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PREFACE

COVID-19 has created a pandemic unprecedented in modern times. Schools, businesses, restaurants, and even churches have closed their doors to limit the spread of the virus. Many of life's most cherished events, including weddings, graduations, births, baptisms, and, perhaps most tragically, funerals, have been postponed, conducted virtually, or limited to only immediate family members. It is times like these that can bring us together as a nation in thought, prayer, word, and action. And there are many accounts of such unity and mutual encouragement. However, the pandemic has also highlighted the divisive partisan rhetoric that unfortunately characterizes this country—a divisiveness that threatens, among other things, our constitutional structure and the liberty it guards.

In this Issue of the *Harvard Journal of Law & Public Policy*, we have the honor of publishing two Essays based on speeches addressing constitutional concerns related to partisanship in this country. In one, Judge Thomas Griffith of the U.S. Court of Appeals for the D.C. Circuit laments the loss of civic charity—the “spirit of amity” and “mutual deference” as George Washington put it—that helped forge the Constitution and is required to maintain it. In another, Attorney General of the United States William Barr—in the Nineteenth Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention—condemns partisan attacks on the executive power that the Framers enshrined in the Constitution, particularly those directed against President Donald Trump's Administration. He warns, “In this partisan age, we should take special care not to allow the passions of the moment to cause us to permanently disfigure the genius of our constitutional structure.” Special thanks are due the editors from other law schools who volunteered to stay on for yet another issue to prepare Attorney General Barr's speech for publication. We could not have published it without their outstanding work.

We are delighted to follow these Essays with two excellent Articles on current legal issues. The first Article, by Louis Capozzi, is a fifty-state survey of the right to appointed counsel in misdemeanor cases and shows that many states have pro-

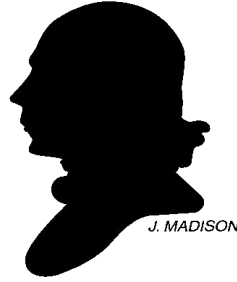
vided a broader right to counsel than that required by the Sixth Amendment of the U.S. Constitution. Capozzi provides a diverse array of approaches to misdemeanor justice that states may consider instead of a one-size-fits-all approach. In the second Article, Professor Thomas Molony traces the history of opinions written or joined by Chief Justice Roberts in cases involving stare decisis with an eye to how the Chief Justice might rule in a case challenging *Roe v. Wade*. He concludes that the Chief Justice's devotion to judicial restraint and the rule of law would lead him to vote in favor of overruling *Roe* only if a challenged abortion regulation cannot be upheld on narrower grounds and if reaffirming *Roe* would cause more harm to the Constitution than casting the abortion question out of federal courts and back to the States.

Finally, we have the pleasure of publishing one of our own in this Issue. In another piece on the Sixth Amendment, Douglas Colby argues that death qualification—the process of removing potential jurors who are unwilling to impose the death penalty—does not violate an originalist understanding of the the Sixth Amendment right to an impartial jury.

I end this preface of my last Issue on a more personal note. It has been a true honor to serve as Editor-in-Chief of this exceptional journal. The *Journal* has been my home since my first year of law school. As Editor-in-Chief, I have seen all of the hard work and dedication that editors put into this journal at every stage. More than that, I have the privilege of calling each and every member of this journal not only a classmate and colleague, but a friend. It is bittersweet to be graduating and leaving behind my work on the *Journal*, but I am confident the next masthead will continue its legacy of excellence, and I look forward to seeing the bright futures of all of its members unfold.

Nicole M. Baade
Editor-in-Chief

THE FEDERALIST SOCIETY



presents

*The Nineteenth Annual Barbara K. Olson Memorial Lecture
Featuring Attorney General William P. Barr*

The Role of the Executive

November 15, 2019

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THE ROLE OF THE EXECUTIVE

WILLIAM P. BARR*

Good Evening. Thank you all for being here. And thank you to Gene Meyer for your kind introduction.

It is an honor to be here this evening delivering the Nineteenth Annual Barbara K. Olson Memorial Lecture. I had the privilege of knowing Barbara and had deep affection for her. I miss her brilliance and ebullient spirit. It is a privilege for me to participate in this series, which honors her.

The theme for this year's Annual Convention is "Originalism," which is a fitting choice—though, dare I say, a somewhat "unoriginal" one for the Federalist Society. I say that because the Federalist Society has played an historic role in taking originalism "mainstream."¹ While other organizations have contributed to the cause, the Federalist Society has been in the vanguard.

A watershed for the cause was the decision of the American people to send Ronald Reagan to the White House, accompanied by his close advisor Ed Meese and a cadre of others who were firmly committed to an originalist approach to the law.² I was honored to work with Ed in the Reagan White House and be there several weeks ago when President Trump presented him with the Presidential Medal of Freedom. As the President aptly noted, over the course of his career, Ed Meese has been

* Attorney General of the United States. This Essay is a lightly edited version of Attorney General Barr's remarks at the Nineteenth Annual Barbara K. Olson Memorial Lecture on November 15, 2019, at the Federalist Society's 2019 National Lawyers Convention.

1. See John O. McGinnis, *An Opinionated History of the Federalist Society*, 7 GEO. J.L. & PUB. POL'Y 403, 406–07, 411 (2009); Michael Kruse, *The Weekend at Yale That Changed American Politics*, POLITICO MAG. (Sept./Oct. 2018), <https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608> [<https://perma.cc/J7TW-HRLE>].

2. Kruse, *supra* note 1.

among the nation's "most eloquent champions for following the Constitution as written."³

I am also proud to serve as the Attorney General under President Trump, who has taken up that torch in his judicial appointments. That is true of his two outstanding appointments to the Supreme Court, Justices Neil Gorsuch and Brett Kavanaugh; of the many superb court of appeals and district court judges he has appointed, many of whom are here this week; and of the many outstanding judicial nominees to come, many of whom are also here this week.

* * * * *

I wanted to choose a topic for this afternoon's lecture that had an originalist angle. It will likely come as little surprise to this group that I have chosen to speak about the Constitution's approach to executive power.

I deeply admire the American presidency as a political and constitutional institution. I believe it is one of the great and remarkable innovations in our Constitution, and it has been one of the most successful features of the Constitution in protecting the liberties of the American people. More than any other branch, it has fulfilled the expectations of the Framers.

Unfortunately, over the past several decades, we have seen steady encroachment on presidential authority by the other branches of government.⁴ This process, I think, has substantially weakened the functioning of the executive branch, to the detriment of the nation. This evening, I would like to expand a bit on these themes.

I. THE FRAMERS' VIEW OF THE EXECUTIVE

First, let me say a little about what the Framers had in mind in establishing an independent executive in Article II of the Constitution.

3. Donald J. Trump, President, United States, Remarks by President Trump at Presentation of the Medal of Freedom To Edwin Meese (Oct. 8, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-presentation-medal-freedom-edwin-meese/> [<https://perma.cc/CHW8-QXBH>].

4. *See, e.g.*, Common Legislative Encroachments On Executive Branch Authority, 13 Op. O.L.C. 248 (1989).

The grammar school civics class version of our Revolution is that it was a rebellion against monarchial tyranny and that, in framing our Constitution, one of the main preoccupations of the Founders was to keep the executive branch weak.⁵ This is misguided. By the time of the Glorious Revolution of 1689, monarchical power was effectively neutered and had begun its steady decline.⁶ Parliamentary power was well on its way to supremacy and was effectively in the driver's seat. By the time of the American Revolution, the patriots well understood that their prime antagonist was an overweening Parliament.⁷ Indeed, British thinkers came to conceive of Parliament, rather than the people, as the seat of sovereignty.⁸

During the Revolutionary era, American thinkers who considered inaugurating a republican form of government tended to think of the executive component as essentially an errand boy of a supreme legislative branch. Often the executive (sometimes constituted as a multimember council) was conceived as a creature of the legislature, dependent on and subservient to that body, whose sole function was carrying out the legislative will.⁹ Under the Articles of Confederation, for example, there was no executive separate from Congress.¹⁰

Things changed by the Constitutional Convention of 1787. To my mind, the real "miracle" in Philadelphia that summer was the creation of a strong executive, independent of, and coequal with, the other two branches of government.

5. Cf. Erin Peterson, *Presidential Power Surges*, HARV. L. TODAY (July 17, 2019), <https://today.law.harvard.edu/feature/presidential-power-surges/> [https://perma.cc/33DU-QFMJ] ("The starting point was that we'd gone through a revolution against monarchial power," [Professor Mark Tushnet] says. "Nobody wanted the chief executive to have the kinds of power the British monarch had.").

6. See Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1027 (1989).

7. *Id.* ("The experience of the American colonies under British rule persuaded them that they needed protection for rights against the legislature as well as against the executive.").

8. See, e.g., JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 72 (J.H. Burns, H.L.A. Hart & Ross Harrison eds., Cambridge Univ. Press 1981) (1776).

9. Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 895 (1990) (describing how Congress set up committees and civil offices to serve in an executive capacity under Congress's direction).

10. *Id.* at 892-93 ("Fundamentally, the Articles of Confederation created a government with a *single* branch of government—a Congress with members appointed by and representing the state legislatures.").

The consensus for a strong, independent executive arose from the Framers' experience in the Revolution and under the Articles of Confederation.¹¹ They had seen that the war had almost been lost and was a bumbling enterprise because of the lack of strong executive leadership.¹² Under the Articles of Confederation, they had been mortified at the inability of the United States to protect itself against foreign impositions or to be taken seriously on the international stage.¹³ They had also seen that, after the Revolution, too many States had adopted constitutions with weak executives overly subordinate to the legislatures.¹⁴ Where this had been the case, state governments had proven incompetent and indeed tyrannical.¹⁵

From these practical experiences, the Framers had come to appreciate that, to be successful, republican government required the capacity to act with energy, consistency, and decisiveness.¹⁶ They had come to agree that those attributes could best be provided by making the executive power independent of the divided counsels of the legislative branch and vesting the executive power in the hands of a solitary individual, regularly elected for a limited term by the nation as a whole.¹⁷ As Jefferson put it, "[F]or the prompt, clear, and consistent action so necessary in an Executive, unity of person is necessary"¹⁸

While there may have been some differences among the Framers as to the precise scope of executive power in particular areas, there was general agreement about its nature. Just as the great separation-of-powers theorists—Polybius, Montesquieu, Locke—had, the Framers thought of executive power as a dis-

11. Charles J. Cooper & Leonard A. Leo, *Executive Power Over Foreign and Military Policy: Some Remarks on the Founders' Perspective*, 16 OKLA. CITY UNIV. L. REV. 265, 268–69 (1991).

12. *Id.*

13. Cooper & Leo, *supra* note 11, at 269–70; Bruce Stein, *The Framers' Intent and the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 418–19 (1982).

14. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 2003); Cooper & Leo, *supra* note 11, at 267–68.

15. THE FEDERALIST NO. 70, *supra* note 14, at 423 (Alexander Hamilton).

16. *See, e.g., id.* at 421–22.

17. *See, e.g., id.*

18. *See* Letter from Thomas Jefferson to John Adams (Feb. 28, 1796), in 28 THE PAPERS OF THOMAS JEFFERSON 618, 618–19 (John Catanzariti et al. eds., 2000).

tinct species of power.¹⁹ To be sure, executive power includes the responsibility for carrying into effect the laws passed by the legislature—that is, applying the general rules to a particular situation.²⁰ But the Framers understood that executive power meant more than this.

It also entailed the power to handle essential sovereign functions—such as the conduct of foreign relations and the prosecution of war—which by their very nature cannot be directed by a preexisting legal regime but rather demand speed, secrecy, unity of purpose, and prudent judgment to meet contingent circumstances.²¹ They agreed that—due to the very nature of the activities involved, and the kind of decisionmaking they require—the Constitution generally vested authority over these spheres in the Executive.²² For example, Jefferson, our first Secretary of State, described the conduct of foreign relations as “executive altogether,” subject only to the explicit exceptions defined in the Constitution, such as the Senate’s power to ratify treaties.²³

A related and third aspect of executive power is the power to address exigent circumstances that demand quick action to protect the well-being of the nation but on which the law is either silent or inadequate—such as dealing with a plague or natural disaster. This residual power to meet contingency is essentially the federative power discussed by Locke in his *Second Treatise*.²⁴

And, finally, there are the Executive’s powers of internal management. These are the powers necessary for the President to superintend and control the executive function, including the powers necessary to protect the independence of the executive branch and the confidentiality of its internal deliberations. Some of these powers are express in the Constitution, such as

19. See ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* 15, 17, 184–228 (2014).

20. See *id.* at 195.

21. See *id.* at 221–24.

22. See *id.*

23. 5 THOMAS JEFFERSON, *Opinion on the Powers of the Senate*, in *THE WRITINGS OF THOMAS JEFFERSON* 161, 161 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1895).

24. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 77, § 147 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690).

the appointment power,²⁵ and others are implicit, such as the removal power.²⁶

One of the more amusing aspects of modern progressive polemic is their breathless attacks on the “unitary executive theory.”²⁷ They portray this as some new-fangled “theory” to justify executive power of sweeping scope. In reality, the idea of the unitary executive does not go so much to the breadth of presidential power. Rather, the idea is that, whatever the executive powers may be, they must be exercised under the President’s supervision.²⁸ This is not “new,” and it is not a “theory.” It is a description of what the Framers unquestionably did in Article II of the Constitution.²⁹

After you decide to establish an executive function independent of the legislature, naturally the next question is who will perform that function? The Framers had two potential models. They could insinuate “checks and balances” into the executive branch itself by conferring executive power on multiple individuals (a council) thus dividing the power.³⁰ Alternatively, they could vest executive power in a solitary individual.³¹ The Framers quite explicitly chose the latter model because they believed that vesting executive authority in one person would imbue the presidency with precisely the attributes necessary for energetic government.³² Even Jefferson—usually

25. U.S. CONST. art. II, § 2, cl. 2–3.

26. *Myers v. United States*, 272 U.S. 52, 119, 125 (1926).

27. See, e.g., Chris Edelson, *Exploring the Limits of Presidential Power*, ACS: EXPERT F. (Dec. 2, 2013), <https://www.acslaw.org/expertforum/exploring-the-limits-of-presidential-power> [<https://perma.cc/6TTD-46RR>] (stating that critics describe the unitary executive theory as placing the President above the law).

28. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 3–4 (2008).

29. See *id.* (“[T]he theory of the unitary executive holds that the Vesting Clause of Article II, which provides that ‘the executive Power shall be vested in a President of the United States of America,’ is a grant to the president of all the executive power, which includes the powers to remove and direct all lower-level executive officials.”).

30. See RICHARD J. ELLIS, *FOUNDING THE AMERICAN PRESIDENCY* 31–43 (1999) (discussing the early debate over having one President or multiple).

31. See THE FEDERALIST NO. 70, *supra* note 14 (Alexander Hamilton) (commenting on how a unitary executive is more favorable than a plurality in the executive).

32. *Id.* at 421 (“Energy in the executive is a leading character in the definition of good government. . . . [Politicians and statesmen] have, with great propriety, con-

seen as less of a hawk than Hamilton on executive power³³—was insistent that executive power be placed in single hands, and he cited America’s unitary executive as a signal feature that distinguished America’s success from France’s failed republican experiment.³⁴

The implications of the Framers’ decision are obvious. If Congress attempts to vest the power to execute the law in someone beyond the control of the President, it contravenes the Framers’ clear intent to vest that power in a single person, the President.³⁵ So much for this supposedly nefarious theory of the unitary executive.

II. ENCROACHMENTS ON THE EXECUTIVE BRANCH TODAY

We all understand that the Framers expected that the three branches would be jostling and jousting with each other, as each threatened to encroach on the prerogatives of the others.³⁶ They thought this was not only natural, but salutary, and they provisioned each branch with the wherewithal to fight and to defend itself in these interbranch struggles for power.³⁷

So let me turn now to how the Executive is presently faring in these interbranch battles. I am concerned that the deck has become stacked against the Executive. Since the mid-60s, there

sidered energy as the most necessary quality of [a single executive], and have regarded this as most applicable to power in a single hand . . .”).

33. See John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421, 422–23 (2008).

34. See Letter from Thomas Jefferson to Destutt de Tracy (Jan. 26, 1811), in 3 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES 334, 335–36 (J. Jefferson Looney et al. eds., 2006).

35. CALABRESI & YOO, *supra* note 28, at 34–35; see also 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) (“If the Constitution has invested all Executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his Executive authority.”).

36. See *Constitutional Amendment to Restore Legislative Veto: Hearing on S.J. Res. 135 Before the S. Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 98th Cong. 63 (1984) (statement of Peter L. Strauss, Professor, Columbia Law School) (“The framers expected the branches to battle each other to acquire and defend power.”).

37. See THE FEDERALIST NO. 51, *supra* note 14, at 318–19 (James Madison) (“But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”).

has been a steady grinding down of the executive branch's authority that accelerated after Watergate.³⁸ More and more, the President's ability to act in areas in which he has discretion has become smothered by the encroachments of the other branches.³⁹

When these disputes arise, I think there are two aspects of contemporary thought that tend to operate to the disadvantage of the Executive. The first is the notion that politics in a free republic is all about the legislative and judicial branches protecting liberty by imposing restrictions on the Executive.⁴⁰ The premise is that the greatest danger of government becoming oppressive arises from the prospect of executive excess. So, there is a knee-jerk tendency to see the legislative and judicial branches as the good guys protecting society from a rapacious would-be autocrat.

This prejudice is wrongheaded and atavistic. It comes out of the early English Whig view of politics and English constitutional experience, where political evolution was precisely that.⁴¹ You started out with a king who holds all the cards; he holds all the power, including legislative and judicial. Political evolution involved a process by which the legislative power gradually, over hundreds of years, reigned in the king, and extracted and established its own powers, as well as those of the

38. See, e.g., ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 101, 107 (2005) (noting in 1974 Congress substantially broadened the Freedom of Information Act to allow for judicial review of executive determinations that something needed to be kept secret, even for national security materials).

39. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–508 (2010) (holding that the dual for-cause removal limitations under the Sarbanes-Oxley Act of 2002 for members of the Public Company Accounting Oversight Board constrained presidential power in violation of the constitutional separation of powers); *Morrison v. Olson*, 487 U.S. 654, 703–15 (1988) (Scalia, J., dissenting) (arguing that the independent counsel provisions of the Ethics in Government Act of 1978, which the majority upheld, constrained presidential power in violation of the separation of powers); *Common Legislative Encroachments On Executive Branch Authority*, 13 Op. O.L.C. 248 (1989).

40. See Julian Davis Mortenson, *Article II Vests the Executive Power, not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1210–19 (2019); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 17–21 (2002).

41. See Mortenson, *supra* note 40, at 1191–1201.

judiciary.⁴² A watershed in this evolution was, of course, the Glorious Revolution in 1689.⁴³

But by 1787, we had the exact opposite model in the United States.⁴⁴ The Founders greatly admired how the British constitution had given rise to the principles of a balanced government.⁴⁵ But they felt that the British constitution had achieved only an imperfect form of this model. They saw themselves as framing a more perfect version of separation of powers and a balanced constitution.⁴⁶

Part of their more perfect construction was a new kind of executive. They created an office that was already the ideal Whig executive. It already had built into it the limitations that Whig doctrine aspired to.⁴⁷ It did not have the power to tax and spend;⁴⁸ it was constrained by habeas corpus and by due process in enforcing the law against members of the body politic;⁴⁹ it was elected for a limited term of office;⁵⁰ and it was elected by the nation as whole.⁵¹ That is a remarkable democratic institution—the only figure elected by the nation as a whole. With the creation of the American presidency, the Whig's obsessive focus on the dangers of monarchical rule lost relevance.

This fundamental shift in view was reflected in the Convention debates over the new frame of government. Their concerns were very different from those that weighed on seventeenth-century English Whigs. It was not executive power that was of so much concern to them; it was danger of the legislative branch, which they viewed as the most dangerous branch to liberty.⁵² As Madison warned, "The legislative department is

42. *Id.*

43. *Id.* at 1196–99.

44. ARTICLES OF CONFEDERATION of 1781 (lacking a single executive and vesting all executive and legislative power in a congress).

45. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1756–58 (1996).

46. Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 474–76 (1996).

47. See Flaherty, *supra* note 45, at 1761–62.

48. U.S. CONST. art. I, § 8, cl. 1.

49. U.S. CONST. art. I, § 9, cl. 2; *id.* amend. V.

50. U.S. CONST. art. II, § 1.

51. *Id.*

52. See, e.g., 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 71, 144, 386–88 (Max Farrand ed., 1911).

everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."⁵³ And indeed, they viewed the presidency as a check on the legislative branch.⁵⁴

The second contemporary way of thinking that operates against the Executive is a notion that the Constitution does not sharply allocate powers among the three branches, but rather that the branches—especially the political branches—“share” powers.⁵⁵ The idea at work here is that, because two branches both have a role to play in a particular area, we should see them as sharing power in that area and that it is not such a big deal if one branch expands its role within that sphere at the expense of the other.⁵⁶

This mushy thinking obscures what it means to say that powers are shared under the Constitution. The Constitution generally assigns broad powers to each of the branches in defined areas.⁵⁷ Thus, the legislative power granted in the

53. THE FEDERALIST NO. 48, *supra* note 14, at 306 (James Madison).

54. *See, e.g.*, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 52, at 144; THE FEDERALIST NO. 73, *supra* note 14, at 441 (Alexander Hamilton) (defending the Executive’s veto power as necessary to “establish[] a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good”).

55. *See, e.g.*, RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 29 (The Free Press 1991) (1960) (presenting the view that the United States is not “a government of ‘separated powers’” but “a government of separated institutions *sharing* powers”); Lloyd N. Cutler, *Now Is the Time for All Good Men . . .*, 30 WM. & MARY L. REV. 387, 387 (1989) (“[The Framers] decided the best way to maintain checks and balances among the branches was to allow at least one other branch to share in each power principally assigned to a different branch.”); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 301 (1989); *see also* THE FEDERALIST NO. 37, *supra* note 14, at 224 (James Madison) (“[N]o skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary . . .”).

56. *See* Flaherty, *supra* note 45, at 1737 (“To [the functionalist], the Constitution . . . invites[] the legislature, the executive, and the judiciary to share power in creative ways. So long as the arrangements that emerge do not upset the specified design at the top of the structure . . . what emerges is fair game.”).

57. *See* THE FEDERALIST NO. 48 (James Madison); Edward Susolik, Note, *Separation of Powers and Liberty: The Appointments Clause, Morrison v. Olson, and Rule of Law*, 63 S. CAL. L. REV. 1515, 1528 (1990) (noting that for a “strict separation of powers . . . [l]egislative, executive, and judicial functions are conceptualized as separate and distinct, and actors within each branch are not to undertake duties allocated to another branch”).

Constitution is granted to the Congress.⁵⁸ At the same time, the Constitution gives the Executive a specific power in the legislative realm—the veto power.⁵⁹ Thus, the Executive “shares” legislative power only to the extent of this specific grant of veto power. The Executive does not get to interfere with the broader legislative power assigned solely to the Congress.⁶⁰

In recent years, both the legislative and judicial branches have been responsible for encroaching on the presidency’s constitutional authority. Let me first say something about the legislature.

A. *Encroachments by the Legislative Branch*

As I have said, the Framers fully expected intense pulling and hauling between the Congress and the President. Unfortunately, just in the past few years, we have seen these conflicts take on an entirely new character.

Immediately after President Trump won election, opponents inaugurated what they called “The Resistance,” and they rallied around an explicit strategy of using every tool and maneuver available to sabotage the functioning of his administration.⁶¹ Now “resistance” is the language used to describe an insurgency against rule imposed by an occupying military power. The term obviously connotes that the government opposed is not legitimate.⁶² This is a very dangerous—indeed, incendiary—

58. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

59. See U.S. CONST. art. I, § 7, cl. 2.

60. See *Springer v. Philippine Islands*, 277 U.S. 189, 201–02 (1928) (discussing the “generally inviolate” rule that “the executive cannot exercise either legislative or judicial power”).

61. See David S. Meyer & Sidney Tarrow, *Introduction* to *THE RESISTANCE: THE DAWN OF THE ANTI-TRUMP OPPOSITION MOVEMENT* 1, 1–24 (David S. Meyer & Sidney Tarrow eds., 2018) (describing how a variety of social activism movements combined to create the origins of “The Resistance”); Charlotte Alter, *How the Anti-Trump Resistance Is Organizing Its Outrage*, TIME (Oct. 18, 2018, 6:35 AM), <http://time.com/longform/democrat-midterm-strategy/> [<http://perma.cc/CDD9-HBZB>]; Alex Seitz-Wald, *The anti-Trump ‘Resistance’ turns a year old—and grows up*, NBC NEWS (Jan. 19, 2018, 8:53 AM), <http://www.nbcnews.com/storyline/2018-state-of-the-union-address/anti-trump-resistance-turns-year-old-grows-n838821> [<http://perma.cc/CPY2-4EVS>].

62. See Tom Ginsburg, Daniel Lansberg-Rodriguez, Mila Versteeg, *When to Overthrow your Government: The Right to Resist in the World’s Constitutions*, 60 UCLA L. REV. 1184, 1208 (2013) (describing the “right to resist” as a “necessary

notion to import into the politics of a democratic republic.⁶³ What it means is that, instead of viewing themselves as the “loyal opposition,” as opposing parties have done in the past,⁶⁴ they essentially see themselves as engaged in a war to cripple, by any means necessary, a duly elected government.⁶⁵

A prime example of this is the Senate’s unprecedented abuse of the advice-and-consent process.⁶⁶ The Senate is free to exercise that power to reject unqualified nominees, but that power was never intended to allow the Senate to systematically oppose and draw out the approval process for every appointee so as to prevent the President from building a functional government.⁶⁷

Yet that is precisely what the Senate minority has done from his very first days in office. As of September of this year, the

popular response in cases of illegitimately exercised or formulated government authority”).

63. See Arthur Kaufmann, *Small Scale Right to Resist*, 21 NEW ENG. L. REV. 571, 574 (1985–1986) (“The tragedy of resistance [is] not only its futility but also its danger to the order of the community”); Edward Rubin, *Judicial Review and the Right To Resist*, 97 GEO. L.J. 61, 63 (2008) (“Resistance . . . is always traumatic, typically dangerous, and often ineffective; and unsuccessful efforts generally lead to disastrous consequences for the participants.”).

64. See George Anastaplo, *Loyal Opposition in a Modern Democracy*, 35 LOY. U. CHI. L.J. 1009, 1010 (2004) (describing the role of the “loyal opposition” as a foil against presidency policies, used by a competing, yet cooperating, political party); see also Jean H. Baker, *A Loyal Opposition: Northern Democrats in the Thirty-Seventh Congress*, 25 CIVIL WAR HIST. 139 (1979) (noting that even during the Civil War, Democrats from northern states played the role of “loyal opposition” against the Lincoln Administration).

65. Joel Kotkin, *Loyal opposition versus resistance to trump*, ORANGE COUNTY REG. (Jan. 8, 2017, 12:00 AM), <http://www.oregister.com/2017/01/08/loyal-opposition-versus-resistance-to-trump/> [<http://perma.cc/5VBF-PAN7>]; Campbell Robertson, *In Trump Country, the Resistance Meets the Steel Curtain*, N.Y. TIMES (Feb. 6, 2020), <https://nyti.ms/2UqYF9n> [<https://perma.cc/6DQU-PHJA>].

66. *Compare Nominations: A Historical Overview*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/briefing/Nominations.htm> [<https://perma.cc/E9DU-U79H>] (last visited May 3, 2020) and *The Confirmation Process for Presidential Appointees*, HERITAGE FOUND., <https://www.heritage.org/political-process/heritage-explains/the-confirmation-process-presidential-appointees> [<https://perma.cc/842A-RS35>] (last visited May 3, 2020) (three rejections of Supreme Court nominations and nine rejections of cabinet appointments in the past hundred years) with Dan Cancian, *Donald Trump Suffers Setback as Senate Rejects Hundreds of Nominations*, NEWSWEEK (Jan. 5, 2019, 10:43 AM), <https://www.newsweek.com/donald-trump-judicial-nominations-116th-congress-us-senate-charles-schumer-1280392> [<https://perma.cc/7PUM-DHUD>] (hundreds of nominees rejected and increased timeframe for decisions during the Trump Administration).

67. See THE FEDERALIST NO. 76, *supra* note 14, at 455–57 (Alexander Hamilton).

Senate had been forced to invoke cloture on 236 Trump nominees⁶⁸—each of those representing its own massive consumption of legislative time meant only to delay an inevitable confirmation. How many times was cloture invoked on nominees during President Obama’s first term? Seventeen times.⁶⁹ The second President Bush’s first term? Four times.⁷⁰ It is reasonable to wonder whether a future President will actually be able to form a functioning administration if his or her party does not hold the Senate.

Congress has in recent years also largely abdicated its core function of legislating on the most pressing issues facing the national government.⁷¹ They either decline to legislate on major questions or, if they do, punt the most difficult and critical issues by making broad delegations to a modern administrative state that they increasingly seek to insulate from presidential control.⁷² This phenomenon first arose in the wake of the Great Depression, as Congress created a number of so-called “independent agencies” and housed them, at least nominally, in the executive branch.⁷³ More recently, the Dodd-Frank Act’s crea-

68. See *Cloture Motions—115th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/115.htm> [<https://perma.cc/29BP-CAYD>] (last visited May 3, 2020); *Cloture Motions—116th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/116.htm> [<https://perma.cc/4MGP-EHRL>] (last visited May 3, 2020).

69. See *Cloture Motions—111th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/111.htm> [<https://perma.cc/6KT5-Y33Q>] (last visited May 5, 2020); *Cloture Motions—112th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/112.htm> [<https://perma.cc/X5SM-PSAK>] (last visited May 5, 2020).

70. See *Cloture Motions—107th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/107.htm> [<https://perma.cc/QX6C-ZWVH>] (last visited May 5, 2020); *Cloture Motions—108th Congress*, U.S. SENATE, <https://www.senate.gov/legislative/cloture/108.htm> [<https://perma.cc/26AE-ZSBN>] (last visited May 5, 2020).

71. See David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL’Y 213, 244–53 (2020); Ethan Blevins, *Ending the Administrative State is an Uphill and Necessary Battle for a Free Nation*, NAT’L REV. (Feb. 20, 2020, 5:50 PM), <https://www.nationalreview.com/bench-memos/ending-administrative-state-uphill-necessary-battle-free-nation/> [<https://perma.cc/C9PB-7JY5>].

72. Schoenbrod, *supra* note 71, at 244–53; Blevins, *supra* note 71; Chuck DeVore, *The Administrative State Is Under Assault And That’s A Good Thing*, FORBES (Nov. 27, 2017, 1:53 PM), <https://www.forbes.com/sites/chuckdevore/2017/11/27/the-administrative-state-is-under-assault-and-thats-a-good-thing/#60c12ddc393c> [<https://perma.cc/D825-TAUW>].

73. John Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 227–31 (2018).

tion of the Consumer Financial Protection Branch, a single-headed independent agency that functions like a junior varsity President for economic regulation, is just one of many examples.⁷⁴

Of course, Congress's effective withdrawal from the business of legislating leaves it with a lot of time for other pursuits. And the pursuit of choice, particularly for the opposition party, has been to drown the executive branch with "oversight" demands for testimony and documents.⁷⁵ I do not deny that Congress has some implied authority to conduct oversight as an incident to its legislative power. But the sheer volume of what we see today—the pursuit of scores of parallel "investigations" through an avalanche of subpoenas—is plainly designed to incapacitate the executive branch, and indeed is touted as such.⁷⁶

The costs of this constant harassment are real. For example, we all understand that confidential communications and a private, internal deliberative process are essential for all of our branches of government to properly function. Congress and the judiciary know this well, as both have taken great pains to shield their own internal communications from public inspection.⁷⁷ There is no FOIA⁷⁸ for Congress or the courts. Yet Congress has happily created a regime that allows the public to seek whatever documents it wants from the executive branch at the same time that individual congressional committees spend their days trying to publicize the Executive's internal decisional

74. See *PHH Corp. v. CFPB*, 839 F.3d 1, 15–17 (D.C. Cir. 2016), *rev'd en banc*, 881 F.3d 75 (D.C. Cir. 2018).

75. See, e.g., Laura Blessing, *Congressional Oversight in the 116th*, GOV'T AFF. INST. AT GEO. U. (Mar. 8, 2019), <https://gai.georgetown.edu/congressional-oversight-in-the-116th/> [<https://perma.cc/7PQ5-XJDS>].

76. Alex Moe, *House investigations of Trump and his administration: The full list*, NBC NEWS (May 27, 2019, 12:02 PM), <https://www.nbcnews.com/politics/donald-trump/house-investigations-trump-his-administration-full-list-n1010131> [<https://perma.cc/SW85-2AUN>] (listing fourteen different Democrat-led House committees investigating President Trump as of May 2019).

77. See, e.g., Classified Information Procedures Act, 18 U.S.C. app. 3 (2018); RULES OF THE HOUSE OF REPRESENTATIVES, r. XVII(10), *reprinted in* H.R. DOC. NO. 114-192, at 788–89 (2017) (authorizing "secret sessions"); STANDING RULES OF THE SENATE, r. XXI, *reprinted in* S. DOC. NO. 113-18, at 15 (2013) (authorizing "closed sessions"); *Supreme Court Procedures*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/UJ47-WM8F>] (last visited May 3, 2020) (noting that only Justices are allowed in the room when the Supreme Court holds conference).

78. 5 U.S.C. § 552 (2018).

process.⁷⁹ That process cannot function properly if it is public, nor is it productive to have our government devoting enormous resources to squabbling about what becomes public and when, rather than doing the work of the people.

In recent years, we have seen substantial encroachment by Congress in the area of executive privilege. The executive branch and the Supreme Court have long recognized that the need for confidentiality in executive branch decisionmaking necessarily means that some communications must remain off limits to Congress and the public.⁸⁰ There was a time when Congress respected this important principle as well.⁸¹ But today, Congress is increasingly quick to dismiss good faith attempts to protect executive branch equities, labeling such efforts “obstruction of Congress” and holding cabinet secretaries in contempt.⁸²

One of the ironies of today is that those who oppose this President constantly accuse this Administration of “shredding” constitutional norms and waging a war on the rule of law.⁸³ When I ask my friends on the other side, what exactly are you referring to? I get vacuous stares, followed by sputtering about

79. See *ACLU v. CIA*, 823 F.3d 655, 662 (D.C. Cir. 2016) (“Nevertheless, because it is undisputed that Congress is not an agency, it is also undisputed that ‘congressional documents are not subject to FOIA’s disclosure requirements.’” (quoting *United We Stand Am., Inc. v. IRS*, 359 F.3d 595, 597 (D.C. Cir. 2004))).

80. *United States v. Nixon*, 418 U.S. 683, 711 (1974) (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”).

81. *In re Sealed Case*, 121 F.3d 729, 740 n.9 (D.C. Cir. 1997) (“Interestingly, it appears that Congress has at times accepted executive officers’ refusal to testify about conversations they had with the President, even as it was insisting on access to other executive branch documents and materials.” (citing MARK J. ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY* 44 (1994); Robert Kramer & Herman Marcuse, *Executive Privilege—A Study of the Period 1953–1960*, 29 *GEO. WASH. L. REV.* 827, 872–73 (1961))).

82. See, e.g., H.R. REP. NO. 116-125, at 1–2 (2019).

83. Tim Ahmann, *Top Democrats say Trump is shredding Constitution with emergency declaration*, REUTERS (Feb. 15, 2019, 11:25 AM), <https://www.reuters.com/article/us-usa-shutdown-democrats/top-democrats-say-trump-is-shedding-constitution-with-emergency-declaration-idUSKCN1Q423R> [<https://perma.cc/36UX-FE96>]; see also Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 *IND. L.J.* 177, 191–203 (2018).

the travel ban⁸⁴ or some such thing. While the President has certainly thrown out the traditional Beltway playbook, he was upfront about that beforehand, and the people voted for him. What I am talking about today are fundamental constitutional precepts. The fact is that this Administration's policy initiatives and proposed rules, including the travel ban, have transgressed neither constitutional nor traditional norms, and have been amply supported by the law and patiently litigated through the court system to vindication.⁸⁵

Indeed, measures undertaken by this Administration seem a bit tame when compared to some of the unprecedented steps taken by the Obama Administration's aggressive exercises of executive power—such as, under its DACA program, refusing to enforce broad swathes of immigration law.⁸⁶

The fact of the matter is that, in waging a scorched earth, no-holds-barred war of “Resistance” against this Administration, it is the Left that is engaged in the systematic shredding of norms and the undermining of the rule of law. This highlights a basic disadvantage that conservatives have always had in contesting the political issues of the day. It was adverted to by the old, curmudgeonly Federalist, Fisher Ames, in an essay during the early years of the Republic.⁸⁷

In any age, the so-called progressives treat politics as their religion. Their holy mission is to use the coercive power of the state to remake man and society in their own image, according

84. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

85. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–04, 2423 (2018) (upholding the travel ban).

86. See Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Protection, et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/JG97-XT57>]; Barack Obama, President, United States, *Remarks by the President in Address to the Nation on Immigration* (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/7ADG-YUZB>].

87. FISHER AMES, *Laocoon No. II*, in *WORKS OF FISHER AMES* 103, 106–08 (Boston, T.B. Wait & Co. 1809).

to an abstract ideal of perfection.⁸⁸ Whatever means they use are therefore justified because, by definition, they are a virtuous people pursuing a deific end. They are willing to use any means necessary to gain momentary advantage in achieving their end, regardless of collateral consequences and the systemic implications. They never ask whether the actions they take could be justified as a general rule of conduct, equally applicable to all sides.⁸⁹

Conservatives, on the other hand, do not seek an earthly paradise. We are interested in preserving over the long run the proper balance of freedom and order necessary for healthy development of natural civil society and individual human flourishing.⁹⁰ This means that we naturally test the propriety and wisdom of action under a “rule of law” standard.⁹¹ The essence of this standard is to ask what the overall impact on society over the long run if the action we are taking, or principle we are applying, in a given circumstance was universalized—that is, would it be good for society over the long haul if this was done in all like circumstances?⁹²

For these reasons, conservatives tend to have more scruple over their political tactics and rarely feel that the ends justify the means. And this is as it should be, but there is no getting around the fact that this puts conservatives at a disadvantage when facing progressive holy war, especially when doing so under the weight of a hyper-partisan media.

88. See Jim DeMint & Rachel Bovard, Opinion, *Progressive politics is the Left's new religion*, WASH. EXAMINER (Sept. 24, 2019, 12:00 AM), <https://www.washingtonexaminer.com/opinion/progressive-politics-is-the-lefts-new-religion> [https://perma.cc/6ZA5-G3AH].

89. See, e.g., John O. McGinnis, *Progressivism Is a Long-Term Threat to the Rule of Law*, LAW & LIBERTY (July 18, 2016), <https://lawliberty.org/progressivism-is-a-long-term-threat-to-the-rule-of-law/> [https://perma.cc/GGJ5-XCDY].

90. See Lee Edwards, *What Is Conservatism?*, HERITAGE FOUND. (Oct. 25, 2018), <https://www.heritage.org/conservatism/commentary/what-conservatism> [https://perma.cc/5E5Q-JKEM]; Russell Kirk, *Ten Conservative Principles*, RUSSELL KIRK CTR., <https://kirkcenter.org/conservatism/ten-conservative-principles/> [https://perma.cc/V5U8-BPDF] (last visited May 4, 2020).

91. Calvin R. Massey, *Rule of Law and the Age of Aquarius*, 41 HASTINGS L.J. 757, 759 (1990) (book review) (“Adherence to the rule of law is truly conservative in that it preserves the balance between majoritarian power and individual rights or societal values, in order to permit a systemic solution to materialize.”).

92. See Antonin Scalia, *The Rule of Law as A Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989).

B. Encroachments by the Judicial Branch

Let me turn now to what I believe has been the prime source of the erosion of separation-of-power principles generally, and executive branch authority specifically. I am speaking of the judicial branch.

In recent years the judiciary has been steadily encroaching on executive responsibilities in a way that has substantially undercut the functioning of the presidency. The courts have done this in essentially two ways: First, the judiciary has appointed itself the ultimate arbiter of separation-of-powers disputes between Congress and Executive, thus preempting the political process, which the Framers conceived as the primary check on inter-branch rivalry. Second, the judiciary has usurped presidential authority for itself, either (a) by, under the rubric of “review,” substituting its judgment for the Executive’s in areas committed to the President’s discretion, or (b) by assuming direct control over realms of decisionmaking that heretofore have been considered at the core of presidential power.

The Framers did not envision that the courts would play the role of arbiter of turf disputes between the political branches. As Madison explained in *Federalist 51*, “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”⁹³ By giving each the Congress and the presidency the tools to fend off the encroachments of the others, the Framers believed this would force compromise and political accommodation.

The “constitutional means” to “resist encroachments” that Madison described take various forms. As Justice Scalia observed, the Constitution gives Congress and the President many “clubs with which to beat” each other.⁹⁴ Conspicuously absent from the list is running to the courts to resolve their disputes.

That omission makes sense. When the judiciary purports to pronounce a conclusive resolution to constitutional disputes between the other two branches, it does not act as a coequal.

93. THE FEDERALIST NO. 51, *supra* note 14, at 318–19 (James Madison).

94. Transcript of Oral Argument at 10, *Zivotofsky v. Clinton*, 566 U.S. 189 (2012) (No. 10-699).

And, if the political branches believe the courts will resolve their constitutional disputes, they have no incentive to debate their differences through the democratic process—with input from and accountability to the people. And they will not even try to make the hard choices needed to forge compromise. The long experience of our country is that the political branches can work out their constitutional differences without resort to the courts.

In any event, the prospect that courts can meaningfully resolve interbranch disputes about the meaning of the Constitution is mostly a false promise. How is a court supposed to decide, for example, whether Congress's power to collect information in pursuit of its legislative function overrides the President's power to receive confidential advice in pursuit of his executive function? Nothing in the Constitution provides a manageable standard for resolving such a question. It is thus no surprise that the courts have produced amorphous, unpredictable balancing tests like the Court's holding in *Morrison v. Olson*⁹⁵ that Congress did not disrupt "the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions."⁹⁶

Apart from their overzealous role in interbranch disputes, the courts have increasingly engaged directly in usurping presidential decisionmaking authority for themselves. One way courts have effectively done this is by expanding both the scope and the intensity of judicial review.⁹⁷

In recent years, we have lost sight of the fact that many critical decisions in life are not amenable to the model of judicial decisionmaking. They cannot be reduced to tidy evidentiary standards and specific quantum of proof in an adversarial process. They require what we used to call prudential judgment. They are decisions that frequently have to be made promptly, on incomplete and uncertain information, and necessarily involve weighing a wide range of competing risks and making predictions about the future. Such decisions frequently

95. 487 U.S. 654 (1988).

96. *Id.* at 695 (alterations adopted) (quoting *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 443 (1977)) (internal quotation marks omitted).

97. *See, e.g., Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017), *rev'd*, 138 S. Ct. 2392 (2018).

call into play the “precautionary principle.”⁹⁸ This is the principle that when a decisionmaker is accountable for discharging a certain obligation—such as protecting the public’s safety—it is better, when assessing imperfect information, to be wrong and safe, than wrong and sorry.

It was once well recognized that such matters were largely unreviewable and that the courts should not be substituting their judgments for the prudential judgments reached by the accountable executive officials. This outlook now seems to have gone by the boards. Courts are now willing, under the banner of judicial review, to substitute their judgment for the President’s on matters that only a few decades ago would have been unimaginable—such as matters involving national security or foreign affairs.

The travel ban case is a good example. There the President made a decision under an explicit legislative grant of authority, as well as his constitutional national security role, to temporarily suspend entry to aliens coming from a half dozen countries pending adoption of more effective vetting processes.⁹⁹ The common denominator of the initial countries selected was that they were unquestionable hubs of terrorism activity, which lacked functional central government’s and responsible law enforcement and intelligence services that could assist us in identifying security risks among their nationals seeking entry.¹⁰⁰ Despite the fact there were clearly justifiable security grounds for the measure, the district court in Hawaii and the Ninth Circuit blocked this public safety measure for a year and half on the theory that the President’s motive for the order was religious bias against Muslims.¹⁰¹ This was just the first of many immigration measures based on good and sufficient security grounds that the courts have second guessed since the beginning of the Trump Administration.¹⁰²

98. Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1003–04 (2003).

99. *Trump v. Hawaii*, 138 S. Ct. at 2403–05.

100. *Id.* at 2403–04.

101. *Id.* at 2404, 2406–07.

102. See, e.g., *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026 (9th Cir.), *stay granted*, 140 S. Ct. 3 (2019); *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir.), *stay granted*, 140 S. Ct. 1 (2019); *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019).

The travel ban case highlights an especially troubling aspect of the recent tendency to expand judicial review. The Supreme Court has traditionally refused, across a wide variety of contexts, to inquire into the subjective motivation behind governmental action. To take the classic example, if a police officer has probable cause to initiate a traffic stop, his subjective motivations are irrelevant.¹⁰³ And just last term, the Supreme Court appropriately shut the door to claims that otherwise-lawful redistricting can violate the Constitution if the legislators who drew the lines were actually motivated by political partisanship.¹⁰⁴

What is true of police officers and gerrymanderers is equally true of the President and senior executive officials. With very few exceptions, neither the Constitution, nor the Administrative Procedure Act¹⁰⁵ or any other relevant statute, calls for judicial review of executive motive. They apply only to executive action.¹⁰⁶ Attempts by courts to act like amateur psychiatrists attempting to discern an executive official's "real motive"—often after ordering invasive discovery into the executive branch's privileged decisionmaking process—have no more foundation in the law than a subpoena to a court to try to determine a judge's real motive for issuing its decision. And courts' indulgence of such claims, even if they are ultimately rejected, represents a serious intrusion on the President's constitutional prerogatives.

The impact of these judicial intrusions on executive responsibility have been hugely magnified by another judicial innovation—the nationwide injunction. First used in 1963,¹⁰⁷ and

103. *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

104. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) ("[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.").

105. 5 U.S.C. §§ 551, 553–559, 701–706 (2018).

106. *See, e.g., id.* § 706(2) (providing that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions" that are arbitrary, capricious, or contrary to law).

107. *See Wirtz v. Baldor Elec. Co.*, 337 F.2d 518, 520, 536 (D.C. Cir. 1963) (upholding an injunction against a rule that would establish a uniform wage in the electrical motors and generators industry); *see also* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 437–39 (2017).

sparely since then until recently, these court orders enjoin enforcement of a policy not just against the parties to a case, but against everyone. Since President Trump took office, district courts have issued over forty nationwide injunctions against the government.¹⁰⁸ By comparison, during President Obama's first two years, district courts issued a total of two nationwide injunctions against the government.¹⁰⁹ Both were vacated by the Ninth Circuit.¹¹⁰

It is no exaggeration to say that virtually every major policy of the Trump Administration has been subjected to immediate freezing by the lower courts.¹¹¹ No other President has been subjected to such sustained efforts to debilitate his policy agenda.

The legal flaws underlying nationwide injunctions are myriad. Just to summarize briefly, nationwide injunctions have no foundation in courts' Article III jurisdiction or traditional equitable powers;¹¹² they radically inflate the role of district judges, allowing any one of more than 600 individuals to singlehandedly freeze a policy nationwide, a power that no single appellate judge or Justice can accomplish; they foreclose percolation and

108. Tessa Berenson, *Inside the Trump Administration's Fight to End Nationwide Injunctions*, TIME (Nov. 4, 2019, 3:12 PM), <https://time.com/5717541/nationwide-injunctions-trump-administration/> [<https://perma.cc/K4EK-29GC>]. As of February 2020, the number is up to fifty-five. Jeffrey A. Rosen, Deputy Attorney Gen., United States, Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Program (Feb. 12, 2020), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide> [<https://perma.cc/T23U-6GKF>].

109. See *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010), *vacated by*, 658 F.3d 1162 (9th Cir. 2011); *L.A. Haven Hospice, Inc. v. Sebelius*, No. CV08-4469-GW (RZX), 2009 WL 5865294, at *1 (C.D. Cal. Aug. 20, 2009), *aff'd in part, vacated in part, remanded*, 638 F.3d 644 (9th Cir. 2011).

110. See *Log Cabin Republicans*, 658 F.3d at 1168; *L.A. Haven Hospice*, 638 F.3d at 648 (vacating "that portion of the injunction barring enforcement of the regulation against hospice providers other than Haven Hospice").

111. See Jordan Fabian & Jacqueline Thomsen, *Courts become turbocharged battleground in Trump era*, HILL (July 22, 2019, 6:00 AM), <https://thehill.com/homenews/administration/453881-courts-become-turbocharged-battleground-in-trump-era> [<https://perma.cc/D3F8-HZ6N>].

112. See Memorandum from the Attorney General to Heads of Civil Litigating Components United States Attorneys, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* 7-8 (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/Y9U6-E79W>]; Bray, *supra* note 107, at 425-27.

reasoned debate among lower courts, often requiring the Supreme Court to decide complex legal issues in an emergency posture with limited briefing; they enable transparent forum shopping,¹¹³ which saps public confidence in the integrity of the judiciary; and they displace the settled mechanisms for aggregate litigation of genuinely nationwide claims, such as Rule 23 class actions.¹¹⁴

Of particular relevance to my topic tonight, nationwide injunctions also disrupt the political process. There is no better example than the courts' handling of the rescission of DACA. As you recall, DACA was a discretionary policy of enforcement forbearance adopted by President Obama's administration.¹¹⁵ The Fifth Circuit concluded that the closely related DAPA policy (along with an expansion of DACA) was unlawful,¹¹⁶ and the Supreme Court affirmed that decision by an equally divided vote.¹¹⁷ Given that DACA was discretionary—and that four Justices apparently thought a legally indistinguishable policy was unlawful—President Trump's administration understandably decided to rescind DACA.¹¹⁸

Importantly, however, the President coupled that rescission with negotiations over legislation that would create a lawful and better alternative as part of a broader immigration compromise.¹¹⁹ In the middle of those negotiations—indeed, on the same day the President invited cameras into the Cabinet Room to broadcast his negotiations with bipartisan leaders from both Houses of Congress¹²⁰—a district judge in the Northern District

113. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring).

114. See Michael R. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 634–39 (2017).

115. *Texas v. United States*, 809 F.3d 134, 146–47 (5th Cir. 2015).

116. *Id.* at 146.

117. *United States v. Texas*, 136 S. Ct. 2271, 2272 (2016) (mem.).

118. See Michael D. Shear & Julie Hirschfeld Davis, *Trump Moves to End DACA and Calls on Congress to Act*, N.Y. TIMES (Sept. 5, 2017), <https://nyti.ms/2x7xOo2> [<https://perma.cc/GW4K-CHEL>].

119. *Id.* (discussing President Trump's efforts to find a "replacement" for DACA).

120. See Donald J. Trump, President, United States, Remarks by President Trump in Meeting with Bipartisan Members of Congress on Immigration (Jan. 9, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-bipartisan-members-congress-immigration/> [<https://perma.cc/7YNW-JVUT>].

of California enjoined the rescission of DACA nationwide.¹²¹ Unsurprisingly, the negotiations over immigration legislation collapsed after one side achieved its preferred outcome through judicial means.¹²² A humanitarian crisis at the southern border ensued.¹²³ And just this week, the Supreme Court finally heard argument on the legality of the DACA rescission.¹²⁴ The Court will not likely decide the case until next summer, meaning that President Trump will have spent almost his entire first term enforcing President Obama's signature immigration policy, even though that policy is discretionary and half the Supreme Court concluded that a legally indistinguishable policy was unlawful. That is not how our democratic system is supposed to work.

To my mind, the most blatant and consequential usurpation of executive power in our history was played out during the administration of President George W. Bush, when the Supreme Court, in a series of cases, set itself up as the ultimate arbiter and superintendent of military decisions inherent in prosecuting a military conflict—decisions that lie at the very core of the President's discretion as Commander-in-Chief.

This usurpation climaxed with the Court's 2008 decision in *Boumediene*.¹²⁵ There, the Supreme Court overturned hundreds of years of American, and earlier British, law and practice, which had always considered decisions as to whether to detain foreign combatants to be purely military judgments which civilian judges had no power to review.¹²⁶ For the first time, the Court ruled that foreign persons who had no connection with

121. See *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048–50 (N.D. Cal. 2018) (issued January 9, 2018).

122. See Elana Schor & Burgess Everett, *Senate immigration debate ends in failure*, POLITICO (Feb. 15, 2018, 6:15 PM), <https://www.politico.com/story/2018/02/15/immigration-daca-senate-412459> [<https://perma.cc/DH7Q-LBDN>].

123. *Humanitarian and Security Crisis at Southern Border Reaches 'Breaking Point'*, DEP'T HOMELAND SECURITY (Mar. 6, 2019), <https://www.dhs.gov/news/2019/03/06/humanitarian-and-security-crisis-southern-border-reaches-breaking-point> [<https://perma.cc/3FQ9-DYPT>].

124. See Amy Howe, *Argument analysis: Justices torn, hard to read in challenge to decision to end DACA*, SCOTUSBLOG (Nov. 12, 2019, 2:07 PM), <https://www.scotusblog.com/2019/11/argument-analysis-justices-torn-hard-to-read-in-challenge-to-decision-to-end-daca/> [<https://perma.cc/53NG-JNL9>].

125. *Boumediene v. Bush*, 553 U.S. 723 (2008).

126. See *id.* at 826–27, 843–48 (Scalia, J., dissenting).

the United States other than being confronted by our military on the battlefield had “due process” rights and thus have the right to habeas corpus to obtain judicial review of whether the military has a sufficient evidentiary basis to hold them.¹²⁷

In essence, the Court has taken the rules that govern our domestic criminal justice process and carried them over and superimposed them on the nation’s activities when it is engaged in armed conflict with foreign enemies. This rides roughshod over a fundamental distinction that is integral to the Constitution and integral to the role played by the President in our system.

As the Preamble suggests, governments are established for two different security reasons—to secure domestic tranquility and to provide for defense against external dangers.¹²⁸ These are two very different realms of government action.

In a nutshell, under the Constitution, when the government is using its law enforcement powers domestically to discipline an errant member of the community for a violation of law, then protecting the liberty of the American people requires that we sharply curtail the government’s power so it does not itself threaten the liberties of the people.¹²⁹ Thus, the Constitution in this arena deliberately sacrifices efficiency; invests the accused with rights that essentially create a level playing field between the collective interests of community and those of the individual; and dilutes the government’s power by dividing it and turning it on itself as a check. At each stage the judiciary is expressly empowered to serve as a check and neutral arbiter.¹³⁰

None of these considerations are applicable when the government is defending the country against armed attacks from foreign enemies. In this realm, the Constitution is concerned with one thing—preserving the freedom of our political community by destroying the external threat.¹³¹ Here, the Constitution is not concerned with handicapping the government to preserve other values. The Constitution does not confer “rights”

127. *Id.* at 770–71 (majority opinion).

128. U.S. CONST. pmb1.

129. *See, e.g.*, U.S. CONST. amends. IV–VIII.

130. *See* U.S. CONST. art III., § 2, cl. 1.

131. *See* U.S. CONST. art. I, § 8, cl. 11–13, 15–16; *id.* art. II, § 2, cl. 1.

on foreign enemies.¹³² Rather the Constitution is designed to maximize the government's efficiency to achieve victory—even at the cost of “collateral damage” that would be unacceptable in the domestic realm. The idea that the judiciary acts as a neutral check on the political branches to protect foreign enemies from our government is insane.

The impact of *Boumediene* has been extremely consequential.¹³³ For the first time in American history, our Armed Forces are incapable of taking prisoners.¹³⁴ We are now in a crazy position that, if we identify a terrorist enemy on the battlefield, such as ISIS, we can kill them with drone or any other weapon.¹³⁵ But if we capture them and want to hold them at Guantanamo or in the United States, the military is tied down in developing evidence for an adversarial process and must spend resources in interminable litigation.¹³⁶

The fact that our courts are now willing to invade and muck about in these core areas of presidential responsibility illustrates how far the doctrine of separation of powers has been eroded.¹³⁷

132. *Boumediene*, 553 U.S. at 841 (Scalia, J., dissenting) (“There is simply no support for the Court’s assertion that constitutional rights extend to aliens held outside U.S. sovereign territory . . .” (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990))); see also *Johnson v. Eisentrager*, 339 U.S. 763, 784–85 (1950).

133. See, e.g., Beverly E. Bashor, *The Liberty/Safety Paradigm: The United States’ Struggle to Discourage Violations of Civil Liberties in Times of War*, 41 W. ST. U. L. REV. 617, 641–42 (2014) (explaining that, after the *Boumediene* decision, the executive branch and Congress have had to use different tactics to detain suspected terrorists); Ernesto Hernández-López, *Detaining ISIS: Habeas and the Phantom Menace*, 71 OKLA. L. REV. 1109, 1142–51 (2019).

134. See Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 769 (2011) (describing how unclear the law is on whether the United States can detain individuals).

135. See Jonathan G. D’Errico, *Executive Power, Drone Executions, and the Due Process Rights of American Citizens*, 87 FORDHAM L. REV. 1185, 1190–93 (2018).

136. See *Boumediene*, 553 U.S. at 769 (“Habeas corpus proceedings may require expenditure of funds by the Government and may divert the attention of military personnel from other pressing tasks.”).

137. See Heather P. Scribner, *A Fundamental Misconception of Separation of Powers: Boumediene v. Bush*, 14 TEX. REV. L. & POL. 90, 160–62 (2009).

CONCLUSION

In this partisan age, we should take special care not to allow the passions of the moment to cause us to permanently disfigure the genius of our constitutional structure. As we look back over the sweep of American history, it has been the American presidency that has best fulfilled the vision of the Founders. It has brought to our republic a dynamism and effectiveness that other democracies have lacked.

At every critical juncture where the country has faced a great challenge—whether it be in our earliest years as the weak, nascent country combating regional rebellions, and maneuvering for survival in a world of far stronger nations; whether it be during our period of continental expansion, with the Louisiana Purchase, and the acquisition of Mexican territory; whether it be the Civil War, the epic test of the nation; World War II and the struggle against fascism; the Cold War and the challenge of Communism; the struggle against racial discrimination; and most recently, the fight against Islamist Fascism and international terrorism—one would have to say that it has been the presidency that has stepped to the fore and provided the leadership, consistency, energy, and perseverance that allowed us to surmount the challenge and brought us success.

In so many areas, it is critical to our nation's future that we restore and preserve in their full vigor our Founding principles. Not the least of these is the Framers' vision of a strong, independent executive, chosen by the country as a whole.

CIVIC CHARITY AND THE CONSTITUTION

THOMAS B. GRIFFITH*

In 2018, Professor Amy Chua published a book titled, *Political Tribes: Group Instinct and the Fate of Nations*.¹ By Professor Chua's account, the idea for the book started as a critique of the failure of American foreign policy to recognize that tribal loyalties were the most important political commitments in Vietnam, Afghanistan, and Iraq.² But as Professor Chua studied the role such loyalties played in these countries, she recognized that the United States is itself divided among political tribes.³ Of course, Professor Chua is not the first or the only scholar or pundit to point this out.⁴

I am neither a scholar nor a pundit, but I am an observer of the American political scene. I've lived during the Cold War and the Cuban Missile Crisis. I remember well the massive street demonstrations protesting American involvement in the war in Vietnam, race riots in the wake of the assassination of Martin Luther King, Jr., the assassinations of President John F.

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1. AMY CHUA, *POLITICAL TRIBES: GROUP INSTINCT AND THE FATE OF NATIONS* (2018).

2. *See id.* at 2–3.

3. *Id.* at 166, 177.

4. *See, e.g.*, BEN SASSE, THEM: WHY WE HATE EACH OTHER—AND HOW TO HEAL (2018); Arthur C. Brooks, Opinion, *Our Culture of Contempt*, N.Y. TIMES (Mar. 2, 2019), <https://nyti.ms/2Vw3onl> [<https://perma.cc/TS85-VQFD>]; David Brooks, Opinion, *The Retreat to Tribalism*, N.Y. TIMES (Jan. 1, 2018), <https://nyti.ms/2DL1Ddi> [<https://perma.cc/38RD-X2W2>]; Michael Gerson, Opinion, *Tribalism triumphs in America*, WASH. POST (Sept. 18, 2017), https://www.washingtonpost.com/opinions/tribalism-triumphs-in-america/2017/09/18/7c6a841a-9c95-11e7-9083-fb6dd6804c2_story.html [<https://perma.cc/ZYF4-XYNW>]; Andrew Sullivan, *America Wasn't Built for Humans*, N.Y. MAG. (Sept. 18, 2017), <https://nymag.com/intelligencer/2017/09/can-democracy-survive-tribalism.html> [<https://perma.cc/MU7C-VT9T>]; Arthur C. Brooks, President, Am. Enter. Inst., Commencement Address at Brigham Young University: More Love, Less Contempt (Apr. 25, 2019), <https://speeches.byu.edu/talks/arthur-c-brooks/more-love-less-contempt/> [<https://perma.cc/2ZHT-E777>].

Kennedy and his brother Robert, the resignation of President Richard Nixon, and the impeachment and trial of President Bill Clinton. I mention all of this to provide some context for the belief that, in my lifetime, the Republic has been confronted with no more serious a challenge to its well-being and maybe even its survival than it faces today from political tribalism.

I am not alone in playing the role of Jeremiah. New York University's Professor Jonathan Haidt, whose groundbreaking scholarship helps us better understand the reasons competing groups see reality so differently,⁵ is not known as a pessimist. But recently he sounded an ominous alarm. "[T]here is a very good chance," Professor Haidt warned, "that in the next 30 years we will have a catastrophic failure of our democracy."⁶ The reason for his concern? "We just don't know," he observed, "what a democracy looks like when you drain all the trust out of the system."⁷

Can we prove Professor Haidt's gloomy forecast wrong? At the very least, our public debates need more civility. Peter Wehner describes this virtue so vital to the functioning of our civic institutions:

Civility has to do with . . . the respect we owe others as . . . fellow human beings. It is both an animating spirit and a mode of discourse. It establishes limits so we don't treat opponents as enemies. And it helps inoculate us against one of the unrelenting temptations in politics (and in life more broadly), which is to demonize and dehumanize those who hold views different from our own. . . .

. . . [C]ivility, properly understood, advances rigorous arguments, for a simple reason: it forecloses *ad hominem* attacks, which is the refuge of sloppy, undisciplined minds.⁸

5. See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

6. Paul Kelly, 'Very good chance' democracy is doomed in America, says Haidt, *AUSTRALIAN* (July 20, 2019, 1:00 AM), <https://www.theaustralian.com.au/nation/politics/very-good-chance-democracy-is-doomed-in-america-says-haidt/news-story/0106ec1c458a0b5e3844545514a55b5a> [<https://perma.cc/J3R6-T8H8>].

7. *Id.*

8. Peter Wehner, *Civility as a Political Virtue*, *ETHICS & PUB. POL'Y CTR.* (Dec. 1, 2010), <https://eppc.org/publications/civility-as-a-political-virtue/> [<https://perma.cc/U27W-VQ4L>].

But civility is the very *least* we should expect of those in the public square. As Arthur Brooks put it, “Tell people, ‘My spouse and I are civil to each other,’ and they’ll tell you to get counseling.”⁹

We must do better, and fortunately, we have a model. In 1787, the Framers set aside their tribal loyalties in a successful effort to form a more perfect Union. In a fascinating piece of historical scholarship titled, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, Derek Webb describes how the Framers overcame tribalism at the Philadelphia Convention to create the Constitution.¹⁰ Much of what I will say about the Convention is drawn from Webb’s article. In early July of 1787, the Convention was in a “deplorable state” and faced the very real prospect of failure.¹¹ George Washington, Benjamin Franklin, and others feared that “dissolution” of the convention was “hourly to be apprehended.”¹² And yet by mid-September, they had produced the Constitution that would be the basis for our enduring success as a nation. In his letter transmitting the Constitution to Congress, Washington attributed this surprising turn of events—what one popular account of the convention called the “Miracle at Philadelphia”¹³—to the “spirit of amity, and of that mutual deference . . . which the peculiarity of our political situation rendered indispensable.”¹⁴

According to Webb, three factors helped create this “indispensable” “spirit of amity [and] mutual deference.” First, the delegates in the Convention were housed in the same city for

9. ARTHUR C. BROOKS, *LOVE YOUR ENEMIES: HOW DECENT PEOPLE CAN SAVE AMERICA FROM THE CULTURE OF CONTEMPT* 12 (2019).

10. Derek A. Webb, *The Original Meaning of Civility: Democratic Deliberation at the Philadelphia Constitutional Convention*, 64 S.C. L. REV. 183 (2012). Unless otherwise noted, Webb draws his information from RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* (2009) and JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* (Adrienne Koch ed., 1984).

11. Letter from Jared Sparks to James Madison (Mar. 30, 1831), https://www.loc.gov/resource/mjm.23_0611_0613/?st=gallery [<https://perma.cc/ABQ3-BLZE>].

12. Webb, *supra* note 10, at 197 (quoting BEEMAN, *supra* note 10, at 185) (internal quotation marks omitted).

13. CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* (1966).

14. Webb, *supra* note 10, at 197 (quoting MADISON, *supra* note 10, at 627).

four months, making informal social interaction unavoidable.¹⁵ They gathered for deliberations Mondays through Saturdays from “10 or 11 a.m. to 3 or 3:30 p.m.”¹⁶ Afterwards they would take dinner together at local taverns.¹⁷ After dinner, the delegates enjoyed evening tea together.¹⁸ Eventually they formed dinner clubs that were open to delegates from all the states and cut across regional and ideological lines.¹⁹ At several key junctures that summer, Benjamin Franklin threw open the doors of his home for lavish dinner parties that featured the finest cuisine available, topped off with Franklin’s special casks of porter.²⁰ As George Mason wrote to his son, dinner parties at Franklin’s home allowed almost perfect strangers with glowing political resumes from various states to “grow into some acquaintance with each other” and to “form a proper correspondence of sentiments” that would eventually prove to supply the good will needed to craft the Constitution.²¹ Second, the rules of the Convention worked to encourage cooperation. Attendance was mandatory, which meant the delegates were physically present with one another while in session.²² No one spoke to an empty chamber. And when a delegate held the floor, the rules forbade others from talking or even reading.²³ No official record of votes was kept, and the proceedings were in secret, which allowed for an openness to argument and for the changing of views.²⁴

Third, the Framers were willing to set aside their parochial political interests and compromise for the sake of a workable constitution. The gloomy forecasts of dissolution and failure were due, in large measure, to the inability of the delegates to resolve the most difficult issue confronting the Convention: should the representation of states in Congress be on an equal

15. *Id.* at 192.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 193.

21. *See id.* (quoting BEEMAN, *supra* note 10, at 53) (internal quotation marks omitted).

22. *Id.* at 195.

23. *Id.* at 194.

24. *Id.* at 195.

basis or proportional to their populations?²⁵ Faced with this potentially fatal stalemate, the delegates made the critical decision that failure to create a constitution then and there was not an option. They determined that they would compromise on this central controversy even though they could not be certain in advance what the terms of the compromise would be.²⁶ Significantly, the terms of what is now known as the Great Compromise were first created by a committee of eleven that met in Franklin's home.²⁷ This setting emphasized small group dynamics, familiarity, and domesticity. Importantly too, the committee was composed of carefully selected moderates, not ideologues.²⁸

But I think more went into the "spirit of amity [and] mutual deference" than can be gleaned from the rules, procedures, and sociality that shaped the work of the Philadelphia Convention of 1787. Upon the retirement of Justice Kennedy from the Supreme Court, Jeffrey Rosen commented, "Kennedy was an idealist, a patriot, and a lover of the Constitution, who believed fervently that *the greatest document of freedom ever written provides a framework for citizens of different perspectives to agree and disagree with each other in civil terms.*"²⁹ It is no doubt true that the Constitution creates a framework for a civil debate among citizens and between the branches as they exercise checks and balances on each other. But I believe that there is something more at work in the success of the 1787 Constitution.

That something more is an ardent desire for union. Professor Akhil Amar asserts that the most *fundamental liberty* guaranteed by the Constitution is the right of We, the People, to make the rules by which society is governed through our politically accountable representatives.³⁰ I agree, but my point is a different one. I believe that the most *fundamental impulse* that created the Constitution in the summer of 1787 was the yearning for union.

25. *Id.* at 212.

26. *See id.* at 209–16.

27. *Id.* at 216.

28. *See id.* at 216, 218.

29. Jeffrey Rosen, *The Justice Who Believed in America*, ATLANTIC (June 27, 2018) (emphasis added), <https://www.theatlantic.com/ideas/archive/2018/06/celebrating-anthony-kennedy/563966/> [<https://perma.cc/7WST-WPWZ>].

30. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 10 (2005).

The Preamble announces that the purpose of the Constitution is “to form a more perfect Union.”³¹ In other words, the Constitution assumes the coming together of a people who want to create a community. And not just in neighborhoods, villages, towns, counties, or states, but on a continent. And not just with people of their own race, religion, background, class, or viewpoint. The Constitution creates a structure of governance that can allow for human flourishing, but without this desire to unite, the Constitution cannot create a national community in which that flourishing will occur. Without this desire to unite, the Constitution is form without substance.

When politicians and judges like me take an oath to uphold the Constitution, we commit to work for unity; we make a solemn pledge that we will not be agents of division. This vow to work for national unity is more than gauzy sentimentality or merely a call for civility in our public discourse. Instead, it is a studied and determined choice to work at union, and, as we learn from the example of the delegates at the Philadelphia Convention, that requires compromise. The Constitution was created in the first instance by delegates who determined that they would compromise some of their dearly held views for the sake of union. More than that, and quite remarkably, these delegates determined that they would strike a compromise even *before* they knew what the terms of the compromise would be. In short and to the point, they valued national unity over their own particular views. Is that the key to the way forward during this time of division?

The delegates’ impulse to place community above individual preferences tapped into a deep strain of the American experience. In his book, *Bonds of Affection—Civic Charity and the Making of America: Winthrop, Jefferson, and Lincoln*, Matthew Holland calls this element of our national DNA “civic charity” and highlights four moments in our history when the exercise of this virtue helped shape the country we hope America will yet be.³²

In the spring of 1630, John Winthrop, the newly elected governor of the Massachusetts Bay Colony, gave a sermon aboard

31. U.S. CONST. pmb1.

32. MATTHEW S. HOLLAND, *BONDS OF AFFECTION—CIVIC CHARITY AND THE MAKING OF AMERICA: WINTHROP, JEFFERSON, AND LINCOLN* 6 (2007).

the ship *Arbella*.³³ Praised by scholars as the “Ur-text of American literature,”³⁴ Winthrop called upon the members of the colony to live with each other “in the bond of brotherly affection.”³⁵ He preached, “We must uphold a familiar commerce together in all meekness, gentleness, patience, and liberality. We must delight in each other, make each other’s conditions our own, rejoice together, mourn together, labor and suffer together, always having before our eyes our commission and community in the work.”³⁶ In this appeal, Winthrop “established a national mythos that human beings are social beings, dependent upon other social beings not just to survive but to flourish.”³⁷

In March 1801, following what many consider the ugliest campaign for the most consequential presidential election in the nation’s history—“the first real test of whether American national power could be transferred without violent resistance beforehand or bitter retribution afterwards”³⁸—the victorious Thomas Jefferson gave his First Inaugural Address, his “most developed and revealing public statement concerning the foundational ideals of American politics.”³⁹ The bitter election contest “gave Jefferson pause to consider a different threat to the verities of 1776 than those he saw in Federalist policy. Now undermining successful self-rule was what Jefferson considered a dangerous lack of love among American citizens.”⁴⁰ Famously, Jefferson declared, “We are all republicans: we are all federalists.”⁴¹ Less famously, but more importantly, he continued, “Let us then, fellow citizens, unite with one heart and one mind, let us restore to social intercourse that harmony and affection without which liberty, and even life itself, are but

33. *Id.* at 1.

34. *Id.*

35. *Id.* (quoting John Winthrop, Governor, Mass. Bay Colony, *A Model of Christian Charity* (Apr. 8, 1630)) (internal quotation marks omitted).

36. *Id.* (quoting Winthrop, *supra* note 35) (internal quotation marks omitted).

37. *Id.* at 242.

38. *Id.* at 142.

39. *Id.* at 136.

40. *Id.* at 138.

41. Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), in 33 THE PAPERS OF THOMAS JEFFERSON 148, 149 (Barbara B. Oberg et al. eds., 2006).

dreary things.”⁴² In a letter written just weeks later, Jefferson recognized, “It will be a great blessing to our country if we can once more restore harmony and *social love* among its citizens. I confess, for myself, it is almost the first object of my heart, and one to which I would sacrifice everything but principle.”⁴³

On the eve of the Civil War, with the Republic facing an existential crisis, Abraham Lincoln delivered his First Inaugural Address, a last-ditch effort to preserve the Union that had been created by the Constitution.⁴⁴ In words and phrases that have surely become American scripture, our greatest President declared:

We are not enemies, but friends. We must not be enemies. Though passion may have strained, it must not break our *bonds of affection*. The mystic chords of memory, stretching from every battlefield, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.⁴⁵

Tragically, Lincoln’s plea for unity failed. War came, and we live with its consequences to this day.

Four years later, with victory over the Confederacy near at hand, Lincoln’s Second Inaugural Address launched his ambitious project to reconstruct a nation that had been torn asunder.⁴⁶ His remarks at that time, in the wake of an unparalleled national tragedy and on the cusp of a moment filled with promise, have been described as “without precedent in the civil history of the world,” giving voice to “a generosity so grand and unexpected as to nearly defy human comprehension.”⁴⁷ Another verse of American scripture: “With malice toward

42. *Id.*

43. HOLLAND, *supra* note 32, at 138 (quoting Letter from Thomas Jefferson to Elbridge Gerry (Mar. 29, 1801), in 33 THE PAPERS OF THOMAS JEFFERSON, *supra* note 41, at 490, 491) (internal quotation marks omitted).

44. *See id.* at 200.

45. *Id.* at 169 (quoting Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 262, 271 (Roy P. Basler et al. eds., 1953)) (internal quotation marks omitted).

46. *See id.* at 219–20.

47. *Id.* at 222–23.

none; with charity for all; with firmness in the right . . . let us strive on to . . . bind up the nation's wounds"⁴⁸

As Professor Amar points out, the unity Lincoln sought after the Civil War differed from the unity he had envisioned before the Civil War.⁴⁹ In an address delivered a mere four days before his assassination, Lincoln pressed for the extension of the franchise to black men.⁵⁰ According to Professor Amar:

This was an important transformation in Lincoln's view of the Union. For a Union aims to unite not just territory, or states, but also persons—flesh and blood human beings. Lincoln's early vision was of an ultimate Union that would largely be of, by, and for whites; after getting their freedom, blacks would be encouraged to move elsewhere—say, Africa or [C]entral America. But the experience of the Civil War itself, and the bravery exhibited by black soldiers, helped persuade Lincoln to embrace a more inclusive conception of Union, bringing together not merely different regions but also different races.⁵¹

What then of our current moment? How strong are our "bonds of affection"? The Constitution's form of government not only allows spirited disagreement, it requires it. But the Constitution cannot withstand a citizenry whose debates are filled with contempt for one another. As Michael Gerson observes, "The heroes of America are heroes of unity. Our political system is designed for vigorous disagreement. It is not designed for irreconcilable contempt. Such contempt loosens the ties of citizenship and undermines the idea of patriotism."⁵²

The Constitution anticipates instead a citizenship whose "bonds of affection" cross regional, religious, racial, and ideological boundaries. For the Constitution to succeed, We the People must unite to create a society based on shared values.

48. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in 8 COLLECTED WORKS OF ABRAHAM LINCOLN 332, 333 (Roy P. Basler et al. eds., 1953).

49. Akhil Reed Amar, *The David C. Baum Lecture: Abraham Lincoln and the American Union*, 2001 U. ILL. L. REV. 1109, 1132.

50. *Id.*

51. *Id.*

52. Michael Gerson, Opinion, *A primer on political reality*, WASH. POST (Feb. 19, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/02/18/AR2010021803414.html> [<https://perma.cc/M27U-GL2H>].

We will disagree over the content of those values. What is equality? What is liberty? But we must, in the words of the Declaration of Independence, “mutually pledge”⁵³ to stay together as we debate their meaning. We must carry out those arguments in the “spirit of amity [and] mutual deference.” Perhaps most important of all, we must compromise so that we can accommodate others for the sake of union. Without that commitment, *our* Constitution will fail.

Commenting on one such debate over the meaning of equality and liberty—today’s clash between needed antidiscrimination laws and cherished religious liberty—Professor Martha Minow, the former dean of Harvard Law School, notes that compromise can be seen as a departure from principle.⁵⁴ For some, to compromise is to abandon rights and commitments. But as Professor Minow points out, compromise can also allow the type of accommodation that is indispensable in a diverse society.⁵⁵ Where possible, Professor Minow argues, both sides should seek convergence and compromise.⁵⁶ Instead of striving for total victory, each side should search for ways to accommodate the legitimate concerns of the other.⁵⁷ To seek convergence and compromise for the sake of unity is an expression of the civic charity needed to breathe life into the Constitution. In his later years, Jefferson observed that “a government held together by the bands of reason only, requires much compromise of opinion” and that “a great deal of indulgence is necessary to strengthen habits of harmony and fraternity.”⁵⁸ These are expressions of the “spirit of amity [and] mutual deference” that created the Constitution. Washington thought it was “indispensable” in the summer of 1787. Surely it is “indispensable” today.

53. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776).

54. Martha Minow, *Principles or Compromises: Accommodating Gender Equality and Religious Freedom in Multicultural Societies*, in GENDER, RELIGION, & FAMILY LAW: THEORIZING CONFLICTS BETWEEN WOMEN’S RIGHTS AND CULTURAL TRADITIONS 3, 12 (Lisa Fishbayn Joffe & Sylvia Neil eds., 2013).

55. *Id.* at 13.

56. *Id.* at 12–15.

57. *Id.*

58. Letter from Thomas Jefferson to Edward Livingston (Apr. 4, 1824), https://www.loc.gov/resource/mtj1.054_0441_0443/?st=gallery [<https://perma.cc/Y7SW-5QC9>].

Professor Chua is optimistic that we can overcome the tribal politics that currently beset us.⁵⁹ I am sorry to say that I am not. Never before has a people been less willing to put aside emblems of its tribal identities to create a nation in pursuit of a common good. The task is daunting. Christian scripture speaks of a time when every nation, kindred, tongue, and people will be united, but that is in a vision of a distant future under very different and extraordinary circumstances.⁶⁰ Perhaps what we are trying to accomplish simply is not possible absent those circumstances. As Professor Haidt points out, the “human mind is prepared for tribalism.”⁶¹ We are “deeply intuitive creatures whose gut feelings drive strategic reasoning.”⁶² A multicultural democracy is not a natural condition for us. At best it is a fragile possibility.⁶³

Fragile, yes. Very fragile. And our political leaders, the stewards of our Constitution and its norms, our pundits, and our citizenry must keep that in mind. Always.

When he launched his candidacy for the presidency in 1968, Robert F. Kennedy declared: “I want the . . . United States . . . to stand for . . . reconciliation of men.”⁶⁴ In his translation of the New Testament, William Tyndale used the word “reconciliation” to translate the Greek word “katallagē,”⁶⁵ which means “a change from enmity to friendship”⁶⁶ or “the means through which harmony is restored.”⁶⁷ But sometimes he used a newly created word to express the concept: “atonement” or “at-one-ment.”⁶⁸

59. CHUA, *supra* note 1, at 197–202.

60. *Revelation* 7:9.

61. Kelly, *supra* note 6 (internal quotation marks omitted).

62. *Id.*

63. *Id.*

64. Robert F. Kennedy, Presidential Campaign Announcement (Mar. 16, 1968), <https://www.c-span.org/video/?443225-1/robert-f-kennedy-presidential-campaign-announcement> [<https://perma.cc/DP9X-GVK9>].

65. David Rolph Seely, *William Tyndale and the Language of At-one-ment*, in *THE KING JAMES BIBLE AND THE RESTORATION* 25, 35–36 (Kent P. Jackson ed., 2011).

66. AN INTERMEDIATE GREEK-ENGLISH LEXICON: FOUNDED UPON THE SEVENTH EDITION OF LIDDELL AND SCOTT’S GREEK-ENGLISH LEXICON 190 (1889).

67. *MERCER DICTIONARY OF THE BIBLE* 75 (Watson E. Mills et al. eds., 1990).

68. Seely, *supra* note 65, at 35–36.

With wisdom, Benjamin Franklin cautioned his fellow delegates to the Philadelphia Convention that it would take hard work to “keep” the Republic they had just created.⁶⁹ That hard work requires civic charity, now more than ever.

69. *Papers of Dr. James McHenry on the Federal Convention of 1787*, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 923, 952 (Charles C. Tansill ed., 1927).

SIXTH AMENDMENT FEDERALISM

LOUIS J. CAPOZZI III*

Scholarship on the right to appointed counsel in misdemeanor cases has generally focused on the U.S. Constitution, neglecting the role of state law. As states across the country fail to provide effective counsel in more serious cases, some academics have argued that the U.S. Supreme Court should create a constitutional right to appointed counsel in all criminal cases.

This Article focuses instead on state law, arguing that federalism is the key to reforming our misdemeanor indigent defense system. In the process, it pursues both descriptive and normative goals. Descriptively, it documents the current law of the fifty States on the right to appointed counsel and finds that states have not acted in a stereotypically miserly manner. Thirty-four states guarantee a broader right to appointed counsel than the U.S. Supreme Court requires.

Normatively, this Article advocates for a more dynamic federalism to improve our misdemeanor indigent defense system. First, this Article challenges the popular scholarly view that there should be a federal constitutional right to appointed counsel in all criminal cases, addressing both legal and policy arguments. Second, this Article focuses on federalism. Because the U.S. Supreme Court has not imposed a uniform solution on all of the states, there is room for experimentation. But many states have not yet seized the opportunity. Intending to shift the conversation toward finding innovative solutions within federalism, this Article introduces three alternatives to providing ap-

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pointed counsel in misdemeanor cases: non-prosecution, diversion, and an inquisitorial system of adjudication.

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INTRODUCTION: MISDEMEANOR TRIALS IN MONTGOMERY COUNTY, PENNSYLVANIA

On a Tuesday afternoon in King of Prussia, Pennsylvania, a magisterial district judge is conducting shoplifting trials. His court, the judge explains, “gets a ton of business” from shoplifting at the massive King of Prussia Mall across the street. The defendant in his next case, Mindy, is accused of stealing sixty dollars’ worth of clothing from a store. Outside the courtroom, the defendant had struck a bargain with the police officer prosecuting her case. She would plead guilty to shoplifting, she offered, if she could get a payment plan for the fine. The police officer is fine with that arrangement.

As the trial begins, the judge takes control of the proceeding. He asks the defendant a variety of questions about her background, establishing that she has a job as a store clerk and no criminal record. After Mindy tells the judge she wishes to plead guilty, the judge asks the police officer if the Commonwealth would accept a guilty plea to the lower offense of disorderly conduct. The police officer agrees. The judge tells Mindy he is cutting her a “major break” and asks her to also thank the officer, which she happily does. The judge then imposes a fine of \$160 and agrees to a payment plan by which Mindy will pay \$20 per month. After Mindy leaves, the judge explains to me that a retail theft conviction would cost Mindy her job. Because she was a first-time offender, he wanted to cut her a break. As he put it, “peoples’ lives are complicated, and I try to cut people a break unless someone’s an idiot.”

The informal proceeding took all of about ten minutes. There was no formal submission of evidence or cross-examination. And yet Mindy came into the courtroom without a criminal record, and left with one. Perhaps most interestingly, there was no defense lawyer. Indeed, there were no defense lawyers at any of the twelve criminal trials I watched that morning in Montgomery County.

Criminal law scholarship has typically covered misdemeanors and petty offenses only lightly.¹ These labels encompass a vari-

1. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012) (denouncing the “felony-centric” view of criminal law). Some states classify misdemeanors and “petty” offenses separately. In general, when the distinction ex-

ety of offenses, including driving with a suspended license, disorderly conduct, drug possession, shoplifting, harassment, underage drinking, minor assault, vandalism, and even hunting oysters without a license.² Compared with felonies and capital cases, the stakes may seem low. But misdemeanors dominate our criminal justice system. About *fifteen million* misdemeanors are processed in the United States each year, easily dwarfing the number of felonies.³ Misdemeanors matter.

In misdemeanor cases, a significant percentage of criminal defendants do not have a federal constitutional right to appointed counsel. In *Scott v. Illinois*,⁴ the U.S. Supreme Court held that states are obligated to appoint counsel to indigent defendants only when a sentence of imprisonment is imposed.⁵ When other criminal punishments are imposed—most commonly fines—the Federal Constitution does not require States to appoint counsel.⁶ If that does not sound like much, it is worth remembering that many, if not most, criminal charges brought in the state courts are low-level misdemeanors that are generally punished solely with fines.⁷ Thus, States have the discretion not to appoint counsel in a large portion of criminal cases.

ists, a petty offense is considered less serious. Because not all states recognize petty offenses, the term “misdemeanor” refers herein to both.

2. See *id.* at 1321; Sarah Mollett, *The Chesapeake Bay's Oysters: Current Status and Strategies for Improvement*, 18 PENN ST. ENVTL. L. REV. 257, 270 (2010).

3. See RICHARD Y. SCHAUFFLER ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 45, 47 (2010), <http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx> [<https://perma.cc/5DBA-5P6D>].

4. 440 U.S. 367 (1979).

5. *Id.* at 373–74. The States must also appoint counsel before imposing suspended sentences that could result in the defendant being actually imprisoned. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

6. *Scott*, 440 U.S. at 373–74.

7. In 2018, Texas had around 1.1 million non-traffic misdemeanor cases in the justice and municipal courts where the defendant could only be punished by fine, and thus was not entitled to appointed counsel. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY FISCAL YEAR 2018, at Detail 50 (2018), <https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf> [<https://perma.cc/X7UY-PY44>]. That same year, about 290,000 criminal cases were filed in the Texas District Courts, where defendants charged with more serious misdemeanors or felonies are entitled to appointed counsel. See *id.* at Court-Level 20. In other words, the number of criminal cases where defendants were not entitled to appointed counsel easily dwarfed the number of cases where they were.

Most scholars who have considered the right to appointed counsel in misdemeanor cases argue *Scott v. Illinois* was erroneous and should be overruled.⁸ Indeed, some scholars denounce the decision in strong terms, declaring it at odds with the Supreme Court's important decision in *Gideon v. Wainwright*,⁹ which guaranteed indigent defendants the right to appointed counsel in felony cases.¹⁰

8. See, e.g., Russell L. Christopher, *Appointed Counsel and Jury Trial: The Rights that Undermine the Other Rights*, 75 WASH. & LEE L. REV. 703, 777 (2018) (arguing *Scott* clashes “under some circumstances, with ten constitutional rights emanating from the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments”); Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89, 108 (2018) (denouncing *Scott*); Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon’s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299, 2303–04 (2017) (“[T]he Supreme Court’s decision in *Scott* is fundamentally flawed . . .”); Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1169–70 (2015) (criticizing *Scott* for inattentiveness to collateral consequences); Russell L. Christopher, *Penalizing and Chilling an Indigent’s Exercise of the Right to Appointed Counsel for Misdemeanors*, 99 IOWA L. REV. 1905, 1908 (2014) (“*Scott*’s ‘actual imprisonment’ standard may unconstitutionally penalize and chill an indigent’s exercise of the right to appointed counsel.”); John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 16 (2013) (“[E]ven assuming *Scott* made sense when it was decided, its analytical framework no longer stands up.”); John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 87 (2013) (arguing that *Scott* should be overruled); Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 602 (2011) (criticizing *Scott*’s “false binary between incarceration . . . and mere fines”); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 333 (2011); Paul Marcus, *Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 189 (2009) (“*Scott* was wrongly decided and the Constitution truly does mandate counsel in all criminal cases.”); Rinat Kitai, *What Remains Necessary Following Alabama v. Shelton to Fulfill the Right of a Criminal Defendant to Counsel at the Expense of the State?*, 30 OHIO N.U. L. REV. 35, 36 (2004) (“The thesis of this article . . . is that the right to appointment of counsel should be extended to all criminal defendants . . .”). A small number of scholars defend *Scott*. See BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW 40–41, 104–05 (2017) (“There is little evidence that lawyers make much of a difference in simple, nonjury cases.”); Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 477, 496 (2006) (arguing that the appointment of counsel is not that important in low-level misdemeanor cases and advising states to “change [relevant state-law] rule[s] so that counsel is appointed only when the defendant has a constitutional right to that appointment”).

9. 372 U.S. 335 (1963).

10. *Id.* at 344; see, e.g., Buskey & Lucas, *supra* note 8, at 2303 (calling *Scott* the “anti-*Gideon*”); Kitai, *supra* note 8, at 58 (expressing a hope that “*Scott v. Illinois* is merely a way-station, a pause in the evolution of the right to appointed counsel”

This Article takes a different approach, focusing on the important role of the States in defining and actualizing the right to counsel in misdemeanor cases. This important topic, which affects millions of Americans every year, has received surprisingly little attention from academics.¹¹ This Article thus serves an important descriptive function and takes a fresh analytical approach to the challenge of improving our nation's misdemeanor justice system. Instead of advocating that the Supreme Court force a one-size-fits-all solution on the States by mandating appointed counsel in all criminal cases, this Article endorses a federalist approach to the issue. But it does not extoll the status quo. Instead, this Article champions a "better federalism" in the area of misdemeanor justice, whereby states try out bold and innovative solutions, breaking free of the inertia that sometimes robs federalism of its full potential.

Part I reviews existing federal law, documenting how the Supreme Court left the States some room to define the scope of the right to appointed counsel. After describing the typical misdemeanor proceeding, Part II surveys the laws of each state on the right to appointed counsel and explores how they arrived at them, providing the first detailed account of state law in this area. In summary, thirty-four states guarantee a broader right to appointed counsel than required by *Scott*. Among the thirty-four states with a broader right, the state legislatures, rules committees, and judiciaries have all played important roles. But the state legislatures have had the most impact, acting as the first mover in expanding the right to appointed counsel in twenty-one of the thirty-four states.

Part III considers the legal and policy arguments for and against a broader right to appointed counsel. Part III.A considers whether existing law is *legally* correct. Challenging the ortho-

(quoting Lawrence Herman & Charles A. Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71, 117 (1979)) (internal quotation marks omitted)).

11. I am aware of only one scholar who has written an article focusing on the state-law aspect of the right to counsel. See B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417 (2000). However, it is outdated, provides little detail on how—or why—states took the paths they did, and offers a limited prescriptive vision. Other scholars have mentioned the existence of broader state-law rights, but they usually used the States as evidence to argue that it would not be too costly for the U.S. Supreme Court to impose a uniform solution on the States. See, e.g., Buskey & Lucas, *supra* note 8, at 2325.

dox view among scholars, it argues that *Scott* was correctly decided: the Federal Constitution does not guarantee the right to appointed counsel in all criminal cases. It also notes that the case for a broader right to appointed counsel is stronger under some state constitutions.¹² Of course, the courts are not the only government actors that define rights, and thus Part III.B turns to the question of whether it is good public policy to provide counsel in a broader range of cases than the U.S. Supreme Court requires. This Article argues there is no one-size-fits-all answer, recognizing that the optimal approach for a state or locality depends largely on the jurisdiction's unique characteristics and needs.

Above all, this Article contends that federalism is the key to building a better misdemeanor indigent defense system, and Part IV explains how. Part IV.A acknowledges that, on paper, the scope of appointed counsel is a federalism success story. States have not fit the stereotypical account that portrays them as hostile to criminal defendants' rights.¹³ Thirty-four states have guaranteed a broader right to appointed counsel than the U.S. Supreme Court requires.

Still, the state of our misdemeanor indigent justice system is troubling. Reports of routine failures to honor the existing right to appointed counsel abound. The right of misdemeanor defendants to effective appointed counsel is largely an unfunded and unfulfilled mandate. And where the law is followed, the dominance of uncounseled or barely counseled guilty pleas and cookie-cutter sentences raises serious questions about whether misdemeanor defendants are getting individualized adjudications. The fruits of federalism in this area today do not truly warrant celebration.

Although the States bear some blame, this Article does not echo the chorus of scholars demanding States allocate more money to indigent defense. Instead, this Article calls on States to try out innovative ideas for improving misdemeanor justice in America, even going outside the traditional Anglo-American

12. Cf. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 8–9 (2018) (arguing that state constitutions are frequently overlooked by litigants as vehicles for upholding individual rights).

13. See, e.g., ANTHONY LEWIS, GIDEON'S TRUMPET 211–12 (1964) (“[L]egislatures, feeling no demand from the voters, will rarely do anything about unfairness in the administration of the criminal law except under pressure from the courts . . .”).

adversarial system. Part IV.B suggests three approaches that jurisdictions could take toward misdemeanors: declination, diversion programs, and an inquisitorial model of adjudication. The purpose of this Article is not to endorse one of those approaches, but rather to shift the conversation away from seeking a one-size-fits-all solution from the U.S. Supreme Court. Instead, we should be discussing how the States can fulfill their potential as laboratories of democracy in this area and explore new solutions to old problems. Because the Supreme Court did not force a uniform solution on the States in *Scott v. Illinois*, there is room for states to act as real innovators and help create a better misdemeanor justice system in the process.

I. EXISTING SIXTH AMENDMENT LAW ON THE RIGHT TO APPOINTED COUNSEL

A. *The Right-to-Counsel Revolution*

The Sixth Amendment to the U.S. Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹⁴ The Supreme Court was initially slow to incorporate the Sixth Amendment against the States. But in *Powell v. Alabama*,¹⁵ a case dominated by lynch mob dynamics in the Jim Crow-era South, the Court held that the States must appoint counsel in capital cases under special circumstances.¹⁶ In a famous passage, Justice Sutherland stated, “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”¹⁷ He explained that a man “[l]eft without the aid of counsel . . . may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.”¹⁸ This possibility created a severe risk that a defendant, “though he be not guilty, [would] face[] the danger of conviction because he does not know how to establish his innocence.”¹⁹

14. U.S. CONST. amend. VI.

15. 287 U.S. 45 (1932).

16. *Id.* at 71.

17. *Id.* at 68–69.

18. *Id.* at 69.

19. *Id.*

In *Gideon v. Wainwright*, the Supreme Court began the “right to counsel revolution.”²⁰ Justice Black’s opinion for the Court concluded it was an “obvious truth” that a person “cannot be assured a fair trial unless counsel is provided for him.”²¹ Although *Gideon* was initially understood to apply only to felony cases,²² the Court dramatically expanded the Sixth Amendment right in *Argersinger v. Hamlin*.²³ Justice Douglas’s opinion extended *Gideon* to misdemeanors, reasoning that providing counsel was necessary because of their large volume, which risked an “obsession for speedy dispositions, regardless of the fairness of the result.”²⁴

B. Scott v. Illinois

Although the *Argersinger* Court did not hold that appointed counsel was required for *all* criminal cases, it expressly reserved the question.²⁵ Many scholars at the time believed that the Court would soon go the rest of the way and guarantee appointed counsel in all criminal cases.²⁶ But in *Scott v. Illinois*, the Court drew a boundary line. Justice Rehnquist’s majority opinion held that the Sixth Amendment only requires appointed counsel when a defendant is sentenced to jail.²⁷

Aubrey Scott was charged with shoplifting merchandise valued below \$150, an offense punishable by one year’s imprisonment and a \$500 fine under Illinois law.²⁸ Scott was convicted and fined \$50 after a bench trial where he defended himself.²⁹ The state supreme court affirmed, over Scott’s argument that the state was required to appoint counsel for him.³⁰ By a 5-4 vote, the Supreme Court affirmed the conviction and held that

20. See AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* i, iv (2004), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [<https://perma.cc/SP4Q-AMUE>].

21. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

22. Buskey & Lucas, *supra* note 8, at 2302–03.

23. See 407 U.S. 25, 36–37 (1972).

24. *Id.* at 34.

25. See *id.* at 37.

26. See King, *supra* note 8, at 13 n.82 (listing scholars who made this prediction).

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

28. *Id.* at 368.

29. *Id.*

30. *Id.* at 368–69.

Scott was not entitled to appointed counsel because his only punishment was a fine, not imprisonment.³¹

Federalism considerations dominated Justice Rehnquist's opinion. The majority noted the "special difficulties" arising from the incorporation of the Sixth Amendment against the States because the "range of human conduct regulated by state criminal laws is much broader than that of the federal criminal laws, particularly on the 'petty' offense part of the spectrum."³² The Court then reasoned that "any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."³³ As for the individual's interest, the Court reasoned that "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment."³⁴

In dissent, Justice Brennan argued that the Sixth Amendment entitles criminal defendants to appointed counsel in any case where they are charged with an offense for which imprisonment is authorized.³⁵ *Gideon*, he argued, stood for the proposition that counsel was necessary in all criminal cases to "equalize the sides in an adversary criminal process" and to "give substance to other constitutional and procedural protections afforded criminal defendants."³⁶ As for the burden on the States, Justice Brennan deemed it "irrelevant," reasoning that constitutional requirements cannot depend on whether they are difficult to implement.³⁷

Dissenting separately, Justice Blackmun argued for a middle approach. He argued that the Sixth Amendment should be understood to require the appointment of counsel in cases of actual imprisonment and in cases where the defendant was charged with an offense whereby he would be entitled to a jury trial.³⁸

31. *See id.* at 373–74.

32. *Id.* at 372.

33. *Id.* at 373.

34. *Id.*

35. *Id.* at 375–76 (Brennan, J., dissenting).

36. *Id.* at 377.

37. *See id.* at 384.

38. *Id.* at 389–90 (Blackmun, J., dissenting).

C. *Suspended Sentences*

A divided Court later held in *Alabama v. Shelton*³⁹ that suspended sentences cannot be imposed without appointing counsel for indigent defendants. After defending himself in a jury trial without counsel, LeReed Shelton had been convicted of third-degree assault and had been sentenced to thirty days' imprisonment.⁴⁰ But the judge had suspended that sentence and imposed two years' unsupervised probation, conditioned on the payment of court costs, a fine, and restitution.⁴¹ If Shelton was accused of violating those terms, he would be entitled to a hearing; if he was found to be in violation, the court could force him to serve his prison sentence.⁴²

The Supreme Court ultimately held that this sentence was unconstitutional because the state failed to appoint counsel.⁴³ Justice Ginsburg's majority opinion reasoned that a suspended sentence is a term of imprisonment within the meaning of *Scott*.⁴⁴ Dissenting, Justice Scalia argued that Alabama's system was constitutional, reasoning that *Scott* drew a "bright line between imprisonment and the mere threat of imprisonment," and observing it was highly unlikely that Shelton would actually be imprisoned.⁴⁵ Additionally, he argued that the majority's rule would force a burden on states, including "some of the poorest" ones, that did not already provide counsel in cases resulting in suspended sentences.⁴⁶

D. *Using Uncounseled Convictions to Enhance Sentences*

Parts I.A through C have established that there is a class of criminal cases for which the appointment of counsel to indigent defendants is not required. A separate, but conceptually related, question concerns what a state can do with uncounseled convictions. In particular, if the defendant is subsequently charged with another offense, represented by counsel in that latter case, and convicted, can the court use the prior uncoun-

39. 535 U.S. 654 (2002).

40. *Id.* at 658.

41. *Id.*

42. ALA. CODE § 15-22-54 (1995).

43. *Shelton*, 535 U.S. at 659–60, 674.

44. *See id.* at 662.

45. *See id.* at 674–76 (Scalia, J., dissenting).

46. *Id.* at 679–81.

seled conviction to aggravate the defendant's sentence in the latter case?

Initially, the Court suggested the answer to this question was "no" in *Baldasar v. Illinois*,⁴⁷ where a heavily fractured five-Justice majority held that a defendant's sentence cannot be enhanced based on a prior uncounseled conviction.⁴⁸ Dissenting, Justice Powell argued that the Court's decision unfairly taxed the States' prerogative not to provide counsel in certain cases under *Scott*.⁴⁹

Fourteen years later, the Court overruled *Baldasar*. In *Nichols v. United States*,⁵⁰ Kenneth Nichols had previously been convicted (without appointed counsel) of driving under the influence (DUI), for which he was fined but not incarcerated.⁵¹ In a subsequent prosecution for conspiracy to possess cocaine with intent to distribute, he pleaded guilty and was assessed a criminal history point for his DUI conviction, increasing his potential prison sentence by twenty-five months.⁵² Relying on *Baldasar*, Nichols objected to the inclusion of the DUI misdemeanor in his criminal history score because he had not been represented by counsel in the earlier case.⁵³

Chief Justice Rehnquist's opinion for the Court overruled *Baldasar*.⁵⁴ The Court reasoned that enhancement statutes "do not change the penalty imposed for the earlier conviction,"

47. 446 U.S. 222 (1980), *overruled by* *Nichols v. United States*, 511 U.S. 738 (1994).

48. Thomas Baldasar was initially charged with a misdemeanor theft but received an enhanced conviction as a felon and was sentenced to prison because of a prior conviction. *Id.* at 223. In a brief per curiam opinion the Court reversed the enhanced conviction "[f]or the reasons stated in the [three] concurring opinions." *Id.* at 224. The concurring opinions, however, each viewed the problem quite differently. Justice Stewart's brief concurrence reasoned that an uncounseled conviction resulted in a deprivation of defendant's liberty (via the enhanced sentence in the second prosecution), so that reversal was required by *Scott*. *See id.* at 224 (Stewart, J., concurring). Justice Marshall renewed his objection to *Scott*, but otherwise agreed with Justice Stewart. *See id.* at 224–29 (Marshall, J., concurring). Justice Blackmun also renewed his prior objection to *Scott*, arguing that indigent defendants should be entitled to counsel whenever charged with an offense for which at least six months of imprisonment was authorized. *Id.* at 229–30 (Blackmun, J., concurring).

49. *Id.* at 230–35 (Powell, J., dissenting).

50. 511 U.S. 738.

51. *Id.* at 740.

52. *See id.*

53. *See id.* at 741.

54. *Id.* at 748.

thus viewing the sentence imposed on Nichols as a consequence only of his second offense, and not his first one.⁵⁵ The Court supported this move by citing the broad range of factors that sentencing judges are allowed to consider in imposing sentences, including past criminal behavior that did not result in a conviction.⁵⁶ Justices Blackmun and Ginsburg both wrote dissents.⁵⁷ The Court unanimously reaffirmed *Nichols* in 2016.⁵⁸

E. Summary of Sixth Amendment Law

There is a popular misconception that the Federal Constitution guarantees the right to counsel in all criminal cases.⁵⁹ Indeed, in the movie version of *Gideon's Trumpet*, Henry Fonda (playing Clarence Earl Gideon) stated that "Nobody is gonna go on trial in this country ever again without a lawyer."⁶⁰ Fonda was mistaken. The scope of the federal constitutional right can be helpfully boiled down into two rules. First, an indigent criminal defendant cannot be imprisoned unless the court appointed constitutionally effective counsel or the defendant waived his right. Second, a state cannot sentence an indigent criminal defendant to probation, without appointing counsel or securing a waiver, where a violation of the probation terms would result in imprisonment.

But the Sixth Amendment right under *Gideon* has not been expanded to all criminal cases. Under federal law, the States can do the following without appointing counsel:

1. Try to convict indigent criminal defendants without appointed counsel and:

55. *Id.* at 747.

56. *See id.*

57. *Id.* at 754–65 (Blackmun, J., dissenting); *id.* at 765–66 (Ginsburg, J., dissenting).

58. In *United States v. Bryant*, 136 S. Ct. 1954 (2016), the Court relied on *Nichols* to hold that uncounseled convictions obtained in tribal courts could be used to enhance the defendant's sentence in a subsequent prosecution. *Id.* at 1958–59, 1965 (2016) ("*Nichols'* reasoning steers the result here.>").

59. *See, e.g.,* SIXTH AMENDMENT CTR., ACTUAL DENIAL OF COUNSEL IN MISDEMEANOR COURTS 3 (2015), <https://sixthamendment.org/wp-content/uploads/2015/05/Actual-Denial-of-Counsel-in-Misdemeanor-Courts.pdf> [<https://perma.cc/S6UK-5AY9>] ("The . . . Sixth Amendment prohibits federal, state and local governments from taking the liberty of a person of limited financial means unless a competent attorney is provided to the indigent accused This is true, even if the potential term of incarceration is no more than a single day.>").

60. *See* GIDEON'S TRUMPET (Worldvision Enterprises & Hallmark Hall of Fame Productions 1980).

- a. Impose criminal fines. The use of criminal fines has been steadily growing.⁶¹ For example, in 2013, North Carolina reclassified a number of offenses to be punishable solely by fine.⁶² As another example, Texas collected around \$941,000,000 in criminal fines in 2018.⁶³ States can also do this in cases where they charge offenses for which imprisonment is authorized.
- b. Require community service. In 2018, about 90,000 misdemeanor convicts in Texas satisfied their obligation, in full or in part, to pay a criminal fine by performing community service.⁶⁴
- c. Pursue criminal or civil forfeitures. Although the Supreme Court has not established a clear test to evaluate civil forfeitures,⁶⁵ many lower courts apply a proportionality test, which tends to limit the risk of forfeitures accompanying low-level misdemeanors.⁶⁶
- d. Impose a prison sentence but give full credit for time served in the lead-up to the trial. This is

61. See COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 3 (2015), http://nacmconference.org/wp-content/uploads/2014/01/1215_cea_fine_fee_bail_issue_brief.pdf [<https://perma.cc/LGY2-2MUD>] (“The use of [fines] has increased substantially over time; in 1986, 12 percent of those incarcerated were also fined, while in 2004 this number had increased to 37 percent. When including fees as well, the total rises to 66 percent of all prison inmates. In 2014, 44 States charged offenders for probation and parole supervision, up from 26 in 1990.” (footnote omitted)).

62. See COMM’N ON INDIGENT DEF. SERVS., REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 34 (2015), <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2015.pdf> [<https://perma.cc/4Y3P-EAAA>].

63. See OFFICE OF COURT ADMIN., *supra* note 7, at Detail 50.

64. *Id.*

65. See *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (incorporating the Excessive Fines Clause against the States); *Austin v. United States*, 509 U.S. 602, 622 (1993) (holding that civil forfeitures are limited by the Excessive Fines Clause but not establishing a test).

66. See, e.g., *Commonwealth v. Flint*, 940 S.W.2d 896, 898 (Ky. 1997).

common in Indiana, for example.⁶⁷ At least some state courts have upheld this practice.⁶⁸

- e. In a subsequent prosecution, enhance the defendant's sentence based on such an uncounseled conviction.
2. Charge the defendant with a crime, divert prosecution, and negotiate probation terms, whereby a violation of the terms would result in a criminal prosecution with the chance to contest underlying guilt.⁶⁹ The prosecutor could also negotiate a diversion agreement with the defendant before filing charges.⁷⁰
3. Negotiate with the defendant a plea bargain that does not result in actual or potential incarceration. For example, it is a common practice for defendants to plead guilty in exchange for credit for time served.⁷¹

II. EXISTING STATE LAW ON THE APPOINTMENT OF COUNSEL

For some scholars, federal law is just about all that matters. As Judge Jeffrey Sutton has recently documented, scholars, litigants, and law schools have systematically ignored the role of state law in shaping constitutional rights.⁷² This trend has carried over to the right-to-counsel context, where scholars have neglected the role of state law in shaping the scope of the right to appointed counsel, focusing instead on persuading the Supreme Court to overrule *Scott*.⁷³

Whatever the merits of *Scott*,⁷⁴ the Court's decision gave States the opportunity to experiment with different approaches

67. See IND. TASK FORCE ON PUB. DEF., FINDINGS AND RECOMMENDATIONS TO THE INDIANA PUBLIC DEFENDER COMMISSION 34–35 (2018), <https://www.in.gov/publicdefender/files/Indiana%20Task%20Force%20Report.pdf> [<https://perma.cc/GV2J-FP8P>].

68. See, e.g., *Glaze v. State*, 621 S.E.2d 655, 656 (S.C. 2005) (upholding the constitutional validity of an uncounseled conviction where the defendant was sentenced to time served after he spent ten days in jail for failure to pay bail).

69. See *Alabama v. Shelton*, 535 U.S. 654, 671 (2002).

70. See *id.*

71. SIXTH AMENDMENT CTR., *supra* note 59, at 5.

72. See SUTTON, *supra* note 12, at 8–10.

73. See *supra* note 8 (documenting the intense and consistent hostility to *Scott*).

74. See *infra* Part III.A.1.

in this area. This Part studies what the States have done with this opportunity. Part II.A begins by introducing a high-level, typical account of how the States process low-level misdemeanors. Part II.B discusses the extent to which the States have provided a broader right to counsel under state law. In short, thirty-four states have guaranteed a broader right to counsel than the Supreme Court required in *Scott*. Sixteen states do not guarantee broader protection, though some of them have mechanisms in place—like the general discretionary power of a trial judge to appoint counsel—that can result in a broader appointment of counsel in particular cases. Part II.C analyzes *how* the States have arrived at their existing laws. State legislatures, rulemakers, and courts have all played significant roles. But the primary vehicles for broadening the scope of the right to counsel in the States have been the state legislatures, not the courts. Finally, Part II.D raises serious questions about whether these rights are being consistently honored.

A. *A Typical Misdemeanor Case*

The vast majority of cases processed by the American criminal justice system are misdemeanors.⁷⁵ This label encompasses a variety of offenses, including driving with a suspended license, disorderly conduct, drug possession, shoplifting, underage drinking, harassment, minor assault, vandalism, violating the housing code, and curfew violations.⁷⁶ The prevalence of a particular offense varies by jurisdiction. For example, as a magisterial district judge in King of Prussia, Pennsylvania, explained, his court “gets a ton of business from the [King of Prussia Mall]” because of shoplifting. In Virginia, one practitioner estimated that suspended license cases may make up as much as 40 percent of the criminal docket.⁷⁷ A justice of the peace in Phoenix, Arizona, reported that she adjudicates a large number of illegal hunting license cases.⁷⁸

How does our system process almost fifteen million misdemeanors per year? This Part attempts to paint a typical picture,

75. See Natapoff, *supra* note 1, at 1314–15.

76. See *id.* at 1321.

77. See Telephone Interview with David Heilberg, Cofounder, Dygert, Wright, Hobbs & Hernandez, PLC (Feb. 18, 2019).

78. E-mail from Cathy Riggs, Justice of the Peace, Phoenix, Arizona, to author (Sept. 25, 2019, 3:20 PM EST) (on file with author).

acknowledging that there is great diversity among states and localities. Local practice is often more important than law, so this Article supplements traditional legal research with accounts from proceedings I personally witnessed and interviews with judges, prosecutors, and defense lawyers. A clear disclaimer: my evidence of local practice is anecdotal, not empirical.⁷⁹ To borrow a line from Professor Albert Alschuler, my method is “a kind of legal journalism.”⁸⁰ This Article aspires to survey general trends, at least well enough to provide context for assessing the right to counsel. We can best analyze those trends as a series of choices that jurisdictions must make in processing low-level misdemeanors.

Once the police accuse an individual of committing an offense, the first question is whether the police make an arrest or issue a citation, a choice that is, as a matter of federal constitutional law, entirely within the police officer’s discretion.⁸¹ If the defendant is cited, he will be given a ticket (usually resembling a speeding ticket) with an order to appear. For more serious misdemeanors, the police may arrest the defendant and hold him up to forty-eight hours before a preliminary hearing.⁸² The court must then determine whether to require bail, which many poor defendants cannot afford to pay.⁸³ Thus, if the court assesses bail, the defendant may remain detained until trial

79. I spoke with at least two practitioners each from Pennsylvania, Virginia, Iowa, Kentucky, Florida, Ohio, Arizona, Indiana, and Texas. These states are intended to roughly approximate the diversity of state-law approaches to misdemeanor indigent defense.

80. See Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181 (1975) (outlining a methodology for documenting plea bargaining practice).

81. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (provided the officer has “probable cause to believe an individual has committed even a very minor criminal offense in his presence”).

82. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

83. See ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 32–33 (2009), <https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf> [https://perma.cc/Q43S-G8FX].

(which could take a year or longer) or until he pleads guilty,⁸⁴ which is far more likely.

Second, the States must decide which courts, and which judges, will try misdemeanor defendants. Although some states, like California, adjudicate misdemeanors in the same trial courts that try felonies, most states have split their trial courts so that one set of courts adjudicates more serious cases, and the other handles low-level criminal cases.⁸⁵ In Pennsylvania, for example, the Court of Common Pleas is the general trial court that adjudicates some misdemeanors and all felonies, but the Magisterial District Courts adjudicate summary-level offenses, those for which state law authorizes ninety days of prison or less.⁸⁶ Magisterial district judges do not need to be lawyers, but they do need to pass a qualifying exam.⁸⁷ Although criminal defendants may appeal a decision by a magisterial district judge and receive a de novo trial at the Court of Common Pleas, multiple judges have told me that appeals are very rare.⁸⁸ Indeed, de novo appeals for misdemeanors are widely available throughout the country, but statistical evidence suggests these appeals are extremely rare.⁸⁹ As was true in *Scott* itself, the defendant will sometimes be entitled to a jury trial, but not appointed counsel.⁹⁰

84. A Kentucky judge estimated that it may take over a year to get a trial date in Jefferson County, Kentucky. See Telephone Interview with Sara Nicholson, Dist. Judge, Jefferson County, Kentucky (Mar. 22, 2019).

85. See *State Court Structure Charts*, CT. STAT. PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx [https://perma.cc/2KSM-ZS45] (last visited Feb. 17, 2020).

86. *Pennsylvania Court Structure*, PENNSYLVANIANS FOR MODERN CTS., <https://www.pmconline.org/resources/pennsylvania-court-structure> [https://perma.cc/4JQ5-Z3BX] (last visited Feb. 11, 2020).

87. See *Learn*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/learn/> [https://perma.cc/GAR7-5LV9] (last visited Feb. 11, 2020).

88. See Telephone Interview with Albert Masland, Court of Common Pleas Judge, Cumberland County, Pennsylvania (Mar. 1, 2019); Telephone Interview with Jonathan Birbeck, Magisterial Dist. Judge, Cumberland County, Pennsylvania (Mar. 4, 2019).

89. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1939–41 (2019).

90. See *Scott v. Illinois*, 440 U.S. 367, 368, 373–74 (1979) (“We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”); *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (“[W]e have concluded

The third key decision is whether the court requires a preliminary hearing or just goes straight to trial. In Kentucky, low-level misdemeanor defendants appear at a preliminary hearing.⁹¹ If the judge finds probable cause, the case will be scheduled for trial.⁹² In jurisdictions that allow guilty pleas at first appearances, the vast majority of misdemeanor defendants plead guilty at them. In Florida, judges often offer a sentence in exchange for a guilty plea, and most defendants take the offer and waive their right to counsel.⁹³ One Florida defense lawyer described these proceedings as “cattle calls,” explaining that prosecutors and defendants sometimes strike deals before the judge even arrives.⁹⁴ In Columbus, Ohio, a trial judge estimated that over 99 percent of misdemeanor defendants plead guilty, usually at the first appearance.⁹⁵ In Jefferson County, Kentucky, the norm is for plea bargains to happen *after* the preliminary hearing, and after the public defender has been appointed.⁹⁶ Other states proceed to trial more quickly. For example, in most Pennsylvania counties, those charged with low-level misdemeanors usually make their first appearance at the trial itself.⁹⁷

The fourth decision is the subject of this Article: whether to appoint counsel or not. As discussed in Part II.B, there is a tremendous diversity of approaches among the States.

that no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”).

91. See KY. R. CRIM. P. 3.07.

92. See KY. R. CRIM. P. 3.14(1); Telephone Interview with Sara Nicholson, *supra* note 84.

93. See Telephone Interview with L.E. Hutton, Chief Assistant State Attorney, Office of the State Attorney for the Fourth Judicial Circuit of Fla. (Mar. 29, 2019).

94. See Telephone Interview with Scott L. Richardson, Attorney, Law Offices of Scott L. Richardson (Mar. 29, 2019); see also ALISA SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS 15 (2011), <https://nacdl.org/getattachment/eb3f8d52-d844-487c-bbf2-5090f5ca4be3/three-minute-justice-haste-and-waste-in-florida-s-misdemeanor-courts.pdf> [<https://perma.cc/QCP7-N5ZZ>].

95. Telephone Interview with Richard Frye, Court of Common Pleas Judge, Franklin County, Ohio (Oct. 4, 2019).

96. See Telephone Interview with Sara Nicholson, *supra* note 84.

97. See ADMIN. OFFICE OF PA. COURTS, 2013 CASELOAD STATISTICS OF THE UNITED JUDICIAL SYSTEM OF PENNSYLVANIA 124 (2014), <http://www.pacourts.us/assets/files/setting-768/file-3597.pdf?cb=08138b> [<https://perma.cc/34VX-FU5V>]; E-mail from Jonathan Birbeck, Magisterial Dist. Judge, Cumberland County, Pennsylvania, to author (Jan. 29, 2020, 11:06 AM EST) (on file with author).

Fifth, jurisdictions have varying approaches to pleading and plea bargaining. A few trends have emerged from my conversations with judges and practitioners. In all jurisdictions, open guilty pleas (that is, not bargained pleas) are common. For example, an Ohio trial judge estimated that most misdemeanor defendants plead guilty right away and are happy to walk away with a small fine or a few days in jail.⁹⁸ Further, in jurisdictions that do not appoint counsel, there is a relatively high number of trials. Judges in two jurisdictions that do not appoint counsel in large numbers of misdemeanor cases have estimated a trial rate of 20 to 30 percent.⁹⁹ Several judges have noted that defendants often do not have much to lose in taking a trial, because the result (a minor fine) would usually be about the same as if they just pleaded guilty. Or, as one judge in Virginia explained, some defendants just want to tell their story.¹⁰⁰ Finally, in states that appoint counsel for all jailable offenses, negotiated pleas are much more common for low-level misdemeanors. An Iowa magistrate judge explained that plea bargains became more common after the Iowa Supreme Court expanded the right, and that negotiated diversion (rather than a guilty plea with a conviction) became more frequent.¹⁰¹ A Kentucky judge estimated that about 95 percent of her low-level criminal cases were terminated by a plea bargain that was struck after a lawyer was appointed at the preliminary appearance, explaining that the public defenders knew which “cookie-cutter deal” was expected.¹⁰²

Sixth, for the misdemeanor cases that make it to trial, jurisdictions have different trial realities. In the jurisdictions that do not appoint lawyers for low-level misdemeanors, informal bench trials are relatively common.¹⁰³ Based on personal obser-

98. Telephone Interview with Richard Frye, *supra* note 95.

99. See Telephone Interview with Jonathan Birbeck, *supra* note 88; Telephone Interview with Robert Downer, Dist. Judge, Va. Sixteenth Judicial Dist. (Mar. 4, 2019).

100. See Telephone Interview with Robert Downer, *supra* note 99.

101. Telephone Interview with Lynn Rose, Magistrate Judge, Iowa Sixth Dist. (Mar. 1, 2018).

102. Telephone Interview with Sara Nicholson, *supra* note 84.

103. See, e.g., E-mail from Cathy Riggs, *supra* note 78. Some states give jury trials at the first misdemeanor trial. See, e.g., Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 171–73. But many states do not. Although most states theoretically guarantee jury trials in a broader range of misdemeanors than required by the Supreme Court, some of those states only provide a jury trial when an appeal is taken. See, e.g., GA. UNIF. MUN. CT. R. 22.2;

vations and conversations with practitioners, these bench trials are informal and often resemble administrative proceedings. In many of these cases, the judge will dismiss the case, especially if the defendant admits responsibility and promises not to offend again.¹⁰⁴ Cases involving dismissal are generally the most informal, but those resulting in convictions oftentimes are informal too. Some classic procedural protections, like requiring the prosecution to prove guilt beyond a reasonable doubt,¹⁰⁵ are often insisted upon. But judges in multiple states recounted taking a more inquisitorial role. The judge dominates the proceeding by asking questions, though she will usually let the defendant tell his story however he wants, even if, as one Virginia judge explained, “the defendant hangs himself by admitting” he committed the crime.¹⁰⁶ Several judges in different states also confirmed that they will uphold the hearsay rules against the prosecution because unrepresented defendants cannot be expected to understand the rules.¹⁰⁷ As for the prosecution, some states rely on police officers to present the government’s case or answer questions from the judge.¹⁰⁸ The officer will often bring the key witness to testify or, especially in shoplifting cases,

Maryland, CT. STATS. PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts/Maryland.aspx [<https://perma.cc/BNX6-JG5T>] (last visited Feb. 17, 2020). States are more likely to provide jury trials for more serious accusations, like DUI, than less serious ones, like criminal speeding. See E-mail from Cathy Riggs, *supra* note 78 (explaining that jury trials in Phoenix are most prevalent for DUI, but that bench trials are generally given for criminal speeding and hunting license cases). *But see* State v. Denelsbeck, 137 A.3d 462, 476–77 (N.J. 2016) (holding that a jury trial is not required until third or subsequent DUI cases).

104. I saw dismissals in a solid majority of the misdemeanor adjudications I witnessed. There is statistical evidence showing that dismissal is common in misdemeanor adjudications, at least in some states. In 2018, Texas had around 1.1 million non-traffic misdemeanor cases in the justice and municipal courts where the defendant could only be punished by fine, and thus was not entitled to appointed counsel. See OFFICE OF COURT ADMIN., *supra* note 7, at Court-Level 42, 50. Only around 54 percent of those cases resulted in convictions. *Id.* at Court-Level 43, 51. Astonishingly, about 40 percent of those cases resulted in dismissals, while less than 1 percent resulted in acquittals. *Id.* Of the 54 percent of convictions, the defendant did not bother to appear in court about 70 percent of the time, while about 25 percent appeared in court to plead guilty; only about 4 percent were formally found guilty by a judge or jury. *Id.* at Court-Level 44, 51.

105. See *In re Winship*, 397 U.S. 358, 364 (1970).

106. See Telephone Interview with Robert Downer, *supra* note 99.

107. See, e.g., Telephone Interview with Lynn Rose, *supra* note 101.

108. See Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), <https://nyti.ms/2GIqV1S> [<https://perma.cc/LP78-CMQ7>].

a video recording of the defendant.¹⁰⁹ Prosecutors are only sometimes involved.

Seventh, jurisdictions take a variety of approaches to sentencing in low-level misdemeanor cases. In the jurisdictions that do not appoint counsel, a judge's sentencing options are limited. A jail sentence is off the table.¹¹⁰ Empirical research confirms that some states are increasingly turning to fines instead of incarceration for misdemeanors, perhaps because states would rather make money than spend it.¹¹¹ Illustrating this fact, Texas collected around \$941,000,000 in criminal fines in 2018,¹¹² and only about 6 percent of all misdemeanors disposed of that year were even punishable by imprisonment.¹¹³ In jurisdictions that do appoint counsel, judges recounted a broader variety of sentences for the small number of cases that go to trial, with fines and short jail sentences being common. Of course, the vast majority of low-level misdemeanors terminate with an open or negotiated guilty plea, with a fine or probation being a typical sanction. Reports of prosecutors offering credit for time served because of an inability to make bail abound.¹¹⁴

B. Overview of State-Law Approaches to the Right to Counsel

The choice to appoint counsel (or not) in misdemeanor cases is crucial to determining how the rest of the proceeding unfolds. It affects the rate of plea bargaining, the frequency of trials, and

109. Cf. Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1325–29 (1998) (identifying problematic elements of prosecutions by police officers).

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

111. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1099 (2015) (“As government budgets shrink around the country, lower criminal courts are being reconceptualized and repurposed as revenue sources.”).

112. See OFFICE OF COURT ADMIN., *supra* note 7, at Detail 50.

113. Compare *id.* at Statewide 22 (showing the number of fine-only misdemeanors disposed of in 2018), with *id.* at Statewide 14 (showing the number of total new misdemeanors filed in 2018).

114. See *id.* at Detail 50 (showing that fines in Texas misdemeanor cases were waived as satisfied by “jail credit” over 532,000 times in 2018); SIXTH AMENDMENT CTR., *supra* note 59, at 5 (“If a defendant is unable to make bail and remains in jail prior to his next court date, prosecutors may offer the defendant a chance to get out of jail for time served if the accused simply pleads guilty. Of course, the defendant may jump at the opportunity to get out of jail.”).

permissible sentences. This Part studies the laws of the fifty States on the appointment of counsel in misdemeanor cases.

There is a substantial diversity of practice among the States. Thirty-four provide protection that is broader than what the Supreme Court mandated in *Scott*, though they do so to varying extents.¹¹⁵ Twenty-seven states guarantee less protection than Justice Brennan's *Scott* dissent would have mandated, including sixteen that do not guarantee a right to counsel beyond *Scott*'s requirement, though judges in these states have varying amounts of discretionary power to appoint counsel.¹¹⁶ Two of those sixteen states offer broader protection than *Nichols*, restricting their use of uncounseled convictions to enhance subsequent sentences.¹¹⁷

It will be useful to categorize the various approaches. There are undoubtedly multiple ways to carve up state practices, and each state's practice in this area is unique. That being said, here are the approaches, ordered from most to least generous.

115. See *infra* Part II.B.1–4.

116. See *infra* Part II.B.3–6.

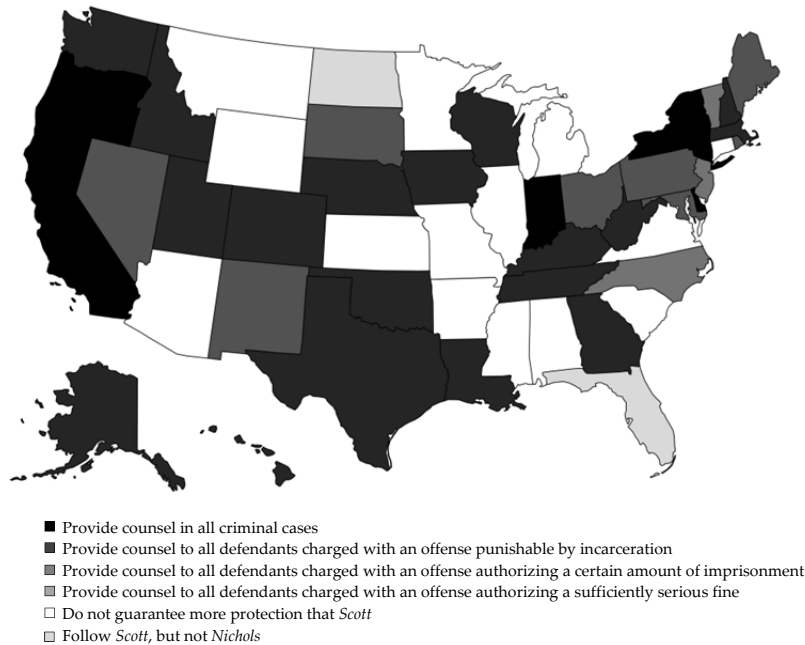
117. See *infra* Part II.B.6.

TABLE 1: STATE APPROACHES TO RIGHT TO APPOINTED COUNSEL IN MISDEMEANOR CASES

APPROACH TO APPOINTED COUNSEL	STATES
Provide appointed counsel in <i>all</i> criminal cases, even when a defendant is charged with a non-jailable offense	Five states: California, Delaware, Indiana, New York, and Oregon
Provide appointed counsel in criminal cases when the defendant is charged with a crime for which imprisonment is authorized, which is Justice Brennan's approach	Eighteen states: Alaska, Colorado, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Massachusetts, Nebraska, New Hampshire, Oklahoma, Tennessee, Texas, Utah, Washington, West Virginia, and Wisconsin
Provide appointed counsel in criminal cases where the defendant is charged with a crime for which a certain amount of imprisonment is authorized (for example, longer than six months)	Eight states: Maine, Maryland, Nevada, New Mexico, Ohio, Pennsylvania, Rhode Island, and South Dakota
Provide counsel in criminal cases when the defendant is charged with a crime for which a sufficiently serious fine is authorized or imposed	Three states: New Jersey, North Carolina, and Vermont
Do not guarantee more protection than is required by <i>Scott</i> or <i>Nichols</i>	Fourteen states: Alabama, Arizona, Arkansas, Connecticut, Illinois, Kansas, Michigan, Minnesota, Mississippi, Missouri, Montana, South Carolina, Virginia, and Wyoming
Do not guarantee more appointed counsel than <i>Scott</i> requires, but do not use uncounseled convictions to enhance sentences in some situations	Two states: Florida and North Dakota

The map below illustrates the approaches by state.

FIGURE 1: STATE PROTECTIONS BEYOND SCOTT



1. Providing Counsel in All Criminal Cases

Five states guarantee appointed counsel in all criminal cases: California,¹¹⁸ Delaware,¹¹⁹ Indiana,¹²⁰ New York,¹²¹ and Oregon.¹²² These states guarantee appointed counsel even in cases charg-

118. See, e.g., *Tracy v. Mun. Court*, 587 P.2d 227, 228, 230 (Cal. 1978) (en banc). Because counsel is not guaranteed for “infractions” under California law, *id.* at 229–30, California does not go as far as it theoretically could.

119. See DEL. CODE ANN. tit. 29, § 4602 (2020) (“The Office of Defense Services shall represent, without charge, each indigent person who is under arrest or charged with a crime, if . . . [t]he defendant requests it [or] [t]he court . . . so orders . . .”).

120. See *Bolkovac v. State*, 98 N.E.2d 250, 253 (Ind. 1951) (“Since § 13 of Article 1 [of the Indiana Constitution] makes no distinction between misdemeanors and felonies, the right to counsel must and does exist in misdemeanor cases to the same extent and under the same rules it exists in felony cases.”); *Brunson v. State*, 394 N.E.2d 229, 231 (Ind. Ct. App. 1979).

121. See N.Y. CRIM. PROC. LAW § 170.10(3)(c) (McKinney 2020); see also *People v. Ross*, 493 N.E.2d 917, 919 (N.Y. 1986) (interpreting the statute to require the appointment of counsel in all criminal cases).

122. See *Brown v. Multnomah Cty. Dist. Court*, 570 P.2d 52, 61 (Or. 1977) (en banc) (“Oregon has long provided court-appointed counsel for indigent defendants in criminal prosecutions. Traffic crimes are no exception.” (citation omitted)).

ing one of the many crimes for which the only punishment is a fine. For example, in *Tracy v. Municipal Court*,¹²³ the defendants were charged in California with the possession of less than one ounce of marijuana; at the time, the maximum penalty under state law was a \$100 fine.¹²⁴ Nevertheless, the court concluded that appointed counsel was required.¹²⁵ Because the California Supreme Court had long recognized a state constitutional right to appointed counsel in all criminal cases,¹²⁶ the court affirmed the defendants' right to appointed counsel.¹²⁷

One problem that states in this category confront is the blurriness of the line between "crimes" and mere regulatory infractions, like some traffic offenses. Sometimes the line is clear. For example, an ordinary parking violation is not a criminal offense. But driving while intoxicated or at 125 miles per hour could easily result in criminal charges. As for traffic offenses that plausibly fall on either side of the line, jurisdictions make different choices. For example, a person charged with driving without a license in New York was guaranteed appointed counsel because New York classified that offense as criminal, even though it was not a jailable offense.¹²⁸ In other states, driving with a suspended license is a mere traffic infraction, not a crime.

2. *Adopting the Authorized Imprisonment Test*

In addition to the five states in the previous Part, eighteen more guarantee appointed counsel to indigent defendants charged with jailable offenses. In other words, they adopted the approach advocated by Justice Brennan's *Scott* dissent.¹²⁹

123. 587 P.2d 227.

124. *See id.* at 228.

125. *Id.* at 228, 230.

126. *In re Johnson*, 398 P.2d 420, 422 (Cal. 1965) (en banc) (stating that the right to appointed counsel "is, in California at least, not limited to felony cases but is equally guaranteed to persons charged with misdemeanors in a municipal or other inferior court").

127. *Tracy*, 587 P.2d at 228, 230.

128. *See People v. Ross*, 493 N.E.2d 917, 919 (N.Y. 1986).

129. *Scott v. Illinois*, 440 U.S. 367, 375-76 (1979) (Brennan, J., dissenting).

These states are Alaska,¹³⁰ Colorado,¹³¹ Georgia,¹³² Hawaii,¹³³ Idaho,¹³⁴ Iowa,¹³⁵ Kentucky,¹³⁶ Louisiana,¹³⁷ Massachusetts,¹³⁸ Nebraska,¹³⁹ New Hampshire,¹⁴⁰ Oklahoma,¹⁴¹ Tennessee,¹⁴² Texas,¹⁴³ Utah,¹⁴⁴ Washington,¹⁴⁵ West Virginia,¹⁴⁶ and Wisconsin.¹⁴⁷

130. *See* *Alexander v. City of Anchorage*, 490 P.2d 910, 913 (Alaska 1971) (recognizing right to counsel under state constitution in all cases in which imprisonment or hefty fines are authorized).

131. COLO. REV. STAT. § 13-10-114.5 (2020) (stating the court shall appoint counsel if “the charged offense includes a possible sentence of incarceration”).

132. GA. CODE ANN. §§ 17-12-1(c), -2(6)(A) (2020).

133. *See* *State v. Dowler*, 909 P.2d 574, 577 (Haw. Ct. App. 1995).

134. IDAHO CODE § 19-851 to -852 (2020) (recognizing right to counsel in all “serious” cases, defined to include all cases in which imprisonment is authorized, regardless of whether actually imposed).

135. *State v. Young*, 863 N.W.2d 249, 281 (Iowa 2015).

136. KY. REV. STAT. ANN. §§ 31.100(8), .110 (West 2020) (recognizing right to counsel for all “serious” offenses and defining term to include all offenses for which imprisonment is authorized).

137. *State v. Fraychineaud*, 620 So. 2d 338, 340 (La. Ct. App. 1993).

138. MASS. GEN. LAWS ANN. ch. 211D, §§ 2B, 5 (West 2020) (triggering the procedures for appointing counsel when the defendant is charged with an offense for which imprisonment may be imposed); *Commonwealth v. Faherty*, 99 N.E.3d 821, 825 (Mass. App. Ct. 2018) (explaining that counsel does not need to be appointed for offenses like disorderly conduct and shoplifting, for which the maximum penalty for the first offense is a fine only).

139. NEB. REV. STAT. ANN. § 29-3903 (LexisNexis 2020).

140. N.H. REV. STAT. ANN. §§ 604-A:2, 625:9 (2020) (requiring the appointment of counsel for all class A misdemeanors, which are defined to include all offenses for which imprisonment is authorized).

141. OKLA. STAT. ANN. tit. 22, § 1355.6 (West 2020) (requiring appointed counsel for all misdemeanor and traffic cases for which imprisonment is authorized).

142. TENN. CODE ANN. § 40-14-102 (2020); *State v. Wenzler*, No. W2011-00873-CCA-R3-CD, 2013 WL 865333, at 3*-4 (Tenn. Crim. App. Mar. 6, 2013) (interpreting Tennessee Rule of Criminal Procedure 44(a) to require appointed counsel for defendants charged with an offense for which imprisonment is authorized).

143. TEX. CODE CRIM. PROC. ANN. art. 26.04(b)(3) (West 2019).

144. UTAH CODE ANN. § 78B-22-201(1)(a) (West 2020) (requiring the appointment of counsel only if there is “the possibility of incarceration regardless of whether actually imposed”).

145. WASH. SUP. CT. CRIM. R. 3.1(a).

146. W. VA. CODE ANN. § 50-4-3 (West 2020).

147. WIS. STAT. ANN. § 967.06 (West 2020).

3. *Providing Counsel to Defendants Charged with Offenses Allowing Sufficient Lengths of Authorized Incarceration*

In his *Scott* dissent, Justice Blackmun suggested the Sixth Amendment should be understood to require the appointment of counsel to defendants charged with an offense for which they would be entitled to a jury trial, that is, offenses punishable by at least six months of imprisonment.¹⁴⁸ Eight states—Maine,¹⁴⁹ Maryland,¹⁵⁰ Nevada,¹⁵¹ New Mexico,¹⁵² Ohio,¹⁵³ Pennsylvania,¹⁵⁴ Rhode Island,¹⁵⁵ and South Dakota¹⁵⁶—have adopted some variant of this approach, thus offering more protection than *Scott* requires. In other words, these states condition the availability of counsel on the *type of offense* rather than the type of punishment ultimately imposed.

The states in this category sit along a spectrum. At the generous end, South Dakota guarantees counsel when a defendant is charged with an offense for which more than thirty days of imprisonment or more than a five-hundred-dollar fine are authorized.¹⁵⁷ Even in cases charging thirty days' of imprisonment or less, the judge must, at arraignment, state on the record to the defendant that he will not be sentenced to prison if found guilty.¹⁵⁸ The statement must also precede an uncounseled plea.¹⁵⁹

148. *Scott v. Illinois*, 440 U.S. 367, 389–90 (1979) (Blackmun, J., dissenting).

149. ME. CONST. art. I, § 6; ME. REV. STAT. ANN. tit. 15, § 810 (2019); ME. R. UNIF. CRIM. P. 44(a)(1). The Maine Supreme Court recently used language suggesting that the right to appointed counsel in Maine may be narrower than this Article suggests. *See State v. Lipski*, 217 A.3d 727, 729 (Me. 2019) (“When a defendant’s liberty is not at stake . . . there is no constitutional requirement that counsel be provided by the State.”). Because that case involved a crime punishable by only six months’ imprisonment, I do not interpret it to displace the statutory requirement that counsel be provided to defendants charged with a misdemeanor punishable by more than one year in prison.

150. MD. CONST. DECL. OF RTS. art. 21; MD. CODE ANN., CRIM. PROC. § 16-204 (LexisNexis 2020).

151. NEV. CONST. art. I, § 8; NEV. REV. STAT. §§ 178.397, 193.120 (2017).

152. N.M. CONST. art. II, § 14; N.M. STAT. ANN. § 31-16-3 (2019).

153. OHIO CONST. art. I, § 10; OHIO REV. CODE ANN. §§ 120.01 to .03 (West 2020).

154. PA. CONST. art. I, § 9; PA. R. CRIM. P. 122(A).

155. R.I. DIST. CT. R. CRIM. P. 44.

156. S.D. CODIFIED LAWS § 23A-40-6.1 (2020).

157. *See id.* (explaining that appointed counsel is not required when defendant is charged with Class 2 misdemeanor or petty offense); *id.* § 22-6-2 (defining boundary between Class 1 and Class 2 misdemeanors).

158. *See id.* § 23A-40-6.1.

159. *See id.*

Maryland and Pennsylvania are at the middle of the spectrum. Pennsylvania guarantees appointed counsel for all cases charging offenses punishable by more than ninety days' imprisonment.¹⁶⁰ Although Pennsylvania gives its judges discretion to appoint counsel, Pennsylvania trial judges have consistently reported that they almost never appoint counsel in summary offense cases.¹⁶¹ Maryland has essentially the same system, requiring counsel in cases where the defendant is charged with an offense where more than three months of imprisonment or a \$500 fine are authorized.¹⁶²

Additionally, four states follow Justice Blackmun's proposed approach, requiring the appointment of counsel to defendants charged with crimes for which more than six months of imprisonment are authorized: New Mexico,¹⁶³ Nevada,¹⁶⁴ Ohio,¹⁶⁵ and Rhode Island.¹⁶⁶

On the spectrum's least generous end, Maine requires the appointment of counsel only if the defendant is charged with a crime for which at least one year of imprisonment or more than a \$2,000 fine is authorized.¹⁶⁷

160. PA. R. CRIM. P. 122(A) (stating counsel must be appointed for all court cases and all "summary cases" only "when there is a likelihood that imprisonment will be imposed"); 18 PA. STAT. AND CONS. STAT. ANN. § 106(c) (West 2020) (defining "summary offense" as having maximum imprisonment of ninety days).

161. *See, e.g.*, Telephone Interview with Albert Masland, *supra* note 88.

162. MD. CODE ANN., CRIM. PROC. § 16-204 (LexisNexis 2020) (requiring the appointment of counsel when a defendant is charged with a "serious offense"); *id.* § 16-101(h) (defining "serious offense").

163. N.M. STAT. ANN. § 31-16-3 (2019) (entitling defendants charged with "a serious crime" to appointed counsel); *id.* § 31-16-2(d) (defining "serious crime" to refer to an offense for which at least six months of imprisonment is authorized).

164. NEV. REV. STAT. § 178.397 (2017) (granting counsel to any indigent defendant "accused of a gross misdemeanor or felony"); *id.* § 193.120 (defining "gross misdemeanor" and "felony" to exclude crimes punishable by, *inter alia*, less than six months of imprisonment).

165. OHIO R. CRIM. P. 44(A)–(B) (requiring the appointment of counsel for "serious offenses" but not "petty offenses," so long as no sentence of imprisonment is imposed); OHIO R. CRIM. P. 2(C)–(D) (defining "serious" and "petty offense," with the line drawn at six months of imprisonment).

166. R.I. DIST. CT. R. 44 ("If the offense charged is punishable by imprisonment for a term of more than six months or by a fine in excess of \$500, the court shall advise the defendant of his or her right to assignment of counsel . . .").

167. ME. R. UNIF. CRIM. P. 44(a)(1) (not requiring the appointment of counsel for Class D and E crimes); *Criminal Justice System*, OFF. ME. ATT'Y GEN., https://www.maine.gov/ag/crime/criminal_justice_system.shtml [<https://perma.cc/4D9Y->

4. *Providing Counsel to Defendants Based on Fine Levels*

Three states tether the appointment of counsel to particular fine amounts: New Jersey,¹⁶⁸ North Carolina,¹⁶⁹ and Vermont.¹⁷⁰ For example, North Carolina law requires the appointment of counsel when a fine of “\$500 or more is likely to be imposed.”¹⁷¹ As another example, New Jersey relies on the courts to develop standards, requiring appointed counsel in all cases where imprisonment or “any other consequence of magnitude” will occur upon conviction.¹⁷² The state’s intermediate appellate court has held that a fine of \$1,800 for multiple municipal ordinance violations triggers the right to counsel.¹⁷³ On the other hand, it has also held that counsel was not required in an illegal U-turn case in which a \$95 fine was imposed.¹⁷⁴ Many other states also effectively limit the amount of fines that can be imposed without appointed counsel by setting maximum fines for low-level offenses (those for which counsel is not provided under state law).¹⁷⁵

5. *States Not Guaranteeing More Protection than Scott*

Scott allowed federalist experimentation in providing counsel beyond the actual imprisonment rule. But that ability also implied the option *not* to expand the right beyond the federal floor. Indeed, some scholars argue that states are incentivized to pursue this option; by convertingailable offenses into finable ones, the state can save money by not having to pay for a defense lawyer and add money to its coffers from the defendant’s

GRWZ] (last visited Mar. 17, 2020) (explaining the distinction between Class C, D, and E crimes).

168. N.J. STAT. ANN. § 2A:158A-5.2 (West 2020).

169. N.C. GEN. STAT. § 7A-451(a)(1) (2020) (requiring the appointment of counsel where a fine of \$500 or more or imprisonment is “likely to be imposed”).

170. VT. R. CRIM. P. 44(a) (requiring the appointment of counsel for defendants charged with a “serious crime”); VT. STAT. ANN. tit. 13, § 5201(4) (2019) (defining “serious crime” to include a crime for which imprisonment or a fine of \$1000 is imposed).

171. N.C. GEN. STAT. § 7A-451(a)(1).

172. N.J. STAT. ANN. § 2A:158A-5.2.

173. *State v. Hermanns*, 650 A.2d 360, 366 (N.J. Super. Ct. App. Div. 1994).

174. *State v. Smith*, 975 A.2d 523, 527–28 (N.J. Super. Ct. App. Div. 2009).

175. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 16-204 (LexisNexis 2020) (requiring the appointment of counsel when a defendant is charged with a “serious offense”); *id.* § 16-101(h)(2) (defining “serious offense” as “a misdemeanor or offense punishable by confinement for more than 3 months or a fine of more than \$500”).

pocket.¹⁷⁶ Sixteen states take this path: Alabama,¹⁷⁷ Arizona,¹⁷⁸ Arkansas,¹⁷⁹ Connecticut,¹⁸⁰ Florida,¹⁸¹ Illinois,¹⁸² Kansas,¹⁸³ Michigan,¹⁸⁴ Minnesota,¹⁸⁵ Mississippi,¹⁸⁶ Missouri,¹⁸⁷ Montana,¹⁸⁸

176. See, e.g., Darryl K. Brown, *Decriminalization, Regulation, Privatization: A Response to Professor Natapoff*, 69 VAND. L. REV. EN BANC 1, 7 (2016); Natapoff, *supra* note 111, at 1058 (“[E]liminating incarceration for misdemeanors looks like a kind of win-win: it relieves defendants of the threat of imprisonment while saving the state millions of dollars in defense, prosecution, and jail costs.”).

177. ALA. R. CRIM. P. 6.1(a).

178. *Campa v. Fleming*, 656 P.2d 619, 621 (Ariz. Ct. App. 1982) (“[T]here is no authority holding that Arizona has standards which are stricter in this area than the U.S. Constitution.”). The language of Arizona Rule of Criminal Procedure 6.1 potentially suggests a broader right to counsel. ARIZ. R. CRIM. P. 6.1(b)(1) (“An indigent defendant is entitled to a court-appointed attorney . . . in any criminal proceeding that may result in punishment involving a loss of liberty . . .”). However, a practitioner I spoke with confirmed that the right to counsel only applies when the prosecutor is seeking jail time. E-mail from Michael Kielsky, Partner, Udall Shumway PLC, to author (May 14, 2020, 1:50 PM EST) (on file with author).

179. *Calloway v. State*, No. CACR00-1317, 2001 WL 651359, at *1–2 (Ark. Ct. App. June 13, 2001).

180. CONN. GEN. STAT. ANN. § 51-296(a) (West 2020).

181. FLA. R. CRIM. P. 3.111(b).

182. 725 ILL. COMP. STAT. ANN. 5/113-3(b) (West 2020) (“In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel.”). This statute can arguably be read to condition counsel based on the *authorized* penalty. It has been interpreted, however, to condition counsel on the *imposed* penalty, consistent with *Scott*. See *People v. Wigginton*, No. 2-13-1036, 2015 WL 4511932, at *1–2 (Ill. App. Ct. July 27, 2015). The law in Illinois is currently unsettled. The Appellate Court of Illinois recently created, apparently unwittingly, an appellate split by recognizing a right to appointed counsel in a case where the defendant was charged with aailable offense but merely fined. See *People v. Rogers*, No. 3-18-0088, 2020 WL 2216195, at *2 (Ill. App. Ct. May 7, 2020).

183. See KAN. STAT. ANN. § 22-4503 (West 2020); *State v. Delacruz*, 899 P.2d 1042, 1047 (Kan. 1995) (“Prior uncounseled misdemeanor convictions under *Scott* are constitutional where no jail time is imposed.”).

184. MICH. CT. R. 6.610(D)(2); *People v. Richert*, 548 N.W.2d 924, 927 (Mich. Ct. App. 1996) (“We find no justification to construe [the Michigan right to counsel provision] more broadly than its federal analogue in the present context.”).

185. See MINN. R. CRIM. P. 5.04, 23.04.

186. MISS. CODE ANN. § 99-15-15 (2020).

187. MO. ANN. STAT. § 545.820 (West 2019) (requiring the appointment of counsel only for felony defendants); *State v. Pike*, 162 S.W.3d 464, 471–72 (Mo. 2005) (en banc) (affirming the legality of an uncounseled conviction that did not result in incarceration under *Scott*); *State v. Keeth*, 203 S.W.3d 718, 727 (Mo. Ct. App. 2006) (“[T]he current state of the law in Missouri is that as decided in *Scott*.”).

188. MONT. CODE ANN. § 46-8-101 (West 2019); *State v. Allen*, 206 P.3d 951, 953 (Mont. 2009) (“Th[e] fundamental right to counsel extends only to cases in which a sentence of imprisonment is actually imposed . . .”).

North Dakota,¹⁸⁹ South Carolina,¹⁹⁰ Virginia,¹⁹¹ and Wyoming.¹⁹²

These states face an administrability challenge, as Justice Brennan pointed out in his dissent in *Scott*.¹⁹³ Judges in states using the “actual imprisonment” standard must decide at the start of the case whether they want the option of sentencing the defendant to imprisonment. Of course, in jurisdictions where guilty pleas predominate over trials, this argument has little force. The parties can easily strike a bargain that complies with *Scott*.

When a trial occurs, or is at least a realistic possibility, some jurisdictions rely on the prosecutor to indicate whether she will seek a prison sentence for the defendant. Minnesota, for example, makes this expectation explicit by requiring the prosecutor to announce *ex ante* that she will not seek a prison sentence in a case, thus obviating the need for counsel.¹⁹⁴ In other jurisdictions, there is an unwritten expectation that prosecutors will make clear whether counsel is needed by stating an intention to seek a prison sentence. For example, in Cumberland County, Pennsylvania, there is a presumption that appointed counsel will not be assigned for summary offense cases unless the prosecutor states an intention to seek a prison sentence at the start of the process.¹⁹⁵ In Phoenix, Arizona, the justices of the peace generally appoint counsel only when the state indicates it will seek jail time.¹⁹⁶

Other states allow the judge to eliminate the need to appoint counsel in cases where the defendant is charged with an offense punishable by incarceration if she formally decides before trial that she will not sentence the defendant, if convicted, to

189. N.D. R. CRIM. P. 44(a).

190. S.C. CODE ANN. § 17-3-10 (2014) (stating counsel shall be appointed to “[a]ny person entitled to counsel under the Constitution of the United States”).

191. VA. CODE ANN. § 19.2-160 (West 2020).

192. WYO. STAT. ANN. § 7-6-102(a)(v)(A) (2020).

193. See *Scott v. Illinois*, 440 U.S. 367, 383 (1979) (Brennan, J., dissenting).

194. See, e.g., MINN. R. CRIM. P. 23.04; see also *Campa v. Fleming*, 656 P.2d 619, 619–21 (Ariz. Ct. App. 1982) (reversing the appointment of counsel because the prosecutor promised he would not seek a prison sentence for the defendant).

195. See Telephone Interview with Jonathan Birbeck, *supra* note 88.

196. E-mail from Michael Kielsky, Partner, Udall Shumway PLC, to author (Sept. 25, 2019, 3:56 PM EST) (on file with author); E-mail from Cathy Riggs, *supra* note 78.

prison. Connecticut,¹⁹⁷ Florida,¹⁹⁸ Montana,¹⁹⁹ Virginia,²⁰⁰ and Wyoming²⁰¹ have variations on this approach. For example, Florida allows its trial judges to decline to appoint counsel, or dismiss appointed counsel, if they file a written order taking imprisonment off the table for the defendant at least fifteen days before the trial.²⁰² The frequency with which these provisions will be invoked largely depends on the individual judge. One Florida judge said she only used it a couple of times in about two years,²⁰³ while a Florida prosecutor estimated it is used in 5 to 10 percent of possible cases.²⁰⁴ It is also worth noting that some states that recognize a broader, but less than complete, entitlement to appointed counsel have similar procedural requirements.²⁰⁵

These states also give their trial judges varying amounts of discretion to appoint counsel. For example, Arizona and South Carolina explicitly give their trial judges discretion to appoint counsel in any case.²⁰⁶ Mississippi, in contrast, gives its trial judges less discretion, allowing appointment of counsel *only* when the defendant is charged with an offense for which at least ninety days of imprisonment are authorized.²⁰⁷ Similarly, if a Montana judge declares at arraignment that the defendant will not be imprisoned, then she lacks discretion to appoint counsel for the defendant.²⁰⁸

Whether judges will use this discretion to appoint counsel is a different question and likely depends on local factors. For ex-

197. CONN. GEN. STAT. ANN. § 51-296(a) (West 2020).

198. FLA. R. CRIM. P. 3.111(b)(1).

199. MONT. CODE ANN. § 46-8-101(3) (West 2019) (allowing the court to decline to appoint counsel if it declares at arraignment that no term of imprisonment will be imposed).

200. VA. CODE ANN. § 19.2-160 (West 2020).

201. WYO. STAT. ANN. § 7-6-102(a)(v)(A) (2020).

202. FLA. R. CRIM. P. 3.111(b)(1).

203. See Telephone Interview with Meredith Charbula, Cty. Judge, Duval County, Florida (Mar. 29, 2019).

204. See Telephone Interview with L.E. Hutton, *supra* note 93.

205. See, e.g., ME. UNIF. R. CRIM. P. 44(a)(1); VT. STAT. ANN. tit. 13, § 5201(4)(B) (2018).

206. ARIZ. R. CRIM. P. 6.1(b)(2) (“In any other criminal proceeding, the court may appoint an attorney for an indigent defendant if required by the interests of justice.”); S.C. CODE ANN. § 17-3-100 (2014) (recognizing that “the discretionary authority of a judge to appoint counsel in any case” is not limited).

207. MISS. CODE ANN. § 99-15-15 (2020).

208. MONT. CODE ANN. § 46-8-101 (West 2019).

ample, trial judges in Cumberland County, Pennsylvania, rarely use their discretion to appoint counsel in summary offense cases.²⁰⁹ In contrast, one Virginia trial judge told me that he and at least some of his colleagues “bend over backwards” to appoint defense lawyers, because not having them can slow cases down.²¹⁰ Similarly, judges in Columbus, Ohio, generally exercise discretion to appoint counsel for jailable misdemeanors, though judges in some rural counties often do not.²¹¹

6. *Following Scott but Rejecting Nichols*

Two states, North Dakota and Florida, reject *Nichols* but follow *Scott*.²¹² In *State v. Orr*,²¹³ the North Dakota Supreme Court highlighted the state’s historical commitment to the right to counsel and, rejecting *Nichols*, it held that uncounseled convictions could not be used to enhance sentences in subsequent cases.²¹⁴ Similarly, in *State v. Kelly*,²¹⁵ the Florida Supreme Court interpreted the Florida Constitution to provide more protection than *Nichols*, holding that prior uncounseled convictions could only be used to enhance a sentence in a subsequent prosecution if the crime charged in the first case carried a potential prison sentence of less than six months.²¹⁶

C. *How the States Arrived at their Present Laws*

The previous Section documented what the law among the fifty states is. This Section focuses on *how* they got there. Which actors within the states were responsible for expanding (or not) the right to counsel? This question sheds light on the operation of our federalist system and legal development at the state level—issues of interest especially to those who wish to follow

209. See Telephone Interview with Jonathan Birbeck, *supra* note 88; Telephone Interview with Albert Masland, *supra* note 88.

210. See Telephone Interview with Edward Hogshire, Judge, Charlottesville Circuit Court (Feb. 26, 2019).

211. Telephone Interview with Richard Frye, *supra* note 95.

212. On the adherence to *Scott*, see FLA. R. CRIM. P. 3.111; N.D. R. CRIM. P. 44(a).

213. 375 N.W.2d 171 (N.D. 1985).

214. *Id.* at 178–79.

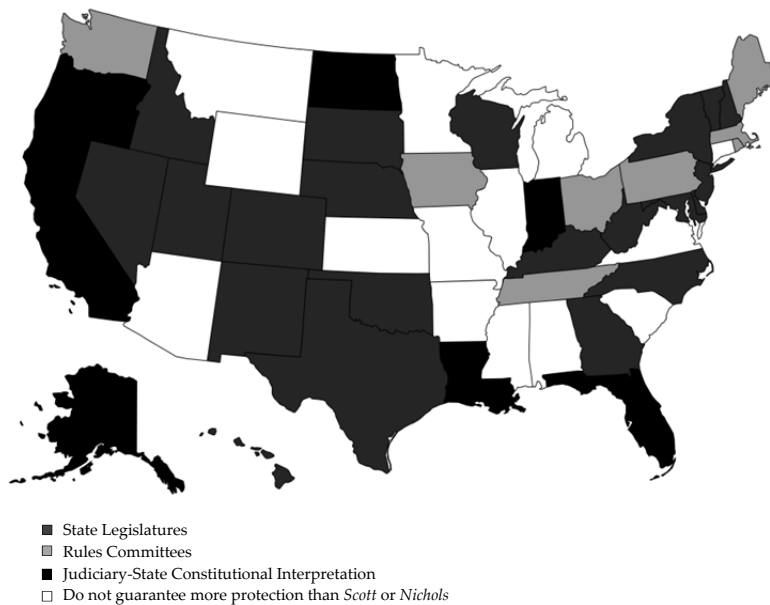
215. 999 So. 2d 1029 (Fla. 2008).

216. *Id.* at 1053.

Judge Sutton's advice to "take both shots" in asserting legal rights.²¹⁷

This Part is divided according to the different institutions of government that have regulated the entitlement to appointed counsel in the several states: state legislatures, rules committees, and state courts. In the states that offer broader legal protection than *Scott* or *Nichols*, the legislature led the way in twenty-one states, the rules committee in eight, and the judiciary in seven. The following map reflects these numbers:

FIGURE 2: INSTITUTIONS THAT EXPANDED ENTITLEMENT FIRST IN THE STATES



1. State Legislatures

The state legislatures have been active in regulating the entitlement to appointed counsel. Among the thirty-six states that recognize a broader right to counsel than *Scott* or *Nichols* require, legislatures led the way in twenty-one. These states are:

217. See SUTTON, *supra* note 12, at 7–10 (counseling lawyers to lodge challenges on behalf of clients under both the Federal Constitution and state constitutions).

Colorado,²¹⁸ Delaware,²¹⁹ Georgia,²²⁰ Hawaii,²²¹ Idaho,²²² Kentucky,²²³ Maryland,²²⁴ Nebraska,²²⁵ Nevada,²²⁶ New Hampshire,²²⁷ New Jersey,²²⁸ New Mexico,²²⁹ New York,²³⁰ North Carolina,²³¹ Oklahoma,²³² South Dakota,²³³ Texas,²³⁴ Utah,²³⁵ Vermont,²³⁶ West Virginia,²³⁷ and Wisconsin.²³⁸ Additionally, California's legislature codified a right previously recognized under its constitution.²³⁹ On the other hand, the state legislatures in seven states codified a statutory requirement that does not guarantee more protection than *Scott*. These states are: Illinois,²⁴⁰ Kansas,²⁴¹ Mississippi,²⁴² Missouri,²⁴³ South Carolina,²⁴⁴ Virginia,²⁴⁵ and Wyoming.²⁴⁶

Most recently, the Colorado legislature passed a bill in 2016 extending the right to appointed counsel to all defendants

218. See Act of June 11, 2016, ch. 366, § 2, 2016 Colo. Sess. Laws 1540, 1540–41.

219. See Act of Jan. 7, 1964, ch. 227, § 1, 54 Del. Laws 738, 738–39.

220. See Act of May 3, 2006, no. 749, § 4(5)(A), 2006 Ga. Laws 752, 753–54.

221. See Act of May 15, 1973, act 76, § 1, 1973 Haw. Sess. Laws 101, 101–02.

222. See Act of Mar. 21, 2005, ch. 93, § 1, 2005 Idaho Sess. Laws 313, 313–14.

223. See Act of Mar. 29, 1978, ch. 155, § 27, 1978 Ky. Acts 396, 410.

224. See Act of Apr. 29, 1971, ch. 209, § 1, 1971 Md. Laws 485, 486–87.

225. See Act of Apr. 8, 1972, L.B. 1463, § 2, 1972 Neb. Laws 1295, 1296.

226. See Act of May 28, 1981, ch. 350, §§ 1–3, 1981 Nev. Stat. 651, 652.

227. See Act of June 28, 1973, ch. 370, § 23, 1973 N.H. Laws 341, 344–45.

228. See Act of May 31, 1974, ch. 33, 1974 N.J. Laws 103, 103–04.

229. See Act of Feb. 27, 1968, ch. 69, §§ 59–61, 1968 N.M. Laws 334, 355–58.

230. See Act of May 20, 1970, ch. 996, § 1, 1970 N.Y. Laws 3117, 3168.

231. See Act of June 23, 1969, ch. 1013, § 1, 1969 N.C. Sess. Laws 1154, 1154.

232. See Act of May 24, 1991, ch. 238, § 7, 1991 Okla. Sess. Laws 1688, 1694.

233. See Act of Mar. 12, 1983, 1983 S.D. Sess. Laws ch. 190 § 1 384, 385.

234. See Act of June 18, 1965, ch. 722, § 1, 1965 Tex. Gen. Laws 317, 425.

235. See Act of Feb. 1, 1980, ch. 14, § 1, 1980 Utah Laws 86, 208.

236. See Act of Apr. 17, 1995, no. 21, § 3, 1995 Vt. Acts & Resolves 67, 68–69.

237. See Act of Mar. 13, 1976, ch. 33, 1976 W. Va. Acts 186, 206–07.

238. See Act of June 30, 1977, ch. 29, § 1593, 1977 Wis. Sess. Laws 35, 412.

239. See CAL. CONST. art. 1, § 15, cl. 3; *Tracy v. Mun. Court*, 587 P.2d 227, 230 (Cal. 1978) (en banc); *In re Smiley*, 427 P.2d 179, 184 (Cal. 1967) (“Under . . . the California Constitution, there can be no doubt that the fundamental right to the assistance of counsel is guaranteed to all persons . . . charged with a misdemeanor . . .”).

240. See Code of Criminal Procedure of 1963, 1963 Ill. Laws 2836, 2861.

241. See Act of Apr. 18, 1969, ch. 291, § 3, 1969 Kan. Sess. Laws 786, 787.

242. See Act of Apr. 5, 1971, ch. 490, § 2, 1971 Miss. Laws 604, 604–05.

243. See MO. REV. STAT. § 4140 (1889).

244. See Act of June 17, 1969, no. 309, § 1, 1969 S.C. Acts 374, 374–75.

245. See Act of Mar. 14, 1983, ch. 97, 1983 Va. Acts 107, 107–08.

246. See Act of Feb. 24, 1999, ch. 95, § 1, 1999 Wyo. Sess. Laws 189, 190.

charged with a jailable offense.²⁴⁷ The bill was politically contested, with divided votes in both houses of the state legislature.²⁴⁸ Although a higher percentage of Democrats than Republican legislators ultimately supported the bill, the bill had bipartisan support, including the strength to make it through the Republican-controlled state senate. During the hearings of the House Committee on the Judiciary (which approved the bill by a 6-5 vote),²⁴⁹ the opposing parties aired some of the policy arguments surrounding this issue, which will be explored more fully below. For example, the attorney for the City of Fort Morgan testified that the bill would impose unnecessary costs on rural municipalities.²⁵⁰

2. Rule Promulgation

Rules committees, generally composed of judges and practitioners, have regulated the right to counsel in eight states. These states are: Iowa,²⁵¹ Maine,²⁵² Massachusetts,²⁵³ Ohio,²⁵⁴ Pennsylvania,²⁵⁵ Rhode Island,²⁵⁶ Tennessee,²⁵⁷ and Washington.²⁵⁸ Seven states promulgated rules that do not guarantee more protection than *Scott* requires, including Alabama,²⁵⁹ Arizona,²⁶⁰

247. Act of June 11, 2016, ch. 366, § 2, 2016 Colo. Sess. Laws 1540, 1540–41.

248. The Colorado House of Representatives approved the bill by a 42-22-1 vote. *HB16-1309 House Vote*, COLO. GEN. ASSEMBLY (Apr. 29, 2016, 12:45 PM), <https://leg.colorado.gov/content/hb16-1309vote6707bc> [<https://perma.cc/89VM-CKT8>]. The Senate approved the bill 29-6. *HB16-1309 Senate Vote*, COLO. GEN. ASSEMBLY (Apr. 26, 2016, 11:09 PM), <https://leg.colorado.gov/content/hb16-1309vote5e4768> [<https://perma.cc/QB3E-X7ZC>]; see also H.B. 16-1309, 69th Gen. Assemb., Reg. Sess. (Colo. 2016).

249. *Hearing on H.B. 16-1309 Before the H. Comm. on Judiciary*, 2016 Leg., 69th Colo. General Assemb. (Colo. 2016).

250. *Id.* (statement of Jason Meyers, City Attorney for City of Fort Morgan).

251. IOWA R. CRIM. P. 2.61(2).

252. ME. R. CRIM. P. 44(a)(1).

253. MASS. R. CRIM. P. 8.

254. OHIO R. CRIM. P. 44.

255. PA. R. CRIM. P. 122(A).

256. R.I. DIST. CT. R. CRIM. P. 44.

257. TENN. R. CRIM. P. 44(a).

258. WASH. SUP. CT. CRIM. R. 3.1(a).

259. ALA. R. CRIM. P. 6.1(a).

260. ARIZ. R. CRIM. P. 6.1(b)(1)(A).

Arkansas,²⁶¹ Florida,²⁶² Michigan,²⁶³ Minnesota,²⁶⁴ and North Dakota.²⁶⁵

3. *State Judiciaries and State Constitutional Law*

Seven states recognizing broader rights than required by *Scott* or *Nichols* have done so through judicial interpretation of their state constitutions. The judiciaries of Alaska,²⁶⁶ California,²⁶⁷ Indiana,²⁶⁸ Louisiana,²⁶⁹ and Oregon²⁷⁰ recognized a broader right than *Scott*. The Florida and North Dakota judiciaries recognized broader state constitutional rights than required by *Nichols*.²⁷¹ Additionally, Iowa's and Hawaii's judiciaries constitutionalized more generous rules first recognized by another branch.²⁷²

The following Parts analyze these state court decisions by focusing on the ingredients on which the state judiciaries have relied.

a. *State Constitutional Texts*

Almost all state constitutions recognize the right to counsel, but sometimes with wording quite different from the Sixth Amendment. Some state courts have therefore relied on textual differences to interpret the right more expansively. The Louisiana Constitution, for example, guarantees a person the right to court-appointed counsel "if he is indigent and charged with an offense punishable by imprisonment," and the state's courts have consequently recognized a right to appointed counsel in

261. ARK. R. CRIM. P. 8.2(a).

262. FLA. R. CRIM. P. 3.111.

263. MICH. CT. R. 6.610(D)(2).

264. MINN. R. CRIM. P. 5.04, 23.04.

265. N.D. R. CRIM. P. 44(a).

266. *Pananen v. State*, 711 P.2d 528, 532 (Alaska Ct. App. 1985).

267. *In re Smiley*, 427 P.2d 179, 184 (Cal. 1967).

268. *Bolkovac v. State*, 98 N.E.2d 250, 253 (Ind. 1951).

269. *State v. Haley*, 538 So. 2d 679, 680 (La. Ct. App. 1989).

270. *See Brown v. Multnomah Cty. Dist. Court*, 570 P.2d 52, 55, 61 (Or. 1977) (en banc).

271. *See State v. Kelly*, 999 So. 2d 1029, 1053 (Fla. 2008); *State v. Orr*, 375 N.W.2d 171, 178–79 (N.D. 1985).

272. *See State v. Dowler*, 909 P.2d 574, 577 (Haw. App. Ct. 1995); *State v. Young*, 863 N.W.2d 249, 277–78 (Iowa 2015).

all jailable cases.²⁷³ The Hawaii judiciary also relied on a broader state constitutional text to expand the right.²⁷⁴ Other broader state constitutional provisions are identified below.²⁷⁵

b. *State Histories*

Some state judiciaries have relied on unique state histories in defining the right to counsel. For example, in *State v. Young*,²⁷⁶ in which the court held that the state constitution requires the appointment of counsel to indigent defendants charged with a jailable offense, the Iowa Supreme Court noted that the state's right-to-counsel provision was "hotly debated" by the framers of the Iowa Constitution because of the controversy over the Fugitive Slave Act.²⁷⁷ As the court explained, slave removal proceedings were civil rather than criminal, and the Iowa framers wanted their constitution to reach broadly enough to cover those proceedings.²⁷⁸ More generally, the court said the framers wanted Iowa to "have the best and most clearly defined Bill of Rights."²⁷⁹ This history helped justify the court's holding that the state constitution guaranteed the right to counsel to all defendants charged with a jailable offense.²⁸⁰

c. *State Precedents*

The variety of precedent among the various state judicial systems is immense. This variety has doubtless influenced the different approaches taken by state judiciaries toward the scope of the right to counsel.

For example, by the time the New Mexico Supreme Court considered a *Nichols*-type issue in 1997, it had previously bor-

273. LA. CONST. art. I, § 13; *State v. Deville*, 879 So. 2d 689, 690 (La. 2004) ("In this respect, Louisiana law provides broader protection than the Sixth Amendment requires.").

274. *See Dowler*, 909 P.2d at 577.

275. *See infra* Table 2.

276. 863 N.W.2d 249.

277. *Id.* at 278.

278. *See id.* at 278–79.

279. *Id.* at 278 (quoting *State v. Baldon*, 829 N.W.2d 785, 810 (Iowa 2013) (Appel, J., specially concurring)).

280. Indeed, the Iowa Supreme Court gave a far longer discourse on the history of this provision in a more recent case deciding when the right to counsel attaches. *See State v. Senn*, 882 N.W.2d 1, 13–16 (Iowa 2016).

rowed the U.S. Supreme Court's *Mathews v. Eldridge*²⁸¹ framework of balancing the defendant's right, the risk of inaccurate deprivation of that right, and the state's interest.²⁸² Thus in considering whether to bar the use of an uncounseled first-time DUI conviction to enhance a defendant's sentence in a subsequent prosecution under the state constitution, the New Mexico Supreme Court analyzed the question under its state due process clause, instead of a direct state-level analog to the Sixth Amendment.²⁸³ The court ultimately balanced the factors in the state's favor, concluding due process did not require appointed counsel under the state constitution.²⁸⁴

d. Different Approaches to U.S. Supreme Court Precedent

State courts often react to federal decisions in their own state-level criminal procedure jurisprudence, including on the right to counsel. Among the states that have not provided more protection than *Scott* or *Nichols*, some state courts have hewed closely to the U.S. Supreme Court's doctrinal moves.²⁸⁵ After the Court's decision in *Baldasar*, several state courts expanded the right to counsel or applied its holding under their state constitutions.²⁸⁶ Likewise, after the Court overruled *Baldasar*, several of these states' judiciaries reversed their post-*Baldasar* decisions.²⁸⁷ In doing so, they relied heavily on the U.S. Supreme

281. 424 U.S. 319 (1976).

282. *State v. Woodruff*, 951 P.2d 605, 613–14 (N.M. 1997) (citing *Eldridge*, 424 U.S. at 334–35).

283. *Id.*

284. *Id.* at 616.

285. See, e.g., *In re Advisory Opinion to the Governor*, 666 A.2d 813, 816 (R.I. 1995) (overruling earlier decision under Rhode Island Constitution guaranteeing counsel in all cases where charged offense authorized more than six months in prison after *Scott*).

286. See, e.g., *State v. Oehm*, 680 P.2d 309, 312 (1984), overruled by *State v. Delacruz*, 899 P.2d 1042 (Kan. 1995); *State v. Armstrong*, 332 S.E.2d 837, 840 (W. Va. 1985) ("Under the sixth amendment of the federal constitution and article III, section 14 of the West Virginia Constitution, unless an individual convicted of a misdemeanor was represented by counsel or knowingly and intelligently waived the right to counsel, such prior conviction may not be used to enhance a sentence of imprisonment for a subsequent offense."), overruled by *State v. Hopkins*, 453 S.E.2d 317 (W. Va. 1994).

287. See, e.g., *Delacruz*, 899 P.2d at 1047 (overruling two state-law decisions based on *Baldasar* and embracing the reasoning of the U.S. Supreme Court in *Nichols*); *State v. Porter*, 671 A.2d 1280, 1282 (Vt. 1996) (overruling a decision based on *Baldasar* and declining to provide broader right under Vermont Constitution, rea-

Court's decisions, mostly eschewing independent state-law reasoning.²⁸⁸ State constitutional law theorists call this approach "lockstepping."²⁸⁹

Other states have been less deferential to the Supreme Court's reasoning. For example, in *State v. Young*, the Iowa Supreme Court harshly criticized Justice Rehnquist's "short" opinion in *Scott*, accusing it of "[h]arkening back to the aberrant and overruled *Betts* [*v. Brady*]."²⁹⁰ The court further criticized both *Scott* and *Nichols* as inconsistent with earlier federal precedent, arguing both "departed from the traditional Sixth Amendment reliability rationale."²⁹¹ The court then rejected the results reached in *Scott* and *Nichols*, holding that the Iowa Constitution required the appointment of counsel in all cases involving offenses for which incarceration is authorized.²⁹²

D. *The Reality on the Ground: Is the Right Being Honored?*

Parts II.A through C have focused on the laws of the States and how they got there. But anyone experienced with the criminal justice system might be wondering whether these state-law rights are worth anything. Are the States *actually* providing counsel broader than what the Supreme Court requires? If they do provide counsel, does it meet a minimum standard of competence? In short, the evidence suggests some states and localities routinely fail to fulfill their federal constitutional obligations to provide effective counsel, or even to provide counsel at all.²⁹³

soning that it provides a "right similar to" the Sixth Amendment); *Hopkins*, 453 S.E.2d at 324 (overruling a post-*Baldasar* decision based on West Virginia Constitution without any independent state constitutional law reasoning), *overruled on other grounds* by *State v. Nichols*, 541 S.E.2d 310 (W. Va. 1999).

288. For example, in *State v. Delacruz*, the Kansas Supreme Court acknowledged the defendant's argument that it was free to provide more protection than the U.S. Supreme Court and that it should prevent unreliable convictions. *Delacruz*, 899 P.2d at 1046–47. But the court dodged this argument. "In response to similar arguments," the court block-quoted three paragraphs from *Nichols*, and then summarily concluded it "agree[d] with and adopt[ed]" the U.S. Supreme Court's rationale. *Id.*

289. See, e.g., SUTTON, *supra* note 12, at 174.

290. *State v. Young*, 863 N.W.2d 249, 267 (Iowa 2015).

291. *Id.* at 270.

292. *Id.* at 281.

293. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1564 (2018) ("The authors conclude that our patchwork system of public defense for the poor remains disturbingly dysfunctional.").

But first, it is worth acknowledging that some jurisdictions honor broader state-law rights to counsel and make those rights meaningful. Practitioners from Philadelphia, Iowa, Indianapolis, and Kentucky insisted counsel is usually appointed for all jailable offenses.²⁹⁴ For example, in Louisville, Kentucky, one judge explained that indigent defendants regularly get counsel for the lowest-level jailable offenses at their preliminary hearings.²⁹⁵ And although plea bargaining terminates about 95 percent of the cases in her county, the judge reported that plea bargains are not usually struck immediately before or during the preliminary hearing, as in some other jurisdictions.²⁹⁶

But that rosy picture does not extend to the entire country. First, when jurisdictions do provide counsel, there are serious questions about whether they are providing minimally effective counsel. Extreme caseloads spread across too few attorneys may be the biggest problem.²⁹⁷ The most recent round of statistics from the Federal Bureau of Justice Statistics presents a grim picture, with public defenders in many states forced to close more than one case per day.²⁹⁸ For example, the average Arkansas defender reportedly closed 590 cases in 2013.²⁹⁹ Similar situations exist in a large number of other states.³⁰⁰ Moreover, workloads might even be worse in states that rely on contracts with defense firms to handle indigent defense, because the lowest bidding firm might get stuck with massive amounts of cases.³⁰¹ For example, one county recently contracted with a three-person firm to handle half of its caseload for \$400,000, which

294. See Telephone Interview with Sara Nicholson, *supra* note 84; E-mail from Katherine Robinson, Public Defender, retired, Marion County, Indiana, to author (Oct. 6, 2019) (on file with author); Telephone Interview with Lynn Rose, *supra* note 101; Interview with David Rudovsky, Founding Partner, Kairys, Rudovsky, Messing & Feinberg, LLP (Feb. 18, 2019).

295. See Telephone Interview with Sara Nicholson, *supra* note 84.

296. See *id.*

297. See Erica Hashimoto, *Motivating Constitutional Compliance*, 68 FLA. L. REV. 1001, 1019–20 (2016).

298. SUZANNE M. STRONG, U.S. DEP'T OF JUSTICE, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013, at 1–3 (2017), <https://www.bjs.gov/content/pub/pdf/saids13.pdf> [<https://perma.cc/6LB7-8AKS>].

299. *Id.* at 5.

300. *Id.*

301. See BARTON & BIBAS, *supra* note 8, at 27 (“Contract attorneys have it worst of all.”).

boiled down to 1,523 felonies and 3,587 misdemeanors that year.³⁰²

So how do defense lawyers close out multiple cases per workday? The evidence suggests caseload pressures are helping transform our criminal justice system into an assembly line that relies on plea deals to function.³⁰³ As Justice Kennedy noted in *Lafler v. Cooper*,³⁰⁴ our criminal justice system has evolved into “a system of pleas, not a system of trials.”³⁰⁵ About 95 percent of cases terminate in guilty pleas.³⁰⁶ And these pleas come fast; “meet ‘em and plead ‘em” lawyering is increasingly common.³⁰⁷ This phenomenon is likely to be particularly common in misdemeanor cases, which are far more numerous than felonies, and where indigent defendants often face a choice between waiting in jail for a trial (because they cannot afford bail) or pleading guilty.³⁰⁸ And even in jurisdictions where plea bargains generally come *after* the preliminary hearing, there is, as one Kentucky judge explained, a “market” for “cookie-cutter plea deals,” raising serious questions about whether individualized dispositions are achieved.³⁰⁹

Additionally, serious questions exist about whether some jurisdictions are consistently providing *any* counsel in misdemeanor cases when required to do so under *Argersinger* or *Shelton*. National statistical evidence is difficult to come by, especially because many states do not maintain records in this area.³¹⁰ But

302. *See id.*

303. *See, e.g.,* State v. Miller, 76 A.3d 1250, 1269 (N.J. 2013) (Albin, J., dissenting) (bemoaning the treatment of a defendant as “just another fungible item to be shuffled along on a criminal-justice conveyor belt” with “the right to effective assistance of counsel [being] nothing more than the *presence* of an appointed attorney at counsel’s table”).

304. 566 U.S. 156 (2012).

305. *Id.* at 170.

306. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1118–19 (2011).

307. *See, e.g.,* BARTON & BIBAS, *supra* note 8, at 28 (calling it a “common practice” and citing examples).

308. *See, e.g., id.*; Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1753 (2013) (“Overwhelmingly, misdemeanor defendants cannot make bail even where it is set at \$1000 or less. In the majority of misdemeanor cases, the defendant pleads guilty at arraignment or soon after, the judge imposes a light, agreed upon sentence, and the defender’s representation of the client concludes.” (footnote omitted)).

309. *See* Telephone Interview with Sara Nicholson, *supra* note 84.

310. *See* SIXTH AMENDMENT CTR., *supra* note 59, at 7.

statewide statistics suggest the problem is serious. For example, in Texas, a state that ostensibly guarantees appointed counsel in all cases where the defendant is charged with a jailable crime, three quarters of Texan counties only appointed counsel in fewer than 20 percent of misdemeanor cases in 2009.³¹¹ Anecdotal accounts also abound on the failure of states to provide *any* counsel in misdemeanor cases when prison or suspended sentences are imposed.³¹² A few recent examples:

1. In Tennessee, observers watched courts give many misdemeanor defendants suspended sentences without informing them of their right to counsel.³¹³
2. In Utah, an eighteen-month study concluded that around 62 percent of misdemeanor defendants statewide were not being appointed counsel.³¹⁴
3. In 2009, Chief Justice Jean Hofer Toal of the South Carolina Supreme Court publicly rebuked the Supreme Court's decision in *Shelton*: "*Alabama v. Shelton* [is] one of the more misguided decisions of the United States Supreme Court, I must say . . . so I will tell you straight up we [are] not adhering to *Alabama v. Shelton* in every situation."³¹⁵ Chief Justice Donald Beatty circulated a memo in 2017 to the state's trial judges rebuking the common practice of sentencing defendants to prison without appointing constitutionally required counsel.³¹⁶

311. See BORUCHOWITZ ET AL., *supra* note 83, at 15.

312. See, e.g., Erica Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1020 (2013).

313. See STEPHEN F. HANLON, THOMAS B. HARVEY & NORMAN LEFSTEIN, AM. BAR ASS'N, DENIAL OF THE RIGHT TO COUNSEL IN MISDEMEANOR CASES: COURT WATCHING IN NASHVILLE, TENNESSEE 8 (2017), <https://www.courthousenews.com/wp-content/uploads/2017/08/NashvilleMisdemeanor.pdf> [<https://perma.cc/RC6Z-VMMD>].

314. SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES, at III (2015), https://sixthamendment.org/6ac/6AC_utahreport.pdf [<https://perma.cc/Y33Y-WRRF>].

315. See BORUCHOWITZ ET AL., *supra* note 83, at 17 (alterations in original) (internal quotation marks omitted).

316. Memorandum from Donald W. Beatty, Chief Justice, S.C. Supreme Court, to Magistrates and Municipal Judges, Sentencing Unrepresented Defendants to Imprisonment (Sept. 15, 2017), <https://www.sccourts.org/summaryCourtBenchBook/MemosHTML/2017-09.htm> [<https://perma.cc/ZN7Q-JKMJ>].

4. In 2010, the New York Supreme Court allowed a lawsuit to proceed alleging a systematic failure to provide *any* counsel in a range of cases in several counties.³¹⁷
5. In Indiana, a state that guarantees appointed counsel in all misdemeanor cases, a recent government report concluded that only 36 percent of misdemeanor defendants receive appointed counsel.³¹⁸

Further, some states use other methods to avoid appointing counsel to indigent defendants. For example, jurisdictions are increasingly pressuring indigent defendants to pay fees for the appointment of counsel.³¹⁹ One judge in Michigan estimated that 95 percent of misdemeanor defendants were waiving their right to counsel because of these fees.³²⁰ Additionally, some state court systems pressure defendants to waive their constitutional rights.³²¹ This pressure is a common practice in a substantial number of states.³²² Pressure may be unnecessary, however. A judge and a prosecutor in Jacksonville, Florida, explained that a substantial percentage of misdemeanor defendants will happily waive their right to counsel in exchange for probation and a suspended sentence.³²³ Finally, some states impose very demanding indigence standards that prevent the vast majority of poor people from qualifying for appointed counsel.³²⁴

In states that do not consistently provide effective counsel in felony cases or provide *any* counsel in misdemeanor cases where imprisonment or suspended sentences are imposed, it is hard to imagine they consistently honor state-law rights to

317. See *Hurrell-Harring v. State*, 930 N.E.2d 217, 219, 228 (N.Y. 2010).

318. See IND. TASK FORCE ON PUB. DEF., *supra* note 67, at 34.

319. See Backus & Marcus, *supra* note 293, at 1588.

320. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 12 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [<https://perma.cc/C59X-JKWZ>].

321. See SIXTH AMENDMENT CTR., *supra* note 59, at 6 (describing the frequency of this practice in Delaware misdemeanor courts and estimating that 75 percent of misdemeanor defendants proceed through the Delaware courts without ever speaking to a lawyer).

322. See, e.g., *id.* at 16–17. Practitioners I spoke with also confirmed this fact. See, e.g., Telephone Interview with David Heilberg, *supra* note 77.

323. See Telephone Interview with Meredith Charbula, *supra* note 203; Telephone Interview with L.E. Hutton, *supra* note 93.

324. See, e.g., Marcus, *supra* note 8, at 153–54.

counsel going beyond what the U.S. Constitution requires. In short, it may be easier to recognize a right than to make it real.

III. LAW AND POLICY: SHOULD THERE BE A RIGHT TO APPOINTED COUNSEL BEYOND WHAT *SCOTT* REQUIRES?

With existing law on the table, this Article turns to what the law is and should be. This Part considers two conceptually distinct questions. First, should either the U.S. Supreme Court or state courts recognize a broader *constitutional* right to counsel? Second, should policymakers codify a broader right to counsel? Regarding the first question, this Article argues *Scott v. Illinois* was rightly decided. The constitutional text does not mandate appointed counsel in all criminal cases, and federalism concerns militate against imposing a uniform requirement on all of the states. The answer, however, might be different under some state constitutions.

To answer the second question, Part III.B marshals the arguments on both sides of the question. Ultimately, this Article concludes there is no one-size-fits-all answer, and that a jurisdiction's optimal approach should depend on its particular characteristics.

A. *Is There a Constitutional Right to Appointed Counsel in All Criminal Cases?*

Numerous scholars argue the Supreme Court should overrule *Scott v. Illinois* and require the appointment of counsel in all criminal cases.³²⁵ Although the Sixth Amendment does not recognize such a right, some state constitutions likely do.

1. *Federal Constitution*

The Federal Constitution should not be interpreted to require the appointment of defense counsel in all criminal cases for several reasons.

First, the Constitution's original public meaning does not mandate the appointment of counsel in all criminal cases. The Sixth Amendment says, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel

325. See *supra* note 8.

for his defence.”³²⁶ Justice Brennan’s *Scott* dissent focused on the word “all.”³²⁷ Thus, he argued that “the plain wording of the Sixth Amendment . . . compel[led] the conclusion” that counsel is required in all cases in which a defendant is charged with an offense for which imprisonment is authorized.³²⁸

But originally, the Sixth Amendment was not understood to provide a right to appointed counsel, but rather a right to retained counsel acquired without the government’s assistance.³²⁹ For a long time in England, there was no right to appear with retained counsel during felony cases.³³⁰ Indeed, it was innovative when Parliament allowed those charged with *treason* to appear with retained counsel.³³¹ Further, the first Congress passed a statute requiring appointed counsel for defendants in capital cases but not other crimes in federal court.³³² Because this statute coexisted with the ratified Sixth Amendment, government officials in the 1790s apparently did not understand the Sixth Amendment to require a broad right to appointed counsel. For originalists, that should be enough to reject Justice Brennan’s argument.

Of course, Justice Brennan was not an originalist,³³³ and he was likely arguing the Sixth Amendment’s modern meaning

326. U.S. CONST. amend. VI.

327. See *Scott v. Illinois*, 440 U.S. 367, 375, 378 (1979) (Brennan, J., dissenting).

328. *Id.* at 376.

329. See, e.g., *Bute v. Illinois*, 333 U.S. 640, 661 n.17 (1948) (“It is probably safe to say that from its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment . . . was not regarded as imposing on [federal courts] the duty to appoint counsel for an indigent defendant.” (quoting Alexander Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L.Q. REV. 1, 7–8, 10 (1944)) (internal quotation marks omitted)); WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 27–30 (1955); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 107 (2010) (“It was no part of the original understanding that the government might have to hire a lawyer for a defendant who could not afford one.”).

330. See *Garza v. Idaho*, 139 S. Ct. 738, 756–58 (2019) (Thomas, J., dissenting) (discussing the original public meaning of the right to counsel and citing historical evidence).

331. See Erica J. Hashimoto, *An Originalist Argument for a Sixth Amendment Right to Competent Counsel*, 99 IOWA L. REV. 1999, 2004 (2014) (discussing the Treason Act and calling it “remarkable for its time”).

332. See Federal Crimes Act of 1790, ch. 9, § 29, 1 Stat. 112, 118–19.

333. See Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990) (“Justice Brennan has not pretended that the constitutional revolution in which he has played a leading role was dictated by the text of the Constitution or by the intentions of its framers.”).

supported his view.³³⁴ When interpreting legal documents, the strong traditional rule is that the original meaning must trump the modern meaning.³³⁵ Some scholars think that conventional meaning should trump in the constitutional context for various pragmatic or policy-based reasons, including that the original public meaning is often difficult to identify or leads to an undesirable result.³³⁶

But departing on these grounds from the original public meaning of the Sixth Amendment in this context is unwarranted. First, the original public meaning is not obscure in this case. Although Professor David Strauss favors a broad right to appointed counsel, even he acknowledges that the original public meaning of the Sixth Amendment clearly did not require the government to appoint counsel for indigent defendants.³³⁷ Interpreting the Sixth Amendment to require appointed counsel based on an arguable present-day meaning thus seems about as sensible as interpreting the Constitution's Domestic Violence Clause to empower the federal government to combat spousal abuse.³³⁸

Further, trying to regulate the right to appointed counsel through the Sixth Amendment's text seems like an unwise task. Historical evidence makes clear the Sixth Amendment was not designed to regulate the right to appointed counsel; it was adopted in a historical context where public prosecutors and even retained defense lawyers were rare.³³⁹ States would not develop systems to regularly appoint defense counsel until the

334. Cf. STRAUSS, *supra* note 329, at 107 (observing that "it is just a coincidence" that *Gideon* "happens to fit nicely with the language of the Sixth Amendment").

335. See ANTONIN SCALIA & BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78–92 (2012).

336. See STRAUSS, *supra* note 329, at 106–08.

337. See *id.* at 107.

338. See U.S. CONST. art. IV, § 4 ("The United States shall . . . protect each of [the states] . . . on Application of the Legislature . . . against domestic Violence."); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 298 (2019) ("Today [domestic violence] is almost always used to refer to 'violent or aggressive behavior within the home, esp[ecially] violent abuse of a partner.' Yet at the founding, this phrase apparently carried a different meaning; it was understood as a reference to insurrection, rebellion, or rioting within a state . . ." (footnote omitted) (second alteration in original)).

339. See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 16 (2012) (documenting how prosecutors and defense lawyers only became common in the late eighteenth century); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 262–65 (1979).

early 1900s.³⁴⁰ Because the Sixth Amendment was not designed to regulate the right to appointed counsel, we should not expect it to be a well-calibrated vehicle for defining the optimal scope of appointed counsel.

Another potential textual hook for the right to appointed counsel is the Due Process Clause,³⁴¹ which the Supreme Court has interpreted to require each state to uphold principles of “fundamental fairness.”³⁴² In many criminal cases, fundamental fairness may require the appointment of counsel. After all, as Justice Sutherland observed in *Powell*, the criminal justice system had undoubtedly become quite complex by the twentieth century, creating the risk that innocent defendants would be frequently convicted under it.³⁴³ Under this doctrine, the Court’s decision in *Gideon* may be justified.³⁴⁴

But the Court’s fundamental fairness doctrine does not provide a solid footing to ground a broad right to appointed counsel. As Justice Kennedy explained in *Medina v. California*,³⁴⁵ the Court has “defined the category of infractions that violate fundamental fairness very narrowly based on the recognition that, beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.”³⁴⁶ The Court is cautious because “the expansion of . . . constitutional guarantees under the open-ended rubric of the Due Process

340. See BIBAS, *supra* note 339, at 16.

341. See U.S. CONST. amend. V; Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 707–08 (1996) (“[T]he indigent’s right to appointed counsel could also be derived from the innocence-protecting spirit of the Due Process Clause.”).

342. See, e.g., *Medina v. California*, 505 U.S. 437, 443 (1992).

343. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

344. See Amar, *supra* note 341, at 707–08. *But see* Sessions v. Dimaya, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (arguing the Due Process Clause requires governments to adhere to the “customary procedures to which freemen were entitled to by the old law of England” before depriving an individual of life, liberty, or property (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring in the judgment)) (internal quotation marks omitted)); *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting) (suggesting that the original public meaning of the Due Process Clause only requires that the government “proceed according to the ‘law of the land’” (quoting *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting)) (internal quotation marks omitted)).

345. 505 U.S. 437.

346. *Id.* at 443 (alteration adopted) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)) (internal quotation marks omitted).

Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.”³⁴⁷

There are good reasons for this rule. First, the Court is usually ill-equipped to make judgements about what is optimal criminal justice policy. As Justice Byron White recognized in *Patterson v. New York*,³⁴⁸ “preventing and dealing with crime is much more the business of the States than it is of the Federal Government,”³⁴⁹ meaning that the Court “should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.”³⁵⁰ Second, constitutionalizing additional areas and removing them from the processes of democratic governments risks unduly concentrating power in the Supreme Court, which undermines representative government.³⁵¹ Third, concentrating power in the Supreme Court undermines *good* government. The Justices and their limited staff may not have access to the information and time they would need to wisely create a misdemeanor justice system for all fifty states.

Finally, federalism principles go a long way in supporting the Court’s refusal to extend the right to counsel in *Scott*. The Court’s inaction enables our country to reap the benefits of federalism. As Justice Brandeis once noted, federalism means that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”³⁵² As discussed in Part IV.B, our system desperately needs some experimentation and innovation in the area of misdemeanor justice. Preserving room for the States to act as laboratories of democracy is therefore essential.

Additionally, Supreme Court inaction allows state governments to better cater to their citizens’ priorities and values. As Part III.B.2 makes clear, mandating more appointed counsel for indigent defendants would have to come at the expense of other

347. *Id.*

348. 432 U.S. 197 (1977).

349. *Id.* at 201 (citing *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion)).

350. *Id.*

351. See SUTTON, *supra* note 12, at 17.

352. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

priorities and values. In other words, there is a difficult values-based choice to make. It is not an easy choice. Federalism allows the States (and localities) to adopt different answers to such choices. For those who wish to impose uniform solutions on the country in the style of a central planner, this may be a downside.³⁵³ But the Framers saw it as a benefit. As “Federal Farmer” wrote in a 1787 pamphlet, “[O]ne government and general legislation alone, never can extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the different states, which by a uniform system of laws would be unreasonably invaded.”³⁵⁴ In other words, the people of different states have different political preferences, and federalism allows elected officials in state and local governments to tailor policies to those preferences more easily than the federal government.³⁵⁵

In short, federalism-based decisions are worth defending. As Part IV.A discusses, the right-to-counsel area has been a federalism success story, at least on paper. But to the extent it has not been a success story, federalism gives the States desperately needed room to innovate in this area, as discussed in Part IV.B. If the Supreme Court had sided with the plaintiffs in *Scott*, a particular form of the adversarial model (which is not working even for more serious cases in many parts of the country) would have been frozen in place for misdemeanors.

2. State Constitutions

The argument for a broader right to counsel is stronger under some state constitutions than under the Federal Constitution. Litigants can look to several state-specific sources to support their legal arguments.

First, some state constitutional texts appear to require the appointment of counsel in a broader range of criminal cases than does the text of the Sixth Amendment. The following table reproduces state constitutional provisions that arguably articulate a broader right to counsel than the Sixth Amendment does:

353. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 914 (1994).

354. Letters from the Federal Farmer, Letter I (Oct. 8, 1787), in 2 THE COMPLETE ANTI-FEDERALIST 223, 230 (Herbert J. Storing ed., 1981).

355. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987) (book review).

TABLE 2: STATE CONSTITUTIONS WITH ARGUABLY BROADER RIGHTS TO APPOINTED COUNSEL

STATE	STATE CONSTITUTIONAL LANGUAGE
Georgia	"Every person charged with an offense against the laws of this state shall have the <i>privilege and benefit</i> of counsel"356
Hawaii	"The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment." ³⁵⁷
Louisiana	"When any person has been arrested or detained in connection with the investigation or commission of any offense . . . [he has the] right to the assistance of counsel and, if indigent, his right to court appointed counsel. . . . At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment." ³⁵⁸
New Hampshire	"Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown"359
North Dakota	"In criminal prosecutions <i>in any court whatever</i> , the party accused shall have the right to . . . appear and defend in person and with counsel." ³⁶⁰
Ohio	"In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel"361
West Virginia	"In all [trials of crimes and of misdemeanors] the accused . . . <i>shall have</i> the assistance of counsel"362

356. GA. CONST. art I, § 1, para. 14 (emphasis added).

357. HAW. CONST. art. I, § 14.

358. LA. CONST. art. I, § 13.

359. N.H. CONST. pt. I, art. XV.

360. N.D. CONST. art. I, § 12 (emphasis added).

361. OHIO CONST. art I, § 10.

362. W. VA. CONST. art. III, § 14 (emphasis added).

Although the Sixth Amendment was adopted in an era where appointed counsel was almost unheard of, several of these state constitutions were adopted or amended during the twentieth century.³⁶³ Of these states, only Hawaii and Louisiana have recognized a broader state-law right to counsel than *Scott* requires.³⁶⁴ The North Dakota Supreme Court relied on its unique right-to-counsel provision to limit the use of uncounseled convictions to enhance sentences in subsequent prosecutions.³⁶⁵

Most state constitutions, however, articulate the right to counsel in language that is identical, or nearly identical, to the Sixth Amendment. Moreover, some state constitutional provisions appear on their face less amenable than the Sixth Amendment to an interpretation requiring appointed counsel in all criminal cases. The following table reproduces such provisions:

363. See, e.g., GA. CONST. (adopted in 1983); HAW. CONST. (adopted in 1950); LA. CONST. (adopted in 1974); N.H. CONST. (amended in 1966 to provide the right to counsel at state expense if need is shown).

364. See *State v. Dowler*, 909 P.2d 574, 577 (Haw. Ct. App. 1995); *State v. Deville*, 879 So. 2d 689, 690 (La. 2004) (“In this respect, Louisiana law provides broader protection than the Sixth Amendment requires.”).

365. *State v. Orr*, 375 N.W.2d 171, 178–79 (N.D. 1985).

TABLE 3: STATE CONSTITUTIONS WITH APPARENTLY NARROWER RIGHTS TO APPOINTED COUNSEL

STATE	STATE CONSTITUTIONAL PROVISION
California	"In criminal cases the rights of a defendant . . . to the assistance of counsel . . . shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States." ³⁶⁶
Nevada	"[A]nd in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, <i>as in civil actions</i> ." ³⁶⁷
Maryland	"That in all criminal prosecutions, every man hath a right . . . to be <i>allowed</i> counsel . . ." ³⁶⁸
New York	"In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel <i>as in civil actions</i> . . ." ³⁶⁹
Pennsylvania	"In all criminal prosecutions the accused hath a right to be heard by himself and <i>his</i> counsel . . ." ³⁷⁰
South Carolina	"Any person charged with an offense shall enjoy the right . . . to be fully heard in his defense by himself or by <i>his</i> counsel or by both." ³⁷¹
Virginia	The Virginia Constitution does not have a right-to-counsel provision.

In summary, litigants arguing for or against a broader right to appointed counsel under state constitutions should be mindful of the varying constitutional texts among states.

366. CAL. CONST. art I, § 24.

367. NEV. CONST. art. I, § 8 (emphasis added).

368. MD. CONST., Declaration of Rights, art. XXI (emphasis added).

369. N.Y. CONST. art. I, § 6 (emphasis added).

370. PA. CONST. art. I, § 9 (emphasis added).

371. S.C. CONST. art. I, § 14.

Second, as discussed in Part II.C.3.b, the States have different histories that litigants may be able to use to their advantage. Indeed, the Iowa Supreme Court partially relied on statements by the framers of the Iowa Constitution when adopting the authorized imprisonment rule.³⁷² Litigants and scholars favoring a broader right to counsel might have some success if they mine state histories for similar evidence.³⁷³

Third, state judiciaries have different sets of precedent to call upon than does the U.S. Supreme Court. For example, some states analyze due process claims in the criminal context under the three-part framework developed in *Mathews v. Eldridge*.³⁷⁴ In contrast, the U.S. Supreme Court has adopted a less rights-protective standard, explicitly rejecting the *Mathews* framework in the criminal context.³⁷⁵ Thus, litigants might have more success in arguing for an expanded right to counsel in state courts than in federal courts.

Finally, litigants seeking remedies under state law must reckon with the states' varying separation-of-powers constraints. For example, West Virginia has traditionally been very strict with its separation-of-powers doctrine, whereas New Jersey has been more relaxed.³⁷⁶ In general, judiciaries in states with stricter separation-of-powers traditions may be more hesitant to expand the state-law right to counsel, in large part because those judges will anticipate the difficulties of making the other branches of state government fulfill and fund the right.

In sum, litigants should remember that they can vindicate their claims under state constitutions, perhaps with better chances of success than under the Federal Constitution.³⁷⁷

372. *State v. Young*, 863 N.W.2d 249, 278 (Iowa 2015).

373. Cf. SUTTON, *supra* note 12, at 17 ("Might the state courts of Utah and Rhode Island and Maryland construe a free exercise clause differently than other state courts given their histories?").

374. See, e.g., *State v. Woodruff*, 951 P.2d 605, 613 (N.M. 1997) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

375. See *Medina v. California*, 505 U.S. 437, 443 (1992).

376. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 15 & nn.37–38 (1998).

377. See SUTTON, *supra* note 12, at 8–10.

B. *Policy Arguments For and Against a Broader Right to Counsel than Scott Requires*

Of course, the courts are not the only government actors capable of regulating rights. On paper at least, state legislatures and rules committees have been significantly more important in expanding the right to appointed counsel than state courts. So how should policymakers decide whether to expand the entitlement to appointed counsel? This Part explores various arguments on both sides of the issue. Ultimately it is a close question, and there is no one-size-fits-all answer. Instead, a jurisdiction's optimal policy approach should depend on the specific characteristics of the state or locality.

1. *Policy Arguments in Favor of a Broader Right*

Gideon itself makes the primary argument for a broader constitutional right to counsel: fairness. In *Gideon*, Justice Black observed, “[t]hat government hires lawyers to prosecute . . . indicat[es] . . . that lawyers in criminal courts are necessities, not luxuries.”³⁷⁸ As one scholar observed, *Gideon*'s logic is not tethered to the seriousness of the offense; it seems to apply to all criminal trials.³⁷⁹ If the state elects to spend resources to criminally prosecute, the argument goes, fairness requires that it also furnish an indigent defendant with counsel.³⁸⁰ Relatedly, if rich defendants would hire a lawyer in misdemeanor cases, it may be unfair to withhold counsel from poor defendants.³⁸¹

But these arguments from fairness do not necessarily support the conclusion that the state should guarantee counsel in all criminal proceedings. In some jurisdictions, prosecutors are not always present to prosecute low-level criminal offenses. For example, a Pennsylvania trial judge estimated that the police stand in for the prosecutor in about 90 percent of the summary offense trials in his county.³⁸² Similarly, in Virginia, the police sometimes face off against uncounseled defendants in sus-

378. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

379. See Kitai, *supra* note 8, at 45.

380. See Marcus, *supra* note 8, at 161–62; Kitai, *supra* note 8, at 46.

381. Kitai, *supra* note 8, at 39 (“The principle of equality is violated when defendants who cannot afford counsel are exposed to a greater risk of an unreliable verdict than their affluent counterparts.”).

382. See Telephone Interview with Jonathan Birbeck, *supra* note 88.

pending license prosecutions.³⁸³ Furthermore, misdemeanor trials are rare.³⁸⁴ And, as discussed below, it is not clear how much value a defense lawyer adds during misdemeanor plea bargaining.

Second, defense lawyers are arguably necessary to prevent inaccurate adjudications. The modern criminal trial, dominated by the public prosecutor, is complex. There is, for example, little hope that a layman will be able to understand the rules of evidence. Misdemeanor cases can produce complicated legal questions, despite their seemingly lower stakes, and having a defense lawyer in every case could produce more accurate adjudications.³⁸⁵ But judges can assist defendants in simple cases. For example, one Iowa magistrate judge explained that, before Iowa adopted the authorized imprisonment test, she would have to enforce the rules of evidence against the prosecution, because one cannot expect the defendant to understand the hearsay rule.³⁸⁶ As she put it, she “had to be careful to vindicate the rights of defendants when the defendant could not recognize them.”³⁸⁷

Third, criminal fines and forfeitures are burdensome criminal penalties, so appointing counsel is arguably necessary to protect defendants. At the center of Justice Rehnquist’s *Scott* analysis was the premise that incarceration is a far more serious punishment than criminal fines.³⁸⁸ But some scholars have argued to the contrary that criminal fines are more serious penalties than many believe.³⁸⁹ The problem for many poor defendants is that they cannot afford the fines, and that failure to pay them may result in additional fees and interest charges.³⁹⁰ It is also

383. See Telephone Interview with David Heilberg, *supra* note 77. But see Kitai, *supra* note 8, at 39 (“We can just imagine the possible damage to law enforcement if the presiding judge were authorized to ask the prosecutor to leave the court since the case is not complex and could be presented by the victim without wasting the prosecuting attorney’s time and money.”).

384. See King & Heise, *supra* note 89, at 1940.

385. See Roberts, *supra* note 8, at 303–06, 333.

386. Telephone Interview with Lynn Rose, *supra* note 101.

387. *Id.*

388. See *Scott v. Illinois*, 440 U.S. 367, 372–73 (1979).

389. See Buskey & Lucas, *supra* note 8, at 2319–20.

390. See Katherine Beckett & Alexes Harris, *On cash and conviction: Monetary sanctions as misguided policy*, 10 CRIMINOLOGY & PUB. POL’Y 509, 516–17 (2011).

easy to imagine the abuse of forfeiture proceedings in these cases, especially in jurisdictions that do not limit civil forfeitures.

Fourth, in addition to the burden of fines and forfeitures, there are serious collateral consequences flowing from criminal convictions.³⁹¹ Possibly the most significant collateral consequence is that having a criminal conviction often creates serious problems for a person's ability to find or keep employment.³⁹² A misdemeanor conviction may preclude obtaining various types of professional licenses in areas like police work, nursing, or law.³⁹³ Further, because of internet-based databases of criminal records, employers can easily check to see if a job applicant has a criminal record.³⁹⁴ And, rightly or wrongly, employers often consider hiring applicants with criminal records relatively risky.

Although employment discrimination is the most frequent collateral consequence, there are others. For example, having a misdemeanor conviction can make it more difficult to gain admittance into schools and colleges.³⁹⁵ Further, a misdemeanor conviction can affect eligibility for public benefits, like public housing.³⁹⁶ Finally, a criminal conviction can cause particularly serious problems for noncitizens.³⁹⁷ Being convicted of a crime involving moral turpitude (CIMT) during the naturalization statutory period automatically renders an alien ineligible for naturalization if the maximum *possible* penalty for the offense

391. See, e.g., Natapoff, *supra* note 1, at 1323–27 (suggesting the collateral consequences transform the person into a criminal, and that “a significant psycho-social line has been crossed”).

392. See Marcus, *supra* note 8, at 173–75.

393. See *id.* at 174–75 (documenting various types of licenses that are harder to obtain because of a misdemeanor conviction).

394. See, e.g., *Instant Access to Pennsylvania State, County and Municipal Records*, PA. ST. RECORDS, <https://pennsylvania.staterecords.org> [<https://perma.cc/S9NS-BXKK>] (last visited Mar. 17, 2020) (allowing individuals to search for Pennsylvania criminal records); see also Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Feb. 28, 2015), <https://nyti.ms/1C8KVBq> [<https://perma.cc/4G8E-KF9T>].

395. Although the Common Application, which many students use to apply to college, recently stopped asking about criminal convictions, many schools still individually ask applicants if they have criminal records. See Scott Jaschik, *Common App Drops Criminal History Question*, INSIDE HIGHER ED (Aug. 13, 2018), <https://www.insidehighered.com/admissions/article/2018/08/13/common-application-drops-criminal-history-question-although-colleges> [<https://perma.cc/7J9L-5UTB>].

396. See Marcus, *supra* note 8, at 182–83.

397. For a thorough discussion, see Clapman, *supra* note 8, at 586–88.

was more than one year.³⁹⁸ Although most misdemeanors are not CIMTs, some can be, including petty theft, drug possession, and turnstile jumping, which can involve potential sentences of a year or more, thereby subjecting noncitizens to potential deportation.³⁹⁹ Moreover, the Board of Immigration Appeals has held that it will consider uncounseled convictions for immigration law purposes.⁴⁰⁰

Fifth, although the U.S. Supreme Court prohibits the States from directly imprisoning an uncounseled defendant, it allows them to do so indirectly by using uncounseled convictions to enhance sentences in subsequent cases.⁴⁰¹ Many state legislatures have authorized harsher prison sentences for repeat offenders.⁴⁰² Uncounseled misdemeanors can trigger these sentencing schemes, thus leading to more time in prison for subsequent convictions. For example, in *Nichols* itself, counting the uncounseled conviction increased the defendant's criminal history score by one point, thus causing his maximum possible sentence to increase by twenty-five months.⁴⁰³ Of course, states that do not offer more appointed counsel than *Scott* requires can limit the use of uncounseled misdemeanors under their sentencing schemes. Florida and North Dakota follow this approach.⁴⁰⁴

Sixth, appointing counsel in all criminal cases could deter states from prosecuting minor crimes. Many scholars have decried the trend toward overcriminalization in our society, arguing that it effectively gives the police and prosecutors a vast discretionary power that threatens rule-of-law principles.⁴⁰⁵ This trend extends to misdemeanors. In *Scott*, Justice Brennan

398. 8 U.S.C. § 1182(a)(2)(A) (2018).

399. See Cade, *supra* note 308, at 1754 (“Turnstile jumping, petty shoplifting, and misdemeanor marijuana possession, among many other low-level offenses, can trigger deportation, sometimes with almost no possibility of discretionary relief.”).

400. See *Matter of Cuellar-Gomez*, 25 I. & N. Dec. 850, 851–55 (B.I.A. 2012) (interim decision) (holding municipal marijuana violation constitutes conviction for immigration purposes where defendant was not afforded right to counsel or advised of potential immigration consequences).

401. See *supra* Part I.D.

402. See Lisa Eaton, *Three Strikes and You're Out: Enhanced Sentences for Repeat Offenders Research Pathfinder*, 22 LEGAL REFERENCE SERVICES Q., no. 4, 2003, at 55.

403. See *Nichols v. United States*, 511 U.S. 738, 740–41 (1994).

404. See *supra* Part II.B.6.

405. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506–09 (2001).

suggested that requiring the States to appoint counsel in a broader set of cases “would lead state and local governments to re-examine their criminal statutes [because they] might determine that [they] no longer desired to authorize incarceration for certain minor offenses in light of the expense of meeting the requirements of the Constitution.”⁴⁰⁶ Of course, whether courts should push for substantive criminal law reforms by manipulating procedure is controversial. But forcing the States to provide appointed lawyers in all misdemeanor cases would make prosecuting these cases less economically feasible, and some may see that as positive development.

2. Policy Arguments Against a Broader Right

There are persuasive arguments against expanding the right to appointed counsel. First, it would be expensive. As Justice Rehnquist noted in *Scott*, it may be difficult to estimate exactly what these costs would be, but they would be “necessarily substantial.”⁴⁰⁷ At the same time, state budgets are very limited—many are still recovering from the 2008 financial crisis⁴⁰⁸—and under significant pressure. Although some states have raised taxes, most have focused on spending cuts.⁴⁰⁹ This may help explain why some states have cut their indigent defense budgets.⁴¹⁰ Some states are failing to make budget appropriations.⁴¹¹ State budgets will likely be under even more pressure due to the COVID-19 outbreak across the country.

406. *Scott v. Illinois*, 440 U.S. 367, 388 (1979) (Brennan, J., dissenting).

407. *See id.* at 373 (majority opinion).

408. *See* Barb Rosewicz & Daniel Newman, *Tax Revenue Has Recovered in 31 States, Despite Flat Q3*, PEW CHARITABLE TR. (May 17, 2017), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2017/05/17/tax-revenue-has-recovered-in-31-states-despite-flat-q3> [https://perma.cc/6A7N-9FP6].

409. *See* Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS (Dec. 31, 2012), <https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession/> [https://perma.cc/KE9P-SCAU].

410. *See, e.g.*, ERINN HERBERMAN & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, STATE GOVERNMENT INDIGENT DEFENSE EXPENDITURES, FY 2008–2012—UPDATED 1, 5 (2015), <https://www.bjs.gov/content/pub/pdf/sgide0812.pdf> [https://perma.cc/KKR3-TSD7].

411. *See, e.g.*, Matt Byrne, *State funding for court-appointed attorneys runs out*, PORTLAND PRESS HERALD (May 3, 2017), <http://www.pressherald.com/2017/05/03/state-funding-for-court-appointed-attorneys-runs-out/> [https://perma.cc/8ELP-83J9] (documenting the failure of the Maine Legislature to appropriate money for indigent defense so attorneys had to work without pay for two months).

Second, requiring the appointment of defense lawyers in low-level criminal cases could increase the time costs of all parties involved.⁴¹² Admittedly, there is compelling scholarship suggesting that defense lawyers actually accelerate the disposition of criminal cases by greasing the wheels of plea bargaining.⁴¹³ But lawyers are capable of clogging the system of justice, as Justice Powell argued in *Argersinger*.⁴¹⁴ Delays caused by lawyers may actually prejudice defendants, who have an interest in getting proceedings “over with.”⁴¹⁵ In Montgomery County, Pennsylvania, one judge explained that his “worst cases” are those where defendants bring lawyers in, because they slow things down and usually make bad arguments. Delaying adjudication is particularly bad for defendants unable to make bail because they must await trial in jail. In the meantime, they might lose their job and be unable to provide for their family.

Third, appointed lawyers may not be essential in a misdemeanor system dominated by plea bargaining. Trials are rare, with some estimating that 95 percent of misdemeanor defendants plead guilty.⁴¹⁶ Most defendants do not want to contest their guilt; they just want to get the process “over with” and move on with their lives.⁴¹⁷ This problem is aggravated if the court sets bail for an indigent defendant, who might be incentivized to plead guilty to get out of pretrial detention.⁴¹⁸ For the relatively few defendants who do not plead guilty at the first appearance, it is questionable how helpful appointed lawyers are in negotiating misdemeanor plea bargains. Because prosecutors are generally incentivized to secure quick convictions,⁴¹⁹

412. See, e.g., BARTON & BIBAS, *supra* note 8, at 108–09.

413. See MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 89–90 (1978).

414. *Argersinger v. Hamlin*, 407 U.S. 25, 58 (Powell, J., concurring in the result) (noting the “common tactic of counsel of exhausting every possible legal avenue, often without due regard to its probable payoff”).

415. See HEUMANN, *supra* note 413, at 89–90.

416. See, e.g., Bibas, *supra* note 306, at 1118. Of course, this will vary by jurisdiction. For example, one Iowa magistrate judge estimated that about 30 percent of summary offense defendants obtain trials in her county. Telephone Interview with Lynn Rose, *supra* note 101.

417. See BARTON & BIBAS, *supra* note 8, at 58.

418. See Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <https://nyti.ms/1IJKXjS> [<https://perma.cc/PZ98-VTES>].

419. See BARTON & BIBAS, *supra* note 8, at 86 (“Most prosecutors are interested in maximizing their conviction rates as efficiently as possible.”); HEUMANN, *supra*

they may offer generous terms (like low fines or credit for time served) to uncounseled defendants that are similar to what they would offer represented ones. This dynamic may extend even to retained lawyers. One Florida defense lawyer told me that prosecutors in Palm Beach County typically offer all misdemeanor defendants the same deals, regardless of whether they are represented.⁴²⁰ Admittedly, lawyers could theoretically be useful in these cases as advisors on the collateral consequences of guilty pleas.⁴²¹ As the former Chief Public Defender of Montgomery County, Pennsylvania, explained to me, “most criminal defendants don’t think about collateral consequences; they’re only concerned with the here and now.”⁴²² But lawyers are not the only actors that can tell defendants about collateral consequences; judges can too.

Fourth, lawyers may not be essential in the relatively small number of misdemeanor trials that do occur. Misdemeanor trials often play out differently than typical felony trials. They often resemble inquisitorial hearings, with the judge taking an active role in asking questions and helping enforce the rules against the prosecution.⁴²³ Moreover, in some states, prosecutors are usually not involved. For example, in Cumberland County, Pennsylvania, the police appear on the state’s side instead of a prosecutor in about 90 percent of summary offense trials.⁴²⁴ And although anti-*Scott* scholars have correctly observed that some misdemeanor cases involve complex substantive or procedural issues,⁴²⁵ certain types of offenses make for straightforward adjudications. For example, in prosecutions for driving with a suspended license, the prosecution will usually

note 413, at 103 (“If it is a nonserious matter, [prosecutors] are amenable to defense requests for a small fine in the circuit court . . .”).

420. Interview with Scott Richardson, *supra* note 94.

421. See Buskey & Lucas, *supra* note 8, at 2318 (“Left alone to negotiate with the prosecutor, the defendant has no way of knowing that the prosecutor’s seemingly generous offer of no jail time may prove ruinous.”).

422. Telephone Interview with Dean Beer, Chief Pub. Def., retired, Montgomery County, Pennsylvania (Mar. 7, 2019).

423. See Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1290 (2013).

424. See, e.g., Telephone Interview with Jonathan Birbeck, *supra* note 88.

425. See Kitai, *supra* note 8, at 45 (“The prospective penalty makes no substantial difference regarding the complexity of the trial.”).

not struggle to prove its case because it can rely on databases.⁴²⁶ And the defendant may also be able to effectively defend herself by disputing the prosecutor's attempt to prove the *actus reus* of a simple offense.⁴²⁷

Professor Erica Hashimoto considers empirical evidence on this issue and concludes that the "empirical evidence currently available supports the proposition that lawyers who are appointed in federal misdemeanor cases provide no significant advantage to their clients."⁴²⁸ Quite the contrary: she finds that pro se defendants were convicted at lower rates and got better sentencing outcomes by statistically significant margins.⁴²⁹ Although most of Professor Hashimoto's data comes from the federal system, she concludes that the limited state court data suggests "the outcomes of pro se defendants in state court may actually be better—rather than worse—than the outcomes of their federal counterparts."⁴³⁰ In the end, Professor Hashimoto's empirics are a good reminder that more lawyers do not guarantee more justice.

Fifth, it does not make sense to expand the right to counsel in jurisdictions that are not meeting their existing constitutional obligations. As discussed in Part II.D, many jurisdictions across the country are consistently failing to provide effective counsel, or any counsel, in a broad variety of cases. This is reflected in the failure of the States to fund the right to appointed counsel. Nationwide, between 1982 and 2005, the States increased their collective allocation for indigent defense from one billion dollars to three and a half billion dollars, a 75 percent increase after adjusting for inflation.⁴³¹ Simultaneously, the total number of cases where indigent defense is legally required has doubled or

426. See Natapoff, *supra* note 1, at 1348 ("Driving on suspended license charges are presumably triggered by the existence of DMV records.").

427. Cf. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 482–83 (1992) (arguing that the adversarial trial system often incentivizes the defendant not to testify even though she may be "the most important witness in the case").

428. See Hashimoto, *supra* note 8, at 489.

429. *Id.* at 490–91.

430. *Id.* at 495.

431. *Id.* at 485–86.

tripled.⁴³² In short, “[I]ndigent defense budgets nationwide have not come close to keeping pace with the caseload increases”⁴³³

For states that are not meeting their federal constitutional obligations to appoint counsel in more serious cases, it makes little sense to advocate for a broader right to counsel. If felony defendants, or even capital defendants, cannot receive adequate representation,⁴³⁴ jurisdictions should prioritize those problems rather than allocating money to fund appointed counsel for minor misdemeanor cases. As Professor Hashimoto argues, “In a world of limited indigent defense resources, states must make a choice: They can provide minimal representation to all indigent defendants, or they can deny counsel to defendants facing low-level misdemeanor charges and focus those resources on the representation of defendants facing charges of the greatest severity.”⁴³⁵ Every intake nurse who has ever had to triage at a hospital understands that the latter option might make more sense.

Sixth, mandating a broader right to counsel denies the States flexibility to cater to their varying geographical needs. Justice Brennan’s *Scott* dissent did not acknowledge this difficulty. For him, Justice Rehnquist’s concern about imposing costs on the States was not significant because “public defender systems have proved economically feasible, and the establishment of such systems to replace appointment of private attorneys can keep costs at acceptable levels even when the number of cases requiring appointment of counsel increases dramatically.”⁴³⁶

But the public defender model is more realistic for cities, which have large enough volumes of cases to enable economies of scale. In contrast, it would be difficult for rural states and localities to adapt, because they would likely have to rely on appointments of private practitioners and at rates close enough

432. *Id.* at 484–85.

433. *Id.* at 485.

434. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994) (describing the lack of effective lawyering for poor capital defendants).

435. See Hashimoto, *supra* note 8, at 513; see also BARTON & BIBAS, *supra* note 8, at 11 (“America will never be able to offer every criminal defendant facing any amount of jail time a criminal defense lawyer equal to what the wealthy can afford. But we can focus our effort on the cases that so desperately need our attention and care: serious felonies.”).

436. See *Scott v. Illinois*, 440 U.S. 367, 385 (1979) (Brennan, J., dissenting).

to what a lawyer could earn in private practice to ensure people are willing to serve.⁴³⁷ Indeed, this is how Iowa decided to provide counsel for low-level criminal defendants after the Iowa Supreme Court adopted the authorized imprisonment test. Although estimating costs is difficult, an Iowa judge told me that at least one town attempted to circumvent the ruling by reclassifying several offenses as fine-only offenses, and that magistrate judges in some rural counties were not informing low-level defendants about their right to counsel. Relatedly, in the legislative debates on whether to expand the scope of the right to counsel in Colorado, one individual testifying against the bill, a lawyer for a rural Colorado town, argued that the bill would disproportionately affect rural jurisdictions.⁴³⁸ Similarly, an Ohio judge told me that the rural counties are less likely to appoint counsel in misdemeanor cases because of cost.⁴³⁹

Seventh, and counterintuitively, not requiring jurisdictions to appoint counsel in low-level misdemeanor cases may actually be better for defendants because it incentivizes the States not to impose harsher penalties for minor offenses. As discussed above, mandating the appointment of counsel for all criminal cases may deter jurisdictions from enforcing low-level offenses. It just might not be worth it for a state to devote taxpayer dollars to punishing minor crimes. But low-level crimes exist for a reason, so jurisdictions will want to enforce them, even if mandatory appointment of counsel in all cases made it more expensive. As one Florida judge explained, she uses her discretion under Florida law to appoint counsel (rather than certify that imprisonment will not be imposed to avoid the necessity of appointing counsel) because she wants to preserve the option to punish the defendant with jail time.⁴⁴⁰ Thus, the legislature could just increase the penalties available under the relevant statutes.

By not forcing jurisdictions to pay for defense lawyers in minor cases, one might be giving the States room to enforce low-level statutes in a gentle and sensible way. The status quo may en-

437. Although judges can compel practitioners to serve, rates must be high enough to avoid unconstitutional takings. *See, e.g., State v. Lynch*, 796 P.2d 1150, 1163 (Okla. 1990).

438. *See supra* note 250 and accompanying text.

439. Telephone Interview with Richard Frye, *supra* note 95.

440. Telephone Interview with Meredith Charbula, *supra* note 203.

courage mercy. Statistical evidence in Texas suggests that, in 2018, charges were dismissed in over 40 percent of the misdemeanor cases where defendants were not entitled to counsel.⁴⁴¹ In Norristown, Pennsylvania, I observed one judge dismiss most of his criminal docket in a morning, explaining that it is enough that the defendants “came in and took responsibility for their actions.” As another example, in Virginia, the prosecution routinely takes prison off the table for defendants charged with driving with a suspended license.⁴⁴² The motivation for this move, according to one local defense lawyer, is to facilitate the easier and quicker disposition of these cases, usually involving the payment of some sort of fine.⁴⁴³ Additionally, a Pennsylvania trial judge explained to me that counsel is rarely appointed in summary offense cases because judges generally issue minor fines, often far below the \$300 maximum.⁴⁴⁴ Several scholars have also documented how the States are incentivized to transform jailable offenses into finable ones to save money.⁴⁴⁵ By denying lawyers to low-level offenders, the States might provide quicker, cheaper, and gentler justice.

3. *Assessment*

In summary, there are strong policy arguments both for and against a broader right to appointed counsel. On the one hand, it is difficult to endorse a system where prosecutors routinely face off against uncounseled defendants. In such instances, the fairness argument made in *Gideon* seems strong. If the state is willing to pay to prosecute such offenses, perhaps it should pay for a defense lawyer. Moreover, the individual faces sub-

441. In 2018, Texas had around 1.1 million non-traffic misdemeanor cases in the justice and municipal courts where the defendant could only be punished by fine, and thus was not entitled to appointed counsel. See OFFICE OF COURT ADMIN., *supra* note 7, at Court-Level 42, 50. About 40 percent of these cases were terminated by dismissals. *Id.* at Court-Level 43, 51.

442. Telephone Interview with David Heilberg, *supra* note 77.

443. See *id.*

444. Telephone Interview with Albert Masland, *supra* note 88 (explaining how judges in Cumberland County often issue fines of around \$25 or \$50 to cut poor defendants some slack).

445. See Brown, *supra* note 176, at 7; Natapoff, *supra* note 111, at 1058 (“[E]liminating incarceration for misdemeanors looks like a kind of win-win: it relieves defendants of the threat of imprisonment while saving the state millions of dollars in defense, prosecution, and jail costs.”).

stantial consequences if convicted, both direct and collateral. We can rightly worry that an innocent person could be convicted.

On the other hand, guaranteeing counsel in all criminal cases could be costly and potentially ineffective. Many of these cases are factually straightforward and rarely go to trial. Expanding the right may mean little more than paying a lawyer to spend a few minutes with an arrestee to advise her to take a canned plea deal the prosecutor would probably be willing to offer anyway. The only truly empirical article on this subject suggests the States should hesitate. As Professor Hashimoto summarizes: "Although it may appear that denying counsel to some misdemeanor defendants will prejudice their interests, empirical evidence suggests that counsel in misdemeanor cases do not typically provide significant benefits to many of their clients."⁴⁴⁶

As the above discussion indicates, there is no universal answer in this policy debate.⁴⁴⁷ And these "universal" considerations may not matter as much as jurisdiction-specific ones. In other words, whether more counsel should be guaranteed should likely vary by state, and even within states. Two factors seem particularly relevant.

First, is the jurisdiction failing to provide effective counsel, or any counsel, in cases where the Supreme Court has held it is required? If so, it makes little sense to recognize a broader right. The right would be meaningless and make a mockery of the law. Although Part II.D has emphasized the jurisdictions that do not meet their legal obligations, it is worth remembering that some jurisdictions *do* consistently provide counsel when required to.⁴⁴⁸ For example, a prominent defense attorney insisted that Philadelphia consistently provides effective defense lawyers in all criminal cases.⁴⁴⁹ It makes more sense for jurisdictions like these to expand the right to counsel.

Second, a jurisdiction's geographical character may be essential. In general, urban jurisdictions can more easily offer a

446. See Hashimoto, *supra* note 8, at 463.

447. *Contra* Kitai, *supra* note 8, at 49 (arguing that it is "virtually impossible to produce any principled competing interests" against requiring the appointment of counsel in all criminal cases).

448. For example, an Iowa magistrate judge opined that, at least in her county, lawyers are consistently appointed when they are supposed to be, and that the quality of representation is pretty good. Telephone Interview with Lynn Rose, *supra* note 101.

449. Interview with David Rudovsky, *supra* note 294.

broader right to appointed counsel because economies of scale are more feasible in large cities than in rural areas. Wyoming would face a heavier burden in guaranteeing counsel in all criminal cases than Rhode Island. There will also be variation within states. For example, an Iowa magistrate judge explained to me that the relatively urban counties around Des Moines and Iowa City have more easily handled the broader right to appointed counsel mandated by the Iowa Supreme Court than the rural counties.⁴⁵⁰ A similar dynamic plays out in Ohio.⁴⁵¹

Of course, there are an infinite variety of factors that will influence a jurisdiction's optimal policy outcome. Voters in one jurisdiction might have different preferences than those in another. Policymakers might want to focus more on healthcare or infrastructure in some jurisdictions. The bar association in one jurisdiction could be stronger than in another. This Article cannot enumerate all the variables. The point is that there is no one-size-fits-all solution. Allowing states and localities to experiment with different approaches will allow policymakers to account for their jurisdiction's specific needs. This experimentation is one of the great benefits of federalism.⁴⁵²

IV. HOW A BETTER FEDERALISM IS ESSENTIAL TO FIXING MISDEMEANOR JUSTICE

Federalism is essential to building a better misdemeanor indigent defense system. The surface-level point made clear by Part II is that we should not assume the States will be less generous than the U.S. Supreme Court in protecting the rights of criminal defendants. Part IV.A emphasizes this point: the scope of appointed counsel in misdemeanor cases is, on paper, a federalism success story. But Part IV.B suggests the reality is more complicated. Our misdemeanor justice system, including indigent defense, is broken in many jurisdictions across the United States.

Moreover, our academic discourse is stuck in a rut, with most scholars arguing that the status quo is a "travesty, and demand[ing] that courts or legislatures spend more money on

450. Telephone Interview with Lynn Rose, *supra* note 101.

451. Telephone Interview with Richard Frye, *supra* note 95.

452. See McConnell, *supra* note 355, at 1494.

individual lawyers for individual cases.”⁴⁵³ Scholars also consistently demand that the Supreme Court force the States to honor a broader right to counsel. Part IV.C therefore seeks to reorient the conversation away from the Supreme Court and the assumption that we should be trying to perfect the adversarial system in misdemeanor cases. Instead, it suggests that the States should use the room given to them by *Scott* to act as laboratories of democracy. In particular, the States should consider experimenting with three non-adversarial models: declination, diversion, and inquisitorial prosecution. Finally, Part IV.D acknowledges the barrier of inertia, arguing our criminal justice system desperately needs a better federalism.

A. *A Federalist Success Story on Paper*

There is an oft-repeated narrative that the States cannot be trusted to protect individual rights, and that the Supreme Court must therefore occupy the field if justice is to be done. As Judge Sutton put it: “Convention suggests that only life-tenured federal judges, not elected state court judges, only the national government, not the States, can be trusted to enforce constitutional rights.”⁴⁵⁴ Anthony Lewis, who told the story of Gideon and the Supreme Court’s right-to-counsel revolution in *Gideon’s Trumpet*, apparently believed this.⁴⁵⁵

That standard account has not played out in the right-to-counsel context. As discussed in Part III.B, thirty-four states voluntarily provide more protection than the Supreme Court required in *Scott*. Even among the sixteen less protective states, there is a diversity of procedural mechanisms that give judges discretion to appoint counsel. This flexibility also allows judges to decline to appoint counsel in cases where it makes sense, like Virginia typically does in suspended license cases.

Additionally, there is no clear correlation between a state’s approach to this issue and the state’s general political leanings. Some conservative states, like Indiana and Texas, provide broader protection than federally required. In contrast, some progressive states, like Illinois and Connecticut, have elected not to guarantee more protection than required by *Scott*.

453. See BARTON & BIBAS, *supra* note 8, at 7.

454. See SUTTON, *supra* note 12, at 203.

455. See LEWIS, *supra* note 13, at 211–12.

At first glance, this diversity of approaches is cause for celebration. States have different characteristics that should affect their decisions. It may be easier for urban jurisdictions to offer an expanded entitlement than rural ones. It makes more sense for states that have functioning right-to-counsel systems to offer expanded entitlements than for states which already have a rotten reputation in this area. There are many variables that could lead states and localities to different results.

This Article thus provides partial reinforcement for Judge Sutton's argument that we should place more trust in the States to protect individual rights. This area of the law, like those covered in Judge Sutton's book, "provide[s] a healthy counterweight to the received wisdom" that is hostile to empowering the States.⁴⁵⁶

B. *Hold the Applause*

But this Article does not celebrate the status quo. Our misdemeanor justice system is failing. As discussed in Part II.D, many states and localities are consistently failing to meet their constitutional obligations. Accounts of routine failures to provide *any* counsel in some jurisdictions abound. Further, scholars and practitioners have documented that states use a variety of mechanisms, like indigence determination and waivers, to legally cut down on the need to appoint counsel.⁴⁵⁷ And even when states spend the money to appoint counsel, it is not clear how much good that is doing. Because defense lawyers in many jurisdictions face crushing workloads, there has been a mass movement toward plea bargaining. Reports of "meet 'em and plead 'em" lawyering are now common, particularly in misdemeanor cases.⁴⁵⁸ And for the few misdemeanor cases that do go to trial, our system is plagued by complaints of ineffective assistance of counsel. Anecdotal accounts of defense lawyers being "asleep, drunk, unprepared, or unknowledgeable"

456. See SUTTON, *supra* note 12, at 204.

457. For example, judges in Virginia allegedly push defendants to waive their right to appointed counsel quite frequently. See, e.g., Telephone Interview with David Heilberg, *supra* note 77. Of course, defendants may have good incentives to waive counsel, especially because many states charge even indigent defendants fees and try to recoup costs. See Telephone Interview with Edward Hogshire, Judge, Charlottesville Circuit Court (Feb. 26, 2019).

458. See BARTON & BIBAS, *supra* note 8, at 28 (discussing this problem); Hashimoto, *supra* note 8, at 473–74 (discussing the extent of the problem).

abound.⁴⁵⁹ The system is failing, creating a grave risk that millions of Americans every year will confront an inefficient, intimidating, frustratingly bureaucratic, and inaccurate system of misdemeanor justice.

Additionally, our discourse on how to fix these problems is “stuck in a *Groundhog Day* loop.”⁴⁶⁰ The vast majority of scholars writing about misdemeanor justice argues that the Supreme Court should overrule *Scott* and require appointed counsel in all criminal cases.⁴⁶¹ As for existing unfunded mandates, a chorus of scholars has demanded that states and localities provide more money for indigent defense to make our promised adversarial system a reality.⁴⁶² In tandem, a group of devoted advocates has brought systemic litigation throughout the country seeking court orders for more allocations of resources.⁴⁶³ In other words, the stereotypical solution is: more money, more lawyers, more justice.⁴⁶⁴ All of these accounts focus on perfecting our adversarial system, on making *Gideon* a reality in all criminal cases.

Even if the Supreme Court did overrule *Scott*, there are reasons to be cynical that it would make any difference. It is easy to say states should allocate more money to indigent defense, and much harder to actually lobby a state legislature to make it happen. The massive number of misdemeanors processed every year would require funds unlikely to be allocated.⁴⁶⁵ And it would also require a herculean effort from judges, prosecutors,

459. See, e.g., Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1.

460. See BARTON & BIBAS, *supra* note 8, at 7.

461. See *supra* note 8.

462. For a particularly thoughtful example of an article falling into this category, see Backus & Marcus, *supra* note 293. Professors Mary Sue Backus and Paul Marcus argue that “drastic underfunding” was and is “a root cause of the intractable problems plaguing the patchwork of state indigent defense systems in the United States.” *Id.* at 1578–80.

463. See, e.g., *Kuren v. Luzerne County*, 146 A.3d 715, 723–25 (Pa. 2016).

464. Cf. Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 968 (2012) (“If appointing some lawyers is good, then appointing more lawyers must be better. At least that seems to be the logic of the civil *Gideon* movement . . .”).

465. See, e.g., Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1158 (2004) (“American lower criminal courts have long been structurally incapable of adjudicating legal and factual disputes in the vast majority of the cases that come before them.”).

and defense lawyers, all of whom are incentivized to quickly dispose of misdemeanor cases.⁴⁶⁶ Rather than make that effort, it seems more likely that all three groups would push for more waivers of the right to counsel, something that is already used to circumvent the Supreme Court's requirements.⁴⁶⁷

Some advocates are trying to improve misdemeanor justice through systemic litigation, but problems plague these efforts. Such suits are difficult to bring because "they can be incredibly protracted and expensive."⁴⁶⁸ Because it is challenging to litigate highly individualized claims of ineffective assistance of counsel via aggregate litigation, mass or class actions are only viable in those states and localities where counsel is routinely denied altogether.⁴⁶⁹ Standing doctrines may stand in the way as well. These lawsuits are hard to win, and even if litigants are successful, it is not clear how much relief they will get for their efforts.

Louisiana illuminates the problem. In 1966, Louisiana established its public defender system, relying primarily on local funding and oversight.⁴⁷⁰ In 1993, the Louisiana Supreme Court rebuked the funding system, established a presumption of ineffective assistance of counsel in part of New Orleans, and threatened to take more intrusive measures if the legislature did not act.⁴⁷¹ When the legislature did not act quickly, in 1994,

466. See HEUMANN, *supra* note 413, at 38.

467. For example, some states have figured out how to effectively issue suspended sentences without appointing counsel. One Florida prosecutor explained to me that the most common sentence for an uncounseled defendant who pleads guilty to his first DUI is a probationary sentence, with jail risked if the defendant violates the probation terms. See Telephone Interview with L.E. Hutton, *supra* note 93. The reason this practice does not violate *Shelton* is because judges ensure that defendants waive their right to counsel, thus preventing a constitutional problem if the defendant is later imprisoned for violating the probation conditions. See *id.*

468. See Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 449 (2009).

469. See, e.g., *Hurrell-Harring v. State*, 930 N.E.2d 217, 221 (N.Y. 2010) ("[E]ffective assistance is a judicial construct designed to do no more than protect an individual defendant's right to fair adjudication; it is not a concept capable of expansive application to remediate systemic deficiencies.").

470. ANDREA M. MARSH, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, STATE OF CRISIS: CHRONIC NEGLECT AND UNDERFUNDING FOR LOUISIANA'S PUBLIC DEFENSE SYSTEM 9 (2017), <https://www.nacdl.org/getattachment/dfc14b97-099b-45d6-89e6-d7e9b652feac/state-of-crisis-chronic-neglect-and-underfunding-for-louisiana-s-public-defense-system-report-final.pdf> [[https://perma.cc/8N\]6-V2XB](https://perma.cc/8N]6-V2XB)].

471. *Id.* at 10; *State v. Peart*, 621 So. 2d 780, 783 (La. 1993).

the Louisiana Supreme Court ordered the creation of the Louisiana Indigent Defense Assistance Board.⁴⁷² Although the legislature begrudgingly codified the Board, it only allocated five million dollars to it, even though twenty million were needed.⁴⁷³ In 2005, the Louisiana Supreme Court again rebuked the legislature, threatened to halt prosecutions and called for reform.⁴⁷⁴ In 2007, the legislature authorized a new public defense board and authorized more funding.⁴⁷⁵ But by 2010, twenty-eight of Louisiana's forty-two defender offices were financially underwater.⁴⁷⁶ Even after dramatic cost-cutting measures and serious layoffs, Louisiana's defender offices were still running a collective deficit of three million dollars in 2015.⁴⁷⁷ By 2016, thirty-three out of forty-two defender officers had formally begun restricting services.⁴⁷⁸ In response, Louisiana judges continued to scold the legislature, began forcing private attorneys to represent defendants, and forced large numbers of defendants to wait in pretrial detention until counsel could be appointed.⁴⁷⁹ The crisis is ongoing.

The Louisiana story should not be that surprising. The courts have limited power within state governments. Separation-of-powers doctrines in various states will limit what courts can order legislatures to do. And even if there are not formal limits, judges will hesitate to wade into the appropriations process. Indeed, these separation-of-powers limitations have repeatedly frustrated attempts by courts to enforce positive state-law rights.⁴⁸⁰ And although judges could take more drastic steps like halting prosecutions, they will likely hesitate to do so, particularly if they are elected by voters, many of whom dislike "soft on crime" judges.

In light of these practical considerations, we should stop to question whether right-to-counsel advocates are supporting the right goals. The allure of the *Gideon* vision is undeniable. We

472. MARSH, *supra* note 470, at 10.

473. *Id.* at 11.

474. *See* State v. Citizen, 898 So. 2d 325, 336–39 (La. 2005).

475. MARSH, *supra* note 470, at 11–12.

476. *Id.* at 14.

477. *See id.* at 16.

478. *Id.*

479. *See id.* at 17.

480. *See* SUTTON, *supra* note 12, at 32–35.

would undoubtedly do great justice if we provided effective counsel and an effective adversarial system in all cases, often including a jury trial. On paper, the “accused has every advantage” in the American criminal justice system.⁴⁸¹ But this vision is not real in many parts of the country. In a large percentage of cases, for legal and illegal reasons, no counsel is provided. In the vast majority of cases, there is no real adversarial system.

C. Pursuing New Ideas Within Our Federalist System

So maybe we should rethink the adversarial system, at least in some cases. This Part proposes, but does not endorse, alternatives to the adversarial system for low-level crimes. None of them involve the appointment of counsel. This list is not exhaustive, and some scholars have proposed other interesting ideas.⁴⁸² My ambition is not to endorse any single approach, but to highlight the necessity of new ideas and the importance of using our federalist system to try them out. Federalism could help break the current “Groundhog Day loop” of rehashing the same arguments about the right to counsel.

1. Non-Prosecution or Reclassification

Some jurisdictions could simply decriminalize or stop enforcing low-level crimes. Indeed, several scholars have argued for decriminalization.⁴⁸³ This approach would have several advantages.

First, non-prosecution of low-level offenses allows law enforcement to prioritize more serious offenses. Especially in urban jurisdictions, which are rightly focused on punishing felons, it may not be feasible for the police to vigorously enforce all mis-

481. See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (Hand, J.).

482. See, e.g., BARTON & BIBAS, *supra* note 8, at 110–37 (offering several interesting ideas, including the use of online dispute resolution and non-lawyer mediation to quickly resolve some low-level cases); Natapoff, *supra* note 1, at 1372–74 (suggesting we raise the evidentiary standard for police to arrest suspects for low-level crimes); John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251 (2018) (suggesting the conditions under which it may make sense to delegate criminal justice in certain cases to a privately run system that imposes penalties on violators).

483. See, e.g., Kitai, *supra* note 8, at 57; Lucas, *supra* note 8, at 109.

demeanor laws.⁴⁸⁴ For example, California reclassified low-level drug possession as a civil offense rather than a criminal one.⁴⁸⁵ As then-Governor Arnold Schwarzenegger explained, “In this time of drastic budget cuts, prosecutors, defense attorneys, law enforcement, and the courts cannot afford to expend limited resources prosecuting a crime that carries the same punishment as a traffic ticket.”⁴⁸⁶

Second, it may not be efficient for the States to enforce these low-level offenses. Prosecutors are unlikely to seek prison sentences in many of these cases. For the few that go to trial, one can question whether it is efficient for the state to pay a prosecutor, judge, and perhaps a defense lawyer for at least several hours of time to secure a small fine that provides little deterrence. As one Pennsylvania trial judge bluntly put it, “you can’t usually justify the cost of trial for minor offenses like public intoxication.”⁴⁸⁷ Similarly, Professor Milton Heumann documented that most judges, prosecutors, and defense lawyers feel that these cases are “not worth extensive time in trial or even in plea negotiations.”⁴⁸⁸ Professor Robert Boruchowitz has estimated that the States could save billions per year by reclassifying some misdemeanors as civil infractions.⁴⁸⁹

Third, there may be better ways to enforce these low-level offenses than criminal prosecution. Professor David Rudovsky, for example, suggests that we treat low-level offenses more like traffic offenses.⁴⁹⁰ At a recent hearing on the subject, Senate

484. See, e.g., Memorandum from Kenneth P. Thompson, Dist. Attorney, Kings County, New York, to District Attorney’s Office for King’s County, New York, Policy Regarding the Prosecution of Low-Level Possession of Marijuana Cases 1–2 (July 8, 2014), <http://nylawyer.nylj.com/adgifs/decisions14/070914policy.pdf> [https://perma.cc/7MP2-82D2] (announcing a general policy of non-prosecution for marijuana possession to ensure, in part “the limited resources of this Office are allocated in a manner that most enhances public safety”).

485. Act of Sept. 30, 2010, ch. 708, 2010 Cal. Stat. 3994.

486. See Letter from Arnold Schwarzenegger, Governor, California, to Members, Cal. State Senate (Sept. 30, 2010), <http://www.salem-news.com/articles/october012010/schwarzenegger-marijuana.php> [https://perma.cc/8AX6-5A4F].

487. See Telephone Interview with Albert Masland, *supra* note 88.

488. See HEUMANN, *supra* note 413, at 38.

489. See *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) [hereinafter *Misdemeanor Hearing*] (statement of Robert C. Boruchowitz, Professor, Seattle University School of Law), <https://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Boruchowitz%20Testimony.pdf> [https://perma.cc/EBP2-JQ4R].

490. See Interview with David Rudovsky, *supra* note 294.

Judiciary Committee Chairman Chuck Grassley made a similar suggestion.⁴⁹¹ You would get a ticket, but the offenses would not be deemed criminal. It is worth acknowledging that the police already enforce some low-level public order offenses by means other than criminal prosecution. The classic example is drunk and disorderly conduct. The police rarely enforce it. And if someone is particularly obnoxious, the police are more likely to hold the person in jail over night until he sobers up than to charge him with an offense.⁴⁹²

One counterargument lies in broken windows policing theory. In brief, that theory suggests that failure to curb disorder and low-level crimes will result in the proliferation of more serious crimes.⁴⁹³ As James Wilson and George Kelling put it in their famous article: “[A]t the community level, disorder and crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken.”⁴⁹⁴

Broken windows theory has proven both very influential and very controversial.⁴⁹⁵ This Article does not express either agreement or disagreement with it. But to the extent that the theory is persuasive, it counsels against a systemic refusal to enforce public order laws.

Furthermore, the public may have a strong interest in seeing low-level offenses enforced. Philadelphia’s decision not to prosecute petty larceny has earned severe criticism, as it arguably puts shop owners at the mercy of petty thieves.⁴⁹⁶ Shoplifting

491. See *Misdemeanor Hearing*, *supra* note 489 (statement of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary), <https://www.judiciary.senate.gov/imo/media/doc/05-13-15%20Grassley%20Statement1.pdf> [<https://perma.cc/7MP6-BHPF>].

492. See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 476 (2000) (finding that many order maintenance arrests resulted in a night in jail and then release).

493. See George L. Kelling & James Q. Wilson, *Broken Windows: The police and neighborhood safety*, *ATLANTIC MONTHLY*, Mar. 1982, at 29.

494. *Id.*

495. See, e.g., Nick Malinowski, *Useful or Not, Broken Windows Policing Remains Morally Indefensible*, *HUFFINGTON POST* (Dec. 6, 2017), https://www.huffingtonpost.com/nick-malinowski/useful-or-not-broken-wind_b_10742902.html [<https://perma.cc/47EN-SK7B>].

496. See Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, *N.Y. TIMES MAG.* (Oct. 30, 2018), <https://nyti.ms/2CPjBOP> [<https://perma.cc/5KJ2-DPJ6>] (“[P]rosecutors were instructed to handle

has been called the “nation’s most expensive crime,”⁴⁹⁷ and retailers’ losses from shoplifting were around eighteen billion dollars nationwide in 2016.⁴⁹⁸ Even with something that sounds relatively harmless, like drunk and disorderly conduct, parents might not want to raise children in a neighborhood where obnoxious drunks are given free rein to wander the streets at night.

2. *Diversion*

A second option is to offer low-level offenders diversion agreements. Agreements can be reached either before filing criminal charges (a deferred charge agreement) or after (a deferred prosecution agreement). Under such terms, a defendant would not be brought to trial if he complied with the terms of the agreement. Such terms could include a commitment not to commit any more crimes, restitution, or community service.

Of course, diversion is common in many jurisdictions, and it is used in at least 9 percent of criminal cases.⁴⁹⁹ It is often used for drug offenses, and successful completion of a rehabilitation program is often required by diversion agreements.⁵⁰⁰ In that context, diversion agreements are seen as particularly promising because the system hopes to prevent future crime by helping people stop using drugs. It is not clear whether diversion offers similar benefits for, say, petty larceny offenders. Diversion would not “cure” offenders. And it is questionable whether it would deter the commission of future offenses, because it

any retail theft with a value of less than \$500 with a citation, the lowest possible offense under Pennsylvania law.”).

497. See Susan Konig, *Helping Shoplifters to Reform*, N.Y. TIMES (Sept. 29, 1996), <https://nyti.ms/3bOznIr> [<https://perma.cc/T42W-7MZK>].

498. See RICHARD HOLLINGER, NAT’L RETAIL FED’N, 2017 NATIONAL RETAIL SECURITY SURVEY 6, 8 (2017), <https://cdn.nrf.com/sites/default/files/2018-10/NRSS-Industry-Research-Survey-2017.pdf> [<https://perma.cc/MU4A-UUQ8>] (stating inventory shrinkage accounts for \$48.9 billion, of which shoplifting is accountable for 36 percent).

499. ACLU KANSAS, CHOOSING INCARCERATION: KANSAS PROSECUTORS’ REFUSAL TO USE DIVERSION AND THE COST TO COMMUNITIES 8–9 (2018), https://www.aclukansas.org/sites/default/files/field_documents/choosing_incarceration_-_aclu_report_on_diversion_in_kansas_-_updated_january_2018_0.pdf [<https://perma.cc/NF2D-PPHE>].

500. See CTR. FOR PRISON REFORM, DIVERSION PROGRAMS IN AMERICA’S CRIMINAL JUSTICE SYSTEM 5–6 (2015), <https://centerforprisonreform.org/wp-content/uploads/2015/09/Jail-Diversion-Programs-in-America.pdf> [<https://perma.cc/K4CF-FSLH>].

may be impracticable for law enforcement to monitor compliance with such agreements. Undoubtedly, most misdemeanors go undetected.

However, states could use diversion agreements to impose noncriminal punishments on offenders. Florida, for example, offers deferred prosecution for many of its misdemeanors (including some traffic offenses), whereby defendants attend classes, pay restitution, and do community service.⁵⁰¹ Seen that way (and not relying on rehabilitation), this option could make sense for some jurisdictions. The state is spared the expenses of prosecution. The defendant benefits by being spared the stigma and collateral consequences of a criminal conviction. At the same time, this option dodges the most serious objections against the previous option: it does not abdicate enforcement of low-level criminal offenses.

3. *An Inquisitorial System*

Unlike the previous two suggestions, this third proposal keeps criminal convictions, but without a traditional adversarial process. Instead, some states should consider experimenting with an inquisitorial system.

Inquisitorial legal systems exist throughout the world. In fact, they are far more common than adversarial ones.⁵⁰² In brief, inquisitorial systems rely more heavily on judges to develop the factual record than adversarial ones. In inquisitorial proceedings, judges develop the record by interrogating the involved parties.⁵⁰³ Although lawyers can certainly play a role, that role is less important than in an adversarial system.

In American legal discourse, the inquisitorial system has long been considered heretical. Ever since abuses by the judges of the Stuart kings in seventeenth century England, the Anglo-American system has distrusted inquisitorial processes.⁵⁰⁴ The

501. Telephone Interview with L.E. Hutton, *supra* note 93.

502. BARTON & BIBAS, *supra* note 8, at 152 (“Most courts in the world, including virtually all of the courts in continental Europe and most of the courts in Asia, South America, and Africa, run on an inquisitorial system.”).

503. *Id.* at 151.

504. See Langbein, *supra* note 339, at 269. Although the jury was undoubtedly a powerful institution in early American history, it is worth acknowledging that some evidence points to broad judicial power in certain instances. See, e.g., Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 213–14 (2000) (describing the common practices of judges

Founders also distrusted judges because of their association with the English colonial administration.⁵⁰⁵ To counter judicial power, our Constitution enshrines the right to a jury trial both in Article III and the Sixth Amendment.⁵⁰⁶ Indeed, it is the only constitutional right enshrined in both the original Constitution and the Bill of Rights. Historically, the States long resisted the move toward optional bench trials.⁵⁰⁷

But perhaps that extreme distrust is no longer rational. Continental Europe has managed to keep trials because of the inquisitorial system's efficiency, whereas we have lost them.⁵⁰⁸ Moreover, our system largely already *is* inquisitorial as administrative proceedings routinely proceed in an inquisitorial manner.⁵⁰⁹ In the federal system, entitlement to Social Security Disability, veterans' benefits, and asylum are all largely determined through a partially inquisitorial process.⁵¹⁰ The Federal Social Security Disability system is the largest system of adjudication in the western world.⁵¹¹ State administrative agencies across the country likewise use inquisitorial processes to determine eligibility for various public benefits.⁵¹² Small claims courts around the country also use these procedures. Many Americans are most familiar with the inquisitorial system through television shows like *Judge Judy* and *The People's Court*.⁵¹³

commenting on evidence to juries in both civil and criminal cases in early American history).

505. See Langbein, *supra* note 339, at 269.

506. U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

507. See Langbein, *supra* note 339, at 269; see also *Cancemi v. People*, 18 N.Y. 128, 138 (1858) (disallowing defendants to waive the presence of even one juror's presence, lest the "ancient and invaluable institution of trial by jury" be threatened).

508. See Langbein, *supra* note 339, at 267.

509. See, e.g., BARTON & BIBAS, *supra* note 8, at 151–52; Michael Asimow, *Inquisitorial Adjudication and Mass Justice in American Administrative Law*, in *THE NATURE OF INQUISITORIAL PROCESSES IN ADMINISTRATIVE REGIMES: GLOBAL PERSPECTIVES* 93, 93–94 (Laverne Jacobs & Sasha Baglay eds., 2013).

510. See Asimow, *supra* note 509, at 98–108.

511. See JERRY J. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 18 (1983).

512. For example, Pennsylvania determines eligibility for unemployment benefits primarily through an inquisitorial system. See 43 PA. STAT. AND CONS. STAT. ANN. § 753 (West 2020). Indeed, I advocated on behalf of pro bono clients as a law student during some of these hearings. But many individuals proceed through this system pro se.

513. See BARTON & BIBAS, *supra* note 8, at 151.

One could reply that criminal proceedings are different because they involve higher stakes, but that is not always true.⁵¹⁴ Denial of unemployment benefits by a state agency can produce devastating collateral consequences, including a spiral into poverty. For asylum claimants appearing before hearing officers, a rejection may well lead to eventual deportation. A criminal conviction, attended by some punishment and later collateral consequences, may be similar in severity to many matters we already determine through partially inquisitorial proceedings.

Besides, in states where there is no right to counsel in low-level misdemeanor cases, practitioners suggested that judges by necessity act in a more inquisitorial fashion. For example, one Iowa magistrate judge explained that, before Iowa adopted the authorized imprisonment test, she had to enforce the rules of evidence against the prosecution, because one cannot expect the defendant to understand the rules.⁵¹⁵ As she put it, she “had to be careful to vindicate the rights of defendants when the defendant could not recognize them.”⁵¹⁶ Because trials with uncounseled defendants frequently occur in some jurisdictions, our misdemeanor system is already by necessity partially inquisitorial.

A non-adversarial system would have some benefits. First, it would save the States money (a helpful argument to make when seeking reforms), sparing them the expense of paying a prosecutor and a defense lawyer. Second, a speedier system would enable defendants to actually insist on their trial right. For those detained pretrial, it might not make a difference. But for non-jailed individuals who just want to “get it over with,” the prospect of a quick hearing might help an innocent defendant persevere. That, in turn, would help protect the innocent and produce more acquittals than our system currently obtains. Third, although American judges would initially be uncomfortable

514. *See, e.g.,* Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (“[T]oday’s civil laws regularly impose penalties far more severe than those found in many criminal statutes[.]”).

515. Telephone Interview with Lynn Rose, *supra* note 101.

516. *Id.*

performing inquisitorial functions,⁵¹⁷ they might actually provide more assistance to defendants than many state-appointed lawyers currently do. And from the defendant's perspective, this system would be an improvement on the prospect of going to trial without a lawyer in a jurisdiction where the trial judge will not help you.

Of course, there are undoubtedly disadvantages to the inquisitorial system.⁵¹⁸ Just one is that it places a tremendous amount of faith in judges, something at odds with our nation's historical distrust of unchecked judicial power.⁵¹⁹ Explicitly shifting toward an inquisitorial system could also lead to the weakening of other rights associated with the adversary system. For example, it could undermine the defendant's right not to self-incriminate by incentivizing her to testify at trial.⁵²⁰ State courts could also undertake less sweeping inquisitorial-style reforms, like revising court rules to encourage its trial judges to assist pro se litigants.⁵²¹ But it could be worthwhile for a state to try out an inquisitorial mode of adjudication, serving as a laboratory of democracy.

Constructing a non-adversarial adjudicative system for low-level misdemeanors is no small task, and its feasibility will vary widely depending on the state. Ironing out the precise parameters of such a system is beyond the scope of this Article. Rather, anticipating the possibility of future scholarship, I will lay out some specific issues that a design proposal must take into account.

517. A state could cultivate expertise by assigning particular judges to only handle inquisitorial cases or by offering continuing legal education to its judges. See, e.g., BARTON & BIBAS, *supra* note 8, at 154.

518. See, e.g., *id.* at 152–53.

519. See, e.g., *Blakely v. Washington*, 542 U.S. 296, 305–08 (2004) (discussing the Framers' distrust of unchecked judicial power).

520. See Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises*, 2001 U. ILL. L. REV. 791, 824–25 (describing how the French inquisitorial trial system incentivizes defendants to take the stand and testify).

521. See BARTON & BIBAS, *supra* note 8, at 145–50 (discussing simple ways that judges could make proceedings easier for pro se litigants, like relaxing procedural and evidentiary rules).

a. Jury Trial

The role of the jury trial in misdemeanors is understudied. The U.S. Supreme Court has held that the Sixth Amendment requires the States to offer jury trials whenever the defendant is charged with an offense jailable for more than six months.⁵²² As with the right to counsel, that means that the Supreme Court has given the States a substantial amount of room to experiment beyond the jury trial. Because of the logistical burdens of convening juries, it could be difficult to incorporate juries into a non-adversarial system for misdemeanors. One can question whether defendants would exercise a broader jury trial right. A judge in Ohio, where defendants have a jury trial right for all jailable offenses, explained that the right is almost never exercised in misdemeanor cases.⁵²³

However, the law may require jury trials. Scholars have issued serious challenges to the Supreme Court's jury trial jurisprudence.⁵²⁴ Considering the Anglo-American legal system's strong tradition of providing juries, the federal constitutional right to a jury trial may cover a broader range of misdemeanors than is currently recognized.⁵²⁵ Moreover, all state constitutions offer a jury trial right, and around 80 percent of the states, at least theoretically, guarantee a broader jury trial right than the U.S. Supreme Court.⁵²⁶

b. Plea Bargaining

Anyone designing a system of misdemeanor adjudication must consider the role of plea bargaining. Although empirical work is limited, the importance of plea bargaining in resolving misdemeanors is broadly recognized.⁵²⁷ Indeed, some have identified a link between greater procedural protections, like

522. See *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

523. Telephone Interview with Richard Frye, *supra* note 95.

524. See, e.g., *Murphy*, *supra* note 103.

525. For example, New Jersey does not guarantee a jury trial to all DUI defendants. See *State v. Denelsbeck*, 137 A.3d 462, 477 (N.J. 2016). And this rule clashes with the tradition of using juries for offenses to which the community attaches moral blameworthiness. See *Murphy*, *supra* note 103, at 135–39. One can argue under the Due Process Clause or, alternatively, the Privileges or Immunities Clause. U.S. CONST. amend. XIV, § 1.

526. See *Murphy*, *supra* note 103, at 171–73.

527. See *Bibas*, *supra* note 306, at 1118.

the right to counsel, and an increased rate of plea bargaining.⁵²⁸ Anecdotally, my conversations with practitioners support that link.⁵²⁹ The relationship between procedural protections and plea bargaining deserves careful academic attention. And those proposing a broader right to counsel should consider the possibility that plea bargaining will become more common as the States are incentivized to avoid the costs of prosecution through quick deals, perhaps offered en masse, as sometimes occurs in Florida.⁵³⁰

c. Dual Trial Court Systems

Perhaps the most bizarre part of America's current system for adjudicating misdemeanors is the structure of our state courts. There is an extraordinary diversity of structures. Only a few states are structured like the federal courts, with one trial court, an intermediate appellate court, and a supreme court. The vast majority of states have at least two trial courts. Maryland's structure is typical.⁵³¹ At the bottom of the hierarchy are the District Courts, which handle misdemeanors and small-value civil cases.⁵³² If a misdemeanor defendant is convicted at the District Court, he can appeal to the Circuit Court.⁵³³ The Circuit Courts are the trial courts of general jurisdiction, and felonies and serious civil cases start there.⁵³⁴ Oddly, the defendant appealing from the District Court is entitled to a *de novo* review of the case by the Circuit Court.⁵³⁵ And from there, the defendant can appeal up to the intermediate appellate court and, perhaps, the state supreme court.⁵³⁶

528. Cf. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984) (endorsing a system where bench trials are offered to reduce the dominance of plea bargaining).

529. See, e.g., Telephone Interview with Lynn Rose, *supra* note 101 (arguing that the rate of plea bargaining rose dramatically in Iowa after the Iowa Supreme Court expanded the right to counsel in 2016).

530. See, e.g., Telephone Interview with Scott Richardson, *supra* note 94 (asserting misdemeanor plea bargains are negotiated in "cattle calls").

531. See *Maryland*, *supra* note 103.

532. See *id.*

533. See *id.*

534. See *id.*

535. See *Kleberg v. State*, 568 A.2d 1123, 1124 (Md. 1990).

536. See *Maryland*, *supra* note 103.

The value of a dual trial court system is open to question. Why should a misdemeanor defendant get two *de novo* examinations of his case, especially when a felony defendant only gets one trial? Perhaps states are concerned, for good reason, about the accuracy of highly informal proceedings when there is no right to counsel. Historically, this system appears to have arisen in medieval England to avoid the necessity of convening juries for low-level crimes.⁵³⁷ And a fair number of states reflect that tradition by guaranteeing a jury trial for a relatively broad set of cases, but only offering a jury at the second trial.⁵³⁸

d. Appeals

Closely related to the dual trial court system is the question of appeals. How should appellate review work for an inquisitorial proceeding? Perhaps review should be *de novo* or at least more searching than for a jury trial. With fewer procedural protections at the initial adjudication, stronger appellate review could allay due process concerns.

But one must also consider the cost and potentially limited benefits of robust appellate review for low-level misdemeanors. As Justice Jackson once remarked in the federal habeas context, “reversal by a higher court is not proof that justice is thereby better done.”⁵³⁹ And defendants may be unlikely to take advantage of appeal rights if they have been merely fined a small amount. That dynamic appears to play out in the status quo. In states with two trial courts and a *de novo* appeal, limited statistical evidence suggests that defendants *almost never* take that *de novo* appeal.⁵⁴⁰ Stand-alone articles could undoubtedly address the reasons for that data, and the insights gained from such studies could inform the task of designing a misdemeanor adjudication system.

537. For the most important scholarship on this issue, see Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926).

538. See, e.g., *Georgia*, CT. STATS. PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts/Georgia.aspx [<https://perma.cc/J9SW-GVTE>] (last visited Feb. 18, 2020).

539. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

540. King & Heise, *supra* note 89, at 1940.

e. Personnel

Another difficult question is *who* should adjudicate misdemeanors. A fair number of states do not use lawyers to staff their lower trial courts. Texas, for example, does not require its justice and municipal court judges to be lawyers.⁵⁴¹ This practice raises serious system design questions. And scholars should be asking whether non-lawyers are running misdemeanor adjudications in a manner consistent with the rule of law rather than the rule of men. Can non-lawyers properly enforce the rules of evidence, interpret statutes,⁵⁴² and guarantee a defendant's constitutional rights? Personally, I witnessed misdemeanor trials in different parts of Pennsylvania conducted by non-lawyers in a highly informal fashion that varied greatly depending on the particular judge. Some of these proceedings took place without oaths, formal evidence, or any lawyers in the room. Although this phenomenon has received limited attention, the California Supreme Court forced a transition away from a dual trial court system after holding that non-lawyer judges presiding over criminal proceedings violated due process.⁵⁴³ This topic certainly needs more scholarly attention.

D. A Better Federalism

This Article does not endorse a one-size-fits-all approach to misdemeanors. This Part has introduced some alternatives to an adversarial adjudication system: non-prosecution, diversion, and an inquisitorial system. With an inquisitorial system in particular, the previous Part introduced several difficult variables that would need to be addressed. This Part's primary goal is to raise new questions for study and to reorient the conversation away from convincing the Supreme Court to force a uniform approach on fifty diverse states. We need experimentation. Federalism, rather than a universally mandated procedure frozen in place, is the key for enabling innovation in the right-to-counsel area.

541. See E-mail from Emily Miskel, Dist. Judge, 470th Tex. Judicial Dist., to author (Jan. 25, 2019, 5:17 PM EST) (on file with author).

542. See Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897 (2013) (asking this question).

543. See *Gordon v. Justice Court*, 525 P.2d 72, 79 (Cal. 1974).

But federalism may not be sufficient. Federalism will not inevitably lead to innovative solutions to difficult problems. Inertia and herd mentality are powerful forces that will counteract innovation. When suggesting to practitioners various new ideas for adjudicating misdemeanors, like an inquisitorial system, many responded that these ideas were not feasible. When I asked why, I repeatedly got the same response: "That's just not the way our system works." Inertia and tradition are powerful forces.⁵⁴⁴ Further, lawyers and bar associations have anti-innovation reputations, perhaps because lawyers are benefiting from the status quo.⁵⁴⁵

So letting federalism run its course will often not be good enough to spur innovation among the States. But that is where academics and legal crusaders can help. By proposing, advocating, and lobbying for new ideas in a single state, they can help make innovative reform a real possibility. If scholars concerned about the state of misdemeanor justice in America can shift their focus and move beyond demanding more one-size-fits-all solutions from the Supreme Court, it is not far-fetched to think that policymakers in individual jurisdictions can be convinced to try out new solutions. By curbing our obsession with the Supreme Court, we might be able to create a better, more dynamic federalism in the process.

CONCLUSION

The *Gideon* revolution has faltered. Some scholars think *Scott v. Illinois* was partially responsible for slowing it down. But those experienced in the criminal justice system should realize that *Scott* is not the real problem. In too many parts of the nation, our system of misdemeanor justice is not working.

As a matter of constitutional law, this Article has argued that *Scott* was rightly decided. Indeed, Justice Rehnquist's invocation of federalism proved prescient. The States, at least on paper, have innovated in this area. In thirty-four states, criminal de-

544. See, e.g., Asimow, *supra* note 509, at 94 (arguing that the American insistence on the adversarial model is largely because of "path dependence—it has always been done that way").

545. See BARTON & BIBAS, *supra* note 8, at 75 ("Courts, court processes, and the regulation of the legal profession effectively benefit the repeat players: judges, clerks, prosecutors, public defenders, and lawyers.").

fendants have a broader right to counsel than required by *Scott*. Some jurisdictions have taken steps to make those rights real. Others have not, and do not even honor the U.S. Supreme Court's existing mandates.

On paper, the States have proven the merits of federalism in this area. But we should hold our applause. Although some jurisdictions have gotten pretty close to actualizing America's traditional adversarial system for misdemeanors, it is unrealistic to expect the entire country to replicate that. Our misdemeanor justice system is in desperate need of experimentation. Inertia is undoubtedly a major obstacle to federalism reaching its full potential. We need new ideas.

The best reason to celebrate *Scott* was that it left room for the States to experiment in more meaningful ways. Had the Supreme Court adopted Justice Brennan's proposed authorized imprisonment test, no state would have room to innovate. The system would have been ossified, consistent with the vision of robed central planners. Instead, we have at least fifty shots to build a better misdemeanor justice system in America.

TAKING ANOTHER LOOK AT THE CALL ON THE FIELD: ROE, CHIEF JUSTICE ROBERTS, AND STARE DECISIS

THOMAS J. MOLONY*

During his confirmation hearing, United States Supreme Court Chief Justice Roberts described the role of a judge as that of an umpire, and he insisted that “[n]obody ever comes to a ball game to see the umpire.” These days, though, all eyes are on the Chief Justice. He appears to have become the swing vote on the Court, and his approach to overruling prior decisions may determine the future of Roe v. Wade.

The principle of stare decisis requires the Court to adhere to its earlier rulings—even those it considers wrongly decided—absent a “special justification.” In Franchise Tax Board v. Hyatt and Knick v. Township of Scott, both decided 5-4 in the waning days of the Court’s October 2018 term, Chief Justice Roberts and the other conservative Justices on the Court found such a justification and overruled decisions dating back to 1979 and 1985.

Justices Breyer and Kagan suggested that Hyatt and Knick spell a bad omen for other precedents. But one should not be so quick to proclaim that the sky is falling for, on the basis of stare decisis alone, the Chief Justice sided with the Court’s four progressives in Kisor v. Wilkie, a 5-4 decision of the same vintage as Hyatt and Knick in which the Court refused to overrule 1945 and 1997 precedents, and he joined Justices Alito and Kagan in dissenting from the fractured Court’s 2020 decision in Ramos v. Louisiana to overturn a ruling handed down the year before Roe. The Chief Justice’s votes in Kisor and Ramos suggest a commitment to stare decisis at least to a degree and that he will give serious and thoughtful consideration to the principle’s demands if the Court is asked to overrule Roe.

* Professor of Law, Elon University School of Law. This Article is dedicated to the memory of John T. “Jack” Ballantine, my father-in-law and a 1957 graduate of Harvard Law School. Jack was an exceptional lawyer and a consummate gentleman. I miss him and always will treasure the relationship we had.

This Article explores the Chief Justice's approach to stare decisis by examining what he himself has written and where he otherwise has stood in decisions in which stare decisis has featured prominently. Without attempting to predict whether the Chief Justice ultimately would vote in favor of overruling Roe, the Article attempts to identify significant considerations that could push him in that direction, thereby offering guidance to litigants on both sides of the issue. And the Article concludes that Chief Justice Roberts's devotion to judicial restraint and the rule of law should lead him to vote in favor of overruling Roe only if a challenged abortion regulation cannot be upheld on narrower grounds and reaffirming the landmark 1973 decision will cause more harm to the Constitution than casting the abortion question out of the courts and back to the States.

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INTRODUCTION

Speculate no more. Chief Justice Roberts now has command of the United States Supreme Court. Nowhere was this on greater display than the last day of the October 2018 term when the Court issued opinions addressing partisan gerrymandering

and the propriety of including a question about immigration status in the census.¹ Chief Justice Roberts was the swing vote and authored both opinions of the Court, leading the Court's conservative wing in rejecting a challenge to North Carolina and Maryland redistricting plans and siding with the progressive Justices in concluding that the Department of Commerce's decision to include a citizenship question on the census did not proceed from reasoned agency judgment.² Now more than ever, the man who described the job of a judge as that of an "umpire"³ is making the calls that decide the game.

Of course, it is one thing to say whether the last pitch was a ball or a strike.⁴ It is quite another to review a call made almost fifty years ago and decide whether to overrule another umpire. Yet that is what abortion opponents want the Court to do with respect to *Roe v. Wade*.⁵ And how Chief Justice Roberts would vote if presented with a request to reconsider the 1973 decision has been subject to much prognostication.⁶

1. See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

2. *Rucho*, 139 S. Ct. at 2506–07 (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties”); *Dep't of Commerce*, 139 S. Ct. at 2576 (“We do not hold that the agency decision here was substantively invalid. . . . Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.”).

3. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Confirmation Hearing*] (statement of Judge John G. Roberts, Jr.).

4. See *id.* at 56.

5. 410 U.S. 113 (1973); see, e.g., Brief *Amici Curiae* of 207 Members of Congress in Support of Respondent and Cross-Petitioner at 2, *June Medical Services, LLC v. Russo*, No. 18-1323 (U.S. Jan. 2, 2020).

6. See Joan Biskupic, *John Roberts has voted for restrictions on abortion. Will he overturn Roe v. Wade?*, CNN (May 15, 2019, 6:14 PM), <https://www.cnn.com/2019/05/15/politics/john-roberts-abortion-alabama-roe-v-wade/index.html> [https://perma.cc/QFE9-VY65] (“Chief Justice John Roberts will not vote to strike down *Roe v. Wade* and outright ban abortion. At least not yet.”); Ryan Everson, Opinion, *Based on his Obergefell dissent, Chief Justice Roberts will overturn Roe*, WASH. EXAMINER (June 5, 2019, 1:40 PM), <https://www.washingtonexaminer.com/opinion/based-on-his-obergefell-v-hodges-dissent-chief-justice-john-roberts-will-overturn-roe-v-wade> [https://perma.cc/8FB5-RDHL] (describing Chief Justice's Roberts's dissent in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and asserting that, “[i]f Roberts applies this logic to abortion, he would have to overturn *Roe*”); Pete Williams, *The Supreme Court and abortion: Will Roe v. Wade survive the new onslaught?*, NBC NEWS

Both sides of the abortion debate have reason for optimism and for concern. In *Gonzales v. Carhart*,⁷ decided shortly after Chief Justice Roberts took his seat on the Court, he and the other four conservative Justices united to form a 5-4 majority that upheld the federal partial-birth abortion ban.⁸ In addition, in *Whole Woman's Health v. Hellerstedt*,⁹ the Chief Justice joined Justice Alito in dissenting from the Court's decision to strike down Texas statutes requiring an abortion provider to have admitting privileges at a nearby hospital and requiring abortion facilities to meet the standards that apply to ambulatory surgery centers.¹⁰ On the other hand, in *June Medical Services, LLC v. Gee*,¹¹ Chief Justice Roberts backed a stay against a Louisiana admitting privileges requirement similar to the one at issue in *Hellerstedt*.¹²

For several reasons, though, how the Chief Justice voted in *Gonzales* and *Hellerstedt* and with respect to the *Gee* stay is not particularly instructive when trying to gauge how he might vote in a direct challenge to *Roe*. First, the Court in *Gonzales* did not consider whether to overrule *Roe*.¹³ Second, Justice Alito's dissent in *Hellerstedt* focused largely on procedural missteps Justice Alito believed the majority had made.¹⁴ Third, the Chief Justice did not join Justice Thomas in *Gonzales* when he asserted his "view that the Court's abortion jurisprudence . . . has no basis in the Constitution"¹⁵ or in *Hellerstedt* when Justice Thomas

(May 16, 2019, 10:01 AM), <https://www.nbcnews.com/politics/supreme-court/supreme-court-abortion-will-right-survive-new-onslaught-n1006386> [<https://perma.cc/N8J6-7DXX>] ("[I]t takes five votes to [overturn *Roe v. Wade*], and there's no guarantee Chief Justice John Roberts would provide it, given his interest in the court's long-term legacy.").

7. 550 U.S. 124 (2007).

8. *Id.* at 133 ("We conclude the [Partial-Birth Abortion Ban Act of 2003] should be sustained . . .").

9. 136 S. Ct. 2292 (2016).

10. *See id.* at 2330–53 (Alito, J., dissenting).

11. 139 S. Ct. 663 (2019) (mem.).

12. *Id.* at 663.

13. *See Gonzales*, 550 U.S. at 156–67 (upholding the federal partial-birth abortion ban under the undue burden standard adopted in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

14. *See Hellerstedt*, 136 S. Ct. at 2330 (Alito, J., dissenting) ("[D]etermined to strike down two provisions of a new Texas abortion statute in all of their applications, the Court simply disregards basic rules that apply in all other cases.").

15. 550 U.S. at 169 (Thomas, J., concurring).

declared that he “remain[ed] fundamentally opposed to the Court’s abortion jurisprudence.”¹⁶ Finally, the Chief Justice’s vote in *Gee* was for temporary relief and therefore signals nothing about how he might vote on the merits.¹⁷

Divining how Chief Justice Roberts might vote in a case challenging *Roe* becomes all the more difficult when one considers where he has stood in recent decisions featuring *stare decisis*, a Latin phrase meaning “to stand by things decided”¹⁸ and a principle that directs courts to follow precedent absent a “special justification” for doing otherwise.¹⁹ During his confirmation hearing, the Chief Justice emphasized that “overruling of a prior precedent . . . is inconsistent with principles of stability and yet . . . the principles of *stare decisis* recognize that there are situations when that’s a price that has to be paid.”²⁰ In two decisions handed down as the October 2018 term drew to a close, the Chief Justice was willing to pay that price;²¹ in two others at the end of that term and a third during the Court’s most recent term, he declined.²²

16. 136 S. Ct. at 2324 (Thomas, J., dissenting).

17. The Court has issued a writ of certiorari and heard oral arguments in *June Medical Services, LLC v. Gee*, but has not issued an opinion on the merits. See *June Medical Services, LLC v. Gee*, 140 S. Ct. 35, 35–36 (2019) (mem.) (granting certiorari); *June Medical Services, LLC v. Russo*, No. 18-1323 (U.S. argued Mar. 4, 2020).

18. *Stare decisis*, BLACK’S LAW DICTIONARY (11th ed. 2019).

19. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)) (internal quotation marks omitted).

20. See *Confirmation Hearing*, *supra* note 3, at 144 (statement of Judge John G. Roberts, Jr.).

21. See *Knick v. Township of Scott*, 139 S. Ct. 2162, 2179 (2019) (overruling *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985)); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1490 (2019) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

22. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425 (2020) (Alito, J., dissenting) (dissenting from the Court’s decision to overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972)); *Kisor*, 139 S. Ct. at 2408 (refusing to overrule *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)); *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (affirming precedent supporting the “dual sovereignty” doctrine). During the current term, the Chief Justice also was part of the majority in *Allen v. Cooper*, 140 S. Ct. 994 (2020), a case in which the Court concluded that *stare decisis* stood in the way of the plaintiffs’ claim against North Carolina for copyright infringement. See *id.* at 1003 (indicating that deciding in the plaintiffs’ favor would require the Court to overrule *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999)). The Court in *Allen* declined to revisit the relevant precedent because the plaintiff as-

Chief Justice Roberts was in the majority in all four rulings at the close of the October 2018 term.²³ Three of the cases were decided by a 5-4 margin.²⁴ In *Franchise Tax Board v. Hyatt*,²⁵ the Chief Justice joined his conservative brethren in overturning the Court's 1979 decision in *Nevada v. Hall*.²⁶ About a month later, the Chief Justice wrote the opinion for the same conservative majority in *Knick v. Township of Scott*,²⁷ a case in which the Court discarded *Williamson County Regional Planning Commission v. Hamilton Bank*,²⁸ which dated back to 1985.²⁹ Justice Breyer dissented in *Hyatt* and "wonder[ed] which cases the Court [would] overrule next."³⁰ Justice Kagan latched on to this in her *Knick* dissent, responding: "[T]hat didn't take long. Now one may wonder yet again."³¹

Just days after the Court released its opinion in *Knick*, however, Chief Justice Roberts allied with the Court's progressives in *Kisor v. Wilkie*³² to uphold decisions from 1997 and 1945—*Auer v. Robbins*³³ and *Bowles v. Seminole Rock & Sand Co.*³⁴ Less than a year later, the Chief Justice once again exhibited a reticence to overrule precedent, pairing up with Justices Alito and Kagan to decry the 6-3 decision in *Ramos v. Louisiana*³⁵ that disposed of *Apodaca v. Oregon*,³⁶ a 1972 Sixth Amendment ruling.³⁷

serted nothing more than that the earlier case was decided incorrectly. *See id.* (explaining that "error alone . . . cannot overcome *stare decisis*").

23. *Kisor*, 139 S. Ct. at 2408; *Knick*, 139 S. Ct. at 2166-67; *Gamble*, 139 S. Ct. at 1963; *Hyatt*, 139 S. Ct. at 1490.

24. *Kisor*, 139 S. Ct. at 2408; *Knick*, 139 S. Ct. at 2166-67; *Hyatt*, 139 S. Ct. at 1490.

25. 139 S. Ct. 1485.

26. 440 U.S. 410; *see Hyatt*, 139 S. Ct. at 1490.

27. 139 S. Ct. 2162.

28. 473 U.S. 172 (1985).

29. *Knick*, 139 S. Ct. at 2179.

30. *Hyatt*, 139 S. Ct. at 1506 (Breyer, J., dissenting).

31. *Knick*, 139 S. Ct. at 2190 (Kagan, J., dissenting).

32. 139 S. Ct. 2400 (2019).

33. 519 U.S. 452 (1997).

34. 325 U.S. 410 (1945); *see Kisor*, 139 S. Ct. at 2408 (affirming *Auer* and *Seminole Rock*).

35. 140 S. Ct. 1390 (2020).

36. 406 U.S. 404 (1972).

37. *See Ramos*, 140 S. Ct. at 1439-40 (Alito, J., dissenting) (asserting that the Court should have upheld *Apodaca* based on *stare decisis*).

The Chief Justice's votes in *Hyatt*, *Knick*, *Kisor*, and *Ramos* evidence a complex and nuanced view about the place of stare decisis in our constitutional system. With these cases in the backdrop, eyes naturally turn to the Chief Justice when it comes to abortion. Indeed, his beliefs about stare decisis could prove critical to the continuing vitality of *Roe* and the right to choose that the Court recognized in 1973.

This Article examines Chief Justice Roberts's approach to stare decisis, attempting to identify matters that could prove important to him in evaluating *Roe*, but without offering a prediction about how he would vote in a case challenging the decision. Part I explores the Court's jurisprudence with respect to stare decisis since the Chief Justice took his seat on the Court, surveying how the Court has applied the principle in statutory, procedural, and constitutional contexts and describing important concurring and dissenting opinions that the Chief Justice either has written himself or has joined. Part II then attempts to distill from the Chief Justice's historical statements and positions on stare decisis particular matters that may influence his thinking about the principle in relation to *Roe*. In so doing, the Article highlights critical points for parties to address as they try to persuade the Chief Justice to vote one way or the other. Finally, the Article concludes that, to win Chief Justice Roberts's vote to overrule *Roe*, challengers will need to prove that *Roe* was "not just wrong," but that "[i]ts reasoning was exceptionally ill founded"³⁸ and that continuing to recognize a constitutional right to choose abortion would "do[] more damage to [the rule of law] than to advance it."³⁹

The Chief Justice admitted in his confirmation hearing that "it is a jolt to the legal system when you overrule a precedent."⁴⁰ History tells us, however, that the Chief Justice believes fidelity to the Constitution is paramount and sometimes demands that the legal system absorb the shock.⁴¹

38. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019).

39. *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

40. *Confirmation Hearing*, *supra* note 3, at 144 (statement of Judge John G. Roberts, Jr.).

41. *See, e.g., Knick*, 139 S. Ct. at 2166–67.

I. THE CHIEF JUSTICE'S HISTORICAL APPROACH TO STARE DECISIS

Stare decisis is not a monolithic principle, as Chief Justice Roberts explained in his confirmation hearing.⁴² It takes on “special force” with respect to a precedent that interprets a statute because, through subsequent legislation, Congress can remedy an erroneous ruling.⁴³ The principle is weaker, on the other hand, with respect to constitutional matters given that, absent Court action, correction usually requires the people to go through the onerous process of amending the Constitution.⁴⁴ But even these general parameters only go so far, for a weaker form of stare decisis applies when the Court interprets the Sherman Antitrust Act,⁴⁵ and according to Chief Justice Roberts, a stronger version applies in constitutional matters involving the dormant Commerce Clause.⁴⁶

In the Court's 2019 decision in *Gamble v. United States*,⁴⁷ Justice Thomas announced his view that, in applying stare decisis, the Court should consider only whether the prior decision is “demonstrably erroneous.”⁴⁸ If it is, according to Justice Thomas, the Court should overrule the decision without considering

42. See *Confirmation Hearing*, *supra* note 3, at 164 (statement of Judge John G. Roberts, Jr.) (indicating that stare decisis “is strongest when you’re dealing with a statutory decision” but enjoys less force in constitutional matters).

43. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014) (“The principle of *stare decisis* has ‘special force’ ‘in respect to statutory interpretation’ because ‘Congress remains free to alter what we have done.’” (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008))).

44. *Knick*, 139 S. Ct. at 2177–78 (“The doctrine ‘is at its weakest when we interpret the Constitution’ . . . because only this Court or a constitutional amendment can alter our holdings.” (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997))); see also U.S. CONST. art. V (requiring ratification by three-fourths of the states for constitutional amendments).

45. 15 U.S.C. § 1 (2018); *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2412 (2015) (“This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act.” (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20–21 (1997))); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“*Stare decisis* is not as significant in this case, . . . because the issue before us is the scope of the Sherman Act.” (citing *Khan*, 522 U.S. at 20)).

46. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2102 (2018) (Roberts, C.J., dissenting) (“We have applied this heightened form of *stare decisis* in the dormant Commerce Clause context.”).

47. 139 S. Ct. 1960 (2019).

48. *Id.* at 1984–85 (Thomas, J., concurring).

other factors that might weigh in favor of retaining the precedent as a matter of policy.⁴⁹ The Chief Justice Roberts does not agree. Not only did he not support Justice Thomas's concurrence in *Gamble*, he spoke of the traditional factors underlying stare decisis in his confirmation hearing,⁵⁰ dissented from the Court's 2018 decision to overrule precedent in *South Dakota v. Wayfair*⁵¹ even though he believed the previous cases were wrongly decided,⁵² and voted in *Kisor* and *Ramos* to uphold *Auer*, *Seminole Rock*, and *Apodaca*, not based on the soundness of those rulings, but on the grounds of stare decisis alone.⁵³ If this were not enough, the Chief Justice made his view abundantly clear in *Allen v. Cooper*⁵⁴ by joining Justice Kagan's opinion for the Court, which explained that, "with th[e] charge of error alone, [one] cannot overcome *stare decisis*."⁵⁵

As the Chief Justice stressed in *Citizens United v. FEC*:⁵⁶ "*Stare decisis* is . . . a 'principle of policy.' When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against

49. See *id.* at 1981–82 ("The Court currently views *stare decisis* as a 'principle of policy' that balances several factors This approach . . . might have made sense in a common-law legal system But our federal system is different." (quoting *Citizens United v. FEC*, 558 U.S. 310, 363 (2010)) (internal quotation marks omitted)). Justice Thomas reiterated this view in *Ramos* and in another 2020 concurrence. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1421–22 (2020) (Thomas, J., concurring in the judgment); *Allen v. Cooper*, 140 S. Ct. 994, 1007–08 (2020) (Thomas, J., concurring in part and concurring in the judgment).

50. *Confirmation Hearing*, *supra* note 3, at 143–44 (statement of Judge John G. Roberts, Jr.) ("It is not enough that you may think the prior decision was wrongly decided. . . . [Y]ou . . . look at these other factors, like settled expectations, like the legitimacy of the Court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments.").

51. 138 S. Ct. 2080.

52. *Id.* at 2101 (Roberts, C.J., dissenting) (indicating that, although he "agree[d] that [*National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967)] was wrongly decided," he would have "decline[d] the invitation" to overrule it).

53. See *Ramos*, 140 S. Ct. at 1434 (Alito, J., dissenting) (with Chief Justice Roberts joining) ("I cannot say that I would have agreed either with Justice White's analysis or his bottom line in *Apodaca* if I had sat on the Court at that time"); *Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring) (joining the majority opinion's consideration of stare decisis, but not its evaluation of whether *Auer* and *Seminole Rock* were correctly decided).

54. 140 S. Ct. 994.

55. *Id.* at 1003.

56. 558 U.S. 310 (2010).

the importance of having them *decided right*.”⁵⁷ To earn the Chief Justice’s vote to overrule *Roe*, it will take more than convincing him that the Court got it wrong in 1973.

A. *Stare Decisis with Greater Force*

Except with respect to a ruling that interpreted the Sherman Antitrust Act,⁵⁸ Chief Justice Roberts consistently has voted in favor of upholding precedent based on stare decisis when the earlier rulings have involved either statutory interpretation or a field in which Congress exercises primary authority.⁵⁹ In those cases, the Chief Justice has stressed, the Court should exercise restraint and defer to Congress because “legislators may more directly consider the competing interests at stake” and “ha[ve] the capacity to investigate and analyze facts beyond anything the Judiciary could match.”⁶⁰

In 2008, Chief Justice Roberts joined the majority in *John R. Sand & Gravel Co. v. United States*,⁶¹ a decision in which the Court gave brief attention to stare decisis when declining an invitation to overrule the Court’s decisions in three cases: *Soriano v. United States*,⁶² *Finn v. United States*,⁶³ and *Kendall v. United*

57. *Id.* at 378 (Roberts, C.J., concurring) (citation omitted) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

58. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

59. One might argue that the Chief Justice did not take this approach when he joined Justice Alito’s dissent in *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), with respect to a Patent Act decision or when he wrote the majority opinion in *Knick* which involved a practical problem that Congress could solve by amending a statute. See *infra* notes 231–254, 314–326 and accompanying text (discussing *Kimble* and *Knick*). But Justice Alito asserted in *Kimble* that the precedent the Court refused to overrule “d[id] not actually interpret a statute,” *Kimble*, 135 S. Ct. at 2418 (Alito, J., dissenting), and in *Knick*, the Chief Justice stressed that Congress could not offer a complete solution to the prior opinion’s erroneous interpretation of the Constitution. *Knick*, 139 S. Ct. at 2179 (“But takings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement . . .”).

60. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2104 (2018) (Roberts, C.J., dissenting) (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 309 (1997)) (internal quotation marks omitted); see *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 277 (2014) (indicating that concerns regarding abuses associated with securities class action law suits “are more appropriately addressed to Congress”).

61. 552 U.S. 130 (2008).

62. 352 U.S. 270 (1957).

63. 123 U.S. 227 (1887).

States.⁶⁴ The Court had concluded in all three that the statute of limitations for federal claims is jurisdictional in nature,⁶⁵ and consistent with those decisions, the *John R. Sand* Court ruled that the Court of Federal Claims must consider the running of any applicable statute of limitations even if the government does not assert the statute as a defense.⁶⁶

Noting the “special force” of stare decisis with respect to statutory interpretation, the Court rejected arguments that the prior decisions had proved unworkable and that reliance interests were not an impediment to overruling them.⁶⁷ With regard to workability, the Court emphasized that its different treatment of “similarly worded[] statutes” more recently did not mean that the previous decisions had become unworkable, but if anything, reflected varying judicial assumptions.⁶⁸ Moreover, for reasons not explained, the Court indicated that, even if no governmental reliance on the earlier decisions could be established, having a settled matter now reversed could prove harmful.⁶⁹

Just months after *John R. Sand*, the Court applied principles of stare decisis in a nontraditional way—to determine the scope of a civil rights statute. In *CBOCS West, Inc. v. Humphries*,⁷⁰ the Chief Justice again joined the opinion of the Court, which this time concluded that a person may make an unlawful retaliation claim under 42 U.S.C. § 1981.⁷¹ In arriving at its decision, the Court reasoned that § 1981 historically has been treated in a manner similar to 42 U.S.C. § 1982, that in *Sullivan v. Little Hunting Park, Inc.*⁷² in 1969 and *Jackson v. Birmingham Board of Education*⁷³ in 2005, the Court considered § 1982 to include a claim for retaliation, and that after the Court had interpreted § 1981 to reach only conduct related to the formation of a con-

64. 107 U.S. 123 (1883); see *John R. Sand*, 552 U.S. at 138–39.

65. See *John R. Sand*, 552 U.S. at 134–36.

66. *Id.* at 132.

67. *Id.* at 139.

68. *Id.* at 138–39.

69. See *id.* at 139.

70. 553 U.S. 442 (2008).

71. *Id.* at 446 (“The question before us is whether § 1981 encompasses retaliation claims. We conclude that it does.”).

72. 396 U.S. 229 (1969).

73. 544 U.S. 167 (2005).

tract, Congress amended § 1981 in a way that permitted the Court to decide that it covered retaliation.⁷⁴

Using *stare decisis* to justify its decision, the Court explained that *Sullivan* (as the Court in *Jackson* understood and applied it), when combined with the Court's extensive historical practice of treating §§ 1981 and 1982 similarly, indicates that "the view that § 1981 encompasses retaliation claims is . . . well embedded in the law."⁷⁵ As a result, the Court suggested, ruling to the contrary would undermine "many Court precedents" and effectively would overrule *Sullivan*.⁷⁶ According to the Court, the age of the *Sullivan* decision weighed against going that far.⁷⁷ Moreover, in disposing of CBOCS's argument that since *Sullivan* the Court has taken a more textualist approach to statutory interpretation, the CBOCS Court declared that changes in interpretive methods would not justify reconsideration of "well-established prior law."⁷⁸

Returning to the traditional context for analyzing what *stare decisis* requires, the Court in *Michigan v. Bay Mills Indian Community*⁷⁹ decided against overruling its 1998 decision in *Kiowa Tribe v. Manufacturing Technologies, Inc.*⁸⁰ Contending that abrogating sovereign immunity was a matter for Congress and not the courts, the *Kiowa* Court had concluded that tribal sovereign immunity extends to suits with respect to a tribe's commercial activities even when those activities are not conducted on tribal lands.⁸¹ The Court in *Bay Mills*, with the Chief Justice in the majority, indicated that, "[h]aving held in *Kiowa* that this issue is up to Congress, [it could not] reverse [itself] because some may think its conclusion wrong"⁸² and that it would "scale the heights of presumption" for the Court to overturn

74. See CBOCS, 553 U.S. at 451.

75. *Id.*

76. *Id.* at 451–52.

77. See *id.* at 453 ("[W]e believe it is too late in the day in effect to overturn the holding in that case (nor does CBOCS ask us to do so) on the basis of a linguistic argument that was apparent, and which the Court did not embrace at that time.").

78. *Id.* at 457.

79. 572 U.S. 782 (2014).

80. 523 U.S. 751 (1998); see *Bay Mills*, 572 U.S. at 791.

81. See *Bay Mills*, 572 U.S. at 790.

82. *Id.* at 803.

Kiowa after Congress specifically considered *Kiowa* when debating legislation that would modify tribal immunity.⁸³

In declining Michigan's request to overrule *Kiowa*, the *Bay Mills* Court indicated that several *stare decisis* factors raised a bar that Michigan could not overcome. Looking both forward and backward, the Court noted that *Kiowa* itself had "reaffirmed a long line of precedents"⁸⁴ and that the Court later followed *Kiowa* in a case involving commercial activity conducted outside tribal lands.⁸⁵ Moreover, the Court highlighted that "concerns of *stare decisis* . . . are 'at their acme'" in property and contract cases, and parties have looked to *Kiowa* in designing business transactions.⁸⁶ In addition, the Court noted that Michigan had not offered any new arguments and that the state's argument regarding changes in tribal commercial activity had been disposed of previously.⁸⁷ Finally, the *Bay Mills* Court emphasized that *Kiowa* recognized that "Congress . . . has the greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests' involved" and its decisions therefore should command respect.⁸⁸

One sees a similar emphasis on deferring to Congress in opinions Chief Justice Roberts authored after *Bay Mills*. Writing the opinion of the Court in 2014 in *Halliburton Co. v. Erica P. John Fund, Inc.*⁸⁹ and a dissent in the Court's 2018 *South Dakota v. Wayfair, Inc.* decision, Chief Justice Roberts rejected the idea that the Court should abandon precedents that arguably had become outmoded because of changes in the economy or in our understanding of the economy.⁹⁰ According to the Chief Justice,

83. *Id.*

84. *Id.* at 798.

85. *See id.* (indicating that the Court began with *Kiowa* when it reached its decision in *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe*, 532 U.S. 411 (2001)).

86. *Id.* at 799 (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997)).

87. *Id.*

88. *Id.* at 800–01 (quoting *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998)).

89. 573 U.S. 258 (2014).

90. *See id.* at 272 ("Halliburton has not identified the kind of fundamental shift in economic theory that could justify overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities."); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2104 (2018) (Roberts, C.J., dissenting) ("The Court is of course correct that the Nation's economy has changed dramatically since the

it is best to leave such considerations to Congress and, if the Court had erred, allow Congress to provide the remedy.⁹¹ As he emphasized in *Wayfair*:

A good reason to leave these matters to Congress is that legislators may more directly consider the competing interests at stake. Unlike this Court, Congress has the flexibility to address these questions in a wide variety of ways. . . . Congress “has the capacity to investigate and analyze facts beyond anything the Judiciary could match.”⁹²

In *Halliburton*, though, *stare decisis* may not have been the most compelling motivation for the Chief Justice’s vote to retain a controversial aspect of the Court’s 1988 decision in *Basic, Inc. v. Levinson*.⁹³ As Justice Kagan explained in *Kimble v. Marvel Entertainment, LLC*,⁹⁴ “*stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.”⁹⁵ And it seems that Chief Justice Roberts was not convinced that the *Basic* Court had gone off track.⁹⁶

The Court long has recognized that Rule 10b-5 under the Securities Exchange Act of 1934⁹⁷ includes a private cause of action for securities fraud,⁹⁸ and to recover, a plaintiff must establish reliance on the defendant’s false or misleading statement.⁹⁹ In *Basic*, the Court made this task easier for Rule 10b-5

time that *Bellas Hess* and *Quill* roamed the earth. I fear the Court today is compounding its past error by trying to fix it in a totally different era.”).

91. See *Wayfair*, 138 S. Ct. at 2104–05 (Roberts, C.J., dissenting) (“I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century.”); *Halliburton*, 573 U.S. at 277 (“[C]oncerns [about abuses in class actions] are more appropriately addressed to Congress . . .”).

92. *Wayfair*, 138 S. Ct. at 2104 (Roberts, C.J., dissenting) (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 309 (1997)).

93. 485 US 224 (1988).

94. 135 S. Ct. 2401 (2015).

95. *Id.* at 2409.

96. See *Halliburton*, 573 U.S. at 272 (“The academic debates . . . have not refuted the modest premise underlying [*Basic*’s] presumption of reliance.”).

97. 15 U.S.C. §§ 78a–78qq (2018).

98. *Halliburton*, 573 U.S. at 267 (“[W]e have long recognized an implied private cause of action to enforce [section 10(b) of the Securities Exchange Act of 1934] and its implementing regulation.” (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975))).

99. *Id.*

plaintiffs by giving them the benefit of a rebuttable presumption of reliance based on the “fraud-on-the-market” theory, which hypothesizes that the market price of securities traded on an efficient market will incorporate all information publicly available, including false or misleading statements.¹⁰⁰ Urging the Court to overrule *Basic*’s presumption, the defendants in *Halliburton* argued that the presumption was inconsistent with congressional intent and based on since-discredited economic theory.¹⁰¹

Refusing to overrule *Basic*’s presumption of reliance, the *Halliburton* Court observed that the defendants had not offered any new arguments regarding congressional intent that would give the Court cause to revisit the question.¹⁰² In addition, the Court determined that subsequent developments in economic theory did not undermine the presumption’s validity, but instead informed assessments of when the presumption applies or has been rebutted.¹⁰³ The Court in *Halliburton* also observed that *Basic* itself acknowledged the controversy surrounding the underlying economic theory and that the ensuing debate has not undermined *Basic*’s “modest premise.”¹⁰⁴ Moreover, the *Halliburton* Court asserted, the defendants had not “identified the kind of fundamental shift in economic theory that could justify overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities.”¹⁰⁵

The Court in *Halliburton* also concluded that the principle of stare decisis stood in the way of overruling *Basic*’s presumption. Acknowledging that *Basic*’s presumption related to a judicially-created implied cause of action,¹⁰⁶ the Court insisted that *Basic* enjoyed the weighty form of stare decisis that applies to statutory interpretation because Congress can modify the Rule 10b-5 private cause of action if it disagrees with how the Court has

100. *Id.* at 268.

101. *Id.* at 269.

102. *Id.* at 270.

103. *Id.* at 272 (“[I]n making the presumption rebuttable, *Basic* recognized that market efficiency is a matter of degree and accordingly made it a matter of proof.”).

104. *Id.*

105. *Id.*

106. *Id.* at 274.

applied it. In fact, the *Halliburton* Court asserted, the abuses in securities fraud cases that the defendants cited were better addressed by Congress, which had enacted remedial statutes twice since *Basic*.¹⁰⁷ Finally, the Court denied that *Basic*'s presumption conflicted with more recent decisions.¹⁰⁸

Unlike in *Halliburton*, the *Wayfair* Court was undeterred by stare decisis when it upheld a South Dakota law that requires an out-of-state merchant to collect sales taxes with respect to sales made in the South Dakota even when the merchant has no physical presence there.¹⁰⁹ In the course of reaching its decision, the Court overruled *National Bellas Hess, Inc. v. Department of Revenue*¹¹⁰ and *Quill Corp. v. North Dakota*,¹¹¹ in which the Court had determined that the Constitution required a "physical presence" before a state could impose a collection obligation on out-of-state residents.¹¹²

In overruling *Bellas Hess* and *Quill*, the *Wayfair* majority emphasized that changes in the economic landscape, with the surge of internet sales, undermined the justifications for the physical presence rule.¹¹³ Moreover, the Court insisted that *Bellas Hess* and *Quill* have resulted in a "judicially created tax shelter" and arbitrary discrimination against "economically identical actors."¹¹⁴ The physical presence rule, the *Wayfair* Court contended, was "an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions,"¹¹⁵ and allowing the rule to persist might undermine the Court's legitimacy concerning the cases involving the regulation of interstate commerce.¹¹⁶

107. *Id.* at 274, 276–77.

108. *Id.* at 274–76.

109. *See* South Dakota v. Wayfair, 138 S. Ct. 2080, 2091–92, 2099 (2018).

110. 386 U.S. 753 (1967).

111. 504 U.S. 298 (1992).

112. *Wayfair*, 138 S. Ct. at 2099.

113. *Id.* at 2093 ("[T]he administrative costs of compliance [with a sales tax collection requirement], especially in the modern economy with its Internet technology, are largely unrelated to whether a company happens to have a physical presence in a State.").

114. *Id.* at 2094.

115. *Id.* at 2095.

116. *See id.* at 2096 ("It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. This is also essential to the confi-

According to the *Wayfair* majority, *stare decisis* did not stand in the way of overruling *Bellas Hess* and *Quill*.¹¹⁷ Although the *Wayfair* Court acknowledged that Congress could abrogate the “physical presence” rule under its power to regulate interstate commerce, the Court stressed that Congress could not correct an erroneous constitutional interpretation.¹¹⁸ *Quill*, the Court held, was wrong when decided and changes in the economy only have made its effects more serious.¹¹⁹ Furthermore, the Court opined that the physical presence rule was unworkable because attempting to define what constitutes physical presence has become increasingly difficult in the modern age, creating the risk that “technical and arbitrary disputes” would flood the court system.¹²⁰ In addition, the Court stressed that reliance interests can prop up errant precedent only when the interests are “legitimate,” and they were not in the case of the physical presence rule because the rule aided consumers in avoiding tax obligations.¹²¹ Moreover, the Court indicated that “other aspects of the Court’s Commerce Clause doctrine” could fill the gaps in the protection of interstate commerce that abolition of the physical presence rule might leave open.¹²²

In dissent, Chief Justice Roberts agreed that *Bellas Hess* was incorrect when decided, but he argued that the Court should have upheld *Bellas Hess* and *Quill* based on *stare decisis*.¹²³ Similar to his view in *Halliburton*, the Chief Justice pointed to the particular strength of the doctrine when Congress can correct the Court’s missteps,¹²⁴ and he contended that the Court should avoid making new mistakes in trying to address changes in

dence placed in this Court’s Commerce Clause decisions. Yet the physical presence rule undermines that necessary confidence . . .”).

117. *See id.*

118. *Id.*

119. *See id.* at 2097 (“Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.”).

120. *Id.* at 2098.

121. *Id.*

122. *Id.*

123. *Id.* at 2101 (Roberts, C.J., dissenting).

124. *Id.* (explaining that the force of *stare decisis* is “even higher [than normal] in fields in which Congress ‘exercises primary authority’ and can, if it wishes, override this Court’s decisions with contrary legislation” (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 (2014))).

economic reality: “I fear the Court today is compounding its past error by trying to fix it in a totally different era. . . . I would let Congress decide whether to depart from the physical-presence rule that has governed this area for half a century.”¹²⁵ He also asserted that there is even more reason to uphold the physical presence rule under stare decisis because the Court had reaffirmed the rule in *Quill*, “toss[ing] [the ball] into Congress’s court” a second time.¹²⁶ In addition, the Chief Justice stressed that Congress has been considering how to address collection of taxes in the changing economy and the Court’s decision to abandon the rule could impede congressional action.¹²⁷

The Chief Justice’s espousal of deference to the political branches when possible was on display most recently in *Kisor v. Wilkie*, a 2019 case in which the only question at issue was whether to retain or overrule *Auer v. Robbins* and *Bowles v. Seminole Rock*.¹²⁸ In *Auer* and *Seminole Rock*, the Court determined that courts should defer to reasonable agency interpretations of ambiguous regulations,¹²⁹ and with significant attention to the principles of stare decisis, the Court upheld both.¹³⁰

Chief Justice Roberts was the swing vote in *Kisor*’s five-Justice majority, but unlike the other four Justices, he did not vote to uphold *Auer* and *Seminole Rock* because he believed they were correctly decided.¹³¹ Instead, his vote turned solely on the Court’s application of stare decisis.¹³² In applying the principle to *Auer* and *Seminole Rock*, the Court emphasized that Congress has the ability to alter decisions deferring to agency interpretations—thus enhancing the force of stare decisis—and that Congress had declined to do so even as Supreme Court Justices

125. *Id.* at 2104–05.

126. *Id.* at 2102 (second alteration in original) (quoting *Kimble v. Marvel Entm’t, Inc.*, 135 S. Ct. 2401, 2409 (2015)) (internal quotation marks omitted).

127. *See id.* at 2102–03.

128. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

129. *See id.* (citing *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)).

130. *See id.*

131. *See id.* at 2424 (Roberts, C.J., concurring in part).

132. *See id.* (“For the reasons the Court discusses in [the part of the Court’s opinion addressing stare decisis], I agree that overruling those precedents is not warranted.”).

have questioned the propriety of deference.¹³³ Moreover, the Court stressed that overruling *Auer* and *Seminole Rock* would introduce unparalleled uncertainty with respect to previous Court decisions:

Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law. . . . [B]ecause that is so, abandoning *Auer* deference would cast doubt on many settled constructions of rules . . . [and] would allow relitigation of any decision based on *Auer* It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.¹³⁴

Finally, the *Kisor* Court pointed out the fact that a decision was incorrect or poorly reasoned is not the measure for stare decisis and that the petitioner had not argued that deference was unworkable, nor had he identified changes in legal doctrine that undermine *Auer*.¹³⁵

B. Stare Decisis with Lesser Force

Although the Chief Justice consistently has voted against overruling precedents in which stare decisis enjoys particular force, he has not been so confined in contexts in which he has considered the principle's effect more modest. The Chief Justice, however, favored restraint in the first case after his elevation to the Court that specifically implicated the effect of stare decisis.

In *Randall v. Sorrell*¹³⁶ a fractured Court reversed the decision of the Court of Appeals for the Second Circuit to uphold a Vermont law limiting campaign contributions and expenditures.¹³⁷ Justice Breyer announced the judgment of the Court in *Randall*, but only Chief Justice Roberts joined in Justice Breyer's treatment of stare decisis.¹³⁸ According to Justice Breyer, the defendants in *Randall* "in effect" had asked the Court to over-

133. *Id.* at 2422–23 (majority opinion) (explaining conclusion power and pointing out that Congress has declined to exercise it).

134. *Id.* at 2422.

135. *Id.* at 2423.

136. 548 U.S. 230 (2006).

137. *Id.* at 236, 263 (plurality opinion).

138. *Id.* at 235.

rule *Buckley v. Valeo*,¹³⁹ a 1976 decision in which the Court struck down on First Amendment grounds federal campaign expenditure limits, but concluded that the contribution limits in the federal law did not contravene the Constitution's free speech guarantee.¹⁴⁰ Justice Breyer insisted that principles underlying *stare decisis* weighed against overruling *Buckley*.¹⁴¹ In particular, he stressed that adhering to precedent is particularly important when it "has become settled through iteration and reiteration over a long period of time"¹⁴² and that the Court repeatedly had applied *Buckley* in subsequent cases.¹⁴³ Moreover, he pointed out that circumstances have not changed that weaken the legal principles described in or the factual basis underlying *Buckley* and that Congress and state legislatures have relied on the decision in crafting campaign finance laws.¹⁴⁴

Just a year after *Randall*, though, Chief Justice Roberts was willing to dispense with an antitrust precedent. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹⁴⁵ the Chief Justice was part of a five-Justice conservative majority that overruled the Court's nearly 100-year-old decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*¹⁴⁶ The *Leegin* Court explained that the Court has understood *Dr. Miles* as adopting a *per se* rule that an agreement between a manufacturer and a distributor setting a minimum price for resale of a good—that is, a vertical price restraint—is illegal under section 1 of the Sherman Antitrust Act.¹⁴⁷ Emphasizing changes in the American economy and advances in understanding the effect of such agreements, the

139. 424 U.S. 1 (1976); *Randall*, 548 U.S. at 243 (plurality opinion). Justices Kennedy, Souter, and Ginsburg, however, indicated that the defendants had not asked the Court to overrule *Buckley*. See *id.* at 264 (Kennedy, J., concurring in the judgment) ("The parties [do not] ask the Court to overrule *Buckley* in full . . ."); *id.* at 283 (Souter, J., dissenting) ("Vermont's argument . . . does not ask us to overrule *Buckley* . . .").

140. See *Randall*, 548 U.S. at 241 (plurality opinion).

141. *Id.* at 243–44.

142. *Id.* at 244; see *id.* at 242 (citing the number times that the Court has applied *Buckley* since it was decided).

143. *Id.* at 244 ("[T]his Court has followed *Buckley*, upholding and applying its reasoning in later cases.").

144. *Id.*

145. 551 U.S. 877 (2007).

146. 220 U.S. 373 (1911); see *Leegin*, 551 U.S. at 882.

147. See *Leegin*, 551 U.S. at 881.

Court in *Leegin* indicated that, if it were considering the matter in the first instance, it would not adopt a per se rule, but a rule of reason under which the factfinder evaluates whether a particular vertical price restraint is anticompetitive and therefore illegal under the Sherman Act.¹⁴⁸

Nevertheless, the *Leegin* Court acknowledged that it was not “writ[ing] on a clean slate” and had to consider whether the force of stare decisis was enough to sustain *Dr. Miles*.¹⁴⁹ The Court determined that it was not.¹⁵⁰ Although it admitted stare decisis’s potency in relation to statutory interpretation, the Court stressed that the principle is weaker with respect to the Sherman Act because the Court always has viewed the Act as “a common-law statute” whose interpretation evolves as the Court determines from time to time.¹⁵¹ With economics experts widely agreeing that restrictions on resale prices can be pro-competitive and federal antitrust enforcement agencies recommending against a per se rule, the Court explained, revisiting *Dr. Miles* was appropriate.¹⁵² The Court added that, since *Dr. Miles* was decided, the Court had distanced itself from the ruling’s underlying rationales and, in fact, began to “rein[] in the decision” just eight years after the Court handed it down.¹⁵³ In addition, according to the Court, it later had taken a more relaxed approach to vertical restraints on trade.¹⁵⁴ Moreover, the Court asserted that *Dr. Miles* was “inconsistent with a principled framework” governing vertical restraints on trade, and the Court expressed concern that failing to overrule *Dr. Miles* would give rise to questions about the continuing validity of more recent decisions.¹⁵⁵ The per se rule arising from *Dr. Miles*, the Court concluded, “[was] a flawed antitrust doctrine that serve[d] the interests of lawyers—by creating legal distinctions that operate[d] as traps for the unwary—more than the interests

148. *See id.* at 885, 887–99.

149. *Id.* at 899.

150. *Id.* at 900 (“*Stare decisis*, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints.”).

151. *Id.* at 899.

152. *See id.*

153. *Id.* at 901 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307–08 (1919)).

154. *See id.* at 901–02.

155. *Id.* at 902–03.

of consumers—by requiring manufacturers to choose second-best options to achieve sound business objectives.”¹⁵⁶ Finally, the Court explained that reliance interests could not “justify an inefficient rule” and were not a significant consideration with respect to *Dr. Miles* because the per se rule was relatively narrow, allowing manufacturers to achieve similar ends through other means.¹⁵⁷

In contrast to the divisions in *Randall* and *Leegin*, the Court spoke with one voice in *Pearson v. Callahan*¹⁵⁸ as it overruled the requirement in *Saucier v. Katz*¹⁵⁹ that courts employ a rigid analytical structure in determining whether a defendant in an action under 42 U.S.C § 1983 is entitled to qualified immunity.¹⁶⁰ The *Pearson* Court explained that *Saucier* required judges first to evaluate whether the facts alleged or shown would support a claim for a constitutional violation and then whether the violation was clear at the time the defendant took the offending action.¹⁶¹ Determining that stare decisis did not require otherwise, the Court in *Pearson* ruled that a court has the discretion to grant a defendant immunity from suit solely because a violation was unclear, without considering whether the facts alleged or shown support the plaintiff’s claim that the defendant actually violated the plaintiff’s constitutional rights.¹⁶²

In reaching the decision to limit *Saucier*, the Court indicated that the strength that stare decisis bears when precedent interprets a statute or involves a matter that Congress may correct does not apply to court-fashioned rules designed to govern judicial operations.¹⁶³ Moreover, the Court stated, “Revisiting precedent is particularly appropriate where . . . a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the op-

156. *Id.* at 904.

157. *Id.* at 906.

158. 555 U.S. 223 (2009).

159. 533 U.S. 194 (2001).

160. *See Pearson*, 555 U.S. at 227 (“We now hold that the *Saucier* procedure should not be regarded as an inflexible requirement . . .”).

161. *Id.* at 232 (citing *Saucier*, 533 U.S. at 201).

162. *Id.* at 231–36 (concluding that *Saucier*’s procedure “should no longer be regarded as mandatory”).

163. *See id.* at 233–34.

eration of the courts, and experience has pointed up the precedent's shortcomings."¹⁶⁴ The *Saucier* rule, the Court insisted, all the more warranted reconsideration given that lower court judges and Justices on the Court repeatedly have criticized it.¹⁶⁵

The *Pearson* Court acknowledged that reliance interests can be significant when a prior ruling implicates property or contract rights, but it explained that that is not so with respect to judicially-created trial court procedures.¹⁶⁶ According to the Court, overruling *Saucier's* mandate would not upset anyone's "settled expectations."¹⁶⁷ And the Court stressed that the quality of *Saucier's* underlying reasoning and its workability were not relevant because the decision did not involve constitutional or statutory interpretation.¹⁶⁸ Instead, the Court emphasized, experience was the key consideration.¹⁶⁹

For the Court in *Pearson*, experience with *Saucier's* procedure weighed heavily in favor of abandoning it. First, according to the Court, *Saucier's* rule tended to waste both judicial resources and parties' resources with "[u]nnecessary litigation of constitutional issues."¹⁷⁰ Second, the *Pearson* Court observed that the *Saucier* rule had failed to achieve one of its intended benefits—developing a body of constitutional precedent.¹⁷¹ Third, the Court indicated that the rule might impede the ability of a party who wins on the second prong to seek review of a decision with respect to the first prong that would govern the party's future practices.¹⁷² Fourth, the Court stressed, "Adherence to [the *Saucier* structure] departs from the general rule of constitutional avoidance and runs counter to the 'older, wiser judicial counsel not to pass on questions of constitutionality . . . unless

164. *Id.* at 233.

165. *Id.* at 234–35.

166. *Id.* at 233.

167. *Id.*

168. *Id.* at 234.

169. *See id.* ("[I]t is sufficient that we now have a considerable body of new experience to consider regarding the consequences of requiring adherence to this inflexible procedure.").

170. *Id.* at 237.

171. *Id.* at 237–41.

172. *Id.* at 240 ("Rigid adherence to the *Saucier* rule may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations.").

such adjudication is unavoidable.”¹⁷³ Fifth, the Court identified the rigid *Saucier* structure as an outlier, given the latitude lower courts enjoy when making decisions with respect to comparable matters.¹⁷⁴ And finally, the *Pearson* Court denied that modifying *Saucier*’s mandate would be harmful, highlighting that lower courts remained free to apply *Saucier*’s two-step approach¹⁷⁵ and rejecting the argument that relaxing the *Saucier* rule would spawn suits against local governments or encourage litigation over standards for determining when a court must consider the merits of a case.¹⁷⁶

The Court’s unanimity in *Pearson* was short-lived. Three months after *Pearson*, the Court returned to a 5-4 split in *Arizona v. Gant*,¹⁷⁷ a Fourth Amendment decision in which the Chief Justice allied with Justices Kennedy, Breyer, and Alito in dissent.¹⁷⁸ The *Gant* majority concluded that, under the Court’s 1981 decision in *New York v. Belton*¹⁷⁹ and its 2004 decision in *Thornton v. United States*,¹⁸⁰ if no other exception to the warrant requirement applies, a police officer may search an arrestee’s vehicle without a warrant only when the arrestee has not been secured and can reach the passenger compartment or when the arresting officer reasonably believes that the compartment contains evidence related to the crime associated with the arrest.¹⁸¹ In reaching this decision, the Court refused to interpret *Belton* as establishing a bright-line rule allowing an officer to search a vehicle’s passenger compartment without a warrant when the search is in connection with an arrest of a recent occupant of the vehicle.¹⁸²

With the Chief Justice joining, Justice Alito argued in dissent that the majority effectively overruled *Belton* and *Thornton*

173. *Id.* at 241 (quoting *Scott v. Harris*, 550 U.S. 372, 388 (Breyer, J., concurring)) (internal quotation marks omitted).

174. *See id.* at 241–42.

175. *Id.* at 242–43.

176. *Id.* at 243.

177. 556 U.S. 332 (2009).

178. *Id.* at 355 (Alito, J., dissenting).

179. 453 U.S. 454 (1981).

180. 541 U.S. 615 (2004).

181. *See Gant*, 556 U.S. at 343.

182. *See id.* (rejecting “a broad reading of *Belton*”).

without the defendant's request that it do so,¹⁸³ disposing of the "bright-line" rule that the *Belton* Court adopted and that the *Thornton* Court understood *Belton* to recognize.¹⁸⁴ According to Justice Alito, the *Gant* Court should not have abandoned *Belton*'s clear rule,¹⁸⁵ and he addressed five factors relevant to stare decisis in reaching that conclusion: "whether the precedent has engendered reliance, whether there has been an important change in circumstances in the outside world, whether the precedent has proved to be unworkable, whether the precedent has been undermined by later decisions, and whether the decision was badly reasoned."¹⁸⁶

Although Justice Alito acknowledged that reliance normally is "most important" when property or contract rights are at issue, he also emphasized that the Court has weighed reliance "heavily" when a change would affect "embedded . . . routine police practice."¹⁸⁷ In addition, Justice Alito pointed out that police work had not become any more or less risky than it was when *Belton* was decided; therefore changed circumstances did not justify departing from *Belton*.¹⁸⁸ And he insisted that the broad reading given to *Belton* makes it very workable, supplying a rule that both judges and law enforcement officials easily can apply.¹⁸⁹ Rather, Justice Alito suggested, the *Gant* Court's new standard was the unworkable one, "reintroduc[ing] the same sort of case-by-case, fact-specific decisionmaking that the *Belton* rule was adopted to avoid."¹⁹⁰ As to inconsistency with later cases, Justice Alito noted none and that, in fact, the Court in *Thornton* had "reaffirmed and extended" the rule.¹⁹¹ More-

183. *Id.* at 356 (Alito, J., dissenting) ("Although the Court refuses to acknowledge that it is overruling *Belton* and *Thornton*, there can be no doubt that it does so."); *id.* at 365 ("Respondent in this case has not asked us to overrule *Belton* . . .").

184. *See id.* 356–57.

185. *Id.* at 358 (arguing that the principles underlying stare decisis "weigh in favor of retaining the rule established in *Belton*").

186. *Id.* at 358 (citations omitted).

187. *Id.* at 358–59 (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)) (internal quotation marks omitted).

188. *See id.* at 360.

189. *Id.*

190. *Id.*

191. *Id.* at 361.

over, contrary to the majority's view that a broad interpretation of *Belton* was inconsistent with the Court's 1969 decision in *Chimel v. California*,¹⁹² Justice Alito maintained that *Belton* represented only a slight extension of the rule in *Chimel* that the area subject to search extends just to the arrestee's body and to the area within which he or she might reach a weapon or evidence that could be destroyed.¹⁹³ According to Justice Alito, *Chimel* must have concluded that the measure of one's reach is determined at the time of arrest, not at the time of the search, and therefore, *Belton* merely avoided a case-by-case determination of a particular person's reach when he or she occupies a particular vehicle.¹⁹⁴

Later in the same term in which the Court decided *Pearson* and *Gant*, Chief Justice Roberts was part of a five-Justice conservative majority in *Montejo v. Louisiana*¹⁹⁵ that overruled *Michigan v. Jackson*,¹⁹⁶ a Sixth Amendment decision that "forb[ade] police [from] initiat[ing] interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding."¹⁹⁷ According to the *Montejo* Court, *Jackson* was unnecessary because rules established in Fifth Amendment cases sufficiently protect a defendant's Sixth Amendment right to counsel by barring certain conduct once a defendant approached for interrogation indicates that he or she wants an attorney.¹⁹⁸

Addressing *stare decisis*, the *Montejo* Court identified workability, *Jackson's* age, reliance, and the quality of *Jackson's* reasoning as the key considerations.¹⁹⁹ The Court in *Montejo* devoted quite a bit of attention to workability, explaining that the rule from *Jackson* did not make sense in states where a defend-

192. 395 U.S. 752 (1969).

193. See *Gant*, 556 U.S. at 361–63 (Alito, J., dissenting).

194. See *id.* 362–63.

195. 556 U.S. 778 (2009).

196. 475 U.S. 625 (1986).

197. *Montejo*, 556 U.S. at 780–81.

198. See *id.* 794–95.

199. *Id.* at 792 ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it." (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))); *id.* at 792–93 ("Beyond workability, the relevant factors . . . include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." (citing *Pearson v. Callahan*, 555 U.S. 223, 234–35 (2009))).

ant is appointed counsel either as a matter of course or by the court without any request.²⁰⁰ The Court then determined that *Jackson's* over-twenty-year life was no impediment to overruling it, and it decided that reliance likewise was not an issue because criminal defendants who understood *Jackson* did not need its protection and prosecutors remained free to limit themselves as *Jackson* had required.²⁰¹

With respect to the quality of the Court's reasoning in *Jackson*, the *Montejo* Court indicated that, because the rule at issue was a Court-created "prophylactic rule . . . to protect a constitutional right," the Court's inquiry consisted of weighing the rule's costs against its benefits.²⁰² And according to the Court, *Jackson's* benefits were insufficient when compared with its costs.²⁰³ The purpose of the *Jackson* rule, the Court explained, was to prevent "badgering" a defendant after the defendant asserts his or her right to counsel, and Fifth Amendment precedents are adequate for that end.²⁰⁴ Acknowledging Jesse *Montejo's* argument that Fifth Amendment protection only applies when a defendant is in custody, the Court indicated that protection otherwise is not critical because a defendant who is not in custody has other ways to avoid police attempts at interrogation without counsel present.²⁰⁵ Moreover, the Court pointed out the significant costs associated with *Jackson*, including the societal effects of deterring police from attempting to obtain voluntary confessions and of letting guilty parties go free.²⁰⁶

Chief Justice Roberts and the rest of the *Montejo* quintet got together again in *Citizens United v. FEC*, a controversial 2010 decision that overruled *Austin v. Michigan State Chamber of Commerce*²⁰⁷ and part of *McConnell v. FEC*.²⁰⁸ *Citizens United* in-

200. See *id.* at 784–85 (discussing the problems associated with the Louisiana Supreme Court's interpretation of *Jackson*).

201. *Id.* at 792–93.

202. *Id.* at 793.

203. *Id.* at 797 (concluding that the *Jackson* rule did not "pay its way" (quoting *United States v. Leon*, 468 U.S. 897, 907 n.6 (1984)) (internal quotation marks omitted)).

204. *Id.* at 794–95.

205. See *id.* at 795 ("When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering.").

206. *Id.* at 796.

207. 494 U.S. 652 (1990).

208. 540 U.S. 93 (2003); *Citizens United v. FEC*, 558 U.S. 310, 365–66 (2010).

volved a First Amendment challenge to a federal campaign finance statute.²⁰⁹ The statute barred a corporation from using its general funds to pay for a communication to be made during the period immediately before an election if the communication mentions a candidate for federal office by name.²¹⁰ The Court in *McConnell* had upheld the federal law, and according to the *Citizens United* Court, *McConnell* was predicated on *Austin*,²¹¹ a 1990 decision in which the Court rejected a challenge to a state law prohibiting similar corporate expenditures with respect to candidates for state office.²¹²

In overruling *Austin* and the part of *McConnell* that relied on *Austin*, the *Citizens United* Court evaluated whether *Austin* should enjoy the protection of stare decisis. And the following factors, the Court indicated, typically guide a stare decisis inquiry: workability, a precedent's age, reliance interests, the quality of a precedent's reasoning, and experience that "point[s] up [a] precedent's shortcomings."²¹³ The *Citizens United* Court, however, did not address workability or consider *Austin*'s twenty-year age. According to the Court, the other factors weighed heavily enough against *Austin*.²¹⁴

The Court in *Citizens United* commented that even the federal statute's proponents ignored *Austin*'s reasoning, turning instead to other justifications for the decision, and that *Austin* had "abandoned First Amendment principles" when it looked to an earlier case that erroneously described the history of campaign finance laws.²¹⁵ Regarding experience with *Austin*, the *Citizens United* Court noted that parties usually find ways around campaign finance laws and that continuing technological changes in how information is delivered counsel against restrictions on political speech "based on the corporate identity

209. *Citizens United*, 558 U.S. at 319, 321.

210. *Id.* at 320–21.

211. *Id.* at 331 ("The holding and validity of *Austin* were essential to the reasoning of the *McConnell* majority opinion . . .").

212. *See id.* at 347 (citing *Austin*, 494 U.S. at 695).

213. *Id.* at 362–63 (first citing *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009); then quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)) (internal quotation marks omitted).

214. *Id.* at 363–65.

215. *Id.* at 363.

of the speaker and the content of the . . . speech.”²¹⁶ Finally, the Court highlighted the absence of significant reliance on *Austin*, explaining that reliance considerations are more important where property and contract rights are at stake and stressing that legislative reliance through enacting campaign finance laws cannot prevent the Court from performing its duty to interpret the law accurately.²¹⁷

Chief Justice Roberts joined in full the majority opinion in *Citizens United*, but he also wrote separately to give particular attention to stare decisis.²¹⁸ Notably, the Chief Justice emphasized that reexamining *Austin* was appropriate because the Court had been asked to do so and because it could not grant the plaintiffs relief on narrower grounds.²¹⁹

The Chief Justice’s concurring opinion in *Citizens United* did not identify reaffirmation of an earlier decision as a relevant stare decisis factor, but he made the point that, in the case of *Austin*, earlier decisions could not “be understood as a *reaffirmation*” because the Court had not previously been asked to overrule *Austin*.²²⁰ In addition, the Chief Justice treated in detail two specific issues: whether *Austin* deviated from earlier Court decisions²²¹ and whether “adherence to [*Austin*] actually [would] impede[] the stable and orderly adjudication of future cases.”²²² With respect to the latter, the Chief Justice stressed that a precedent may be an impediment when its “validity is so hotly contested that it cannot reliably function as a basis for decision in future cases,” when the underlying basis “threatens to upend [the Court’s] settled jurisprudence in related areas of law,” and when, to stand by the precedent, the Court must adopt a justification different from the one underlying the precedent.²²³ According to the Chief Justice, all of these consid-

216. *Id.* at 364.

217. *Id.* at 365.

218. *Id.* at 372–85 (Roberts, C.J., concurring).

219. *Id.* at 374–76.

220. *Id.* at 377.

221. *Id.* at 378 (indicating that returning to previous decisions might more effectively serve the function of stare decisis).

222. *Id.* at 379.

223. *Id.*

erations tipped in favor of departing from the principle of *stare decisis* with respect to *Austin*.²²⁴

First, the Chief Justice asserted, *Austin* “departed from the robust protections” the Court otherwise had accorded to political speech and from the previously-held view that speech does not receive less First Amendment protection just because a corporation is the speaker.²²⁵ Second, the Chief Justice observed that *Austin* had not merely been controversial, but that the level of disagreement with the decision “undermine[d] [*Austin*]’s ability to contribute to the stable and orderly development of the law.”²²⁶ Third, the Chief Justice pointed to the fact that *Austin* had been extended beyond its scope to curtail First Amendment protection and that it might reach further in the future, threatening the speech protection that media corporations enjoy: “[B]ecause *Austin* is so difficult to confine to its facts—and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly—the costs of giving it *stare decisis* effect are unusually high.”²²⁷ Finally, the Chief Justice called attention to the federal government’s having abandoned the original arguments in favor of *Austin*’s holding, instead attempting to advance two arguments that the *Austin* Court did not consider.²²⁸ The Chief Justice emphasized: “*Stare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. . . . [A]llow[ing] the Court’s past missteps to spawn future mistakes [would] undercut[] the very rule-of-law values that *stare decisis* is designed to protect.”²²⁹

In 2015, five years after *Citizens United*,²³⁰ Chief Justice Roberts once again espoused a weak form of *stare decisis*, this time in a

224. *Id.*

225. *Id.* at 379–80.

226. *Id.* at 380.

227. *Id.* at 382.

228. *Id.* at 383 (“Th[e] interests [the government asserted] may or may not support the result in *Austin*, but they were plainly not part of the reasoning on which *Austin* relied.”).

229. *Id.* at 384.

230. Three years after *Citizens United*, the Chief Justice dissented from the Court’s decision in *Alleyne v. United States*, 570 U.S. 99 (2013), but stated that he “w[ould] not quibble with the majority’s application of our *stare decisis* prece-

statutory context. In *Kimble v. Marvel Entertainment, LLC*, the Chief Justice joined in Justice Alito's dissent to the Court's decision to uphold its 1964 ruling in *Brulotte v. Thys Co.*,²³¹ a case in which the Court concluded that federal patent law bars a patent holder from receiving royalties for use of the patented invention after the patent's term has ended.²³²

Though the majority acknowledged that both courts and commentators had been urging the Court to abandon *Brulotte*, the *Kimble* Court decided to sustain *Brulotte* on the grounds of stare decisis.²³³ In so doing, the Court noted the principle's power with respect to statutory interpretation.²³⁴ In that regard,

dents." *Id.* at 132 (Roberts, C.J., dissenting). Curiously, though, the majority opinion in *Alleyne* gave no specific attention to stare decisis other than to state that it is least potent when a procedural rule offering central protection under the Constitution is at issue. *See id.* at 116 n.5 (majority opinion) ("The force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.").

Justice Sotomayor, however, in a concurrence that only Justices Ginsburg and Kagan joined, addressed stare decisis in some detail. *Id.* at 118–22 (Sotomayor, J., concurring). In *Alleyne*, the Court overruled *Harris v. United States*, 536 U.S. 545 (2002), a 2002 decision in which the Court had concluded that it was not inconsistent with the Sixth Amendment's right to a jury trial to permit a judge to increase a mandatory minimum sentence following the judge's own determination by a preponderance of the evidence that aggravating factor existed. *Alleyne*, 570 U.S. at 103. In her concurrence, Justice Sotomayor considered minimal any reliance interest that state and federal governments had because prosecutors could alter their practices with respect to indictments. *Id.* at 119 (Sotomayor, J., concurring). In addition, according to Justice Sotomayor, the weakness of *Harris* was evident because, after the decision, the Court continued to apply an earlier decision to limit mandatory sentencing schemes. *See id.* at 119–20 (discussing application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), following *Harris*). Moreover, Justice Sotomayor indicated that only a minority of the Justices in *Harris* had agreed with a key point, and she emphasized that the Court in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), had explained that "a decision may be 'of questionable precedential value' when 'a majority of the Court expressly disagreed with the rationale of [a] plurality.'" *Alleyne*, 570 U.S. at 120 (Sotomayor, J., concurring) (alteration in original) (quoting *Seminole Tribe*, 517 U.S. at 66).

231. 379 U.S. 29 (1964); *see Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2405 (2015) (declining to overrule *Brulotte*); *id.* at 2415–19 (Alito, J., dissenting).

232. *See Kimble*, 135 S. Ct. at 2405 (majority opinion).

233. *Id.* at 2406 ("[S]ome courts and commentators have suggested [that] we should overrule *Brulotte*. For reasons of *stare decisis*, we demur." (footnote omitted)).

234. *Id.* at 2409 ("[S]tare decisis carries enhanced force when a decision, like *Brulotte*, interprets a statute."); *id.* at 2410 ("[W]e have often recognized that in . . . cases involving property and contract rights' . . . considerations favoring *stare decisis* are 'at their acme.'" (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997))).

the Court emphasized that “Congress has spurned multiple opportunities to reverse *Brulotte*—openings as frequent and clear as this Court ever sees,”²³⁵ and, the Court added, with property and contracts at issue, reliance interests carry considerable weight because parties have ordered their affairs with *Brulotte* in mind.²³⁶ Given Congress’s failure to act and the reliance interests at stake, the Court declared, *Brulotte* enjoyed a “superpowered form of *stare decisis*, [requiring] a superspecial justification to warrant revers[al].”²³⁷

With this high bar in the background, the Court contended that *Brulotte*’s foundations had not diminished—that the statutory text had not changed, that cases from which *Brulotte* drew continued to stand, and that later rulings have not left *Brulotte* as a “doctrinal dinosaur.”²³⁸ In addition, the Court maintained that *Brulotte*’s rule is eminently workable, offering a clear and bright line.²³⁹

Stephen Kimble failed to convince the Court to overrule *Brulotte* because the earlier ruling was founded on the flawed economic assumption that requiring royalties for post-effectiveness use is anticompetitive.²⁴⁰ Although the *Kimble* Court saw no reason to discredit the broad scholarly consensus that supported Kimble’s argument,²⁴¹ the Court found the consensus insufficient to overcome *stare decisis* given that *Brulotte* was a patent case rather than an antitrust case where *stare decisis* carries much less weight.²⁴² In addition, the *Kimble* Court concluded that the erroneous economic principle that Kimble cited had not served as the basis for *Brulotte*, but that the decision instead relied on “a categorical principle that all patents, and all benefits from them, must end when their terms expire.”²⁴³ Finally, the Court in *Kimble* rejected the plea to overturn *Brulotte* because it discouraged the type of innovation that patent

235. *Id.* at 2409–10.

236. *Id.* at 2410.

237. *Id.*

238. *Id.* at 2410–11.

239. *Id.*

240. *Id.* at 2412.

241. *Id.* (“We do not join issue with Kimble’s economics . . .”).

242. *Id.* at 2412–13.

243. *Id.* at 2413 (citing *Brulotte v. Thys Co.*, 379 U.S. 29, 30–32 (1964)).

law is intended to foster.²⁴⁴ According to the Court, the judiciary is ill-suited to decide that matter and Congress is the proper venue for a debate over the effect of *Brulotte* on invention.²⁴⁵

Justice Alito disagreed, and joined by the Chief Justice, blasted the *Kimble* majority's application of *stare decisis* to keep *Brulotte*:

The Court employs *stare decisis*, normally a tool of restraint, to reaffirm a clear case of judicial overreach. Our decision in *Brulotte* . . . was not based on anything that can plausibly be regarded as an interpretation of the terms of the Patent Act. It was based instead on an economic theory—and one that has been debunked. . . . *Stare decisis* does not require us to retain this baseless and damaging precedent.²⁴⁶

Noting the absence of any language in the Patent Act regarding post-term royalties, Justice Alito described *Brulotte* as a “bald act of policymaking” and “not really statutory interpretation at all.”²⁴⁷ Moreover, Justice Alito stressed that, in *Brulotte*'s approximately fifty-year history, the underlying economic rationale had become indefensible.²⁴⁸ Allowing *Brulotte* to live on, he insisted, was economically harmful, unduly inhibiting the ability of parties to achieve their goals.²⁴⁹ Furthermore, according to Justice Alito, Marvel Entertainment had offered no evidence of reliance, and given that Marvel did not know of the *Brulotte* rule when negotiating its license with Kimble, any suggestion that other parties were relying on the rule was a fantasy.²⁵⁰ In fact, Justice Alito asserted, *Brulotte* itself had had the effect of upsetting commercial expectations.²⁵¹

Justice Alito insisted that the Court does “not give super-duper protection to decisions that do not actually interpret a statute”²⁵² and that cases involving pure policymaking should

244. *See id.* (addressing *Brulotte*'s foundations).

245. *Id.* at 2414.

246. *Id.* at 2415 (Alito, J., dissenting).

247. *Id.*

248. *Id.*

249. *Id.* at 2416 (explaining harms associated with *Brulotte*'s rule).

250. *Id.* at 2417.

251. *Id.*

252. *Id.* at 2418.

enjoy the same stare decisis effect as antitrust decisions.²⁵³ Finally, Justice Alito assailed the majority for relying on the absence of congressional action as a reason to keep *Brulotte*, explaining that “[p]assing legislation is no easy task” and therefore the Court should not be too quick to equate a failure to act with approbation.²⁵⁴

Within days after the Court’s refusal to dispose of *Brulotte*, Chief Justice Roberts was part of the six-Justice majority with two additional Justices concurring in the judgment in *Johnson v. United States*²⁵⁵ that overruled two decisions that had interpreted the Armed Career Criminal Act of 1984²⁵⁶ (ACCA)—*James v. United States*²⁵⁷ and *Sykes v. United States*.²⁵⁸ In *James* and *Sykes*, the Court declined to strike down the “residual clause” of the ACCA as unconstitutionally vague under the Due Process Clause of the Fifth Amendment.²⁵⁹ Admitting that the Court had not succeeded in adopting a generally applicable test for applying the residual clause, the *Johnson* Court decided that *James* and *Sykes* were wrong about the clause’s constitutionality.²⁶⁰

Furthermore, the *Johnson* Court determined that stare decisis could not save *James* or *Sykes*.²⁶¹ The Court in *Johnson* dismissed out of hand any argument that a reliance interest supported the two decisions.²⁶² More importantly, the Court explained that stare decisis does not prevent it from reconsidering a decision “where experience with its application reveals that it is unworkable”—even when the Court reached the decision based on a well-developed record.²⁶³ Revisiting *James* and *Sykes* was

253. *Id.* (likening *Brulotte* to an antitrust decision).

254. *See id.* at 2418–19.

255. 135 S. Ct. 2551 (2015).

256. 18 U.S.C. § 924(e) (2018).

257. 550 U.S. 192 (2007).

258. 564 U.S. 1 (2011); *Johnson*, 135 S. Ct. at 2555, 2563.

259. *Johnson*, 135 S. Ct. at 2555–56.

260. *Id.* at 2557 (“We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant’s sentence under the clause denies due process of law.”).

261. *Id.* at 2562–63.

262. *See id.* at 2563 (“[D]eparting from [*James* and *Sykes*] does not raise any concerns about upsetting private reliance interests.”).

263. *Id.* at 2562 (first citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); then citing *United States v. Dixon*, 509 U.S. 688, 711 (1993); *Payne*, 501 U.S. at 828–30).

all the more appropriate, the *Johnson* Court explained, because the vagueness issue had not been fully briefed or argued in either case,²⁶⁴ and experience in applying the residual clause testified to errors the Court had made:

Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast. . . . Even after *Sykes* tried to clarify the residual clause's meaning, the provision remains a "judicial morass that defies systemic solution," "a black hole of confusion and uncertainty" that frustrates any effort to impart "some sense of order and direction."²⁶⁵

In *Hurst v. Florida*,²⁶⁶ a 7-1-1 decision with the Chief Justice in the majority, the Court overruled in part two more precedents—*Spaziano v. Florida*²⁶⁷ and *Hildwin v. Florida*.²⁶⁸ According to the Court in *Hurst*, the *Spaziano* and *Hildwin* Courts had incorrectly concluded that the Sixth Amendment does not require that the jury determine the existence of aggravating factors before a court may impose the death penalty.²⁶⁹

In reaching its decision, the *Hurst* Court dispensed with *stare decisis* quickly, focusing on *Spaziano's* and *Hildwin's* inconsistency with the Court's 2000 opinion in *Apprendi v. New Jersey*²⁷⁰ and on the Court's 2002 decision in *Ring v. Arizona*²⁷¹ to overrule another pre-*Apprendi* case in which the Court had relied on *Hildwin*.²⁷² "[I]n the *Apprendi* context," the Court explained, "*stare decisis* does not compel adherence to a decision whose

264. *Id.* at 2562–63.

265. *Id.* at 2562 (quoting *United States v. Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring)).

266. 136 S. Ct. 616 (2016).

267. 468 U.S. 447 (1984).

268. 490 U.S. 638 (1989); *Hurst*, 136 S. Ct. at 624.

269. *Hurst*, 136 S. Ct. at 623 ("*Spaziano* and *Hildwin* summarized earlier precedent to conclude that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" (quoting *Hildwin*, 490 U.S. at 640–41)).

270. 530 U.S. 466 (2000).

271. 536 U.S. 584 (2002).

272. See *Hurst*, 136 S. Ct. at 623 (concluding that *Spaziano* and *Hildwin* were "irreconcilable" with *Apprendi*, and discussing *Ring*).

underpinnings have been eroded by subsequent developments of constitutional law.”²⁷³

Making up for its brevity in *Hurst*, the Court gave extensive attention to stare decisis in *Janus v. AFSCME*,²⁷⁴ a 2018 case in which the Court overturned its 1977 decision in *Abood v. Detroit Board of Education*.²⁷⁵ In *Janus*, the Court considered the constitutionality of an Illinois law compelling a public employee to pay fees to a union even when the employee does not join the union and disagrees intensely with the union’s positions in collective bargaining and other matters.²⁷⁶ The Illinois law was similar to one the Court in *Abood* had upheld against a First Amendment challenge,²⁷⁷ but the *Janus* Court concluded that requiring a public employee who is not a union member to subsidize union activities offends the First Amendment.²⁷⁸

Addressing stare decisis, the *Janus* Court noted that the principle is “at its weakest” in constitutional matters²⁷⁹ and perhaps enjoys the “least force” in the First Amendment context.²⁸⁰ To guide its evaluation of *Abood* amidst such feebleness, the Court identified five factors: “the quality of *Abood*’s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision.”²⁸¹ After giving studied attention to all of these factors, the Court decided that stare decisis was not enough to sustain *Abood*.²⁸²

First, the Court cited significant problems in the *Abood* Court’s reasoning.²⁸³ According to the Court in *Janus*, *Abood* re-

273. *Id.* at 623–24 (quoting *Alleyne v. United States*, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring)) (internal quotation marks omitted).

274. 138 S. Ct. 2448 (2018).

275. 431 U.S. 209 (1977); *Janus*, 138 S. Ct. at 2460.

276. *Janus*, 138 S. Ct. at 2459–60.

277. *Id.* at 2460.

278. *Id.* (“We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.”).

279. *Id.* at 2478 (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)) (internal quotation marks omitted).

280. *Id.*

281. *Id.* at 2478–79.

282. *Id.* at 2479 (“After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.”).

283. *Id.* at 2480–81.

lied on two previous cases that were inapposite to its decision because they dealt with Congress's authorization of private-sector unions and focused on Commerce Clause and substantive due process issues, with only scant attention to the First Amendment.²⁸⁴ In addition, the *Janus* Court indicated, the Court in *Abood* applied a deferential standard of review that is foreign to free speech cases, and if the Court had applied the appropriate standard, it might have invalidated the law it was considering.²⁸⁵ Moreover, the Court in *Janus* asserted, the *Abood* Court failed to grasp the importance of the context in which the law operated and the nature of the speech that was at issue.²⁸⁶

Second, the Court in *Janus* concluded that the rule in *Abood* was unworkable.²⁸⁷ *Abood*, the *Janus* Court observed, attempted to draw a line between expenses that may be charged to non-union members and those that may not, and the test the Court later adopted in *Lehnert v. Ferris Faculty Ass'n*²⁸⁸ to assist in making that distinction had resulted in splintered decisions and spawned litigation: "*Lehnert* failed to settle the matter; States and unions have continued to 'give it a try' ever since."²⁸⁹ Furthermore, the *Janus* Court pointed out that even the respondents in the case acknowledged the difficulty in distinguishing between chargeable and non-chargeable expenses, thus undermining the forty-year standard's workability.²⁹⁰ Moreover, the Court noted that practical problems impeded the ability of nonunion members to challenge the union's allocation of expenses.²⁹¹

Third, the Court in *Janus* identified legal and factual developments that had "'eroded' [*Abood*]'s 'underpinnings,'" making

284. *See id.* at 2479 (discussing *Ry. Emps. v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961)).

285. *Id.* at 2479–80.

286. *Id.* at 2480 ("*Abood* failed to appreciate the conceptual difficulty of distinguishing in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends." (quoting *Harris v. Quinn*, 573 U.S. 616, 636 (2014)) (internal quotation marks omitted)).

287. *Id.* at 2481–82.

288. 500 U.S. 507 (1991).

289. *Janus*, 138 S. Ct. at 2481.

290. *See id.* at 2481 (discussing the respondents' suggestion that the Court revisit how to distinguish between chargeable and non-chargeable expenses).

291. *See id.* at 2482.

the decision “an outlier among [the Court’s] First Amendment cases.”²⁹² According to the *Janus* Court, one of the assumptions underlying *Abood* had proven to be false.²⁹³ In addition, the Court reported, at the time *Abood* was decided, public-sector unions were in their infancy, and since then they have blossomed, with a significant impact on state and local government costs, “giv[ing] collective-bargaining issues a political valence that *Abood* did not fully appreciate.”²⁹⁴ Furthermore, the Court pointed out that *Abood*’s failure to apply heightened scrutiny is inconsistent with more recent cases in which the Court has held that public employees usually cannot be forced to provide funding to a political party.²⁹⁵

Finally, the *Janus* Court determined that reliance interests could not buoy *Abood*.²⁹⁶ The Court stressed that overruling *Abood* would merely have a short-term effect on existing collective bargaining agreements and that “it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years’ time.”²⁹⁷ The Court also emphasized that the uncertainty surrounding the *Abood* standard and the divisions on the Court surrounding its viability undermined union reliance.²⁹⁸ Last, the Court explained that unions have the ability to protect themselves in their collective bargaining agreements if agency fees are essential.²⁹⁹

A year after *Janus*, the Court returned to stare decisis in the constitutional context with three decisions, and Chief Justice Roberts was part of the majority in all three. In the first, *Franchise Tax Board v. Hyatt*, the Court overruled *Nevada v. Hall*, a 1979 decision in which the Court had held that a state is not immune

292. *Id.* (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

293. *See id.* at 2465 (“*Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*’s fears were unfounded.”).

294. *Id.* at 2483.

295. *Id.* at 2484 (discussing the Court’s “political patronage” cases).

296. *Id.*

297. *Id.*

298. *Id.* at 2485 (“[A]ny public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.”).

299. *See id.* at 2485.

from a suit by a private plaintiff in another state's courts.³⁰⁰ Drawing on the understanding of state sovereignty that existed at the nation's Founding, the Court in *Hyatt* concluded that the *Hall* Court had gone off course.³⁰¹

According to the *Hyatt* Court, *stare decisis* could not save *Hall*.³⁰² Unlike in *Janus*, however, the Court in *Hyatt* considered just four *stare decisis* factors: "the quality of [*Hall*]'s reasoning; its consistency with related decisions; legal developments since [*Hall*]; and reliance."³⁰³ And the Court dispensed with all four quickly. The Court first pointed out that *Hall*'s reasoning was divorced from the historical understanding of the immunity that states would enjoy in relation to each other.³⁰⁴ Moreover, the Court noted that *Hall* represented a departure from the Court's sovereign immunity corpus, particularly when considered against recent cases.³⁰⁵ Finally, the Court identified no reliance interest that weighed in favor of retaining *Hall*.³⁰⁶ Although it sympathized with the plaintiff's loss of time and money in pursuing his claim based on *Hall*, the Court indicated that reliance of this type does not carry weight for *stare decisis* purposes because the prospect that the Court will overturn a critical prior ruling is ever present when one pursues a legal claim.³⁰⁷

In *Gamble v. United States*—the second of the three 2019 cases implicating *stare decisis* with respect to a constitutional precedent—the Court refused to overrule a long line of precedents holding that the Fifth Amendment's Double Jeopardy Clause does not proscribe prosecution in separate proceedings of an

300. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1492 (2019); *Nevada v. Hall*, 440 U.S. 410, 426–27 (1979).

301. *See Hyatt*, 139 S. Ct. at 1492 ("*Nevada v. Hall* is contrary to our constitutional design and the understanding of sovereign immunity shared by the States that ratified the Constitution.").

302. *Id.* at 1499.

303. *Id.* (citing *Janus*, 138 S. Ct. at 2478–79; *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

304. *Id.*

305. *Id.* ("*Hall* stands as an outlier in our sovereign-immunity jurisprudence, particularly when compared to more recent decisions."); *id.* at 1496 (citing other cases addressing sovereign immunity).

306. *See id.* at 1499.

307. *Id.*

offense under state law and an offense under federal law, even when both offenses arise out of the same set of facts.³⁰⁸ Noting that the Fifth Amendment bars prosecution more than once for an “offence,” the Court explained that, because both the state and the United States are separate sovereigns, an offense under federal law is different from one under state law.³⁰⁹

The Court in *Gamble* highlighted the extremely high burden that the defendant had to meet to persuade the Court that it had erred in its previous decisions and therefore should discard them:

[E]ven in constitutional cases, . . . something more than “ambiguous historical evidence” is required before we will “flatly overrule a number of major decisions of this Court.” And the strength of the case for adhering to such decisions grows in proportion to their “antiquity.” Here, . . . Gamble’s historical arguments must overcome *numerous* “major decisions of this Court” spanning *170 years*. In light of these factors, Gamble’s historical evidence must, at a minimum, be better than middling.³¹⁰

According to the Court, Terance Gamble had not satisfied the minimum.³¹¹ Among other things, the Court noted the absence of directly applicable reported cases, that some of the cases Gamble proffered undermined his argument, that the evidence Gamble attempted to draw from a seventeenth-century case was less than conclusive, and that two of the cases Gamble cited did not rely on the principle Gamble was asserting.³¹² Moreover, the Court indicated that an earlier case had considered some of Gamble’s arguments and rejected them, and nothing had changed since then that would make those arguments more powerful.³¹³

308. *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (affirming precedent supporting the “dual-sovereignty” doctrine).

309. *Id.* at 1963–64 (quoting U.S. CONST. amend. V).

310. *Id.* at 1969 (first quoting *Welch v. Tex. Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 479 (1987); then quoting *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009)).

311. *Id.*

312. *Id.* at 1973–74.

313. *Id.* at 1974 (“Surveying the pre-Fifth Amendment cases in 1959, we concluded that their probative value was ‘dubious’ due to ‘confused and inadequate reporting.’ Our assessment was accurate then, and the passing years have not made those early cases any clearer or more valuable.” (quoting *Bartkus v. Illinois*, 359 U.S. 121, 128 n.9 (1959))); *id.* at 1976 (“When we turn from 19th-century trea-

Having assigned Justices Thomas and Alito the majority opinions in *Hyatt* and *Gamble*, Chief Justice Roberts himself took on the responsibility of drafting the last of the Court's 2019 constitutional stare decisis opinions. In *Knick v. Township of Scott*, the Court concluded that a violation of the Takings Clause under the Fifth Amendment occurs immediately when a government takes property without compensation and that a property owner may sue in federal court under 42 U.S.C. § 1983 right away.³¹⁴ In reaching that conclusion, the Court overruled *Williamson County Regional Planning Commission v. Hamilton Bank*, a 1985 decision in which the Court had held that a property owner must be unsuccessful in seeking compensation in state court and under state law before a taking violates the Fifth Amendment.³¹⁵

Noting that stare decisis is “at its weakest” with respect to decisions interpreting the Constitution,³¹⁶ Chief Justice Roberts evaluated *Williamson County* using four of the stare decisis factors identified in *Janus* (but not the same ones the Court employed in *Hyatt*): “the quality of [the precedent’s] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision.”³¹⁷ According to the Chief Justice, *Williamson County* failed at every turn.³¹⁸

First, the Chief Justice emphasized that *Williamson County* was “exceptionally ill founded,” drawing on dicta from another opinion, ignoring more recent decisions, and conflicting with the Court’s customary approach to takings.³¹⁹ Moreover, the Chief Justice noted that Justices later had discredited *Williamson*

tises to 19th-century state cases, *Gamble*’s argument appears no stronger. The last time we looked, we found these state cases to be ‘inconclusive.’” (quoting *Bartkus*, 359 U.S. at 131)).

314. 139 S. Ct. 2162, 2172 (2019) (“[B]ecause a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time.”).

315. *See id.* at 2167 (reciting the holding in *Williamson County*); *id.* at 2170 (“Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* . . .”).

316. *Id.* at 2177 (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)).

317. *Id.* at 2178 (quoting *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018)) (internal quotation marks omitted).

318. *Id.* (“All of these factors counsel in favor of overruling *Williamson County*.”).

319. *Id.*

County, as had scholars, including those who defend requiring a property owner to litigate takings in state court.³²⁰ In addition, according to the *Knick* Court, the justifications for *Williamson County*'s rule had shifted over time: "The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of stare decisis."³²¹

Second, the *Knick* Court decided that *Williamson County* had created an indefensible consequence that made the decision unworkable. As a result of *Williamson County*, the Court explained, an unsuccessful state court plaintiff could not pursue a federal takings claim because the federal full faith and credit statute requires a federal court to give preclusive effect to the state court judgment.³²² Furthermore, Chief Justice Roberts rejected the dissent's argument that *Williamson County* should enjoy a heartier version of stare decisis given Congress's power to amend the full faith and credit statute to eliminate the problem.³²³ For the Chief Justice, that was not enough. Congressional action, he pointed out, could not fix *Williamson County*'s incorrect interpretation of the Fifth Amendment.³²⁴

Finally, the Court in *Knick* found that reliance interests did not counsel against overruling *Williamson County*. The *Knick* Court observed that stare decisis is weaker when the relevant rule does not deal with what behavior is lawful and what is not.³²⁵ And according to the Court, overruling *Williamson County* would not subject governments to greater liability, but only allow a plaintiff to bring a federal court action in place of a state court action.³²⁶

Unlike in *Knick*, reliance interests weighed heavily in the Chief Justice's vote in *Ramos v. Louisiana*, a 2020 case in which the Court gave significant attention to stare decisis in a patchwork of opinions that combined to reach five votes to overrule

320. *Id.*

321. *Id.* (citing *Janus*, 138 S. Ct. at 2472).

322. *Id.* at 2178–79.

323. *Id.* at 2179.

324. *See id.*

325. *Id.* ("We have recognized that the force of *stare decisis* is 'reduced' when rules that do not 'serve as a guide to lawful behavior' are at issue." (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995))).

326. *Id.*

Apodaca v. Oregon.³²⁷ This time, the Chief Justice found himself out of step with the majority and joined Justices Alito and Kagan in dissent.³²⁸

The Court handed down *Apodaca*, a ruling that turned away a Sixth Amendment challenge to an Oregon rule permitting nonunanimous verdicts for criminal convictions,³²⁹ just eight months before *Roe*. In *Ramos*, the Court evaluated *Apodaca* under the four stare decisis factors cited in *Hyatt* and concluded that none of them reflected favorably on the 1972 decision.³³⁰ First, the Court in *Ramos* described *Apodaca* not just as wrong, but as “gravely mistaken.”³³¹ According to the *Ramos* Court, the underlying reasoning in the two opinions that resulted in *Apodaca*’s holding widely missed the mark, ignoring the Sixth Amendment’s historical underpinnings, Court decisions interpreting the amendment to require unanimity, and the Oregon rule’s racist patrimony.³³² Moreover, the Court in *Ramos* criticized the *Apodaca* four-member plurality’s use of “an incomplete functionalist analysis of its own creation” to support the constitutionality of nonunanimous verdicts, and spurned the fifth, concurring Justice’s stubborn adherence to a view the Court long since had abandoned.³³³

Second, pointing to eight Court decisions after *Apodaca* that referred to a unanimity requirement, the *Ramos* Court asserted that *Apodaca* had departed from related decisions and that legal developments had left the precedent behind.³³⁴ Finally, observing “that neither Louisiana nor Oregon claim[ed] anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke” nor “that nonunanimous verdicts have ‘become part of our national cul-

327. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404–08 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972)); see *id.* at 1432 n.17 (Alito, J., dissenting) (describing the various opinions that result in the Court’s decision).

328. See *id.* at 1425 (Alito, J., dissenting) (“I would not overrule *Apodaca*.”).

329. See *id.* at 1398–99 (majority opinion).

330. *Id.* at 1405 (citing *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019)).

331. *Id.*

332. See *id.* at 1397–1401.

333. *Id.* at 1405; see *id.* at 1398 (describing Justice Powell’s “belief in ‘dual-track’ incorporation”).

334. See *id.* at 1399 n.35 (listing eight cases); *id.* at 1405–06 (discussing jurisprudential considerations).

ture,” the Court in *Ramos* dismissed the contention that overruling *Apodaca* would upend the reliance courts in Louisiana and Oregon had placed on the precedent in conducting criminal trials for nearly fifty years.³³⁵

These judicial reliance interests, however, apparently moved the Chief Justice to join Justice Alito’s *Ramos* dissent.³³⁶ Justice Alito devoted quite a bit of his opinion to reliance, but before doing so, he explained why the majority’s criticisms of the *Apodaca* Court’s reasoning were “overblown.”³³⁷ Although Justice Alito would not say whether he agreed with the *Apodaca* plurality, he defended the plurality’s reasoning, explaining in significant detail why the underlying rationales were not as flawed as the *Ramos* majority charged.³³⁸ Moreover, responding to the majority’s arguments about developments and *Apodaca*’s fit with related decisions, Justice Alito contended that the majority disregarded how *Apodaca* was “intertwined” with the Court’s Sixth Amendment jurisprudence.³³⁹

Reliance interests, though, were what carried the day for Justice Alito and the Chief Justice.³⁴⁰ Justice Alito expressed serious concerns about what overruling *Apodaca* would mean for the “thousands and thousands” of trials that Louisiana and Oregon had conducted in reliance on the precedent.³⁴¹ According to Justice Alito, disposing of *Apodaca* threatened to unleash a torrent of direct and collateral challenges to criminal convictions.³⁴² The risk of this type of upheaval, Justice Alito insisted, is significant and real, and the weak, nonexistent, “air[y],” and “abstract” reliance interests presented in *Hyatt*, *Wayfair*, *Pearson*, *Montejo*, *Citizens United*, and *Janus* paled in comparison.³⁴³

335. *Id.* at 1406 (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)).

336. *See id.* at 1436 (Alito, J., dissenting) (“What convinces me that *Apodaca* should be retained are the enormous reliance interests of Louisiana and Oregon.”).

337. *Id.* at 1433.

338. *See id.* at 1433–35.

339. *Id.* at 1436.

340. Justice Kagan did not join the portion of Justice Alito’s dissent that considered reliance.

341. *Ramos*, 140 S. Ct. at 1436.

342. *See id.* at 1438–40.

343. *See id.* at 1439.

II. CONVINCING THE CHIEF JUSTICE

Justice Thomas repeatedly has expressed hostility to *Roe* and its progeny,³⁴⁴ and he is resolute that faithfulness to the Constitution demands that the Court overrule errant decisions, other considerations associated with stare decisis be damned.³⁴⁵ Justice Thomas needs no convincing; if presented with the opportunity, he will vote to overrule *Roe*.

It is not so easy with Chief Justice Roberts. Although he has dissented in the two significant abortion cases that have come before the Court since he joined its ranks, the Chief Justice himself has not expressed disagreement with, nor has he joined an opinion expressing disagreement with, *Roe's* premises.³⁴⁶ Moreover, his concurrence in *Citizens United* and the majority opinions he authored in *Halliburton* and *Knick* evidence a commitment to evaluating multiple factors when considering the continuing vitality of an earlier Court decision.³⁴⁷

344. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) ("I remain fundamentally opposed to the Court's abortion jurisprudence."); *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("I write separately to reiterate my view that the Court's abortion jurisprudence . . . has no basis in the Constitution."); *Stenberg v. Carhart*, 530 U.S. 914, 980 (2000) (Thomas, J., dissenting) ("In 1973, this Court . . . render[ed] unconstitutional abortion statutes in dozens of States. . . . [T]hat decision was grievously wrong," (citing *Roe v. Wade*, 410 U.S. 113, 119 (1973))). Justice Thomas also joined Justice Scalia's opinion in *Casey*, which expressed a similar sentiment. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining.").

345. See *Ramos*, 140 S. Ct. at 1421–22 (Thomas, J., concurring in the judgment) (asserting that the Court's consideration of additional factors is inconsistent with its constitutional duty); *Allen v. Cooper*, 140 S. Ct. 994, 1008 (2020) (Thomas, J., concurring in part and concurring in the judgment) ("If our decision in *Florida Prepaid* were demonstrably erroneous, the Court would be obligated to 'correct the error, regardless of whether other factors support overruling the precedent.'" (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring))); *Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.").

346. See *supra* notes 15–16 and accompanying text (noting that Chief Justice Roberts did not join in Justice Thomas's concurrence in *Gonzales* or Justice Thomas's dissent in *Hellerstedt*).

347. See *Citizens United v. FEC*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring); see also *Knick v. Township of Scott*, 139 S. Ct. 2162, 2177–78 (2019); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275–77 (2014). Most recently, the

Thus, those who want to earn the Chief Justice's vote to overrule *Roe* will need to do more than convince him that the Court got it wrong. They will need to attack *Roe* successfully on multiple fronts. And an important bulwark—the Court's 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*³⁴⁸—stands in the way.³⁴⁹

A. *The Force of Planned Parenthood v. Casey*

During Chief Justice Roberts's confirmation hearing, Senator Arlen Specter displayed a chart showing some thirty-eight cases in which *Roe* had been addressed and asked then-Judge Roberts if he might consider *Roe* to be a "super-duper precedent."³⁵⁰ The Chief Justice declined to comment on the moniker and emphasized that, of the thirty-eight, the only one relevant to the level of *Roe*'s precedential force is *Casey* because the *Casey* Court specifically had considered overruling *Roe*, yet reaffirmed it.³⁵¹ And in his 2010 *Citizens United* concurrence, Chief Justice Roberts indicated that he continued to hold the view that reaffirmation requires reconsideration and only decisions

Chief Justice expressed this view indirectly by joining Justice Kagan's majority opinion in *Cooper*. See *Cooper*, 140 S. Ct. at 1003 ("[W]ith th[e] charge of error alone, [one] cannot overcome *stare decisis*.").

348. 505 U.S. 833 (1992).

349. *Id.* at 833–34.

350. *Confirmation Hearing*, *supra* note 3, at 145 (statement of Sen. Arlen Specter).

351. See *id.* at 145 (statement of Judge John G. Roberts, Jr.) ("The interesting thing . . . is not simply the opportunity to address [*Roe*], but when the Court actually [has] consider[ed] the question [whether to overrule the decision]. And that, of course, is in the *Casey* decision where it did apply the principles of *stare decisis* and specifically addressed [the question]."). Citing *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), the *Casey* Court stated that *Roe* was "expressly affirmed by a majority of six in 1983 and by a majority of five in 1986," and in both *Akron* and *Thornburgh*, the Court stated that it was reaffirming *Roe*. *Casey*, 505 U.S. at 858 (plurality opinion) (citation omitted); *Thornburgh*, 476 U.S. at 759 ("Again today, we reaffirm the general principles laid down in *Roe* and in *Akron*."); *Akron*, 462 U.S. at 420 ("We . . . reaffirm *Roe v. Wade*."). Chief Justice Roberts, however, seems to discredit this characterization because the Court in neither *Akron* nor *Thornburgh* actually considered whether to overrule *Roe*. Instead, the Court respected *Roe* and applied it. And notably, the Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007), did not even intimate that it was reaffirming *Casey*, but "assume[d] . . . principles [from *Casey*] for the purposes of th[e] opinion." *Id.* at 146.

reaffirming a precedent are germane to the strength that *stare decisis* enjoys with respect to the precedent.³⁵²

Consequently, if called upon to reevaluate *Roe*, Chief Justice Roberts almost certainly will embark at *Casey*. Indeed, the Chief Justice said as much in his confirmation hearing:

[T]he *Casey* decision itself, which applied the principles of *stare decisis* to *Roe v. Wade*, is itself a precedent of the Court, entitled to respect under principles of *stare decisis*. . . . [*Casey*]'s a precedent on whether or not to revisit the *Roe v. Wade* precedent. And under principles of *stare decisis*, that would be where any judge . . . would begin.³⁵³

The first critical battlefield for the Chief Justice's vote, then, will be whether the principles of *stare decisis* require the Court to respect *Casey*'s application of *stare decisis* to *Roe*.

In *Casey*, the Court abandoned *Roe*'s detailed trimester framework for evaluating the constitutionality of abortion regulations,³⁵⁴ but purported to preserve what it described as *Roe*'s "essential holding"—that viability is the critical dividing line between a woman's right to choose and a state's ability to bar the choice and that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."³⁵⁵ Importantly, though, the *Casey* Court's decision was not rooted in the conclusion that *Roe* had been decided correctly, but solely in *stare*

352. See *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring) (asserting that previous decisions could not "be understood as a reaffirmation of [*Austin*]" because the Court had not previously been asked to overrule the decision); see also *Gamble v. United States*, 139 S. Ct. 1960, 1976 (2019) ("When we turn from 19th-century treatises to 19th-century state cases, Gamble's argument appears no stronger. The last time we looked, we found these state cases to be 'inconclusive.'" (quoting *Bartkus v. Illinois*, 359 U.S. 121, 131 (1959))); *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (indicating that *Buckley* "has become settled through iteration and reiteration over a long period").

353. *Confirmation Hearing*, *supra* note 3, at 145 (statement of Judge John G. Roberts, Jr.).

354. See *Casey*, 505 U.S. at 873 (plurality opinion) ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*." (citing *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (1989) (opinion of Rehnquist, C.J.); *id.* at 529 (O'Connor, J., concurring in part and concurring in the judgment))).

355. *Id.* at 846.

decisis.³⁵⁶ And according to the Court, the principle is extraordinarily powerful as it relates to *Roe*—in the Court’s words, *Roe* enjoys “rare precedential force”—because the ruling has been deeply polarizing.³⁵⁷

In support of its decision to uphold *Roe*, the *Casey* Court began with several factors that have appeared in stare decisis rulings handed down during Chief Justice Roberts’s tenure on the Court: workability, reliance, erosion of precedent, and developments since the case was decided.³⁵⁸ All of these factors, the Court determined, swung in *Roe*’s favor. First, the Court in *Casey* concluded that *Roe* had not been unworkable, but imposed only a “simple limitation” that courts are competent to assess.³⁵⁹ Second, taking a sweeping view of reliance, the Court asserted that, “for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.”³⁶⁰ Third, the Court contended that *Roe* remained consistent with decisions regarding liberty, both in the context of “intimate relationships, the family, and decisions about whether or not to beget or bear a child” and in the context of “personal autonomy and bodily integrity.”³⁶¹ Moreover, the Court explained that *Roe* might even fit within a classification all its own, and intervening abortion-related decisions have not departed from *Roe*’s fundamental premises.³⁶² Finally, according to the *Casey* Court, although technological advances had enhanced the safety of abortion and pushed viability earlier, these developments did not undermine the use of viability as the key marker in deciding when the state’s interest in protect-

356. *See id.* at 871 (“We do not need to say whether each of us . . . would have concluded . . . that [the] weight [of the State’s interest in potential life] is insufficient to justify a ban on abortions prior to viability . . . [T]he immediate question is . . . [*Roe*’s] precedential force . . .”).

357. *Id.* at 867.

358. *Id.* at 854–55.

359. *Id.* at 855.

360. *Id.* at 856.

361. *Id.* at 857.

362. *See id.* (“[O]ne could classify *Roe* as *sui generis*.”).

ing potential life becomes strong enough to limit a woman's ability to choose abortion.³⁶³

Though the *Casey* Court concluded that all of the stare decisis factors weighed in *Roe*'s favor, the Court nevertheless felt compelled to venture further and consider what overruling *Roe* would mean for the Court's legitimacy. According to *Casey*, the Court's legitimacy rests not only on making sound decisions founded on valid legal principles, but also on the public's perception that the judiciary is capable of interpreting the nation's laws.³⁶⁴ Overturning *Roe* in the midst of extreme divisiveness and under public pressure that is no less intense than it was in 1973, the Court contended, would undermine these foundations intolerably: "[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."³⁶⁵ With this in mind, *Roe*—or, more precisely, its "essence"—would stand.³⁶⁶

One of the principal questions with respect to a new challenge to *Roe* is whether the Chief Justice would consider himself bound by *Casey*'s stare decisis rubric, with its broad view of reliance and its assertions regarding legitimacy. And those opposing *Roe* certainly have significant ammunition to convince him that he is not so constrained.

Of the cases in which the Court has given significant attention to stare decisis since Roberts became Chief Justice, *Pearson* stands out as one that might guide his thinking about the respect that the Court must afford *Casey*'s approach to precedent. In *Pearson*, with all of the Justices of one accord, the Court suggested that stare decisis is weak in relation to decisions regarding rules that govern the judiciary,³⁶⁷ and stare decisis itself is a

363. *See id.* at 860 (discussing changes weakening *Roe*'s factual premises).

364. *See id.* at 865.

365. *Id.* at 867.

366. *Id.* at 869 ("A decision to overrule *Roe*'s essential holding under the existing circumstances would [come] at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law.").

367. *See Pearson v. Callahan*, 555 U.S. 223, 233 (2009) ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules' that do not produce such reliance." (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991))).

principle of judicial policy that controls reconsideration of previous decisions.³⁶⁸ Therefore, Congress does not have the liberty to change how the Court applies stare decisis. Because Congress does not have that power, a weak form should apply to *Casey's* application of the principle.³⁶⁹

Pearson teaches that reliance, the quality of a precedent's reasoning, and workability are inapposite when evaluating cases involving rules governing the judiciary and that experience is the measure of whether to retain or dispose of such decisions.³⁷⁰ And relevant to the question of experience, the *Pearson* Court indicated, are later criticism by Justices and inconsistent application of the relevant rule.³⁷¹

Although the application of stare decisis in *Casey* drew criticism from a dissenting Chief Justice Rehnquist,³⁷² the Court's treatment of the principle in *Casey* has elicited virtually no studied attention from individual members of the Court since then.³⁷³

368. *See id.*; *see also* *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring) ("*Stare decisis* is . . . a 'principle of policy.'" (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))).

369. *See Pearson*, 555 U.S. at 233–34 ("[T]he *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations. Any change should come from this Court, not Congress.").

370. *See id.* at 233–34.

371. *See id.* at 235 ("Where a decision has 'been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,' these factors weigh in favor of reconsideration." (alteration in original) (quoting *Payne*, 501 U.S. at 829–30)).

372. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 953–66 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

373. Justice O'Connor's 1995 opinion in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), distinguished the Court's application of stare decisis in *Casey* from the way she believed it should apply to the 1990 precedent that the Court overruled in *Adarand*, but only Justice Kennedy joined in Justice O'Connor's opinion. *See id.* at 233–34 (opinion of O'Connor, J.). Justice Stevens in *Hubbard v. United States*, 514 U.S. 695 (1995), a decision of the same vintage, cites *Casey* as secondary authority for certain propositions associated with stare decisis; like Justice O'Connor's decision in *Adarand*, however, Justice Stevens's opinion in *Hubbard* did not command majority support. *See id.* at 711–15 (1995) (opinion of Stevens, J.). And, since *Casey* was decided, references to *Casey's* treatment of stare decisis have appeared in a smattering of concurrences and dissents, but without any significant examination. *See, e.g., Gamble v. United States*, 139 S. Ct. 1960, 1981, 1988–89 (2019) (Thomas, J., concurring); *Citizens United*, 558 U.S. at 408–09 (Stevens, J., concurring in part and dissenting in part); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 918 (2007) (Breyer, J., dissenting); *see FEC v. Wis. Right to*

The 2003 decision in *Lawrence v. Texas*³⁷⁴ might be the exception. In *Lawrence*, the Court struck down a Texas anti-sodomy law, overruling *Bowers v. Hardwick*³⁷⁵ and provoking Justice Scalia. The majority, Justice Scalia contended, had employed stare decisis with respect to *Bowers* in a manner inconsistent with *Casey*.³⁷⁶ According to Justice Scalia, absent from the *Lawrence* Court's decision was any consideration of the workability of *Bowers*, and unlike in *Casey*, the *Lawrence* Court cited divisiveness as a reason for overruling precedent, rather than upholding it.³⁷⁷ True to form, Justice Scalia did not mince words: "To tell the truth, it . . . should surprise no one[] that the Court has chosen today to revise the standards of *stare decisis* set forth in *Casey*. It has thereby exposed *Casey's* extraordinary deference to precedent for the result-oriented expedient that it is."³⁷⁸

Moreover, again perhaps with *Lawrence's* being the exception, a majority of the Court has not once come close to using *Casey* as a model for a stare decisis inquiry.³⁷⁹ The principal opinion in *Ramos*, the Court's most recent foray into stare decisis, does not mention *Casey* at all,³⁸⁰ and Justice Kavanaugh's concurrence in *Ramos* includes *Casey* among a long list of decisions overruling precedent.³⁸¹ Perhaps most significant, though, is the absence of any reference to *Casey* in the majority opinion

Life, Inc., 551 U.S. 449, 535 (2007) (Souter, J., dissenting); *Gonzales v. Carhart*, 550 U.S. 124, 190–91 (2007) (Ginsburg, J., dissenting).

374. 539 U.S. 558 (2003).

375. 478 U.S. 186 (1986); *Lawrence*, 539 U.S. at 578.

376. *Lawrence*, 539 U.S. at 587 (Scalia, J., dissenting).

377. *Id.*

378. *Id.* at 592.

379. See *supra* note 373 (discussing the sparse attention paid to *Casey's* analysis of stare decisis). In *Agostini v. Felton*, 521 U.S. 203 (1997), the majority cited *Casey* in finding that principles of stare decisis did not require it to reaffirm a 1985 decision and rejected the idea that overruling the case would undermine the Court's legitimacy, finding that it "do[es] no violence to the doctrine of *stare decisis* when [the Court] recognize[s] bona fide changes in . . . decisional law." *Id.* at 235–39.

380. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404–08 (2020).

381. See *id.* at 1411–12 (Kavanaugh, J., concurring in part). Justice Kavanaugh observed that the *Casey* Court "rejected *Roe's* trimester framework[] and . . . expressly overruled two other important abortion precedents." *Id.* at 1412 n.1; see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion) (overruling in part *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)).

in *Obergefell v. Hodges*,³⁸² the Court's watershed decision regarding same sex marriage. In *Obergefell*, the Court cited *Lawrence* and overruled the 1972 *Baker v. Nelson*³⁸³ decision with nary a mention of stare decisis.³⁸⁴ In addition, *Ramos* and other recent stare decisis decisions have devoted particular attention to the quality of a precedent's reasoning, suggesting that *Casey*'s analysis is impoverished by today's standards.³⁸⁵ Thus, those who oppose *Roe* might try to convince the Chief Justice that *Casey* has become a "doctrinal dinosaur,"³⁸⁶ "an outlier" among the Court's cases about stare decisis,³⁸⁷ and completely out of step with the Court's application of stare decisis since 1992.

Roe's proponents, on the other hand, might reply that *Pearson* dealt with extensive lower-court experience in applying the *Saucier* procedure³⁸⁸ and that the Court has not applied *Casey*'s approach to stare decisis because it has not had to decide whether to curtail individual constitutional rights (rather than expand them as it did in *Lawrence* and *Obergefell*). Indeed, in discussing reliance interests in *Lawrence*, the Court emphasized that, "[i]n *Casey* [it had] noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course."³⁸⁹ Finally, although less compelling, those seeking to preserve *Roe* through *Casey*'s application of stare decisis can point to Justice

382. 135 S. Ct. 2584 (2015).

383. 409 U.S. 810 (1972).

384. *Obergefell*, 135 S. Ct. at 2605–06.

385. See *Ramos*, 140 S. Ct. at 1405; *Knick v. Township of Scott*, 139 S. Ct. 2162, 2177–78 (2019); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019); *Janus v. AFSCME*, 138 S. Ct. 2448, 2478–79 (2018).

386. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2411 (2015).

387. *Janus*, 138 S. Ct. at 2482.

388. See *Pearson v. Callahan*, 555 U.S. 223, 235 (2009) (indicating that the lack of "consistent application by the lower courts . . . weigh[s] in favor" of reconsidering a precedent involving a judiciary rule (quoting *Payne v. Tennessee*, 501 U.S. 808, 829–30 (1991))).

389. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (emphasis added) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855–56 (1992) (plurality opinion)).

Thomas's assertion in a 2009 concurrence that *Casey* defines "the prevailing approach to *stare decisis*."³⁹⁰

But the Chief Justice's characterization of *stare decisis* in *Citizens United* is at odds with *Casey*: "*Stare decisis* is a doctrine of preservation, not transformation."³⁹¹ And the view Chief Justice Roberts expressed in *Citizens United* is reminiscent of what a dissenting Chief Justice Rehnquist said in *Casey*:

Stare decisis is defined in Black's Law Dictionary as meaning "to abide by, or adhere to, decided cases." Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.³⁹²

Indeed, even though the Court in *Casey* upheld the right of a woman to choose abortion before fetal viability, it transformed *Roe*'s trimester framework into an undue burden test.³⁹³ Moreover, one sees in *Casey* a subtle but significant shift in the identified constitutional foundation for the right to choose, from an emphasis on privacy rights³⁹⁴ to the declaration that "[t]he controlling word . . . is 'liberty,'"³⁹⁵ "the heart of [which] is the right to define one's own concept of existence, of meaning, of

390. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 534 (2009) (Thomas, J., concurring).

391. *Citizens United v. FEC*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring); see also *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019) ("The fact that the justification for the state-litigation requirement continues to evolve is another factor undermining the force of *stare decisis*." (citing *Janus*, 138 S. Ct. at 2472 ("[W]e have previously taken a dim view of similar attempts to recast problematic First Amendment decisions."))).

392. See *Casey*, 505 U.S. at 954 (Rehnquist, C.J., dissenting) (citation omitted).

393. *Id.* at 876 (plurality opinion) ("The trimester framework . . . does not fulfill *Roe*'s own promise that the State has an interest in protecting fetal life or potential life. . . . In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

394. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("Th[e] right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . , as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

395. *Casey*, 505 U.S. at 846 (plurality opinion).

the universe, and of the mystery of human life.”³⁹⁶ In addition, the *Casey* Court cited “personal dignity and autonomy,” words that appear nowhere in *Roe*, as “central to the liberty protected by the Fourteenth Amendment.”³⁹⁷ Finally, gone is the primacy of a woman’s physician in making the abortion decision— “[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician”³⁹⁸—and in the physician’s place is the woman as principal decision maker—“a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”³⁹⁹ With these differences, *Roe*’s challengers might succeed in persuading the Chief Justice that the *Casey* Court’s application of *stare decisis* was not *stare decisis* at all and therefore is not entitled to respect.

B. *Placing Roe on the Stare Decisis Continuum*

Although Chief Justice Roberts reliably has favored upholding earlier rulings when a strong version of *stare decisis* applies (for example, cases involving statutory interpretation and constitutional arenas where Congress exercises primary authority), he otherwise has exhibited little hesitation in voting to overrule Court precedent.⁴⁰⁰ Decisions from 2018 and 2019 present in stark relief the contextual distinctions the Chief Justice has drawn. In *Wayfair*, he advocated adherence to a decision he admitted was wrongly decided because the decision involved interstate commerce, an area in which the Constitution grants Congress broad regulatory latitude.⁴⁰¹ In addition, the Chief Justice cast the deciding vote in *Kisor* to retain *Auer* and *Seminole*

396. *Id.* at 851.

397. *Id.*

398. *Roe*, 410 U.S. at 164; *see also id.* at 163 (“This means . . . that, for the period of pregnancy prior to this ‘compelling’ point, the attending physician, in consultation with his patient, is free to determine . . . that . . . the patient’s pregnancy should be terminated.”).

399. *Casey*, 505 U.S. at 879 (plurality opinion).

400. *See supra* Part I.

401. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101–02 (2018) (Roberts, C.J., dissenting) (“We have applied this heightened form of *stare decisis* in the dormant Commerce Clause context.”).

*Rock*⁴⁰²—administrative law decisions that Congress perhaps could address by statute⁴⁰³—not because he believed that those decisions were decided correctly, but on the basis of *stare decisis* alone.⁴⁰⁴ In contrast, his opinion in *Knick* rejected the idea that the Court should leave *Williamson County* alone because Congress could amend a statute to fix a practical problem the decision had wrought.⁴⁰⁵ That, the Chief Justice explained, was not enough because Congress could not remedy the Court’s erroneous interpretation of the Constitution.⁴⁰⁶

Moreover, by joining Justice Alito’s dissent in *Kimble*, Chief Justice Roberts rejected the majority’s suggestion that *Brulotte* enjoyed a “superpowered form of *stare decisis*” because it involved statutory interpretation and could affect contractual relationships.⁴⁰⁷ As Justice Alito explained: “[W]e do not give super-duper protection to decisions that do not actually interpret a statute. When a precedent is based on a judge-made rule . . . , we cannot ‘properly place on the shoulders of Congress’ the entire burden of correcting ‘the Court’s own error.’”⁴⁰⁸ How much more might one expect the Chief Justice to reject the idea of “super-duper precedent” when referring to *Roe*. Legislative action cannot eliminate the putative right to abortion, which is mentioned nowhere in the Constitution, but ostensibly resides in a right to privacy emanating from the penumbra of the Bill of Rights or in some amorphous right to privacy, dignity, or autonomy hidden within the term “liberty” under the Fourteenth Amendment’s Due Process Clause.⁴⁰⁹

402. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2424 (2019) (Roberts, C.J., concurring in part).

403. *Id.* at 2412 (plurality opinion). *But see id.* at 2444 (Gorsuch, J., concurring in the judgment) (“[I]t [is not] entirely clear that Congress *could* overturn the *Auer* doctrine legislatively.”).

404. *See id.* at 2424 (Roberts, C.J., concurring).

405. *See Knick v. Township of Scott*, 139 S. Ct. 2162, 2179 (2019) (addressing dissent’s assertion that *Williamson County* should enjoy an “enhanced” form of *stare decisis*).

406. *See id.* (indicating that Congress did not have the power to fix *Williamson County*’s disparate treatment of takings claims and other constitutional claims).

407. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2418 (2015) (Alito, J., dissenting) (quoting *id.* at 2410 (majority opinion)).

408. *Id.* (quoting *Girouard v. United States*, 328 U.S. 61, 69–70 (1946)).

409. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (finding abortion right within Fourteenth Amendment’s concept of liberty); *Roe v. Wade*,

Chief Justice Roberts, in fact, underscored in his confirmation hearing the risk associated with interpreting the Due Process Clause: “[I]t is an area in which the danger of judges going beyond their appropriately limited authority is presented because of the nature of the sources of authority. You’re not construing the text narrowly.”⁴¹⁰ If the Chief Justice was unwilling to accord *stare decisis* the usual force in *Kimble*, the risk he identified with respect to interpreting the Due Process Clause would seem to push him even more toward applying a weaker form of *stare decisis* to *Roe*.

This is not to say that Chief Justice Roberts would apply the weakest form of *stare decisis* to *Roe*. The *Janus* Court indicated that First Amendment precedents may enjoy the least respect,⁴¹¹ and the Court in *Alleyne v. United States*⁴¹² stated that “[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections.”⁴¹³ Furthermore, unlike *Janus*, a case in which the Court was recognizing greater free speech rights,⁴¹⁴ overruling *Roe* would *decommission* a very personal individual right. And although the Court in *Hyatt* seemed to do so rather easily,⁴¹⁵ it is hard to equate the right to sue one state in the courts of another with one of the most controversial rights that the Court has recognized in recent history.

The key for pro-choice advocates, then, is to convince Chief Justice Roberts that he must adhere to *Casey*’s view that *stare decisis* enjoys particular force with respect to decisions addressing divisive constitutional issues—that *Roe* really is a special case, one to which the customarily weak form of *stare decisis* with respect to constitutional precedents does not apply. He was not on the Court in *Casey*, however, and none of the opinions he has authored or joined during his tenure suggest that

410 U.S. 113, 152–53 (1973) (discussing sources of constitutional right to privacy and contending that right to choose abortion is included in this right).

410. *Confirmation Hearing*, *supra* note 3, at 259–60 (statement of Judge John G. Roberts, Jr.).

411. *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018).

412. 570 U.S. 99 (2013).

413. *Id.* at 116 n.5.

414. *Janus*, 138 S. Ct. at 2478.

415. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

he would gravitate toward this view. Thus, pushing the Chief Justice toward a stronger form of stare decisis with respect to *Roe* seems a tall order.

C. *Applying Stare Decisis Factors to Roe*

Persuading Chief Justice Roberts about where *Roe* falls on the stare decisis continuum is not insignificant given his voting record. In contexts where the Chief Justice has determined that stare decisis enjoys particular strength, he has voted to uphold precedent every single time.⁴¹⁶ When the Chief Justice has concluded that the principle is weak, on the other hand, he has favored disposing of precedent ten of fourteen times.⁴¹⁷ And *Gamble*—one of the decisions in which he voted to uphold prior rulings—probably should not count among the fourteen given that the Court in that case emphasized that the challenger had not offered sufficient evidence of error.⁴¹⁸ After all, as Justice Kagan pointed out in *Kimble*, stare decisis only is important when the Court determines that a previous decision was wrong.⁴¹⁹

The Chief Justice's vote in *Ramos* to retain *Apodaca* is the first significant sign in over ten years that he is open to upholding precedent when stare decisis is weak, and thus *Roe*'s proponents would be wise to mine Justice Alito's dissent (which the Chief Justice joined) for clues about how to persuade the Chief Justice to leave *Roe* alone.⁴²⁰ Moreover, recent history indicates

416. See *supra* Part I.A.

417. See *id.* Not counted among these numbers is the Chief Justice's recent vote in *Cooper*. The *Cooper* Court declined to evaluate whether to overrule *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), because the plaintiffs asserted nothing more than that the earlier decision was incorrect. See *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020). Thus, one cannot glean how the Chief Justice might have voted had the plaintiffs asserted more, giving the Court reason to evaluate the effect of stare decisis.

Also not counted is the Chief Justice's vote in *Allelyne*, a decision in which the Court overruled its 2002 *Harris* ruling. Although the Chief Justice dissented in *Allelyne*, he did not challenge the manner in which the majority evaluated the demands of stare decisis. See *supra* note 230.

418. See *supra* notes 308–313 and accompanying text.

419. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (“[S]tare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.”).

420. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1431–40 (2020) (Alito, J., dissenting) (discussing stare decisis).

that, regardless of where the Chief Justice situates *Roe* on the stare decisis continuum, he would give studied attention to various factors from the Court's stare decisis jurisprudence in deciding how to vote in a challenge to *Roe*.⁴²¹ With the Court's uneven consideration of various factors,⁴²² however, which factors Chief Justice Roberts would consider relevant is an open question. If he determines that *Casey* sets the stare decisis standard, one would expect him to look to the factors the *Casey* Court addressed—workability, reliance, and developments (legal and factual) since the decision.⁴²³ But if the Chief Justice does not view *Casey* as a constraint, he might dispense with one or more of the *Casey* factors and add one or more other factors which the *Casey* Court neglected.

In the Chief Justice's confirmation hearing, he identified workability, doctrinal developments, and reliance (which he also referred to as "settled expectations") as the principal considerations when deciding whether to overrule an erroneous precedent.⁴²⁴ As noted above, these factors featured in *Casey*. Not surprisingly, they also have been present in the many cases examining the effect of stare decisis while the Chief Justice has been on the Court.⁴²⁵ Opinions that he has written and those he has joined since becoming Chief Justice have addressed with some frequency other factors as well, including the age of the

421. See *Cooper*, 140 S. Ct. at 1003; *Knick v. Township of Scott*, 139 S. Ct. 2162, 2177–78 (2019); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

422. See, e.g., *Janus v. AFSCME*, 138 S. Ct. 2448, 2478–79 (2018) (identifying five relevant factors); see also *Knick*, 139 S. Ct. at 2178 (reciting only four of the five factors identified in *Janus*); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

423. See *supra* notes 354–366 and accompanying text (describing *Casey's* application of stare decisis).

424. See, e.g., *Confirmation Hearing*, *supra* note 3, at 142 (statement of Judge John G. Roberts, Jr.); see also *id.* at 223 (indicating that reliance "is often expressed in the Court's opinions [as] settled expectations").

425. See, e.g., *Ramos*, 140 S. Ct. at 1432–36 (Alito, J., dissenting); *Knick*, 139 S. Ct. at 2178; *Janus*, 138 S. Ct. at 2478; *Johnson v. United States*, 135 S. Ct. 2551, 2562–63 (2015); *Citizens United v. FEC*, 558 U.S. 310, 362–63 (2010); *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009); *Arizona v. Gant*, 556 U.S. 332, 358–63 (2009) (Alito, J., dissenting); *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). *Janus* identified as separate factors consistency with related decisions and doctrinal developments. *Janus*, 138 S. Ct. at 2478–79. But the *Janus* Court did not evaluate them separately, instead addressing them together in an evaluation of factual legal developments. *Id.* at 2482–84.

precedent⁴²⁶ and, with particular prominence of late, the quality of the precedent's reasoning.⁴²⁷

1. Roe's Age

That *Roe* is pushing fifty is unlikely to figure much in the Chief Justice's stare decisis evaluation. Admittedly, he joined the 2019 *Kisor* majority in declining to overrule the Court's 1945 decision in *Seminole Rock* and disagreed with the 2018 majority in *Wayfair* when it did away with the Court's 1967 decision in *Bellas Hess*; the Chief Justice situated both *Seminole Rock* and *Bellas Hess* on the strong side of the stare decisis continuum.⁴²⁸ And although he voted in 2020 to retain a 1972 constitutional precedent in *Ramos*, in the 2019 *Hyatt*, 2018 *Janus*, and 2015 *Kimble* decisions, all of which involved precedents the Chief placed on the weak side, he favored overruling decisions dating back to 1979, 1977, and 1964.⁴²⁹ Moreover, the Chief Justice sided with the majority in *Leegin*, a 2007 decision overruling a 1911 decision in the antitrust realm, where stare decisis also is weak.⁴³⁰ Thus, he does not seem compelled to keep an erroneous precedent merely because it is old.

If overruling a precedent threatens to upend a host of later decisions that have relied on the precedent—a risk that increases with age—the calculus is different. The Chief Justice in *Ramos* joined a dissenting Justice Alito, who observed that Louisiana and Oregon “ha[d] conducted thousands and thousands of trials” assuming *Apodaca*'s validity and who warned that disposing of *Apodaca* could unleash a “tsunami of litigation.”⁴³¹ Similarly, in the *Kisor* Court's discussion of stare decisis, which the Chief Justice endorsed, the Court observed, “This Court alone

426. E.g., *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019); *Citizens United*, 558 U.S. at 362–63; *Montejo*, 556 U.S. at 792–93; *Pearson*, 555 U.S. at 233; *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 452–53 (2008).

427. E.g., *Ramos*, 140 S. Ct. at 1432–35 (Alito, J., dissenting); *Knick*, 139 S. Ct. at 2177–78; *Hyatt*, 139 S. Ct. at 1499; *Janus*, 138 S. Ct. at 2478–79; *Citizens United*, 558 U.S. at 362–63; *Montejo*, 556 U.S. at 792–93; *Gant*, 556 U.S. at 361–63 (Alito, J., dissenting).

428. See *supra* notes 109–135 and accompanying text.

429. See *supra* notes 231–254, 274–299, 300–307, 327–343 and accompanying text.

430. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899, 907 (2007).

431. *Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting).

has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times. . . . It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.”⁴³² Moreover, with the Chief Justice on board, the *Gamble* Court stressed that the evidence of error needed to be very strong to “overcome numerous ‘major decisions of th[e] Court’ spanning 170 years.”⁴³³ In addition, the 2008 CBOCS majority (of which the Chief Justice was a part) cited age as a reason not to depart from *Sullivan* (decided four years before *Roe*) and emphasized that doing otherwise would destabilize “many Court precedents.”⁴³⁴ Finally, back in 2006, the Chief Justice joined Justice Breyer who asserted in *Randall* that stare decisis should buoy the Court’s 1976 *Buckley* decision because the underlying principle “ha[d] become settled through iteration and reiteration over a long period of time.”⁴³⁵

Taking *Roe* and *Casey* at their word, the abortion right *Roe* recognized is one of a kind,⁴³⁶ and therefore, overruling *Roe* should not have similar ripple effects. In considering whether there were doctrinal developments that undermined *Roe*, the *Casey* Court emphasized that any error in *Roe* goes to the strength of the state’s interest in potential life and that perpetuating that error in future decisions was unlikely to have far-reaching consequences.⁴³⁷ If the *Casey* Court was correct that *Roe* is so limited, then—although *Roe*’s demise no doubt would create a cultural tidal wave—it would not have the wide-ranging effects of the kind that seem to have concerned the Chief Justice in *Ramos*, *Kisor*, *Gamble*, and *Randall*. In fact, because overruling *Roe* would staunch a stream of litigation that has continued unabated since 1973, departing from stare deci-

432. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019).

433. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Welch v. Tex. Dep’t. of Highways & Pub. Transp.*, 483 U.S. 468, 479 (1987)).

434. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 451–52 (2008).

435. *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality opinion).

436. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality opinion) (“Abortion is a unique act. It is an act fraught with consequences . . . , depending on one’s beliefs, for the life or potential life that is aborted.”); *id.* at 857 (“[O]ne could classify *Roe* as *sui generis*.”); *Roe v. Wade*, 410 U.S. 113, 159 (1973) (“The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . .”).

437. See *Casey*, 505 U.S. at 858–59 (discussing the effect of not overruling *Roe*).

sis would have the very opposite effect that the *Kisor* majority feared and that Justice Alito's *Ramos* dissent forecasted.

2. Quality of Roe's Reasoning

The *Casey* Court did not evaluate *Roe*'s reasoning when it decided to affirm *Roe*'s essential holding,⁴³⁸ and in *Kisor*, Chief Justice Roberts joined the portion of the opinion of the Court in which Justice Kagan stated that whether an earlier decision was "right and well-reasoned . . . is not the test for overturning [it]."⁴³⁹ Numerous opinions during the Chief Justice's tenure, though, indicate that he believes that a precedent's reasoning is an important consideration, at least in cases when stare decisis is weak.⁴⁴⁰ For the Chief Justice, it seems to be a matter of degree. As he explained in *Knick*: "*Williamson County* was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of [the Court's] takings jurisprudence."⁴⁴¹

Based on what the Chief Justice himself has written and the opinions he has joined, a number of details are relevant in measuring the extent to which a precedent's reasoning has gone off course. Among the pertinent considerations are whether the decision relies on dicta⁴⁴² or decisions that are not germane,⁴⁴³ ignores applicable precedent,⁴⁴⁴ conflicts with the pertinent jurisprudential corpus,⁴⁴⁵ has been subject to criticism by Justices and scholars,⁴⁴⁶ fails to account for contextual dis-

438. See *id.* at 869 ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was" (emphasis added)); *id.* at 982 (Scalia, J., concurring in the judgment in part and dissenting in part).

439. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423 (2019).

440. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1432–36 (2020) (Alito, J., dissenting); *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019); *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019); *Janus v. AFSCME*, 138 S. Ct. 2448, 2479 (2018); *Citizens United v. FEC*, 558 U.S. 310, 362–63 (2010); *Montejo v. Louisiana*, 556 U.S. 778, 792–93 (2009); *Arizona v. Gant*, 556 U.S. 332, 358 (2009) (Alito, J., dissenting); *Pearson v. Callahan*, 555 U.S. 223, 234 (2009).

441. *Knick*, 139 S. Ct. at 2178.

442. See *id.* at 2178.

443. See *Janus*, 138 S. Ct. at 2479.

444. See *Knick*, 139 S. Ct. at 2178; *Citizens United*, 558 U.S. at 348 (indicating that *Austin v. Michigan State Chamber of Commerce* "bypass[ed]" two important precedents).

445. See *Knick*, 139 S. Ct. at 2178; *Janus*, 138 S. Ct. at 2479–80.

446. *Knick*, 139 S. Ct. at 2178.

tinctions,⁴⁴⁷ has had changing justifications over time,⁴⁴⁸ lacked a sufficient judicial record,⁴⁴⁹ or departed from the understanding of relevant principles at the Founding.⁴⁵⁰ Importantly, though, *Gamble* teaches that, for the Court to overrule a precedent, the evidence must make clear that the reasoning was errant.⁴⁵¹ Unlike in *Gamble*, however, where repeating old arguments met disfavor, it would seem that any arguments made in *Casey* about how *Roe* went off course still are fair game in a challenge to *Roe*, given that the *Casey* Court did not consider and reject any arguments regarding *Roe*'s premises, but avoided them entirely.⁴⁵²

An exhaustive study of all of the considerations identified above would stretch this Article beyond its principal aim, but in light of what the Chief Justice himself stated in *Knick* and what Justice Alito said in the *Ramos* dissent the Chief Justice joined, a few points warrant specific mention. First, regarding the weakness of *Roe*'s reasoning, the Chief Justice might find it telling that the Court in *Casey* did not even consider *Roe*'s reasoning,⁴⁵³ but affirmed *Roe*'s "essential" holding based on the *Casey* Court's explanation of liberty and on other factors underlying *stare decisis*.⁴⁵⁴ Of course, one rightly might point out that, similar to the *Casey* Court, Justice Alito declined to say how he would have voted in *Apodaca* if he were on the Court at the time,⁴⁵⁵ but it seems more notable that Justice Alito departed

447. *Janus*, 138 S. Ct. at 2480.

448. *Knick*, 139 S. Ct. at 2178; *Citizens United*, 558 U.S. at 363.

449. *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015).

450. *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019).

451. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019).

452. *See id.* at 1974, 1976 (discussing arguments previously raised and noting the absence of any changes making the arguments more convincing); *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (plurality opinion) ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, *if error there was . . .*" (emphasis added)); *id.* at 982 (Scalia, J., dissenting).

453. *See Casey*, 505 U.S. at 854–69 (plurality opinion) (omitting an evaluation of *Roe*'s logic).

454. *See id.* at 853 ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

455. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1434 (2020) (Alito, J., dissenting) ("I cannot say that I would have agreed either with Justice White's analysis or his bottom line in *Apodaca* if I had sat on the Court at that time . . ."); *cf. Casey*, 505

from the *Casey* Court when he engaged in a careful and detailed evaluation of the reasoning that led to the *Apodaca* Court's judgment.⁴⁵⁶ Whatever one might say about the *Apodaca* Court's bottom line, according to Justice Alito (and the Chief Justice with him), the errors the *Ramos* majority identified did not make the *Apodaca* decision "gravely mistaken"⁴⁵⁷ or, as the Chief Justice described the precedent in *Knick*, "exceptionally ill founded."⁴⁵⁸

Which leads to the second point. Unlike what the Chief Justice noted in *Knick* with respect to *Williamson County*, during the "[n]early . . . half century . . . since [the Court decided *Apodaca*], no Justice ha[d] even hinted that *Apodaca* should be reconsidered."⁴⁵⁹ The same cannot be said of *Roe*'s almost fifty-year history. Before *Casey*, Justice O'Connor repeatedly criticized *Roe*.⁴⁶⁰ For example, in *Akron v. Akron Center for Reproductive Health, Inc.*,⁴⁶¹ she asserted that *Roe*'s adoption of the trimester framework and viability as a critical marker therein "violates the fundamental aspiration of judicial decision making through the application of neutral principles 'sufficiently absolute to give them roots throughout the community and continuity over significant periods of time . . .'"⁴⁶² Furthermore in *Akron*, she voiced her opposition to the *Roe* Court's conclusion that the

U.S. at 871 (plurality opinion) ("We do not need to say whether each of us, . . . when the valuation of the state interest came before [the Court] as an original matter, would have concluded . . . that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.").

456. See *Ramos*, 140 S. Ct. at 1432–36 (Alito, J., dissenting).

457. *Id.* at 1405 (majority opinion).

458. *Knick*, 139 S. Ct. at 2178; see *Ramos*, 140 S. Ct. at 1433 (Alito, J., dissenting) (describing errors the *Ramos* majority identified as "overblown").

459. *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting).

460. See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828–29 (1986) (O'Connor, J., dissenting) (asserting that the state has a compelling interest in protecting potential life that exists throughout pregnancy and that *Roe*'s trimester framework is "outmoded"); *Planned Parenthood Ass'n of Kan. City, Mo. v. Ashcroft*, 462 U.S. 476, 504 (1983) (O'Connor, J., concurring in part in the judgment and dissenting in part) ("[T]he State possesses a compelling interest in protecting and preserving fetal life, [and] I believe this state interest is extant throughout pregnancy."); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 453–66 (1983) (O'Connor, J., dissenting) (criticizing *Roe*'s trimester framework and evaluation of the state's interests).

461. 462 U.S. 416.

462. *Id.* at 458 (O'Connor, J., dissenting) (quoting ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 114 (1976)).

state's interest in protecting potential life is not compelling throughout pregnancy.⁴⁶³

Justice Kennedy seems to have held similar views. By joining Chief Justice Rehnquist's 1989 opinion in *Webster v. Reproductive Health Services*,⁴⁶⁴ it appears that Justice Kennedy both concurred with Justice O'Connor about the nature of the state's interest in potential life⁴⁶⁵ and fundamentally disapproved of *Roe's* declarations regarding trimesters and viability: "The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle."⁴⁶⁶ Other Justices—Chief Justice Rehnquist and Justices Scalia, Thomas, and Byron White, in particular—have repeatedly and more vociferously aired their objections to *Roe*.⁴⁶⁷ Even Justice Ginsburg

463. See *id.* at 461 ("The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that the State's interest in protecting potential human life exists throughout the pregnancy.").

464. 492 U.S. 490 (1989).

465. See *id.* at 519 (opinion of Rehnquist, C.J.) (criticizing *Roe*).

466. *Id.* at 518.

467. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) ("I remain fundamentally opposed to the Court's abortion jurisprudence."); *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) ("I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution." (citation omitted)); *Stenberg v. Carhart*, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting) ("If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let them decide, State by State, whether this practice should be allowed."); *id.* at 980 (Thomas, J., dissenting) ("In 1973, this Court . . . render[ed] unconstitutional abortion statutes in dozens of States. . . . [T]hat decision was grievously wrong." (citing *Roe v. Wade*, 410 U.S. 113 (1973))); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) ("We believe that *Roe* was wrongly decided, and that it can and should be overruled . . ."); *id.* at 980 (Scalia, J., concurring in the judgment in part and dissenting in part) ("The issue is whether [the power of a woman to abort her unborn child] is a liberty protected by the Constitution of the United States. I am sure it is not."); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520–21 (1990) (Scalia, J., concurring) ("I continue to believe . . . that the Constitution contains no right to abortion. . . . The Court should end its disruptive intrusion into this field as soon as possible."); *Webster*, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment) ("As to Part II-D [of Chief Justice Rehnquist's opinion], I [hold the] view that it effectively would overrule *Roe v. Wade*. I think that should be done, but would do it more explicitly." (citation omitted)); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 788 (1986) (White, J.,

before ascending to the Court commented that the “[h]eavy-handed judicial intervention [in *Roe*] was difficult to justify.”⁴⁶⁸ And perhaps most significant, Chief Justice Burger, a member of *Roe*’s majority,⁴⁶⁹ was questioning the decision by 1986: “The soundness of our holdings must be tested by the decisions that purport to follow them. If [*Planned Parenthood of Central Missouri v. Danforth* and today’s holding really mean what they seem to say, I agree we should reexamine *Roe*.”⁴⁷⁰

In addition, scholarly criticism began immediately after the Court handed down *Roe*.⁴⁷¹ In 1973, pro-choice Yale professor John Ely Hart⁴⁷² stated: “The opinion strikes the reader initially as a sort of guidebook, addressing questions not before the Court and drawing lines with an apparent precision one generally associates with a commissioner’s regulations. On closer examination, however, the precision proves largely illusory.”⁴⁷³ Harvard professor Laurence Tribe contemporaneously expressed a similar sentiment: “One of the most curious things about *Roe* is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.”⁴⁷⁴ And Professors Hart and Tribe have not been alone.⁴⁷⁵ Given

dissenting) (“[T]he time has come to recognize that *Roe v. Wade* . . . ‘departs from a proper understanding’ of the Constitution and to overrule it.” (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985))); *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting) (“To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment.”); *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting) (“I find nothing in the language or history of the Constitution to support the Court’s judgments. The Court simply fashions and announces a new constitutional right for pregnant women . . .”).

468. Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385 (1985).

469. *Roe*, 410 U.S. at 115.

470. *Thornburgh*, 476 U.S. at 785 (Burger, C.J., dissenting).

471. Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1427 (2020) (Alito, J., dissenting) (noting scholarly approbation of nonunanimous verdicts, which the *Apodaca* Court concluded were permissible under the Sixth Amendment).

472. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926 (1973) (“Were I a legislator I would vote for a statute very much like the one the Court [in *Roe*] ends up drafting.”).

473. *Id.* at 922 (footnote omitted).

474. Laurence H. Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 7 (1973).

475. See, e.g., Timothy P. Carney, *The pervading dishonesty of Roe v. Wade*, WASH. EXAMINER (Jan. 23, 2012, 12:00 AM), <https://www.washingtonexaminer.com/the>

that Chief Justice Roberts considered persuasive less extensive critiques of *Williamson County*,⁴⁷⁶ one would expect *Roe*'s opponents to remind the Chief Justice early and often of the widespread disapproval of *Roe*'s reasoning.

Finally, in his majority opinion in *Knick*, the Chief Justice cited the shifting justification for the rule in *Williamson County* as undercutting its precedential force.⁴⁷⁷ As discussed above, one can see multiple revisions in the Court's abortion jurisprudence over time—from being founded on privacy to being rooted in dignity and autonomy, from employing a trimester framework to using a structured undue burden standard that has further morphed into an uncertain balancing test, and from the primacy of the doctor in the decisionmaking process to the woman's right to make "the ultimate decision."⁴⁷⁸ Indeed, drawing from *Knick*, abortion foes might argue to the Chief Justice that the *Roe* Court errantly recognized an unenumerated right wobbling on "shaky foundations," with a shifting justification, and with respect to which the Court has been in search of a workable test "for over [forty-five] years."⁴⁷⁹

3. *Roe's Workability*

The fact that the constitutional test for abortion regulations has evolved over the years could prove important to the Chief Justice in evaluating *Roe*'s workability. Workability, however, did not feature prominently in the *Casey* Court's *stare decisis* evaluation. Having decided to abandon the trimester framework, the Court described *Roe* as a "simple limitation beyond

pervading-dishonesty-of-roe-v-wade [https://perma.cc/W8XH-CM6V] (recounting numerous criticisms of *Roe*); Kermit Roosevelt, Opinion, *Shaky Basis for a Constitutional 'Right'*, WASH. POST (Jan. 22, 2003), https://www.washingtonpost.com/archive/opinions/2003/01/22/shaky-basis-for-a-constitutional-right/dd30d42e-188d-42f6-8fb2-b935394e63aa/ [https://perma.cc/8HUY-DT33] ("As constitutional argument, *Roe* is barely coherent. The court pulled its fundamental right to choose more or less from the constitutional ether.").

476. See *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019).

477. *Id.* ("[T]he state-litigation requirement has been a rule in search of a justification for over 30 years."). With the Chief Justice as part of the majority, the Court in *Janus* expressed a similar point. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2472 (2018).

478. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875 (1992) (plurality opinion); see *supra* notes 391–399 and accompanying text (discussing how *Casey* modified *Roe*).

479. *Knick*, 139 S. Ct. at 2178.

which a state law is unenforceable.”⁴⁸⁰ Gone were Justice O’Connor’s concerns about the absence of a “bright line” rule to guide legislatures and about courts being ill-equipped to “act as science review boards.”⁴⁸¹ According to *Casey*, courts are perfectly capable of evaluating regulations under the undue burden standard with viability acting as the fulcrum.⁴⁸²

Testing experience since *Casey* against what Chief Justice Roberts has considered relevant in assessing workability suggests he might not view *Roe* and *Casey* as setting out such a simple and workable limitation. Based on the opinions he has written or joined, key considerations in evaluating workability include whether the decision has given rise to unreasonable or unanticipated consequences⁴⁸³ or draws unclear lines, which result in different applications that create uncertainty and increase litigation.⁴⁸⁴ *Roe*’s advocates might point out that the consequences of the decision have not resulted in a practical conundrum like the one in *Knick*, but what the *Casey* Court anticipated and what has happened have differed sharply.

Roe, even as the *Casey* Court interpreted it, has proved incapable of yielding the result that the Court promised—“call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.”⁴⁸⁵ Through persistent legislative action,⁴⁸⁶ “States . . . have continued to ‘give it a try’ ever since”⁴⁸⁷ *Roe*, thereby spawning constant litigation.⁴⁸⁸

480. *Casey*, 505 U.S. at 855.

481. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 455, 458 (1983) (O’Connor, J., dissenting).

482. See *Casey*, 505 U.S. at 855 (discussing workability).

483. See *Knick*, 139 S. Ct. at 2179.

484. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2481 (2018); *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2562 (2015); *Arizona v. Gant*, 556 U.S. 332, 360 (2009) (Alito, J., dissenting); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 902–04 (2007).

485. *Casey*, 505 U.S. at 867.

486. Elizabeth Nash, Lizamarie Mohammed & Olivia Cappello, *Illinois Steps Up as Other States Decimate Abortion Rights*, GUTTMACHER INST. (June 12, 2019), <https://www.guttmacher.org/article/2019/06/illinois-steps-other-states-decimate-abortion-rights> [<https://perma.cc/ZF2L-2H37>] (noting that “53 abortion restrictions ha[d] been enacted in 17 states” in the first half of 2019).

487. *Janus*, 138 S. Ct. at 2481.

488. See Amanda Holpuch & Erin Durkin, ‘We’re in the fight of our lives’: Alabama abortion law spurs lawsuits and protests, GUARDIAN (May 15, 2019, 6:25 PM), <https://>

Moreover, *Casey's* undue burden test did not even attract the votes of a majority of the Justices hearing the case,⁴⁸⁹ and the test has proven difficult to apply. The Court in *Hellerstedt* interpreted the undue burden test to require courts to balance the burdens and benefits of abortion regulations.⁴⁹⁰ When the Court in *Gonzales* nine years earlier applied the undue burden standard, however, it did not balance burdens and benefits, but was more faithful to *Casey's* text and considered whether the applicable regulation had the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion"⁴⁹¹ pre-viability.⁴⁹² With changes from one test to another and with clear variations in application even within the Court, it may be difficult to convince Chief Justice Roberts that *Roe* is workable. The stream of litigation since *Roe* suggests that neither *Roe* nor *Casey* "provid[ed] a test that would be relatively easy for . . . judges to apply," and to the extent that *Hellerstedt* calls for a free-flowing balancing exercise, the undue burden standard now requires the type of "case-by-case, fact-specific decisionmaking" that the Chief Justice rejected in *Gant*.⁴⁹³ Indeed, similar to what the Court said in *Johnson* with the Chief Justice in the majority, *Roe's* opponents reasonably can argue

www.theguardian.com/us-news/2019/may/15/were-in-the-fight-of-our-lives-alabama-abortion-bill-spurs-lawsuits-and-protests [https://perma.cc/8VN4-PUGR] (indicating that a lawsuit challenging an Alabama abortion ban "join[ed] a slew of other legal actions filed in response to efforts in other states to drastically restrict abortion access in the US").

489. Cf. *Alleyne v. United States*, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring) ("[A] decision may be 'of questionable precedential value' when 'a majority of the Court expressly disagreed with the rationale of [a] plurality.'" (alteration in original) (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996))). As the Ninth Circuit Court of Appeals has explained, "[a]lthough parts of the joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless considered the holding of the Court . . . as the narrowest position supporting the judgment." *Whole Woman's Health v. Cole*, 790 F.3d 563, 571 (9th Cir. 2015) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)); see also *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting) ("Despite my disagreement with the opinion, . . . the *Casey* joint opinion represents the holding of the Court in that case." (citing *Marks*, 430 U.S. at 193)).

490. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016).

491. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (plurality opinion).

492. See *Gonzales v. Carhart*, 550 U.S. 124, 156–67 (2007) (considering the partial birth abortion ban's purpose and effect).

493. *Arizona v. Gant*, 556 U.S. 332, 360 (2009) (Alito, J., dissenting).

that, “[a]ll in all, [*Roe*], [*Casey*], and [*Hellerstedt* have] failed to establish any generally applicable test that prevents [judicial decisionmaking] from devolving into guesswork and intuition.”⁴⁹⁴ Rather, “[e]ven [since *Casey*] tried to clarify the [scope of the abortion right], [it] remains a ‘judicial morass that defies systemic solution,’ ‘a black hole of confusion and uncertainty’ that frustrates any effort to impart ‘some sense of order and direction.’”⁴⁹⁵ Consequently, reminiscent of his *Wayfair* dissent, Chief Justice Roberts might conclude that the Court in *Casey* “compound[ed] its past error by trying to fix it”⁴⁹⁶ and that another attempted fix may compound the error even more. As he said in *Citizens United*, *stare decisis*, “counsels deference to past mistakes, but provides no justification for making new ones.”⁴⁹⁷

4. *Developments Since Roe*

Although approaching the Chief Justice by defending *Roe*’s reasoning and workability seems perilous, *Roe*’s supporters may have an opportunity with respect to developments since 1973. Various developments appear to have influenced the Chief Justice in the past. Among them are proof that the assumptions underlying a precedent were incorrect;⁴⁹⁸ changes in technology;⁴⁹⁹ changes in economic understanding;⁵⁰⁰ attempts to limit the precedent;⁵⁰¹ developments in constitutional law;⁵⁰² and that the Court previously addressed a point in an earlier decision.⁵⁰³ Of these, changes in constitutional law may prove to be of particular import.

494. *Johnson v. United States*, 135 S. Ct. 2551, 2559 (2015).

495. *Id.* at 2562 (quoting *United States v. Vann*, 660 F.3d 771, 787 (4th Cir. 2011) (Agee, J., concurring)).

496. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2104 (2018) (Roberts, C.J., dissenting).

497. *Citizens United v. FEC*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring).

498. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2483 (2018); *Kimble v. Marvel Entm’t LLC*, 135 S. Ct. 2401, 2415 (2015) (Alito, J., dissenting); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274–76 (2014).

499. See *Citizens United*, 558 U.S. at 364.

500. *Kimble*, 135 S. Ct. at 2415 (Alito, J., dissenting); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).

501. *Leegin*, 551 U.S. at 901.

502. See *Hurst v. Florida*, 136 S. Ct. 616, 623–24 (2016).

503. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 799 (2014).

The Court in *Casey* took a brief look at factual developments and noted that abortion had become more safe and that viability was coming earlier, but the Court suggested that those changes “ha[d] no bearing on the validity of *Roe*’s central holding, that viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”⁵⁰⁴ Yet the *Roe* Court offered no factual support for viability as the appropriate marker. It noted a divergence in thought about when life begins, declared that the state could not put its thumb on the scale, and declared that viability is the point at which the state’s interest in protecting potential life becomes compelling.⁵⁰⁵ According to *Roe*, both logic and biology justified this decision because, at viability, “the fetus . . . presumably has the capability of meaningful life outside the mother’s womb.”⁵⁰⁶ Whether something is meaningful, of course, is a value judgment, and otherwise, as Professor Ely aptly stated, “the Court’s defense seems to mistake a definition for a syllogism.”⁵⁰⁷ When a decision is not based on facts, factual changes cannot undermine it. As a result, factual developments as such may not be relevant to the Chief Justice at all. The lack of a factual basis, on the other hand, is another mark against *Roe*’s reasoning.

Developments in constitutional law since *Roe*, though, appear to weigh in favor of retaining the decision. In fact, the Court’s decision in *Obergefell* seems to reflect not an erosion of *Roe*, but an expansion of unenumerated rights arising out of the Fourteenth Amendment’s liberty interest.⁵⁰⁸

In his dissent in *Lawrence*, Justice Scalia asserted that *Washington v. Glucksberg*,⁵⁰⁹ in which the Court concluded that the Fourteenth Amendment does not bar a prohibition against physician-

504. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (plurality opinion).

505. *See Roe v. Wade*, 410 U.S. 113, 159–66 (1973).

506. *Id.* at 163.

507. Ely, *supra* note 472, at 924.

508. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

509. 521 U.S. 702 (1997).

assisted suicide, represented a retreat from *Roe* and *Casey*.⁵¹⁰ According to Justice Scalia, the *Glucksberg* Court concluded that a right is fundamental under the Fourteenth Amendment “only [if it is] ‘deeply rooted in this Nation’s history and tradition,’” a question that the Court in *Roe* and *Casey* had not explored.⁵¹¹ But the majority in *Lawrence* made no mention of *Glucksberg* and looked to *Casey* as support for overruling *Bowers*,⁵¹² and the Court in *Obergefell* explained that, although *Glucksberg*’s approach may have been appropriate with respect to the right considered therein, it did not exclude other approaches.⁵¹³ And the *Obergefell* Court cited *Lawrence* when it stated that “[h]istory and tradition guide and discipline [a fundamental rights] inquiry but do not set its outer boundaries.”⁵¹⁴

Thus, *Roe*’s proponents might argue to the Chief Justice that, although the *Obergefell* Court made no mention of *Roe* or *Casey*, *Obergefell* represents a development that reinforces those two rulings. Moreover, recalling the concern that Justice Alito expressed in the *Ramos* dissent that the Chief Justice joined, pro-choice advocates could maintain that *Roe* “is intertwined with the body of [the Court’s Fourteenth] Amendment case law” and that “[r]epudiating the reasoning of [*Roe*] will almost certainly prompt calls to overrule [*Obergefell*]” and other rulings with similar roots.⁵¹⁵ The problem, of course, is that *Obergefell* stresses that the Fourteenth Amendment inquiry is right-specific, and to argue that constitutional developments fortify *Roe*, one may need to bring up a decision the Chief Justice considered one of alarming judicial overreach.⁵¹⁶ That could be a bridge too far.

510. See *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (observing that the Court in *Glucksberg* concluded that a person does not have a constitutional right to physician-assisted suicide because such a right was not grounded in “this Nation’s history and tradition” (quoting *Glucksberg*, 521 U.S. at 721) (internal quotation marks omitted)).

511. *Id.*

512. See *id.* at 573–74 (majority opinion) (citing *Casey* as a development that undermined *Bowers*).

513. See *Obergefell*, 135 S. Ct. at 2602.

514. *Id.* at 2598 (citing *Lawrence*, 539 U.S. at 572).

515. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1436 (2020) (Alito, J., dissenting).

516. See *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) (“The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent.”).

5. *Reliance on Roe*

Which way reliance pushes Chief Justice Roberts may depend on how broadly he conceives the factor. The Court in *Casey* employed an expansive view, looking to economic and social developments since the Court decided *Roe*.⁵¹⁷ To win favor with the Chief Justice on reliance, *Roe*'s defenders likely will need to convince him that *Casey*'s conception represents the relevant standard with respect to precedent under which the Court has recognized a constitutional right.

That is a hard sell. Opinions since the Chief Justice's elevation to the Court have taken a narrower view of reliance interests. Just recently in *Ramos*, with the Chief Justice joining, Justice Alito underscored the concrete reliance interests related to *Apodaca*, contrasting those interests with what the *Montejo* dissent raised and the *Montejo* majority (including the Chief Justice) rejected—a vague “public . . . interest ‘in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State.’”⁵¹⁸ This interest, according to Justice Alito, was an “abstract [one], if it c[ould] be called reliance in any proper sense of the term.”⁵¹⁹ Additionally, the *Janus* Court emphasized that reliance interests are weaker when there is uncertainty regarding the applicable standard and when there are significant questions about a decision's continuing vitality.⁵²⁰ Moreover, the Court in *Janus* stressed that reliance is a less important factor when overruling a decision will have only a short-term effect on expectations and affected parties have the ability to protect themselves against the changes that would result.⁵²¹

Under this narrower view, *Roe* is more vulnerable to attack. Looking to what Justice Alito said about *Montejo* in *Ramos*, one might suggest to the Chief Justice that the nebulous societal reliance the *Casey* Court credited is not “reliance in any proper

517. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855–56 (1992).

518. *Ramos*, 140 S. Ct. at 1439 (Alito, J., dissenting) (quoting *Montejo v. Louisiana*, 556 U.S. 778, 809 (2009) (Stevens, J., dissenting)).

519. *Id.*

520. See *Janus v. AFSCME*, 138 S. Ct. 2448, 2484–85 (2018).

521. See *id.*; see also *Ramos*, 140 S. Ct. at 1439 (Alito, J., dissenting) (reiterating the *Janus* Court's conclusion that the ability to protect against consequences if a precedent is overruled mitigates reliance interests with respect to the precedent).

sense of the term.”⁵²² As the Court in *Casey* conceded, and decisions since Chief Justice Roberts joined the Court have confirmed, reliance usually takes on significance when a precedent involves contract or property rights,⁵²³ and *Roe* does not implicate those rights. Also, in *Kisor* and *Ramos*, the Chief Justice ostensibly feared that overruling precedent would bring about an avalanche of legal challenges to decisions in which courts had relied on precedent,⁵²⁴ and overruling *Roe* quite likely would put a damper on, if not smother, most constitutional abortion-related litigation. Furthermore, any legitimate reliance interest in *Roe* surely has been weakened substantially by the obvious uncertainty surrounding *Roe*’s future, which uncertainty is manifest both in commentary⁵²⁵ and in legislative efforts to shore up abortion rights in the event that the Court overrules *Roe*.⁵²⁶ Finally, pointing to those legislative developments and to the availability of birth control,⁵²⁷ abortion opponents might look to *Janus* and argue that “it would be unconscionable to . . . abridge[] in perpetuity” the States’ right to enact legislation prohibiting abortion when the public can take steps to preserve access to abortion or to prevent the need for the procedure.⁵²⁸

522. *Ramos*, 140 S. Ct. at 1439 (Alito, J., dissenting).

523. See *Citizens United v. FEC*, 558 U.S. 310, 365 (2010); *Arizona v. Gant*, 556 U.S. 332, 358–59 (2009) (Alito, J., dissenting); *Pearson v. Callahan*, 555 U.S. 223, 233 (2009); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

524. See *Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting) (observing that “thousands and thousands of trials” had been held based on *Apodaca*’s validity); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (noting that lower courts had applied *Auer* or *Seminole Rock* “thousands of times”).

525. See, e.g., Rebecca Shapiro, *CNN’s Jeffrey Toobin: ‘No Doubt’ Abortion Will Be Illegal In 20 States In 18 Months*, HUFFPOST (June 28, 2018), https://www.huffpost.com/entry/jeffrey-toobin-abortion-illegal-20-states-18-months_n_5b33ea80e4b0b5e692f3dced [<https://perma.cc/Q337-ES88>] (“*Roe v. Wade* is doomed.” (quoting CNN legal analyst Jeffrey Toobin) (internal quotation marks omitted)).

526. See *Nash et al.*, *supra* note 486 (indicating that *Roe* is under direct threat and identifying state efforts to protect the abortion right).

527. See PLANNED PARENTHOOD, *A HISTORY OF BIRTH CONTROL METHODS* (2012), https://www.plannedparenthood.org/files/2613/9611/6275/History_of_BC_Methods.pdf [<https://perma.cc/4EXN-XY8K>] (describing various methods of birth control).

528. *Janus v. AFSCME*, 138 S. Ct. 2448, 2484 (2018). Of course, *Roe*’s proponents might point out that the availability of birth control is no solution when emergency contraception can be ineffective following nonconsensual sex. *Emergency Contraception*, HHS.GOV (May 21, 2019), <https://www.hhs.gov/opa/pregnancy-prevention/birth-control-methods/emergency-contraception/index.html> [<https://perma.cc/AQM8-DX96>].

To be successful with the Chief Justice, therefore, pro-choice advocates likely will need to convince him that *Roe* really is a unique case and thus he must take into account the broader reliance interests that *Casey* identified. Although the Court in *Hyatt* took away the right of private parties to sue a state in the court of another state,⁵²⁹ that right simply is not of the same magnitude as a right to choose abortion. Moreover, *Roe*'s supporters might remind Chief Justice Roberts that he joined Justice Alito's dissents in both *Gant* and *Ramos*, which emphasized reliance interests unrelated to contract and property rights,⁵³⁰ and that the Chief Justice himself indicated in *Knick* that reliance interests take on greater importance "when rules that . . . 'serve as a guide to lawful behavior' are at issue."⁵³¹ As discussed above, although abortion foes might point to *Lawrence* and *Obergefell* as evidence that the Court has abandoned a broad view of reliance like that in *Casey*, both *Lawrence* and *Obergefell* expanded individual rights and a decision to overrule *Roe* would abridge such a right.⁵³²

Of course, persuading the Chief Justice that he should employ a broad view of reliance *a la Casey* would not end the inquiry. Instead, it would invite a skirmish over some of *Casey*'s premises for finding reliance to be a key factor—that the availability of abortion has influenced how "people have organized [their] intimate relationships" and has facilitated "[t]he ability of women to participate equally in the economic and social life of the Nation."⁵³³ To win the battle over these assertions, the parties would be left to offer competing evidence.

D. Effect of Overruling *Roe* on the Court's Legitimacy

After evaluating how various stare decisis factors applied in relation to *Roe*, the Court in *Casey* offered a long discourse

529. See *supra* notes 300–307 and accompanying text (discussing *Hyatt*).

530. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425 (Alito, J., dissenting) (weighing heavily reliance by courts in trials that have been completed); *Arizona v. Gant*, 556 U.S. 332, 358–59 (2009) (Alito, J., dissenting) (arguing that reliance interests enjoy considerable weight when dealing with routine police practices).

531. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2179 (2019) (quoting *United States v. Gaudin*, 515 U.S. 506, 521 (1995)).

532. See *supra* note 389 and accompanying text (discussing *Lawrence* and *Obergefell*).

533. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion).

about the need to preserve the Court's legitimacy, and at the end, the *Casey* Court proclaimed that "[a] decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law."⁵³⁴ Thus, if the Chief Justice concludes that he must apply *Casey*'s approach to stare decisis, he would need to reach beyond whatever specific factors he might address and speak to the question of legitimacy. And even if he does not conclude that he is bound by *Casey*, he almost certainly would address the question as one of fundamental importance.⁵³⁵

Lawrence and *Obergefell* suggest that "overrul[ing a prior decision] under fire"⁵³⁶ should not give rise to the same level of apprehension regarding legitimacy that it did in *Casey*. And those worries are unlikely to influence the Chief Justice's thinking anyway, for his views regarding legitimacy differ sharply from those the *Casey* Court articulated. In his *Obergefell* dissent, Chief Justice Roberts explained that legitimacy "flows from the perception—and reality—that [the Court] exercise[s] humility and restraint in deciding cases according to the Constitution and law."⁵³⁷ In addition, he stressed in his *Citizens United* concurrence that "adherence to a precedent . . . impedes the stable and orderly adjudication of future cases . . . when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases . . . and when the precedent's underlying reasoning has become [seriously] dis-

534. *Id.* at 869.

535. See *Confirmation Hearing*, *supra* note 3, at 143–44 (statement of Judge John G. Roberts, Jr.) (indicating that legitimacy is an important consideration when deciding to overrule a prior decision); cf. Adam Liptak, *In Surprise Abortion Vote, John Roberts Avoids 'Jolt to the Legal System,'* N.Y. TIMES (Feb. 8, 2019), <https://nyti.ms/2DYUuJ6> [<https://perma.cc/ZKF4-FBY8>] (describing the Chief Justice as "a guardian of his court's legitimacy"); William McGurn, *Opinion John Roberts's 'Illegitimate' Court*, WALL STREET J. (May 27, 2019 4:35 P.M.), <https://www.wsj.com/articles/john-robertss-illegitimate-court-11558989312> [<https://perma.cc/Z6Q4-F32W>] ("[N]ews stories about a big case that may end up before the Supreme Court come with a warning that what's at stake is the 'legitimacy of the Roberts court.'").

536. *Casey*, 505 U.S. at 867 (plurality opinion); see *supra* notes 508–516 and accompanying text (discussing *Lawrence* and *Obergefell*).

537. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting).

credited.”⁵³⁸ Moreover, Chief Justice Roberts was part of a six-Justice majority with two additional Justices concurring in the judgment in *Johnson*, a case in which the Court declared that propping up two recent cases under stare decisis would undermine “‘evenhanded, predictable, and consistent development of legal principles[,]’ . . . the goals that *stare decisis* is meant to serve.”⁵³⁹ Finally, in *Kimble*, the Chief Justice signed on to Justice Alito’s dissenting opinion that decried the majority’s use of stare decisis to preserve a prior ruling that Justice Alito believed was the product of judicial policymaking: “The Court employs *stare decisis*, normally a tool of restraint, to reaffirm a clear case of judicial overreach. . . . *Stare decisis* does not require us to retain this baseless and damaging precedent.”⁵⁴⁰ Thus, even in the context of statutory interpretation, where stare decisis normally holds particular strength, the Chief Justice appears open to discarding a decision in which the Court exceeded its authority.

The Chief Justice’s views as expressed in his *Obergefell* and *Citizens United* opinions and in Justice Alito’s *Kimble* dissent do not reflect a recent revelation. They date at least as far back as Chief Justice Roberts’s confirmation hearing, when he described the Court’s decision in *Brown v. Board of Education*⁵⁴¹ to overrule *Plessy v. Ferguson*⁵⁴² not as an act hubris, but one of restraint because the Court had focused on legal argument and the erosion of precedent, refusing to cower at the prospect of pandemonium that might result from disposing of *Plessy*.⁵⁴³ Therefore, according to the Chief Justice, legitimacy depends on “humility and restraint,”⁵⁴⁴ and restraint sometimes requires the Court to overrule hotly contested decisions.

For the Chief Justice, restraint is characterized by three fundamental principles. First, the Court should refrain from inserting itself into controversial issues except in those cases when

538. *Citizens United v. FEC*, 558 U.S. 310, 379 (2010) (Roberts, C.J., concurring).

539. *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

540. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2415 (2015) (Alito, J., dissenting).

541. 347 U.S. 483 (1954).

542. 163 U.S. 537 (1896).

543. See *Confirmation Hearing*, *supra* note 3, at 409 (statement of Judge John G. Roberts, Jr.).

544. *Obergefell*, 135 S. Ct. at 2624 (Roberts, C.J., dissenting).

there is a case or controversy—as the Constitution requires.⁵⁴⁵ Second, the Court should defer to the political branches whenever possible. And third, the Court should avoid deciding more than is necessary to resolve a case.

Regarding the first principle, the Chief Justice was clear in his confirmation hearing: “[J]udges should be very careful to make sure they’ve got a real case or controversy before them, because that is the sole basis for the legitimacy of them acting in the manner they do in a democratic republic.”⁵⁴⁶ And opinions he has written since joining the Court testify to his commitment to this constitutional requirement.⁵⁴⁷ For example, when the Court turned away the challenge to partisan gerrymandering in the 2019 *Rucho* decision, Chief Justice Roberts wrote in his opinion that the “case or controversy” requirement has been understood to mean that the judiciary must avoid questions that are not appropriate to the judicial process.⁵⁴⁸ Likewise, he dissented from the Court’s decision to strike down the Defense of Marriage Act⁵⁴⁹ in *United States v. Windsor*,⁵⁵⁰ agreeing with Justice Scalia that there was no case or contro-

545. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases [and] . . . Controversies . . .”).

546. *Confirmation Hearing*, *supra* note 3, at 342 (statement of Judge John G. Roberts, Jr.).

547. The Chief Justice’s recent vote to declare a Second Amendment claim moot, over some very compelling arguments by Justice Alito in dissent, might suggest that he is committed to the case or controversy requirement to a fault. See *N.Y. State Rifle & Pistol Ass’n, Inc. v. City of New York*, 140 S. Ct. 1525, 1525–26 (2020). Some, however, have not been so charitable in describing the Chief Justice’s motives. See Editorial Board, Opinion, *The Chief Justice Ducks on Gun Rights*, WALL STREET J. (Apr. 27, 2020, 6:49 PM), <https://www.wsj.com/articles/the-chief-justice-ducks-on-gun-rights-11588026396> [https://perma.cc/N639-APUS] (“The Chief Justice is carving out a reputation as a highly political Justice whose views on the law can be coerced with threats to the Court’s ‘independence.’”).

548. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493–94 (2019) (“Article III of the Constitution limits federal courts to deciding ‘Cases’ and ‘Controversies.’ We have understood that limitation to mean that federal courts can address only questions ‘historically viewed as capable of resolution through the judicial process.’” (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968))).

549. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2018) and 28 U.S.C. § 1738C (2018)).

550. 570 U.S. 744, 751–52 (2013).

versy to be resolved because the Government had stopped defending the act.⁵⁵¹

The weight Chief Justice Roberts gives to *stare decisis* when a precedent involves statutory interpretation or a when a matter comes within a sphere where Congress has broad authority reflects his adherence to the second principle of restraint.⁵⁵² The Chief Justice's dissent in *Wayfair* in fact evidences downright distrust of the Court's ability to fix one of its previous errors⁵⁵³ and stresses why the Court should leave correction to the legislative process when that process can provide a remedy: "A good reason to leave these matters to Congress is that legislators may more directly consider the competing interests at stake. Unlike this Court, Congress has the flexibility to address these questions in a wide variety of ways [and can] . . . 'investigate and analyze facts beyond anything the Judiciary could match.'"⁵⁵⁴ And the Court in *Bay Mills*, a 5-4 decision in which the Chief Justice was part of the majority, expressed a similar sentiment.⁵⁵⁵

Moreover, Chief Justice Roberts has stretched to defer to the political process under intense pressure to do otherwise. He famously—or infamously, depending on one's perspective—wrote the opinion of the Court in *National Federation of Independent Business v. Sebelius*,⁵⁵⁶ a case in which the Court upheld the individual mandate under President Barack Obama's Patient Protection and Affordable Care Act,⁵⁵⁷ going out of his way to conclude that enacting the mandate was a proper exercise of

551. See *id.* at 775 (Roberts, C.J., dissenting) ("I agree with Justice Scalia that this Court lacks jurisdiction to review the decisions of the courts below."); *id.* at 782 (Scalia, J., dissenting) ("What the petitioner United States asks us to do in the case before us is exactly what the respondent Windsor asks us to do: not to provide relief from the judgment below but to say that that judgment was correct.").

552. See *supra* Part I.A (discussing cases in which the Chief Justice deemed a strong form of *stare decisis* appropriate).

553. See *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2104 (2018) (Roberts, C.J., dissenting) ("I fear the Court today is compounding its past error by trying to fix it in a totally different era.").

554. *Id.* (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 309 (1997)).

555. See *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800–01 (2014) ("Congress . . . has the greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests' involved . . ." (quoting *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998))).

556. 567 U.S. 519 (2012).

557. 26 U.S.C. § 5000A (2018).

Congress's taxing authority.⁵⁵⁸ In *Sebelius*, he explained: "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' . . . Granting the Act the full measure of deference owed to federal statutes, it can be . . . read [as imposing a tax]."⁵⁵⁹

Furthermore, in the context of guarantees to due process and equal protection, the Chief Justice voted in favor of deferring to Congress's decision to enact the Defense of Marriage Act⁵⁶⁰ and recognizing that the States have broad latitude in defining marriage.⁵⁶¹ His explanation of the judicial role and judicial overreach in *Obergefell* expresses his view quite distinctly:

Just who do we think we are?

It can be tempting for judges to confuse our own preferences with the requirements of the law. . . . "[C]ourts are not concerned with the wisdom or policy of legislation." The majority today neglects that restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question.⁵⁶²

Finally, the Chief Justice's view of judicial restraint extends to how he believes courts should go about deciding cases. In his *Citizens United* concurrence, he noted approvingly the Court's approach—first determining whether the case could be decided on statutory grounds, then considering whether it could be decided on narrow constitutional grounds, and only

558. *NFIB*, 567 U.S. at 575.

559. *Id.* at 563 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

560. *See United States v. Windsor*, 570 U.S. 744, 775 (2013) (Roberts, C.J., dissenting) ("I . . . agree with Justice Scalia that Congress acted constitutionally in passing the Defense of Marriage Act (DOMA). Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world."); *id.* at 795 (Scalia, J., dissenting) ("[T]he Constitution does not forbid the government to enforce traditional moral and sexual norms. . . . [T]here are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case." (citing *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting))).

561. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) ("[T]his Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us.").

562. *Id.* at 2612 (citation omitted) (quoting *Lochner v. New York*, 198 U.S. 45, 69 (1905) (Harlan, J., dissenting)).

after those two avenues had been exhausted, taking the more drastic step of overruling *Austin*.⁵⁶³ The Chief Justice's majority opinion in the Court's 2007 decision in *FEC v. Wisconsin Right to Life, Inc. (WRTL)*⁵⁶⁴ offers an important contrast. In *WRTL*, the Court did not reconsider *Austin* because it was not asked to do so.⁵⁶⁵ Moreover, the Court declined to conclude that the federal statute at issue in *WRTL* was facially invalid because it had been presented only with an as-applied challenge.⁵⁶⁶ It was not until the Court directly faced the question of overruling *Austin* in *Citizens United* that the Court decided to do so,⁵⁶⁷ and it was not until *Citizens United* that the Court struck down the federal statute at issue in *WRTL* as facially invalid.⁵⁶⁸ Similarly, with Chief Justice Roberts in the majority, the Court in *Harris v. Quinn*⁵⁶⁹ declined a request to overrule *Abood*⁵⁷⁰ as it struck down on First Amendment grounds an Illinois law that required nonunion members to pay agency fees.⁵⁷¹ Rather than overruling *Abood* in haste, the Court waited four years to take that step in

563. See *Citizens United v. FEC*, 558 U.S. 310, 374–75 (2010) (Roberts, C.J., concurring) (discussing the sequence of the majority's analytical process).

564. 551 U.S. 449 (2007).

565. See *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring) (indicating that the question of whether *Austin* should be overruled was not raised in *WRTL*). Notably, the Chief Justice joined Justice Alito's dissent in *Gant*, which objected to the Court's decision to overrule *Belton* and *Thornton* when the defendant had not asked it to do so. See *Arizona v. Gant*, 556 U.S. 332, 355 (2009) (Alito, J., dissenting).

566. See *WRTL*, 551 U.S. at 464 ("After all, appellants reason, *McConnell* already held that [§ 203 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (BCRA)] was facially valid. These cases, however, present the separate question whether § 203 may constitutionally be applied to these specific ads."); *id.* at 482 (Alito, J., concurring) ("I join the principal opinion because I conclude . . . that because § 203 is unconstitutional as applied to the advertisements before us, it is unnecessary to go further and decide whether § 203 is unconstitutional on its face.").

567. See *Citizens United*, 558 U.S. at 365.

568. See *id.* at 365–66 (overruling *McConnell* and striking down BCRA § 203).

569. 573 U.S. 616 (2014).

570. See *id.* at 658 (Kagan, J., dissenting) ("Today's majority cannot resist taking potshots at *Abood*, but it ignores the petitioners' invitation to depart from principles of *stare decisis*." (citation omitted) (citing *id.* at 635–38 (majority opinion))); *Janus v. AFSCME*, 138 S. Ct. 2448, 2484 (2018) ("[I]n *Harris*, we were asked to overrule *Abood*, and . . . we found it unnecessary to take that step . . .").

571. See *Harris*, 573 U.S. at 624, 635–39, 645–46 (describing the Illinois law, criticizing *Abood*, and refusing to extend its reasoning to the law under consideration).

Janus when it encountered a statute that was more like the one at issue in *Abood* than the one considered in *Harris*.⁵⁷²

CONCLUSION

When evaluating how the Chief Justice might vote with respect to a direct challenge to *Roe*, one must understand well what he believes is necessary for a legitimate decision. For Chief Justice Roberts, legitimacy and restraint go hand in hand, as he made clear from day one:

Judges have to have the courage to make the unpopular decisions when they have to. That sometimes involves striking down Acts of Congress. That sometimes involves ruling that acts of the Executive are unconstitutional. That is a requirement of the judicial oath. You have to have that courage. But you also have to have the self-restraint to recognize that your role is limited to interpreting the law and doesn't include making the law.⁵⁷³

The Chief Justice's *Obergefell* dissent reveals a consistent sentiment: "The legitimacy of this Court ultimately rests 'upon the respect accorded to its judgments.' That respect flows from the perception—and reality—that we exercise humility and restraint in deciding cases according to the Constitution and law."⁵⁷⁴

And given that dissent, it would not be at all surprising to learn that he believes that the Court in *Roe* failed to act with restraint and thereby undermined the Court's institutional legitimacy. But in deciding what to do with *Roe* now, the Chief Justice likely would assess whether the Court can put the genie back in the bottle—whether the act of overruling *Roe* will help to restore the Court's legitimacy or damage it more—whether overruling *Roe* would be an act of hubris like what he saw in *Obergefell* or an act of restraint like what he saw in *Brown*.⁵⁷⁵

572. See *Janus*, 138 S. Ct. at 2463, 2486 (indicating that the *Abood* Court had upheld a similar "agency-shop arrangement" and overruling *Abood*).

573. See *Confirmation Hearing*, *supra* note 3, at 256 (statement of Judge John G. Roberts, Jr.).

574. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2624 (Roberts, C.J., dissenting) (citation omitted) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

575. See *Confirmation Hearing*, *supra* note 3, at 409 (statement of Judge John G. Roberts, Jr.) (discussing *Brown*).

Chief Justice Roberts declared in his confirmation hearing that “the rule of law—that’s the only client I have as a judge.”⁵⁷⁶ Based on his judicial approach since joining the Court, one would expect that the Chief Justice will serve his client by moving cautiously. History suggests that he only will reconsider an earlier Court ruling if asked to do so and if he must do so to decide the case. And if both of those conditions are met with respect to *Roe*, one would expect that he will apply traditional factors associated with stare decisis, not ducking the question of error as the *Casey* Court did, but assessing whether *Roe* was “not just wrong” but “exceptionally ill founded.”⁵⁷⁷

When Chief Justice Roberts described the job of a judge as being that of an umpire, he added that “[n]obody ever went to a ball game to see the umpire.”⁵⁷⁸ Given the current climate, though, that statement seems to reflect an aspiration, not an observation. If abortion opponents succeed in getting the Court to “check the tapes” on *Roe*,⁵⁷⁹ everyone will line up to see how Chief Justice Roberts—the most powerful umpire in America⁵⁸⁰—calls the pitch.

576. *Id.* at 279.

577. *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019).

578. *Confirmation Hearing*, *supra* note 3, at 55 (statement of Judge John G. Roberts, Jr.).

579. See Connor Groel, *Upon Further Review: Instant Replay Should Be Banned from Sports*, TOP LEVEL SPORTS (May 17, 2019), <https://toplevelsports.net/upon-further-review-instant-replay-should-be-banned-from-sports/> [<https://perma.cc/LK84-JLCJ>] (referring to instant replay as “stop[ping] play to check the tapes”).

580. Adam Liptak, *John Roberts, Leader of Supreme Court’s Conservative Majority, Fights Perception That It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), <https://nyti.ms/2RlcjKd> [<https://perma.cc/4M8A-7CLP>] (“[Chief Justice Roberts] has taken Justice Kennedy’s place as the swing vote at the court’s ideological center, making him the most powerful chief justice in 80 years.”).

DEATH QUALIFICATION AND THE RIGHT TO TRIAL BY JURY: AN ORIGINALIST ASSESSMENT

INTRODUCTION

The Sixth Amendment of the Constitution guarantees criminal defendants the right to a trial “by an impartial jury.”¹ But criminal procedure has evolved substantially since 1791, raising the question of which changes are permissible under the original meaning of the Sixth Amendment. As now-Judge Joan Larsen notes, the modern jury “bears such faint resemblance to the jury of 1791, that if the Court decides to seriously engage the project of restoring the original jury it will find itself very busy indeed.”² However, the Court has shown some willingness to cut through precedent to return to the original public meaning in criminal procedure cases. Indeed, “the Court’s Sixth Amendment jurisprudence is in the midst of an originalist revolution. Starting with *Jones v. United States* and continuing through *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, and *Crawford v. Washington*, the Court stands poised to refasten Sixth Amendment jurisprudence to its historical underpinnings.”³ This “originalist revolution” continued this year in *Ramos v. Louisiana*,⁴ where the Court held that non-unanimous jury convictions for serious crimes violate the Sixth Amendment.⁵ Given this trend, it is possible that the Court will reassess its death qualification jurisprudence on originalist grounds.

This Note analyzes whether death qualification—the process of removing potential jurors who are unwilling to impose the death penalty—survives an originalist assessment. It begins with the background of death qualification and then analyzes whether the process survives a number of potential originalist

1. U.S. CONST. amend. VI.

2. Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism’s Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 961 (2010) (footnote omitted).

3. G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87, 88 (2008) (footnotes omitted).

4. 140 S. Ct. 1390 (2020).

5. *Id.* at 1394–97.

objections. Ultimately, it concludes that although there was no direct analogue for death qualification at common law or in criminal procedure at the time of the ratification of the Constitution and Bill of Rights, death qualification does not violate an originalist understanding of the Sixth Amendment right to an impartial jury or of a constitutional criminal trial.

I. SUPREME COURT JURISPRUDENCE AND THE POLICY OF DEATH QUALIFICATION

A. *Legal Background*

Death qualification is a step in the jury selection process in capital cases in which potential jurors are dismissed if they would be categorically unwilling to impose the death penalty.⁶ This includes potential jurors who are unwilling to impose the death penalty as a sentence as well as those who are, regardless of the evidence, unwilling to find guilt when execution is a potential penalty.⁷ These potential jurors are excluded from the jury for cause, thus not requiring any of the prosecution's peremptory strikes.⁸ Only potential jurors who are unwilling to impose the death penalty are excluded: those who personally oppose the death penalty but would be willing to impose it are not.⁹

The question of whether death-qualified juries violate the original meaning of the right to an impartial jury is significant in criminal procedure. In *Lockhart v. McCree*,¹⁰ the Supreme Court rejected the argument that excluding jurors who are unwilling to impose the death penalty in capital cases violates a defendant's Sixth Amendment right to an impartial jury.¹¹ Writing for the Court, Justice Rehnquist stated:

[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on

6. See Susan D. Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 677 (2002).

7. *Id.* at 680.

8. See *id.* at 677.

9. *Id.* at 681–82.

10. 476 U.S. 162 (1986).

11. See *id.* at 183 (“[I]t is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints.”).

the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.¹²

However, Justice Rehnquist relied on precedent and reason rather than analysis of the original public meaning of the Constitution to arrive at this conclusion.¹³ As the current Court revisits various aspects of criminal procedure with an originalist lens, it is worth analyzing whether the original meaning of the Sixth Amendment would prevent the exclusion of jurors who would be unwilling to impose capital punishment.

B. *The Policy Significance of Death Qualification*

The impact of a constitutional ban on death qualification would be significant. Allowing those who are unwilling to impose the death penalty to serve on capital juries would effectively end the death penalty in America. Because the death penalty has become more controversial and less popular over the last several decades,¹⁴ it is likely that many capital juries would include at least one person that is unwilling to impose the sentence. But the elimination of the death penalty by objecting jurors could be just the tip of the iceberg if the Court found that jurors could not be excluded for cause if they were unwilling to uphold the law. Indeed, with the rise of the prison abolition movement and the increasing categorical opposition to imprisonment as well as the death penalty, objecting jurors could potentially alter the entire system of criminal justice in America.¹⁵

12. *Id.* at 184.

13. *See id.* at 178 (“The view of jury impartiality urged upon us by [the defendant] is both illogical and hopelessly impractical.”).

14. *See, e.g., Death Penalty*, GALLUP (2019), <https://news.gallup.com/poll/1606/death-penalty.aspx> [<https://perma.cc/3P2S-D7M2>] (charting the decline of American support for the death penalty for a person convicted of murder from a high of 80 percent in 1994 to 56 percent in 2019).

15. Prison abolitionism has gained increased publicity in recent years. Some self-described prison abolitionists are merely advocates of aggressive forms of criminal justice reform with the aspirational goal of eliminating the need for prison. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015). However, others advocate for the wholesale end of prison even for the most violent criminals. As John Washington summarizes, “Abolitionists believe that incarceration, in any form, harms society more than it helps.” John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/what-is-prison-abolition/> [<https://perma.cc/GPA5-UFAZ>].

On the other hand, the exclusion of those who are unwilling to impose the death penalty from juries raises compelling questions of partiality as the word is commonly understood today. There is robust literature to suggest that death qualification disproportionately reduces the number of women and people of color on capital juries.¹⁶ There is also evidence to suggest that death-qualified juries are more conviction-prone than normal juries in criminal trials.¹⁷ However, the Court in *Lockhart* rejected these arguments, noting “serious doubts about the value of these studies in predicting the behavior of actual jurors.”¹⁸ The Court went further and said that, even assuming they accepted the studies as true, death qualification would still be constitutional.¹⁹ The Court noted that there is no “fair-cross-section” requirement for petit juries, but that even if there were such a requirement, the Court found that:

The essence of a “fair-cross-section” claim is the systematic exclusion of “a ‘distinctive’ group in the community.” In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors . . . are not “distinctive groups” for fair-cross-section purposes.²⁰

In short, the Court found that the exclusion of potential jurors with beliefs that render them unwilling to impose a penalty

Indeed, the *Harvard Law Review* recently dedicated an entire issue to prison abolitionism. See *Introduction*, 132 HARV. L. REV. 1568 (2019) (introducing the *Harvard Law Review*'s issue focused on prison abolition).

16. See, e.g., Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984); see also J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1133 (2014) (arguing that higher levels of opposition to the death penalty most likely contribute to lower participation in trials with capital charges).

17. See, e.g., Fitzgerald & Ellsworth, *supra* note 16, at 42–44. Robert Fitzgerald and Phoebe Ellsworth found that death-qualified jurors are less likely to believe that it is better to let some guilty parties go free than to convict the innocent. *Id.* at 42. They are also more likely to think that a non-testifying defendant is probably guilty and generally favored harsher sentences. *Id.* at 42–44.

18. *Lockhart v. McCree*, 476 U.S. 162, 171 (1986).

19. See *id.* at 173 (“Having identified some of the more serious problems with [the defendant’s] studies, . . . we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that ‘death qualification’ in fact produces juries somewhat more ‘conviction-prone’ than ‘non-death-qualified’ juries. We hold, nonetheless, that the Constitution does not prohibit the States from ‘death qualifying’ juries in capital cases.”).

20. *Id.* at 174 (citation omitted) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

does not violate the Sixth Amendment because they are not a “distinctive group,” but rather an ideological one.

However, death qualification can occasionally result in juries that substantially diverge from their communities’ values. The case of Dzhokhar Tsarnaev, the Boston Marathon Bomber, is an illustrative example. Though Massachusetts abolished the death penalty under state law, Tsarnaev was convicted under federal law for his attack which killed three people, and he was sentenced to death.²¹ However, a *Boston Globe* poll released shortly after Tsarnaev’s trial found that only a third of Massachusetts residents and only a quarter of Boston residents favor the death penalty for egregious crimes.²² This discrepancy between state law and public opinion and federal charges led to an unusual situation where the majority of potential jurors might be excluded based on their unwillingness to impose the death penalty.²³ Despite death qualification excluding ideological adherents rather than any specific demographic group, the fact that it likely removes the majority of the community as a whole from serving as jurors in some cases is uncomfortable.

II. POTENTIAL ORIGINALIST OBJECTIONS TO DEATH QUALIFICATION

An originalist, however, is not concerned with policy arguments or precedent in determining whether a constitutional right exists. Instead, an originalist looks to the public meaning of the document at the time of its enactment to determine the rights guaranteed by constitutional text.²⁴ In determining the

21. See Katharine Q. Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May 15, 2015), <https://nyti.ms/1d3IpCz> [<https://perma.cc/TF7V-KUQM>].

22. See Evan Allen, *Few favor death for Dzhokhar Tsarnaev, poll finds*, BOS. GLOBE (Apr. 26, 2015, 7:55 PM), <https://www.bostonglobe.com/metro/2015/04/26/globe-poll-shows-diminishing-support-for-death-penalty-for-tsarnaev/S3GMhFIGj5VUkZrmLzh1iN/story.html> [<https://perma.cc/RKC4-TA8Z>]. Interestingly, even fewer supported the death penalty for Tsarnaev specifically than supported the death penalty in general. *See id.*

23. See Aliza Plener Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 115 (2016) (“Because Tsarnaev’s federal capital case was tried, extraordinarily, in an abolitionist state, the impact of death qualification was particularly noteworthy; yet death qualification shapes verdicts in death-penalty states nationwide . . .”).

24. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37–39 (1997). Here, Justice Scalia outlines his methodology and distin-

original meaning of the right to trial by jury, Judge Larsen states that:

[I]f the jury provisions [of the Constitution] state a rule, demanding trial *by* a particular entity called a *jury*, then the originalist's task is to give effect to those terms as they were understood in 1791. Put differently, the question for an originalist is . . . what attributes comprised the jury trial of 1791? Those are retained because the text so demands.²⁵

In short, the originalist must try to determine the "attributes" that defined jury trials in 1791.

To determine these attributes and interpret the Constitution, Judge Larsen notes that an originalist must start with the text of the document, searching it for clear rules or standards.²⁶ The Sixth Amendment provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.²⁷

Unlike some provisions of the Constitution that provide clear rules,²⁸ the term "impartial jury" and its related protections are not apparent from the text.

In determining the protections guaranteed under the Sixth Amendment right to an impartial jury, Justice Thomas wrote in dissent in *Peña-Rodriguez v. Colorado*²⁹ that the right "is limited to the protections that existed at common law when the Amendment was ratified."³⁰ In other words, Justice Thomas asserts that the right to a trial by an impartial jury had a specific

guishes it from interpreting law based on the drafters' intent, specifically noting, "[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." *Id.* at 38.

25. Larsen, *supra* note 2, at 992.

26. *See id.* at 989–90.

27. U.S. CONST. amend. VI (emphasis added).

28. *See* Larsen, *supra* note 2, at 988–89 (noting the age qualifications of congressmen, senators, and Presidents as examples of rules in the Constitution as opposed to other, less precise provisions).

29. 137 S. Ct. 855 (2017).

30. *Id.* at 872 (Thomas, J., dissenting).

legal meaning which governs its interpretation.³¹ Justice Thomas views the originalist interpretation of the term “impartial jury” to be the contemporaneous legal meaning.³² As evidence for his assertion that the original public meaning of the Sixth Amendment right to an impartial jury is derived from English common law, Justice Thomas cites Justice Story, stating that “‘the trial by jury in criminal cases’ protected by the Constitution is the same ‘great privilege’ that was ‘a part of that admirable common law’ of England.”³³ Thus, to determine the common law at the time of ratification, Justice Thomas looks to commentators on both English and American common law.³⁴

Justice Thomas also looks to state practice “[a]t the time of the founding” as evidence of the Sixth Amendment’s original public meaning.³⁵ This approach of looking to state practice for evidence of the original public meaning of constitutional provisions is consistent with the approach that Justice Scalia took in *District of Columbia v. Heller*,³⁶ where he looked to state constitutions and practices to discern the original public meaning of the Second Amendment right to bear arms.³⁷ Because the plain meaning of the Sixth Amendment’s text does not clearly answer whether the right to an “impartial jury” provides a right to defendants against the death qualification of juries, it is necessary to consult the common law and state practices.

31. See Mike Rappaport, *The Language of the Law and Peña-Rodriguez v. Colorado*, LAW & LIBERTY (Mar. 14, 2017), <https://www.lawliberty.org/2017/03/14/the-language-of-the-law-and-pena-rodriguez-v-colorado/> [<https://perma.cc/4KE7-X7R9>].

32. Originalist scholars debate whether some passages of the Constitution should be interpreted by their original public meaning (that is, what an average person would understand a passage to mean) or by their original legal meaning (that is, what a lawyer at the time of ratification would understand a passage to mean). See generally John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018). This Note assumes that Justice Thomas’s method is correct, and to the extent that lay and legal meaning diverge in interpreting the Sixth Amendment, the original legal meaning is the correct originalist interpretation.

33. *Peña-Rodriguez*, 137 S. Ct. at 872 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1773, at 652–53 (1833)).

34. See *id.* (noting William Blackstone’s, Matthew Bacon’s, Edward Coke’s, and Thomas Cooley’s comments on the meaning of impartiality).

35. *Id.*

36. 554 U.S. 570 (2008).

37. *Id.* at 584–86 (noting the constitutions of nine states and their related practices as evidence of the meaning of the term “bear arms”).

There are several potential originalist attacks on death qualification that must be assessed to determine whether the practice is constitutional. First, because death qualification involves the removal of jurors based on their convictions, it changes the potential pool of jurors.³⁸ If such exclusion changes the composition of the jury such that it is no longer impartial under the original meaning of the Sixth Amendment, then the practice is unconstitutional. Second, death qualification inherently prevents juries from judging law by removing jurors who oppose it.³⁹ If the right to a trial by jury in criminal cases provides a robust right to defendants to have their respective jurors judge the law as well as the evidence, then death qualification cannot stand. Third, death qualification provides the court and prosecution a means to shape juries for which there was no analogue at common law or in state practice.⁴⁰ For death qualification to be legitimate under an originalist constitutional assessment, it must be able to survive these three objections. And it can.

A. *Objection One: The Right to an Impartial Jury*

The first objection is the most easily dismissed from an originalist perspective. In his dissent in *Lockhart*, Justice Marshall was persuaded by the literature suggesting that death-qualified juries are more prone to convict, stating that he believed the defendant had “succeeded in proving that his trial by a jury so constituted violated his right to an impartial jury.”⁴¹ This literature gives a reason to question death qualification as a policy choice. However, the defendant in *Lockhart* did not show that his jury was impartial in any sense that would violate the meaning of an impartial jury in 1791.

38. See Sullivan, *supra* note 16, at 1133.

39. See Larsen, *supra* note 2, at 968–69 (arguing that the “Founders’ jury . . . had the right to judge the law” in addition to their right to determine a defendant’s guilt or innocence based on evidence).

40. See *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968) (clarifying that death qualification is permissible when a juror’s “attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s guilt”).

41. *Lockhart v. McCree*, 476 U.S. 162, 193 (1986) (Marshall, J., dissenting). However, Justice Marshall went on to concede that no “individual on the jury that convicted [the defendant] fell short of the constitutional standard for impartiality” but instead embraced the defendant’s argument “that, by systematically excluding a class of potential jurors less prone than the population at large to vote for conviction, the State gave itself an unconstitutional advantage at his trial.” *Id.*

There is substantial evidence of the original public meaning of an impartial jury as guaranteed by the Sixth Amendment that contradicts Justice Marshall's assessment. William Blackstone noted that partiality was one of the four for-cause challenges that either party could use against potential jurors.⁴² He wrote:

Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. . . . A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion either of malice or favour: as, that a juror is of kin to either party within the ninth degree; . . . that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him⁴³

Blackstone further notes that out of "caution against all partiality and bias," a whole array of jurors would be "quash[ed]" if the officer or sheriff involved in gathering the array were "suspected to be other than indifferent."⁴⁴ Although Blackstone wrote here about selection of civil juries, he notes that the same criteria were used for selecting and challenging jurors in criminal cases.⁴⁵ Blackstone's definition of partiality is quite narrow. To be disqualified as impartial, a juror must either have a familial or other close personal association with the defendant or, alternatively, be financially interested in the case. For instance, a juror who took bribes "for his verdict" was disqualified as partial. These narrow criteria stand in contrast to the sources of impartiality that the defendant proposed in *Lockhart*, which involved ideological predisposition rather than any direct, personal bias.⁴⁶

Early post-revolutionary American case law also confirms that the original meaning of "impartiality" was narrow, though the case law indicates that a juror's public prejudging of a case

42. 3 WILLIAM BLACKSTONE, COMMENTARIES *361–64.

43. *Id.* at *363 (footnote omitted).

44. *Id.* at *365.

45. See 4 BLACKSTONE, *supra* note 42, at *346 ("Challenges may . . . be made, either on the part of the king, or on that of the prisoner . . . for the very same reasons that they may be made in civil causes.").

46. See *Lockhart*, 476 U.S. at 177 (rejecting the defendant's argument that the jury "lacked impartiality because the absence of [those unwilling to impose the death penalty] 'slanted' the jury in favor of conviction").

might also render him partial. In *Peña-Rodriguez*, Justice Thomas cited to *Pettis v. Warren*,⁴⁷ which echoed Blackstone's view that impartial jurors must "have no interest of their own affected, and no personal bias, or pre-possession, in favor [of] or against either party."⁴⁸ In *Goodright v. M'Causland*,⁴⁹ the Supreme Court of Pennsylvania found that a juror's small bet on the outcome of a case was insufficient evidence of partiality to overturn a verdict, as was the fact that jurors had eaten with (and possibly at the expense of) one of the parties.⁵⁰ And in *United States v. Worrall*,⁵¹ a federal court listed situations that could "prevent a federal officer" from being "impartial" in the "performance of his duty."⁵² Disqualifying relationships between an officer and a defendant included "assault and battery [against the officer]; or the [officer's] recovery of a debt, as well as the offer of a bribe."⁵³ Regarding prejudging cases, however, when a defendant in a high-profile murder case motioned for the right to ask potential jurors whether they had publicly prejudged his case, the sitting judges on the North Carolina Superior Courts of Law and Equity agreed that "there [was] no precedent of this kind," though they ultimately permitted it.⁵⁴ Similarly, a federal court in Pennsylvania granted a new trial when a juror had publicly declared before the trial that the defendant should be executed.⁵⁵ Thus, although the original meaning of an "impartial jury" as seen in early American case law may have been slightly broader than Blackstone's criteria, it remained very narrow, only potentially adding public prejudgment of a case.

Moreover, the history, both in England and colonial America, confirms a narrow definition of partiality. The right to a jury trial derived from Magna Carta's guarantee to trial by a jury of

47. 1 Kirby 426 (Conn. Super. Ct. 1788).

48. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 872 (2017) (Thomas, J., dissenting) (alteration in original) (quoting *Pettis*, 1 Kirby at 427) (internal quotation marks omitted).

49. 1 Yeates 372 (Pa. 1794).

50. *Id.* at 378.

51. 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766).

52. *Id.* at 777.

53. *Id.*

54. *State v. Norris*, 2 N.C. (1 Hayw.) 429, 430 (N.C. Super. Ct. Law & Eq. 1796).

55. See *United States v. Fries*, 9 F. Cas. 826, 917–18, 921–23 (C.C.D. Pa. 1799) (No. 5,126).

one's peers.⁵⁶ The definition of "peers" was broad. Professor John Baker notes that "[p]eers . . . were of two classes only: temporal lords of Parliament, and commoners."⁵⁷ The ancient right to a trial by one's peers, then, did not historically guarantee a cross section of society or a group with which a defendant might have particular affinity. In late eighteenth-century England, there were, in fact, property requirements for jurors: they had to own land that produced at least ten pounds of income per year.⁵⁸ However, this did not leave only the wealthy to serve. Jurors often derived from "[t]he occupations of farmer, artisan, and tradesman," and "[t]he jury was . . . neither aristocratic nor democratic."⁵⁹ Jurors came from a wide socioeconomic spectrum, but juries in late eighteenth-century England were not a true cross section of society.

In colonial America, however, jurors better reflected their communities and had much in common with defendants. As Professor Bruce Mann writes of jurors in colonial Connecticut, "In background, experiences, and outlook [the jurors] were very much like the litigants whose disputes they determined, and not very different from the judges who oversaw them."⁶⁰ Indeed, juries often knew the parties personally or by reputation as "they were neighbors or from nearby towns."⁶¹ Inevitably, jurors would know of the alleged crimes and have preexisting notions of the defendants, which are biases that modern criminal procedure seeks to avoid. This familiarity suggests that impartiality from an originalist's perspective is quite narrow. Jurors in 1791 were far less insulated and brought far more per-

56. See J.H. Baker, *Criminal Courts and Procedure at Common Law 1550–1800*, in *CRIME IN ENGLAND: 1550–1800*, at 15, 23 (J.S. Cockburn ed., 1977) ("Nearly all lawyers in our period traced the right to trial by jury to chapter 29 of Magna Carta.").

57. *Id.*

58. John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY: 1700–1900*, at 13, 25 (Antonio Padoa Schioppa ed., 1987).

59. *Id.*

60. BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* 71 (G. Edward White ed., 1987).

61. *Id.* at 71. Professor Mann provides an illustrative example of the challenges that well-known parties faced in litigation by detailing the suit between the Wheeler and Winthrop families in Connecticut. "The parties were prominent, their differences well known, their antipathy implacable. Jurors, who were drawn from the county, could not help but know of the litigants and the context of the lawsuit." *Id.* at 72.

sonal knowledge than society would prefer today. As such, broad assertions of impartiality based on filtering out those of certain views are not supported by the original meaning of the Sixth Amendment.

B. Objection Two: Judging the Jury's Role

The second potential originalist objection is the most challenging to death qualification. Ben Cohen and Robert Smith have challenged the constitutionality of death qualification on originalist grounds.⁶² Central to their analysis is the argument that juries in 1791 judged both law and fact.⁶³ However, Cohen and Smith overstate the scholarly certainty on this issue. First, although juries judged law in some states in the colonial and early American period, in others they were clearly instructed not to do so. Second, even where juries did judge law as well as fact, it seems that they were exercising a power rather than fulfilling a duty. Indeed, based on evidence from the Judiciary Act of 1789⁶⁴ and the common law, the original public meaning of the Sixth Amendment did not grant juries the right to judge law, even if they had the power to acquit against the evidence.

The implications for the constitutionality of death qualification are clear. The ability of juries to judge law had two aspects: first, juries often interpreted the law, and, thus, lawyers could argue for their preferred legal interpretations at trial.⁶⁵ The second aspect of jurors judging the law is the ability to pass judgment on the law, declining to apply it if they thought it was unjust.⁶⁶ If jurors have the right to judge law in this second sense, then it is only a small step to say that it is unconstitutional to exclude a juror because she cannot uphold the law. Indeed, if jurors who cannot impose a given law are excluded outright, then it is not possible for juries to subsequently judge the law, unless the jury has a change of heart on the law in question during the trial and deliberations and only then decide to judge the law.

62. See Cohen & Smith, *supra* note 3.

63. See *id.* at 87 ("The Framers understood criminal petit juries to be responsible for making determinations of both fact and law.").

64. Ch. 20, 1 Stat. 73.

65. See William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1005 (2010).

66. See Cohen & Smith, *supra* note 3, at 118–19.

To determine whether the right to judge law is included within the original public meaning of the constitutional right to a jury in criminal trials, one must ask whether it was one of the “protections that existed at common law” when the Bill of Rights was ratified,⁶⁷ and whether state practice in 1791 provides evidence for such a right. This assessment will begin by reviewing the common law.

Two leading English commentators, Edward Coke and Blackstone, support the proposition that juries determined fact and judges determined law. For example, Coke stated, “The most usual triall of matters of fact is by 12 . . . men; for *ad quæstionem facti non respondent iudices*: and matters in law the judges ought to decide and discusse; for *ad quæstionem juris non respondent juratores*.”⁶⁸ Professor James Bradley Thayer infers from this passage that “[i]n a sense [it] emphasizes the limitations of the jury, — as saying that it is *only* fact which they are to decide.”⁶⁹ Professor Thayer restates his understanding of Coke’s view on the issue, saying:

In general, issues of fact, and only issues of fact, are to be tried by jury; when they are so tried, the jury and not the court are to find the facts, and the court and not the jury is to give the rule of law; the jury are not to refer the evidence to the judge and ask his judgment upon that, but are to find the facts which the evidence tends to establish, and may only ask the court for their judgment upon these. That this determination by the jury involves a process of reasoning, of inference and judgment, makes no difference . . .⁷⁰

Professor Thayer’s summary of Coke’s view holds two implications. First, Coke clearly believed that the jury’s sole domain was fact rather than law. Second, Thayer firmly disputed the notion that applying the law to facts was the same as judging law. Juries, of course, must apply the law, but that does not

67. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 872 (2017) (Thomas, J., dissenting) (explaining how to adduce whether the Constitution provides a jury-related right to defendants).

68. EDUARDO COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 234, at 155b (Francis Hargrave & Charles Butler eds., London, Luke Hunsard & Sons 16th ed. 1809). Coke’s Latin maxim translates, “Judges do not answer questions of fact; juries do not answer questions of law.” THE DICTIONARY OF LEGAL QUOTATIONS 139 n.2 (James William Norton-Kyshe ed., 1904).

69. James B. Thayer, “Law and Fact” in *Jury Trials*, 4 HARV. L. REV. 147, 149 (1890).

70. *Id.* at 150.

make them masters over it.⁷¹ As Professor Thayer elucidates, Coke's commentary strongly suggests that juries did not have the right to judge law at common law.

Though less explicit on the issue, Blackstone seems to make the same delineation as Coke. Indeed, Blackstone refers to jurors explicitly as "judges of fact" without mentioning any ability to judge law.⁷² To be sure, this exclusion is not dispositive, but it is negative evidence of Blackstone's views of juries as finders of fact rather than judges of law. Furthermore, Blackstone's recounting of the jurors' oath in criminal cases is telling. He writes that jurors were "sworn 'well and truly to try, and true deliverance make, between our sovereign lord the king, and the prisoner whom they have in charge; and a true verdict to give, according to their evidence.'" ⁷³ Thus, Blackstone notes the jury's role in finding fact and weighing evidence rather than judging law. In discussing criminal verdicts, Blackstone provides no evidence that juries were to judge law. Instead, Blackstone states that juries had the option to rely on the judge to help them render a special verdict in cases "where they *doubt* the matter of law."⁷⁴ This consultation of the court is by the jury's choice, and the jury maintains "an unquestionable right of determining upon all the circumstances, and finding a general verdict."⁷⁵ However, Blackstone's comment on jurors' fears of violating the law through their verdict is telling. He states that juries might submit a special verdict to avoid risking "a breach of their oaths" through a "verdict [that is] notoriously wrong."⁷⁶ If Blackstone believed that juries had the right to judge the law as well as the evidence, he would not expect them to fear being wrong on points of law; instead, jurors

71. Professor Thayer's personal understanding of the delineation between law and fact was even more aggressive. Indeed, Professor Thayer argued that judges could even encroach on the judging of fact to some degree. He noted that "the allotment of fact to the jury, even in the strict sense of fact, is not exact," instead pointing out that judges would sometimes judge questions of fact "by calling them questions of law." *Id.* at 159. For instance, Professor Thayer points out that judges maintained the right to determine "the construction of writing" by using "historical and administrative" justifications despite the construal of documents not actually being a matter of law. *Id.* at 160.

72. 3 BLACKSTONE, *supra* note 42, at *361.

73. 4 BLACKSTONE, *supra* note 42, at *348 (emphasis added).

74. *Id.* at *354.

75. *Id.*

76. *Id.*

would have been solely concerned with what they personally thought was fair to the defendant rather than violating their society's laws. Put another way, if the proper role of Blackstone's jury were to judge law as well as fact, the jury's judgment, by definition, could not be "notoriously wrong."⁷⁷ Instead, in this hypothetical jury common law system, the law would largely be made via jury interpretation. However, Blackstone clearly rejects this hypothetical system. Blackstone's commentaries, like those of Coke, strongly support the proposition that juries did not have a right to judge law.

In practice, it was very rare for juries to acquit against the evidence in England during the late eighteenth century, and most cases where juries acquitted against the evidence were political offenses.⁷⁸ Professor Langbein's commentary on English jury instructions affirms Blackstone: "The judge's opinion upon a matter of law was in theory binding upon the jury."⁷⁹ However, he points out that in most criminal cases the law was not complicated, even though determining the facts might be.⁸⁰ As such, Professor Langbein "doubt[s] that the jury was much instructed in routine cases."⁸¹ Thus, the common law as well as contemporary practice in England shows that there was no right there for juries to judge law as well as fact.

The evidence of original public meaning from state practice in 1791 is less clear on whether juries have the right to judge law, but the stark differences among state practices suggests that the original public meaning of the Sixth Amendment did not guarantee a constitutional right for juries to judge law as well as fact. Legal scholars debate whether juries in early America judged law in addition to fact, and Judge Larsen argues it is "the dominant scholarly position" that juries had a

77. *Id.*

78. See Langbein, *supra* note 58, at 36 ("If the jury persisted in returning a verdict contrary to the judge's wishes, it mattered greatly whether the verdict was one of conviction or acquittal. . . . As a practical matter . . . acquittal was the important sphere of potential judge/jury disagreement. Even there, however, it is hard to detect instances of disagreement about acquittal in the later eighteenth century, apart from a few political offenses, of which seditious libel was the most important.")

79. *Id.* at 35.

80. *Id.*

81. *Id.*

right to judge law.⁸² Even the dissenting scholars acknowledge that they are arguing against “the conventional wisdom” that “juries acquired the right to determine the law as well as the facts in colonial times.”⁸³

Cohen and Smith cite Professors Akhil Amar and William Nelson, and leading early American lawyers, such as John Adams, to support the proposition that early American juries were entitled to judge law as well as fact.⁸⁴ They argue that what they view as the unconstitutional removal of juries’ right to judge law “is of particular consequence in cases involving the ‘death-qualification’ of jurors.”⁸⁵ Such an assertion that the modern arrangement is an unconstitutional shift from the original public meaning in 1791 is not without evidence. Indeed, Professor Amar argues:

Alongside their right and power to acquit against the evidence, eighteenth-century jurors also claimed the right and power to consider legal as well as factual issues—to judge both law and fact ‘complicately’—when rendering any general verdict. Founding-era judges might give their legal opinions to the jury, but so might the attorneys in a case, and the jurors could decide for themselves what the law meant in the process of applying it to the facts at hand in a general verdict of guilty or not guilty . . . Jurors today no longer retain this right to interpret the law, but at the Founding, America’s leading lawyers and statesmen commonly accepted it.⁸⁶

According to Professor Amar, then, leading lawyers and even various judges sometimes asserted that juries had the right to judge both law and fact.⁸⁷

However, the dissenting scholars’ arguments are fairly modest and not necessarily inconsistent with Professor Amar’s recounting of history. They do not argue that juries lacked the right to judge law in *all* colonies or at *all* times. Rather, they

82. See Larsen, *supra* note 2, at 968 & n.47. Judge Larsen does, however, note that there is substantial scholarly disagreement on the topic. *Id.* at 968 n.47.

83. Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 116 (1998).

84. See Cohen & Smith, *supra* note 3, at 87–88, 93–94, 99–100.

85. *Id.* at 88.

86. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 238 (2005).

87. *Id.* at 581 n.73 (listing “Jefferson, Adams, Wilson, Iredell, and Kent, to name just a few”).

argue that, although juries may have determined law as well as fact in some colonies during some periods of time, this was far from a universal right in colonial and early America.⁸⁸ With state practices differing widely, it is incorrect to say that the Sixth Amendment includes a right for juries to judge law as well as fact in criminal cases.

The notion that juries could determine law as well as fact seems to have been a colonial American invention. Indeed, as Professor Stanton Krauss notes, “[n]o judge in England is known ever to have given . . . a charge” that encouraged criminal juries to find law in addition to fact.⁸⁹ The final establishment of judges as the undisputed masters of law and juries confined to finding fact would not come until 1895, when the Supreme Court settled the issue in *Sparf v. United States*.⁹⁰ However, this late uniformity on the issue does not prove that there was inverse uniformity in the past. Instead, the most comprehensive studies of court records suggest that colonial and early state practices were sharply divided and continuously evolving.⁹¹ Furthermore, although Cohen and Smith’s sources tend to emphasize the perspectives of leading lawyers and the opinions of judges, it is helpful to examine the actual court records to look for positive or negative evidence of such a right.⁹²

88. See, e.g., Krauss, *supra* note 83, at 121–22.

89. *Id.* at 115–16. Professor Krauss contrasts English trial histories with an early eighteenth-century American trial for treason in which Justice Duvall, presiding in a circuit court, advised the jury that juries “have a right, in all criminal cases, to decide on the law and the facts.” *Id.* at 113 (quoting *United States v. Hodges*, 26 F. Cas. 332, 334 (C.C.D. Md. 1815) (No. 15,374)) (internal quotation marks omitted). However, Professor Krauss further notes that another judge on the trial disagreed with this instruction, saying, “The opinion which [Justice Duvall] has just delivered . . . is not, and I thank God for it, the law of this land.” *Id.* at 113 (alteration in original) (quoting *Hodges*, 26 F. Cas. at 335) (internal quotation marks omitted).

90. 156 U.S. 51, 78 (1895) (“[U]nder the Constitution of the United States, juries in criminal cases have not the right to decide any question of law, and, . . . in rendering a general verdict, their duty and their oath require them to apply to the facts, as they find them, the law given to them by the court.”); see Cohen & Smith, *supra* note 3, at 100–01; cf. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 911 (1994) (“Today the constitutions of three states—Georgia, Indiana, and Maryland—provide that jurors shall judge questions of law as well as fact. In all three states, however, judicial decisions have essentially nullified the constitutional provisions.” (footnote omitted)).

91. See Krauss, *supra* note 83; Nelson, *supra* note 65.

92. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 321 (1966) (“In assessing the eighteenth-century practice it is

Professors Nelson and Krauss are two leading scholars who argue that criminal juries in colonial America did not have a universal right to judge both law and fact. Both scholars have extensively reviewed colonial court records and have examined the statements of jurists and lawyers on the topic. Professor Nelson's view on the matter is particularly interesting: for over thirty years, he was a leading proponent of the theory that juries *did* have the right to judge law.⁹³ However, after surveying colonial court records, Professor Nelson changed his position, writing in 2010 that "the story of the jury's power is far more complex than I had thought before. If the question is simply whether colonial juries had the power to find law, the answer is sometimes yes and sometimes no."⁹⁴ Professor Krauss reaches the same conclusion, though noting a large degree of uncertainty arising from the relatively scarce historical colonial court records.⁹⁵

Professor Krauss also helpfully notes that some confusion on this question may come from failing to distinguish the criminal jury's rights from its powers. Although criminal juries had the *power* to acquit defendants against the evidence, Professor Krauss points out that "this does not mean that juries have a *right* to decide criminal cases without regard to the facts; it just means that they have the power to do so, and that in some cases that power is absolute."⁹⁶ Professor Krauss is correct that criminal juries had the power to render general verdicts of acquittal, which implicitly gave them the power, if not the right, to judge law if they disagreed with imposing it in a particular case.⁹⁷ However, although no scholars question that juries had the

necessary (as in every legal-historical investigation) to consider both what courts and laymen said about it and what the courts really did. What is said about criminal juries, even by judges, has changed a great deal in some American jurisdictions. What is really done in criminal cases has changed hardly at all since 1790, but it is more complex than either the modern or the older descriptions indicate.").

93. See, e.g., William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904–17 (1978).

94. Nelson, *supra* note 65, at 1003. However, Professor Nelson argues that the question of juries' law-finding power is too narrow and that, instead, scholars should assess how much power localities held in deciding the law compared to the power held by "central political authorities." *Id.* at 1003–04.

95. Krauss, *supra* note 83, at 124–25.

96. *Id.* at 114 (emphasis added).

97. See, e.g., Henderson, *supra* note 92, at 326–27 ("[T]he jury's right 'to decide the law' or to give an uncontrolled general verdict was primarily a right to acquit.").

power to acquit against the evidence and, therefore, implicitly to judge the law or its application, it seems that in some jurisdictions there was no *right* to do so, and the right to find law was reserved for judges.

Both Professors Nelson and Krauss acknowledge that there is a shortage of evidence given the scarcity of colonial court records. Indeed, after reviewing the records of each colony, Professor Krauss concludes:

The truth is that . . . we just don't know whether, when, or where colonial criminal juries had the authority to judge the law. It seems reasonably clear that they had no such right in mid-eighteenth century Georgia, seventeenth and (at least) early eighteenth-century Maryland, and in Massachusetts on the eve of Independence. On the other hand . . . criminal juries were acknowledged to have some form of law-finding right in Rhode Island throughout the colonial period. The rest (to varying degrees) is a mystery.⁹⁸

Professor Nelson disagrees with Professor Krauss on some particular colonies⁹⁹ but arrives at the same general conclusions. Indeed, his more recent research fills in some of Professor Krauss's gaps. Professor Nelson states, "On the issue of the lawfinding power of colonial juries, the score is roughly tied . . . juries possessed ultimate power over the law in New England and Virginia, but not in the Carolinas, New York, and Pennsylvania."¹⁰⁰ He further clarifies, "[I]t seems clear that the Constitution of 1787, as its framers intended it to do, created a national government that gradually gained increasing power to

98. Krauss, *supra* note 83, at 212.

99. As their statements quoted in this paragraph show, Professors Krauss and Nelson arrive at different conclusions regarding the jury's right to judge law in Massachusetts. Professor Nelson, a leading authority on colonial Massachusetts legal history, probably has the better of the disagreement. However, Professor Krauss does effectively point out that there was disagreement among Massachusetts lawyers on the question. Cohen and Smith, as well as Professor Nelson, cite John Adams on the topic because he argued that juries had a right to judge both law and fact. See Cohen & Smith, *supra* note 3, at 99–100; Nelson, *supra* note 65, at 1005. However, Professor Krauss notes that Josiah Quincy, John Adams's co-counsel in the defense of the British soldiers tried in relation to the Boston Massacre, told the jury his interpretation of the law, but "he also admonished the jurors that they were bound to follow the law they would receive from the Bench. Though [the judge] told the jurors that Quincy was right about their duty, neither he nor [the other judges] interfered with Quincy or . . . Adams, when they argued the law to the jury." Krauss, *supra* note 83, at 128.

100. Nelson, *supra* note 65, at 1028.

impose national law on its recalcitrant peripheries.”¹⁰¹ With the states sharply divided in practice in 1791, it is wrong to conclude that the original public meaning of criminal juries guaranteed that they had a right to judge the law, though it would certainly include the power for criminal juries to acquit a defendant without judges reviewing their reasoning.

Even Professor Amar, a major proponent of the position that juries judged law as well as fact, does not contend that this practice rose to the level of a constitutional right. After reviewing the evidence in favor of the right of juries to review law (particularly laws that jurors believe to be unconstitutional), Professor Amar concedes, “I do not mean to suggest that I am wholly convinced. But the mere fact of [the argument’s] strong plausibility shows how strikingly powerful the jury might have become had post-1800 history unfolded differently.”¹⁰² Professor Amar also points out the difficulty of finding a right of juries to judge law based on the bare-bones text of the Constitution on juries, combined with the Judiciary Act of 1789’s focus on the jury’s role as factfinder in both civil and criminal cases. Professor Amar notes:

Jurors could point to no strong statements in constitutional text or the framework Judiciary Act of 1789 that forbade this shrinkage [of juries’ lawfinding power]. If anything, the Seventh Amendment highlighted the civil jury’s role in deciding issues of “fact,” and the Judiciary Act similarly stressed, in both criminal and civil cases, that the “trial of issues [of] *fact*” in all common-law cases would be “by jury.”¹⁰³

Indeed, the Judiciary Act of 1789 repeatedly states that issues of *fact* shall be decided by jury but makes no mention of juries judging law.¹⁰⁴ Thus, Professor Amar, based on the text of the Constitution and the Judiciary Act of 1789, declines to argue that the original public meaning of the Sixth Amendment included a right for criminal juries to judge law.

101. *Id.* at 1029.

102. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 103 (1998).

103. AMAR, *supra* note 86, at 241 (alteration in original) (quoting Judiciary Act of 1789, ch. 20, §§ 9, 12, 13, 1 Stat. 73, 77, 80–81).

104. *See* §§ 9, 12, 13, 1 Stat. 73, 77, 80–81.

C. *Objection Three: Quaker Oaths and Pious Perjurers*

Cohen and Smith point to early trials where Quakers were excused from juries to argue a third potential originalist objection against death qualification—that the process gives the court more control over jury selection than was provided at common law or by state practice in 1791.¹⁰⁵ However, the examples of the trials that Cohen and Smith cite do not support their argument. Instead, they demonstrate that the state held considerable control over the jury selection process at common law and in early American history. Moreover, Quakers' relationship with English and early American juries affirms the earlier argument that jurors had a duty to uphold the law rather than a right to judge it.

As Cohen and Smith point out, there was no explicit death qualification: after the jury pool convened, the potential jurors were sworn and then joined the petit jury unless challenged.¹⁰⁶ Yet, the fact that jurors were sworn to uphold the law challenges the notion that death qualification is contrary to common law controls, as this swearing may have served as a form of excluding those who would be unwilling to impose the law. Jurors were sworn to uphold the law, but, as previously discussed, both in England and America they held the power to acquit against the evidence. Professor Baker notes that such acquittals did sometimes occur in England in the sixteenth through eighteenth centuries, stating that jurors “could mitigate the rigours of the penal system by ‘pious perjury’—the merciful use of ‘partial verdicts’ or false acquittals contrary to the evidence.”¹⁰⁷ The nomenclature for these acquittals seems to undercut the proposition that juries had a right to judge the law. If jurors were forced to “perjure” themselves when they engaged in nullification, it logically follows that making jurors swear that they could, in fact, uphold the law (including in death penalty cases) was permissible at common law.

Furthermore, the account of Justice Story and the excluded Quaker jurors is informative on the question of state control over jury selection in early America. Cohen and Smith discuss at length two cases in which Quakers were excluded from juries

105. See Cohen & Smith, *supra* note 3, at 91–96.

106. See *id.* at 92.

107. Baker, *supra* note 56, at 23.

because of their opposition to the death penalty.¹⁰⁸ From these accounts, Cohen and Smith derive a number of inferences based on incorrect historical assumptions. The first case is *United States v. Cornell*,¹⁰⁹ in which Justice Story, sitting as a circuit judge, upheld a federal district court's exclusion of two Quakers who informed the court that they could not impose capital punishment in the case.¹¹⁰ Arguing that Justice Story erred in removing the Quakers from the jury, Cohen and Smith point out that he did not cite precedent in upholding the removal.¹¹¹ Although this is true, Justice Story did not cite precedent in his orders on most of the other nine objections in the case, and he did invoke general judicial practice in New England on this issue.¹¹²

Moreover, it seems that the defendant's objection in the case was not to the exclusion of jurors, but rather to the lower court's failure to make the Quakers swear that *the reason* they gave for seeking removal was true. Indeed, Justice Story states, "The objection . . . affects to place some reliance upon the fact, that the jurors were not sworn or affirmed to the truth of their statements."¹¹³ Justice Story agreed that the treatise the defendant cited supported such swearing.¹¹⁴ However, he declined to sustain the objection based on common law in New England, which would not require the sworn attestation of an undisputed fact.¹¹⁵ Considering the context of the objection, the defendant was likely not objecting to death qualification itself: instead, he sought to use the Quakers' inability to swear oaths to reverse his conviction on procedural grounds. In other words, the reason that the Quakers gave for seeking excusal was fine, but it was a violation of procedure that they could not *swear* that they were unable to implement the death penalty. Furthermore, that

108. See Cohen & Smith, *supra* note 3, at 93–96.

109. 25 F. Cas. 650 (C.C.D.R.I. 1820) (No. 14,868).

110. *Id.* at 655–56.

111. See Cohen & Smith, *supra* note 3, at 93.

112. See *Cornell*, F. Cas. at 656 ("I may add, that in all the courts of New-England, where I have seen practice, the course pursued on this occasion, has been uniformly adopted."). However, it is unclear if the practice to which Justice Story refers in alluding to New England practice is death-qualifying jurors or another contested aspect of the relevant criminal procedure.

113. *Id.*

114. *Id.*

115. *Id.*

Justice Story felt the objection could “be disposed of in a very few words” suggests that this was not a matter of first impression for him.¹¹⁶ Instead, Justice Story’s refusal “to compel [a Quaker] to decide against his conscience, or to commit a solemn perjury” is consistent with the notion that jurors did not have a right to find against the evidence based on their convictions; they simply had the *power* to acquit against the evidence.¹¹⁷

The second case is *Commonwealth v. Leshner*,¹¹⁸ which Cohen and Smith identify as the “origin[] of death-qualifications.”¹¹⁹ Cohen and Smith point to this case, where the Supreme Court of Pennsylvania upheld the for-cause strike of a juror based on his religious convictions against imposing the death penalty, as the first recorded death qualification of a jury in the United States.¹²⁰ However, although the court noted that this was the first time that it was imposing a for-cause strike, the history that the court recounts regarding such strikes strongly weighs against Cohen and Smith’s argument. Explaining the absence of previous for-cause strikes of anti-death-penalty objectors in Pennsylvania, the Court wrote:

Besides, the sheriff, until the year 1805, had the nomination of jurors; and it is not likely that he would summon, to serve on capital trials, those whose conscientious persuasions were known to be abhorrent from such service. We may easily discover wherefore this right of challenge, though always existing in the law, has been so rarely called into use.¹²¹

Thus, the court rejected the possibility that those who could not impose the death penalty had a right to serve on juries. And the issue was only novel because the sheriff had previously

116. *Id.* at 655.

117. *Id.*

118. 17 Serg. & Rawle 155 (Pa. 1828).

119. Cohen & Smith, *supra* note 3, at 94.

120. *See id.* at 94–95. However, at least one successful for-cause challenge to a juror who could not impose the death penalty occurred several years earlier in 1824 in Washington, D.C. *See United States v. Ware*, 28 F. Cas. 404 (C.C.D.D.C. 1824) (No. 16,641). In that case, the ruling was very simple, which could imply that this type of for-cause strike may not have been uncommon in some regions. Indeed, the opinion notes, “Mr. Taylor, for the United States . . . then challenged [the conscientious objectors] for cause, alleging that they did not stand indifferent,” and the Court simply stated “it was a good cause of challenge, and the jurors were set aside.” *Id.* at 404.

121. *Leshner*, 17 Serg. & Rawle at 159.

excluded such jurors before they reached the panel. The court did not find this control over jury selection to be problematic.

Furthermore, Cohen and Smith's argument relies on a speculative and unsound assumption about the Quaker community's beliefs regarding capital punishment in late eighteenth- and early nineteenth-century America. Cohen and Smith assert that Pennsylvanian Quakers in the early 1800s "largely opposed the death penalty and lived in the state in sufficient numbers to give [a defendant in a capital case] hope that a Quaker would serve on his jury."¹²² Cohen and Smith further argue that the defendant in *Leshner* had the bad luck of receiving "the one death-penalty-opposed juror who would decide to unilaterally inform the judge of his inability to sentence [the defendant] . . . to death."¹²³ However, Cohen and Smith do not present evidence to show that Quakers were quietly serving on juries in capital cases and, therefore, acquitting defendants or causing hung juries. Indeed, categorical opposition to capital punishment in Pennsylvania was actually rare until the early nineteenth century, even among Quakers.¹²⁴

In the eighteenth century, Quakers frequently served on juries or even as judges in capital cases and would convict if convinced of the defendant's guilt.¹²⁵ But as Timothy Hayburn notes, the Quakers' political system often "tempered [death penalty sentences] with a liberal application of pardons [from the governor and Provincial Council] to mitigate the harsher aspects of the penal code."¹²⁶ The Quakers also worked politically to construct a more lenient criminal justice system than in

122. Cohen & Smith, *supra* note 3, at 94.

123. *Id.*

124. See Albert Post, *Early Efforts to Abolish Capital Punishment in Pennsylvania*, 68 PA. MAG. OF HIST. & BIOGRAPHY 38, 42 (1944) ("For almost a generation the question of the death penalty lay in abeyance. . . . The capital punishment issue was suddenly revived in 1809 by a series of articles . . .").

125. See Timothy J. Hayburn, *Who Should Die?: The Evolution of Capital Punishment in Pennsylvania, 1681–1794*, at 93–95 (May 2011) (unpublished Ph.D. dissertation, Lehigh University) (on file with Lehigh Preserve, Lehigh University).

126. *Id.* at 23. The governor held the pardon power in colonial Pennsylvania, which he "exercised . . . through his council and invariably acted upon the recommendations of the judges who tried the culprits." Herbert William Keith Fitzroy, *The Punishment of Crime in Provincial Pennsylvania*, 60 PA. MAG. HIST. & BIOGRAPHY 242, 255 (1936). Pardons were common in colonial Pennsylvania: "Of one hundred and forty-one recorded convictions in capital cases before the Revolution, forty-one were pardoned and twenty-six reprieved." *Id.*

England and other states by legislatively establishing fewer (but still some) capital crimes.¹²⁷ Thus, even Quakers in the colonial era through the ratification of the Bill of Rights were often willing to impose the death penalty.

As noted earlier, the whole matter of juror oaths suggests that juror exclusion in capital cases arose as a necessary response to the small but growing portion of the population that was unwilling to impose the death penalty rather than as a disruption of historical practice. Indeed, in England in 1791, Quakers were unable to serve on juries simply because their religious convictions prevented them from taking oaths. Until 1833, Quakers were “disqualified from two offices—namely, any office under the Crown, and from serving on juries.”¹²⁸ And even the legislative history of the Quaker and Moravian Act of 1833 shows that, on at least one occasion, a criminal conviction was found to be defective because a Quaker, who had not taken an oath, had served on the jury.¹²⁹ The legislative history also shows an additional objection to allowing Quakers to serve on juries: that “the strong opinions entertained by members of the Society of Friends with respect to capital punishment might interpose some obstacle to their taking part in the administration of the criminal law.”¹³⁰ However, at a different point in the deliberations, the Duke of Richmond pointed out that at least some Quakers were willing to impose capital punishment, noting that “a Quaker was on a Jury last January at the Old Bailey, and did not hesitate to find a man guilty of felony.”¹³¹ The bill passed, and Quakers gained the right to serve on juries. However, the dual fears that Quakers could not swear oaths to uphold the law and that Quakers would be un-

127. *See id.* at 29–31.

128. 17 Parl Deb HC (3d ser.) (1833) col. 1040.

129. *See id.* at cols. 1041–42. The defendant argued on appeal that no citizen “could . . . be tried for any crime, unless it was on the oaths of twelve men. In the present instance, it would appear that only eleven men had been sworn.” *Id.* at 1042. The court agreed and would have overturned the verdict except that the defendant “solved the difficulty, by dying in the mean time in prison.” *Id.* at col. 1042. Interestingly, as this was a “wilful [sic] murder” case, the Quaker juror in question seems to have been willing to impose the death penalty. *See id.* at cols. 1041–42. This seems to be the same case to which the Duke of Richmond alluded discussed later in this paragraph. *See id.* at col. 1041.

130. *Id.* at col. 1043.

131. 17 Parl Deb HC (3d ser.) (1833) col. 1018.

willing to impose the law if they served as jurors suggests that juries had the power—but not a right—to judge law in England.

III. THE 1791 JURY: A MIXED BAG FOR DEFENDANTS

Assessing the common law and state practice, the death qualification of juries does not violate the original public meaning of juries under the Sixth Amendment. However, the exclusion of large numbers of jurors, such as in the Tsarnaev case, based on their opposition to the death penalty does seem divergent from the highly local and community-oriented image of the historic jury, even if it violates no constitutional right. But objectors who would like to appeal to the historic ideal of the jury should be careful what they wish for. Now-Judge Stephanos Bibas argues that, although “many defense lawyers cheer certain originalist [criminal procedure] decisions, they would not like the whole package that would result from applying a consistent originalist philosophy” to juries.¹³² For instance, most advocates of defendants’ rights would be appalled at the prospect of giving the prosecution or police a *greater* power in selecting juries than currently exists via prosecutorial peremptory strikes. However, a direct application of historical principles would do just that by imposing the “stand by” power, which gave the state jury selection power far greater than today’s peremptory strikes,¹³³ and by potentially giving sheriffs the statutory power to select the entire panel.¹³⁴ Similarly, many would balk at the idea of returning to a jury system where

132. Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL’Y 45, 45 (2011).

133. Professor Baker describes the “stand by” power, which existed at common law, stating:

The Crown could not challenge potential jurors peremptorily, but could require them to ‘stand by’, [sic] which meant that their names were passed over; only when the panel was exhausted were the names called again, and then the Crown would have to show cause or acquiesce. In practice this could give the Crown a greater control over the composition of the jury than the prisoner had; but, like the challenge, it does not seem to have been widely exercised.

Baker, *supra* note 56, at 36. Blackstone also notes this power, saying “the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king’s counsel must shew the cause, otherwise the juror shall be sworn.” 4 BLACKSTONE, *supra* note 42, at *347.

134. See *Commonwealth v. Leshner*, 17 Serg. & Rawle 155, 159 (Pa. 1828).

those who knew (and may have disliked) the defendants personally could still serve on juries unless removed via peremptory strike.¹³⁵

Similarly, Cohen and Smith advocate for the return to a system where jurors are not asked any questions, much less questions about their willingness to impose the law. They argue that, under Blackstone's regime, "[t]here was no allowance for asking questions from which to determine whether a venireman could apply a death sentence."¹³⁶ But returning to a world in which jurors do not answer questions would cut both ways, and the judge could not uncover and exclude jurors who believe the death penalty *must* be imposed: these jurors are excluded under Supreme Court jurisprudence.¹³⁷ Furthermore, if jurors were not questioned, it would be difficult to filter out those with other forms of prejudice, such as racial animus, through either for-cause or peremptory strikes. But originalism does not require a direct return to all criminal procedure practices at common law, whether they broadly favor defendants or the prosecution. As Judge Bibas surmised, "[O]riginalism provides only a minimum, not a maximum."¹³⁸ An originalist looks to what rights existed under the original public meaning of the Constitution rather than simply imposing all historical practice on contemporary applications of criminal justice.

CONCLUSION

The differences between Blackstone's jury selection process and modern criminal procedure are substantial. Death qualification does not seem to have had a direct analogue at common law or early American practice. However, the original public meaning of the right to a jury trial in criminal cases offered in Article III¹³⁹ and to an impartial jury as provided in the Sixth

135. See, e.g., MANN, *supra* note 60, at 71–72.

136. See Cohen & Smith, *supra* note 3, at 92.

137. See *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.").

138. Bibas, *supra* note 132, at 52.

139. U.S. CONST. art. III, § 2, cl. 3.

Amendment¹⁴⁰ does not preclude such a process. The common law definition of an impartial jury was quite narrow and would have included the selection only of those who could take an oath to uphold the law. Although juries judged law as well as fact in some colonies and early states, in other states at the time of the ratification of the Constitution and Bill of Rights, they did not. Furthermore, the leading common law commentators do not support such a right: indeed, Coke argued clearly that such a right did not exist. Thus, the evidence does not suggest a right for citizens to sit on a criminal jury despite their unwillingness to apply the law if the evidence requires it. The importance of juries upholding the law was seen also in jurors' oaths, and those who acquitted against the evidence were sometimes called "pious perjurers," indicating that such a judgment of the law (or at least its application in the circumstances) was a violation of the "perjurer's" duty.

Finally, though death qualification, *per se*, did not occur in 1791, the state clearly had powerful tools to shape the jury in ways that likely led to the exclusion of jurors of whom the prosecution was skeptical. Indeed, in Pennsylvania, the sheriff was permitted by statute to select and exclude jurors during the Founding era.

Death qualification poses challenging policy problems in removing large numbers of potential jurors who might be more sympathetic to defendants than the jurors who remain. However, the original public meaning of the Sixth Amendment does not necessitate the inclusion of jurors who will not impose the law. The original public meaning of the Sixth Amendment offers defendants many protections, but it does not render the death qualification of juries unconstitutional.

Douglas Colby

140. U.S. CONST. amend. VI.