26, at 1733.

263. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2511 (2019) (Kagan, J., dissenting).

264. THE FEDERALIST NO. 51, *supra* note 4, at 319 (James Madison).

265. MASHAW, *supra* note 261, at 25. Though disagreeing with this argument, I nonetheless admire his book for showing that the early federal government had a larger administrative apparatus than previously understood and that the separations among the legislative, executive, and judicial branches were far from neat.

266. *Id.* at 5. Professors Posner and Vermeule make a similar argument, but I will focus on Professor Mashaw’s version because it is more detailed and was written more recently. See Posner & Vermeule, *supra* note 26, at 1732–41.

Federal Reserve Board in regulating the money supply.”²⁶⁷ Professor Mashaw’s example makes it seem that Congress granted the First Bank legislative power because the Federal Reserve does now impose rules regulating how much banks can lend in order, in part, to control the money supply.²⁶⁸ Yet, the law establishing the First Bank did not give it the power to regulate other banks.²⁶⁹ It did affect the money supply, but by deciding how much money *it* would lend. Congress could have taken that decision away from the First Bank but leaving it with First Bank was not a delegation of legislative power.

In this example and many others, Professor Mashaw fails to demonstrate that the early Congresses systematically delegated their power to make the rules of private conduct because he conflates (1) Congress ceding legislative powers which it alone was supposed to exercise (such as making the rules of private conduct) with (2) Congress letting others make decisions that Congress itself need not make but could and sometimes did (such as allowing a bank to decide how much money it would lend). The two are distinct, as Dean Ronald Cass shows.²⁷⁰ Yet, Professor Mashaw applies the word “delegate” to both. That is semantically correct but is nonetheless confusing because only the first violates the norm that Article I establishes.²⁷¹

In his extended analysis of Professor Mashaw’s book, Professor Joseph Postell shows that early Congresses “largely refrained” from delegating legislative powers to administrators and did so because of their commitment to the constitutional principle of nondelegation.²⁷² There were some temporary deviations in which Congress granted lawmaking powers to administrators, most notably the infamous Embargo of 1807 to 1809.²⁷³ Professor Mashaw writes that the embargo statutes “featured stunning

267. MASHAW, *supra* note 261, at 47.

268. 12 U.S.C. § 84 (2012).

269. An Act to incorporate the subscribers to the Bank of the United States, ch. 10, 1 Stat. 191 (1791).

270. Cass, *supra* note 260, at 155–58. The distinction appears in *Wayman v. Southard*. 23 U.S. (10 Wheat.) 1, 42–43 (1825).

271. Many of Professor Mashaw’s examples of Congress delegating are of its letting others do what Congress itself did not have to do. *See, e.g.*, MASHAW, *supra* note 261, at 46 (granting the President the power to decide how to distribute congressional appropriated funds to veterans).

272. POSTELL, *supra* note 24, at 78.

273. MASHAW, *supra* note 261, at 91–118.

delegations of discretionary authority both to the President and lower-level officials,” and therefore it “has much to teach us about early understandings of the nondelegation doctrine.”²⁷⁴

This embargo that began in 1807—the one in *Brig Aurora*²⁷⁵ arose under later legislation—was, as Professor Mashaw helpfully explains, borne out of desperation.²⁷⁶ In the course of a war with each other, Britain and France seized American merchant ships and kidnapped their crews.²⁷⁷ These were acts of war against the United States, which was neutral in the conflict, but American officials were afraid of responding militarily against great powers.²⁷⁸ As an alternative, President Thomas Jefferson recommended keeping American ships at home and depriving Britain and France of American exports.²⁷⁹ He asked Congress to authorize such action and it did so.²⁸⁰

It is, however, wrong to conclude that the Embargo of 1807 to 1809 signifies acceptance of delegation.²⁸¹ The statute generated protest in Congress that led ultimately to cutting back the President’s power.²⁸² As Professor Postell sums up, “[T]he embargo was a temporary deviation from the typical policy decisions of the early republic, one that that was nearly universally acknowledged as a colossal failure, and thus is of very limited value as an indication of what early American politicians regarded as legitimate.”²⁸³ It certainly was not an example of the congressional buck passing that drives so much delegation today. Indeed, the embargo brought blame.

Another example that Professor Mashaw highlights is how Congress responded to the dangers of a new technology, steamboats.²⁸⁴ The boilers of early steamboats tended to explode

274. *Id.* at 90.

275. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

276. MASHAW, *supra* note 261, at 91–92.

277. *Id.* at 91.

278. *Id.* at 91–92.

279. *Id.* at 92.

280. *Id.* at 92–93.

281. Professor Philip Hamburger argues the legislation might be seen as giving the President the power to determine facts that would trigger the applicability of law rather than to make law. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 107–10 (2014).

282. MASHAW, *supra* note 261, at 96.

283. POSTELL, *supra* note 24, at 78.

284. MASHAW, *supra* note 261, at 187–208.

with fatal consequences.²⁸⁵ Congress passed the Steamboat Act of 1852, which Professor Mashaw cites as an instance of early Congresses freely delegating the power to make rules of private conduct.²⁸⁶ It was not such an early Congress, coming as it did six decades after the ratification of the Constitution, and not much of an example at that. The statute, as he describes it, used “administrative rulemaking as a principal technique for articulating regulatory standards.”²⁸⁷ Yet, Professor Postell finds only two sections of the statute where “[t]he supervising inspectors were given rulemaking power.”²⁸⁸ One called for the inspectors, as the statute put it, to make rules “for their own conduct” and that of the inspectors working under them.²⁸⁹ This power, Professor Postell aptly argues, was not to make rules governing private conduct, but rather to govern official conduct and so did not violate the consent-of-the-governed norm.²⁹⁰

The other provision called for the inspectors to make rules for ships passing each other.²⁹¹ The genesis of this provision suggests no comfort with Congress empowering others to make rules of private conduct. As Professor Postell recounts, the bill, as originally introduced, contained a section with detailed rules on this subject based upon traditional practices.²⁹² Legislators objected because they did not understand the section and particularly how these practices, which varied with whether a ship was going upstream or downstream, applied when tides reverse the direction of the water’s flow, as can happen far inland in some rivers.²⁹³ At the end of the legislative process in the House, the House passed a bill which included 150 amendments, one of which gave the inspectors broad rule-making authority over ships passing each other.²⁹⁴ The Senate

285. *Id.* at 188.

286. *Id.* at 192.

287. *Id.* at 152.

288. POSTELL, *supra* note 24, at 98.

289. Act of August 30, 1852, ch. 106, § 18, 10 Stat. 61, 70.

290. POSTELL, *supra* note 24, at 98–99.

291. Ch. 106, § 29, 10 Stat. 61 at 72.

292. POSTELL, *supra* note 24, at 99.

293. *Id.* at 100.

294. *Id.*

acceded because it was left with the choice of the House bill or no bill at all dealing with the deaths from steamboat explosions.²⁹⁵

The original language suggests members of Congress expected to state the rules themselves. The great bulk of the bill showed them doing so. It is often highly specific, containing detailed rules on a wide range of issues bearing on steamboat safety, from availability of lifeboats and firefighting equipment to the pressure in boilers, and much more.²⁹⁶ Here is one example:

That every vessel so propelled by steam, and carrying passengers, shall have not less than three double-acting forcing pumps, with chamber at least four inches in diameter, two to be worked by hand and one by steam, if steam can be employed, otherwise by hand; one whereof shall be placed near the stern, one near the stem, and one amidship; each having a suitable, well-fitted hose, of at least two thirds the length of the vessel, kept at all times in perfect order and ready for immediate use; each of which pumps shall also be supplied with water by a pipe connected therewith, and passing through the side of the vessel, so low as to be at all times in the water when she is afloat: *Provided*, That, in steamers not exceeding two hundred tons measurement, two of said pumps may be dispensed with; and in steamers of over two hundred tons, and not exceeding five hundred tons measurement, one of said pumps may be dispensed with.²⁹⁷

Such detailed provisions are more like a regulation that a modern agency would put in the Code of Federal Regulations than an enabling statute that a modern Congress would put in the United States Code. Yet, Professor Mashaw compares the 1852 statute with modern statutes creating “the Occupational Safety and Health Administration, the National Highway Traffic Safety Administration, the Consumer Product Safety Commission, and the Environmental Protection Agency in the 1960s and early 1970s.”²⁹⁸

Professor Mashaw dismisses the specifics in the statute by stating that the steamboat inspectors had “considerable discretion.”²⁹⁹ The statute did leave some room for judgment calls, as

295. *Id.*

296. *Id.* at 101.

297. Ch. 106, § 3, 10 Stat. 61 at 62.

298. MASHAW, *supra* note 261, at 21.

299. *Id.* at 192.

in the phrase “a suitable, well-fitted hose” in the section quoted at length above. Yet, the inspectors, who were expected to come from the steamboat business, could base their determinations on their knowledge of practices in their line of work,³⁰⁰ much as common law juries in that era would base their judgments about reasonable care on practices in their own communities. Thus, the judgments left to the inspectors could be of rule application rather than rulemaking. Alternatively, these judgments would be considered as rulemaking of the “fill up the details” variety. Either way, the legislators had taken responsibility for the politically salient choices. It was nothing like modern statutes in which members of Congress grant legislative powers to avoid personal responsibility for the laws.³⁰¹

In sum, for many decades after the ratification of the Constitution, members of Congress tried to make the rules of private conduct themselves, but sometimes fell short. As Professor Daniel Walker Howe chronicles, legislators in the early decades took positions on the hard choices.³⁰² In contrast, as Part III.D shows, modern Congresses issue detailed instructions but still manage to skirt the hard choices.

C. *The Court Enforced the Norm in Only One Year of Hundreds*

Referring to *Panama Refining* and *Schechter Poultry* striking down provisions of the National Industrial Recovery Act in 1935, Professor Cass Sunstein quipped that the constitutional bar on Congress delegating legislative power has “had one good year and 211 bad ones (and counting).”³⁰³ Yet, as Professor Mark Tushnet recently blogged, “It’s not true,” citing *Carter* in 1936.³⁰⁴ I have cited other examples: *Knickerbocker Ice* in 1920, *L. Cohen Grocery Store* in 1921, and *Washington* in 1924.³⁰⁵ One could also arguably cite *Clinton* in 1998 and *Chadha* in 1983, es-

300. *Id.* at 195.

301. SCHOENBROD, *supra* note 15, at 70–74.

302. DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 125–63, 272–73 (2007); cf. WIEBE, *supra* note 59, at 21.

303. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

304. Mark Tushnet, *The Nondelegation Doctrine—Correcting a Common Error*, BALKINIZATION (Dec. 22, 2018, 11:22 PM), <https://balkin.blogspot.com/2018/12/the-nondelegation-doctrine-correcting.html> [<https://perma.cc/8SME-883T>] (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)).

305. See *supra* Part II.A.

pecially in light of the gloss put on it by *Loving*.³⁰⁶ Indeed, Justice Gorsuch's dissent in *Gundy* cites these cases along with the void for vagueness cases and other cases to show the Court has taken the norm seriously.³⁰⁷ More importantly, Congress substantially honored the norm well into the 1800s.³⁰⁸ *Brig Aurora* and *Wayman* upheld challenged statutes on reasonable grounds. That the cases were brought suggests litigants were willing to raise delegation arguments. That more cases were not brought suggests there was not much worth challenging.

D. *The Constitution Was Amended to Eliminate the Norm*

Professor Ackerman argues that the decisive reelections of President Roosevelt after his confrontation with the Court was a "constitutional moment" that amended the Constitution to allow Congress to delegate its legislative powers.³⁰⁹ In contrast, Professor William Leuchtenburg concludes that whatever else the voters might have been doing in 1936, they were not consciously amending the Constitution.³¹⁰ The public did not think of itself as amending the Constitution at the time, and the Court has not so regarded it since.³¹¹

More fundamentally, the Constitution is not just an agreement on how government should work in response to the will of the

306. *See id.*

307. *Gundy v. United States*, 139 S. Ct. 2116, 2141–43 (2019) (Gorsuch, J., dissenting). Indeed, these cases tend to undercut the Court's rationale that Congress does not delegate legislative power when it states an intelligible principle. Similarly, as Professor David Strauss argues, cases before *Brown v. Board of Education*, 347 U.S. 483 (1954), tended to undercut the "separate but equal" logic of *Plessy v. Ferguson*, 163 U.S. 537 (1896). DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 90–92 (Geoffrey R. Stone ed., 2010). Professor Strauss states, "[T]he Court in *Brown* was taking one further step in a well-established progression." *Id.* at 92.

308. *See supra* Part II.A.

309. 1 ACKERMAN, *supra* note 96, at 306–11; Ackerman, *supra* note 96, at 1053–57, 1070–71; *see also* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 432 n.40, 447–48 (1987) (arguing that the New Deal amended the Constitution to allow delegation). *But see*, Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 924–33 (1990) (rejecting Professor Ackerman's theory).

310. William E. Leuchtenburg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 108 YALE L.J. 2077, 2111 (1999).

311. *Id.*; *see also* LESSIG, *supra* note 93, at 440 (stating in reference to Professor Ackerman's theory, that "it is not obvious that it was a will to amend"). Also, as Professor Lessig argues, "The problem for Ackerman's account . . . is that the Court has repeatedly tried to reset the balance that was itself reset in 1937–1942." *Id.* at 430.

governed, but it is also an agreement on how the Constitution can be amended in response to the will of the governed. The Constitution, of course, includes an explicit, formal process for its amendment.³¹² Although there is something to be said for substance over form, form does have its uses. A formal amendment would have had to make clear whether the electorate opposed a procedural requirement that Congress take responsibility, or rather that it cared more about President Roosevelt's policy objectives, whether any such change was meant to be permanent or only for the duration of the emergencies of the Great Depression and World War II, and whether the amendment permitted only the broad ("here's a problem, fix it") delegations that typified the New Deal or also the narrow ("we get the credit, the agency gets the blame") delegations of the Clean Air Act and its aftermath discussed in Part III of this Article. Finally, if Professor Ackerman is correct that the Constitution was amended by a shift in public opinion, why is it not equally so that the Constitution was reamended when public opinion later began to call for Congress to take responsibility, and Congress feigned doing so, as discussed in Parts II.A and III.C?

E. Delegation Is Consistent with Consent of the Governed

Professors Posner and Vermeule argue that Congress is accountable for agency-made rules. They do so in several paragraphs of suppositions about how legislators and voters behave.³¹³ But these suppositions are not supported by reference to the work of political scientists—the social scientists who systematically describe such behavior.³¹⁴ To the contrary, political scientists conclude that, in many circumstances, delegation al-

312. U.S. CONST. art. V.

313. Posner & Vermeule, *supra* note 26, at 1749–50.

314. Professors Posner and Vermeule do cite political scientists David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 *CARDOZO L. REV.* 947, 961–62 (1999), but they cite these political scientists for the proposition that enforcing the nondelegation doctrine would drive Congress to delegate to legislative committees rather than administrative agencies and thereby undercut accountability another way. See Posner & Vermeule, *supra* note 26, at 1749. This is not the proposition I dispute. The proposition for which Epstein and Professor O'Halloran are cited, if true, may be relevant to the issue of the extent to which courts should underenforce the norm, but not to whether it should, as Professors Posner and Vermeule recommend, be killed off altogether.

lows legislators to take credit for popular consequences and shift blame for unpopular ones.³¹⁵

315. See, e.g., R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 101 (1990) (“Sometimes legislators know precisely what the executive will decide, but the process of delegation insulates them from political retribution.”); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 132 (2d. prt. 1975) (“[I]n a large class of legislative undertakings the electoral payment is for positions rather than for effects.”); Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in *REGULATORY POLICY AND THE SOCIAL SCIENCES* 175 (Roger G. Noll ed., 1985) (offering a mathematical assessment of when it pays legislators to delegate); Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 *PUB. CHOICE* 33, 45–47 (1982) (stating that legislators may pick the regulatory form that makes them look best to their constituents rather than the one that does the most good for their constituents); Justin Fox & Stuart V. Jordan, *Delegation and Accountability*, 73 *J. POL.* 831, 843–44 (2011) (identifying conditions under which delegation to agencies can provide politicians with an element of plausible deniability); Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 *POL. & SOC’Y* 152, 173 (2010) (stating that well-organized business interests pushing for favors from legislators at the expense of the average voter “will seek to substitute symbolic actions for real ones, for example, or manipulate complex policy designs to produce more favorable yet opaque distributional outcomes”); R. Kent Weaver, *The Politics of Blame Avoidance*, 6 *J. PUB. POL’Y* 371, 375, 386–87 (1986) (stating that politicians pass the buck as a means to avoid blame for unpopular actions).

In addition, researchers have used experimental subjects to test whether delegation of authority enables legislators to shift significant amounts of blame to agencies and found that it can. See, e.g., Adam Hill, *Does Delegation Undermine Accountability? Experimental Evidence on the Relationship Between Blame Shifting and Control*, 12 *J. EMPIRICAL LEGAL STUD.* 311 (2015) (answering the question affirmatively on the basis of experiments by multiple researchers). Of his own experiments, Hill wrote, “Even in these cases, where the agent is effectively powerless to change the outcome, participants blame principals significantly less than in cases where the principal brings about the outcome directly.” *Id.* at 312.

Professors Posner and Vermeule also float the idea that delegation must be acceptable because delegation is used pervasively in public and private life. See Posner & Vermeule, *supra* note 26, at 1744–45. Here, they attack an argument that no one makes: delegation is invariably bad. The beef is only with delegation that deflects blame from where it should lie rather than to achieve economies of specialization or scale. Delegation to deflect blame is a ploy used in in business as well as government. See Andy Kessler, Opinion, *Where in the World Is Larry Page?*, *WALL ST. J.* (Dec. 31, 2018, 10:59 AM), <https://www.wsj.com/articles/where-in-the-world-is-larry-page-11546199677> [<https://perma.cc/C5FL-NTZC>] (identifying some of the corporate leaders who work through surrogates to deflect blame).

In addition, Professors Posner and Vermeule argue that legislators will engage in “happy talk” regardless of whether they delegate. Posner & Vermeule, *supra* note 26, at 1748. Perhaps, but spin is less effective than spin plus arranging to have the bad news come on the letterhead of an agency rather than from a vote in Congress.

Professors Posner and Vermeule also argue that the accountability of the President as executive preserves the consent of the governed.³¹⁶ Yet, a President serving a second term escapes accountability at the polls altogether because the Constitution bars a third term.³¹⁷ And even a first term President largely escapes blame for the burdens imposed by agencies. Some agencies are independent of presidential control. And although most are subject to it, Presidents usually will personally announce only those rules that the White House political advisors think will be popular.³¹⁸ Otherwise, the President leaves the announcement to the agency head. The agency head can usually shift some of the blame to the statute or the court decisions that structured the agency's decision making. Everyone is responsible, so no one is.

Moreover, few if any regulatory issues become important in a national presidential election because they are usually overshadowed by the President's work as commander in chief, diplomat in chief, economic strategist, and national leader. These roles generally let the President appear aloof from choices about regulation. In contrast, how members of Congress would vote on such regulatory issues could be important in many of their reelection campaigns.

One might argue that voters should do the homework necessary to see through such trickery, but they will not and they should not have to. As Professor Jeremy Waldron writes, "[T]he agent-accountability that is involved in democracy puts the onus of generating that transparency and the conveying of the information that accountability requires *on the persons being held accountable*. . . . [T]he agents owe the principal an account."³¹⁹

316. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 112–53 (2010); *see also* Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 *YALE L.J.* 1395, 1409–14 (1975).

317. U.S. CONST. amend. XXII.

318. *See, e.g.*, Lisa Heinzerling, *Ozone madness*, *GRIST* (Sept. 4, 2011), <http://grist.org/article/2011-09-03-ozone-madness/> [<https://perma.cc/4XGA-D8ZF>]. Professor Heinzerling was a key member of President Obama's team at the EPA. Lisa Heinzerling, GEO. L., <https://www.law.georgetown.edu/faculty/lisa-heinzerling/> [<https://perma.cc/WD9F-686M>] (last visited Jan. 9, 2020).

319. Jeremy Waldron, *Accountability: Fundamental to Democracy* 32 (N.Y. Univ. Sch. of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 14-13, 2014).

F. *Canons of Statutory Construction
Serve the Purpose of the Norm*

Professor Sunstein argues that the Supreme Court has replaced the constitutional bar on delegation with various “non-delegation canons” of statutory construction, which he calls collectively “The American Nondelegation Doctrine.”³²⁰ It, he argues, serves the purposes of the traditional doctrine.³²¹ In his words, it stops “legislative shirking . . . by requiring Congress to make the relevant judgments. . . . [E]xecutive officials cannot seize on vague or general language to produce specified kinds of outcomes. The legislature must authorize those outcomes in advance, and with a high level of particularity.”³²² The kinds of outcomes for which agencies need clear legislative statements of authorization include, to list some of Professor Sunstein’s examples, those arising from the agency asserting the power to act retroactively, extraterritorially, or in ways that create serious constitutional problems, or would bring about an enormous and transformative expansion in its regulatory authority.³²³

320. Sunstein, *supra* note 193, at 1181. Professor Sunstein sees consent of the governed as an underenforced norm but applauds far more underenforcement than I think necessary.

321. Professor Sunstein also gives arguments against the traditional doctrine. First, he states that it is not judicially manageable because it requires courts to answer a question of degree: “*how much discretion is too much discretion?*” *Id.* at 1182. This is true of the intelligible principle test, yet Professor Sunstein’s own canons require judgments of degree. The “elephants-in-mouseholes doctrine,” invoked when agencies find big powers in obscure grants of authority, requires courts to make two judgments of degree: how big is an elephant and how obscure is a mousehole. Generally, his canons are changeable, *id.* at 1184 (“[T]hey change over time.”), and unclear in application, *id.* at 1200 (“The passage is not without ambiguity . . .”). Meanwhile, *Chevron* is of doubtful manageability because there are several conflicting versions of the doctrine. See Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 783, 817–29 (2010).

Second, Professor Sunstein’s argues that the traditional doctrine is of “uncertain constitutional pedigree” because, citing Professor Mashaw, it clashes with “actual practice during the early period of the American republic.” Sunstein, *supra* note 193, at 1183 (citing MASHAW, *supra* note 261, at 5). Yet, as I argued in Part V.B, Professor Mashaw is wrong. Professor Sunstein also relies upon Professors Posner and Vermeule for the related proposition that the norm lacks “clear roots . . . in the text and in founding-era debates.” *Id.* (citing Posner & Vermeule, *supra* note 26, at 1723). But the roots were clear enough to persuade the early Supreme Court in cases such as *Fletcher v. Peck*, *Brig Aurora*, and *Gibbons v. Ogden*. See *supra* Part II.A.

322. Sunstein, *supra* note 193, at 1191.

323. *Id.* at 1181, 1185.

Clear statement requirements are often, but not always, sensible tools in statutory interpretation.³²⁴ However, clear statement requirements do little to stop shirking by Congress. An example is the 1970 Clean Air Act, which, as discussed in Part III.D, plainly authorized the agency to protect health, but allowed politicians to take credit for healthy air while shifting blame to the EPA and the states for failing to deliver and the economic burdens concomitant with pollution reduction.³²⁵ That is why legislators of both parties voted for it almost unanimously in 1970.³²⁶

So, yes, members of Congress are elected and must authorize agencies to make law. But with great skill they shift blame to the agencies for the unpopular consequences such as regulatory protection not delivered or regulatory burdens imposed. That is not consent of the governed.³²⁷

In sum, Professor Sunstein asserts that Congress can delegate sweeping power to agencies if it does so bluntly. That is bizarre because he would treat purposeful violations of the consent-of-the-governed norm more leniently than inadvertent violations even though the harm to the government is apt to be particularly great where Congress is most insistent that it wants to evade responsibility.

* * * * *

That so many highly intelligent scholars can do no better than make such far-fetched arguments for ignoring the consent-of-the-governed norm bolsters the argument for recognizing it.

324. To the extent that clear statement requirements are used to curb delegation rather than to divine the intent of Congress, they may lead the courts away from the intent of Congress. See John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1557–59 (2008).

325. David Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 789–98 (1983).

326. The Senate version of the act passed unopposed, 116 CONG. REC. 33,120 (1970) (73 for, 0 against); the House version provoked a lone dissenting vote, *id.* at 19,244 (375 for, 1 against). The conference report was agreed to by both the Senate and House without opposition. See *id.* at 42,395 (Senate); *id.* at 42,524 (House).

327. Justice Gorsuch's dissent in *Gundy* cites these delegation-related statutory construction canons to show ongoing judicial concern with the constitutional norm rather than to argue that the canons are an adequate substitute for the norm. See *Gundy v. United States*, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting).

CONCLUSION

We like the administrative state. After all, most people want the regulatory protection we were promised agencies would provide. That is why Congress passed the regulatory statutes.

Nonetheless, we also dislike the administrative state. After all, most people want members of Congress to take personal responsibility for regulations and thus to be accountable for both the burdens imposed and the shortfalls in regulatory protection. By failing to take such responsibility, Congress pits us against ourselves.

Many influential people benefit from Congress's failure to take responsibility: the agency officials who get the power, lawyers whose income and sense of importance come from their role in the abstruse processes that now have the last word on regulation, and most importantly the members of Congress who prefer to avoid responsibility for hard choices so long as members of the opposing political party do.

The job of securing the consent of the governed the Declaration of Independence promised, and the Constitution requires, thus falls to the Supreme Court. It has no duty more supreme than judging compliance with the Constitution. None of the Constitution's norms is more supreme than the consent of the governed. As Justice Kagan recently wrote, "[T]he need for judicial review is at its most urgent in cases" where "politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms."³²⁸

Yet, in response to assertions that Congress violates the consent-of-the-governed norm by outsourcing responsibility, the Court currently outsources its own responsibility for judgment to Congress. That is poetic injustice. It should stop. Once the Court does its duty, Congress can do its duty.

328. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2523 (2019) (Kagan, J., dissenting) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring)) (internal quotation marks omitted).

COUNTERACTING *MARBURY*:
USING THE EXCEPTIONS CLAUSE TO OVERRULE
SUPREME COURT PRECEDENT

INTRODUCTION: THE LEGISLATIVE LIMITS OF *MARBURY*

The case provides the foundation for modern constitutional law. It contains arguably the most recognizable quote in the Supreme Court's history. In *Marbury v. Madison*,¹ Chief Justice Marshall proclaimed, "It is emphatically the province and duty of the judicial department to say what the law is."² Such judicial supremacy in constitutional interpretation has since become a hallmark of the American legal tradition.³ And the Supreme Court has consistently and vehemently reaffirmed what Marshall and the rest of *Marbury's* unanimous Court deemed "the very essence of judicial duty."⁴ No doubt, the fortress *Marbury* built to cement the Court's authority to strike down unconstitutional statutes has been repeatedly attacked: from scholarly commentary,⁵ from state officials,⁶ from the modern administrative state,⁷ and from Congress itself.⁸ However, *Marbury* has survived, and indeed, *Marbury* has thrived. As the Supreme Court explained in the wake of a state's refusal to implement one of the Court's landmark decisions:

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

2. *Id.* at 177.

3. See, e.g., G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1467 (2003) ("*Marbury v. Madison* has been seen as foundational to the American constitutional enterprise . . .").

4. 5 U.S. (1 Cranch) at 178.

5. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006).

6. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 19–20 (1958) (holding that Arkansas state officials were bound by the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and thus had to desegregate schools).

7. See *City of Arlington v. FCC*, 569 U.S. 290, 316 (2013) (Roberts, C.J., dissenting) (quoting *Marbury's* declaration of the judicial responsibility and adding that "[t]he rise of the modern administrative state has not changed that duty").

8. In the aftermath of *Miranda v. Arizona*, 384 U.S. 436 (1966), Congress passed a statute providing for the admissibility of statements made voluntarily, even if the defendant was not first read his or her so-called "*Miranda* rights." See *Dickerson v. United States*, 530 U.S. 428, 432 (2000). The Court deemed this statute unconstitutional. *Id.* at 437.

[T]he Constitution [is] “the fundamental and paramount law of the nation” . . . [*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.⁹

Thus, the suggestion that Congress might act on behalf of the federal government as the final arbiter for a law’s constitutionality is ostensibly at odds with *Marbury*. The idea of a single body wielding the power both to make the law and to interpret its validity seems to conflict squarely with our contemporary conception of separation of powers.¹⁰

Nevertheless, and perhaps surprisingly, the Constitution explicitly permits this type of congressional aggrandizement. An infrequently litigated provision in Article III provides that:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*¹¹

Plainly read, this latter declaration—the so-called “Exceptions Clause”—instills Congress with the unqualified power to restrict the Court’s appellate jurisdiction. So long as a case does not fall within the few enumerated classes of the Supreme Court’s original jurisdiction,¹² a simple majority of Congress (with the President’s approval) could use this provision to legitimately strip the Court of its most powerful check on the legislature—the ability to declare a law unconstitutional.

Given that “hyperpartisanship has led Congress—and the United States—to the brink of institutional collapse,”¹³ this is understandably disturbing. A targeted invocation of the Exceptions

9. *Cooper*, 358 U.S. at 18 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

10. Of course, this does not always hold true in the interpretation of statutes or regulations. See, e.g., *Auer v. Robbins*, 519 U.S. 452, 461 (1997). But that is largely irrelevant to the issue of constitutional interpretation.

11. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

12. Those being “all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.” *Id.*

13. Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1691 (2015) (internal quotation marks omitted).

Clause for pure political gain could be imminent. For example, what is to stop the Republican Party from passing a statute banning abortion and preventing the Court from reviewing the law's constitutionality?¹⁴ On the flip side, could anything prevent Democrats from statutorily overruling *Citizens United v. FEC*¹⁵ with a similar judicial review prohibition, in an effort to gain and entrench partisan advantage? Would the first invocation of such a blatantly partisan strategy result in a Constitution whose meaning effectively shifts whenever Congress changes hands? If so, the fundamental judicial role espoused in *Marbury* may soon be under constitutionally legitimate—although deeply disconcerting—legislative attack.

Part I of this Note provides an overview of the sparse historical dialog between Congress and the Supreme Court with respect to the Exceptions Clause. Part II then scrutinizes both the text and original understanding of the provision and argues that the Constitution grants Congress the near-plenary power to curb the Court's appellate jurisdiction. Finally, although most of this Note seeks to show that Congress *could* legitimately remove a statute from the Court's appellate oversight, Part III will close by arguing why Congress generally *should not* do so.

I. HISTORICAL TREATMENT OF THE EXCEPTIONS CLAUSE

A. Congressional Reluctance

The motivation for Congress to invoke the Exceptions Clause power is clear and tantalizing. Via a procedural device, the legislature can unilaterally rewrite substantive law to comport with majoritarian values, and then shield the act from federal judicial review. In doing so, Congress could bypass the inher-

14. At first glance, given the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), this would seem to conflict squarely with the holding in *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede [the Supreme Court's] decisions interpreting and applying the Constitution."). However, if the court lacked jurisdiction to rule on the constitutionality of the statute superseding the abortion cases in the first place, the Supreme Court would have no constitutional authority to ever render a ruling striking it down. See, e.g., *Patchak v. Zinke*, 138 S. Ct. 897, 907 (2018) (plurality opinion) ("[A] congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power." (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998))).

15. See 558 U.S. 310, 365 (2010) (holding that, under the First Amendment, Congress cannot restrict corporate political expenditures).

ent difficulty of the amendment process, and, in some instances, it could smoothly recalibrate the Constitution with modern ideals.¹⁶ Yet historically, Congress has nonetheless proved hesitant to flex its Exceptions Clause muscles to strong-arm federal legislation into force. Although textually the power to restrain the judiciary certainly resides with the legislature in some fashion, two primary external considerations have provided a deterring force: constitutional uncertainty and political anxieties.

As to the former, Professor Mark Tushnet argues that an emergent “scholarly consensus” supporting the unconstitutionality of such measures provides “a political force that keeps Congress from enacting jurisdiction-restricting legislation.”¹⁷ This cannot, however, be the sole restraint. For one, there is far from a “consensus” in the scholarly literature; some have gone so far as to proclaim a narrow reading of the Exceptions Clause as “antithetical to the plan of the Constitution for the courts.”¹⁸ And although judicial review provides a cornerstone of our modern separation-of-powers framework, one must also keep in mind that *Marbury* was not a foregone conclusion. Its holding does not inevitably flow from any explicit textual provisions, and “nowhere in *Marbury* did [Chief Justice Marshall] suggest that other branches of government were precluded from interpreting the Constitution for themselves.”¹⁹ Indeed, this Note seeks to show that the Exceptions Clause limits *Marbury* in a significant way. It provides the people with a necessary safeguard aimed at reconciling the institution of judicial review

16. *But cf.* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.”).

17. Mark V. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809, 813 (1983).

18. Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965); see also Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 909 (1984) (expressing a “rejection of the arguments for narrow readings of the congressional power to make ‘exceptions’ to the Court’s appellate jurisdiction”).

19. White, *supra* note 3, at 1481.

with democratic values; and it offers the legislature a tool to counteract blatant Supreme Court overreach.²⁰

Beyond constitutional uncertainty, fears of political repercussions also inhibit Congress's use of the Exceptions Clause. And this is likely the overriding reason why targeted jurisdiction-stripping proposals have all failed to become law in the past. The mere idea of invoking such a drastic option for short-term political gain—even if fully consonant with the constitutional text—may be repugnant to participants in the two-party system. After all, the balance of power shifts nearly every election cycle, and as the adage goes, “what goes around comes around.”²¹ Playing constitutional hardball with the Exceptions Clause could ultimately backfire. That is not to say Congress members have never tried. Many have attempted to restrict the Court's ability to hear cases on school prayer,²² desegregation busing remedies,²³ state reapportionment challenges,²⁴ the composition of the military,²⁵ the constitutionality of the Defense of Marriage Act (a measure which did in fact pass the House),²⁶ *Miranda* issues,²⁷ anti-pornography measures,²⁸ the Pledge of

20. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (“The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.”); *Leading Cases*, 110 HARV. L. REV. 135, 286 n.76 (1996) (concluding that “judicial review and expansive congressional authority under the Exceptions Clause” can “not only . . . coexist,” they are “also necessary correlates in a constitutional democracy”). Respect for the Court may, however, be another reason Congress has not yet exercised its full authority.

21. See, e.g., JUSTIN TIMBERLAKE, *WHAT GOES AROUND . . . COMES AROUND* (Jive Records 2006); see also *infra* Part III.

22. See, e.g., Voluntary School Prayer Act of 1981, S. 481, 97th Cong.; H.R. 72, 97th Cong. (1981).

23. See EDWARD KEYNES & RANDALL K. MILLER, *THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION* 219, 221–22 (1989).

24. See Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 991 (1982) (noting that a state reapportionment bill passed the House but not the Senate).

25. See *id.* at 992 n.18.

26. See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 189 (7th ed. 2016).

27. See Baucus & Kay, *supra* note 24, at 991 nn.13–15.

28. See Alan Choate, *Cannon tries to ban federal courts from hearing state porn cases*, DAILY HERALD (June 6, 2006), <https://web.archive.org/web/20060815173032/http://www.heraldextra.com/content/view/181240/> [<https://perma.cc/Z2V2-ABLG>].

Allegiance,²⁹ and state abortion regulations,³⁰ just to name a few.

But given the infrequency with which Congress has historically employed the Exceptions Clause, its modern use to prohibit Supreme Court review of, say, state abortion restrictions would almost certainly trigger retaliatory cries of hyperpartisanship and unfairness.³¹ Because the method for enactment would no longer conform with the rules of historical practice, a party exploiting this perceived “constitutional loophole” to try to dissolve a court-announced right—successful or not—might prove simply unpalatable to voters. And that could very well push America’s large moderate contingent towards the other side of the aisle.³² As such, pragmatic inertia has likely set in on Capitol Hill. The continued vitality of one’s own party restrains even the most politically fervent from using the Exceptions Clause to overturn Supreme Court precedent. And each year this partisan strategy lays dormant only serves to increase the potential for political backlash if it is ever deployed in the future.

Historical practice aside, this then leads to the ultimate question: Even if Congress has never actually leveraged the Exceptions Clause to remove a statute’s constitutionality from Supreme Court review, can it still legitimately do so? The answer, as re-

29. See The Pledge Protection Act of 2002, H.R. 5064, 107th Cong.

30. See H.R. 867, 97th Cong. (1981).

31. This parallels the public reaction to the Republican Party’s refusal to consider Judge Garland’s Supreme Court nomination and subsequent invocation of “the nuclear option” to confirm Justice Gorsuch with a simple majority. See, e.g., J. Stephen Clark, *Senators Can’t Be Choosers: Moratoriums on Supreme Court Nominations and the Separation of Powers*, 106 KY. L.J. 337, 384 (2018) (arguing that the incident contributed to “the public impression that Supreme Court nominees are the mere partisan plants of their ideological champions”); Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263, 266 (“[B]locking Judge Garland’s nomination to the Court broke the patterns of more than 100 years . . .”).

32. See, e.g., Lydia Saad, *Conservative Lead in U.S. Ideology Is Down to Single Digits*, GALLUP (Jan. 11, 2018), <https://news.gallup.com/poll/225074/conservative-lead-ideology-down-single-digits.aspx> [<https://perma.cc/P6WD-9HRF>] (finding that 35 percent of Americans identify as moderate). Indeed, the absence of “Roe rage” among constituents could itself mean the difference in control of Congress. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–74 (2007); Jonathan Turley, *Opinion, Their goal of Roe v. Wade reversal in sight, many Republicans have private second thoughts*, USA TODAY (July 6, 2018, 7:52 AM), <https://www.usatoday.com/story/opinion/2018/07/06/republicans-fear-reversing-roe-abortion-supreme-court-kennedy-trump-column/759349002/> [<https://perma.cc/9RES-UQTS>].

flected by the provision's plain text and its history, is a resounding yes.

B. *Ex parte McCardle and the Bounds of Congressional Authority*

Decided in 1869, *Ex parte McCardle*³³ still stands as the seminal Exceptions Clause decision.³⁴ The case was a unique product of Reconstruction. In 1867, Congress had expanded the availability of federal habeas petitions to “all cases” where one was unlawfully detained under the Constitution,³⁵ thereby permitting state prisoners for the first time to file for a writ of habeas corpus in federal court. Officials then arrested Mississippi newspaper editor William McCardle and detained him for trial in a military tribunal pursuant to the Military Reconstruction Act (MRA).³⁶ But, ironically enough, McCardle sought to leverage the newfound federal habeas provision—itsself designed to effectuate Reconstruction policies—to attack the MRA’s facial constitutionality.³⁷ So with the express purpose of “sweeping the *McCardle* case from the docket by taking away the jurisdiction of the [C]ourt,”³⁸ Congress repealed the expanded habeas statute via an inconsequential tax bill rider—one remarkably passed *after* oral argument.³⁹ The Supreme Court thus had its first meaningful opportunity to consider the Exceptions Clause’s scope.

Writing for a unanimous Court, Chief Justice Chase opened by noting, “The first question necessarily is that of jurisdiction; for, if the [law passed after oral argument] takes away the jurisdiction defined by the [expanded federal habeas provision], it is useless, if not improper, to enter into any discussion of

33. 74 U.S. (7 Wall.) 506 (1869).

34. See, e.g., Patchak v. Zinke, 138 S. Ct. 897, 906–07 (2018) (plurality opinion); Jason S. Greenwood, *Congressional Control of Federal Court Jurisdiction: The Case Study of Abortion*, 54 S.C. L. REV. 1069, 1082 (2003); see also William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229, 232 (1973).

35. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.

36. See Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

37. Van Alstyne, *supra* note 34, at 238.

38. *Id.* at 239 (alteration omitted) (italics added) (quoting CONG. GLOBE, 40th Cong., 2d Sess. 2062 (1868)).

39. *Id.*; see Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44, 44 (1868).

other questions."⁴⁰ Then, without ever reaching the merits, and in a brief four-page opinion, the Court dismissed the case for want of jurisdiction.⁴¹ Explicitly relying on the Exceptions Clause, the Chief Justice observed, "The [expanded federal habeas provision], affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception."⁴² He continued to reason and hold, "Without jurisdiction the court cannot proceed at all in *any* cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."⁴³

McCardle had little else to say about the scope of Congress's legitimate jurisdiction-stripping power. Importantly though, the Court noted, "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."⁴⁴

To be sure, one can plausibly read *McCardle* narrowly as a case enabling Congress to suspend certain habeas petitions from the Supreme Court's purview,⁴⁵ but without acknowledging any unconditional authority to remove an enactment's lawfulness from the Court's oversight altogether. However, an analysis of the broad language employed by the Supreme Court in later cases subverts this narrow reading. For example,

40. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512 (1869); see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" (alteration omitted) (quoting *Mansfield, Coldwater & Lake Mich. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884))). Oddly enough, this (correct) jurisdiction-first approach is in opposition to the approach of Chief Justice Marshall in *Marbury*, where the constitutional issue of jurisdiction was left until the end of the analysis for political reasons. See Samuel R. Olken, *The Ironies of Marbury v. Madison and John Marshall's Judicial Statesmanship*, 37 JOHN MARSHALL L. REV. 391, 414 (2004).

41. See *McCardle*, 74 U.S. (7 Wall.) at 512-15.

42. *Id.* at 514 (italics omitted).

43. *Id.* (emphasis added).

44. *Id.*

45. See, e.g., Gunther, *supra* note 18, at 905 ("More substantial doubts about the precedential value of *McCardle* stem from the fact that the jurisdiction-stripping statute sustained there did not foreclose *all* appellate review . . .").

in *The “Francis Wright,”*⁴⁶ the Court said, “What [the Supreme Court’s appellate] powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control.”⁴⁷ Without stating any qualifications, the Court continued in sweeping terms to conclude that both “whole classes of cases” and “particular classes of questions” may “be kept out of the jurisdiction altogether.”⁴⁸ Similarly, the Court has confirmed that “an uninterrupted series of decisions” establishes that the Supreme Court “exercises appellate jurisdiction *only* in accordance with the acts of Congress upon that subject.”⁴⁹ And it has recently explained, “For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.”⁵⁰ Therefore, although a narrow reading of *McCardle* has its supporters,⁵¹ for many the case “has long been read as giving Congress full control over the Supreme Court’s appellate jurisdiction.”⁵²

C. *The Klein “Rule of Decision” Qualification*

In 1872, Congress afforded the Supreme Court yet another opportunity to wrestle with the Exceptions Clause, albeit less

46. 105 U.S. 381 (1882).

47. *Id.* at 386.

48. *Id.*

49. *Colo. Cent. Consol. Mining Co. v. Turck*, 150 U.S. 138, 141 (1893) (emphasis added); see *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 378 (1893) (“This court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by Congress.”). Justice Frankfurter similarly argued, “Congress need not give [the Supreme] Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*.” *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949) (Frankfurter, J., dissenting) (citing *McCardle*, 74 U.S. (7 Wall.) at 506).

50. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101–02 (1998).

51. See, e.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 605 n.11 (1962) (Douglas, J., dissenting).

52. Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 676 n.15 (1997) (quoting CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 42 (5th ed. 1994)) (internal quotation marks omitted); see also *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality opinion) (“So long as Congress does not violate other constitutional provisions, its ‘control over the jurisdiction of the federal courts’ is ‘plenary.’” (quoting *Bhd. of R.R. Trainmen v. Toledo, Peoria, & W. R.R.*, 321 U.S. 50, 63 (1944))).

directly. The enigmatic decision of *United States v. Klein*⁵³ followed in the wake of the Abandoned and Captured Property Act of 1863 (ACPA), another Civil War enactment that permitted federal officials to seize and sell abandoned or captured civilian property in states or territories rebelling against the Union.⁵⁴ Nonetheless, some individuals whose property had been seized could still recover its value, provided they could demonstrate to a reviewing court that they had “never given any aid or comfort to the present rebellion.”⁵⁵

Despite the express terms of the ACPA, in 1869, the Supreme Court in *United States v. Padelford*⁵⁶ reasoned that the ACPA “requir[ed] such a liberal construction as will give effect to the beneficent intention of Congress.”⁵⁷ It concluded that a presidential pardon of those in rebellious states fulfilled the ACPA’s statutory loyalty requirement, holding that after a pardon, “in the eye of the law the offender is as innocent as if he had never committed the offence.”⁵⁸

Congress, however, made clear that this result was not its intention. Shortly thereafter, it enacted a statute providing that without an express disclaimer of guilt, a presidential pardon would instead serve as “conclusive evidence that [a claimant] *did* take part in and give aid and comfort to the late rebellion” for purposes of the ACPA.⁵⁹ Even more importantly, the statute declared that upon “proof of such pardon . . . the jurisdiction of the court in the case” —including that of the Supreme Court— “shall cease.”⁶⁰ *Klein* held this latter proviso unconstitutional as violating the separation of powers and the President’s power to pardon.⁶¹ It explained that Congress cannot constitutionally wield its Exceptions Clause authority to “withhold appellate jurisdiction . . . as a means to an end.”⁶²

53. 80 U.S. (13 Wall.) 128 (1871).

54. See Abandoned and Captured Property Act of 1863, ch. 120, § 1, 12 Stat. 820, 820.

55. *Id.* § 3.

56. 76 U.S. (9 Wall.) 531 (1869).

57. *Id.* at 538.

58. *Id.* at 542 (quoting *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866)) (internal quotation marks omitted).

59. Act of July 12, 1870, ch. 251, § 1, 16 Stat. 230, 235 (emphasis added).

60. *Id.*

61. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147–48 (1871).

62. *Id.* at 145.

Now, there are two possible interpretations of the Court's assertion here. Opponents of broad jurisdiction-stripping authority point to this statement and insist that *Klein* prohibits Congress from restricting appellate jurisdiction when doing so manifests a motivation to dictate substantive outcomes.⁶³ But as discussed above, this is in extreme tension with *McCardle*, which plainly stated that the Court is "not at liberty to inquire into the motives of the legislature."⁶⁴ What's more, Chief Justice Chase authored both opinions only a few years apart, and nothing indicates that he had such a sudden change of heart as to the salience of legislative motive.

A second interpretation better reconciles *Klein's* assertion with *McCardle*.⁶⁵ By prohibiting jurisdiction stripping as "a means to an end,"⁶⁶ Chief Justice Chase meant that a jurisdictional prohibition cannot be *contingent* upon some state of affairs, one which Congress strategically manipulates to direct its desired substantive outcome.⁶⁷ This is because such a contingency is not so much an "exception" to the Supreme Court's jurisdiction, but rather a "rule of decision" which functionally declares the government as victor in the litigation.⁶⁸ This distinction logically follows from the *Klein* opinion, which declared that:

63. See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 168 (5th ed. 2015); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790–91, 1793–94 (2008).

64. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

65. Besides the "rule of decision" qualification, *Klein* can also be distinguished on the grounds that "Congress cannot limit the Supreme Court's jurisdiction in a manner that violates other constitutional provisions." CHERMERINSKY, *supra* note 63, at 169. "[R]estoration of property was expressly pledged" by the pardon at issue, and by denying any court jurisdiction to vindicate this right, Congress had unlawfully "change[d] the effect of [the] pardon." *Klein*, 80 U.S. (13 Wall.) at 148.

66. *Klein*, 80 U.S. (13 Wall.) at 145.

67. See *id.* at 145 ("If [Congress] simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient."); see also *Patchak v. Zinke*, 138 S. Ct. 897, 919 (2018) (Roberts, C.J., dissenting); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1373 (1953) (citing *Klein* and suggesting that Congress may not grant federal courts jurisdiction in a particular case with the additional limitation that they "tell the Court *how* to decide it").

68. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980) ("[O]f obvious importance to the *Klein* holding was the fact that Congress was attempting to decide the controversy at issue in the Government's own favor.").

It is evident from [the statute] that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point, *but when it ascertains that a certain state of things exists*, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction. It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.⁶⁹

In other words, Congress does not legitimately exercise its Exceptions Clause authority just because it calls a statute “jurisdictional.” And *Klein* shows why. Unlike the statute in *McCardle*, which removed an entire class of cases from the Court’s appellate jurisdiction, the statute in *Klein* did first confer jurisdiction. However, some of those cases were contingently shielded from judicial review based on the presence of certain evidence, in an effort to dictate an outcome favoring the government.⁷⁰ Under a commonsense definition of “jurisdiction,” this type of contingency does not act as an exception to the Court’s jurisdiction at all. *Klein* therefore fails to undercut *McCardle*’s view of Congress’s raw jurisdiction-stripping power over specific categories of cases. And because shielding a statute’s constitutionality from judicial review would not create a “rule of decision,” such a measure would fall within the ambit of *McCardle* rather than that of *Klein*.

Since Reconstruction, the Court has rarely had occasion to confront the Exceptions Clause; the speculative debate has instead raged on almost exclusively in academic circles.⁷¹ In 1996, the Supreme Court in *Felker v. Turpin*⁷² “temporarily sparked

69. 80 U.S. (13 Wall.) at 146 (emphasis added).

70. See *id.* at 146–47; see also *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 (2016) (noting that Congress cannot “attempt[] to direct the result” of a case).

71. The absence of precedent may be indicative of Congress’s hesitation to limit judicial review of constitutional issues without some especially pressing concern (for example, Reconstruction or the War on Terror). See Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CALIF. L. REV. 1193, 1193–94 (2007). Or it may just be the Court’s own fear of wading into such a contentious area. See David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2481 (1998) (“No issue has been more studiously avoided by the courts . . . than congressional control over jurisdiction of the federal courts.”).

72. 518 U.S. 651 (1996).

hopes and fears that [it] would issue a rare pronouncement on the limits of Congress's power."⁷³ But after granting certiorari and asking for briefs on Congress's Exceptions Clause power,⁷⁴ the Court ultimately dodged the issue.⁷⁵ Nevertheless, the Court's limited Exceptions Clause jurisprudence supports a broad conception of Congress's authority to remove whole categories of cases from the Supreme Court's purview. Subject only to the limitations of *Klein* and other constitutional provisions,⁷⁶ the rule is simple: Congress "does not violate Article III when it strips federal jurisdiction over a class of cases."⁷⁷

II. THE PLAIN TEXT PREVAILS

Although the Court has generally acquiesced to congressional jurisdiction-stripping efforts in the past, it has never had occasion to squarely confront the question that this Note proposes. That is, what would happen if Congress passed a statute reversing a Supreme Court decision and providing that the Court lacked jurisdiction to review the law for conformance to the Constitution? In this Part, I argue that the Court would have

73. Velasco, *supra* note 52, at 673.

74. See James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1434 (2000).

75. *Felker*, 518 U.S. at 661–62. In the opinion, Chief Justice Rehnquist explained that:

The Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its "gatekeeping" function over a second petition. But since it does not repeal our authority to entertain a petition for habeas corpus, there can be no plausible argument that the Act has deprived this Court of appellate jurisdiction in violation of Article III, § 2.

Id. A three-member concurrence hinted that if Congress foreclosed the Court from hearing all habeas petition avenues, that might overstep its Exceptions Clause authority. See *id.* at 667 (Souter, J., concurring) ("I write only to add that if it should later turn out that statutory avenues other than certiorari for reviewing a gatekeeping determination were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open.").

76. *Patchak v. Zinke*, 138 S. Ct. 897, 906 n.3 (2018) (plurality opinion). For example, Congress could not restrict members of a certain race from appealing to the Supreme Court. See U.S. CONST. amend. XIV, § 1; cf. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that the Fourteenth Amendment's guarantee of equal protection applies to the federal government). This is because the jurisdictional limitation would *itself* violate equal protection. But it is an entirely different matter when Congress strips the Court of jurisdiction to rule on the *substantive* validity of a statute.

77. *Patchak*, 138 S. Ct. at 906.

to dismiss any challenges to such a statute for want of jurisdiction. This is compelled by the text and history of the Exceptions Clause, as well as the structure of the Constitution. Remarkably then, the Clause provides Congress with a potential avenue to enact laws in direct opposition to the Supreme Court's exposition of constitutional rights.

A. *One Cannot Read Limitations into the Exceptions Clause*

In the words of the late Justice Scalia, "The text is the law, and it is the text that must be observed."⁷⁸ Of course, the text of the Constitution often raises more questions than it provides answers.⁷⁹ But unlike the open-textured language of most constitutional provisions, the Exceptions Clause is clear. Returning to the "critical language of Article III, § 2":⁸⁰

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.⁸¹

Before parsing the provision, it may be useful to read the Exceptions Clause once again, and independently determine the most natural reading without any influence from the analysis below.

As an initial matter, the phrase "[i]n all the other Cases before mentioned" refers to those classes of cases enumerated in the preceding Section, those which the Framers viewed as "the proper subjects of the national judicature."⁸² Hence, the Constitution grants the Supreme Court "appellate Jurisdiction, both as to Law and Fact" for specific categories of cases, such as those producing the familiar diversity jurisdiction or arising-under

78. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 22 (Amy Gutmann ed., 1997).

79. For example, try ascribing a definitive meaning to "due process of law." U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. See generally Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1 (2005).

80. *Felker*, 518 U.S. at 661.

81. U.S. CONST. art. III, § 2, cl. 2.

82. THE FEDERALIST NO. 80, *supra* note 16, at 480 (Alexander Hamilton); see U.S. CONST. art. III, § 2, cl. 1 (enumerating categories of cases).

jurisdiction.⁸³ Next, a “‘regulation’ in the latter part of the eighteenth century, as today, was a rule imposed to establish good order.”⁸⁴ Congress may necessarily prescribe rules of procedure or evidence under this provision. Given this ordinary meaning though, the ability of Congress to make “Regulations” neither adds to nor subtracts from the legislative branch’s jurisdiction-stripping power.

However, the phrase “with such Exceptions . . . as the Congress shall make” modifies “appellate Jurisdiction,”⁸⁵ and it thereby confers upon Congress a license to freely restrict the Supreme Court’s appellate jurisdiction as it sees fit. Simply put, there are no exceptions to this Exceptions Clause power. The language is simple and unambiguous, absolute and unqualified. Indeed, this plain meaning—that Congress has plenary authority over the Court’s appellate jurisdiction—is further supported by contemporaneous dictionaries. Just like today, those sources defined an “exception” as an “[e]xclusion from the things comprehended in a precept or position,”⁸⁶ or similarly, as an “exclusion from the application of a general rule or description.”⁸⁷ Applying those definitions, the Constitution first establishes a general rule: the Supreme Court “shall have appellate Jurisdiction” over “all the other [enumerated] Cases” not subject to the Court’s original jurisdiction.⁸⁸ Then, the Exceptions Clause explicitly permits Congress to exclude *any* portions of this appellate jurisdiction as it “shall” deem proper.⁸⁹ Plain and simple. Nothing else in the Constitution “requires the availability of

83. See U.S. CONST. art. III, § 2, cl. 1.

84. Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 170 (1960) (footnote omitted); see also Velasco, *supra* note 52, at 714–15.

85. See, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512–13 (1869) (concluding that the Supreme Court’s appellate jurisdiction itself is conferred by the Constitution with exceptions made by Congress).

86. THOMAS SHERIDAN, 1 A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 465 (3rd ed. 1790), <https://babel.hathitrust.org/cgi/pt?id=nyp.33433061705111;view=1up;seq=465> [<https://perma.cc/52NU-U65Y>].

87. Ratner, *supra* note 84, at 168–70 (analyzing dictionaries at the time of the Constitutional Convention).

88. U.S. CONST. art. III, § 2, cl. 2.

89. *Id.*

Supreme Court review for particular types of claims.”⁹⁰ And this means that Congress can legitimately enact a jurisdictional exception to shield challenges to a statute’s constitutionality from the Court.⁹¹

Despite this clarity, two alternative textualist views have emerged in the literature. Neither is persuasive. First, some contend that “the exceptions are to the ‘appellate’ form, not to the ‘Jurisdiction’ itself.”⁹² These scholars allege that Congress may only shift categories of cases traditionally earmarked for the Court’s appellate jurisdiction to the Court’s original jurisdiction. But such a reading is unnatural. In fact, the Exceptions Clause is contained in a sentence that itself only references appellate jurisdiction, not original jurisdiction.⁹³ Not only that, but the plausibility of this theory suffers from several additional pitfalls. Most notably, it is squarely at odds with “the plain import of the words” as construed in *Marbury v. Madison*.⁹⁴ For if the Exceptions Clause permitted Congress to perform such an appellate-original shift, then *Marbury* would have held the Judiciary Act of 1789 entirely constitutional upon review.⁹⁵ A modern Supreme Court would be unlikely to abandon the well-established textual understanding of Chief Justice Marshall—especially in a case as foundational as *Marbury*—in favor of a directly opposing position. Furthermore, as described in the next Section, this appellate-original-shifting construction is undermined by both early historical practices of jurisdiction

90. CHEMERINSKY, *supra* note 26, at 207; see Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1041 (1982); Charles L. Black, Jr., *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 845 (1975).

91. Note that although Congress may render Supreme Court review unavailable, other mechanisms for striking down jurisdiction-stripping statutes still exist. Alternative methods include—but are not limited to—congressional repeal, state court decisions, voting out supporters of the legislation, public backlash, and other grassroots social efforts. The Supreme Court should not be viewed “as a general haven for reform movements.” *Reynolds v. Sims*, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting).

92. Alex Glashauser, *A Return to Form for the Exceptions Clause*, 51 B.C. L. REV. 1383, 1402 (2010).

93. See U.S. CONST. art. III, § 2, cl. 2.

94. 5 U.S. (1 Cranch) 137, 175 (1803).

95. See *id.* (“[T]he plain import of the words seems to be, that in one class of cases [the Supreme Court’s] jurisdiction is original, and not appellate; in the other it is appellate, and not original.”).

stripping by Congress, as well as the original understanding of the Exceptions Clause.⁹⁶

Second, other scholars have attempted to argue that “Exceptions” was intended only to modify the word “Fact,” rather than the Court’s ultimate jurisdiction.⁹⁷ Again, the grammatical structure disfavors this interpretation. Read more naturally, “both as to Law and Fact” simply clarifies the potential *reach* of the “appellate Jurisdiction” of the Supreme Court. The Exceptions Clause, by contrast, acts to permit Congress to cabin the scope of this jurisdiction—“both as to Law and Fact.” Moreover, this alternative reading is dispelled by the Federalist Papers,⁹⁸ records from the Constitutional Convention,⁹⁹ countless legal scholars,¹⁰⁰ and most significantly, the First Congress preventing the Court from reviewing certain legal (meaning not factual) conclusions of state courts.¹⁰¹

But regardless of the Clause’s plain meaning, history has manifested that even the most unambiguous provisions have become distorted by layers of precedent,¹⁰² centuries of shifting

96. See *infra* Part II.B.

97. See Henry J. Merry, *Scope of the Supreme Court’s Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 68–69 (1962).

98. See THE FEDERALIST NO. 80 (Alexander Hamilton); *infra* Part II.B.

99. See Velasco, *supra* note 52, at 721 n.244 (“A prior draft of the Constitution provided simply that ‘[i]n all other cases before mentioned, it [*i.e.*, Supreme Court jurisdiction] shall be appellate, with such exceptions and under such regulations as the Legislature shall make.’” (alterations in original) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 186 (Max Farrand ed., 1911))).

100. See, e.g., Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 778–79 (1984); Gunther, *supra* note 18, at 901; Ralph A. Rossum, *Congress, The Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 401 (1983).

101. The Supreme Court could only review decisions of state courts that ruled *against* a federal claim arising under the Constitution. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

102. For example, the First Amendment only provides that “Congress shall make no law” abridging the freedom of speech. U.S. CONST. amend. I (emphasis added). Construed literally, the executive or judiciary could abridge the freedom of speech, but this has not proven the case. See *Citizens United v. FEC*, 558 U.S. 310, 326 (2010) (“Courts, too, are bound by the First Amendment.”); cf. Sonja R. West, *Suing the President for First Amendment Violations*, 71 OKLA. L. REV. 321, 329 (2018) (arguing that courts should hold the President accountable under the First Amendment as it has other executive officials, but noting that “[t]he question of whether the First Amendment applies directly to the President . . . remains officially unresolved”).

values,¹⁰³ and sometimes simple judicial necessity.¹⁰⁴ As one scholar observed, “If we read the text of the Constitution in a straightforward way, American constitutional law ‘contradicts’ the text of the Constitution more often than one might think.”¹⁰⁵ Therefore, my aim for the rest of this Part is to use historical evidence and the underlying structure of the Constitution to support a reading of the Exceptions Clause which is faithful to its plain text.

B. *History Reinforces Congress’s
Sweeping Exceptions Clause Power*

On July 24, 1787, after concluding the initial round of debates at the Constitutional Convention, the delegates submitted the various resolutions they had approved to the Committee of Detail, a task force charged with “report[ing] a Constitution comfortable to the Resolutions passed by the Convention.”¹⁰⁶ In its initial draft of the Exceptions Clause, the Committee of Detail captured the approved resolutions as follows: “in all the other cases before mentioned, it [the Supreme Court’s jurisdiction] shall be appellate, with such exceptions and under such regulations as the Legislature shall make.”¹⁰⁷ Notably, there are only two discrepancies between this draft and the final language enshrined in the Constitution. These include the replacement of “Congress” for “Legislature,” and the insertion of “both as to Law and Fact” to clarify the scope of “it” (the Court’s appellate

103. To illustrate, the “right to privacy” does not flow from any textual provision of the Constitution. See *Griswold v. Connecticut*, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting) (“What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy ‘created by several fundamental constitutional guarantees.’ With all deference, I can find no such general right of privacy in the Bill of Rights, or in any case ever before decided by this Court.”).

104. In *Bolling v. Sharpe*, the Supreme Court held that the federal government could not discriminate on the basis of race in D.C. schools even though “[t]he Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states.” 347 U.S. 497, 499–500 (1954).

105. David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1, 3 (2015).

106. Rossum, *supra* note 100, at 392 (quoting 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22, 46 (rev. ed. 1937)) (internal quotation marks omitted).

107. *Id.* (quoting FARRAND, *supra* note 106, at 173) (internal quotation marks omitted).

jurisdiction). The former modification is merely semantic, and the latter was approved unanimously and with little discussion as a simple clarification of the Court's potential jurisdictional reach.¹⁰⁸ Because "[n]o questions were raised concerning Congress' plenary power to make exceptions," Professor Ralph Rossum resolves that "[t]he conclusion is inescapable: both the words chosen by the delegates and the discussion surrounding their choice of these words suggest an unlimited congressional power over the Court's appellate jurisdiction."¹⁰⁹

Though this particular evidence from the Convention does support Professor Rossum, it is not decisive on the matter. Nevertheless, his conclusion is correct. In parallel with the text, both the original public meaning and history of the Exceptions Clause strongly indicate that Congress has the essentially unconditional authority to act as jurisdictional gatekeeper. The remainder of this Section will examine three additional sources buttressing this view: the *Federalist Papers*, historical practices of the First Congress, and the role state supreme courts played in the early Republic.

1. *The Federalist Papers: Capturing the Views of the Original Public Meaning and Governmental Structure*

"The Federalist Papers long have enjoyed a special reputation as an extremely important source of evidence of the original meaning of the Constitution,"¹¹⁰ both within the academic liter-

108. *See id.* at 392–93 ("James Wilson, the principal architect of the draft reported by the Committee of Detail, answered [a question of the meaning of "it"] that the committee meant 'facts as well as law & Common as well as Civil law.' No comments were forthcoming from other members of the Committee, presumably indicating their agreement with Wilson's answer." (footnote omitted) (quoting FARRAND, *supra* note 106, at 431)).

109. *Id.* at 393.

110. Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 802 (2007). Chief Justice Marshall similarly referred to them with reverence:

The opinion of the *Federalist* has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors [Madison and Hamilton] performed in framing the constitution, put it very much in their power to explain the views with which it was framed.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821).

ature as well as for the federal judiciary.¹¹¹ Alexander Hamilton explained the breadth of the Exceptions Clause in *Federalist No. 80*. There, after enumerating “the particular powers of the federal judiciary, as marked out in the Constitution,” Hamilton argued that “it appears that [the powers] are all conformable to the principles which ought to have governed the structure of [the judicial] department and which were necessary to the perfection of the system.”¹¹² Yet after attesting to the nobility of the proposed federal judiciary’s power, Hamilton then described the rationale for a major legislative check on the jurisdiction of the Court. He continued:

If some partial inconveniences should appear to be connected with the incorporation of any of [the jurisdictional powers] into the plan[,] it ought to be recollected that the national legislature will have *ample authority to make such exceptions, and to prescribe such regulations as will be calculated to obviate or remove these inconveniences*. The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a general principle, which is calculated to avoid general mischiefs and to obtain general advantages.¹¹³

This stark expression of the legislature’s ability to restrain the Supreme Court and “obviate or remove” any “inconveniences” which may arise because of its jurisdiction reinforces the breadth of the Exceptions Clause authority. Indeed, in *Federalist No. 81*, Hamilton further argued that the exceptions power would “enable the government to modify [the Court’s appellate jurisdiction] in such a manner as will best answer the ends of public justice and security.”¹¹⁴ Even during the course of state conventions, ratifiers such as John Marshall shared Hamilton’s view and remarked that the jurisdictional “exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.”¹¹⁵

111. See *Printz v. United States*, 521 U.S. 898, 910 (1997) (noting that the *Federalist Papers* are “usually regarded as indicative of the original understanding of the Constitution”).

112. THE FEDERALIST NO. 80, *supra* note 16, at 480 (Alexander Hamilton).

113. *Id.* (emphases added).

114. THE FEDERALIST NO. 81, *supra* note 16, at 489 (Alexander Hamilton).

115. Rossum, *supra* note 100, at 393 (quoting 3 DEBATES ON THE FEDERAL CONSTITUTION 560 (Jonathan Elliot ed., 2d ed. 1888)) (internal quotation marks omitted).

Taken together, Hamilton's insights demand substantial consideration insofar as they support Congress's legitimate ability to remove the determination of a statute's constitutionality from the Court's purview. For in addition to bolstering a far-reaching understanding of the Exceptions Clause, the *Federalist Papers* also indicate the provision's underlying purpose—to remove “inconveniences . . . connected with the incorporation of any of [the jurisdictional powers] into the plan.”¹¹⁶ By this view, if Congress deemed a statute overturning a Supreme Court decision as indispensable for maintaining public justice and security, then it could act to shield the statute from repeated Supreme Court overreach. And, in certain instances, doing so could promote the virtues of federalism¹¹⁷ or the protection of individual rights.¹¹⁸ Just as the Framers envisioned.

To be clear, it is highly unlikely that Hamilton intended to use the term “inconveniences” lightly in describing the Exceptions Clause's remedial vision.¹¹⁹ Yet cabining unnecessary and undesirable judicial politicization is a fundamental aim of the Exceptions Clause. It provides a legislatively mandated “political question doctrine” of sorts in the form of jurisdiction stripping. And it can prevent nine (potentially five) elite lawyers from announcing politically charged rights found nowhere in our nation's foundational document. In short, the Exceptions Clause “furnishes necessary legitimacy to the enterprise of judicial review . . . by recognizing that the ultimate authority over constitutional interpretation belongs not to the Court alone, but to ‘the People.’”¹²⁰

Therefore, contrary to the views of Professor Laurence Tribe, it is submitted that the “*de facto* reversal, by means far less burdensome than those required for a constitutional amendment, of several highly controversial Supreme Court decisions”¹²¹

116. THE FEDERALIST NO. 80, *supra* note 16, at 480 (Alexander Hamilton).

117. For instance, reversing *Roe v. Wade*, 410 U.S. 113 (1973), to leave it to the states to decide the right to an abortion.

118. For example, Congress could have used the Exceptions Clause to overturn *Plessy v. Ferguson*, 163 U.S. 537 (1896), thereby obviating the need for *Brown v. Board of Education*, 347 U.S. 483 (1954).

119. See THE FEDERALIST NO. 80, *supra* note 16, at 480 (Alexander Hamilton).

120. *Leading Cases*, *supra* note 20, at 285.

121. Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 129–30 (1981) (footnote omitted).

would constitute one of the most institutionally legitimate uses of the Exceptions Clause. Although Professor Tribe is correct that this power should rarely, if ever, be used,¹²² there exists a crucial difference between empowering judges to determine what the law *is* and permitting them unchecked¹²³ to expound what the law *should be*.¹²⁴ Such activism proved a grave issue of concern for the Founders. After all, barring the difficult processes in Article V,¹²⁵ “[b]y deciding [a] question under the Constitution, the Court removes it from the realm of democratic decision” altogether.¹²⁶ When exercised improperly, this sort of judicial activism undermines the Court’s institutional legitimacy,¹²⁷ and it disrespects the relative moral proximity of Congress to the people of the United States.¹²⁸

Further, it is precisely this worry that has often motivated Congress to begin considering jurisdiction-stripping proposals in the first place. For example, in an effort to overrule *Miranda*

122. See *id.* at 130–31; see also *infra* Part III.

123. Because of the inability of either camp to muster a three-fourths majority of states, for many polarizing issues such as abortion or gun rights, a constitutional amendment fails to provide a realistic check on an overtly activist Supreme Court, regardless of which way the Court swings on the issue.

124. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (“Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*.”).

125. One scholar has argued that Congress cannot “strip[] federal jurisdiction over amendment-based claims.” Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 977 (2008). But this theory lacks any textual basis whatsoever. No amendment even implicitly purports to trump the Exceptions Clause or alter the Court’s jurisdiction. Indeed, the presence of a substantive right embodied in an amendment is wholly consistent with the Supreme Court’s inability to hear certain cases calling into question the scope of that right. This is because lower federal courts or state courts can still adequately vindicate the amendment-based right in those cases.

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

127. *But cf.* Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 769 (2013) (arguing that in upholding the Affordable Care Act, the “driving concern for Roberts [in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)] was credibility—the institutional legitimacy of the Court, and, his own reputation and legacy, including the special role of the Chief Justice”).

128. *Cf. Leading Cases*, *supra* note 20, at 285 (arguing that the Exceptions Clause provides a mechanism for “oversee[ing] the functioning of an unelected Supreme Court”).

*v. Arizona's*¹²⁹ prophylactic regime,¹³⁰ the Senate once proposed a bill that would have prohibited federal courts “to review or to reverse, vacate, modify, or disturb in any way, a rule of any trial court of any State in any criminal prosecution admitting in evidence as voluntarily made an admission or confession of any accused.”¹³¹ In simple terms, the act would have precluded the Court from using *Miranda* to exclude wholly voluntary confessions. Why would Congress (and the Framers) find this desirable? The proposed re-admissibility of *Miranda*-less but nevertheless voluntary confessions signifies an effort to “recalibrate” the Constitution in the wake of an activist Warren Court—to legislatively repeal a non-originalist right found nowhere in the Fifth Amendment’s text or history.¹³² Put differently, the *Miranda* decision arguably amounted to a de facto amendment—one well beyond the Court’s power—and Congress strove to leverage the Exceptions Clause to restore the constitutional status quo. It introduced but ultimately did not pass a failsafe check to prevent the alteration of constitutional meaning, one which would have accorded with the original understanding and intent of the Exceptions Clause. And, if the measure had passed, state courts and legislatures could have continued to safeguard rights under the federal Constitution and interpret the Fifth Amendment as it had been construed for nearly two centuries.¹³³

Such congressional curtailment of perceived judicial abuses comports with the system contemplated by the Framers—that our tripartite government is not simply one of separation of powers, but also of “checks and balances to reinforce that separation.”¹³⁴ Ignoring the significance of checks and balances in

129. See 384 U.S. 436 (1966).

130. See *id.* at 467–68 (concluding that an accused person subject to custodial interrogation cannot voluntarily waive his right to remain silent without first being read his all-too-familiar *Miranda* rights).

131. CHEMERINSKY, *supra* note 26, at 187 (quoting GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 47 (13th ed. 1997)) (internal quotation marks omitted).

132. See, e.g., *Miranda*, 384 U.S. at 526 (White, J., dissenting) (asserting that the decision “has no significant support in the history of the privilege [against self-incrimination] or in the language of the Fifth Amendment”); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2628–31 (1996) (similar).

133. See *infra* Part II.B.3.

134. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1215–16 (2015).

this framework and focusing exclusively on the Court's vested power thereby leads opposing theories of the Exceptions Clause down a flawed and dangerous path.¹³⁵ Sure, Hamilton opined that the judiciary was "the weakest of the three departments of power,"¹³⁶ and so some may argue there exists little need for a legislative check on its opinions. But recognizing the fear of austere judicial aggrandizement into a policy-making entity, Hamilton tempered his assessment by adding: "I mean so long as the judiciary remains *truly distinct* from both the legislature and the executive. For I agree, that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'"¹³⁷ Thomas Jefferson shared this sentiment, lamenting in 1823:

Experience . . . soon showed in what way [the judicial branch was] to become the most dangerous [Federal judges had] sapp[ed], by little and little, the foundations of the constitution, and work[ed] [their] change by construction, before any one has perceived that that invisible and helpless worm has been busily employed in consuming its substance.¹³⁸

To credit both Hamilton and Jefferson, a democracy should fear life-tenured and politically unaccountable judges willing to shift the constitutional goalposts. But by enabling Congress to rein in the Supreme Court and correct manifest errors by defining its appellate jurisdiction, the Exceptions Clause can actually *add* to the judiciary's democratic legitimacy.¹³⁹

Now, with a Court that has for better or worse declared itself "the ultimate interpreter of the Constitution,"¹⁴⁰ Hamilton's reservation must be afforded respect. Otherwise, little exists to prevent unchecked judicial politicization. Little exists to mean-

135. See *infra* Part II.C (critiquing the "essential role" theory).

136. THE FEDERALIST NO. 78, *supra* note 16, at 464 (Alexander Hamilton).

137. *Id.* at 464–65 (emphasis added) (quoting 1 MONTESQUIEU, THE SPIRIT OF THE LAWS 181 (1748)).

138. Letter from Thomas Jefferson to Adamantios Coray (Oct. 31, 1823), in 15 THE WRITINGS OF THOMAS JEFFERSON 480, 487 (Andrew A. Lipscomb ed., 1905).

139. See Black, *supra* note 90, at 846 ("Except for the original jurisdiction of the Supreme Court, every assumption of jurisdiction by every federal court since 1789 has been on the basis of an Act of Congress [This] is the rock on which rests the legitimacy of the judicial work in a democracy."); see also *Leading Cases*, *supra* note 20, at 285.

140. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

ingly ensure the “complete independence of the courts of justice [which] is peculiarly essential in a limited Constitution.”¹⁴¹ The amendment process is both arduous and reserved to the States, and so on polarizing issues where it may fail, what enables the still democratically accountable legislature to prevent Lochnerian¹⁴² judicial abuse? The Exceptions Clause. It ingeniously provides a congressional guard rail—a “check”—to ensure the Supreme Court operates within its constitutional role. And as I will argue more fully below,¹⁴³ state courts act as a simultaneous judicial guard rail—a “balance”—to ensure that Congress likewise operates in accordance with the Constitution.

As such, respecting the Exceptions Clause’s breadth can prevent two of the coordinate branches—Congress *and* the courts—from violating the envisioned prerogatives of their co-equal counterparts. This “separation of powers was adopted by the Convention of 1787 . . . to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”¹⁴⁴

2. *The First Congress: Reaffirming Broad Authority*

As with the *Federalist Papers*, “early congressional enactments ‘provide contemporaneous and weighty evidence of the Constitution’s meaning.’”¹⁴⁵ Such “contemporaneous legislative exposition of the Constitution, acquiesced in for a long term of years, fixes the construction to be given its provisions.”¹⁴⁶ Because the First Congress in particular comprised

141. THE FEDERALIST NO. 78, *supra* note 16, at 465 (Alexander Hamilton).

142. See Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244–45 (1998) (arguing that *Lochner v. New York*, 198 U.S. 45 (1905), “the infamous case in which the Supreme Court struck down a New York health and labor regulation limiting bakers’ workweeks to sixty hours,” is one of the “most reviled” cases in the constitutional “anti-canon” because of its judicial activism).

143. See *infra* Part II.B.3.

144. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613–14 (1952) (Frankfurter, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 240, 293 (Brandeis, J., dissenting)) (internal quotation marks omitted).

145. *Printz v. United States*, 521 U.S. 898, 905 (1997) (alteration omitted) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)).

146. *Id.* (alteration omitted) (quoting *Myers*, 272 U.S. at 175) (internal quotation marks omitted).

many members from the Constitutional Convention and state ratifying conventions, its actions produce substantial insight into the original understanding of the Constitution.¹⁴⁷

Tellingly, the Supreme Court has operated with its appellate jurisdiction mitigated or eliminated entirely in certain areas ever since the First Congress passed the Judiciary Act of 1789. Indeed, “[f]or a century, federal criminal cases were not generally reviewable in the Supreme Court.”¹⁴⁸ And that is significant to this Note’s overarching inquiry. Just like a potential law that excludes, for example, the constitutionality of state abortion statutes from Supreme Court review, so too did this enactment of the First Congress exempt a complete category of cases from review based solely upon subject matter. In other words, the First Congress’s restriction indicates that the legislature could function as gatekeeper for the types of questions which may reach the Court.

Furthermore, the early Supreme Court could only review decisions of state supreme courts that ruled against (that is, not in favor of) a federal constitutional claim.¹⁴⁹ This jurisdictional carve out remained in force even until World War I,¹⁵⁰ and serves as powerful corroborative evidence regarding the scope of the Exceptions Clause.¹⁵¹ “It follows from this [historical practice] that Congress has the power by enactment of a statute to strike at what it deems judicial excess by delimitations of . . . the Supreme Court’s appellate jurisdiction.”¹⁵² This could very well entail eliminating the jurisdictional authority to examine a specific statute’s constitutionality.

3. *State Supreme Courts: Vindicating Due Process*

Opponents of jurisdiction stripping often urge that removing judicial review could violate the right to due process.¹⁵³ That is,

147. See *Golan v. Holder*, 565 U.S. 302, 321 (2012).

148. Bator, *supra* note 90, at 1040.

149. See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87.

150. See Act of Dec. 23, 1914, Pub. L. No. 63-224, 38 Stat. 790 (1914).

151. Cf. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327–28 (1936) (“A legislative practice such as we have here, evidenced not by only occasional instances; but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice . . .”).

152. Wechsler, *supra* note 18, at 1005.

153. See, e.g., Van Alstyne, *supra* note 34, at 263–66.

due process would purportedly provide an internal constitutional constraint on restricting the Supreme Court's ability to rule on a statute's validity.

However, this contention overstates the importance of Supreme Court review. Because of our system of dual sovereignty, when Congress peels away a layer of protection by invoking its Exceptions Clause authority, multiple sublayers of judicial review still remain to vindicate constitutional rights. First, Congress may direct the inferior federal courts to hear those cases removed from the Supreme Court's appellate jurisdiction.¹⁵⁴ Second, even absent judicial review in federal courts altogether, state constitutions—often containing similar if not identical language to their federal counterpart—still act as guardians of every individual's right to due process.¹⁵⁵ And third, the federal Constitution *continues* to provide a source of relief to all litigants, regardless of Congress's decisions on whether to exercise the full extent of its Exceptions Clause power. This is because "state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and the state-court adjudication."¹⁵⁶ Moreover, they generally must do so,¹⁵⁷ and via the Supremacy Clause, "Judges in every State shall be bound [by the Constitution]."¹⁵⁸ Practically speaking then, although Congress may not expressly declare a victor in the battle over a constitutional question, it may validly shift the battlefield to state courts.

Assuming state court availability, there is certainly no general due process right to Supreme Court review, for even federal litigants do not receive such as a matter of right.¹⁵⁹ It is furthermore difficult to imagine that automatic federal court review of any sort is really "due" to anybody when: (1) the Exceptions Clause explicitly provides that the Court's appellate jurisdic-

154. *See, e.g.,* *Felker v. Turpin*, 518 U.S. 651, 661–62 (1996) (accepting the practice's constitutionality).

155. *See generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

156. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477–78 (1981).

157. *See* *Testa v. Katt*, 330 U.S. 386, 391 (1947) (holding that state courts have a general duty to hear federal claims).

158. U.S. CONST. art. VI, cl. 2.

159. *See* Judiciary Act of 1891, ch. 517, §§ 4, 6, 26 Stat. 826, 827–28 (removing certain appeals to the Supreme Court for litigants as a matter of right).

tion is subject to restrictions,¹⁶⁰ and (2) given Congress's authority to "ordain and establish" inferior tribunals,¹⁶¹ "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."¹⁶² As one scholar described:

That state courts might come to different substantive conclusions than the Supreme Court does not mean that they are disregarding the Constitution. Nowhere does the Constitution state that the Constitution *as interpreted by the Supreme Court*, or that the decisions of the Supreme Court, shall be the "supreme Law of the Land." If jurisdiction is the authority to decide a case, it must include the authority to decide the case wrongly. Corrections, if any, must come on appeal. State courts may decide cases wrongly—just as the Supreme Court may decide cases wrongly. But just as the latter is constitutionally acceptable, so must be the former.¹⁶³

By this view, when Congress enacts a jurisdiction-stripping provision leaving abortion's legality to the states, restricting corporate election financing, permitting all voluntary confessions in criminal proceedings, curbing gun ownership, or expanding state regulatory freedoms under the dormant commerce clause,¹⁶⁴ the unrestrained state courts have a positive—but wholly independent—duty to uphold both the state and federal constitutions.¹⁶⁵ They would become the final arbiters of the law's constitutionality. And that is perfectly okay.

Optimistically speaking, the state courts would decline Congress's invitation to disregard Supreme Court precedent.

160. See, e.g., *Felker v. Turpin*, 518 U.S. 651, 661–62 (1996).

161. U.S. CONST. art. III, § 1.

162. *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); see *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850) ("Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers.").

163. Velasco, *supra* note 52, at 694–95 (footnotes omitted).

164. For the purposes of overturning or limiting *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Citizens United v. FEC*, 558 U.S. 310 (2010), *Miranda v. Arizona*, 384 U.S. 436 (1966), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), or *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), respectively.

165. More than likely, the state supreme court—even in the absence of U.S. Supreme Court review—would follow its federal counterpart, both as a matter of arguably still binding precedent (via the Supremacy Clause) and as a matter of judicial respect. To prevent the potential dissolution of the Republic and send a strong message back to Congress, they should do so. However, nothing can *stop* the state supreme court from ruling contrary to Supreme Court precedent.

Yet reasonable state courts could disagree as to the weight they would have to afford federal precedent in such a unique situation. After all, Congress would have validly abrogated Supreme Court review on the issue precisely because it viewed an earlier decision of the Court as patently incorrect. Professor Erwin Chemerinsky accordingly notes, “The limit on federal court power might be perceived by some state legislatures as an open invitation to adopt laws disregarding Supreme Court precedents and some state courts, without the prospect of Supreme Court review, might sustain such statutes.”¹⁶⁶ The point is, irrespective of which precedential position the state courts may take, they still act as perpetual safeguards from uninhibited legislative tyranny.¹⁶⁷ Even if potentially cumbersome to litigate an issue in multiple states and despite the risk of a lack of uniformity, state courts unwaveringly serve to prevent legislatures from flatly disregarding any rights embodied in the Constitution.

Such a federalist design might even be desirable in certain instances. State courts are at least as independent from interference by Congress as the Supreme Court is,¹⁶⁸ and so they may provide an even more suitable forum for the litigation of certain prickly political issues.¹⁶⁹ Not only that, but when federal judging becomes unacceptably politicized, this alternative could prevent nine unelected individuals from unilaterally injecting their policy preferences into the inner workings of fifty disparate states. With this in mind, in describing the original

166. CHEMERINSKY, *supra* note 26, at 205.

167. See Hart, *supra* note 67, at 1401 (“In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.”).

168. See Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 912 (1982) (“[S]tate courts remain as independent as article III federal judges, because Congress has no power to regulate either their salary or tenure.”).

169. This intention is probably why the Framers did not allow for exceptions as to the *original* jurisdiction of the Court:

All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation.

THE FEDERALIST NO. 81, *supra* note 16, at 486 (Alexander Hamilton).

vision of jurisdiction contemplated by the Framers, Professor Herbert Wechsler stated that:

Congress would decide from time to time how far the federal judicial institution should be used within the limits of the federal judicial power; or, stated differently, how far judicial jurisdiction should be left to the state courts, bound as they are by the Constitution as “the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”¹⁷⁰

In *Lockerty v. Phillips*,¹⁷¹ the Supreme Court similarly declared, “Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe.”¹⁷² “‘To deny this position’ would undermine the separation of powers by ‘elevating the judicial over the legislative branch,’”¹⁷³ which may have good reasons for delegating constitutional questions exclusively to the states. Whether one agrees with them, such were the choices of the Framers, and we will continue to be bound by those decisions until we, as a nation, leverage the amendment mechanism granted to us in Article V.¹⁷⁴

C. The “Essential Role” Theory

Although the text and history of the Exceptions Clause are clear, much of the recent scholarly commentary has sought to limit its scope.¹⁷⁵ Perhaps most famously, Professor Henry Hart advocated for his own structural limiting principle: that “the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan.”¹⁷⁶ Professor Hart conceded that his “essential role” test found neither textual nor precedential support, but argued that “whatever the difficulties

170. Wechsler, *supra* note 18, at 1005–06 (quoting U.S. CONST. art. VI, cl. 2).

171. 319 U.S. 182 (1943).

172. *Id.* at 187 (emphasis added).

173. *Patchak v. Zinke*, 138 S. Ct. 897, 907 (2018) (plurality opinion) (alteration omitted) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

174. See U.S. CONST. art. V.

175. See, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 240–46 (1985); Clinton, *supra* note 100, at 753–54; Glashausser, *supra* note 92, at 1400–02.

176. Hart, *supra* note 67, at 1365.

of the test, they are less . . . than the difficulties of reading the Constitution as authorizing its own destruction."¹⁷⁷ Professor Leonard Ratner then sought to clarify Hart's indeterminacy:

[The Court's] essential appellate functions under the Constitution are: (1) to provide a tribunal for the ultimate resolution of inconsistent or conflicting interpretations of federal law by state and federal courts, and (2) to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority.¹⁷⁸

Despite the theory's appeal as a prudential vision of how Congress should restrictively wield its authority,¹⁷⁹ it lacks any meaningful basis for concluding why Congress cannot do so uninhibited.¹⁸⁰ Nowhere does the "essential role" theory find any root within the four corners of the Constitution; rather, congressional reach under the Exceptions Clause is textually unqualified. The clause grants Congress the explicit power to remove categories of cases from the Court, and "[w]hen Congress acts *within its sphere of power and responsibilities*, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."¹⁸¹ This sphere plainly includes the authority to choose whether the Supreme Court can review a statute for its conformance to the Constitution.

In addition to these textual and precedential shortcomings, Professor Hart's theory also neglects that the Court's "judicial duty is not less fitly performed by *declining* ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."¹⁸² As the Supreme Court has explained, "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects."¹⁸³ Thus, the Constitution has rendered the Court's appellate jurisdiction "wholly the creature of legisla-

177. *Id.*

178. Ratner, *supra* note 84, at 161.

179. *See infra* Part III.

180. *See, e.g.,* Redish, *supra* note 168, at 906 ("Professor Hart's comment could at best be characterized as conclusory and at worst as simply off-hand.")

181. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (emphasis added).

182. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 515 (1869) (emphasis added).

183. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

tion.”¹⁸⁴ To “create such jurisdiction in any case, two things must concur: the Constitution must give the capacity to take it, *and* an act of Congress must supply the requisite authority.”¹⁸⁵ Setting aside those cases within the Court’s original jurisdiction, the “essential role” of the Supreme Court is therefore singular. It is to adjudicate those disputes—and only those disputes—which Congress has deemed appropriate for it to resolve. Only in such instances will the “judicial duty” be “fitly performed.”¹⁸⁶ Professor Hart’s misguided “essential role” limitation to the Exceptions Clause should accordingly be cast aside as “little more than constitutional wishful thinking.”¹⁸⁷ Instead, the plain text prevails: Congress may shield a statute’s constitutionality entirely from Supreme Court review.¹⁸⁸

III. POLICY CONCERNS RAISED BY SHIELDING A STATUTE FROM SUPREME COURT REVIEW

Throughout this exploration of the Exceptions Clause, I have argued that the clause confers upon Congress the near-plenary authority to curtail the appellate jurisdiction of the Supreme Court. Given the provision’s history and text, this power includes the ability to prevent the Court from ruling on a statute’s facial constitutionality altogether. Yet as the Supreme Court and Spider-Man alike have preached, “[i]n this world, with great power there must also come—great responsibility.”¹⁸⁹ In this final Part, I will argue that even if Congress could constitutionally weaponize the Exceptions Clause, it generally should not do so because of ancillary threats to institutional stability.

184. *Daniels v. R.R. Co.*, 70 U.S. (3 Wall.) 250, 254 (1866).

185. *Id.* (emphasis added); see *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847) (“By the constitution of the United States, the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress. . . .”); *Durosseau v. United States*, 10 U.S. (6 Cranch) 307, 313–14 (1810) (similar); see also *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005) (“[A]bsence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties.”).

186. *McCardle*, 74 U.S. (7 Wall.) at 515.

187. Redish, *supra* note 168, at 911.

188. Subject of course to internal constraints in the Constitution like equal protection.

189. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2415 (2015) (alteration in original) (quoting STAN LEE & STEVE DITKO, *AMAZING FANTASY NO. 15*, at 13 (1962) (containing the first appearance of Spider-Man)) (internal quotation marks omitted).

A. *The Exceptions Clause as a Contravention of Substantive Values*

Despite Congress's legitimate Exceptions Clause authority, principled legislative restraint is paramount lest the constitutional project disintegrate into the very form of despotic government the Revolution sought to proscribe. As Alexis de Tocqueville observed, the power vested in the American courts of "rul[ing] on the unconstitutionality of laws still forms one of the most powerful barriers that has ever been raised against the tyranny of political assemblies."¹⁹⁰ But cutting down that anti-majoritarian barrier would quite simply threaten the most fundamental values embodied in the Constitution. It would allow a single branch to aggrandize the federal powers wisely distributed by the Framers among discrete entities.¹⁹¹

With respect to wise policy, then, Professor Hart's "essential role" theory warrants particular attention.¹⁹² Recall that the core responsibilities of the Supreme Court arguably include both the resolution of conflicting interpretations of federal law and ensuring the supremacy of federal law.¹⁹³ Preventing the federal courts from reviewing a statute's constitutionality would clearly undermine these twin goals. For although state courts may still provide effective redress, they could very well ignore Supreme Court precedent with impunity, and it has long been recognized that a national Constitution with uniform meaning would be lost without the Supreme Court.¹⁹⁴ Whatever value inherent in federalism, it would pervert the Constitution—the unifying emblem of our nation—should its fundamental privileges be conferred unequally by dint of sheer geographic coincidence.¹⁹⁵ Thus, in supporting the "essential roles" theory,

190. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 175 (Liberty Fund new ed. 2012) (1835).

191. Cf. THE FEDERALIST NO. 51, *supra* note 16, at 320 (James Madison) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.").

192. See generally Hart, *supra* note 67.

193. See Ratner, *supra* note 84, at 161.

194. Cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 386 (1921) ("Different States may entertain different opinions on the true construction of the constitutional powers of Congress.").

195. This is precisely why the Supreme Court often grants certiorari on circuit splits.

Professor Ratner described the Constitution's overarching vision as follows:

The Constitution makes us one nation. It is the symbol of our shared purposes. If interpretation of that overriding document, which manifests our agreement on long term associational values, varies from state to state, respect for and confidence in the document is undermined. The nature of our governmental structure and its implications for all citizens become indistinct. Uncertainty and discontent proliferate.¹⁹⁶

Professor Ratner's warning is all the more pressing in light of the increasingly national identity of modern citizens.¹⁹⁷ No longer do we define ourselves first and foremost by our state.¹⁹⁸ Our confidence in the Constitution stems in large part from the fact that it applies equally to us all.¹⁹⁹

Furthermore, the Constitution expresses a profound respect for individual liberties, especially those of minority groups incapable of political redress.²⁰⁰ Recklessly invoking the Exceptions Clause to undercut the judicial protection of valid minority interests would thereby violate a core tenet of constitutional law.²⁰¹ Say what you will of the amorphous concept of the "spirit of the Constitution" as a legal argument. But as a practical matter, few would disagree that its use as an instrument of oppression by the majority is highly objectionable. After all, a defining characteristic of the Constitution is its careful construction aimed at "secur[ing] the Blessings of Liberty" for pos-

196. Leonard G. Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 941 (1982).

197. Cf. Suzanna Sherry, Note, *Against Diversity*, 17 CONST. COMMENT. 1, 1-2 (2000) (arguing that diversity jurisdiction is a historical relic and is no longer necessary because local bias has largely faded).

198. See, e.g., Robert F. Nagel, *On the Decline of Federalism*, DAEDALUS, Winter 2006, at 127, 127-30.

199. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

200. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (expressing the need for "more searching judicial inquiry" when state action expresses "prejudice against discrete and insular minorities").

201. See Larry A. Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review*, 8 U. DAYTON L. REV. 447, 456-57 (1983).

terity.²⁰² It is in broad strokes an enduring venture which seeks to protect the most basic values cherished by society. And recognizing human frailty both in times of peril and in the prospect of power, the Founders deliberately made it exceedingly difficult to change. However, if an impassioned majority irresponsibly alters this Ulysses contract in the heat of the moment²⁰³—as it could potentially do by shielding a statute’s constitutionality from the Court—the Constitution’s attempt to prophylactically tie the hands of future generations could ultimately fail.

B. The Exceptions Clause as a Political Weapon

In addition to undermining substantive values embodied in the Constitution, reckless use of the Exceptions Clause as a partisan weapon by either Republicans or Democrats could also spell mutual destruction—both to the parties and to democracy itself. At the beginning of Part I, I suggested why the political repercussions of shielding a statute’s constitutionality from the Supreme Court have likely compelled Congress to refrain from using the power in the past. Then throughout Part II, I argued why the text, history, and system of checks and balances envisioned by the Framers nonetheless collectively permit Congress to do so. This final Section will bridge that historical disconnect. Suppose that either party in Congress finally chooses to break free of its historical restraint. Even if constitutionally valid, what practical consequences would this weaponization of the Exceptions Clause have for our democracy?

In their recent book, Professors Steven Levitsky and Daniel Ziblatt explain that “our system of checks and balances has worked pretty well—but not, or not entirely, because of the constitutional system designed by the founders. Democracies work best—and survive longer—where constitutions are reinforced by unwritten democratic norms.”²⁰⁴ Standing alone, the

202. U.S. CONST. pmbl.; see also U.S. CONST. amend. XIV, § 1 (mandating equal protection of the laws).

203. Compare *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (upholding the internment of Japanese-Americans during World War II), with *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—‘has no place in law under the Constitution.’” (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting))).

204. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 8 (2018).

Constitution is only words on some parchment; its continued practical strength depends almost entirely upon the conduct of its institutional actors.²⁰⁵ Accordingly, one of the most critical “soft guardrails of American democracy” is “forbearance, or the idea that politicians should exercise restraint in deploying their institutional prerogatives,” and that they should “resist[] the temptation to use their temporary control of institutions to maxim[ize] partisan advantage.”²⁰⁶ When the Constitution contains an explicit provision subject to abuse like the Exceptions Clause, these soft democratic norms deliver an institutional source of shelter from governmental tyranny.

In the jurisdiction-stripping context, forbearance on Capitol Hill is therefore essential. By way of the *Citizens United* example introduced earlier,²⁰⁷ if the legislature sought to leverage the Exceptions Clause to overturn the Court’s decision and cap corporate election spending, this would directly interfere with the freedom and continuity of the electoral process. Regardless of one’s views on *Citizens United*, do we really want the current political party in power to have the final federal say on the scope of campaign speech protected by the First Amendment? Sure, state courts would act as an alternative outlet to adjudicate campaign speech claims.²⁰⁸ But in a national election—as for the presidency—few would tolerate an uneven constitutional floor of First Amendment protections.²⁰⁹ Indeed, what makes this destabilizing vision especially troubling is that under the façade of a constitutionally prescribed prerogative to control jurisdiction, overzealous Congress members would subvert democracy in an entirely lawful manner.²¹⁰ The valid measure would, however, be patently antidemocratic—aimed

205. See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 918–39 (2016) (discussing types of bad faith by institutional actors which may undermine the vitality of the Constitution).

206. LEVITSKY & ZIBLATT, *supra* note 204, at 8.

207. See *supra* note 15 and accompanying text.

208. See *supra* Part II.B.3.

209. Note that state constitutional protections for campaign speech could concededly differ. See SUTTON, *supra* note 155, at 16 (“State courts have authority to construe their own constitutional provisions however they wish. Nothing compels the state courts to imitate federal interpretations of the [U.S. Constitution].”).

210. Cf. LEVITSKY & ZIBLATT, *supra* note 204, at 5 (“Many government efforts to subvert democracy are ‘legal,’ in the sense that they are approved by the legislature or accepted by the courts.”).

at entrenching partisan advantage and sidestepping the more democratic amendment process prescribed in Article V.

Moreover, if the Exceptions Clause is invoked irresponsibly in the first instance, future Congresses with a flipped majority could more forcefully cloak their strategic behavior as merely consistent with prior practice.²¹¹ Put differently, the opposing party could diffuse accountability for their own overstepping by decrying the schoolyard classic “they started it,” a phenomenon which America has witnessed and bemoaned in the Senate’s recent Supreme Court confirmation proceedings.²¹² These sorts of “[c]onstitutional hardball tactics are viewed by the other side as provocative and unfair because they flout ‘the “go without saying” assumptions that underpin working systems of constitutional government.’”²¹³ It goes without saying that absent emergency, breaking constitutional and historic norms as simply a means for partisan ends threatens the long-term health of the political process and the two-party system.²¹⁴ To return to the *Federalist Papers* once more, when Alexander Hamilton spoke to curbing “inconveniences” via the Exceptions Clause,²¹⁵ he envisioned remedying unforeseen consequences arising from the judicial power vested in the Supreme Court by Article III. He assuredly did not mean leveraging the Exceptions Clause to dispel any inconveniences to a party’s factional political agenda.²¹⁶

211. See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1439 (2018) (“If constitutional norms are constantly in flux and if perceived breaches trigger disapproval, as well as other possible sanctions, rational politicians will generally seek to describe their own strategic behavior as consistent with prior practice.” (footnote omitted)).

212. See Matt Flegenheimer, *The Roots of the Battle Over Neil Gorsuch: ‘They Started It,’* N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/supreme-court-neil-gorsuch-senate.html> [<https://perma.cc/EJN9-4N3N>].

213. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 920 (2018) (quoting Mark Tushnet, *Constitutional Hardball*, 37 JOHN MARSHALL L. REV. 523, 523 n.2 (2004)).

214. Cf. LEVITSKY & ZIBLATT, *supra* note 204, at 7–8 (explaining that another “soft guardrail[] of American democracy” is “mutual toleration, or the understanding that competing parties accept one another as legitimate rivals”).

215. THE FEDERALIST NO. 80, *supra* note 16, at 480 (Alexander Hamilton).

216. In fact, “Hamilton dreaded [political] parties as ‘the most fatal disease’ of popular governments and hoped America could dispense with such groups.” RON CHERNOW, ALEXANDER HAMILTON 390 (2004) (quoting Alexander Hamilton, *The Defence No. 1*, in 13 THE PAPERS OF ALEXANDER HAMILTON 393 (Harold C. Syrett ed., 1987)).

Furthermore, that the scope of a constitutional right might seesaw haphazardly by dint of the party currently in power would frustrate constituents. It would diminish the already little remaining faith they have in Congress because of its reputation as an unnecessarily polarized institution.²¹⁷ And this diminution could lead to marked instability in the electoral process.²¹⁸ Therefore, Congress should continue to carefully consider these broader institutional factors before it enacts a constitutionality jurisdiction-stripping proposal; it should only institute such exceptions with overwhelming bipartisan support; it should seek the more palatable amendment process first before resorting to the Exceptions Clause; and it should altogether refrain from weaponizing jurisdiction stripping purely to promote political gain. No matter what the Constitution allows.

To return to this Note's initial inquiry, it will hopefully now be apparent that because of unwavering state court availability, Congress at least could not enlist the Exceptions Clause to *directly* alter the Supreme Court's interpretation of the Constitution.²¹⁹ That is to say, they could not do so entirely unchecked, because state courts would still possess the authority to hear claims regarding the statute's lawfulness. Two qualifications should be noted though. First, with no Supreme Court review to stop them, state courts may unanimously rule the opposite way of the Court (or at least split in some manner) on a contentious issue. The party invoking the Exceptions Clause may thus realistically—but unwisely—embrace the potential to gain a partial political victory as an indirect consequence of its actions.

Second, Congress can always leverage the Exceptions Clause proactively—before the Court has spoken to an issue. Indeed, as *McCardle* suggests, when in doubt as to a measure's constitutionality, Congress may even erase the Supreme Court's jurisdiction after oral argument but before a final opinion has been handed down.²²⁰ To illustrate, suppose that Congress had seri-

217. See, e.g., Farina, *supra* note 13, at 1705 (discussing views on polarization and concluding that "[t]he current level of congressional polarization is the highest since the Civil War").

218. See Chafetz & Pozen, *supra* note 211, at 1438–39. *But cf.* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 871–72 (2011) (discussing how political minorities have at least historically garnered the votes necessary to stop federal jurisdiction-stripping bills).

219. See *supra* Part II.B.3.

220. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512 (1869).

ous reservations as to its authority to enact the Affordable Care Act's individual mandate.²²¹ Before the Court's disposition in *National Federation of Independent Business v. Sebelius*,²²² Congress thus could have legitimately decreed that no federal court could decide the constitutionality of the provision.²²³

Regardless of one's opinion on Obamacare, such weaponization of the Exceptions Clause as a tool to strong-arm signature legislation into force would be a short-term victory for one party and a long-term defeat for the Constitution and the American citizenry. For despite the proactivity of this jurisdiction stripping (which at least obviates the prudential risk of superseding the Supreme Court), the policy considerations above remain in full force. Firing this first shot would likely catalyze retaliatory action and incentivize the opposing political party to mirror the instigator's strategy in passing its own future signature legislation. The people would decry hyperpartisanship and would have to cumbersome litigate these measures in fifty state supreme courts, where disparate conclusions might proliferate.²²⁴ The Framers' ingenious system of "checks and balances" could instead become one of "strikes and counterstrikes" as the Supreme Court wrestles back and forth with Congress for control. And ultimately, if carelessly employed by the legislature as a blunt instrument for short-term partisan advantage, the clause targeted at jurisdictional "Exceptions" may lamentably become the rule.

CONCLUSION

Marbury famously held that the Supreme Court acts as the final arbiter and expounder of the Constitution. Yet in describing the Court's role in resolving difficult questions, Justice Robert Jackson also famously opined that:

221. See 26 U.S.C. § 5000A (2012 & Supp. V 2018).

222. 567 U.S. 519, 588 (2012) (holding that the individual mandate of the Patient Protection and Affordable Care Act was constitutional under the taxing power, but that the Act's Medicaid expansion provision was unduly coercive to the states, and thus in contravention of the spending power).

223. See *supra* Part II.

224. An outcome that is particularly troublesome for a national healthcare scheme.

[R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of [the Supreme Court's] reversals . . . would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.²²⁵

That is, unless Congress employs its Exceptions Clause authority to say otherwise. The Supreme Court has certainly been wrong in the past,²²⁶ and the Framers humbly granted Congress this unique jurisdiction-stripping authority as a measure to correct judicial overreach either discordant with or unforeseen in the envisioned constitutional design. This Note has argued that both the plain text and historical understandings of the Exceptions Clause support Congress's near-plenary power to do so, including the noteworthy ability to remove a statute's facial constitutionality from the Court's watchful eye. Although state courts would then provide an alternative forum to protect individual liberties from legislative tyranny, I have contended that Congress generally should not license this alternative as a policy matter. However, normative merits notwithstanding, one must accept that the Exceptions Clause power both exists and is of remarkable breadth. It provides a potential means by which Congress can overrule the Supreme Court without an amendment. And so ironically enough, the precise constitutional provision which *Marbury* relied on to invalidate a portion of the Judiciary Act of 1789 and thereby establish judicial review, is the very clause by which Congress may lawfully strip the Supreme Court of its future constitutional review authority.

Brian Kulp

225. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

226. E.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)).