

HARVARD JOURNAL
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THE STRUCTURAL CONSTITUTION IN
THE TWENTY-FIRST CENTURY

THE THIRTY-NINTH ANNUAL FEDERALIST SOCIETY
NATIONAL STUDENT SYMPOSIUM ON LAW AND PUBLIC POLICY—2020

The Hon. Paul D. Clement

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PREFACE

The University of Michigan Federalist Society chapter hosted the Thirty-Ninth Annual National Student Symposium, albeit remotely, on March 13th and 14th of 2020. The topic, which was determined in a more tranquil era, proved to be prescient: federalism and the relationships among the branches of government. From the impeachment proceedings in early 2020 to the debates about congressional and state power during the COVID-19 crisis, judges, academics, and the public engaged with issues of structural constitutional law throughout the year. The Federalist Society's Symposium hosted four panels on these issues, during which some of the country's finest legal and judicial minds debated the role of norms in our constitutional system, the proper place of the Senate, and constitutional boundaries on interstate relations, among other topics.

We have the honor of presenting six Essays from the Symposium in this Issue of the *Harvard Journal of Law & Public Policy*. In the Symposium's Keynote Address, former United States Solicitor General Paul D. Clement discusses the Madisonian theory of separation of powers, and posits that an increasingly unassertive Congress—far from the “impetuous vortex” that Hamilton and Madison feared—threatens our model of government. In the following essays, Professor Keith Whittington discusses the role of norms in our constitutional order, and Professor Roderick M. Hills makes a case for keeping the Compact Clause entirely irrelevant. Next, Professors Lynn A. Baker and John Yoo discuss the proper role of the Senate: Professor Baker argues that it tends to erode the federalist system by promoting the power of small-population

states over large-population states; Professor Yoo contends that the Senate plays a healthy role in America's system of government as a force for deliberation and compromise. Finally, the Symposium essays conclude with a piece by Professor William Baude, in which he criticizes the Supreme Court's approach to interstate relations, whereby the Court has abdicated its role in choice-of-law jurisprudence, while aggressively policing the boundaries of state sovereign immunity.

We are also pleased to present three Articles addressing issues of constitutional and administrative law. The first Article of this Issue, by Professor Craig S. Lerner, addresses the phrase "crimes involving moral turpitude," which has long been used in the immigration laws as a trigger for deportation. Professor Lerner reviews the long history of the term and then defends the phrase against attack from both the academy and the judiciary. In the next Article, Professor Lloyd Hitoshi Mayer and Zachary B. Pohlman discuss the application of the Court's 1983 decision in *Bob Jones University v. United States*, which suggested that religious organizations may lose their tax-exempt status if they engage in activities "contrary to fundamental public policy," and which has renewed currency today given debates over religious policies regarding sexual orientation. Drawing on the work of theologian Abraham Kuyper, the authors argue that churches should not generally be subject to the doctrine, although they should still lose their tax benefits if they engage in significant criminal activity. In our last Article, Professor Alexander I. Platt examines the Securities and Exchange Commission's practice of resolving enforcement actions on summary dispositions. Professor Platt concludes that the practice both violates the Administrative Procedure Act and results in bad policy.

In addition to these Articles, we are honored to present an excerpt from Secretary of Labor Eugene Scalia's address at the 2019 Federalist Society's National Lawyers Convention. In his address,

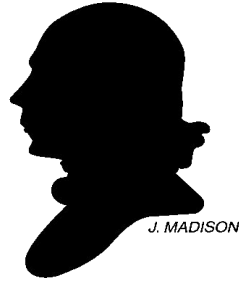
Secretary Scalia notes with concern law firms' increasing refusal to represent clients with unpopular views. Secretary Scalia argues that such refusal is incompatible with free speech and the role of the lawyer in American society. And finally, we are happy to conclude this Issue with two Notes from our own student editors. In the first, Nick Cordova discusses the scope of the *parens patriae* doctrine and considers whether it may preclude some suits by local governments, particularly in the context of the ongoing federal multidistrict opioid litigation. In the second, Brian A. Kulp argues that federal courts have misread Supreme Court precedents and have violated Article III by crafting exceptions to the absolute rule against "hypothetical jurisdiction."

This Issue was not created in normal times. I began work on it as Harvard Law School closed its campus; as I conclude, the school remains closed. The remote nature of work has created tremendous challenges for the *Journal's* staff, who have had to balance remote learning against the difficulties of the pandemic as a whole, and for the *Journal* itself, as all work has gone on remotely and with no access to our usual physical resources. Without exception, I can say that the staff has risen to the challenge, and I am grateful every day. In particular, Deputy Editor-in-Chief Jay Schaefer helped reconfigure our editing process to introduce new students to the *Journal* remotely. Articles Chair Jason Muehlhoff has worked tirelessly to manage our submissions and Article selection process. Both of our Managing Editors, John Ketcham and Stuart Slayton, have put in countless hours editing this Issue. In addition, John Ketcham worked to substantially reorganize our internal style guide, while Stuart Slayton served as National Symposium Editor and also managed to create a remote galleying process entirely from scratch, despite lacking access to our usual office software. Finally, Cooper Godfrey, our Chief Financial Officer, has generously undertaken the work of managing the *Journal's* business affairs. There are many more individuals I could thank; to

enumerate them all would take up the entire Preface. Our staff—including the Symposium Editors who contributed their time to edit the Symposium essays—are the *Journal* at its very best. It is an honor to work with them.

Max J. Bloom
Editor-in-Chief

THE FEDERALIST SOCIETY



presents

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on Law and Public Policy*

The Structural Constitution in the Twenty-First Century

March 13–14, 2020

The University of Michigan Law School

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THE FEDERALIST NO. 48, THE SEPARATION OF POWERS, AND “THE IMPETUOUS VORTEX”

PAUL D. CLEMENT*

Given that the focus of the Symposium is on the structural Constitution, what I want to talk about today is the separation of powers and, in particular, James Madison’s *The Federalist No. 48*¹ and the differences between the strengths of the relative branches of government today versus what Madison envisioned. If you look at *The Federalist No. 48*, you will see that Madison was most concerned with the power that had been given to the new national Congress.² In fact, he famously described Congress in *The Federalist No. 48* as the “impetuous vortex” into which all power would be sucked but for the separation of powers.³ He was particularly concerned about Congress because of the power of the purse. As he wrote, “[it] alone has access to the pockets of the people.”⁴

The executive, by contrast, was less of a concern for Madison because, as he wrote, it is “restrained within a narrower compass, and

* Paul Clement is a partner in the Washington, D.C. office of Kirkland & Ellis LLP and a Distinguished Lecturer in Law at the Georgetown University Law Center. He served as the 43rd Solicitor General of the United States from June 2005 until June 2008. Before his confirmation as Solicitor General, he served as Acting Solicitor General for nearly a year and as Principal Deputy Solicitor General for over three years. This Essay is a lightly edited version of Mr. Clement’s keynote speech at the Federalist Society’s Student Symposium, delivered on March 14, 2020.

1. *THE FEDERALIST NO. 48* (James Madison) (Clinton Rossiter ed., 2003).

2. *See id.* at 310 (“The legislative department derives a superiority in our governments. . . . Its constitutional powers being at once more extensive, and less susceptible of precise limits . . .”).

3. *Id.* at 309.

4. *Id.* at 310.

[is] more simple in its nature.”⁵ The judiciary was even less of a concern for Madison. As he said, “[it is] described by landmarks, still less uncertain,”⁶ by which I believe he meant the case and controversy requirement of the Constitution.⁷

Madison was sufficiently concerned with the Congress and sufficiently unconcerned about the executive and the judiciary that he wrote, “projects of usurpation by either of these departments,” — the executive or judiciary — “would immediately betray and defeat themselves.”⁸ Congress, in Madison’s view, was not just the most powerful and most dangerous branch, but, if you read *The Federalist No. 48* carefully, it is not an overstatement to say that Madison believed that the power of Congress was the *raison d’être* for the separation of powers. The checks and balances were there largely to constrain Congress. As he wrote, “it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.”⁹

So, let’s take a moment now to compare Madison’s vision with our present-day reality. What you see is that both the judiciary and the executive are more powerful than Madison envisioned, and Congress is certainly less active and less of the impetuous vortex that Madison had in mind.

First of all, let’s talk about the judiciary. The case for saying that the judiciary is more powerful today than James Madison conceived that it would be is an easy case to make. It is true in the obvious sense that the Supreme Court of the United States today is deciding many of the most fraught and contentious issues that arise in society as a whole,

5. *Id.*

6. *Id.*

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

8. THE FEDERALIST NO. 48, *supra* note 1, at 310.

9. *Id.* at 309.

such as issues of race,¹⁰ abortion,¹¹ and sexual orientation.¹² All of these issues are being definitively resolved in the Supreme Court of the United States rather than in the Congress.

This would not only surprise Madison, but it is fair to say that nobody designing a system from scratch would think it was a good idea to have these kinds of issues decided by nine unelected lawyers who serve with life tenure. And it is not a surprise, as a result, that the Supreme Court nomination process has become fraught with difficulty because of the power now exercised by the Supreme Court.¹³

But the power of the judiciary *vis-à-vis* the other branches is underscored in less obvious ways too. Right now, a federal district court judge in Ohio is attempting to solve the nationwide opioid crisis armed with tools no more specific than the state law of public nuisance.¹⁴ And that federal judge is not alone in tackling a national

10. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016); *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014) (plurality opinion); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

11. See, e.g., *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Gonzalez v. Carhart*, 550 U.S. 124 (2007); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

12. See, e.g., *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020). Note that Mr. Clement delivered this address before the Court announced its opinion in several of the October 2019 cases, including *June Medical* and *Bostock*.

13. See generally JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* (2007).

14. See John Culhane, *The Little Known Legal Doctrine Making Big Pharma Pay for the Opioid Crisis*, POLITICO (Aug. 28, 2019), <https://www.politico.com/magazine/story/2019/08/28/johnson-and-johnson-decision-opioids-227913> [<https://perma.cc/AZ6Z-4AKA>] (explaining public nuisance in the context of the opioid litigation); Tom Hals & Nate Raymond, *Judge's unorthodox approach has huge opioid settlement within reach*, REUTERS (Oct. 18, 2019, 7:04 AM), <https://www.reuters.com/article/us-opioids-litigation-judge/judges-unorthodox-approach-has-huge-opioid-settlement-within-reach-idUSKBN1WX1AT> [<https://perma.cc/D9A3-62LQ>] (explaining Judge Dan Polster's strategy for trying to help the parties reach a productive settlement instead of going to trial).

problem with very minor and meager judicial tools. Another federal judge in California is trying to address the problem of youth vaping,¹⁵ and there are other federal judges who are being implored to address the global issue of climate change.¹⁶

At the same time that the judiciary is plainly exercising more power than Madison could have imagined, the executive, too, is more powerful than he envisioned. Now in saying that, I don't mean to enter into the debate about the unitary executive and whether the current executive is exercising the executive power vested in him by the Constitution in a way that is similar to or different than what the Framers had in mind.¹⁷ What I really have in mind is how much authority has been delegated to the executive branch by Congress.

You see this very dramatically in the current coronavirus situation. It is not an overstatement to say that in dealing with this crisis all eyes are on the President.¹⁸ To be sure, Congress worked with the Trump Administration to enact an emergency spending measure that had some minor provisions that went beyond spending to address substance.¹⁹ But the interaction has been telling. As far as I can tell, the principal legislative response to the initial administrative request for funding to deal with this crisis was to say, "You did not ask for enough money, and we need to give you at least twice

15. See Complaint for Declaratory & Injunctive Relief, R.J. Reynolds Tobacco Co. v. Cty. of Los Angeles, No. 20-04880, 2020 WL 5405668 (C.D. Cal. June 1, 2020).

16. See, e.g., Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020); Juan Carlos Rodriguez, *NYC Faces Tough 2nd Circ. In Sweeping Big Oil Climate Case*, LAW360 (Nov. 22, 2019, 3:11 PM), <https://www.law360.com/articles/1222555/nyc-faces-tough-2nd-circ-in-sweeping-big-oil-climate-case> [<https://perma.cc/5HAA-6HV8>].

17. For more on the unitary executive debate, see generally John C. Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935 (2009).

18. See, e.g., Shannon Pettypiece, *It's Trump's coronavirus response now, to his political profit or peril*, NBC NEWS (Mar. 29, 2020, 5:14 AM), <https://www.nbcnews.com/politics/2020-election/it-s-trump-s-coronavirus-response-now-his-political-profit-n1171171> [<https://perma.cc/N66N-8J97>] (quoting a White House aide as saying, "All eyes are focused on the president and the White House.").

19. See generally *Coronavirus Aid, Relief, and Economic Security Act*, Pub. L. No. 116-136, 134 Stat. 281 (2020) (addressing, for example, supply chain shortages, health workforce coordination, and sick leave provisions).

as much as you asked for.”²⁰ That is an odd use of the power of the purse, to say the least, in terms of constraining the other branches of government.

But there are more mundane examples as well of the executive tackling lots of issues James Madison would have thought were in Congress’s bailiwick. One I have run across in my own practice is a recent effort by the FCC to reallocate spectrum to jumpstart the 5G revolution.²¹ The 5G revolution is obviously an important issue that should be wrestled with somewhere in the federal government. But the idea that the FCC should do this without any specific direction from Congress does seem anomalous, especially considering that the reallocation of the spectrum is a matter worth literally tens of billions of dollars.²² Some of these dollars may even be generated for the federal government fisc through an auction of the spectrum,²³ but all of the economic value is going to be reallocated from some parties to others. And all of that does seem, especially given the stakes, something that James Madison would have thought that Congress would have dealt with.²⁴

But the biggest surprise to Madison probably would be less that the judiciary and executive are more powerful than that Congress

20. See Erica Werner & Mike DeBonis, *House passes \$8.3 billion emergency spending package to respond to coronavirus outbreak*, WASH. POST (Mar. 4, 2020, 3:42 PM), <https://www.washingtonpost.com/us-policy/2020/03/04/congress-coronavirus-emergency-spending/> [<https://perma.cc/URM9-PJWU>] (discussing the bipartisan view that the initial White House spending proposal was inadequate to address the coronavirus crisis).

21. See Expanding Flexible Use of the 3.7 to 4.2 GHz Band, 85 Fed. Reg. 22,804 (Apr. 23, 2020) (to be codified at 47 C.F.R. pt. 1, 2, 25, 27, & 101).

22. See *id.* at 22,827–28, 22,830–31.

23. See, e.g., 85 Fed. Reg. at 22,828; Mark Colwell, *How Will Congress Spend Over \$40 Billion in C-Band Auction Revenues?*, VOQAL (Dec. 12, 2019), <https://voqal.org/telecommunications-update-how-will-congress-spend-over-40-billion-in-c-band-auction-revenues/> [<https://perma.cc/5HL7-CL4Z>] (predicting a C-Band FCC auction could raise between \$30 and \$60 billion).

24. See Letter from James Madison to George Washington (Apr. 16, 1787), FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-09-02-0208> [<https://perma.cc/MZ2H-EY2J>] (“I would propose next that in addition to the present federal powers, the national Government should be armed with positive and compleat [sic] authority in all cases which require uniformity; such as the regulation of trade . . .”).

has largely yielded power to the other branches and is anything but the “impetuous vortex” that he feared. And there are plenty of examples of this. I am going to just pick very briefly a couple of obvious examples and a couple of more obscure examples to illustrate that it is a broad-scale problem.

Two obvious examples are immigration and the authorization for the use of military force. Immigration is clearly an issue that the federal government should be dealing with in the main. And there is no doubt that there have been great controversies about the proper immigration policy. Now, perhaps it is precisely because immigration policy is so contentious and divided between the parties that there has not been a congressional resolution of the current controversies. However, whatever the reason, Congress has not changed the immigration laws in any material respect in the last decade, while we have seen very different executive branch policies from the last administration to the current administration.²⁵ We have seen individuals caught in the middle, such as the DREAMers who were allowed to stay in the country under the Obama Admin-

25. Compare Memorandum from Janet Napolitano, Sec’y of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012) (regarding the exercise of prosecutorial discretion with respect to individuals who came to the United States as children), with Memorandum from Elaine C. Duke, Acting Sec’y, Dep’t Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017) (regarding the rescission of the June 15, 2012 memorandum entitled Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children); see also John Gramlich, *How border apprehensions, ICE arrests and deportations have changed under Trump*, PEW RES. CENTER (Mar. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/> [https://perma.cc/JV6K-GBJ8] (describing the Trump Administration’s immigration policy and how it compares statistically with the Obama Administration, including data on both border detentions and arrests of unauthorized immigrants in the country’s interior).

istration despite an arguable lack of statutory authority for the policy.²⁶ The question of whether the executive has the power to simply reverse that policy is currently before the Supreme Court.²⁷

The Authorization for the Use of Military Force passed in September of 2001 is another good example of Congress ceding its powers to the other branches.²⁸ The attacks of 9/11 prompted Congress into quick and bipartisan action. Congress acted in a way that gave substantial authority to the President,²⁹ which was probably perfectly appropriate in the immediate wake of those attacks. And so, the Authorization for the Use of Military Force broadly authorized the use of force against those individuals and groups responsible for the attacks of 9/11.³⁰

What is striking is not what Congress did in that first week after the attacks because it did act quickly, sending the bill to President Bush's desk for signing within a week.³¹ What is surprising is that

26. Compare Hans A. von Spakovsky, *DACA Is Unconstitutional, as Obama Admitted*, HERITAGE FOUND. (Sept. 8, 2017), <https://www.heritage.org/immigration/commentary/daca-unconstitutional-obama-admitted> [<https://perma.cc/UU4Z-HBET>] (“Congress has never given the president the power to provide pseudo-amnesty and government benefits to illegal aliens.”), with Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 112 (2015) (praising President Obama's approach to reshaping immigration law through administrative means as “lawful and desirable”).

27. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1919 (2020). As noted in *supra* note 11, Mr. Clement delivered this address before the case was decided. In June 2020, the Supreme Court held that the Trump Administration's decision to rescind the Deferred Action for Childhood Arrivals program was arbitrary and capricious and violated the Administrative Procedure Act. *Id.* at 1915. The Court then reinstated the program but noted that in some instances the executive does possess the authority to overturn a prior policy. *See id.* at 1913.

28. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 (2018)).

29. Congress gave the following authority to the President: “[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” *Id.* § 2(a).

30. *Id.*

31. *See Congress approves resolution authorizing force*, CNN (Sept. 15, 2001, 3:14 PM), <http://www.cnn.com/2001/US/09/15/congress.terrorism/index.html>

Congress has not revisited the issue even though the War on Terror has changed in many different respects in the ensuing two decades and has largely become a war against ISIS,³² which is a group that did not exist (at least in its current form) at the time of the attacks of 9/11.³³ Nonetheless, Congress has not seen fit to revisit an authorization of force quickly enacted within a week of the attacks.

There are many less obvious examples, which underscore that congressional inaction is a widespread phenomenon. One of the most important developments of the last quarter century, and one would think one of the principal objects of congressional action, would be the development of the Internet. But yet, if you look at the congressional laws that principally regulate actors on the Internet, many of the most important ones, such as Section 230 of the Communications Decency Act³⁴ or the Digital Millennium Copyright Act,³⁵ were passed in the 1990s. There is a huge chasm, particularly in the context of the fast-moving Internet age, between the technology of the mid-1990s and today. Yet, most of today's issues are governed by laws that were passed in the very earliest days of the Internet.

To pick just one example that illustrates the phenomenon, take the Telephone Consumer Protection Act³⁶ or "TCPA." This statute

[<https://perma.cc/78T3-5F45>] (discussing the Senate's unanimous authorization of the use of force resolution).

32. See *The Future Of The President's Authorization For Use of Military Force* (NPR radio broadcast Oct. 30, 2017), <https://www.npr.org/2017/10/30/560778907/the-future-of-the-presidents-authorization-for-use-of-military-force> [<https://perma.cc/WKE9-FUCE>] (suggesting that the Authorization for the Use of Military Force Act should be replaced).

33. See James A. D'Cruz, *The Kansas City Shuffle: Arguing Jus in Bellum When Everyone is Looking to the Jus in Bello*, HARV. NAT'L SEC. & L. ASS'N BLOG (last visited Sept. 9, 2020), <https://orgs.law.harvard.edu/nslnsnc/research-blog/> [<https://perma.cc/QWL5-YQ9Y>] (noting that ISIS did not exist in 2001 when Congress passed the Authorization for Use of Military Force, but arguing that ISIS is logically associated with Al-Qaeda).

34. Communications Decency Act, Pub. L. No. 104-104, 10 Stat. 133, 137-39 (1996) (codified as amended at 47 U.S.C. § 230 (2018)).

35. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended at 17 U.S.C. § 101 (2018)).

36. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227 (2018)).

was enacted in 1991 to address one of the annoyances of 1991, namely having the family dinner interrupted by your landline phone ringing because some telemarketer was trying to deliver a prerecorded message to your home phone. Congress passed a statute that largely outlawed such “robocalls” and the use of autodialing machines to reach cellphones that were still relatively scarce and involved costly per-minute charges even for incoming calls.³⁷ Now, nearly thirty years later, the technology has evolved substantially. People are more likely to get an annoying text on their smartphone than they are to get an annoying call on their landline, and cellphones are ubiquitous and generally come with unlimited packages without charges for incoming calls or texts. Yet in all these years, Congress has not revisited the statute. And you now have a situation where, at least in the Ninth Circuit, the statute has been interpreted as providing that even a smartphone may well be an automatic dialing machine.³⁸ And in the face of all that, Congress instead of revisiting the issue has been waiting for the FCC to promulgate a new rule.³⁹

So, what are the consequences of this overly cautious Congress in terms of the separation of powers? First, it has a direct impact on the other branches. Its impact on the judiciary is well illustrated just by looking at the cases before the Supreme Court this term. I am not going to go into the details of the cases, but I will tick off three of the major cases that the Supreme Court is dealing with this term, each of which stems from relative congressional inactivity.

One is the DACA case about the fate of the DREAMers and whether or not they can stay in the country.⁴⁰ Another is the three cases consolidated to deal with the question of whether Title VII and its prohibitions against discrimination based on sex apply to

37. See 47 U.S.C. § 227(b)(1)(A)(iii) (2018).

38. See *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018) (holding that if a device can automatically dial a stored number, then it is an automatic dialer within the meaning of the statute).

39. See *Advanced Methods to Target and Eliminate Unlawful Robocalls: Report and Order and Further Notice of Proposed Rulemaking*, 32 FCC Rcd. 9706, 9706 n.3 (2017) (listing letters from members of Congress in support of rulemakings to stop unwanted robocalls).

40. *Dep’t Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

sexual orientation or transgender status.⁴¹ And the last of these cases is the case involving the Little Sisters of the Poor.⁴²

The Little Sisters case involves the validity of a major change in policy by the executive branch.⁴³ It is worth noting that the Little Sisters case is a byproduct of the Affordable Care Act.⁴⁴ And if you were going to identify one area where Congress has not been quiet in the last decade and a half, it would be health care, with the Affordable Care Act as an example of major legislation, though not major bipartisan legislation.

But even that major legislation left many contentious issues to the executive branch, in particular the question of whether or not there should be a mandate to provide contraception as part of a broad and general preventative health mandate.⁴⁵ And trying to resolve how a contraception mandate would interact with the Religious Freedom Restoration Act was, again, an issue that Congress did not decide directly but left to the executive branch.⁴⁶ So, the Obama Administration did relatively little to accommodate religious exercise, and its executive orders were challenged by religious groups like the Little Sisters and others on those grounds.⁴⁷ And now the Trump Administration has done much more to accommodate religious exercise, and its efforts to accommodate religious exercise have been challenged by several states under the Administrative Procedure Act.⁴⁸ The Supreme Court and not Congress will decide

41. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

42. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

43. *Id.* at 2372–73; see also Editorial Board, *Religious Liberty Lives at the Supreme Court*, WALL ST. J. (July 8, 2020, 7:06 PM), <https://www.wsj.com/articles/religious-liberty-lives-at-the-supreme-court-11594249558> [<https://perma.cc/MFL8-QYAL>]; Robert Pear, Rebecca R. Ruiz & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html> [<https://nyti.ms/2y090eY>].

44. See *Little Sisters of the Poor*, 140 S. Ct. at 2372.

45. See *id.* at 2373–75.

46. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–91 (2014).

47. See, e.g., *id.*; *Little Sisters of the Poor*, 140 S. Ct. at 2367.

48. See *Little Sisters of the Poor*, 140 S. Ct. at 2378; *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410 (9th Cir. 2019), *vacated*, *Little Sisters of the Poor Jeanne Jugan Residence v. California*, No. 19-1053, 2020 WL 3865245 (U.S. July 9, 2020); Robert

all of these contentious issues—on immigration, sexual orientation, contraception, and religious liberty.

The effect on the executive branch has been equally obvious in that many important issues are being decided today by executive orders.⁴⁹ It is not an exaggeration to say that in many respects we have a government by executive order, which, of course, creates the dynamic that when there is a change in administration, one set of executive orders goes out the window to be replaced by another set of executive orders. Such a practice is fine if the orders deal with matters traditionally addressed by executive order such as executive policy or intra-executive interpretation. But when wide swaths of primary conduct are addressed in executive orders covering matters as important as religious freedom and immigration, governing by executive order creates a dynamic in which the basic law of the land is up for grabs and subject to change every four years.

But probably the biggest ramifications of Congress's lack of activity are on Congress itself. There are two effects in particular I would emphasize. One is that, by legislating relatively little, particularly on important issues, members of Congress have lost the art of the compromise. Legislation by its nature requires compromise, especially if you legislate all the way down to the details. One way to avoid an actual substantive compromise on the details is to legislate in relatively general terms about what everyone can agree on and kick everything else to the executive branch. But if Congress were actually to legislate down to the details, compromise would be unavoidable.

Compromise is not always easy, and it is rarely fun. I worked in the Senate for a couple of years for the then-junior senator from Missouri, John Ashcroft, who had previously been the governor of Missouri. One of his favorite lines from that time that still sticks

Pear, *White House Acts to Roll Back Birth-Control Mandate Rule for Religious Employers*, N.Y. TIMES (May 29, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html> [<https://nyti.ms/2rhbOmN>].

49. See, e.g., *Executive Orders*, FED. REGISTER (last updated July 31, 2020), <https://www.federalregister.gov/presidential-documents/executive-orders> [<https://perma.cc/PN2Q-H3LP>] (“Donald Trump issued 175 executive orders between 2017 and 2020. . . . Barack Obama issued 276 executive orders between 2009 and 2017.”).

with me is that, “Somebody who tells you being a senator is as much fun as being a governor will lie to you about other things as well.” Now what he meant by that, of course, was that an executive can get things done quickly and unilaterally through what Hamilton would call “energy in the executive.”⁵⁰ Legislating, by contrast, requires many iterations of the law and compromise.

The second effect I would highlight is that, with less activity in Congress and more activity in the executive branch, there is a natural tendency to exacerbate partisanship and for members of Congress, since they are not acting themselves through legislation, to find themselves in one of two partisan roles. If the President is from the same party as the members of Congress, then those members tend to cheer on what the President is doing through executive orders.⁵¹ Conversely, if members are from the opposite party of the President, they tend to spend most of their time criticizing what is being done through executive orders rather than legislating, at least in a way that leads to signed legislation, instead of drafting bills simply to signal policy differences with the Executive.⁵² All this creates a dynamic that was aptly described by Jonah Goldberg as producing a “parliament of pundits,”⁵³ where, instead of spending

50. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

51. See, e.g., Jane C. Timm, *Republicans Alarmed Over Obama’s Executive Orders, Cheer Trump’s On*, NBC NEWS (Jan. 26, 2017, 1:30 PM), <https://www.nbcnews.com/politics/politics-news/republicans-alarmed-over-obama-s-executive-orders-cheer-trump-s-n712231> [https://perma.cc/TP25-MGEK]; *GOP, Democrats spar over legality of executive orders, as lawsuits begin*, FOX NEWS (Nov. 23, 2014), <https://www.foxnews.com/politics/gop-democrats-spar-over-legality-of-executive-orders-as-lawsuits-begin> [https://perma.cc/H23R-9F9T].

52. See, e.g., *supra* note 51; Mike DeBonis, *Democrats launch health-care law rescue in face of Trump’s threat of repeal*, WASH. POST (May 9, 2019, 6:38 PM), https://www.washingtonpost.com/politics/democrats-launch-health-care-law-rescue-in-face-of-trumps-threat-of-repeal/2019/05/09/4554b3f6-7272-11e9-9331-30bc5836f48e_story.html [https://perma.cc/5QWK-UA2E]; *House Republicans Vote to Block Obama’s Immigration Order*, NBC NEWS (Dec. 4, 2014, 2:45 PM), <https://www.nbcnews.com/politics/immigration/house-republicans-vote-block-obamas-immigration-order-n261706> [https://perma.cc/A3UZ-86EQ].

53. Jonah Goldberg, *Government by Rabble-Rousing*, THE DISPATCH (Nov. 1, 2019), <https://thedispatch.com/p/government-by-rabble-rousing> [https://perma.cc/GLP7-MCPB]; see also Mark Leibovich, *This Is the Way Paul Ryan’s Speakership Ends*, N.Y. TIMES

their time legislating, many of the members of the legislature are instead reduced to being armchair commentators on what the executive is doing or not doing on issues that lie squarely within the power of Congress itself to address.

I want to finish with a caveat and then a few thoughts about the path forward. The caveat is that I do not mean to be heard as saying that congressional action for its own sake is a good thing. There is certainly something to be said for a do-nothing Congress. And in particular, there is something to be said for leaving issues to the states through the structural protections of federalism. My point is simply that given how much is getting done at the federal level, the fact that so much of it is being done by the other branches and not by Congress is something that I think would very much surprise Madison.

Now, in terms of the path forward and whether things can be made any better, I would make two observations. One is that the courts can certainly play a role in trying to create better incentives for Congress to act. Indeed, the Court may be on the verge of reviving the nondelegation doctrine. That possibility is suggested by the opinions in the *Gundy* case⁵⁴ and by a separate writing by Justice Kavanaugh who did not participate in the *Gundy* case.⁵⁵ That prospect is one thing that could force Congress to revitalize its legislative role and legislate down to the details.

Another thing that the courts could certainly do is adhere to principles of statutory construction that minimize the incentives for Congress to simply kick issues to the executive branch or to the courts. But if you think that the ultimate solution to this problem is

(Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/magazine/paul-ryan-speaker-ship-end-trump.html> [<https://perma.cc/6KAN-TTUK>].

54. See *Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting) (suggesting that the Court revive the nondelegation doctrine); *id.* at 2131 (Alito, J., concurring in judgment) (noting that “[i]f a majority of this Court were willing to” consider reviving the nondelegation doctrine, he would support the effort).

55. *United States v. Paul*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (“Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”).

for the courts to do more, then I think you will have missed the import of the first part of my speech underscoring that the judiciary is much more powerful than Madison could have imagined. And I think you will also have missed Madison's view of how the separation of powers are supposed to work: As he wrote in *The Federalist No. 51*, the key to the separation of powers is that "[a]mbition must be made to counteract ambition."⁵⁶ There really is no substitute for Congress itself trying to reassert the authority to actually legislate in areas and not simply delegate to the executive branch. As Madison wrote, each department must have powerful motives to resist encroachment by the others.⁵⁷

So, what can Congress do in this respect? I am not an expert on that particular issue, but I do have some thoughts having spent a couple of years in the Senate and having spent several more years watching Congress operate *vis-à-vis* the other branches. One thing Congress can do is try to revisit issues where technology and other advances have overtaken the legislation on the books. Things like the Internet and the TCPA provide examples where Congress could usefully revisit an issue where technology has rendered certain statutes largely obsolete. Another possibility is that Congress could try to essentially force itself to revisit some issues by imposing sunset clauses in legislation. Such clauses force legislators to reassess the issue every decade or so. Those sunset clauses also happen to have the additional virtue of enhancing liberty by making statutes expire if they are not renewed through the democratic process.

And the last thought, which is perhaps more inside baseball and may be more controversial, is there may be something to be said for giving greater power back to some of the committees of Congress so they can accumulate the kind of expertise you need to deal with some of these cutting-edge issues. There is such a disparity today between relatively lean congressional staffs and the vast executive branch agencies that there is an inevitable temptation to think,

56. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 2003).

57. See *id.* at 321–22 (avoiding a "gradual concentration" of power requires "giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others").

“Well, we have experts for that in the executive branch. We will just defer it to the executive branch.”

In closing, my point is to emphasize that we have a system of separation of powers that was largely premised on the notion that Congress was going to be the dominant actor on the federal level such that, if left unchecked, it could become an impetuous vortex. In reality, we have a situation where Congress is, perhaps, the least active and the least self-aggrandizing of the branches. That is a situation that would certainly surprise James Madison, and it is not something that the institutions Madison helped to fashion are perfectly well designed to address.

THE ROLE OF NORMS IN OUR CONSTITUTIONAL ORDER

KEITH WHITTINGTON*

We have given more attention to the issue of norms recently¹—maybe specifically during this administration—than we have previously. But I think it is high time that we pay attention to norms. They are an essential part of how our constitutional system works in general, but they tend to be under-analyzed. We do not pay as much attention to them as we should, nor do we have good tools for thinking about them. Moreover, I do not believe we even have very good tools for identifying them.

So this is a useful moment for us to try to grapple with the fact that the Constitution vests a great deal of discretion in government officials of all sorts,² and that norms are part of the process—part of the sub-constitutional sets of practices and rules—by which we

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1. See, e.g., Dawn Johnsen, *Toward Restoring Rule-of-Law Norms*, 97 TEX. L. REV. 1205, 1205 (2019) (noting that the article is part of a symposium “that addresses the pressing need for ‘Reclaiming—and Restoring—Constitutional Norms.’”).

2. For example, the Take Care Clause requires the President to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3, cl. 4. In turn, some of this discretion is exercised by those working under the President. See generally TODD GARVEY, CONG. RSCH. SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW (2014) (surveying the power of the President and “those under his supervision” under the Take Care Clause).

make the constitutional system operate effectively, despite the fact that it entrusts vast discretion to government officials.

The phrase “norms” encompasses a great deal of different kinds of activities that qualify as part of these sub-constitutional sets of practices. We might think of some norms as being purely a matter of informal practice, but we might imagine others that get institutionalized to some degree. For example, we might imagine some rules about professional practice, like the Senate filibuster or how the House committee system works, as being similar to a norm, even though they are in fact entrenched in a set of rules. They are part of the sub-constitutional set of practices that regulate how government officials conduct business within the terms of the Constitution, and we think they serve very important functions and do important work within the constitutional system. Some of them may be built into statutes, and so there is a host of framework statutes that are particularly important to how the government operates more generally. And these rules might serve those similar functions of norms as well.

One of the challenges, though, particularly when we consider informal norms—those that are not built into some kind of regularized sets of rules or practices—is recognizing what they are so that we know when a norm violation has occurred and whether or not we ought to be concerned about it. At the very least, norms are part of a regularized set of behavior, and so an outside observer watching a political system may be able to infer that there is a norm based on how people are behaving.

But identifying a routine practice, by itself, probably is not sufficient to identify a norm. For example, it has become the regular practice of recent Presidents to only nominate people to the U.S. Supreme Court who have some prior judicial experience before that nomination is made, largely people who have gone to Harvard and Yale Law School, and, in many cases, who have gone to Princeton

University as undergraduates.³ It is hard to imagine that practice as being a norm. If a President decided not to follow that regularized practice, but instead chose as a judicial nominee to the Supreme Court someone who had not gone to Harvard Law School but instead went someplace else, or if the nominee had not had prior judicial experience, we might think the President had made a nomination that was more or less wise. However, we would be unlikely to think that the President had abused the public trust or subverted the workings of the political system. We might not necessarily think it is a norm violation but rather a break from routine practice.

So that raises questions about when a routine practice is a norm versus a change in routine behavior such that we worry if government officials deviate from it. Sometimes this is a function of breaking regularized practices, which might signal something about a norm being changed. Other times, though, it is less true.

For example, early in the Trump administration, President Trump was criticized for the fact that he maintained his personal Twitter account,⁴ raising questions of whether there is some kind of norm that the President should not have personal social media accounts they continue to use while in office. President Trump famously, and in all caps, blasted on Twitter that his use of social media is “MODERN DAY PRESIDENTIAL.”⁵ He behaves differently than other Presidents have, and among the modern-day features of his presidency is that he will use a Twitter account in a personal capacity.

3. See *Biographies of the Justices*, SCOTUSBLOG, <https://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/> [https://perma.cc/8N3V-WDPH] (summarizing the recent and current Justices’ educational and professional backgrounds).

4. See, e.g., Adrienne LaFrance, *Donald Trump is Testing Twitter’s Harassment Policy*, THE ATLANTIC (July 2, 2017), <https://www.theatlantic.com/politics/archive/2017/07/the-president-of-the-united-states-is-testing-twitters-harassment-policy/532497/> [https://perma.cc/G7H3-43T4].

5. *Id.*

We do not have a long practice that tells us Presidents should not do that kind of thing. And so we are constructing norms on the fly as to whether it is okay to have a personal Twitter account. If it is okay for a President to have a personal Twitter account, how should he use that Twitter account? What kind of behavior on that Twitter account might be acceptable? And those expectations are going to change over time, and it is a challenge to try and determine when we know that the kind of norm has been established and when we do not.

Part of what also complicates thinking about when norms have occurred is that we recognize there are likely to be exceptions to norms over time. So even if we think something has a norm-like quality, we recognize, just like rules, that norms can be violated in various ways. And then the question is when do the violations accumulate such that we in fact think the norm no longer holds and it has broken such that now we can move forward without it, as opposed to simply thinking these are violations of the norms but the norm itself holds going forward.

So, think about the example of faithless electors. The U.S. Constitution sets up a system of an Electoral College that has actual human beings serving as presidential electors who cast ballots a month after the voters themselves cast ballots for the presidency.⁶ All through American history, presidential electors have been pledged electors—when they are selected to hold this office they have pledged themselves to vote for a particular presidential candidate.⁷ But some presidential electors violate that pledge and vote

6. See U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . .”).

7. See Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of the Faithless Electors*, 59 ARIZ. L. REV. 903, 906 (2017) (“[E]arly presidential ballots simply listed the names of the presidential electors pledged to vote for that party’s presidential nominee.”).

for someone other than the person that they were pledged to vote for in the first place.⁸ We call these “faithless electors.”⁹

We might think there is a norm for presidential electors, first, to make pledges and, second, to adhere to their pledges over time and actually cast their ballots in favor of the person for whom they were elected to that office to cast their ballots. But we can observe faithless electors all through American history, sometimes more than other times. The 2016 presidential election featured quite a few,¹⁰ as well as a lobbying campaign to create even more.¹¹ Is it still a norm that electors should not be faithless, despite the fact that we have these examples of electors being faithless over time? Does the existence of faithless electors over the course of our political practice indicate that there is no established norm against faithless electors, or does it merely indicate that a norm against faithless electors persists but is sometimes violated?

And so my question as to when we recognize something as being a norm and when we do not, when it is just routine behavior as opposed to some kind of normatively binding behavior, does turn in part on what the internal motivations and understandings are of those engaged in the practice. Do the people who are engaged in this practice recognize it as a kind of norm such that it ought to guide their behavior and constrain their behavior in various kinds of ways? And likewise, is it blameworthy if they violate that kind of practice over time?

For example, I think we would say that most presidential electors believe, as part of their internal practice, that they ought to adhere

8. *See id.* at 904 (describing the push for faithless electors in the 2016 presidential election).

9. *Id.*

10. *See* Kyle Cheney, *Electoral College sees record-breaking defections*, POLITICO (Dec. 19, 2016, 8:52 PM), <https://www.politico.com/story/2016/12/electoral-college-electors-232836> [<https://perma.cc/8P5V-7C63>] (noting seven faithless electors in the 2016 presidential election, the most in United States history).

11. *See, e.g.,* Whittington, *supra* note 7, at 912–15 (discussing efforts to persuade electors to vote against Donald in the 2016 election).

to their pledges. Moreover, we think it is blameworthy if they do not adhere to their pledges and violate their pledges in various ways. But ultimately, those are empirical questions about whether or not that is true, not only true that there is a regular practice but also true that those who engage in the practice believe that there is a norm that creates an independent reason for continuing to adhere to that practice. And it is a challenge to maintain and enforce that sense of norms in these instances in which people might violate them.

So it was suggested earlier in our discussion, for example, that major pieces of social legislation often get bipartisan support. And that has been true through much of American history. Certainly, it is true that through much of the twentieth century major pieces of legislation received bipartisan support.¹² Yet it is hard to think that this is a norm. It is not obvious that any of the players thought internally that they had to have bipartisan support in order to pass legislation, even during the time period in which they routinely did have bipartisan support for doing so.

It is not clear that anyone thought it was blameworthy if you could not get bipartisan support for a particular piece of legislation. But there were institutional features that encouraged legislative entrepreneurs to seek bipartisan majorities in order to advance their policy initiatives. You had to overcome a Senate filibuster. You possibly had to overcome a presidential veto. There was less political polarization so that there was significant overlap in policy preferences among the two parties such that you often would get bipartisanship just based on where people's policy preferences tended to lie.

12. See BIPARTISAN POLICY CENTER, *History of Bipartisanship*, <https://bipartisanpolicy.org/history-of-bipartisanship/> [<https://perma.cc/T6R9-UULZ>] (last visited Nov. 22, 2020) (listing examples of notable legislation in United States history that have received bipartisan support).

So it becomes an interesting question: if you are now trying to move a piece of legislation through Congress and you cannot get bipartisan support for it, have you somehow violated a norm by continuing to push that legislation forward despite the fact that you do not get support from the other party? If you were a mid-twentieth century legislator who happened to have unified government, a friendly President, and a filibuster-proof partisan majority in the Senate, would you be doing something wrong given the expectations of the time if you moved legislation forward on a purely partisan basis and over the opposition of a unified minority party? Mid-twentieth century legislators rarely found themselves in such a situation, but it is not obvious that they would have thought that they were violating some matter of political duty and doing something disreputable if they were to advance legislation on a purely partisan basis in such circumstances.

Likewise, you had this conversation recently in terms of presidential impeachment, for example. Is it appropriate to move a presidential impeachment forward if you do not have bipartisan support for it?¹³ In what sense is that just misguided because it is not likely to be very successful under those circumstances? And to what degree is that actually blameworthy behavior such that we think we are undermining something important about the constitutional system itself? When Speaker Pelosi suggested that a presidential impeachment should not move forward until there was bipartisan support for such action,¹⁴ was that merely a strategic

13. See, e.g., Alan Dershowitz, *A partisan impeachment vote is exactly what the Framers feared*, THE HILL (Nov. 1, 2019, 10:00 AM), <https://thehill.com/opinion/judiciary/468483-a-partisan-impeachment-vote-is-exactly-what-the-framers-feared> [<https://perma.cc/XKR6-RJ9L>] (arguing that no impeachment should ever move forward without bipartisan support).

14. See Dan Mangan & Kevin Breuninger, *House Speaker Nancy Pelosi says Trump 'unfit' to be president, but 'I'm not for impeachment'*, CNBC (Mar. 12, 2019, 8:03 AM), <https://www.cnbc.com/2019/03/11/house-speaker-nancy-pelosi-says-im-not-for-impeachment-of-trump.html> [<https://perma.cc/9PYM-CSDA>] (quoting Speaker Pelosi as

calculation about the politics of the situation or was that an expression of a norm that suggested that a House majority would be doing something shameful if they voted on an impeachment resolution over the unified opposition of the President's own co-partisans?

Some of those questions are going to turn on how important we think that particular practice is in helping to sustain the larger workings of the democratic political system. Some kinds of practices we can abandon without having lots of negative consequences for how the constitutional system works and certainly not a lot of latent consequences for the limits on government power. But some we should be much more worried about if we wind up losing them and having them break down in various ways.

There is a reason, for example, why we expect the Department of Justice, for the most part, to be relatively independent from presidential intervention. There is a reason why we think it is inappropriate for Congress to interfere with the size of the Supreme Court and to pack the Court by adding additional seats or to pack Congress by adding other states. It is not just the fact that these are longstanding practices and so deviations would be unusual, nor is it just that such deviations might be imprudent political moves that are unlikely to achieve their ultimate objectives.

There is a concern that if we change those practices, what will likely be the consequences for the political system as a whole? And there are at least some norms that, if we start violating them, we should worry there will be bad consequences, not only for people's support of the political system, but also for how well the constitutional system is likely to function and what kind of limits on governmental power are likely to exist.

Let me just briefly put one more issue on the table for us to think about and maybe some questions it raises as well, which is how we go about enforcing norms. We are used to constitutional rules that

stating that "unless there's something so compelling and overwhelming and bipartisan, I don't think we should go down that path, because it divides the country").

we enforce, for example, through judicial review, as well as other mechanisms. Norms are much trickier about how we enforce them and maintain them over time.

So think about the classic example of a norm, which was the tradition of a two-term presidency, in which the idea was that a President should not run for more terms of office than George Washington himself had done.¹⁵ We thought this was an important constraint on the presidency and a way of preventing Presidents from becoming dictatorial leaders.¹⁶ One thing that helped preserve that over time, besides the fact that Presidents often were not very popular by the end of their second term,¹⁷ was the fact that we had lots of gatekeepers in the political parties that could force Presidents to limit themselves to two terms.

So when some people thought, for example, that it would be a great idea for Ulysses S. Grant to run for a third term,¹⁸ there were party leaders inside the Republican party who pushed back and said that was inappropriate,¹⁹ that you should not have a President run for a third term of office. Once those kinds of gatekeepers break down, though, it is very hard to know how to continue to enforce the norm.

Do you simply rely on the self-restraint of the political leader? Are you relying on the mass public? These questions are often going to be very difficult. In the case of two-term presidencies, of

15. See Harry A. Bailey, Jr., *Presidential Tenure and the Two-Term Tradition*, 2 *PUBLIUS* 95, 95 (1972) (quoting JOSEPH E. KALLENBACH, *THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP 188-90* (1966)).

16. See *id.* at 105 (“One of the expressed reasons for the [Twenty-Second] Amendment is to prevent the possibility of a president securing a third term, which would presumably increase his chances of becoming a dictator.”).

17. See *id.* (noting that a majority of Presidents in the United States have served only one term).

18. See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 *MINN. L. REV.* 565, 580-82 (1999) (describing the events surrounding President Grant’s possible third presidential run).

19. See *id.* (noting that in 1875 several state Republican conventions “passed resolutions declaring their opposition to presidential services beyond two terms”).

course, we built it into a constitutional rule instead.²⁰ But we can think about similar questions in terms of, for example, the norm for presidential candidates to release health records and tax returns. Are we just relying on the mass public at this point to enforce that norm by refusing to vote for somebody who will not do it? Relying on the public's vote often seems like an ineffective mechanism to enforce a particularly important norm.

It is an interesting question of what states can do in this kind of context of primarily federal norms. Of course, states, in their own internal operations, have their own sets of norms. And they are struggling over those, as well. One feature of norms is we might think that they are largely not institutionalized, although you can imagine some ways states might try to help institutionalize particular norms through litigation, through statutes, and the like. But you can also think about informal things states can do to try to put pressure on federal officials they think are violating norms in various ways.

You might think of the sanctuary cities movement as being an aspect of that—namely, states deciding to use their own powers to refuse to cooperate with federal government officials who are conducting their policy in a way they think violates traditional expectations about how exactly immigration policy is going to be implemented.²¹ I think about the case of President Andrew Johnson, to go back to a set of presidential norms, for example, where he went on a tour of cities in 1866 leading up to the mid-term elections and used what were traditionally understood to be ceremonial political

20. See U.S. CONST. amend. XXII (“No person shall be elected to the office of the President more than twice . . .”).

21. See generally Ilya Somin, *Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary Cities Unintentionally Strengthened Judicial Protection for State Autonomy*, 97 TEX. L. REV. 1247 (2019).

events to make them into partisan political events.²² And one consequence was local government officials stopped showing up for those events.²³

Presidents traditionally could be expected to be on stage with all the local bigwigs. Andrew Johnson increasingly was isolated.²⁴ The local bigwigs would not come and be onstage with him if he was going to use his presidential platform as a partisan device rather than primarily a ceremonial or celebratory device. And we can imagine similar ways in which, in the modern context, state and local officials can push back against federal officials they think are misbehaving by speaking out against them and reinforcing a set of norms about what our expectations are about how political figures behave and by ostracizing political officials they think are behaving in bad ways.

An underlying feature of that question is who is the relevant community to help support norms or to undermine them? If we're changing norms, is it because the people in general want it, or is it something else? And there's certainly a set of norms that are a function of mass public opinion but an awful lot of political norms that matter for how political actors behave are really elite-driven norms that are not necessarily something the mass public has much stake in, knows very much about, or even would be very supportive of if you were to highlight it to them.

So, some of President Trump's unusual rhetorical behavior, for example, we might think of as breaking traditional norms about how exactly Presidents are supposed to criticize judges or criticize other political leaders. Those may have been expectations among a set of political elites but not necessarily something the general public cares very much about or would necessarily be supportive of if

22. This tour is commonly known as President Johnson's "swing around the circle." CHESTER G. HEARN, *THE IMPEACHMENT OF ANDREW JOHNSON* 97 (2000).

23. *See id.* at 102–04.

24. *See id.* at 107.

you push them on it. So I do not think we should necessarily think that the desirable feature of norms is that they all rest on mass majority support. Sometimes we might think norms are a very good idea, even if a majority of the people in fact prefer to operate rather differently. An outsider, populist politician might also be a norm breaker precisely because political norms are often created, enforced and maintained by insider political elites. The political outsider might well have popular support for burning those insider norms down, but we might find that the constitutional system is less functional, less robust, and less attractive once those norms are all torn away.

KEEPING THE COMPACT CLAUSE IRRELEVANT

RODERICK M. HILLS*

I want to say a few words, some sounding in law and some sounding in policy, about why I think the Compact Clause should continue to be, as it has always been, ignored by all relevant constitutional actors. That is not to say we should not acknowledge the Compact Clause is in the Constitution, but we should treat that Clause as a nonjusticiable part of the Constitution, much like the Guarantee Clause of Article IV is treated. I will go even further to argue that the Compact Clause should be understood to announce truisms that are unlikely to ever affect policymaking, because everyone agrees on them and rarely, if ever, violates them.¹

Let's start with non-justiciability. As you know, the Constitution guarantees to each state a republican form of government, and, as you also know, the United States is supposed to enforce that provision.² Yet, this duty has always been regarded as nonjusticiable.³ It

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1. See JOHN R. KOZA, ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE 239 (2013) ("[W]e have been unable to locate a single case where a court invalidated a compact for lack of consent on the grounds that it impermissibly encroached on federal supremacy.").

2. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

3. See *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74, 79–80 (1930) ("As to the guaranty of every State of a republican form of government (section 4, art. 4), it is well settled that the questions arising under it are political, not judicial, in character, and thus are for the consideration of Congress and not the courts.").

has never been directly enforced by anyone, not even Congress.⁴ And that is just as well. Everyone agrees that government should be “republican” in a very general sense of being accountable to the public. It probably serves no one’s interests to constitutionalize our disagreements about the best mechanisms for ensuring such accountability by having judges or politicians invoke the Guarantee Clause. These disagreements are best treated as matters of negotiable policy, not constitutional principle.

Exactly the same considerations should apply to the Compact Clause. I have some legalistic reasons why I think it is perfectly reasonable to construe the Compact Clause as being nonjusticiable and having very narrow scope, but my main reasons will sound in policy. The legalistic reasons will sound in the usual modalities of constitutional interpretation: text, original understanding, and precedent. The policy reasons will sound in terms of the costs and benefits of using constitutional doctrines to constrain subnational policymaking.

On the legalistic reasons, let us start with the text. The text refers to compacts or contracts. It is a reasonable reading of these words to argue that mere coordination among states does not amount to a compact or contract unless such coordination is accompanied by some sort of an enforcement mechanism such as adjudication under international or contract law before some tribunal like the Supreme Court sitting in original jurisdiction.

Without that enforcement mechanism, it is perfectly reasonable to say that states coordinating with each other simply amounts to coordination, not a compact. On this reading, any agreement among states would fall outside the Compact Clause just so long as the agreement did not provide for any binding mechanism for resolving disputes. This reading is actually a narrower view of the Compact Clause than that which has been taken by the U.S. Supreme Court, but my reading produces practically the same out-

4. See Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 878 (1994) (arguing that Guaranty Clause ought to be justiciable because of “the great improbability of congressional action”).

comes: both the Supreme Court's doctrine and my narrower reading ensure that the Clause will never be enforced, which is a good thing.⁵

You might well ask: "Why is that a good thing? Are we not defying the original understanding of the Constitution?" This question brings me to my second legalistic reason for not enforcing the Compact Clause: that Clause was intended to address problems that no longer exist.⁶ The Compact Clause was added as an afterthought to address the worries expressed in *The Federalist No. 5*, one of the few essays by John Jay, an underestimated writer of the Publius trio.⁷ Jay warns in *The Federalist No. 5* about the danger that the states will break into confederations that will ally themselves to a foreign power.⁸ Because we do not want the United States to become disunited by such alliances, Jay urges, we should ratify this Constitution that will reduce states' incentives to ally with foreign powers.⁹

This fear that different regions might ally with foreign powers was, indeed, a big worry in the 1780s and 1790s.¹⁰ The United States was militarily weak, access to the Mississippi was difficult, and failure of union, or a weak union under the Articles of Confederation, would naturally invite each state to fend for itself by making immediate alliances with a few of its neighbors.¹¹

5. See KOZA, *supra* note 1, at 239.

6. See James F. Blumstein & Thomas J. Cheeseman, *State Empowerment and the Compact Clause*, 27 WM. & MARY BILL RTS. J. 775, 784–85 (2019).

7. Cf. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 694 (1925).

8. See THE FEDERALIST NO. 5, at 47 (John Jay) (Clinton Rossiter ed., 2003) ("[E]ach of [the states] should be more desirous to guard against the others, by aid of foreign alliances, than to guard against foreign dangers by alliances between themselves.").

9. *Id.*

10. See, e.g., MURRAY N. ROTHBARD, *THE NEW REPUBLIC, 1784–1791*, at 101, 104 (2019) (explaining the concern that those in the West would ally with Spain to secure navigation of the Mississippi River); Matthew Spalding, *America's Founders and the Principles of Foreign Policy: Sovereign Independence, National Interests, and the Cause of Liberty in the World*, THE HERITAGE FOUND. (Oct. 15, 2010), <https://www.heritage.org/political-process/report/americas-founders-and-the-principles-foreign-policy-sovereign-independence> [https://perma.cc/X8XJ-DMP9].

11. See ROTHBARD, *supra* note 10, at 98; see also THE FEDERALIST NO. 5, *supra* note 8.

The primary practical worry focused on the danger that Westerners would make an alliance with Spain to get access to the Mississippi River.¹² John Jay had negotiated the Jay-Gardoqui Treaty in 1786 to ensure American rights to trade with the Spanish, but that treaty did not give Americans the right to navigate the Mississippi, so it was rejected by the Continental Congress.¹³ The Westerners worried that Eastern politicians like Jay would ignore their interests in shipping goods to New Orleans on the Mississippi, a worry that encouraged Westerners to seek out help from foreign powers to protect their interests.¹⁴ The eighteenth century saw miscellaneous conspiracies between Westerners (or people purporting to represent their interests) to form alliances with European powers to secure land or navigation rights especially valued in the West.¹⁵ William Blount, for instance, was expelled from the U.S. Senate in 1797 for one such very odd and improbable plot to ally with Great Britain in order to invade Florida with the aid of Tennesseans backed by Cherokee and Creek Indians.¹⁶

The original purpose of the Compact Clause, in short, was to prevent states from entering into military alliances with foreign powers.¹⁷ This purpose is suggested by its placement among other forbidden powers in Article I, section 10 of the Constitution, all of which focus on war and diplomacy, such as powers to make war, maintain naval ships, and enter into treaties with foreign powers.¹⁸

12. See ROTHBARD, *supra* note 10, at 101, 104.

13. *Id.* at 99.

14. *Id.* at 100–02.

15. See, e.g., Michael Allen, *The Mississippi River Debate, 1785-1787*, 36 TENN. HIST. Q. 447, 452 (1977) (“But the Spanish were fortunate enough to have retained some American allies on the Southwestern question.”); Eli Merritt, *Sectional Conflict and Secret Compromise: The Mississippi River Question and the United States Constitution*, 35 AM. J. LEGAL HIST. 117, 119 (1991) (addressing a conspiracy led by General James Wilkinson to secede the Mississippi Valley from the United States under the protection of Spain).

16. *Blount Expulsion*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/expulsion_cases/Blount_expulsion.htm [<https://perma.cc/UA87-X44R>].

17. See Blumstein & Cheeseman, *supra* note 6, at 785.

18. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in war, unless actually invaded, or in such imminent Danger as will not admit of delay.”).

The Compact Clause, read in light of this surrounding text, is about states acting as sovereign nations by making alliances with each other and other nations.

That original worry mostly evaporates with the ratification of the Constitution in 1788. It lingers on in various improbable schemes following ratification, ranging from William Blount's scheme to conquer Florida with Great Britain's assistance to the 1814 Hartford Convention of Federalist New Englanders who sought to make a separate peace with Great Britain to end the trade-killing War of 1812.¹⁹ After Andrew Jackson won the Battle of New Orleans, the Federalists of New England were deeply embarrassed by their efforts at diplomacy.²⁰ Since then, no one has worried about a bunch of states forming a confederation or an alliance with a foreign power.

A plausibly narrow reading of constitutional text, in short, is supported by a narrow historical purpose: the Compact Clause was added to deal with a problem that quickly became obsolete. The Clause itself, therefore, can be ignored without violating the spirit or letter of the Constitution. There is no reason why one should invent new problems for such text to address just to ensure that the Clause has some work to do. Unemployed constitutional text is not like an unemployed worker who needs a job to safeguard its dignity. In particular, I do not see a word or a breath in the eighteenth century, described by Professor Michael Greve, that sub-groups of states must be stopped from forming cartels that will inefficiently restrict the supply of goods and services or beat up on other states.²¹ That just was not a worry that I see anywhere in the documentary history of the ratification of the Constitution. To the extent that any worries were expressed that are relevant to the Compact Clause, they were about alliances with foreign powers that today would be

19. See Mark Janis, *The Hartford Convention and the Specter of Secession*, UNIV. OF CONN. (Dec. 15, 2014), <https://today.uconn.edu/2014/12/the-hartford-convention-and-the-specter-of-secession> [<https://perma.cc/T9ZP-J6EV>].

20. *Id.*

21. Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 325–26 (2003).

treasonous.²² I do not see any eighteenth century reason why we should take this Clause seriously today, when the dangers of such treason are now nil.

Beyond these considerations of text and original purpose, judicial precedent also suggests a narrow reading of the Compact Clause. The Clause has never been taken seriously by the U.S. Supreme Court because taking it literally invites absurdity and taking it less than literally invites judicial legislation. As Justice Field said in *Virginia v. Tennessee*,²³ “it would be the height of absurdity” to say that every conceivable contract between state governments constitutes a compact or contract within the meaning of Article I, section 10.²⁴ Justice Field cited interstate agreements to control “pestilence” as examples of the sort of agreement that should not need congressional ratification.²⁵

But there were other sorts of bargains for which congressional ratification seems unnecessary. In the early twentieth century, states were litigating against each other’s citizens to control interstate pollution, invoking the original jurisdiction of the Supreme Court.²⁶ For instance, Georgia sued a Tennessee copper refining company to control pollution from acid rain caused by copper smelting.²⁷ In *Georgia v. Tennessee Copper Company*, Justice Holmes held that the U.S. Supreme Court could grant Georgia an injunction against this kind of pollution.²⁸ Much later, the Supreme Court held

22. Blumstein & Cheeseman, *supra* note 6, at 784–85.

23. 148 U.S. 503 (1893).

24. *Id.* at 518.

25. *Id.* (“[I]t would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence, without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms ‘compact’ or ‘agreement’ in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?”)

26. *See, e.g., Missouri v. Illinois*, 180 U.S. 208, 218 (1901) (pertaining to the seeking of an injunction to restrain the defendants from discharging sewage into an artificial channel).

27. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1906).

28. *Id.* at 239.

that the federal courts could use their power to decide cases arising under federal law to fashion a common law of public nuisance for resolving disputes between a state (Illinois) and a subdivision of a state (Milwaukee).²⁹

This sort of litigation over interstate nuisances could easily involve two states. Presumably, the parties to such litigation, whether public or private, ought to have the power to enter into settlements of their lawsuits. But would one argue that each such consent decree must be ratified by Congress? If not, then how does a court distinguish those that require congressional consent and those that do not? Quite apart from torts, states are constantly making contracts, often with each other. The University of Michigan might make a deal with the University of Ohio to arrange a football game. Are we really going to say that such an agreement has to go to Congress? Of course not. That would be, as Justice Fields said, “the height of absurdity.” But as soon as one realizes that states are simply corporations that must make dozens of deals, many of which will be with cities and states, drawing a line between the bad compacts and the good compacts leads one down a path of chaos.

The Supreme Court has never taken seriously the task of separating the contracts that fall within and outside Article I, section 10. The Court in *United States Steel Corp. v. Multistate Tax Commission*³⁰ held that these compacts never violate the Compact Clause unless they interfere in some special, unspecified, mystical way with the United States’ “just supremacy.”³¹ Nobody quite knows what that phrase means, and I would just as soon not find out.³²

In sum, the Court has never, ever enforced the Compact Clause. So as a matter of precedent, in addition to original understanding and text, it makes sense for the Compact Clause to stay interred.

29. *Illinois v. City of Milwaukee*, 406 U.S. 91, 91–92 (1972).

30. 434 U.S. 452 (1978).

31. *Id.* at 468 (quoting *Virginia*, 148 U.S. at 519); see also Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV 741, 764 (2010) (stating that in each case the federal supremacy test has applied, the Supreme Court did not find encroachment to require congressional review or Congress had already approved the agreement).

32. See Hollis, *supra* note 31, at 765 (“Exactly when the Court will find an interstate agreement requires congressional consent thus remains an open question.”).

What about policy? Consider three policy reasons for not reviving the Compact Clause from its dignified coma, two concerning alternative mechanisms for dealing with undesirable interstate compacts and one relating to the cost of getting rid of them.

Professor Greve is right that, in theory, an interstate compact could lead a group of states to impose costs on other states.³³ But do we need the Compact Clause to protect us from these costs? I am skeptical for two reasons.

First, the Executive Branch, through its agencies, has more than enough resources to act quickly and expeditiously to get rid of state compacts that it believes interfere with any federal policy embodied in a statute.³⁴ There are a lot of federal statutes out there, ranging from the Clean Air Act and the Clean Water Act to the federal regulation of motor carriers. If the President believes that some group of states are somehow undermining an actual federal policy contained in one of these statutes, then he or she can instruct the Department of Justice to bring a lawsuit enforcing the supremacy of federal law.

Second, if the President does not act, the Supreme Court can act under a bevy of doctrines that enforce unwritten, made-up judicial principles of nationalism, like the dormant commerce clause or *Zschernig's* and *Garamendi's* Foreign Policy Dormant Clause.³⁵ And the Court has on occasion invoked these doctrines to prevent, for instance, California from creating its own Holocaust compensation system that seemed inconsistent with the compensation system that

33. Greve, *supra* note 21, at 294.

34. See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 688 (2014) (arguing that the Take Care Clause of the Constitution requires the President to enforce enacted federal law but that the executive retains "some independent executive authority to assess whether and to what degree any given law applies in any given factual circumstance").

35. See, e.g., Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1630–31 (1997) (These decisions "draw their 'inspiration and authority' from constitutional structure, they have a content that is based on independent discretionary policy judgments by courts, and they can be overturned by legislation rather than by constitutional amendment."); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975) (emphasizing the role of constitutional common law in the development of courts' understanding of various constitutional doctrines).

had been negotiated by President Clinton with Germany in the 1990s.³⁶

So, given that both the Court and the President can act quickly to protect national supremacy, I really do not see why we need this extra Compact Clause backstop to say states need to queue up before Congress to get compacts approved.

I especially do not think that the removal of the Compact Clause presents a notable danger in the context of our current political climate. Aside from the safeguard of the presidency and aside from the safeguard of the Court, the costs of subnational inaction could be higher than the costs of too much action in an age of polarization. Put another way, false negatives (state compacts that ought to be invalidated but are not) might be less dangerous than false positives (state compacts that are struck down but ought to be upheld).

Right now, we are living through a time in which the federal government is essentially mired in gridlock. I cast no aspersions on any party or region of the nation, red or blue, in recognizing the existence of this national paralysis. Whatever the reasons, the simple fact that the Congress cannot easily act to address pressing national problems, ranging from COVID-19 to police brutality, means that, if any governmental response is to be had, it must come from the states. But there is no reason why we should prefer uncoordinated state responses to coordinated ones. True, as Professor Greve notes, the latter can be protectionist, but so too can the former.³⁷ The notion that gridlock is so desirable that we should inflict the paralysis of the central government on the state governments seems improbable. A strict Compact Clause doctrine, however, threatens to export the gridlock of the national government into the states' regulatory processes. Any time that you queue up a compact before Congress, you can expect that for reasons utterly unrelated to the merits at issue, nothing will happen.³⁸ And nothing is no longer acceptable in a world in which we need policy making to emerge from

36. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 412–15 (2003).

37. Greve, *supra* note 21, at 317.

38. See Matthew Pincus, *When Should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J.L. & SOC. PROBS. 511, 533–34 (2009) (“These built-in impediments put

some level of government.

So, it seems to me that we should simply switch the default rule. If Congress and the President, the President alone, or the Court alone thinks that what the states are doing is undermining foreign policy or some important national policy, then let them intervene to make a case for implied preemption under either statutory or constitutional policy.

But coordination among the states that is not enforceable through any form of binding litigation should never be an additional reason to strike down what the states have done merely because the device through which such coordination is achieved might count as a compact under Article I, section 10.

a 'thumb on the scale' against congressional action: doing nothing is always easier than passing a piece of legislation.").

RETHINKING THE SENATE

LYNN A. BAKER*

To give you a sense of where I'm headed, the very first article I published about the Senate back in 1997 was titled, "*The Senate: An Institution Whose Time Has Gone?*"¹

I do not know if I would term the Senate evil, but I would certainly term it deeply problematic today. I do think it is very important to have some protection for minority viewpoints. Much of my scholarship has sought to underscore the benefits of some measure of state sovereignty within our federal system.² I teach state and

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1. Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997).

2. See, e.g., Lynn A. Baker, *The Spending Power After NFIB v. Sebelius*, 37 HARV. J.L. & PUB. POL'Y 71 (2014); Lynn A. Baker & Sanford Levinson, *Twenty-Year Legacy of South Dakota v. Dole: Dole Dialogue*, 52 S.D. L. REV. 468 (2007); Lynn A. Baker, *Federalism and Redistribution: Lessons from the American Experience*, in 8 PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE U.K. 173 (Jörg Fedtke & Basil S. Markesinis eds., 2006); Lynn A. Baker, *Federalism and the Spending Power from Dole to Birmingham Board of Education*, in THE REHNQUIST LEGACY 205 (Craig Bradley ed., 2006); Lynn A. Baker, *The Future of Federalism?: Pierce County v. Guillen as a Case Study*, 50 N.Y.L.S. L. REV. 699 (2005–2006); Lynn A. Baker, *Lochner's Legacy for Modern Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U. L. REV. 727 (2005); Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003); Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433 (2002); Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2001); Lynn

local government law. I am a big fan of state government. Yet, somehow, I end up in a different place with regard to the Senate than many other scholars.³

We are all aware that from the very beginning of our constitutional democracy the Senate has held an exalted place. For example, Article I's apportionment of representation in the Senate is the only provision among our current Constitution's dictates that cannot be amended pursuant to the ordinary procedures of Article V.⁴ This provision was critical to getting the country off the ground, ensuring that the smaller states would feel protected and represented in the federal government.⁵

But there are two particular harms today that derive from the fact that the existing allocation of representation in the Senate provides small population states what we all understand to be disproportionate power relative to their populations.⁶ The first is that the Senate systematically and unjustifiably redistributes wealth from large population states to small population states.⁷

Secondly, the Senate, systematically and to my mind unjustifiably, affords large population states disproportionately little power, relative to their shares of the nation's population, to block

A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001); Lynn A. Baker & Samuel H. Dinkin, *Getting from Here to There: The Rebirth of Constitutional Constraints on the Special Interest State*, 40 WM. & MARY L. REV. 515 (1999); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

3. See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 2 (1980) (arguing that "state interests are forcefully represented in the national political process"); Stephen Macedo, *Towards A More Democratic Congress? Our Imperfect Constitution: The Critics Examined*, 89 B.U. L. REV. 609, 611 (2009) ("Senate malapportionment is a tolerable imperfection rather than an egregious affront to the political and moral equality of citizens."); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 548 (1954) (identifying the Senate as the "guardian of state interests").

4. Baker & Dinkin, *supra* note 1, at 21–22 (citing U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.")).

5. See *id.* at 85–86.

6. *Id.* at 24.

7. *Id.* at 30–42.

federal homogenizing legislation.⁸ This is a blocking power that I might favor to protect minority viewpoints that minority states might have. The Senate will help provide the blocking power, but the problem is the allocation of that power: the large population states will be at a disadvantage relative to the small population states in protecting their own minority viewpoints in this way.⁹

Let me go into some detail now about each of these aspects of the Senate. The redistribution of wealth from large population states to small ones is not entirely the fault of the Senate's structure of representation.¹⁰ That's what our panel's topic is, so I will focus on that. But I have elsewhere discussed, and have published significantly on this topic as well, that some of the problem is also what the U.S. Supreme Court has done since the Founding, by taking provisions of the Constitution such as the spending power and rendering essentially meaningless or nonjusticiable notions like "general welfare" that could provide constraints on congressional power.¹¹ We might similarly think of some of the other Article I limitations that, if enforced by the courts, might have helped to further reinforce state sovereignty.¹² But we are where we are, and the Supreme Court has played the role that it has, and we are here to discuss the Senate.

8. *Id.* at 53–55.

9. *Id.* at 54.

10. See *infra* notes 11–12 and accompanying text; cf. Matthew C. Klein, *Who Wins and Loses From America's Transfer Union?*, FT ALPHAVILLE (Dec. 16, 2016), <https://ftal-phaville.ft.com/2016/12/16/2181274/who-wins-and-loses-from-americas-transfer-union> [<https://perma.cc/G8CT-THQY>] (discussing some demographic and economic causes of interstate wealth transfers).

11. See, e.g., Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495, 518–19 (2009) [hereinafter *Constitutional Ambiguities*] (arguing that the Court's refusal to enforce the General Welfare Clause enables small states to use their disproportionate power to their advantage); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 196 (2001) ("[T]he states will be at the mercy of Congress so long as there are no meaningful limits on its spending power.").

12. See generally Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951 (2001) (comparing intrinsic and extrinsic limits on federal congressional power).

The disproportionate power that the Senate gives small population states is not going to affect the total dollar amount of what I will call federal pork barrel spending, but it is absolutely going to affect the distribution of that spending.

Consider that if the Senate alone could enact legislation, we would expect the total dollar amount that each state would receive over time to be roughly equal. And this would mean, for example, that if one billion dollars of special legislation or other benefits from the federal government were provided to the states, that each resident of California would receive \$34 while each resident of Wyoming would receive in excess of \$2,200.¹³ That is sixty-five times as much benefit. By contrast, of course, if the House alone were engaged in this, we would expect to see substantially equal per capita benefits over time.¹⁴

Now, of course, our current system includes both the House and the Senate. Neither body alone is able to adopt legislation of this or any other sort, and it is important to appreciate the balancing effect of having these two different houses apportioned in very different ways. Sometimes in elementary school civics, one is taught that this is a very nice balance, that the large population states and the small population states are somehow made equal through this fact of the two chambers, that they precisely balance each other.

And in fact, in that 1997 publication I mentioned at the outset of my remarks, a coauthor and I deployed a formal game theoretic model.¹⁵ We calculated the Shapley-Shubik indices of the various states, given the population of each at the time.¹⁶ And here is the math of how the balancing actually works out. Let us look at California and Rhode Island. Consider that the population ratio is 32:1 between California and Rhode Island.¹⁷ The power in the House in terms of representation is 33.5:1, very similar to what we would, in

13. Baker & Dinkin, *supra* note 1, at 37.

14. *Id.*

15. *Id.* at 24–29; see also *Constitutional Ambiguities*, *supra* note 11, at 528–29.

16. Baker & Dinkin, *supra* note 1, at 26–27, 96 app. 1; see also *Constitutional Ambiguities*, *supra* note 11, at 528–29.

17. *Constitutional Ambiguities*, *supra* note 11, at 528–29.

fact, expect. Power in the Senate, we understand, has a ratio of 1:1.¹⁸ And then power in Congress turns out to be 5.5:1.¹⁹ Thus, when we combine, theoretically, the power in the House and the Senate, we do not get an even midpoint between those two bodies. What we get is 5.5, which looks a whole lot closer to 1 than it does to 32.²⁰

In that initial research we also looked to see what one might find empirically. We looked systematically with the help of statistics compiled by both the federal government and the Harvard Kennedy School, and we looked at something called the balance of payments that individual states have with the federal government. And it turns out that the ten largest states are minus \$560 per person, which means that people who live in large population states are coming out minus \$560 or so with the federal government.²¹ Meanwhile, the ten smallest states at the time were coming up plus \$543.²² We looked at this empirical data to be certain that our theory was not just a theory, but was actually matched in reality.

Now, as is always the case with empirical data, one can quibble around the edges. In any event, the first concern is that the Senate plays a role but it is a redistributive role. And we might think that perhaps poverty explains this. There are forms of redistribution among the states that we might favor as a matter of social policy. For example, maybe this is largely about federal poverty relief programs and maybe that can explain the redistribution. In fact, however, the ten largest states at the time had higher poverty rates on average than the ten smallest states.²³ So the direction of redistribution is in precisely the wrong direction if poverty relief were an explanation.

Now, I will turn to my second point, which has to do with federal homogenizing legislation. We all share a concern that, beyond what is unconstitutional, diversity among the states—having states and

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 535; see also Baker & Dinkin, *supra* note 1, at 39–41.

22. *Constitutional Ambiguities*, *supra* note 11, at 535.

23. See Baker & Dinkin, *supra* note 1, at 41–42.

localities fulfill the preferences of their constituents in areas of reasonable disagreement—would be preferable.²⁴

As an example here, consider that sixteen states did not have the death penalty available at the end of 2017; thirty-four states did.²⁵ So in the absence of a federal government, the thirty-four states that did have the death penalty would have only two ways to compete for residents with regard to what Professor Charles M. Tiebout told us is the migration of people from state to state.²⁶ Those states would be free to offer their own package of laws, which would include the death penalty in the pro-death penalty states, along with their taxes and whatever other services they were interested in providing their citizens. Or those states could make some adjustments to their own package of laws and adopt a statutory or constitutional prohibition against the death penalty.

But now we bring Congress into the picture, and Congress is able to give the thirty-four states that favor the death penalty an additional option when competing for residents, which I will term the “anticompetitive option.” Congress has the option to intervene and tip the scales further against the minority viewpoint. This might take the form of conditional spending legislation.²⁷ It might simply take the form of a federal law prohibiting states from having the death penalty. I am going to term this “federal homogenizing legislation,” which will reduce the diversity among the states and would therefore arguably be disfavored insofar as it reduces aggregate welfare across the nation.²⁸

Now, a potential reply is, “But isn’t one of the roles of the Senate that it, in fact, makes it more difficult for Congress to pass laws? So,

24. *Id.* at 47–49; see also Baker, *Conditional Federal Spending After Lopez*, *supra* note 2, at 1950–51; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 424 (1956).

25. TRACY L. SNELL, U.S. DEP’T JUST., NCJ 253060, CAPITAL PUNISHMENT, 2017: SELECTED FINDINGS (2019), <https://www.bjs.gov/content/pub/pdf/cp17sf.pdf> [<https://perma.cc/VP4E-EEEXK>].

26. Tiebout, *supra* note 24, at 418.

27. Baker, *Conditional Federal Spending After Lopez*, *supra* note 2, at 1949.

28. Baker & Dinkin, *supra* note 1, at 50–55.

to the extent you're concerned about federal homogenizing legislation, isn't the Senate actually to be favored?" And my response here goes to the allocation of the power to block federal homogenizing legislation: Certain homogenizing legislation will be able to be blocked more readily than others.²⁹ In particular, the large population states will have disproportionately little ability to block federal homogenizing legislation that they disfavor.³⁰ Meanwhile, the small population states will have relatively more ability in that particular regard.³¹

Consider that the representatives of the nine largest states represent fully fifty percent of the nation's population.³² Those nine states, if they did band together, would not be able to block federal homogenizing legislation that they found unattractive. Meanwhile, Senators from the twenty-six smallest states, which represent only eighteen percent of the nation's population, would have a vastly easier time blocking such legislation.³³

So what can we do about this? As a purely theoretical improvement, I personally might want the states to be represented proportionally in the Senate. I would be fine having a federal legislature with two chambers, each of which is proportionally represented. The two chambers would not have to be the same size. I would also want, though, for one of those bodies, let us call it the Senate, to also have a supermajority rule. We like supermajority rules in certain parts of the Constitution. We have already mentioned impeachment and overriding presidential vetoes. All of those are two-thirds rules.³⁴ So I would offer a combination of those as a possible improvement on the current regime.

Now, of course, the fact is we will never see my personal utopia. Article V, as has already been mentioned, requires the consent of a

29. *Id.* at 53–54.

30. *Id.* at 54–55.

31. *Id.* at 53–54.

32. *Id.* at 54.

33. *Id.* at 53.

34. U.S. CONST. art I, § 3, cl. 6; U.S. CONST. art I, § 7, cl. 2.

small population state in order to have its allocation of representation altered.³⁵ It is fair to assume that no small population state is going to be excited or interested to agree to any reduction in its power within the Senate.

Thus my last suggestion is that, in the interim, the U.S. Supreme Court help with some of this problem by returning to a reading of, for example, the federal spending power that would provide more meaningful constraint through the “general welfare” language in the constitutional text.³⁶ I am in favor of the Tenth Amendment doing more work for us than it has come to do. I am in favor of some of the Article I enumerated powers, such as the commerce power, being read by the courts in a way that is stricter rather than more permissive. So, recommending a shift in how the courts play their role is the partial remedy I can offer in the meantime.

35. See Baker & Dinkin, *supra* note 1, at 68–72; Baker & Dinkin, *supra* note 2, at 519.

36. Baker, *Constitutional Ambiguities*, *supra* note 11, at 540–41.

THE PROPER ROLE OF THE SENATE

JOHN YOO*

The Framers were wise to design a second house. The original version of the Constitution proposed a Senate that was elected by the House so that it still retained an indirectly majoritarian character.¹ But, of course, the Great Compromise between the large and the small states brought today's Senate into being as the price of having the Constitution.²

It is important to remember that the Founders were suspicious of democracy.³ James Madison was against having a Senate elected by state legislatures.⁴ In fact, he wanted to have a Council of Revision that would have brought together aspects of the national government to continuously exercise not just judicial review, but policy review over all the acts of the state legislatures.⁵

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1. The Virginia Plan, presented to the Constitutional Convention on May 29 by Edmund Randolph, stated, "[Resolved,] that the members of the second branch of the National Legislature ought to be elected by those of the first." THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20 (Max Farrand ed., 1911) [hereinafter THE RECORDS].

2. *See id.* at 14.

3. For example, Edmund Randolph observed that the object of the new constitution was to "provide a cure for the evils under which the U.S. laboured," and "that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy." *Id.* at 51.

4. *See id.* at 154 (James Madison, arguing against the election of senators by state legislatures).

5. *See id.* at 138–39.

Indeed, Madison and the other leaders of the Constitutional Convention and the ratification debates had come together because they thought that democracy had gone too far in the states.⁶ You might recall James Madison wrote a memo right before the Constitutional Convention called “The Vices of the Political Systems of the United States.”⁷ He did not call it a memo, but James Madison would have been an inveterate memo writer today. We would have been sick of getting all of his emails.

In that memo, he wrote an analysis of what had gone wrong during the Critical Period between the Revolution and the Constitution.⁸ That diagnosis was excessive democracy.⁹ The democracies that existed under the state constitutions looked very much like governments with no upper house, other than an upper house controlled by the lower house;¹⁰ governments with a weakened Executive, again, controlled by the lower house;¹¹ and governments that looked much more like parliamentary democracies as we see them in Western Europe.¹² It is no accident, then, that not just the Senate but many aspects of the Constitution have this anti-democratic feature, or at least have the goal of trying to channel and limit democracy.¹³

6. See, e.g., James Madison, *Vices of the Political Systems of the United States*, in 2 THE WRITINGS OF JAMES MADISON 361, 365–70 (Gaillard Hunt ed., 1901); THE RECORDS, *supra* note 1, at 27 (Edmund Randolph, arguing, “None of the constitutions have provided sufficient checks against [] democracy.”); *id.* at 48 (Elbridge Gerry, suggesting “[t]he evils we experience flow from the excess of democracy.”).

7. Madison, *supra* note 6, at 365–70.

8. See generally Madison, *supra* note 6.

9. See THE RECORDS, *supra* note 1, at 48.

10. See William Clarence Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS AM. ACAD. POL. & SOC. SCI. 64, 74 (1897); VT. CONST. of 1777, ch. II, §§ 2, 7–8; GA. CONST. of 1776, art. II; PA. CONST. of 1776, § 2.

11. See Webster, *supra* note 10, at 82.

12. See, e.g., *Parliament's Authority*, U.K. PARLIAMENT, <https://www.parliament.uk/about/how/sovereignty/> [<https://perma.cc/Q477-365Z>].

13. See ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 15–20 (2d ed. 2003) (listing various undemocratic provisions in the Constitution).

So if Democrats have objections to the Senate, they also ought to have objections to having House seats allocated by states.¹⁴ They ought to have objections to the judiciary and judicial review and the Electoral College, and so on.¹⁵ In fact, they should disagree with the idea of having power divided between a federal and state government at all and wonder why we don't have a system more like France or Japan where all power just flows from a singular national government.¹⁶ And then what we really have is just decentralized administrative units rather than semi-sovereign states.

One of the questions is, "Is it really worth undoing all that?" It is hard to say what the consequences would have been if we had not had a Senate or if we had not had a Senate where every state had two seats. The best you can do, I think, is compare and look at what happened to other countries that have adopted much more democratic or majoritarian systems or ones without a non-democratic branch of the legislature. And the best ones you can look at might be Western Europe or Japan. You could look at countries like the United Kingdom, France, Germany, Italy—countries which are much more democratic in their design than ours¹⁷—and ask, in the last one hundred years or so, have their outcomes consistently been better?

Regardless of whether it is the states that are there or some other non-democratic means of selection, the Senate has the effect of

14. See Saikrishna Prakash, *More Democracy, Less Constitution*, 55 *DRAKE L. REV.* 899, 907 ("Because House seats are apportioned by state, the people of some states have a much larger say in the election of representatives.").

15. See DAHL, *supra* note 13, at 15–20.

16. See Jun Iio, *Policy analysis and the policy process in Japanese government*, in *POLICY ANALYSIS IN JAPAN* 91, 91 (2015) ("Japan is a unitary state, not federal."); Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 *B.U. INT'L L.J.* 57, 59 (1994) ("France is composed of a single national government.").

17. For various democratic constitutional provisions not found in the United States Constitution, see, for example, Art. 75 *COSTITUZIONE [COST.] (It.)* (allowing for national referenda to repeal laws when requested by a sufficient number of citizens), and 1958 *CONST.* 3, 11 (Fr.) (permitting national referenda). See also DAHL, *supra* note 13, at 188 (noting that Italy, Germany, and France all have alternatives to the first-past-the-post method of electing representatives found in the United States).

slowing down the ability of the United States to adopt public policies.¹⁸ Some might say that adds to greater deliberation.¹⁹ Other people might say it also allows entrenched interests of the status quo to stay in effect—that there is a bias against change.²⁰

But is rapid change so good when you look at what happened over the last one hundred years in Western Europe? The Senate may prevent, for example, quick action for public policy problems, but it also might prevent the adoption of wild schemes and bad ideas. You might say that is what happened in England in the last fifty or sixty years with their swings between nationalization, privatization, and free markets, back and forth, back and forth.²¹ Does that lead to better public policy? Our Constitution is a risk-averse decision-making system of which the Senate is a crucial part.²²

That brings me to my second point: the Senate performs a number of functions that are not about representing the states. I would not say, based on voting patterns, that the modern Senate really represents the institutional interests of the states. It represents what the

18. See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 899, 915 (2011) (“[T]he Senate’s design ensures that it is slower to respond to changes in the political winds than the House.”).

19. See, e.g., Frances E. Lee, *Senate Deliberation and the Future of Congressional Power*, 43 PS: POL. SCI. & POL. 227, 228 (2010) (noting that “the dominant norm now is the belief that the Senate’s supermajority requirements are what make the body uniquely valuable”); *Institution: Party Division*, UNITED STATES SENATE, <https://www.senate.gov/history/origins.htm> [<https://perma.cc/5VMZ-6PRC>] (“Known as the ‘the world’s greatest deliberative body,’ the Senate has been a forum for free debate and the protection of political minorities.”).

20. See, e.g., Lee, *supra* note 19, at 227 (suggesting that “[t]he need for broad consensus as a prerequisite for Senate action is the most serious institutional obstacle to national policymaking”); Matthew Yglesias, *American democracy’s Senate problem, explained*, VOX (Dec. 17, 2019), <https://www.vox.com/policy-and-politics/2019/12/17/21011079/senate-bias-2020-data-for-progress> [<https://perma.cc/AE9W-822U>].

21. See Cento G. Veljanovski, *Privatization in Britain—The Institutional and Constitutional Issues*, 71 MARQ. L. REV. 558, 560–66 (1988) (providing a detailed history of British nationalization and privatization from the 1940s to the 1990s); Tim Harford, *The pendulum swings against privitisation*, FIN. TIMES (Sept. 29, 2017), <https://www.ft.com/content/cb769098-a443-11e7-b797-b61809486fe2> [<https://perma.cc/YDT3-X3DT>].

22. See JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 33–80 (2013) (discussing the desirability of supermajoritarian rules as a form of risk reduction and such rules’ expression in the United States Constitution).

constituents in those states happen to want now, and, as a result, magnifies the current political interests of people who live in different geographic locations rather than the institutional interests of the states.²³

As far as I can tell, you do not see voting patterns where small states gang up on the bigger states and vote as a group. I think you probably see that the states just vote according to the partisan control of their state governments, and that you are starting to see groupings now where the states on the coasts seem to vote together and the states in the middle of the country tend to vote together.

But the Senate also plays an important role in other areas, and this is where the Senate's original design before the Great Compromise is still part of the Constitution—the Senate as a council of state.²⁴ The Senate is the second house of the legislature, and it also has the advice and consent function for judges,²⁵ for cabinet officers,²⁶ and for the ratification of treaties.²⁷ Additionally, the Senate has, as we just saw for the third time in history, the ability to conduct impeachment trials,²⁸ and it has a veto over constitutional amendments.²⁹ These are important functions that I think we should not forget.

When Thomas Jefferson returned from his post as ambassador to France, he had missed the drafting and ratification of the Constitution.³⁰ The story goes that Jefferson asked George Washington,

23. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776–1995*, at 214 (1997) (noting that the Seventeenth Amendment “rendered the Senate more directly responsive to the public”).

24. See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1369 (1997) (“The Framers intended the Senate to constitute a sort of privy council that would safeguard the interests of the nation as a whole.”).

25. U.S. CONST. art. II, § 2, cl. 2.

26. *Id.*

27. *Id.*

28. U.S. CONST. art. I, § 3, cl. 6.; see also Peter Baker, *Impeachment Trial Updates: Senate Acquits Trump, Ending Historic Trial*, N.Y. TIMES (Feb. 6, 2020, 1:59 AM), <https://www.nytimes.com/2020/02/05/us/politics/impeachment-vote.html> [<https://nyti.ms/2SrhZAS>].

29. U.S. CONST. art. I, § 7, cl. 1.

30. Lawrence S. Kaplan, *Jefferson and the Constitution: The View from Paris, 1786–89*, 11 DIPLOMATIC HIST. 321, 321 (1987).

“What’s the point of the Senate?”³¹ Jefferson was drinking a cup of coffee at the time, and poured a little bit of coffee into the saucer, prompting Washington to ask why.³² “To cool it; my throat is not made of brass,” Jefferson replied. Responding to his question, Washington said, “Even so, we pour our legislation into the senatorial saucer to cool it.”³³

The Senate plays that role in many areas throughout our government. So it is not a mistake that the Senate is involved in every major decision that our government makes, in contrast with the House, which does not participate in the executive functions of the federal government.³⁴ It is there to slow down and cool things, hopefully leading to more deliberation and compromise.³⁵

Then the interesting question is, if we were to sit down and think about it now, should we make it two seats for every state? Should we think about other ways of making the Senate more proportional, other than by population?

I would not favor going this route, but there are other countries, such as Italy, that have upper houses where a distinguished citizen can be made a senator for life.³⁶ Italy is not the government to mimic right now for many reasons, but if you are going to open it up for discussion, you could say, well, does it have to be states? Could you

31. See MONCURE DANIEL CONWAY, *REPUBLICAN SUPERSTITIONS AS ILLUSTRATED IN THE POLITICAL HISTORY OF AMERICA* 47–48 (1872) (recounting this apocryphal conversation).

32. *Id.*

33. *Id.*

34. See U.S. CONST. art. II, § 2, cl. 2 (listing executive functions in which the Senate but not the House participates); THE FEDERALIST NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 2003); THE FEDERALIST NO. 65, at 394 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

35. See THE FEDERALIST NO. 62, *supra* note 34, at 377 (“The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.”); THE FEDERALIST NO. 63, at 382 (James Madison) (Clinton Rossiter ed., 2003) (“I shall not scruple to add that such an institution may be sometimes necessary as a defense to the people against their own temporary errors and delusions.”).

36. Art. 59 COSTITUZIONE [COST.] (It.); see also THE FEDERALIST NO. 63, *supra* note 35, at 383 (noting that Sparta, Rome, and Carthage had senators for life).

have different interests represented in the same house, similar to what constitutions in new countries have?³⁷ I tend to think these would not be great ideas, but it is an interesting question to pursue in addition to whether each state should have two votes.

Indeed, I would tend to agree that the original Constitution is rather spartan and permits a fairly large number of arrangements and outcomes. Using the administrative state, the New Deal revolution of 1937 imposed homogenized nationwide legislation and regulatory schemes.³⁸ I think the governing structure of the 1930s is growing more obsolete in terms of the new kind of world and economy that we have. We have a national system that evolved radically to regulate an economy characterized by large employers, like U.S. Steel, and large unions and workforces are still organized along mass production lines.³⁹ I think our economy is changing very quickly because of the information revolution.⁴⁰

It is not apparent to me that the revolution of 1937 should continue. We should rethink whether we should return back to original principles, or whether there are other systems that might better govern society and an increasingly decentralized economy.

The interesting thing is that the Senate is going to be a roadblock to all of that because, even though the Senate was supposed to represent the states, it really just does increase deliberation and slow

37. *E.g.*, 1994 CONST. (Belg.) art 67; 1958 CONST. art. 24 (Fr.); *see also* Régis Dandoy et al., *The New Belgian Senate. A (Dis)Continued Evolution of Federalism in Belgium?*, 51 REPRESENTATION 327, 327 (2015).

38. *See* John C. Yoo, *Franklin Roosevelt and Presidential Power*, 21 CHAP. L. REV. 205, 206, 222 (2018).

39. *See id.* at 206 (suggesting that the New Deal “radically shifted the balance of power among the three branches”); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447–48 (1987).

40. *See* G.B. Reschenthaler & Fred Thompson, *The Information Revolution and the New Public Management*, 6 J. PUB. ADMIN. RES. & THEORY 125, 126 (1996) (“It would be surprising, indeed, if the . . . information revolution, did not ultimately effect changes of a comparable magnitude in the state and its institutions.”); Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 460 (2002).

down change.⁴¹ And so to the extent we do want to change the government in whatever direction, because it no longer fits the economy and society we have, the Senate will prevent change, just because it is so hard to overcome the filibuster or to get any legislation through the Senate.

If you wanted to dismantle the administrative state, for example, and return the government towards classical liberal forms, it is going to be very hard to do that through legislation in the Senate. To ask the Senate to repeal aspects of government organization, to ask it to take back more authority from the agencies, is going to be extremely difficult just because of the setup of the Senate and the way interest group politics work.

You could do it, I think, through the courts, but the courts can only get you so far. Suppose the Supreme Court does take up the challenge in *Gundy*⁴² and tries to articulate some kind of nondelegation doctrine. I still think the hard work, the nitty gritty of reorganizing the administrative state, is still going to be up to Congress. The courts aren't going to do it for Congress. The Senate will stand as an obstacle to such radical change.

Nevertheless, I am surprised many people are so pessimistic about the possibility of change.⁴³ Change could be political, rather than formal. It reminds me of the national popular vote initiatives that some states are pushing to try to get around the Electoral College.⁴⁴ Suppose you had Senators that ran on a platform such as this

41. See THE FEDERALIST NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 2003) (“[T]he equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty.”).

42. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (calling for a revival of the non-delegation doctrine).

43. See, e.g., Clyde Wayne Crews Jr., *What If The Administrative State Cannot Be Reformed?*, FORBES (May 13, 2019, 9:38 AM), <https://www.forbes.com/sites/waynecrews/2019/05/13/what-if-the-administrative-state-cannot-be-reformed/> [https://perma.cc/LN8B-EYWB]; Lee, *supra* note 19, at 227; Yglesias, *supra* note 20.

44. See THOMAS H. NEALE, CONG. RSCH. SERV., R43823, THE NATIONAL POPULAR VOTE (NPV) INITIATIVE: DIRECT ELECTION OF PRESIDENT BY INTERSTATE COMPACT 9 (2019) (noting that fifteen states and the District of Columbia, accounting for 196 electoral votes, have adopted national popular vote initiatives).

and said, “I will, as Senator, vote to approve anything the House decides to do because I do not like the anti-democratic features of the Senate.” And over time, you could see the Senate just becoming a rubber stamp, much in the way that the House of Lords in England has become more ceremonial.⁴⁵

I am not convinced that if you put such change up to a vote of the national population—the idea of getting rid of the Senate or even changing the two-senator rule—it would pass. I think a lot of people in the country are not ready to radically alter the rules of the game.

You could achieve this kind of change within constitutional rules. But I just do not really sense, aside from odd claims by people running for various presidential offices who do not get through even one or two states of the primaries,⁴⁶ a lot of appetite for serious structural change. If there were, people could do it within the constitutional rules as they exist now.

45. See Walton Hamilton, *Review*, 52 *YALE L.J.* 186, 187 (1942) (reviewing HENRY HAZLITT, *A NEW CONSTITUTION NOW* (1942)) (“The House of Lords came into its decadent political role by way of a series of dramatic incidents.”); Justin McCarthy, M.P., *The Useless House of Lords*, 157 *THE N. AM. REV.* 215, 216 (1893).

46. See Scott Detrow, *Democratic Candidates Embrace the Risk of Radical Ideas*, NPR (March 20, 2019, 1:37 PM), <https://www.npr.org/2019/03/20/705131248/democratic-candidates-embrace-the-risk-of-radical-ideas> [<https://perma.cc/H4EG-HP35>] (highlighting the policy positions of Elizabeth Warren and Pete Buttigieg, which include abolishing the Electoral College, eliminating the Senate filibuster, and providing reparations).

CONSTITUTIONALIZING INTERSTATE RELATIONS: THE TEMPTATION OF THE DARK SIDE

WILLIAM BAUDE*

I.

What does the Constitution have to say about interstate relations? Well, it depends on how you ask.

One of the main topics in interstate relations is the question of what is called choice of law, which sounds very technical but fundamentally is the question of who governs—that is, which state gets to govern any given transaction.

The same kind of question comes up at the federal level—federal law versus state law—but it is dealt with by the Supremacy Clause of the Constitution, which makes clear that if a federal law is constitutional, it is controlling.¹ But there is no Supremacy Clause for state law, which has forced people who worry about this question to look harder and elsewhere for some sort of hint about which state is supposed to govern which transaction.

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1. U.S. CONST. art. VI, cl. 2. Of course, federal law often chooses to permit or incorporate state law. See William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1374–76, 1423–30 (2012) (discussing examples).

Now, the Supreme Court has largely abdicated any control of the topic of choice of law. And just to give a concrete example: in 1981, the Supreme Court decided a case called *Allstate Insurance v. Hague*.² A friend and learned scholar has described this case to me as one of the most indefensible Supreme Court opinions on any topic ever. It is a case that comes from the Minnesota Supreme Court, where a man named Ralph Hague was riding a motorcycle in Wisconsin and crashed.³

Now, once upon a time, it was well-settled that accidents in Wisconsin were always going to be governed by Wisconsin law. Classically, states followed the rule of *lex loci delicti*,⁴ meaning the law of the place of the wrong. Many states have changed that rule over the course of the twentieth century, depending on whether the people were from other states, and so on.⁵ But even under most of these modern approaches, this should still have been an easy case. Mr. Hague was in Wisconsin. He was from Wisconsin. The other driver was from Wisconsin. Pretty much everything about the trip and the accident involved Wisconsin.⁶

But the lawsuit was brought in Minnesota, which had a law that was much more favorable to Mr. Hague, and the Minnesota Supreme Court seized on basically one fact, which is that Mr. Hague worked in Minnesota.⁷ Now, he was not on his way to work. The accident had nothing to do with work. But he had been to Minnesota pretty regularly, and that, plus the Minnesota Supreme Court's

2. 449 U.S. 302 (1981).

3. *Id.* at 305.

4. See, e.g., *Bain v. N. Pac. Ry. Co.*, 98 N.W. 241, 243–44 (Wis. 1904), *overruled by* *Wilcox v. Wilcox*, 133 N.W.2d 408 (Wis. 1965); see also *Phelps v. Benson*, 90 N.W.2d 533, 535 (Minn. 1958), *overruling recognized by* *Milkovich v. Saari*, 203 N.W.2d 408, 412 (Minn. 1973).

5. Luther L. McDougal III, *The Real Legacy of Babcock v. Jackson: Lex Fori Instead of Lex Loci Delicti and Now It's Time for a Real Choice-of-Law Revolution*, 56 ALB. L. REV. 795, 795–96 (1993); Douglas M. Deibert, Comment, *Lex Loci Delicti: The Conflict Continues*, 17 S.D. L. Rev. 374, 375–78 (1972).

6. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 44–45 (Minn. 1978).

7. *Id.* at 46.

conclusion that their own law was just better than Wisconsin's, caused them to think that they should apply their own law.⁸ This isn't something that Minnesota made up. It reflected the influence of Professor Robert A. Leflar, who wrote an influential article advocating this approach.⁹

The case went to the U.S. Supreme Court to decide whether anything in the Constitution stops the State of Minnesota and the Minnesota Supreme Court from deciding that their law is just better than everyone else's and applies even to things that have almost nothing to do with their state. But the Supreme Court turned down the opportunity to say that this was madness. Instead, the plurality opinion by Justice Brennan demonstrated uncharacteristic judicial restraint:

It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations.¹⁰

And they concluded nothing in the federal Constitution did.

This is pretty much where things stand today. When it comes to one of the most fundamental questions of interstate relations, if a state supreme court wants to apply their own law to almost anything, then as long as there is some connection, the U.S. Supreme Court will let them.¹¹

8. *See id.* at 49 (finding that "[t]he Minnesota rule is better" and that "[t]his consideration clearly mandates application of Minnesota law").

9. *See generally* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

10. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981).

11. *See* Charles M. Thatcher, *Could a State Court's Selection of Another State's Substantive Law Exceed Constitutional Limitations on Choice of Law*, 61 S.D. L. REV. 20, 21–22 (2016) ("The ease with which the proponent of a state court's choice of law can satisfy the *Hague* test makes it unlikely that a state court's application of the substantive law of

But not all issues in interstate relations are left to the states. Last year, in a case called *Franchise Tax Board v. Hyatt*,¹² the Supreme Court had a very different question of interstate relations—or, at least, what they thought was a very different question—which is whether or not one state, in this case the State of California, ought to be able to claim sovereign immunity in another state’s court, in that case, the State of Nevada.¹³

This too is a question of interstate relations. One might even call it a question of choice of law. The Nevada Supreme Court sits over here deciding whether or not it can hear a case against the Franchise Tax Board of California. They conclude that the answer is yes.¹⁴ California thinks that Nevada’s choice is constitutionally out of bounds, so they go to the U.S. Supreme Court. If we were applying the same kind of deference the Court applies on choice of law, you would expect the U.S. Supreme Court to say, “It is not for us to decide whose theory of sovereign immunity controls.”¹⁵ But that is not what the Supreme Court said.

another state could ever be held to exceed the modest limitations the Constitution imposes on choice of law.”); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1058–59 (2009) (noting lax standard). The rare exception is *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), where the Court held that the Kansas Supreme Court could not apply Kansas law to class action plaintiffs with “no apparent connection to the State of Kansas.” *Id.* at 815, 823.

12. 139 S. Ct. 1485 (2019).

13. *Id.* at 1490 (“This case . . . requires us to decide whether the Constitution permits a State to be sued by a private party without its consent in the courts of a different State.”).

14. *See id.* at 1491 (describing the case’s history).

15. Professor Sachs and I filed an amicus brief arguing that the Constitution did not speak to the recognition of sovereign immunity in state court, though a state might have other constitutional options to avoid an adverse judgment. Brief of Professors William Baude & Stephen E. Sachs as Amici Curiae in Support of Neither Party, *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299). *See generally* William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017) (discussing this view).

Instead, the Supreme Court stepped in—in what we could call Laycockian fashion¹⁶—to say this is an area where the Constitution controls. There is nothing in the text about this. There is nothing in the text that says which state’s law applies in a multi-state conflict. But the Supreme Court said, “Each State’s equal dignity and sovereignty under the Constitution implies certain constitutional ‘limitations on the sovereignty of all of its sister States.’”¹⁷ The Constitution “divests the States of the traditional diplomatic and military tools that foreign sovereigns possess” and “deprives them of the independent power to lay imposts or duties on imports and exports,” and thus, the Court concluded, it “embeds interstate sovereign immunity within the constitutional design.”¹⁸ Nevada’s choice to breach sovereign immunity violates a pre-constitutional norm, and California no longer has all of the pre-constitutional tools to retaliate. And therefore, the Court concludes, there are doctrines of federal law that now control things that previously were left to the raw power of the states.

Again, the same things might have been said in the choice of law context. The aggressive assertion of jurisdiction by the State of Minnesota violated a pre-constitutional norm, and the other states no longer have all of the pre-constitutional tools to retaliate. Taken seriously, the logic of *Franchise Tax Board* should lead to the constitutionalization of choice of law doctrine just as much as interstate sovereign immunity.

Instead, we have a strange inconsistency. In one area—sovereign immunity—the Supreme Court says that rules of federal constitutional law announced by the Supreme Court will control this. But in an analogous, and far more important area—choice of law—the

16. See generally Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (advocating constitutional limits on choice of law).

17. *Hyatt*, 139 S. Ct. at 1497 (internal alteration omitted) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

18. *Id.*

Supreme Court says that there is almost no constitutional constraint on what the states can do. Sometimes we live with these inconsistencies in doctrine for a long time. But they usually are a clue that something has gone wrong.

II.

One way forward would be for the Supreme Court to constitutionalize choice of law doctrine. Professor Douglas Laycock has advocated this in a groundbreaking and important article.¹⁹ It uses some constitutional doctrines I do not completely endorse to achieve some results that I think might be good.²⁰ So, we might call this “the temptation of the dark side of The Force.”

And it is tempting indeed. I would be reasonably happy living in a world where the Constitution and Supreme Court doctrine controlled all questions of interstate relations. This is not an area where the states can be neutral arbiters, and the Supreme Court is as good a neutral arbiter as we have these days.

Yet as I have suggested, I have some textual misgivings about that world. For instance, I am not convinced that the Full Faith and Credit Clause does quite as much work as Professor Laycock advocates. On the one hand, it says that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”²¹ It sounds like nothing could be more than full faith and credit. But, on the other hand, it says that Congress is allowed to decide “the Effect thereof,”²² which means

19. See Laycock, *supra* note 16, at 297–301 (advocating that in the absence of congressional action under the Effects Clause, the Court should develop federal choice-of-law rules under the Full Faith and Credit Clause).

20. See also Caleb Nelson, *State and Federal Models of the Interaction between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 664 n.18 (2013) (“As a policy matter, there is much to be said for the system contemplated by Professor Laycock. But as a historical matter, the Constitution probably was not really understood to require such a system.”).

21. U.S. CONST. art. IV, § 1.

22. *Id.*

that what the effects of those laws are should be left up to Congress. Indeed, this was the original understanding: the Constitution required states to accept other states' laws as evidence of the law, but it did not speak to the legal effect of those laws. That question was left to Congress.²³

There is also no provision of the constitutional text that says that state jurisdiction is territorially limited, although this is an important conflicts principle.²⁴ And even if we overlook the absence of text, and say that the doctrine just has to be an unwritten structural postulate of the Constitution, a constitutional doctrine of territoriality leads to some practical problems, and has led to them in the past: When a dispute has connections to multiple territories, which territory governs? So the principle of territoriality, on its own, will not answer questions like, "What happens when an event affects more than one state?" Or, "What happens when an accident involves somebody driving from one state to another or people from one state and the accident takes place in another state?" Besides the principle of territoriality, you need what conflicts nerds would call a principle of localization—that is, a principle that determines which act really matters.²⁵

23. See Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1206 (2009) ("The real significance of the [Full Faith and Credit] Clause was the power it granted to Congress to specify that effect later."); David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L. J. 1584, 1588 (2009) (making a similar statement); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEMPHIS ST. U. L. REV. 1, 3 (1981) (making a similar statement); Nelson, *supra* note 20, at 664 n.18 (endorsing Professor Sachs's position).

24. See Laycock, *supra* note 16, at 317 ("The Constitution thus assumes that states are territorial, though it never quite says so.").

25. See, e.g., JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 5.4, at 53, § 53.2, at 304, § 59.2, at 308 (1935) (concerned with establishing "localizing rules"); Joseph M. Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflict-of-Laws Principle*, 14 S. CAL. L. REV. 221, 241–43 (1941); Nelson, *supra* note 20, at 671–73 (describing need for localization under the First Restatement); Laycock, *supra* note 16, at 322–31 (proposing some different localizing rules than Professor Beale's); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of*

The Supreme Court did briefly experiment with constitutionalizing territoriality *and* localization, but it was back in the *Lochner* era when the Supreme Court could determine, using a complicated doctrine of vested rights, that the constitutional right to have a particular state's law apply to a case was vested under the Due Process Clause as soon as a particular act happened.²⁶ Most people do not think the *Lochner* era's substantive due process doctrine is something we should return to.²⁷ Professor Laycock does want to restore that doctrine's application to choice of law. But unless we do, I am not convinced that a constitutionalization of the choice of law would be possible. Again, you see why I call it the dark side.

III.

In any event, it seems to me that right now we live in a strange world in between, where the Supreme Court is sometimes trying to constitutionalize principles of interstate relations, as it does in the sovereign immunity context, and then, other times, continuing to abdicate them as it does in the choice-of-law context, which is much, much more important. If we are going to constitutionalize this area, we ought to get something good out of it.

Our Intelligence by Means of Language, 80 NOTRE DAME L. REV. 1821, 1830–36 (2005) (discussing theoretical problems with First Restatement's territorial approach).

26. See James Y. Stern, Note, *Choice of Law, the Constitution, and Lochner*, 94 VA. L. REV. 1509, 1512 (2008) (footnote omitted) (“[O]f the eighteen *Lochner* Era opinions that used liberty of contract reasoning to sustain constitutional challenges to state and federal laws, eight involved instances of a state supposedly exceeding its territorial jurisdiction.”).

27. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 387–88, 418–19 (2011). To be sure, the meaning (and implications) of the “*Lochner* era” are contested. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873–74 (1987). For competing accounts, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE FREEDOM* (2011); Randy E. Barnett, *After All These Years, Lochner Was Not Crazy—It Was Good*, 16 GEO. J.L. & PUB. POL'Y 437, 437–438 (2018).

Still, suppose we don't. What would it look like to turn away from the dark side? As Professor Stephen E. Sachs has discussed, interstate relations were once governed not primarily by constitutional law but by the shared, unwritten, "general law."²⁸

The First Restatement of Conflicts and its doctrine of vested rights lent itself to constitutionalization. The century before the First Restatement, however, there was a brilliant treatise on conflict of laws by Justice Joseph Story, which we might see as a sort of "zeroth restatement," the original Restatement.²⁹ We could have done a lot better by trying to stick with that.

Justice Story described a set of territorial rules, but they were principles of general and international law, and so they were more flexible. Justice Story did not turn them into platonic axioms where there was one unique answer to everything. When the First Restatement tried to do that, it found itself forced into weird epicycles about what to do if someone was poisoned and traveled across multiple states while the poison took effect, and other strange things like that.³⁰

People rightly thought the First Restatement had become both byzantine and unforgiving, but rather than do something sensible, like go back to the zeroth restatement and loosen the edges of the territorial rules, they instead started jettisoning the old rules altogether.³¹

28. Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1252–53, 1268–69 (2017); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1875 (2012).

29. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

30. Restatement (First) of Conflict of Laws § 377, cmt. a, illus. 2 (1934).

31. Here I profoundly agree with Professor Laycock. See Laycock, *supra* note 16, at 322 ("Beale's rules were crude, but territoriality did not make them so. They were crude because they tried to derive the solution to every choice-of-law controversy from the single premise that rights vested at the place of the last act necessary to the right. Critics of the Restatement appear to have assumed that all of Beale's mistakes were inherent in territorialism, and they diverted a generation of conflicts scholars from the task of developing more sensible and sophisticated territorial rules.").

It may be too late to bring back the old rules themselves. General law can cease to be the law if it falls out of use, and approaches based on comity have to consider the world as they find it. But it may not be too late to bring back the logic and the approach of a bygone age.

And if it is too late, then maybe the Supreme Court can at least constitutionalize some good rules for us.

ADDENDUM

In response to a question about lessons we can learn from the Supreme Court's exercise of original jurisdiction over controversies between states:

This is a not very widely studied area of the Supreme Court's docket unless you teach water law, contract law, or a couple of the other areas. Yet, every year there is something on the Supreme Court's docket that involves neighboring states fighting about a river, or an island, or something like that.³²

My own impression from those cases are two lessons—one optimistic, one pessimistic.

The optimistic lesson—especially for something like Professor Sachs's view—is that the Court takes a general law approach to a lot of these cases, relying on unwritten background principles.³³ The Court's approach in these decisions recognizes that there is a general principle governing where the border goes. Even though these questions—who ought to own Ellis Island³⁴ or what they ought to do with the lobster³⁵—are questions of policy, the Justices do not take advantage of their control over the case to pursue their own policy analysis.

Thus, the Justices seem to think their job is to make the federal system run more smoothly by preserving stable expectations to apply whatever law has been in place for a long time, if they can. That sounds good. If you take the Supreme Court's performance in those cases, it is what we hope for from a federal tribunal in charge of interstate relations. That is the good part.

32. *See, e.g., Montana v. Wyoming*, 138 S. Ct. 758, 758 (2018) (Mem.) (finding that Wyoming's water usage practices violated the Yellowstone River Compact).

33. *See supra* note 28 and accompanying text.

34. *See New Jersey v. New York*, 523 U.S. 767, 770–71 (1998) (holding that New Jersey has sovereign authority over the “new” land added to Ellis Island through land reclamation projects).

35. *See New Hampshire v. Maine*, 426 U.S. 363, 364–65 & n.1 (1976) (resolving a dispute between the two states over lobster fishing rights in a shared river).

The bad part is, from what I can tell, the Supreme Court does not like these cases very much. So when they hear the cases—and maybe this is partly a necessity—they generally appoint a special master who is not one of the Justices to be in charge of most the case, including fact finding, negotiating with the parties, managing a lot of the procedure, and then they, as a court, check in on the case every couple of years when the parties have some sort of problem.³⁶

Thus, the Supreme Court is exercising oversight over the case, and, if there is a legal issue, they ultimately do resolve it through oral argument and a written opinion. Yet, for the amount of time the case spends supposedly in the Supreme Court, it spends most of its time in front of a temporary agent of the Court where the Justices do not have to be concerned with it. While, again, there are practical reasons for that, I get the sense it is not an area of the Supreme Court's docket that they really think deserves their attention.

Beyond delegating the administration of these cases, the Justices also sometimes refuse to hear them at all. Now the Constitution and the federal statutes about the Supreme Court's original jurisdiction might lead you to believe that when two states have a dispute about something, they are entitled to bring it to the Supreme Court. The Supreme Court has jurisdiction. No other court has jurisdiction.³⁷ The normal practice in jurisdictional rules is that when a federal court has jurisdiction—especially when nobody else does—and somebody shows up and sues, the federal court puts it in its docket and deals with it.

Yet, the Supreme Court has created a doctrine where they decide whether they want to deal with it, even though if they say no, there

36. See Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 653–57 (2002) (explaining the role of special masters in original jurisdiction cases).

37. See U.S. CONST. art. III, § 2 (addressing the Supreme Court's original jurisdiction); 28 U.S.C. § 1251 (2018).

is nothing else for the states to do.³⁸ The Supreme Court regularly just declines to hear cases between two states.³⁹ Justice Thomas and Justice Alito have very recently started objecting to this practice, but they are the only ones.⁴⁰

So, the good news is when the Supreme Court hears these cases, it seems to do a decent job. But the bad news is that even if the Supreme Court agrees to hear a case, they do not necessarily hear it very much, and they reserve the right not to hear it.

38. See Kristin A. Linsley, *Original Intent: Understanding the Supreme Court's Original Jurisdiction in Controversies Between States*, 18 J. APP. PRAC. & PROCESS 21, 47 (2017) (“[E]ven when the parties do not have access to another forum in which to litigate, the Court still may use its discretion on a case-by-case basis to deny leave to file an original action.”); see also SUP. CT. R. 17(3) (providing that “[t]he initial pleading [in an action invoking the Court’s original jurisdiction] shall be preceded by a motion for leave to file”).

39. See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 560–61 (1985) (explaining that the Court has denied these cases “[f]or many years” and giving several examples).

40. *Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016) (Thomas, J., joined by Alito, J., dissenting from denial of certiorari) (“Federal law does not, on its face, give this Court discretion to decline to decide cases within its original jurisdiction.”); *Arizona v. California*, 140 S. Ct. 684, 684 (2020) (Thomas, J., joined by Alito, J., dissenting from denial of certiorari) (“[W]e likely do not have discretion to decline review in cases within our original jurisdiction that arise between two or more States.”).

**“CRIMES INVOLVING MORAL TURPITUDE”:
THE CONSTITUTIONAL AND PERSISTENT
IMMIGRATION LAW DOCTRINE**

CRAIG S. LERNER*

ABSTRACT

For over a century, American immigration law has provided that an alien is deportable for “crimes involving moral turpitude” (CIMT). For nearly as long, observers have lamented the persistence of the phrase, complaining of its antiquarianism and imprecision. These criticisms have ripened in recent years into the argument that the phrase is so vague as to be unconstitutional. Defenders of the phrase are scarce among judges and nonexistent in the scholarly community.

This Article offers a defense of the CIMT provisions, built upon a more thorough understanding of their history. It demonstrates that Congress has acknowledged objections to the CIMT provisions but ultimately rejected these criticisms. The recent void-for-vagueness precedents cited to support the invalidation of the CIMT provisions are, for the most part, inapposite. Furthermore, the argument that the CIMT provisions are indeterminate, because there is no moral consensus in American contemporary society, is overstated. The Article concludes that the CIMT provisions reflect and highlight the

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differences between criminal law, which punishes discrete acts, and immigration law, which sets a minimum moral threshold for inclusion in a political community. The CIMT provisions invest executive officials with a measure of discretion, channeled by precedent, that allows them to achieve the goals of immigration law.

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INTRODUCTION

On what legal and moral grounds can a nation expel an alien? Even among Western nations, the approaches differ greatly. The Swedish highest court recently overturned a deportation order of a convicted rapist, holding that there was no “extraordinary reason” to banish the offender.¹ The court explained that “[t]he idea behind the requirement of ‘extraordinary reasons’ [if the perpetrator has been in Sweden for over four years] is that there should be a point where a foreigner has the right to feel secure in Sweden.”² In that case, the court acknowledged that the thirty-three year-old Somali citizen, who had lived in Sweden for eight years, displayed “clear signs of flaws in his social adaptation,” including convictions for drug possession, reckless driving, and causing bodily harm.³ However, when not committing criminal offenses, the court found that he had been engaged in either studies or employment, and he had even learned some Swedish. Thus, the equities weighed in favor of allowing him to remain in Sweden, after he had served his two-year prison sentence for rape.⁴

Australia has adopted a markedly different approach to the issue of deportation. In 2014 its Parliament voted overwhelmingly

1. *Sweden’s Supreme Court overturns deportation decision for convicted rapist*, THE LOCAL (Apr. 25, 2019), <https://www.thelocal.se/20190425/swedens-supreme-court-overturns-deportation-decision-for-convicted-rapist> [<https://perma.cc/K43L-HJUD>].

2. *Id.* (second alteration in original).

3. *Id.*

4. *Id.* The Swedish approach to deportation seems remarkably hospitable, but even it falls short of the more principled position advocated by Professor Ilya Somin. Ilya Somin, *The Case Against Deporting Immigrants Convicted of Crimes*, REASON (May 27, 2018, 5:35 PM), <https://reason.com/2018/05/27/the-case-against-deporting-immigrants-co> [<https://perma.cc/A6NT-28AE>]. He argues that deportation or banishment should be regarded as a form of punishment. Categorizing the “discriminatory deportation of criminal immigrants” as a “serious injustice,” Professor Somin argues that it is defensible only when there is “strong evidence” that it is necessary to prevent a “great evil.” *Id.*

to expand the grounds for removing an alien.⁵ Criminal convictions are no longer necessary predicates for a banishment order.⁶ Australia's Attorney General can revoke the visa of an alien upon a finding that the alien belonged to a group that had been involved in criminal activity or simply that the alien did not possess "good moral character."⁷ For example, this provision has been invoked to expel a New Zealand citizen who had joined a biker gang associated with drug trafficking.⁸

Over the past century, the American approach to this issue has generally evolved in a direction less congenial to aliens deemed unfit, for whatever reason. Apart from statutorily denominated non-criminal reasons for expulsion, a growing number of criminal offenses can trigger removal from, or foreclose entry into, the United States. The first category of crimes listed in the relevant statute is, outside of the immigration law context, an oddity: "crimes involving moral turpitude (CIMT)."

The phrase entered federal immigration law in 1891. The Act of 1891 provided for the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude."⁹ At the time, the phrase "moral turpitude" was a customary term in the law, arising most often in slander cases

5. See Henry Sherrell, *Australia, New Zealand and the "corrosive" character test*, THE INTERPRETER (July 19, 2019).

6. Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: Can Australia Deport Refugees and Cancel Visas on 'Character Grounds'?*, UNSW SYDNEY (Mar. 22, 2017), <https://www.kaldorcentre.unsw.edu.au/publication/can-australia-deport-refugees-and-cancel-visas-character-grounds> [<https://perma.cc/B79H-B8RS>].

7. *Id.*

8. *Two Hells Angels gang members to be deported from Australia to New Zealand*, STUFF (Oct. 16, 2020), <https://www.stuff.co.nz/world/australia/300134596/two-hells-angels-gang-members-to-be-deported-from-australia-to-new-zealand> [<https://perma.cc/XA4J-CJ59>].

9. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084. The "moral turpitude" provision was reenacted in the Immigration Act of 1917, Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874, 875, 889; the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 241, 66 Stat. 163, 204; and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 435, 110 Stat. 1214, 1274.

and in deciding questions of evidence (relating to the impeachment of a witness).¹⁰ The Immigration Act of 1917 provided that those “convicted” of a “crime involving moral turpitude” were not only inadmissible to the United States but also deportable.¹¹ Over the ensuing decades, legal grounds for expulsion came and went, but deportation as the result of a “crime involving moral turpitude” persisted. Every reenactment of the federal immigration law preserved the doctrine. The Immigration and Nationality Act of 1952 provided for the deportation of any immigrant who had committed a “crime involving moral turpitude” within five years of admission to the United States, assuming that a prison sentence of at least one year was imposed.¹² The Illegal Immigration Reform and Immigration Responsibility Act of 1996 broadened this criterion, providing that a crime involving moral turpitude was a ground for deportation even if the alien had not been sentenced to any prison time, as long as the crime was punishable by a year in prison.¹³

In recent decades, the phrase has attracted skeptical commentary and blunt criticisms in judicial opinions and academic literature. Questions have been raised about how immigration officials, the Board of Immigration Appeals (BIA), and federal judges have decided whether an alien has committed a crime “involve moral turpitude”: Should the adjudicator evaluate the legal elements of the alien’s crime of conviction (the “categorical approach”) or should it

10. See generally Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001 (2012). As late as 1933, an American judge could write, “The phrase ‘involving moral turpitude’ is a familiar term in the courts of the United States.” *United States ex rel. Volpe v. Smith*, 62 F.2d 808, 810 (7th Cir. 1933).

11. Immigration Act of 1917, Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874, 875, 889.

12. § 241, 66 Stat. at 204. In addition, conviction of two or more crimes involving moral turpitude provided a ground for deportation regardless of the length of time the alien had been present in the United States.

13. § 435, 110 Stat. at 1274.

consider the actual, underlying conduct that gave rise to the criminal conviction (the “fact-based approach”)?¹⁴ Critics of the CIMT provisions have questioned whether federal courts owe deference to the BIA’s conclusion that an alien has committed a crime involving moral turpitude.¹⁵ Some have argued that the concept of “moral turpitude” is outdated and rooted in “gendered honor-culture norms.”¹⁶ The most sweeping criticism, raised as long ago as a 1929 Harvard Law Review student note¹⁷ but with mounting fervor in the past decade, is that the CIMT provisions are so indeterminate as to be unconstitutional.¹⁸ This argument has become particularly ripe in light of a trio of Supreme Court opinions that have used the void-for-vagueness doctrine to strike down aspects of federal criminal and immigration law.¹⁹

14. See Pooja R. Dadhania, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 313 (2011); Brian C. Harms, *Redefining “Crimes Of Moral Turpitude”: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 282 (2001).

15. See William Yeatman, *Ninth Circuit Review-Reviewed: Court’s Constitutional Critics of “Crimes Involving Moral Turpitude” Should Start with Chevron*, YALE J. REG. NOTICE & COMMENT (Apr. 9, 2019), <https://www.yalejreg.com/nc/ninth-circuit-review-reviewed-courts-constitutional-critics-of-crimes-involving-moral-turpitude-should-start-with-chevron-by-william-yeatman/> [<https://perma.cc/26ZJ-6NAU>]; Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1242 (2011).

16. Rob Doersam, *Punishing Harmless Conduct: Toward a New Definition of “Moral Turpitude” in Immigration Law*, 79 OHIO. ST. L.J. 547, 564 (2008) (citing Simon-Kerr, *supra* note 10).

17. Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 121 (1929).

18. See Jennifer Lee Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals’ Quiet Expansion of the Meaning of Moral Turpitude*, 71 STAN. L. REV. ONLINE 267, 279–80 (Mar. 2019); Evan Tsen Lee & Lindsay M. Kornegay, *Why Deporting Immigrants for “Crimes Involving Moral Turpitude” Is Now Unconstitutional*, 13 DUKE J. CON. L. & PUB. POL’Y 47, 48–49 (2017); Mary Holper, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 NEB. L. REV. 647, 648 (2012); Amy Wolper, *Unconstitutional and Unnecessary: A Cost/Benefit Analysis of “Crimes Involving Moral Turpitude” in the Immigration and Nationality Act*, 31 CARDOZO L. REV. 1907, 1908–09 (2010); Derrick Moore, *“Crimes Involving Moral Turpitude”: Why the Void-For-Vagueness Argument is Still Available and Meritorious*, 41 CORNELL INT’L L.J. 813, 814–16 (2008).

19. *United States v. Davis*, 139 S. Ct. 2319 (2019); *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *Johnson v. United States*, 576 U.S. 591 (2015).

This author cannot help but wonder whether the intensifying hostility to the CIMT doctrine arises, in part, from the rejection of any meaningful distinctions between aliens and citizens.²⁰ Whereas one of the preeminent privileges of citizenship is immunity from banishment, it was for centuries taken for granted that aliens claimed no such immunity; to the contrary, aliens were said to be here on “sufferance.”²¹ This did not mean, of course, that America was indifferent to the demands of hospitality and to legal and extralegal duties to accord fair treatment to foreigners, particularly those in long residence here. Today, however, it is deemed rude in most law review articles even to use the word “alien,” given its exclusionary connotations.²² From this perspective, the CIMT doctrine not only makes objectionable claims about what morality is but then dares to impose this requirement only on aliens.

This Article offers a different perspective on the CIMT provisions, built upon a more thorough understanding of their history. Part I

20. This could be framed positively, as reflecting our movement along the moral “arc of history” (Barack Obama) as we expand our “circles of compassion” (Peter Singer), or warily, as reflecting the indiscriminate progress of the principle of equality (Tocqueville) and the triumph of the last man (Nietzsche).

21. See, e.g., *United States ex rel. Volpe v. Smith*, 62 F.2d 808, 810 (7th Cir. 1933); *Tutrone v. Shaunessy*, 160 F. Supp. 433, 437 (S.D.N.Y. 1958); *In re Cartellone*, 148 F. Supp 676, 681 (N.D. Ohio 1957); *United States ex rel. Berlandi v. Reimer*, 30 F. Supp. 767, 768 (S.D.N.Y. 1939).

22. See, e.g., Eric Franklin Amarante, *Criminalizing Immigrant Entrepreneurs (and their Lawyers)*, 61 B.C. L. REV. 1323, 1328–29 (2020) (immigrant activists and some governments refrain from using the term because it “exoticizes and otherizes those from foreign countries”); *Trump v. Hawaii*, 138 S. Ct. 2392, 2443 n.7 (2018) (Sotomayor, J., dissenting) (observing that many scholars and courts regard “using the term ‘alien’ to refer to other human beings [as] offensive and demeaning.”). This Article uses the term “alien” not to fetishize otherness but because it is the legal term used in federal statutes. Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2018) (“alien” is defined as “any person not a citizen or national of the United States”). Using terms such as “immigrant” or “noncitizen” invites confusion, as is conceded even by those who prefer these terms to “alien.” See, e.g., Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions*, 74 N.Y.U. L. REV. 1696, 1698 n.7 (1999) (“‘noncitizen’ is somewhat of a misnomer because the persons to whom it refers are presumably citizens of some nation”).

demonstrates that for over a century Congress has, in a bipartisan spirit, relied on the CIMT provisions in crafting the nation's immigration law. As set out in this Part, Congress has long been aware that these provisions have generated a measure of jurisprudential uncertainty. The puzzle that emerges from this Part is why Congress has remained wedded to these provisions even as simpler-to-administer alternatives are easily imagined.

Part II sketches the argument that courts, which have become increasingly critical of the CIMT provisions, would likely use to strike them down as unconstitutionally vague. This Part argues that the void-for-vagueness precedents cited to support the invalidation of the CIMT provisions are, for the most part, inapposite. These provisions are entrenched in the law and reflect a conscious congressional choice; the fact that alternatives can be imagined does not authorize courts to overturn them. Furthermore, the argument that the CIMT provisions are indeterminate, because there is no moral consensus in American contemporary society, is overstated.

Part III tests this last claim—that there is sufficient moral consensus in the United States that the CIMT doctrine remains viable. This Article considers a case of first impression, litigated over the past decade in the BIA and Ninth Circuit. The principal issue is whether sponsoring an animal in a fighting venture, in violation of federal law, is a crime of moral turpitude. Despite the Ninth Circuit's initial doubts that it is, this Article argues that the BIA's conclusion—that there *is* an American consensus on this issue—is reasoned and defensible. Furthermore, sponsoring a chicken in a cockfight may not be a grave crime, meriting substantial punishment, but the goals of criminal law and immigration law are not identical. The Article concludes by arguing that the CIMT provisions reflect and highlight these differences: Criminal law is fundamentally about punishing discrete acts; immigration law is fundamentally about deciding what kind of people share the moral precepts that define it as a

political community. The CIMT provisions invest executive officials with a measure of discretion, channeled by precedent, that allows them to achieve the goals of immigration law.

I. CONGRESSIONAL RELIANCE ON “CRIMES INVOLVING MORAL TURPITUDE” IN IMMIGRATION LAW

The phrase “crime . . . involving moral turpitude” acquired its foothold in federal immigration law in 1891.²³ On three subsequent occasions (1917, 1952, and 1996), Congress enacted provisions that enlarged the importance of CIMTs.²⁴ This legislative commitment to the phrase is noteworthy, given the growing disapproval of CIMTs in judicial opinions and academic commentary. Aware of criticisms and alternatives, legislators have persisted in re-enacting the CIMT provisions. This should be understood as a conscious choice. By considering congressional debates, this Part demonstrates that Congress has chosen to preserve the CIMT language in immigration law, notwithstanding the miscellaneous concerns that have been raised.

A. *The 1891 Act: Introduction of the CIMT Language*

The Immigration Act of 1891, expanding upon exclusions in previous laws,²⁵ prohibited the admission of “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.”²⁶ At that time, the phrase “moral turpitude” was used frequently in legal contexts,²⁷ but it also enjoyed a

23. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084.

24. Immigration Act of 1917, Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874, 875, 889; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 241, 66 Stat. 163, 204; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 435, 110 Stat. 1214, 1274.

25. *E.g.*, Immigration Act of 1882, ch. 376, § 4, 22 Stat. 214 (excluding only “all foreign convicts except those convicted of political offenses”).

26. § 1, 26 Stat. at 1084.

27. *See* Simon-Kerr, *supra* note 10, at 1039.

wider currency. In the post-Civil War decades, the phrase appears dozens of times in the congressional record, usually contemplating fraud, but many times gesturing indistinctly toward the concept of moral impropriety.²⁸ Although no member of Congress clarified the phrase's meaning in the 1891 law, members of Congress had a general idea of what was intended. Professor Julia-Ann Simon-Kerr has argued that there was a "fuzziness" to the phrase.²⁹ This fuzziness has become a feature, rather than a bug, as it affords policymakers some play in administering the immigration law.³⁰ The House Select Committee on Immigration and Naturalization explained that the "intent of our immigration laws is not to restrict immigration, but to sift it, to separate the desirable from the undesirable immigrants, and to permit only those to land on our shores who have certain physical and moral qualities."³¹

To the extent that the immigration law was creating grounds for the exclusion of aliens who had no connection to America, constitutional objections to such standards are hard to articulate; after all, such individuals are unable to raise a due process challenge. Fairness issues nonetheless arose when implementing a law designed to exclude those convicted of CIMTs. The case of Edward Mylius

28. For example, in 1873, in debates concerning a bankruptcy bill, Senator Sherman stated that a man "ought not to be forced into involuntary bankruptcy unless he has committed some act which is wrong in a moral sense, . . . which seem to imply some moral turpitude or involve some immorality, or some attempt to deceive, to defraud or to cheat." 43 CONG. REC. 1151 (Feb. 3, 1874).

29. Simon-Kerr, *supra* note 10, at 1040.

30. Professor Julia Ann Simon-Kerr discusses how, in the voting context, the fuzziness of the phrase "crimes of moral turpitude" made it "well suited to the purpose of selective [voter] disenfranchisement." *Id.* She argues that in the immigration context courts took steps to "couch[] the question in the terms of clearer common law concepts," rendering the doctrine more operational. *Id.* at 1046. This view is sound and accords with my own conclusion; nonetheless, the doctrine inescapably invites judgments about the community's moral norms in at least some cases, such as the one explored in Part III.

31. H.R. REP. NO. 3472, at ii (1891).

highlighted those difficulties.³² Mylius was convicted of criminal libel in English courts in 1911 as the result of defamatory statements he published about King George V.³³ American immigration officials, deeming libel a CIMT, held him to be inadmissible into the United States.³⁴ He sought and obtained relief in a habeas proceeding in federal district court, the decision of which the Second Circuit affirmed.³⁵ Opinions from both courts merit attention.

The threshold procedural question in front of both courts was how to decide whether a crime was one that involves moral turpitude. In addressing that issue, the courts held that the inquiry should be stripped of all the facts in the petitioner's case. As Judge Coxe, writing for the Second Circuit, held, the question before the court was whether "the publication of a defamatory libel *necessarily* involve[s] moral turpitude."³⁶ Even though the facts of Mylius's criminal case reveal "the extreme brutality of the libel" involving the English king and his family, this was deemed irrelevant, as the judicial focus must be on the inherent "nature" of the crime.³⁷

On the substantive question of whether criminal libel "necessarily" involves moral turpitude, the district court, in an opinion by Judge Noyes, observed that a definition of the term "moral turpitude" was in order, but exactitude was impossible:

'Moral turpitude' is a vague term. Its meaning depends to some extent upon the state of public morals. A definition sufficiently accurate for this case is this: 'An act of

32. United States *ex rel.* Mylius v. Uhl, 203 F. 152 (S.D.N.Y. 1913), *aff'd*, 210 F. 860 (2d Cir. 1914).

33. *Id.* at 153. Mylius had written that George V had secretly married a woman in Malta in 1890, which, if true, would render his marriage to Queen Mary bigamous. See United States *ex rel.* Mylius v. Uhl, 210 F. 860, 862 (2d Cir. 1914); Robin Callender Smith, *The Missing Witness? George V, Competence, Compellability and the Criminal Libel Trial of Edward Frederick Mylius*, 33 J. LEGAL HIST. 209, 209 (2012).

34. *Mylius*, 203 F. at 153.

35. United States *ex rel.* Mylius v. Uhl, 210 F. 860 (2d Cir. 1914).

36. *Uhl*, 210 F. at 862.

37. *Id.*

baseness, vileness, or depravity in the private or social duties which a man owes to his fellow man or to society.’³⁸

Criminal libel, as committed, might entail moral turpitude, but the elements of the offense do not *necessarily* entail it. Judge Noyes observed that one can negligently commit the offense, and thus “guilt hardly implies [one’s] moral obliquity.”³⁹ Likewise, Judge Coxe offered this hypothetical:

A statute . . . makes it a crime to give a glass of whisky to an Indian under the charge of an Indian agent. A conviction under this section would not be proof of moral turpitude, although the evidence at the trial might disclose the fact that the whisky was given for the basest purposes.⁴⁰

One can question whether the adopted categorical approach—focusing on the elements or inherent nature of the offense, and not the offense as it was committed—is the best interpretation of what Congress intended when enacting the Immigration Act of 1891. On the one hand, the language provides for the exclusion of those who have been “*convicted . . . of a crime . . . involving moral turpitude,*” which arguably focuses attention on the crime of conviction—that is, the elements of the offense—and not the actual conduct of the alien.⁴¹ Had the fact-based approach been what Congress intended, the language could have been, for example, “criminal *acts* involving moral turpitude.” On the other hand, in ordinary speech we often contemplate and specify the conduct giving rise to a criminal conviction—that is, “Smith was convicted of burglary *of a mansion,*” or “Jones stole *a Rembrandt.*” In recent decades, in related statutory contexts, the Supreme Court has grappled with this interpretative question, with the majority view being the former (criminal convic-

38. *Mylius*, 203 F. at 154.

39. *Id.*

40. *Uhl*, 210 F. at 862.

41. *Id.*

tion focuses on elements of the offense) and the minority view being the latter (criminal conviction contemplates the facts of the crime as committed).⁴²

In reaching these conclusions, modern opinions have tended to direct their attention, at least initially, to the legislative text and what “convicted” means, but this was not the approach taken in either opinion in *Mylius*’s case. Rather than a textual analysis, the courts argued that considering the facts of the crime, as it was committed, would be beyond the competence of immigration officials⁴³ and would substantially and unreasonably delay the admission process.⁴⁴ Judge Noyes conceded that under the adopted categorical approach some aliens who were convicted of nominally serious crimes may be excluded, although their particular acts evidenced no immorality, and that some who were convicted of slight offenses may be admitted, although the facts surrounding their commission were such as to indicate moral obliquity.⁴⁵ But, he added, such a result is “necessary for the efficient administration of the immigration laws.”⁴⁶

Judge Noyes’s claim that “efficiency” requires the categorical approach is vulnerable to the objection, which he recognizes, that the resulting conclusions may be irrational. Could this categorical approach possibly be what Congress had intended? The very fact that Congress implemented a screening device suggests that it wanted a *rational* screening device, which is arguably undermined by a rigidly categorical approach.

42. The latter (minority) view has been prominently espoused by Justice Alito. See *Moncrieffe v. Holder*, 569 U.S. 184, 219 (2013) (Alito, J., dissenting) (“In ordinary speech, when it is said that a person was convicted of or for doing something, the ‘something’ may include facts that go beyond the bare elements of the relevant criminal offense.”).

43. See *Mylius*, 203 F. at 153.

44. See *Uhl*, 210 F. at 862–63.

45. See *Mylius*, 203 F. at 153.

46. *Id.*

B. *The 1917 Act: Expansion of CIMTs to Deportation*

In response to growing concerns about immigration “of the wrong kind,”⁴⁷ Congress passed the 1917 Act, which further expanded the criteria both for excluding aliens from entering and for deporting those who were lawfully present.⁴⁸ Congress drew upon the doctrine of “moral turpitude” for both purposes, providing for: (1) the exclusion of any alien who had been convicted of a CIMT; (2) the deportation of any alien who was convicted of a CIMT within five years of admission to the United States, for which the sentence was one year or more of imprisonment; and (3) the deportation of any alien who was twice convicted of a CIMT, whenever committed, for which the sentence was one year or more of imprisonment.⁴⁹ An alien could potentially avoid adverse consequences from a criminal conviction if the sentencing judge in his criminal trial made a recommendation against deportation, referred to as a Judicial Recommendation Against Deportation, or JRAD, to the federal government.⁵⁰

47. Brian C. Harms, *Redefining “Crimes Of Moral Turpitude”: A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 262 (2001) (quoting President Theodore Roosevelt: “[w]e can not have too much immigration of the right kind, and we should have none at all of the wrong kind. The need is to devise some system by which undesirable immigrants shall be kept out entirely.” (alteration in original)); see also E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 127 (1981) (quoting Theodore Roosevelt, who remarked that immigration law should “exclude absolutely . . . all persons who are of a low moral tendency”).

48. Immigration Act of 1917, Pub. L. No. 64-301, §§ 3, 19, 39 Stat. 874, 875, 889.

49. *Id.*

50. *Id.* § 19. The statutory language allowed the court to “make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act.” *Id.* The provision reflects an awareness that a purely categorical approach to CIMTs can be both over- and under-inclusive in capturing those aliens truly guilty of moral turpitude. Whether this broadly authorized a more fact-based approach can be debated. On the one hand, the provision suggests an openness to having immigration authorities and reviewing courts look beyond the elements of the offense of conviction to the circumstances of the crime. On the other hand, the provision provides one discrete solution: a judicial recommendation not to deport. It could be argued that Congress regarded the categorical approach as appropriate with this ameliorating qualification. For a comprehensive study of the provision, see Margaret H. Taylor & Ronald F. Wright,

As to how and why the language of “moral turpitude” was inserted into the statutory framework for deportation, the answer is lost in the cigar smoke that beclouded the corridors of power. Clues abound, but they are inconclusive. In 1908, a bill was proposed in the House that would have required the deportation of an alien convicted of *any* felony.⁵¹ As E.P. Hutchinson observes, “One of the most telling arguments of the opponents was that the definition of felony varies widely from state to state and includes minor crimes in some of them.”⁵² The use of the phrase “crimes involving moral turpitude,” borrowed from the law governing the exclusion of aliens, was likely seen as a solution to the difficulty. In the words of Representative Adolph Sabath, it would allow immigration officials to distinguish between a minor criminal and “a real criminal . . . a criminal at heart.”⁵³ It is perhaps also significant that the early twentieth century saw the rise of *malum prohibitum* crimes; in some such crimes, the common law assumption that “scienter was a necessary element” in the criminal law was relaxed or abandoned.⁵⁴ Given the rise of such offenses, the need to specify a subcategory within “crime” may have seemed all the more imperative; otherwise, the Joseph Dotterweichs of the world, innocent of all wrongdoing but nonetheless culpable in the eyes of modern regulatory law, should find themselves, were they aliens, not only punished but then, to compound the injustice, banished.⁵⁵

The Sentencing Judge as Immigration Judge, 51 EMORY L.J. 1131 (2002).

51. H.R. 13079, 60th Cong. (1908).

52. HUTCHINSON, *supra* note 47, at 144 (citations omitted).

53. 53 CONG. REC. 5167 (Mar. 30, 1916) (statement of Rep. Sabath).

54. *United States v. Balint*, 258 U.S. 250, 251 (1922); *see also United States ex rel. Berlandi v. Reimer*, 30 F. Supp. 767, 768 (S.D.N.Y. 1939) (“Moral turpitude implies something immoral in itself It must not merely be *mala prohibita*.”).

55. *See United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (“In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”); *see also* Craig S. Lerner, *The Trial of Joseph Dotterweich: The Origin of the “Responsible Corporate Officer” Doctrine*, 12 CRIM. L. & PHIL. 493, 495 (2018) (documenting that the government secured the convic-

A moment is needed here to address a stray comment in the legislative history that has been leveraged in subsequent decades by critics of the CIMT language. In a hearing in the House of Representatives in which the Police Commissioner from New York City was the sole witness, Representative Sabath remarked that that “no one can really say what is meant by saying a crime involving moral turpitude.”⁵⁶ The statement’s significance has achieved undeserved talismanic power in the CIMT literature. In fact, no member of Congress expressed the opinion that the CIMT language was so imprecise as to preclude its usage in the law. And even Representative Sabath accepted the CIMT language. He proposed several amendments to the proposed law that incorporated—and even extended—the CIMT language.⁵⁷ Nor did he or any member of Congress propose alternative language. Indeed, within months of the debate on the immigration bill, Congress enacted a law providing for a pension for all firefighters in the District of Columbia; the

tion by simultaneously insisting that Dotterweich’s culpability, or lack thereof, was irrelevant, thereby preventing him from introducing exculpatory evidence, but then regularly insinuating that he had acted in bad faith despite the absence of any supporting evidence).

56. *Restriction of Immigration: Hearings Before the H. Comm. on Immigration & Naturalization*, H.R. REP. NO. 10384, 64th Cong. 8 (1916) (statement of Rep. Sabath); see also *Cabral v. INS*, 15 F.3d 193, 195 (1st Cir. 1994) (citing *Jordan v. DeGeorge*, 341 U.S. 223, 233–34 (1951) (referencing Justice Jackson’s review of legislative history in *Cabral*, which includes Rep. Sabath’s statement as evidence that Congress knew of the ambiguity in the phrase).

57. One amendment would have rendered an alien deportable for a CIMT only within three, not five, years of admission to the United States. His point in so doing was to ameliorate the harshness of the proposed legislation in one sense. But to demonstrate his bona fides he also proposed another amendment that would have provided for the deportation of an alien, regardless of how long he had been in the United States, upon being convicted of a second CIMT. See 53 CONG. REC. 5167–69 (Mar. 30, 1916) (“I have no desire to protect a real criminal.”). He prevailed on the second amendment, but not the first. *Id.* He also proposed an amendment to allow a trial judge to issue the recommendation against deportation not only at sentencing but up to thirty days after the imposition of sentence. *Id.*

adopted law provided for the termination of benefits in the event that one was convicted of a “crime involving moral turpitude.”⁵⁸

The CIMT language drew public scrutiny in 1926. Immigration officials excluded an English playwright, Vera, Countess of Cathcart, on the basis that she had committed adultery—a crime involving moral turpitude.⁵⁹ The Countess attracted many supporters, doubtless in part because the play she had recently written, and in which she intended to perform, *Ashes of Love*, was touted as an oblique commentary on her celebrated, star-crossed affair.⁶⁰ What made the Countess’s case so controversial, moreover, was that just months earlier, the aptly named Earl of Craven, who had spurned the Countess in said affair, was permitted, without commentary on *his* moral turpitude, to enter the country. A *Harvard Law Review* student note, citing the Countess’s case, complained in 1929 that the phrase “crime involving moral turpitude” had attracted a “patch-quilt of decisions.”⁶¹ The student author lamented the persistence of the phrase anywhere in the law, but particularly in the immigration context:

[I]t is in the Immigration Act that the phraseology seems most unfortunate. Though proceedings under the act are not criminal, they are sufficiently severe in the application to be in their nature penal. Men who are menaced with the loss of civil rights should know with certainty the possible grounds of forfeiture. And the loose terminology of moral turpitude hampers uniformity; it is

58. 53 CONG. REC. 12025 (1916).

59. Simon-Kerr, *supra* note 10, at 1049–51.

60. See Mark Lynn Anderson, *The Impossible Films of Vera, Countess of Cathcart*, in RESEARCHING WOMEN IN SILENT CINEMA: NEW FINDINGS AND PERSPECTIVES 176 (Monica Dall’Asta et al., eds., Univ. of Bologna Dep’t of Arts 2013). Contemporary reviewers, Walter Winchell included, were unimpressed by the play and by the Countess’s thespian skill. *Id.* at 187–88.

61. See Note, *Crimes Involving Moral Turpitude*, 43 HARV. L. REV. 117, 117 (1929).

anomalous that for the same offense a person should be deported or excluded in one circuit and not in another.⁶²

The author concluded that it was “perilous and idle to expect an indefinite statutory term to acquire precision by the judicial process” and suggested that Congress should either enumerate those offenses that provide a basis for deportation or specify a minimum criminal penalty that would trigger deportation proceedings.⁶³

The student note adumbrated modern criticisms of the phrase, but it did not reflect public opinion at the time. The *New York Times* article cited by the student author did not call for the abolition of the phrase.⁶⁴ Indeed, a contemporaneous *New York World* editorial wrote that the phrase “lays down a reasonable enough doctrine in language plain enough to anyone who uses such brains as God gave him.”⁶⁵ The editorial continued, “It meant murder, robbery, embezzlement, and the like, not sin, not vice, not caddishness.”⁶⁶ As in the *New York Times* article, the objection was not to the phrase but to its unequal application (against the Countess but not the Earl of Craven). And when Senator Copeland introduced the *New York World* editorial into the Congressional Record, his point was exactly the same: he objected to the application of the phrase, not the phrase itself.⁶⁷

Furthermore, the student author’s judgment that the CIMT language had resulted in a “patchquilt” of decisions is inaccurate.⁶⁸

62. *Id.* at 121.

63. *Id.*

64. *Id.* at 117 n.6 (quoting *British Countess, Admitting Divorce, Detained On Liner*, N.Y. TIMES, Mar. 6, 1926, at 1).

65. *Official Dunces*, N.Y. WORLD, Feb. 15, 1926, quoted in 67 CONG. REC. 3,978 (Feb. 15, 1926).

66. *Id.*

67. 67 CONG. REC. 3,979 (1926) (statement of Sen. Copeland) (“I have no doubt it was an act of moral turpitude. I rose in my place to say, however, that the same punishment should have been meted out to the Earl of Craven.”).

68. Which is to say that, were the note submitted in a class at Harvard Law School in the Fall 2020 semester, it would have received a “P.”

Given the paucity of criminal offenses in the first half of the twentieth century, it is likely that in many cases, there was little doubt that an alien's crime qualified as a CIMT. After all, murder, rape, robbery, and burglary were conceded to be CIMTs.⁶⁹

More striking is the obdurate conclusion that any intent to separate another person unlawfully from his property, regardless of the amount or the provocation, represented a blackness of heart meriting banishment. Perhaps there is an echo of Maitland here and the idea that to be a thief is to be a felon and to call someone a felon is "as bad a word as you can give a man or thing."⁷⁰ Thus, condemnation was sweeping—for larceny, grand or petty, issuing a check without funds, receiving stolen goods, encumbering mortgaged property, and all of the sundry offenses involving an intent to defraud, irrespective of magnitude. The Jean Valjeans found no quarter in such a hard world, as was discovered by twenty-three year-old Phyllis Edmead. A housemaid in Massachusetts and an alien from the British West Indies, Edmead stole fifteen dollars from her employer, was convicted of misdemeanor petty larceny, and sentenced to exactly one year in jail.⁷¹ A divided First Circuit panel affirmed the Immigration Commissioner's order to deport her; in so doing, the panel invoked, among other august sources, the "divine and natural duties" that forbid theft of any kind.⁷² The decision prompted a dissenting judge to gesture, in quasi-Marxist disgust, to our benighted "code of property rights and wrongs," but the decision is still a striking demonstration of the monolithic case law on all variants of property crimes.⁷³

69. See, e.g., *United States ex rel. Andreacchi v. Curran*, 38 F.2d 498, 499 (S.D.N.Y. 1926) ("It is conceded that the sentence for burglary does involve moral turpitude.").

70. Quoted in *Morissette v. United States*, 342 U.S. 246, 260 (1952) (citing Maitland). This author confesses to being puzzled how a "thing" can be a felon but is nonetheless impressed by the comprehensiveness of the denunciation.

71. *Tillinghast v. Edmead*, 31 F.2d 81, 82 (1st Cir. 1929).

72. *Id.* at 83.

73. *Id.* at 84 (Anderson, J., dissenting).

Malum prohibitum crimes raised more questions, although even here courts were fairly consistent. For example, the modern strict liability offense of carrying a concealed weapon was uniformly deemed not a CIMT.⁷⁴ Prohibition Act cases proved potentially more difficult, as illustrated by *United States ex rel. Iorio v. Day*.⁷⁵ Judge Learned Hand's opinion is noteworthy as a rare judicial confession that construing the phrase "crime involving moral turpitude" required more than application of self-evident moral truths. According to Judge Hand, the CIMT language narrows the category of crimes triggering deportation to those that are "shamefully immoral."⁷⁶ But this is "a nebulous matter at best"; judges should be careful not to impose their own moral judgments, and must instead estimate "what people generally feel."⁷⁷ Importantly, Judge Hand did not regard this task as an insurmountable one: "Congress may make [a CIMT] a ground of deportation, but while it leaves as the test accepted moral notions, we must be loyal to that, so far as we can ascertain it."⁷⁸ And, as Judge Hand observed, "We cannot say that among the commonly accepted mores the sale or possession of liquor as yet occupies so grave a place."⁷⁹ Judge Hand easily distinguished the case at hand from a Ninth Circuit case in which the alien had been convicted under a state statute that had criminalized not simply the illegal sale of alcohol but the ownership of an establishment where illegal liquor was sold.⁸⁰

Crimes of violence like assault and manslaughter also raised CIMT categorization issues, but again, inconsistencies have been

74. See, e.g., *Andreacchi*, 38 F.2d at 499; *Ex parte Saraceno*, 182 F. 955, 957 (S.D.N.Y. 1910).

75. 34 F.2d 920 (2d Cir. 1929).

76. *Id.* at 921.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (distinguishing *Rousseau v. Weedon*, 284 F.2d 565 (9th Cir. 1922)).

overstated and relatively clear rules emerged.⁸¹ Assaultive crimes were divided into simple assault (not CIMTs) and aggravated assault (CIMTs).⁸² This distinction, akin to that between “general intent” assaults and “specific intent” assaults, is a fine one. But the law is festooned with fine distinctions, and this distinction is preserved in the criminal law today, particularly in the context of the intoxication defense.⁸³ Judges in cases involving assaults studied the statutes under which the alien had been convicted, and they were not averse to going beyond the elements of the offense to a consideration of at least parts of the factual record. Such a detailed inquiry was frequently necessary to establish whether the assault reflected a deliberate intention to do harm, which would constitute moral turpitude, or a more inchoate act of violence, in which “one ordinarily law abiding, in the heat of anger, strikes another.”⁸⁴ In *Ciambelli ex rel. Maranci v. Johnson*,⁸⁵ the court referred to the “allegations of the indictment” and even the “alien’s statement” in concluding that the victim had been injured in a “melee,” and not from conscious design.⁸⁶

Manslaughter posed a still more interesting problem for the CIMT analysis, one that persists to this day and which this Article will repeatedly consider. It partakes of the genus of crimes (homicide) generally regarded as the very worst. Assuming, however, that a CIMT is an “act of baseness, vileness, and depravity,” or, as

81. See, e.g., *Recent Decisions*, *Guarneri v. Kessler*, 98 F.2d 580 (5th Cir. 1938), 37 MICH. L. REV. 1294, 1295 (1939) (describing the clear conditions for “moral turpitude” in the crimes of assault and manslaughter).

82. *Id.*

83. Intoxication is traditionally permitted as a defense in crimes, including assaults, involving “specific intent,” but not “general intent.” See, e.g., *People v. Hood*, 462 P.2d 370, 374–75 (Cal. 1969); *State v. Stasio*, 396 A.2d 1129, 1132 (N.J. 1979).

84. *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass. 1926).

85. 12 F.2d 465 (D. Mass. 1926); see also *United States ex rel. Griffio v. McCandless*, 28 F.2d 287 (E.D. Pa. 1928); cf. *Weedin v. Tayokichi Yamada*, 4 F.2d 455 (9th Cir. 1925); *United States ex rel. Mazzillo v. Day*, 15 F.2d 391 (S.D.N.Y. 1926); *United States ex rel. Morlacci v. Smith*, 8 F.2d 663 (W.D.N.Y. 1925);.

86. *Johnson*, 12 F.2d at 466.

a judge later put it, reflects a “readiness to do evil,” manslaughter straddles the CIMT line.⁸⁷ When we focus on the harm, manslaughter is as serious a crime as there is. Yet when we focus on the culpability, manslaughter occupies a hazier place in the pantheon of crimes. The difficulty is that the mens rea required for manslaughter is typically “recklessness,” or the conscious creation of a substantial and unjustified risk.⁸⁸ Criminal punishments necessarily take account, notwithstanding academic objections,⁸⁹ of both harm and culpability, so the sentences for manslaughter are frequently greater than those that are imposed for crimes that are unmistakably CIMTs, such as larceny or perjury. Courts recognized this difficulty and coalesced around a sensible distinction: only those manslaughters in which the injury was intentional qualified as CIMTs.

Illustrative of this distinction is *United States ex rel. Sollano v. Doak*.⁹⁰ The alien had been convicted under New York law of first degree manslaughter, which required that the killing occur in a “cruel or unusual manner, or by means of a dangerous weapon.”⁹¹ The court observed:

[O]ne who uses a dangerous weapon like a revolver, not in self-defense but in such a way as to cause the death of another, must be held so lacking in sense of moral responsibility as to be morally depraved and his act to be one involving moral turpitude.⁹²

By contrast, the court in another case held that a conviction of second degree manslaughter did not justify deportation, as the offense contemplated “an act resulting in death *without design to injure or*

87. *Franklin v. INS*, 72 F.3d 571, 594 (8th Cir. 1995) (Bennett, J., dissenting).

88. MODEL PENAL CODE § 2.02(2)(C) (AM. LAW. INST. 1985).

89. See, e.g., LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 38–41 (2009).

90. *United States ex rel. Sollano v. Doak*, 5 F. Supp. 561 (N.D.N.Y. 1933).

91. *Id.* at 564.

92. *Id.* at 565.

effect death."⁹³ The distinction is a subtle one, and the court, although paying lip service to the rule that the "facts and particular circumstances" of a crime should not be taken account, nonetheless saw fit to add that the evidence in the case supported the alien's claim that the death was accidental.⁹⁴

The first judicial opinion to express marked disapproval with the use of "moral turpitude" in deportation decisions was *United States ex rel. Manzella v. Zimmerman*.⁹⁵ The case turned on whether "prison breach" was a CIMT. Restricting the inquiry to the record of conviction and not the "particular circumstances," the judge concluded that the elements of the offense did not necessarily entail force or fraud (e.g. if escape was accomplished simply by walking away) and thus was not a CIMT.⁹⁶ The judge continued, however:

I agree with those who regard it as most unfortunate that Congress has chosen to base the right of a resident alien to remain in this country upon the application of a phrase so lacking in legal precision and, therefore, so likely to result in a judge applying to the case before him his own personal views as to the mores of the community.⁹⁷

The citation for the sentence is not a judicial opinion but the 1929 *Harvard Law Review* note. Curiously, the *Zimmerman* opinion belies its own claim that the phrase is "lacking in legal precision."⁹⁸ Judge Maris applied the test in a straightforward manner in reaching the

93. *United States ex rel. Mongiovi v. Karnuth*, 30 F.2d 825, 826 (W.D.N.Y. 1929) (emphasis added) (reversing deportation order).

94. *Id.* ("In an affidavit filed in this proceeding, he deposed that it was his daughter who accidentally suffered death at his hands in the course of a quarrel between him and his wife, wherein there was a struggle for possession of a pistol, which, during the struggle, was accidentally discharged.")

95. 71 F. Supp. 534 (E.D. Pa. 1947).

96. *Id.* at 537.

97. *Id.*

98. *Id.*

conclusion that prison breach did not *necessarily* include force or fraud and therefore did not necessarily involve moral turpitude.⁹⁹

Four years later, the most far-ranging criticism of the CIMT provisions was expounded in the dissenting opinion in the Supreme Court case, *Jordan v. De George*.¹⁰⁰ The case involved an alien who had lived in the United States for decades and had been convicted on two separate occasions of conspiring to defraud the United States (through the sale of illegal liquor). Although De George's brief simply challenged the classification of his crime as one that involved moral turpitude, a dissenting Justice Jackson, joined by Justices Black and Frankfurter, argued that the CIMT provisions were so hopelessly indeterminate as to be unconstitutional.

Justice Jackson premised his opinion on the claim that resident aliens in deportation hearings are entitled to the same protections of the Due Process Clause that are applicable in a criminal trial. Justice Jackson drew attention to a recent Supreme Court decision invalidating a Utah law that had criminalized "acts injurious to public morals."¹⁰¹ He observed: "I am unable to rationalize why 'acts injurious to public morals' is vague if 'moral turpitude' is not."¹⁰² One response to Justice Jackson, unfortunately not raised by the majority, is that the due process standards that govern a criminal trial do not apply *identically* to deportation hearings.¹⁰³

99. To be sure, the result in the case was perhaps not what Congress would have intended. The petitioner had been arrested for bank robbery, escaped, and promptly fled to Canada, before sneaking back into the United States. *Id.* at 535. In clarifying whether prison breach was a CIMT in his case, one might well want to know the crime for which he had been incarcerated and the circumstances of the escape, but none of this was at issue, because the court rigorously applied the categorical approach. In other words, to the extent that the result was irrational, that followed from the categorical approach; but the claim that the phrase lacked "legal precision" has no basis in the opinion itself.

100. 341 U.S. 223 (1951).

101. *Id.* at 243 (Jackson, J., dissenting) (citing *Musser v. Utah*, 333 U.S. 95, 97 (1948)).

102. *Id.*

103. See *infra* at text accompanying notes 262–67.

Justice Jackson also pointed to the already-cited observation by Representative Sabath that “no one can really say what it meant by . . . crime involving moral turpitude.” Justice Jackson drolly added that, notwithstanding this ambiguity, “Congress did not see fit” to clarify the meaning of the phrase.¹⁰⁴ Justice Jackson seemed to regard Representative Sabath’s statement as a statement against interest, an acknowledgment of legislative ineptitude so grave as to justify judicial nullification. But there are many reasons why Congress might not have seen fit to clarify, among them that it intended to delegate the matter to executive officials or that it thought that over time the phrase’s meaning would coalesce around a settled interpretation. Justice Jackson conceded the latter possibility, but found that a few decades of practice and “fifty cases in lower courts” failed to produce agreement.¹⁰⁵ The support for this claim, which is crucial to his argument, was buried in a footnote that presents three pairs of supposedly inconsistent precedents construing the CIMT provisions.¹⁰⁶ As already suggested, the legal distinctions in CIMT cases were fine, but arguably not, in the words of Justice Jackson, a matter of “caprice.”¹⁰⁷

Justice Jackson’s most fundamental objection to the CIMT provisions is that they presuppose the implausible: an American consensus as to what constitutes “moral turpitude.” Decades earlier, Judge Hand had also observed that, given the diversity of views in our large nation, a judge would have difficulty surveying “what people feel”; nonetheless, he did not dispute that Congress “may make [a CIMT] a ground for deportation.”¹⁰⁸ Justice Jackson, by contrast, concluded that the CIMT provisions failed to supply “an intelligible definition of deportable conduct.”¹⁰⁹

104. *De George*, 341 U.S. at 234 (Jackson, J., dissenting).

105. *Id.* at 239.

106. *Id.* at 239 n.13.

107. *Id.*

108. *United States ex rel. Iorio v. Day*, 34 F.2d 920, 921 (2d Cir. 1929).

109. *De George*, 341 U.S. at 245 (Jackson, J., dissenting).

Justice Jackson's dissenting opinion has lately become a banner waved by scholars and academics, protesting that the phrase "crimes involving moral turpitude" is incurably vague. Most notably, in 2016, Judge Posner cited Justice Jackson's opinion in *Jordan v. De George* as a "great dissent" and a demonstration that "[i]t is preposterous that that stale, antiquated, and, worse, meaningless phrase should continue to be a part of American law."¹¹⁰ As it happened, in the very year *De George* was decided, Congress was debating a momentous change to immigration law. Did it take note of Justice Jackson's concerns in formulating the new law?

C. *The 1952 Act: Preservation of CIMTs After Elaborate Study*

The short answer is: Yes, but not in a way that would have been satisfactory to Justice Jackson.

Members of Congress revealed a familiarity with the *De George* decision in debates about the proposed immigration law. For example, on May 14, 1952, Senator Humphrey questioned the constitutionality of a provision that would have given the Attorney General the discretion to deport aliens solely on the ground that the alien knowingly engaged in "activities which would be prejudicial to the public interest."¹¹¹ According to Senator Humphrey, given the "vagueness of what may be prejudicial to our interest," the provision could not be "reconcile[d]" with *De George*.¹¹² *De George* was thus understood to stand for the proposition that the criteria for deportation must be sufficiently precise to survive due process scrutiny. It is noteworthy, then, that Senator Humphrey recognized this principle but did not indicate that he believed the CIMT provisions violated it.¹¹³

110. *Arias v. Lynch*, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring).

111. 98 CONG. REC. S5,161 (daily ed. May 14, 1952) (statement of Sen. Humphrey).

112. *Id.*

113. On the same day, Senator Benton discussed the CIMT language, without any suggestion that he regarded it as vague or unconstitutional. *Id.* at 5,155-56.

A comprehensive 1947 Senate report, weighing in at 953 pages, canvassed the myriad issues raised by federal immigration law, including the implementation of the CIMT provisions regarding exclusion and deportation. The Report referenced the recommendation of an American consul in Marseilles that Congress provide a “listing of crimes and circumstances comprehended within the meaning of ‘moral turpitude.’”¹¹⁴ But the Report then noted contrary opinions from several other immigration officials. One official recognized that it might be, as a theoretical matter, preferable to articulate a list of deportable crimes but that in practice it would be difficult to formulate a catalog “broad enough to cover the various crimes contemplated by the law.”¹¹⁵ The Report quoted another official who wrote that if the law was designed to exclude the “criminally inclined,” then “the test of the statute as now written is as good as any that can be inserted in any law.”¹¹⁶

The Report was sensitive to the concern that the term is “vague,” has not been “definitely and conclusively defined by the courts,” and is “dependent to some extent on the state of public morals.”¹¹⁷ But the Report also identified a “sufficiently clear” definition of moral turpitude from a court opinion:

[Moral turpitude is an] act of baseness or vileness in the private and social duties that a man owes to his fellow man or society. And, adapting this, we may say that a crime involves moral turpitude when it manifests on the part of the perpetrator personal depravity or baseness.¹¹⁸

114. S. REP. NO. 81-1515, at 353 (1947).

115. *Id.*

116. *Id.*

117. *Id.* at 351.

118. *Id.* (citation omitted).

The Report, after observing that the courts were in general agreement as to what crimes constituted CIMTs,¹¹⁹ concluded by embracing the continuation of the CIMT provisions in the law.¹²⁰

Adopting the recommendations of the Report, the 1952 law preserved CIMTs in immigration law, for purposes of admission and deportation, in a manner almost identical to the 1917 law. To the chagrin (again) of the *Harvard Law Review*, “the need for clarification was ignored.”¹²¹ The origin of this “need” was obscure: as the article conceded, in the heartland of cases, whether or not a crime constituted a CIMT was well defined.¹²² Notably, larceny and fraud, even when seemingly trivial, did not escape condemnation as crimes of moral turpitude.¹²³ The one case that dared to compromise this principle involved a conviction for petty larceny, when the alien was a minor; nonetheless, the court acknowledged its own audacity and paid homage to the doctrine that, “[i]t is of course true that all aliens are here on sufferance.”¹²⁴

At least through the 1970s, also squarely in the “moral turpitude” camp were crimes involving sexual impropriety. In *Babouris v. Esperdy*,¹²⁵ for example, the alien, convicted of two counts of “soliciting men for the purpose of committing a crime against nature,” objected that the crime did not qualify as a CIMT. The court curtly rejected the claim: “Appellant stresses the comparatively trivial sentences imposed upon him. The sentence imposed, however,

119. *Id.* at 351–52 (observing that forgery, embezzlement, and larceny, had been found to be CIMTs, whereas not paying a ship fare or carrying a concealed weapon had not).

120. *Id.* at 353.

121. *Developments in the Law: Immigration and Nationality*, 66 HARV. L. REV. 643, 655 (1953).

122. *Id.* (recognizing that “[l]arceny, criminal fraud with respect to property, and perjury have been held to involve moral turpitude, while disorderly conduct, carrying a concealed weapon, criminal libel, and juvenile delinquency do not”).

123. See, e.g., *Burr v. INS*, 350 F.2d 87, 91–92 (9th Cir. 1965) (holding that issuing a check without sufficient funds was a CIMT).

124. *Tutrone v. Shughnessy*, 160 F. Supp. 433, 437 (S.D.N.Y. 1958).

125. 269 F.2d 621 (2d Cir. 1959).

does not qualify or alter the nature of the crime.”¹²⁶ The court is here making the point, discussed earlier in the context of manslaughter, that the punishments imposed by the criminal law are only imperfect proxies for moral turpitude. Manslaughter is often punished by years in prison but may not be a CIMT, whereas crimes of sexual impropriety can be less severely punished but (at least in this period) were uniformly held to be CIMTs. The moral obliquity of a crime—the concern of immigration law—is only incompletely captured by the punishment assigned by the criminal law.

This point regarding crimes of sexual impropriety is also made in *Velez-Lozano v. INS*.¹²⁷ The petitioner, an alien who had resided in the United States for nearly five years, was charged with consensual sodomy with a woman who was not his wife.¹²⁸ He was convicted and sentenced to three years imprisonment, all of which was suspended.¹²⁹ He appealed his deportation order.¹³⁰ With arresting brevity, the D.C. Circuit rejected his “lengthy argument”:

Sodomy is a crime of moral turpitude in Virginia, § 18.1-212, and is still considered a felony in the District of Columbia, 22 D.C. Code 3502. Similarly, the Board has held the crime of solicitation to commit sodomy was a crime involving moral turpitude as early as 1949.¹³¹

One might object that the question of whether a crime is a CIMT should be assessed by the moral views of the whole country, not two states. In 1970 all or almost all states criminalized sodomy, but in some jurisdictions there was a defense, which might have been available to Velez-Lozano, when the crime occurred in a “private

126. *Id.* at 623.

127. 463 F.2d 1305 (D.C. Cir. 1972).

128. *Id.* at 1307.

129. *Id.*

130. Although the crime occurred in Arlington, Virginia, the appeal from the deportation order was taken to the D.C. Circuit. *Id.* at 1306.

131. 463 F.2d at 1307.

place.”¹³² Furthermore, the fact that an activity has been criminalized does not necessarily mean that the relevant crime is a CIMT.¹³³ The very existence of the category, “crimes involving moral turpitude,” assumes that there are activities that the legislature has criminalized that do *not* involve moral turpitude. To this, the court in *Velez-Lozano* offered no clear response, perhaps assuming that any reader would recognize that crimes of sexual impropriety, whatever the punishment assigned by the court, necessarily involve moral turpitude. And clinching this conclusion was the court’s recognition that it was the long-settled judgment of the Board of Immigration Appeals that sodomy was a CIMT.¹³⁴ Indeed, all courts of appeal in this period, apart from the Ninth Circuit, recognized, either implicitly or explicitly, that the BIA’s construal of the statutory phrase “crimes involving moral turpitude” was owed a measure of judicial deference.¹³⁵

132. See, e.g., *United States v. Lemons*, 697 F.2d 832, 838 (8th Cir. 1983) (Arkansas statute criminalizing sodomy “in a public place or public view”).

133. The Virginia statute did not designate the crime as one that involved moral turpitude. See Va. Code. Ann. § 18.1-212 (1950) (“If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a felony.”) (quoted in Ellen Ann Andersen, *The Stages of Sodomy Reform*, 23 T. MARSHALL L. REV. 283, 298 (1998)).

134. *Velez-Lozano*, 463 F.2d at 1307 (“[T]he Board has held the crime of solicitation to commit sodomy was a crime involving moral turpitude as early as 1949.”).

135. See, e.g., *Cabral v. INS*, 15 F.3d 193, 195 (1st Cir. 1994) (deferring to the BIA’s conclusion that accessory after the fact to murder was a CIMT; “We therefore inquire whether the agency interpretation was arbitrary, capricious, or clearly contrary to the statute.”); *Okoroha v. INS*, 715 F.2d 380, 382 (8th Cir. 1983) (deferring to the BIA’s conclusion that possession of stolen mail was a CIMT; “This court . . . must give deference to an agency’s interpretation of a statute it is charged with administering”). The Fifth Circuit took the position that the BIA’s construction of federal law was entitled to deference, but not its determination of the elements of state law. See, e.g., *Hamdan v. INS*, 98 F.3d 183, 185 (5th Cir. 1996) (“We must uphold the BIA’s determination of what conduct constitutes moral turpitude [under the INA] if it is reasonable. However, a determination that the elements of a crime constitute moral turpitude for purposes of deportation pursuant to [the INA] is a question of law, which we review *de novo*.”).

During this period, there were close or “peripheral”¹³⁶ cases, and the BIA and courts were not averse to reviewing the “record of the conviction,” including the indictment, to resolve whether a crime, as committed, was a CIMT. The Ninth Circuit carved out as narrow a definition of CIMTs as might be plausibly (and sometimes implausibly) inferred from the statutory text and evolving case law.¹³⁷ This may have reflected a diminishing attachment to the background principle that aliens are here on sufferance. Consider that a court in 1958 gruffly informed an alien present in America for decades, expelled for a long-ago crime, that “he has no one to blame but himself, for his behavior has certainly not been what this country had the right to expect of an alien living here at its sufferance.”¹³⁸ This once oft-repeated meme, in its various formulations,¹³⁹ gradually fell out of favor.

As already discussed, some of the most difficult crimes to categorize were those that involved inchoate acts of violence. Even in homicide cases, the BIA and courts required evidence that the crime reflected a consciously evil design: negligently causing a death was not a CIMT. Recklessness is the great puzzle for the criminal law. Assuming, as Judge Bennett did in *Franklin v. INS*,¹⁴⁰ that a CIMT presumes a “readiness to do evil,”¹⁴¹ then there is a legitimate debate, already noted,¹⁴² as to whether recklessly causing a death qualifies as a CIMT. The facts of Myrisia Franklin’s case highlight the difficulty. While pregnant with her fourth child, Franklin failed

136. *Franklin v. INS*, 72 F.3d 571, 595 (8th Cir. 1995) (Bennett, J., dissenting).

137. The Ninth Circuit adopted the view that, “For crimes . . . that are not of the gravest character, a requirement of fraud has ordinarily been required.” *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995). For a criticism of this approach, see *infra* at text accompanying notes 180–92 and 306–07.

138. *Cartellone v. Lehmann*, 255 F.2d 101, 102 (6th Cir. 1958).

139. See, e.g., *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 223 (1953) (“Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government.”).

140. 72 F.3d 571 (8th Cir. 1995).

141. *Id.* at 601 (Bennett, J., dissenting).

142. See *supra* text accompanying notes 87–94.

to seek medical treatment for her three-year-old son after her son's father violently assaulted him; she was sentenced to three years of incarceration for involuntary manslaughter.¹⁴³ There was, we must assume, evidence beyond a reasonable doubt that she was conscious of the mortal risk to her child. However, exploring whether her failure to seek aid promptly constituted a "readiness to do evil" would launch us into deep philosophical waters. The panel majority remained safely grounded by applying the categorical approach—that is, it never considered the facts of the case—and deferring to the BIA's conclusion that, in the abstract, the conscious creation of a substantial and unjustified risk amounts to moral turpitude.¹⁴⁴ The one and one-half page majority opinion elicited a thirty-three page dissenting opinion which ventilated a congeries of concerns about the CIMT doctrine.¹⁴⁵

Yet Judge Bennett's dissenting opinion in *Franklin* was the only sustained criticism of the CIMT language in this period. Throughout the 1990s, not a single case questioned the constitutionality of the CIMT language, and most courts assumed that the agency's determination that a crime was a CIMT was entitled to deference. It was against this backdrop of judicial opinions that Congress embarked on yet another major piece of immigration legislation.

D. The 1996 Act: Further Expansion of CIMTs to Crimes Punishable by One Year's Imprisonment

The 1996 Immigration and Naturalization Act was the culmination of years of debate. Although major provisions in the 1952 law were reconsidered and jettisoned, the 1996 Act significantly broadened the scope of the CIMT provisions: amendments to then-existing immigration law rendered an alien deportable on the basis of a

143. See *Franklin*, 72 F.3d at 580 n.6 (Bennett, J., dissenting).

144. See *id.* at 572–73 (majority opinion).

145. *Id.* at 573–606 (Bennett, J., dissenting).

CIMT for which there was simply the possibility of a year's imprisonment, even if no term of incarceration was imposed.¹⁴⁶

In 1995, Senator Roth came closest to suggesting a radical approach to deportable offenses that would obviate the CIMT provisions. Arguing in favor of a proposal to "dramatically simplify[]" the law governing deportation, he observed that "criminal aliens have already been afforded all the substantial [sic] due process required under our system of criminal justice . . ."¹⁴⁷ He added that "[f]urther simplification could be achieved if Congress were to eliminate the current distinctions among aggravated felonies, crimes of moral turpitude and drug offenses and simply make all felonies deportable offenses."¹⁴⁸ In later debates, Senator Dole admitted that the CIMT phrase was "vague" and "lack[ed] the certainty we should desire."¹⁴⁹ But his point in making this observation was not to call into question the phrase's legitimacy, but to emphasize the need for a new provision that made all crimes of domestic violence deportable offenses. As Senator Dole correctly observed, "Simple assault or assault and battery are not necessarily going to be interpreted as crimes of moral turpitude."¹⁵⁰ Elsewhere, Senator Dole made a comment that suggests a familiarity with the prevailing categorical approach judges used to determine whether a crime was a CIMT.¹⁵¹

Interpreting the 1996 Act, most courts of appeal have continued to embrace the categorical approach (narrowing the focus to the record of conviction), but some have suggested a willingness to

146. Pub. L. No. 104-132, 110 Stat. 1214, 1274, § 435. This amendment to then-existing law was sufficiently uncontroversial that it emerged from committee by a voice vote. *House Judiciary Committee Clears Criminal Alien Legislation*, 72 Interpreter Releases 199 (1996).

147. S. REP. NO. 104-48, at 3 (1995).

148. *Id.* at 4.

149. 142 CONG. REC. S4058-59 (daily ed. Apr. 24, 1996).

150. *Id.*

151. He said: "Whether a crime is one of moral turpitude is a question of State law and thus varies from State to State." *Id.*

look beyond the elements of the offense to ascertain whether the crime, as committed, was a CIMT.¹⁵² Confronting this division of authorities, Attorney General Mukasey issued a decision in 2008 that embraced a more fact-based approach, authorizing judges “to the extent they deem it necessary and appropriate [to] consider evidence beyond the formal record of conviction.”¹⁵³ Several courts of appeal balked, refusing to accord *Chevron* deference to the *Mukasey* decision. In *Prudencio v. Holder*,¹⁵⁴ for example, the Fourth Circuit held that no deference to the Attorney General was appropriate because “the moral turpitude statute is not ambiguous.”¹⁵⁵ The court then rejected the BIA’s conclusion that a twenty-year-old alien, who had had sex with a thirteen-year-old girl, infecting her with a sexually transmitted disease,¹⁵⁶ had committed a crime involving moral turpitude. The panel majority arrived at this remarkable conclusion by diligently averting its gaze from the facts of the case and then straining its imagination and hypothesizing cases involving the charged offense that would allegedly not have presupposed moral turpitude.¹⁵⁷ A dissenting Judge Shedd responded:

I find it difficult—if not impossible—to accept that Congress intended for persons such as Prudencio to remain in the United States “simply because there might

152. See Piotr M. Matusiak, *Overcoming the Labyrinth: Embracing Attorney General Mukasey’s Silva-Trevino Decision*, 2016 MICH. ST. L. REV. 215, 231–35 (2016).

153. Silva-Trevino, 24 I. & N. Dec. 687, 690 (Att’y. Gen. 2008), *vacated* 26 I. & N. Dec. 550 (Att’y. Gen. 2015).

154. 669 F.3d 472, 482 (4th Cir. 2012).

155. *Id.*

156. *Id.* at 487 (Shedd, J., dissenting).

157. The majority reasoned as follows: The statute under which Prudencio was convicted had two subsections. See *id.* at 476–77 (majority opinion). Although no one seems to have doubted that he was convicted under the second subsection, involving carnal knowledge, the first subsection punishes “[a]ny person 18 years of age or older . . . who willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected.” *Id.* That subsection could be violated if an adult induced the minor to commit trespassing. *Id.* at 485. It was thus conceivable that the crime, as committed, would not involve moral turpitude. See *id.* at 486.

have been no moral turpitude in the commission by other individuals (real or hypothetical) of crimes described by the wording of the same statute under an identical indictment.”¹⁵⁸

Judge Shedd’s observation that this was not a result intended by Congress can be filed under the header of “truer words were never spoken.” Nonetheless, the case appropriately turned not on congressional intent but on the text of the law. Even here, the panel majority’s conclusion is dubious;¹⁵⁹ at a minimum, *Prudencio* suggests that a Rubicon in the mental landscape has been traversed, and far behind us is the unforgiving realm in which aliens are deemed present merely on sufferance.

In the face of such judicial headwinds, Attorney General Holder conceded defeat in 2015 and vacated the 2008 *Mukasey* decision.¹⁶⁰ Divisions persist in the courts of appeal on the appropriateness of the categorical approach,¹⁶¹ and members of Congress have indi-

158. *Id.* at 488 (Shedd, J., dissenting) (quoting *Marciano v. INS*, 450 F.2d 1022, 1027 (8th Cir. 1971) (Eisele, J., dissenting)).

159. Even assuming that courts owe no deference to the BIA’s interpretation of the statutory language, and even assuming that the BIA was foreclosed from considering the arrest warrant, surely the “record of conviction” includes the fact that *Prudencio* was sentenced to twelve months’ incarceration, *see id.* at 473; such a sentence would not have been imposed for the trivial infractions fancifully imagined by the panel majority.

160. *Matter of Silva-Trevino*, 26 I. & N. Dec. 550 (Att’y Gen. 2015).

161. The BIA followed up with another decision, *Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016), which explicitly declined to settle the matter. In determining whether a crime constituted a CIMT, the BIA observed that some courts look to “the least culpable conduct hypothetically necessary to sustain a conviction under the statute,” whereas others look to “the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction.” *Id.* at 832. The BIA then stated that the BIA would apply the latter approach, “unless controlling circuit law expressly dictates otherwise.” This Article will not directly engage the literature that developed in this area, except to note that the “least culpable” test risks making a mockery of the CIMT language. Even courts supposedly employing the “realistic probability” test seem to do so in a way that is wholly unrealistic. *See, e.g., Menendez v. Whitaker*, 908 F.3d 467, 473 (9th Cir. 2018) (apparently regarding it as “realistic” that a hug at a Halloween party could give rise to a criminal conviction, *see infra* note 192). One method of constraining the imagination of appellate judges and introducing a measure of rationality to the

cated that they are aware of the confusion. Senator Cornyn and others have introduced bills that would authorize officials and judges to look beyond the record of conviction, to plea colloquies and even police reports.¹⁶² Although those bills have not gained traction, some observers have complained that the BIA has moved toward a less categorical, more fact-based approach in determining whether a crime was a CIMT.¹⁶³

With respect to the substantive question—what is the meaning of “crime involving moral turpitude”?—the past twenty years have witnessed a growing disconnect between the academic community and many judges on the one hand, and Congress on the other. Federal judges, who are regularly in the business of construing unartfully drafted statutes, have openly criticized the phrase. It has been called “notoriously plastic”¹⁶⁴ and “the quintessential example of an ambiguous phrase”;¹⁶⁵ the jurisprudence surrounding it has been called an “amorphous morass.”¹⁶⁶ Judge Posner’s concurring opinion in *Arias v. Lynch*¹⁶⁷ is characteristically uninhibited in its condemnation. According to Judge Posner, the phrase is “preposterous,” “stale,” and “arbitrary”; echoing the 1929 Harvard Law Review student note, Judge Posner contended the phrase is infused

CIMT case law would be to consider the sentence imposed. Immigration law specifically states that the sentence is part of the record of conviction, 8 U.S.C. § 1229a(c)(3)(B)(ii) (2018), and several courts have recognized that the sentence imposed is indeed part of the record of conviction. *See, e.g., Fajardo v. Att’y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011); *Daibo v. Att’y Gen.*, 265 F. App’x 56, 59 (3d Cir. 2008); *Wala v. Mukasey*, 511 F.3d 102, 108 (2d Cir. 2007) (quoting *Dickson v. Ashcroft*, 346 F.3d 44, 53 (2d Cir. 2003)). For a persuasive argument to bring order in this area of the law, see *Matusiak*, *supra* note 152, at 267.

162. 163 CONG. REC. S4801 (daily ed. Aug. 3, 2017) (statement of Sen. Cornyn); Building America’s Trust Act, S. 1757, 115th Cong. § 404 (2017); SECURE Act of 2017, S. 2192, 115th Cong. § 1404 (2017).

163. *See, e.g., Koh*, *supra* note 18, at 270 (“[S]ince *Silva-Trevino III*, the Board’s decisions suggest the existence of an unstated backlash against the categorical approach”).

164. *Ali v. Mukasey*, 521 F.3d 737, 739 (7th Cir. 2008).

165. *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 (9th Cir. 2009) (en banc).

166. *Partyka v. Att’y Gen.*, 417 F.3d 408, 409 (3d Cir. 2005) (Berzon, J., dissenting).

167. 834 F.3d 823 (7th Cir. 2016).

by “antiquated” ideas (“base, vile, or depraved”), and that the distinctions that are drawn amount to irrational “gibberish.”¹⁶⁸ Some of the examples that Judge Posner cited do not merit such vitriol. For example, he noted that one state regards possession of cocaine as a CIMT but another regards possession of marijuana as not a CIMT.¹⁶⁹ The distinction between cocaine (criminalized in every American jurisdiction) and marijuana (decriminalized de jure in many states and de facto in many more) permeates American criminal law in 2020. In any event, Judge Posner’s condemnation of the concept of CIMT was unnecessary to the resolution of the case before him. As he observed, the crime at issue—using a false social security card to obtain employment—was probably not a CIMT under existing case law, as there was no intent to defraud. (There was no “victim,” as the petitioner paid taxes.)

Judge Posner did not argue that the phrase “crimes involving moral turpitude” should be struck down as unconstitutional, but two Ninth Circuit judges have “joined the chorus of voices calling for renewed consideration as to whether the phrase ‘crimes involving moral turpitude’ is unconstitutionally vague.”¹⁷⁰ The argument has been percolating in the academic literature for over a decade,¹⁷¹ but it has become more viable in the light of a trilogy of Supreme Court cases deploying the void-for-vagueness doctrine to hold the phrase “crime of violence” unconstitutional.¹⁷² I explore this argument in the next Part.

168. *Id.* at 831 (Posner, J., concurring).

169. *Id.* at 832.

170. *Barbosa v. Barr*, 919 F.3d 1169, 1175 (9th Cir. 2019) (Berzon, J., concurring); *see also Islas-Veloz v. Whitaker*, 914 F.3d 1249, 1257 (9th Cir. 2019) (Fletcher, J., concurring).

171. *See supra* note 18.

172. The more modest argument in the academic literature is that Congress or the BIA should step in and replace the CIMT doctrine with a distinction that is easier to apply and, supposedly, more reliably tracks modern intuitions about which crimes involve the greatest moral impropriety. *See, e.g.,* Brian C. Harms, *Redefining “Crimes Of Moral Turpitude”: A Proposal to Congress*, 15 *GEO. IMMIGR. L.J.* 259, 278 (2001).

Given the multiplication of criminal laws, courts of appeal are more often deciding novel CIMT issues. But Judge Colloton's opinion in *Bakor v. Barr*¹⁷³ suggests that traditional principles are adequate to the task even when the criminal offenses are of recent vintage. In that case, the alien had been convicted of two crimes under Minnesota law: fifth degree criminal sexual conduct and failure to register as a sex offender. With respect to the first offense, defined as "intentional touching" of another's "intimate parts," Judge Colloton held that the offense could be construed either as nonconsensual sexual conduct or as aggravated assault; either way, under long-established precedents, the offense qualified as a CIMT.¹⁷⁴ Failure to register as a sex offender was a more difficult issue, as the offense could be cast as a *malum prohibitum* offense, in which case the weight of opinion has been that the imputation of moral turpitude was inappropriate. Judge Colloton sensibly argued that the "bright line" that is said to exclude regulatory crimes from the CIMT categorization is doubtful, at least when the law's intent is to protect "vulnerable victims" and the mens rea upon which the offense is predicated is *willful* conduct.¹⁷⁵

Judge Colloton's approach to CIMTs may be a beacon unto those judges who conceive their duty as straightforwardly applying the statutory language within the body of precedents that already exists; other judges seem to regard CIMT cases as an arena in which to indulge their cleverness at the expense of a supposedly obtuse BIA. Illustrative of this latter category is *Garcia-Martinez v. Barr*.¹⁷⁶ The Seventh Circuit reversed the BIA's conclusion that being an accomplice in an assault with a deadly weapon was a CIMT. The

173. 958 F.3d 732 (8th Cir. 2020).

174. *Id.* at 736.

175. Judge Colloton distinguished sex registration offenses in which negligence would suffice to convict. His approach would also mean that regulatory crimes in which there is no discrete class of vulnerable victims would not be CIMTs. See *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993) (reversing a BIA decision that structuring financial transactions to avoid currency report was a CIMT).

176. 921 F.3d 674, 677 (7th Cir. 2019).

opinion lingered over the fact that the only act committed by the alien was that he tripped the victim, adding, archly, that “the Board did not decide whether the foot for this purpose was deadly.”¹⁷⁷ Playing for easy laughs, the court here committed an elementary error: to be an accomplice in an assault *with a deadly weapon* one must knowingly align oneself with *that* venture.¹⁷⁸ There is, moreover, a vast gulf that separates Scenario 1, in which A trips V while B slaps V, and Scenario 2, in which A trips V while B is applying a bat to V’s head *and A knows that B is wielding a bat*. Most people would have little difficulty concluding that Scenario 1 is not a CIMT, but Scenario 2 is.

The Ninth Circuit has been a trailblazer in the past decade in its ever-narrowing reading of the CIMT provisions. Rejecting the BIA’s conclusions and granting petitions for review, the court has concluded that the following crimes are not CIMTs: misdemeanor false imprisonment;¹⁷⁹ misprision of a felony;¹⁸⁰ simple kidnapping;¹⁸¹ commission of a felony “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members”;¹⁸² witness tampering;¹⁸³ perjury;¹⁸⁴ identity theft;¹⁸⁵

177. *Id.* at 677.

178. *See* *Rosemond v. United States*, 572 U.S. 65, 76 (2014) (citations omitted) (“[A] person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense’s commission. An intent to advance some different or lesser offense is not, or at least not usually, sufficient: Instead, the intent must go to the specific and entire crime charged . . .”).

179. *See* *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 628–29 (9th Cir. 2010).

180. *See* *Robles-Urrea v. Holder*, 678 F.3d 702, 712 (9th Cir. 2012). The underlying felony was conspiracy to distribute marijuana and cocaine. *See In re Robles-Urrea*, 24 I.& N. Dec. 22, 23 (B.I.A. 2006). The alien was sentenced to nine months’ imprisonment. *Id.*

181. *See* *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1218 (9th Cir. 2013).

182. *See* *Hernandez-Gonzalez v. Holder*, 778 F.3d 793, 797 (9th Cir. 2015) (quoting Cal. Penal Code § 186.22(b)(1)).

183. *See* *Escobar v. Lynch*, 846 F.3d 1019, 1021 (9th Cir. 2017).

184. *See* *Rivera v. Lynch*, 816 F.3d 1064, 1075 (9th Cir. 2016).

185. *See* *Linares-Gonzalez v. Lynch*, 823 F.3d 508, 515–16 (9th Cir. 2016).

fleeing a police officer;¹⁸⁶ committing lewd and lascivious conduct upon a fourteen or fifteen year-old child;¹⁸⁷ and robbery in the third degree.¹⁸⁸ In arriving at these conclusions, the Ninth Circuit has employed a definition of CIMTs (“[o]nly truly unconscionable conduct”)¹⁸⁹ that reflects an unwarranted contraction from the traditional definition of CIMTs.¹⁹⁰ When the Ninth Circuit’s depleted notion of what constitutes moral turpitude is paired with a comically inventive use of the categorical approach, the results can be irrational, as in the court’s conclusion in *Menendez v. Whitaker*¹⁹¹ that committing lewd and lascivious conduct upon a fourteen or fifteen year-old child is not a CIMT because one could be guilty of this offense if, for instance, one hugged a minor dressed as an adult at a Halloween party.¹⁹²

The CIMT language presupposes the exercise of discretion and judgment—there is no algorithm that solves for “moral turpitude.” Cases such as *Menendez* suggest that some judges are not exercising

186. See *Ramirez-Contreras v. Sessions*, 858 F.3d 1298, 1306 (9th Cir. 2017).

187. See *Menendez v. Whitaker*, 908 F.3d 467, 474 (9th Cir. 2018).

188. See *Barbosa v. Barr*, 926 F.3d 1053, 1059 (9th Cir. 2019).

189. See *Robles-Urrea v. Holder*, 678 F.3d 702, 708 (9th Cir. 2012).

190. See *United States ex rel. Mylius v. Uhl*, 203 F. 152, 154 (S.D.N.Y. 1913) (“An act of baseness, vileness, or depravity in the private or social duties which a man owes to his fellow man or to society.”). The 1947 Senate Report used an almost identical definition. See S. REP. NO. 81-1515, *supra* note 114.

191. 908 F.3d 467 (9th Cir. 2018).

192. One judge posed the following “Halloween party hypothetical” at oral argument:

A criminal defendant is charged with hugging someone at a Halloween party thinking that they were 19 years old. The defendant is 24 years old, thinking . . . the victim is 19 years old, turns out the victim is 14 years old, but the criminal defendant had every reason to think the person was 19-year-old. Of course, they said, they were 19, they had a college ID with them saying they were sophomore [sic] in college. You can think of the many reasons why someone could make themselves look like they’re 19 when they’re 14.

Transcript of Oral Argument, *Menendez v. Sessions*, No. 14-72730, 2018 WL 1426516 (9th Cir. Feb. 8, 2018). In what world this person would not only be indicted for lewd and lascivious conduct against a minor but also convicted and then sentenced to six month’s incarceration, as was this defendant, is hard to say, but it is undoubtedly several thousand miles from California.

that discretion consistent with the statutory text, let alone in a manner that reflects a background interpretative principle that aliens are present at the host country's pleasure.¹⁹³ The Ninth Circuit is not alone in disfiguring the CIMT caselaw with questionable decisions.¹⁹⁴ Even so, the "patchquilt" quality¹⁹⁵ of the CIMT case law can be overstated: If the denominator is the number of CIMT immigration cases and the numerator is the number of petitions for review granted, the relevant number is still very small.¹⁹⁶

Yet in the midst of judicial and scholarly disapproval of CIMTs, members of Congress continue to use the phrase without any indication that they regard it as unconstitutionally vague. Even members of Congress sympathetic to loosening standards for admission of aliens and for restricting grounds for deportation have never proposed to abandon the CIMT language. One of the most commonly offered amendments to the 1996 immigration law has been to restore language from the 1952 law that made a CIMT relevant for immigration purposes only if the alien was actually incarcerated for one year for the offense.¹⁹⁷ In response to criticisms that bills

193. In *Zadvydas v. Davis ex rel. Mezei*, 533 U.S. 678 (2001), a dissenting Justice Scalia quoted from an older case for the proposition that "[n]othing in the Constitution requires the admission or sufferance of aliens." *Id.* at 703 (quoting *Shaughnessy v. United States*, 345 U.S. 206, 222 (1953)) (Scalia, J., dissenting). According to Justice Scalia, the majority declined to overrule *Mezei* but only because it "obscure[d] it in a legal fog." *See id.* at 703.

194. Consider the Second Circuit's opinion in *Mendez v. Barr*, 960 F.3d 80 (2d Cir. 2020). Following Ninth Circuit precedent, the court in *Mendez* rejected the BIA's conclusion that misprision of a felony is a CIMT. *See id.* at 85. The opinion turned on what it means to "conceal" a felony, and the panel majority strung together a "grab bag" of inapposite cases to manufacture the implausible argument that accidental concealment is legally adequate for a misprision of felony conviction. *See id.* at 92 (Sullivan, J., dissenting). Other circuits have rejected the Second and Ninth Circuits' conclusions on this point. *See, e.g., Patel v. Mukasey*, 526 F.3d 800, 803–04 (5th Cir. 2008); *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002).

195. *See Crimes Involving Moral Turpitude, supra* note 17, at 117.

196. *See infra* note 280 and accompanying text.

197. For example, the Immigrant Fairness Restoration Act of 2000 aimed to return to the pre-1996 definition, reserving deportation for aliens *sentenced* to a year in prison for a crime involving moral turpitude. Immigrant Fairness Restoration Act of 2000, S. 3120,

they have sponsored would allow criminals to enter the country and become citizens, Democrats have often *approvingly* cited the language in the current law that guarantees the inadmissibility and deportability of those convicted of CIMTs. For instance, while discussing the Securing America's Borders Act in 2006, Senator Kennedy rejected the claim that the Act was necessary to ensure that criminals were ineligible for permanent resident status, drawing attention to the "sweeping changes" to immigration laws that already foreclose those convicted of crimes, such as CIMTs, from eligibility for a green card.¹⁹⁸ Two years ago, Representative Lofgren corrected a fellow representative who had argued that aliens convicted of a DUI could escape immigration consequences.¹⁹⁹ She observed that "one conviction for DUI with a suspended license[,]" where the driver knew that her license was suspended, would constitute a CIMT.²⁰⁰ In addition, repeated efforts to introduce a bill giving privileged refugee status to Liberians, which finally succeeded, have all excluded those convicted of a CIMT.²⁰¹

Outside the immigration context, members of Congress continue to use the phrase "crimes involving moral turpitude." This typically occurs when identifying grounds for the removal of government officials and judges and the stripping of government pensions.²⁰² The phrase was also used when discussing President

106th Cong. § 4 (2000); *see also* 146 CONG. REC. S9388-89 (daily ed. Sept. 27, 2000) (statement of Sen. Leahy).

198. *See* 152 CONG. REC. S2591 (daily ed. Mar. 30, 2006) (statement of Sen. Kennedy).

199. *See* 165 CONG. REC. H4290 (daily ed. June 4, 2019) (statement of Rep. Lofgren).

200. *See id.* Representative Lofgren is correct that a DUI while driving on a suspended license is a CIMT, *see* *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc); however, "'a simple DUI offense' will almost never rise to the level of moral turpitude," *see* *Knapik v. Ashcroft*, 384 F.3d 84, 90 (3d Cir. 2004) (quoting *Matter of Lopez-Mena*, 22 I. & N. Dec. 1188 (B.I.A. 1999)).

201. *See, e.g.*, *Liberian Refugee Immigration Fairness Act of 1999*, S. 656, 106th Cong. § 2 (1999); *Liberian Refugee Immigration Fairness Act of 2013*, S. 527, 113th Cong. § 2 (2013); *National Defense Authorization Act for Fiscal Year 2020*, Pub. L. No. 116-92, § 7611 (2019).

202. *See generally* *White House Accountability Act*, S. 2000, 104th Cong. § 471(e)(1)(D) (1996).

Clinton's impeachment trial, with one Senator observing that "[c]ommitting crimes of moral turpitude such as perjury and obstruction of justice go to the heart of qualification for public office."²⁰³ And, notwithstanding academic scoffing,²⁰⁴ the doctrine of "crimes involving moral turpitude" remains a fixture in professional licensing law, with regulatory bodies throughout the country using the criterion to expel some who are among their ranks and to disqualify others from joining.²⁰⁵ The doctrine attracted notice last year when it was discovered that receipt of Covid-19 relief was, according to long-standing, albeit obscure, Small Business Association regulations, contingent upon business owners not having been convicted of a "felony or crime of moral turpitude."²⁰⁶ This regulation is evocative of the use of CIMTs in immigration law: one is not entitled to an SBA loan. It is a supererogatory gesture, albeit one that must be dispensed in a just and rational manner. CIMTs provide such a sorting function here, as they do in the context of immigration law, where, at least according to the older view, an alien cannot demand the right to remain in a country but may do so only as long as he or she observes the moral traditions of that country.

203. 145 CONG. REC. S1781, S1789–90 (daily ed. Feb. 23, 1999) (statement of Sen. Hatch).

204. See, e.g., Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 LAW & SOC. INQUIRY 1027, 1033–34 (2018).

205. The catalog of professions that continue to use "moral turpitude" to screen applicants and expel members is long, extending well beyond the familiar ones of law and medicine. See, e.g., Sutton, Mo. Admin 15-1012 CB, 2016 WL 3456667, at *1 (Mo. Admin. Hrg. Comm. May 4, 2016) (cosmetologist); Florida Chapter 61B-60.003(a)(1), <http://www.myfloridalicense.com/Dbpr/lsc/documents/YSRules.pdf> [<https://perma.cc/5LAA-W8GX>] (ship broker).

206. See *Ineligible Businesses and Eligible Passive Companies*, 13 C.F.R. § 120.110(n) (2020). The regulation was referenced in a lawsuit brought by a former felon challenging restrictions in the Coronavirus Aid, Relief, and Economic Security Act. See *Verified Complaint for Declaratory and Injunctive Relief, Carmen's Corner Store v. SBA*, No. 1:20-cv-01736-GLR, 2020 WL 3254359, at ¶ 60 (D. Md. June 10, 2020); Pub. L. No. 116-136 (2020).

In short, the criticism of CIMTs in the judicial and scholarly arenas has not secured purchase in America at large or in the halls of Congress. Democrats and Republicans, those in favor of liberalizing and those in favor of restricting immigration, all regard the doctrine as eminently sensible. This makes all the more remarkable the mounting argument that the doctrine is so irrational and vague as to be unconstitutional. We now turn to that argument.

II. THE NEW VOID-FOR-VAGUENESS CHALLENGE TO THE CIMT PROVISIONS

In the decades after *De George* was decided, void-for-vagueness challenges to the CIMT language were seldom raised and peremptorily rejected. Recently, however, several judges, litigants, and law review authors have revived the argument. This Part will first lay out an argument for reconsidering *De George* and holding the CIMT provisions unconstitutional under the more robust “void for vagueness” doctrine articulated by the Supreme Court over the past decade. The Part will then present a refutation, which focuses on the crucial difference between immigration law and criminal law. Under the correct understanding of the void-for-vagueness doctrine, the CIMT provisions are constitutional.

A. *The Argument That “Crimes Involving Moral Turpitude” is Unconstitutionally Vague*

The constitutional challenges to the CIMT provisions begin with the supposed errors in Chief Justice Vinson’s *De George* opinion. These errors are said to have eroded the opinion’s solidity as a precedent and invited its reconsideration.²⁰⁷ The majority opinion in *De*

207. See Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WISC. L. REV. 1127, 1179 (“The federal judiciary need not prolong its endorsement of CIMTs. Courts are likely to hear arguments that the CIMT definition is void for vagueness . . .”).

George emphasized that the CIMT language had been a part of immigration law for “sixty years.”²⁰⁸ Yet time bestows veneration only on those laws that prove themselves in the cauldron of experience, and, as a dissenting Justice Jackson observed, this cannot be said of the provisions in immigration law that use the CIMT language.²⁰⁹ According to the critics, as the conflicting precedents multiply, the respect due the CIMT language²¹⁰—and *De George* for upholding that language—allegedly evaporates.

Moreover, legal developments have strengthened the constitutional argument. At the time *De George* was decided, the void-for-vagueness doctrine²¹¹ was exclusively designed to ensure that penal laws put people on notice as to the conduct that was proscribed: “Every man should be able to know with certainty when he is committing a crime.”²¹² In the second half of the twentieth century, the Court’s void-for-vagueness doctrine took a “leap forward” by adding a second goal: the need to curtail arbitrary enforcement.²¹³ As

208. See *Jordan v. De George*, 341 U.S. 223, 229 (1951).

209. See *id.* at 238 (Jackson, J., dissenting).

210. See, e.g., Lee & Kornegay, *supra* note 18, at 57 (“This amorphous standard has resulted in a tangle of inconsistent rulings affording little predictability.”).

211. The academic literature on the doctrine dates back to a student note by Anthony Amsterdam. See generally Anthony Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Then came the law review articles, invariably commenting on the “murk[iness]” of the doctrine, before proposing ways to reframe, recast, or reconceptualize it. See Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL’Y & L. 1, 3 (1997); John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 242 (2002) (“[O]ne of the subjects that defies principled reasoning is the concept of vagueness in the criminal law”); Ryan McCarl, *Incoherent and Indefensible: An Interdisciplinary Critique of the Supreme Court’s “Void-for-Vagueness” Doctrine*, 42 HASTINGS CONST. L.Q. 73, 73 (2014) (“The void-for-vagueness doctrine is a confusing conceptual thicket.”). This author will resist the urge to wander into this rabbit warren, but he does recommend one recent article for its comprehensive survey and insightful proposal. See Michael J. Zydney Mannheimer, *Vagueness As Impossibility*, 98 TEX. L. REV. 1049, 1114 (2020).

212. E.g., *United States v. Reese*, 92 U.S. 214, 220 (1875).

213. See Lee & Kornegay, *supra* note 18, at 84; Koh, *supra* note 207, at 1134–36.

the Court explained in *Papachristou v. City of Jacksonville*,²¹⁴ striking down a vagrancy law, the challenged ordinance was void “both in the sense that it ‘fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,’ and because it encourages arbitrary and erratic arrests and convictions.”²¹⁵ The “fair notice” and the “arbitrary enforcement” rationales supply independent grounds for striking down a law as unconstitutionally vague.²¹⁶ The CIMT provisions are, according to this argument, doubly unconstitutional: they fail to provide notice as to the forbidden conduct, and they endow executive officials with untrammelled power. As one author writes, “[T]he term CIMT casts judges in the role of God, deciding according to the ‘moral standards prevailing at time.’”²¹⁷

The Court’s void-for-vagueness doctrine has recently acquired greater prominence. In a trilogy of cases, the Supreme Court relied upon the vagueness rationale to strike down language in federal law that had existed for years. In *Johnson v. United States*,²¹⁸ the Court held that “violent felony,” as defined in the residual clause of the Armed Career Criminal Act, was unconstitutionally vague because of its “hopeless indeterminacy.”²¹⁹ In *Sessions v. Dimaya*,²²⁰ the Court found that “crime of violence,” as defined in 18 U.S.C. § 16(b), and cross-referenced in the Immigration and Nationalization Act (INA), was likewise unconstitutionally vague.²²¹ Finally, in

214. 405 U.S. 156 (1972).

215. *Id.* at 162 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)) (citations omitted).

216. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

217. Holper, *supra* note 18, at 701.

218. 576 U.S. 591 (2015).

219. *Id.* at 598.

220. 138 S. Ct. 1204 (2018).

221. *See id.* at 1215.

Davis v. United States,²²² the Court struck down the phrase “crime of violence,” as it appears in 18 U.S.C. § 924(c)(3)(B).²²³

The trilogy supplies a roadmap for constitutional challenges to CIMTs in immigration law. In *Johnson*, the contested language provided that a “violent felony” was any felony that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”²²⁴ Previous case law had held that when inquiring whether an offense was a violent felony, courts should adopt a “categorical approach”: the question was not how much risk was created in the crime as it was committed, but how much is created categorically, in the “ordinary case.”²²⁵ Given this “categorical approach,” Justice Scalia held that “violent felony” was unconstitutionally vague for two reasons: First, there is “grave uncertainty” as to what constitutes an “ordinary case”; and second, even if one could identify the “ordinary case,” it is unclear what degree of risk constitutes “serious potential risk.”²²⁶

The application of this reasoning to CIMTs in immigration law is clear. Courts have adopted a categorical approach to CIMTs, inquiring not about an individual crime as it was committed but often hypothesizing the “least culpable conduct” that has given rise to a conviction.²²⁷ If the charged crime is indecency with a minor, for example, courts are foreclosed from considering the actual ages of the defendant and victim, but must consider the “least culpable conduct” that could generate a conviction under the statute. But what does “least culpable conduct” mean? Even if the actual victim

222. 139 S. Ct. 2319 (2019).

223. *See id.* at 2324.

224. 576 U.S. at 591.

225. *See Taylor v. United States*, 495 U.S. 575, 600 (1990).

226. 576 U.S. at 597–599.

227. *See, e.g., Moreno v. Attorney General*, 887 F.3d 160, 163 (3d Cir. 2019) (citations omitted) (“Under our precedent, we apply the categorical approach to determine whether moral turpitude inheres in a particular offense. Our inquiry proceeds in two steps. First, we must ‘ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute.’”).

was fourteen years old and the actual defendant sixty years old, are courts obliged to imagine that the victim was sixteen and the defendant thirty? Or seventeen and twenty-one? “Is the federal court in [this] immigration case going to go to that extreme length in hypothesizing innocuous fact situations, or is the federal court . . . going to stick to locally familiar anecdotes?”²²⁸ Furthermore, how much moral impropriety is needed for a finding of “moral turpitude?” Is it moral turpitude for a twenty-five year-old to have sex with a sixteen year-old? And says who?

Moreover, almost any crime carries an attribution of moral fault, but how much fault constitutes “moral turpitude”? Even the most serious crimes, such as premeditated murder, can be committed in ways that are not acutely probative of moral fault.²²⁹ If courts are required to consider the “least culpable conduct” that can give rise to a conviction, most crimes can escape a finding of moral turpitude.²³⁰ With respect to “violent felony,” Justice Scalia observed that there is “pervasive disagreement” in the lower courts about what constitutes a crime of violence.²³¹ The same could be said for CIMTs. The decades of judicial struggles have demonstrated, it is said, that

228. Lee & Kornegay, *supra* note 18, at 114.

229. For instance, conviction for premeditated first-degree murder can follow from an agonized mercy killing. *State v. Forrest*, 362 S.E.2d 252 (N.C. 1987). More generally, homicide and murder are regarded as the most heinous of crimes. Yet these legal categories capture a spectrum of unlawful killings that vary widely in their moral culpability. In addition, accomplice liability and felony murder rules, as well as a general disregard for motives (as illustrated by the case of Clyde Forrest), result in a heterogeneous moral collection of offenses falling under the header of “homicide” and “murder.” *See, e.g., Hines v. State*, 578 S.E.2d 868 (Ga. 2003) (felony murder conviction and life without parole sentence affirmed, when the predicate felony was being a felon in possession of a firearm and the defendant had accidentally caused a friend’s death during a hunting trip); Adam Liptak, *Serving Life For Providing Car to Killers*, N.Y. TIMES (Dec. 4, 2007), <https://www.nytimes.com/2007/12/04/us/04felony.html?ref=topics> [<https://perma.cc/R4G-8LMH>] (felony murder conviction for person who lent his car to housemates, who then robbed a drug dealer and accidentally killed the dealer’s daughter).

230. Kornegay & Lee, *supra* note 18, at 115.

231. *Johnson*, 576 U.S. at 601.

the indeterminacy is sufficiently “grave” that a void-for-vagueness challenge is compelling.²³²

In *Johnson*, the government argued that even if “violent felony” is indeterminate in some cases, there are others that are “straightforward.”²³³ To this, Justice Scalia responded that the number of “straightforward” cases may be overstated,²³⁴ which is equally true of CIMTs. Moreover, he rejected the contention that “a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.”²³⁵ And likewise again for CIMTs: even if some crimes “clearly” involve moral turpitude, the phrase generates uncertain answers for many other crimes and must therefore be struck down.²³⁶

In *Dimaya*,²³⁷ the Court expanded upon *Johnson* in ways that could prove significant in the context of a challenge to CIMTs. *Dimaya* turned on a provision in the INA that provides for the deportation of any alien convicted of an “aggravated felony,” a term that includes “crime of violence,” as defined by 18 U.S.C. § 16(b).²³⁸ Not surprisingly, the government’s first argument, attempting to distinguish *Johnson*, was that “a less searching form of the void-for-vagueness doctrine applies,” because this was not a criminal case

232. Cf. Clancey Henderson, *Stemming the Expansion of the Void-for-Vagueness Doctrine Under Johnson*, 2019 UTAH L. REV. 237, 258 (2019) (“It was only after the Court’s failed efforts that Justice Scalia reiterated that ‘the life of the law is experience’ and concluded that the Court’s poignant experience with the residual clause over a decade left only ‘guesswork and intuition.’”).

233. 576 U.S. at 602.

234. *Id.*

235. *Id.*

236. See Koh, *supra* note 207, at 1130 (“[B]y dispensing with the requirement that a statute be vague in all of its applications in order to run afoul of due process, *Johnson* thus potentially invigorates the vagueness doctrine, and has particularly strong implications for immigration provisions . . .”).

237. 138 S. Ct. 1204 (2018).

238. *Id.* at 1207; 18 U.S.C. § 16(b) defines a “crime of violence” to encompass “any . . . offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” 18 U.S.C. § 16(b) (2018).

but an immigration matter.²³⁹ Justice Kagan responded that *De George* foreclosed this argument, as the Court in that case applied “the established criteria of the ‘void for vagueness’ doctrine’ applicable to criminal laws.”²⁴⁰ She added:

Nothing in the ensuing years calls that reasoning into question. This Court has reiterated that deportation is “a particularly severe penalty,” which may be of greater concern to a convicted alien than “any potential jail sentence.” And we have observed that as federal immigration law increasingly hinged deportation orders on prior convictions, removal proceedings became ever more “intimately related to the criminal process.”²⁴¹

In sum, Justice Kagan argued that following *De George*, “the same standard” should be applied in the two settings.²⁴² Justice Gorsuch’s concurring opinion not only purported to give an originalist basis for this conclusion, but also seemed to suggest, sweepingly, that the void-for-vagueness doctrine operated as broadly in the civil context as it does in the criminal context.²⁴³

In the final installment of the void-for-vagueness trilogy, *United States v. Davis*,²⁴⁴ the government argued that any vagueness problems with the phrase “crime of violence” could be avoided if the language were not construed to require the hypothesizing “categorical approach.”²⁴⁵ Instead of expecting courts to identify the inherent “nature” of any given criminal offense—an insuperably difficult task for reasons cataloged by Justice Scalia in *Johnson*²⁴⁶—the

239. *Dimaya*, 138 S. Ct. at 1212.

240. *Id.* at 1213 (quoting *Johnson v. DeGeorge*, 341 U.S. 223, 231 (1951)).

241. *Id.* (citations omitted) (quoting *Jae Lee v. United States*, 137 S. Ct. 1958, 1968 (2017); *Chaidez v. United States*, 568 U.S. 342, 352 (2013)).

242. *Id.*

243. *Id.* at 1246 (Gorsuch, J., concurring in part and concurring in the judgment).

244. 139 S. Ct. 2319 (2019).

245. *Id.* at 2327.

246. *See supra* at text accompanying note 226.

statute's ambiguous language should be construed to allow immigration officials and judges to consider the concrete facts of a crime, as it was committed.²⁴⁷ Justice Gorsuch rejected the government's argument, hewing to the categorical approach and holding that the "constitutional avoidance" canon has never been used to expand the reach of a criminal statute.²⁴⁸ That holding, it will be argued, forecloses an analogous argument the government could raise in the CIMT context: Abandoning the categorical approach to CIMTs and adopting a fact-based approach would impermissibly expand the reach of the law—that is, by resulting in the removal of aliens who had committed offenses that would not qualify, categorically, as CIMTs.

As a recent amicus brief filed with the Supreme Court argued, if the statutory phrases "violent felony" and "crimes of violence" are unconstitutionally vague, then the phrase "crimes involving moral turpitude" cannot survive a constitutional challenge.²⁴⁹ Given the "incommensurability of morality" and the fact that "the concept of moral turpitude will always fluctuate with differences of time, culture, and locality," it is a hopeless task to clarify the phrase to achieve sufficient certainty.²⁵⁰ It is, according to this argument, time to relegate the antiquated CIMT provisions to the dustbin of history.

247. *Davis*, 139 S. Ct. at 2349–50 (2019) (Kavanaugh, J., dissenting). For example, it is unclear whether, in the abstract, conspiracy to commit a Hobbs Act violation is a violent offense, but the question is easier to answer with respect to a concrete example, when the facts of a case are considered. As Justice Kavanaugh argued in dissent, "By any measure, Davis and Glover's conduct during the conspiracy was violent." *Id.* at 2338.

248. *Id.* at 2332 (majority opinion). Justice Gorsuch argued that adopting the more fact-based approach "would cause [the provision's] penalties to apply to conduct they have not previously been understood to reach: categorically nonviolent felonies committed in violent ways." *Id.*

249. Brief of Amici Curiae Law Professors, *Islas-Veloz v. Barr* (2019) (No. 19-627), 2019 WL 7049908.

250. *Id.* at *7–*8.

B. *The Argument That “Crimes Involving Moral Turpitude” Survives Constitutional Scrutiny*

As we have seen in the previous Part, the linchpin of the argument that the CIMT provisions are unconstitutional is that the void-for-vagueness doctrine supplies, in the words of Justice Kagan, the “same standard” in criminal law and in immigration law. This Part will refute this argument, emphasizing the differences between immigration law and criminal law. Drawing upon recent scholarship, this Part will argue that the void-for-vagueness doctrine, properly understood, focuses on laws that are so indefinite that compliance is impossible. Subjecting aliens to the CIMT provisions raises none of the unfairness issues, either regarding lack of notice or arbitrary discretion, that are addressed by the void-for-vagueness doctrine.

For starters, little weight should be ascribed to the *De George* Court’s statement that the same due process standards apply in criminal law and in immigration law: the question was not briefed and the Court’s treatment of it was conclusory.²⁵¹ If we are to reconsider the Court’s conclusion that the CIMT provisions are constitutional, it is only appropriate likewise to reconsider the premise of that holding.

Justice Kagan did not entirely rely on precedent. She also observed that the consequences of an adverse ruling in an immigration proceeding can amount to a “severe penalty.”²⁵² However true, this alone does not justify the importation of the same procedural protections required in a criminal trial. The manifold protections of

251. Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and concurring in the judgment) (“Sound judicial decisionmaking requires ‘both a vigorous prosecution and a vigorous defense’ of the issues in dispute” (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978))).

252. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018).

the criminal justice system—the privilege against self-incrimination,²⁵³ the power to suppress illegally obtained evidence,²⁵⁴ the duty to provide *Miranda* warnings,²⁵⁵ the right to be free from cruel and unusual punishments,²⁵⁶ the right to state-appointed counsel,²⁵⁷ the right to be free from *ex post facto* laws,²⁵⁸ and the like—are not afforded aliens in removal proceedings. One might argue that the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel, by their plain text, and the *ex post facto* law, by long-established precedent,²⁵⁹ apply only to criminal matters. The same cannot be said of the Fourth Amendment, which broadly proscribes all unreasonable searches and seizures. Nonetheless, the exclusionary rule, imposed in all criminal matters, applies only in egregious cases in immigration matters: the Court has emphasized that such hearings are noncriminal in nature,²⁶⁰ notwithstanding the fact that deportation can deprive a man “of all that makes life worth living.”²⁶¹ Thus, the oft-repeated statement that due process applies in immigration matters must be read in tandem with the equally oft-repeated statement that “control over matters of immigration is a sovereign prerogative, largely within

253. *Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011).

254. *Yanez-Marquez v. Lynch*, 789 F.3d 434, 445–46 (4th Cir. 2015).

255. *Guzman-Aranda v. Sessions*, 887 F.3d 205, 214 (9th Cir. 2017).

256. *Sunday v. Attorney Gen.*, 832 F.3d 211, 218–19 (3d Cir. 2016).

257. *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1045 (9th Cir. 2012).

258. *Harisiades v. Shaughnessey*, 342 U.S. 580, 594 (1952). If the Court were to strike down the CIMT provisions as intolerably vague, a puzzling conclusion would result: it would be unconstitutional to remove an alien on the basis of a criterion (“crimes involving moral turpitude”) that has been embedded in immigration law for over a century because that term fails to provide adequate notice, but it would be constitutional to remove an alien on the basis of a criterion that did not exist *at all* when the triggering offense was committed.

259. *See Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798).

260. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

261. *Galvan v. Press*, 347 U.S. 522, 530 (1954) (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

the control of the executive and the legislature.”²⁶² Summary procedures, which would plainly offend due process in a criminal case, are tolerated in immigration matters, precisely because they are regarded as a different “context.”²⁶³

It has indeed never been the case that the void-for-vagueness doctrine was applied in the same way in the immigration and criminal law contexts. As Justice Thomas observed, a criminal law that punished “moral turpitude” could never survive constitutional scrutiny, but immigration law has long been understood to attach consequences to crimes involving moral turpitude.²⁶⁴ As early as 1885, for example, an Arkansas court overturned a conviction for an act “against public morals,” with the observation, “We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion.”²⁶⁵ By contrast, it is constitutional, the Supreme Court has held, to attach adverse immigration consequences to having a “psychopathic personality.”²⁶⁶ This is a condition so imprecise that it is inconceivable, as Justice Thomas observed, that it could satisfy due process if it supplied the basis of a criminal offense.²⁶⁷

It is true that in recent years the void-for-vagueness doctrine has acquired new rationales—such as the prohibition of “arbitrary and discriminatory enforcement”²⁶⁸—and migrated to distant corners of

262. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982); *see also Hinds v. Lynch*, 790 F.3d 259, 279 (1st Cir. 2015) (citation omitted) (“Nor do we gainsay that ‘the Due Process Clause applies to all “persons” within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.’ But, at least when delineating those classes of aliens who are removable, the Constitution in its fullest application places little substantive limit on Congress’s reasonable policy decisions.” (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001))).

263. *Rusu v. INS*, 296 F.3d 316, 321 (4th Cir. 2002) (“[H]earing procedures that comport with due process in the asylum context might well be unacceptable in other proceedings.”).

264. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1248 (2018) (Thomas, J., dissenting).

265. *Ex parte Jackson*, 45 Ark. 158, 164 (1885).

266. *Boutilier v. INS*, 387 U.S. 118, 123–24 (1967).

267. *Dimaya*, 138 S.Ct. at 1247 (Thomas, J., dissenting).

268. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

the legal system. This development has prompted Justice Thomas to liken the doctrine, both in its legitimacy and its metastasizing quality, to substantive due process. Justice Gorsuch has engaged Justice Thomas and defended the void-for-vagueness doctrine on originalist grounds.²⁶⁹ However, in a recent article, *Vagueness as Impossibility*, Professor Michael Mannheimer persuasively argues that Justice Gorsuch's effort has failed.²⁷⁰ Professor Mannheimer's article is a pathbreaking contribution to a crowded field of academic scholarship in this area. He contends that the void-for-vagueness doctrine is "best understood as an instantiation of Lord Coke's ancient dictum that a statute cannot compel that the 'impossible . . . be performed.'"²⁷¹ This formulation admirably captures the historic contours of the void-for-vagueness doctrine, but it raises questions about some of the more recent applications, including the trilogy of

269. It is striking that the two most outspokenly originalist judges on the Court today, Justices Thomas and Gorsuch, have staked out opposite positions on the void-for-vagueness doctrine, with Justice Thomas exhibiting wariness about what he has depicted as its alarming growth, *see Johnson v. United States*, 576 U.S. 591, 607–08 (2015) (Thomas, J., concurring); *Dimaya*, 138 S. Ct. at 1244 (Thomas, J., dissenting), and Justice Gorsuch embracing a more robust doctrine, *see id.* at 1223 (Gorsuch, J., concurring). Given the indisputably originalist understanding that Congress exercised plenary power in this area, *id.* at 1249 (Thomas, J., dissenting) ("When our Constitution was ratified, moreover, '[e]minent English judges, sitting in the Judicial Committee of the Privy Council, ha[d] gone very far in supporting the . . . expulsion, by the executive authority of a colony, of aliens.'" (alteration in original) (quoting *Demore v. Kim*, 538 U.S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in the judgment))), Justice Gorsuch's confident extension of the doctrine to immigration matters seems unwarranted, *see Jennifer Gordon, Immigration As Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 *IND. L.J.* 653, 655–56 (2018) ("In *Sessions v. Dimaya*, a 5-4 majority of the Supreme Court reached new heights of constitutional oversight of Congress's actions on immigration, for the first time striking down a substantive deportation ground as unconstitutional after finding that it was void for vagueness. Rather than approaching plenary power doctrine head on, the 5-4 majority in *Dimaya* simply ignored it, robustly reviewing the immigration statute without referring to the doctrine.").

270. Professor Mannheimer argues that Justice Gorsuch's account of the earlier cases was mistaken: he confused cases applying the rule that penal statutes should be strictly construed with cases striking down statutes as unconstitutionally vague. *See Mannheimer, supra* note 211 at 1069–73.

271. *Id.* at 1054.

cases that would likely form the basis for the newly minted challenge to the CIMT provisions.

As Professor Mannheimer argues, the void-for-vagueness doctrine is a protection against laws so indefinite that they quite literally demand the impossible. For example, a law that requires individuals to calculate a commodity's price under perfect market conditions ("what the community would have given for them if the continually changing conditions were other than they are") demands the impossible.²⁷² By contrast, the laws at issue in *Johnson* and *Dimaya* did not demand the impossible. In the former, the Armed Career Criminal Act provided for enhanced penalties upon conviction for being a felon in possession if one had committed three or more "violent felonies"; in the latter, 18 U.S.C. § 16(b) provided for removal of an alien who committed a "crime of violence." Professor Mannheimer concludes:

Looked at through the lens of impossibility, these cases were wrongly decided. For an alien to avoid virtually automatic deportation, and for a federal felon to avoid being sentenced as a recidivist, he need not do the impossible. Even pursuant to these admittedly imprecisely worded statutes, he need only refrain from committing a felony or, at the least, refrain from committing a felony that could possibly be considered to engender a serious or substantial risk of force against, or injury to, another.²⁷³

This was essentially the same point made by Justice Alito, dissenting in *Johnson*: due process requires that one know whether one's conduct is criminal or not, but "[d]ue process does not require . . . that a 'prospective criminal' be able to calculate the precise penalty that a conviction would bring."²⁷⁴

272. *Int'l Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 223 (1914).

273. Mannheimer, *supra* note 211, at 1112.

274. *Johnson v. United States*, 576 U.S. 591, 630 (2015) (Alito, J. dissenting).

Along with Professor Mannheimer's article, Justice Alito's dissenting opinion draws attention to the gulf that separates the foundational due process cases and some of the more recent applications. Vastly different procedural protections are appropriate when (a) the question is whether conduct is proscribed *at all* and (b) the question is the extent of the penalty, direct and indirect, that attaches to a criminal conviction. In category (a), the void-for-vagueness principle is primarily important in ensuring that an individual was, *ex ante*, put on notice that the conduct was contrary to law. In *Papachristou*, for example, the statute criminalized "habitual loafers."²⁷⁵ The vagueness of the phrase is manifest: many a law professor would be obliged to wonder, day to day, whether he or she is running afoul of this prohibition. By contrast, in category (b), the person is on notice that the conduct was contrary to law. The substantially less compelling narrative is "I knew that my conduct was a felony, but I could not price the cost because I was unclear on the penalty." The foundational "void-for-vagueness" cases do not have this aspect. As Justice Alito observed in *Johnson*, the concerns that vague laws will "trap the innocent" have no force "when it comes to sentencing provisions."²⁷⁶

With the further extension of the void-for-vagueness doctrine to immigration matters—that is, the indirect consequences of a criminal conviction—the doctrine takes flight to even more distant lands. Consider a recent certiorari petition filed by an alien convicted of Medicare fraud and tax fraud; he asked the Supreme Court to strike

275. 405 U.S. at 156 n.1.

276. 576 U.S. at 630 (Alito, J. dissenting). Consider, furthermore, that for much of American history many felonies were punishable by a wide range of prison terms, subject only to the unfettered discretion of the trial judge. For example, an early nineteenth century New York statute provided the crime of simple assault was punishable by up to fourteen years in prison. See Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 68 n.29 (1993). Obviously, such a scheme would not satisfy void-for-vagueness concerns if the standard were applied in the "same" way to sentencing as it does to guilt.

down the CIMT provisions as unconstitutionally vague.²⁷⁷ Such petitioners concede they were committing crimes, and they concede they knew a punishment including incarceration for at least a year was attached to each of those crimes; the claim is that they did not know that, after violating clearly demarcated crimes and being sentenced to clearly foreseeable punishments, they might have then been subject, as a collateral consequence, to deportation. This argument, a frail one to begin with, has been rendered vaporous in light of *Padilla v. Kentucky*,²⁷⁸ which requires a criminal defense lawyer to “advise a noncitizen client that pending charges may carry adverse immigration consequences.”²⁷⁹ When an alien pleads guilty to a crime, as the above petitioner did, we must now assume that his lawyer informed him that there are potentially adverse consequences in immigration law; these consequences may include a finding that violating clearly demarcated criminal laws, with clearly foreseeable penalties, may include a subsequent finding that said laws will be judged CIMTs. Where, then, is the unfairness, when that is exactly what happens?

The vaporous claim that the use of the CIMT provisions to trigger removal is unfair is rendered evanescent in the overwhelming majority of cases. There is, at any given time, broad agreement as to which offenses qualify as CIMTs and which do not. My research indicates that in 2019 there were only six cases in which courts of appeals granted petitions for review from BIA decisions on the ground that the agency erroneously concluded that the alien’s crime was a CIMT.²⁸⁰ Given the thousands of removal proceedings

277. Petition for Writ of Certiorari at 2, *Chhabra v. Lynch*, 137 S. Ct. 678 (2017) (No. 16-630), 2016 WL 6679341.

278. 559 U.S. 356 (2010).

279. *Id.* at 369.

280. Two such cases involved the perennial issue of how to categorize assault. *See Garcia-Martinez v. Barr*, 921 F.3d 674, 676 (7th Cir. 2019); *Hernandez v. Whitaker*, 914 F.3d 430, 432 (6th Cir. 2019). Three others involved associational crimes, where there was uncertainty as to whether the crime which the alien joined was itself a CIMT. *See Cabrera v. Barr*, 930 F.3d 627, 630 (4th Cir. 2019); *Marinelarena v. Barr*, 930 F.3d 1039,

per year, and given the dozens of petitions for review denied, the area of law is not nearly as incomprehensible as advertised. To the extent that the courts of appeal *have* generated inconsistent results, and to the extent that uniformity and predictability are goals in immigration law, then the obvious solution is judicial deference to the reasoned framework put forward by the Attorney General and BIA as to what constitutes a CIMT.²⁸¹ One cannot complain that it is a “fool’s errand to try to lend coherence to CIMTs in immigration law” and then object to embarking on a path likely to arrive at coherence.²⁸² Likewise, one cannot simultaneously insist that immigration officials inquire whether a crime was a CIMT in a rigidly categorical way, blind to all of the circumstances of a case, and then object that the results in any given case are irrational.²⁸³ The solution to this problem, assuming it is a problem, is for immigration officials and judges to consider, as necessary, the “record of conviction,” which would give a fuller sense of what crime was actually committed. Given that this was a common approach in the courts of appeals at the time Congress enacted the 1996 Act,²⁸⁴ it is fair to assume that this was the inquiry Congress intended immigration officials to conduct.²⁸⁵

1042 (9th Cir. 2019); *Garcia-Morales v. Barr*, 792 F. App’x. 618, 619 (10th Cir. 2019). In only one other case—involving an offense straddling the line between larceny and joy-riding—did a court of appeals outright reject the BIA’s conclusion that a crime was a CIMT. *Barbosa v. Barr*, 926 F.3d 1053, 1056 (9th Cir. 2019). (In another case a court of appeal remanded for further explanation from the BIA, conceding that one of the government’s arguments, raised in briefing, was “compelling,” but the agency did not rely on that reasoning in its decision.” *Flores v. Barr*, 791 F. App’x. 222, 226 (2nd Cir. 2019)).

281. See *Matusiak*, *supra* note 152, at 219–20.

282. See *Yeatman*, *supra* note 15.

283. Cf. *Johnson v. United States*, 576 U.S. 591, 624 (2015) (Thomas, J., concurring in the judgment) (“Having damaged the residual clause through our misguided jurisprudence, we have no right to send this provision back to Congress and ask for a new one.”).

284. See *supra* at text accompanying notes 134–35.

285. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379 (1982) (presuming that Congress was aware of the legal background when it reenacted a law).

As noted earlier, apart from concerns about statutes that provide inadequate notice, the void-for-vagueness doctrine acquired a new rationale about fifty years ago—as a check against laws that encourage (or simply authorize) arbitrary and discriminatory enforcement. It is an irony, rich for those inclined to savor it, that the Court, when deploying this doctrine to invalidate laws it deems unduly vague, has been itself notoriously indifferent to precision.²⁸⁶ One can criticize the arbitrary enforcement rationale as hopelessly inconsistent in application²⁸⁷ and little more than a warrant for judicial activism,²⁸⁸ but let us assume it should be given some scope in the immigration context. To be sure, the phrase “moral turpitude,” when viewed in isolation, is so much in the eye of the beholder that

286. In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Court invalidated a statute because it “encourage[d] arbitrary and erratic arrests and convictions.” *Id.* at 162. That same year, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court replaced “arbitrary and erratic arrests and convictions” with “arbitrary and discriminatory enforcement.” *Id.* at 108. Two years later, in *Smith v. Gogon*, 415 U.S. 566 (1974), the Court tried out another test: “a legislature [must] establish minimal guidelines to govern law enforcement.” *Id.* at 574. In *Kolender v. Lawson*, 461 U.S. 352 (1983), the Court returned to “not encourage arbitrary and discriminatory enforcement,” *id.* at 357, but some cases, in a spirit of linguistic play, suggested that the doctrine should be used to invalidate statutes that do not simply encourage, but merely authorize arbitrary and discriminatory enforcement, *see City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Then in 2008, the Court seemed to narrow the doctrine, restricting its application to a law “so standardless that it authorizes or encourages seriously discriminatory enforcement.” *United States v. Williams*, 553 U.S. 285, 304 (2008). But then in *Sessions v. Dimaya*, 138 U.S. 1204 (2018), the Court returned to: “the doctrine guards against arbitrary or discriminatory law enforcement.” *Id.* at 1212. For an excellent summary of these developments through 2010, see Christina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L., POL’Y & ETHICS J. 255, 273–75 (2010).

287. Professor Mannheimer points out that, notwithstanding the hullabaloo occasionally raised about imprecise statutes inviting untrammelled judicial discretion and arbitrary administrative enforcement, “it is equally well settled that a narrowing judicial construction can save an otherwise vague statute from unconstitutionality” and “an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.” Mannheimer, *supra* note 211, at 1088, 1092 (citations omitted).

288. *See* Lockwood, *supra* note 286, at 298 (arguing that the second prong of the void-for-vagueness doctrine is a license for “unwarranted judicial activism” and should be dropped).

arbitrary enforcement would seem inevitable. It is in this spirit that critics have alleged that the CIMT provisions invest untrammelled discretion in executive branch officials, enabling them to “play God.”

But the actual criterion for removal is not “moral turpitude,” but “crimes involving moral turpitude,” a legislative term that has existed for over a century and that has been substantially channeled through case law. Thus, when an immigration official or judge adjudicates an alien deportable, he or she is required to determine that the offensive act is (1) a state or federal crime punishable by more than a year in prison, and (2) a crime of moral turpitude, *as defined by case law and the national community*. Step (1) could not be more objective and constrained, therewith narrowing discretion and foreclosing a vagueness challenge.²⁸⁹ And even step (2) presupposes an inquiry into the views of the community. As Judge Learned Hand observed, in this task, the judge “must be loyal” to “accepted moral notions . . . , so far as we can ascertain [them].”²⁹⁰ To a great extent, these “accepted moral notions” have been clarified by precedent, which further constrains discretion. There is not “pervasive disagreement about the nature of the inquiry one is sup-

289. Furthermore, the BIA and courts of appeal have clarified that only statutes that are punishable by a year in prison *and that include a scienter requirement* qualify as CIMTs. *Michel v. INS*, 206 F.3d 253, 263 (2d Cir. 2000) (“corrupt scienter is the touchstone of moral turpitude”). Courts have deemed this significant when evaluating statutes for unconstitutional vagueness. *See Gonzalez v. Carhart*, 550 U.S. 124, 149 (2007) (“The Court has made clear that scienter requirements alleviate vagueness concerns.”); *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 13–14 (1st Cir. 2011) (rejecting vagueness challenge to ordinance that authorized police to intervene when there was a “substantial disturbance,” because the ordinance clarified that a “violation of law” was “a condition precedent to police intervention . . .”).

290. *United States ex rel. Iorio v. Day*, 34 F.2d 920, 921 (2d Cir. 1929). The case is discussed *supra* at text accompanying notes 75–80.

posed to conduct and the kinds of factors one is supposed to consider.”²⁹¹ As Judge Colloton’s opinion in *Bakor v. Barr*²⁹² demonstrates, judges are usually able to accomplish this task, even when evaluating statutes that have not been construed before, by drawing upon a thick body of precedent and the sort of analogical reasoning that is an ordinary part of the judicial task.

But in the rare case a statute will present itself for which there is no precedent to which the case can be easily analogized. This task is indisputably difficult. For a century, however, members of Congress on both sides of the political aisle have thought it prudent to invest immigration officials with the power to exclude and deport aliens on this basis. The final Part will consider a recent case of first impression. Through a study of this case, we can evaluate whether the critics have fairly portrayed both how vague the CIMT provisions are and how unconstrained immigration officials have been when enforcing them.

III. A CASE STUDY: COCKFIGHTING AND THE MATTER OF ORTEGA-LOPEZ

In 1976, Congress enacted the Animal Welfare Act Amendments,²⁹³ amended by the Animal Fighting Prohibition Enforcement Act of 2007,²⁹⁴ which criminalizes the exhibition or sponsoring of animals in fighting ventures.²⁹⁵ In 2008, football player Michael Vick was sentenced under this statute to twenty-three months in

291. *Johnson v. United States*, 576 U.S. 591, 601 (2015). For an insightful application of this test, see Emily M. Snoddon, *Clarifying Vagueness: Rethinking the Supreme Court’s Vagueness Doctrine*, 86 U. CHI. L. REV. 2301, 2352–53 (2020).

292. 958 F.3d 732 (8th Cir. 2020). See *supra* at text accompanying notes 173–75.

293. Pub. L. No. 94-279, § 17, 90 Stat. 421 (1976).

294. Pub. L. No. 110-22, § 3, 121 Stat. 88 (2007). See Francesca Ortiz, *Making the Dog-man Heel: Recommendations for Improving the Effectiveness of Dogfighting Laws*, 3 STAN. J. ANIMAL L. & POL’Y 1, 75 (2010).

295. 7 U.S.C. § 2156 (2018); 18 U.S.C. § 49(a) (2018).

prison for his role in a dog fighting conspiracy.²⁹⁶ If we judge by the stiff sentence Vick received and the withering rebukes he endured in the national press, the crime is taken seriously by many Americans. But no court had ever decided whether a violation of 7 U.S.C. § 2156(a)(1) (for sponsoring or exhibiting an animal in a fighting venture) qualified as a CIMT until the issue was posed by Augustin Ortega-Lopez.

Ortega-Lopez is a Mexican citizen who immigrated to the United States without legal authorization in 1992.²⁹⁷ In 2009, he pled guilty to a violation of 7 U.S.C. § 2156(a)(1), and the Department of Homeland Security initiated deportation proceedings against him.²⁹⁸ In 2011, the immigration judge who heard his case ruled that his cock-fighting conviction was a CIMT and that therefore Ortega-Lopez was ineligible for cancellation of removal. Ortega-Lopez appealed to the BIA, which in 2013 affirmed the finding of the immigration judge.²⁹⁹ In 2016, Ortega-Lopez sought review in the Ninth Circuit. The court hesitated to affirm the BIA's decision because, under its precedents, "[n]on-fraudulent crimes of moral turpitude almost always involve an intent to harm someone, the actual infliction of harm upon someone, or an action that affects a protected class of victim."³⁰⁰ It remanded the case to the BIA for a fuller explanation of how sponsoring or exhibiting a chicken in a cockfight was a CIMT, adding that it would be inadequate to observe that all fifty

296. Adam Kurland, *The Prosecution of Michael Vick: Of Dogfighting, Dual Sovereignty, Depravity and "A Clockwork Orange,"* 21 MARQ. SPORTS L. REV. 465, 467 (2011).

297. Maura Dolan, *Federal Appeals Court Sides with Immigrant Convicted of Cockfighting,* L.A. TIMES (Aug. 23, 2016), <https://www.latimes.com/local/lanow/la-me-ln-cock-fighting-20160823-snap-story.html> [<https://perma.cc/P6DJ-VYN4>].

298. *Id.*

299. Matter of Augustin Ortega-Lopez, 26 I. & N. Dec. 99 (BIA 2013) ("*Ortega-Lopez I*"). Ortega-Lopez's first name is misspelled ("Augstin") in Westlaw's version of this case. See DOJ original at https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3777_correction.pdf [<https://perma.cc/X823-DGQA>].

300. Ortega-Lopez v. Lynch, 834 F.3d 1015, 1018 (9th Cir. 2016) ("*Ortega-Lopez II*") (quoting Nunez v. Holder, 594 F.3d 1124, 1127 (9th Cir. 2010)).

states criminalized this activity.³⁰¹ In August 2018, the BIA reaffirmed its previous decision in a more elaborate opinion.³⁰² In September 2019, one decade after his criminal conviction, Ortega-Lopez appealed this second BIA ruling, and as this Article was in the final stage of edits, the Ninth Circuit denied his petition for review.³⁰³

My point here is not to assess whether the BIA is correct that a Section 2156(a)(1) violation is a CIMT. Rather, the point is to evaluate whether the BIA's reasoning in arriving at its conclusion reveals the hopeless indeterminacy of the entire process: Is the phrase "crimes involving moral turpitude" so vague that immigration officials are simply "playing God" in determining the fate of Ortega-Lopez?

Both BIA opinions make clear that they are operating within the familiar framework for assessing whether a crime involves moral turpitude: there must be (1) "a culpable mental state" and (2) "reprehensible conduct."³⁰⁴ The first part of the inquiry requires a close reading of the relevant statute. In this case, Section 2156(a)(1) stipulates a mens rea of "knowingly," so a conviction requires proof of scienter. The second part of the inquiry is the more difficult and potentially open-ended one: Is the conduct contemplated by Section 2156(a)(1) "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general?"³⁰⁵ By answering that it is, and in reaffirming this conclusion on remand, the BIA plausibly rejected the Ninth Circuit's contention in its first opinion that, apart from fraud, only violent crimes directed at protected classes qualify.³⁰⁶ In so doing, the BIA did not invoke its own

301. *Id.* at 1017–18.

302. *Matter of Agustin Ortega-Lopez*, 27 I. & N. Dec. 382 (BIA 2018) ("*Ortega-Lopez III*").

303. *Ortega-Lopez v. Barr*, 978 F.3d 680 (9th Cir. 2020) ("*Ortega-Lopez IV*").

304. *Ortega-Lopez I*, 26 I. & N. at 100; *Ortega-Lopez III*, 27 I. & N. at 385.

305. *Ortega-Lopez III*, 27 I. & N. at 385 (citation omitted).

306. *Ortega-Lopez II*, 834 F.3d at 1018.

moral views but canvassed the established “standards of a civilized society.”³⁰⁷ Although it might have done so more systematically than it did, and more clearly set out the criteria it was applying, the BIA nonetheless accumulated substantial evidence to support its conclusion: (1) The fact that all fifty states, the District of Columbia, and the federal government have criminalized animal fighting ventures;³⁰⁸ (2) the fact that the federal government recently enhanced the penalties;³⁰⁹ (3) denunciations of animal fighting ventures—which torture animals and brutalize human spectators—by lawmakers;³¹⁰ (4) equally spirited denunciations of the activity in judicial opinions;³¹¹ and (5) the social science conclusion that animals are sentient creatures capable of suffering pain and suffering, which has inaugurated significant changes in animal treatment in much of the world.³¹²

Critics of the CIMT provisions seem to regard the task of ascertaining “the standards of a civilized society” as fraudulent; according to these critics, there is no such thing as a “civilized society,” and those who purport to invoke its standards are simply privileging their own values.³¹³ As an empirical matter, the criticism is

307. *Ortega-Lopez III*, 27 I. & N. at 386.

308. *Id.* at 390.

309. *Id.* at 383 n.4.

310. *Id.* at 387–88. See *Animal Fighting Prohibition Enforcement Act of 2005: Hearing on H.R. 817 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 56, 57 (2006) (animal fighting desensitizes spectators to violence and teaches “that inflicting pain is an acceptable form of amusement”); H.R. REP. NO. 94-801, at 10 (1976) *reprinted in* 1976 U.S.C.C.A.N. 758, 761 (animal fighting is “dehumanizing, abhorrent, and utterly without redeeming social value”).

311. *Ortega-Lopez III*, 27 I. & N. at 388. See *Commonwealth v. Tilton*, 49 Mass. (8 Met.) 232, 234–35 (1844) (describing animal fighting as “barbarous and cruel, leading to disorder and danger, and tending to deaden the feelings of humanity, both in those who participate in it, and those who witness it”); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973) (stating that animal fighting events have been outlawed because they “debased and brutalized the citizenry who flocked to witness such spectacles”).

312. *Ortega-Lopez III*, 27 I. & N. at 389. See Gary L. Francione, *Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein*, 2006 U. CHI. LEGAL F. 231, 240–41 (2006).

313. *E.g.*, Brief of Amici Curiae Law Professors, *Islas-Veloz v. Barr*, *supra* note 249 (arguing that morality varies with “time, culture, and locality”).

faulty: there are certain activities that, as the BIA observes, civilized societies *do* overwhelmingly regard as reprehensible and vile.³¹⁴ Nonetheless, one plausible criticism of the BIA is that the test should not be “standards of a civilized society,” but as it writes at another point in the 2018 opinion, “[t]he clear consensus in contemporary American society.”³¹⁵ This is essentially the test adopted by Judge Learned Hand.³¹⁶ It not only dispels the aura of civilizational superiority, but it also tracks a test that the Supreme Court has adopted in manifold settings. For example, in the context of the selective incorporation of the Bill of Rights, the Court inquires whether a procedural right is “necessary to an *Anglo-American* regime of ordered liberty,”³¹⁷ which does not foreclose the possibility that other “regimes of ordered liberty” might choose a different course. Or in the context of the Eighth Amendment, the Court canvasses practices in the states to see whether a given punishment conforms to a national consensus.³¹⁸

The BIA’s observation that all fifty states criminalize cock-fighting is thus relevant in assessing whether there is a national consensus that such a crime qualifies as a CIMT. The Ninth Circuit’s answer in its original opinion that “more is required”³¹⁹ to prove that the crime involves moral turpitude is unpersuasive. Yes, all fifty states criminalize simple assault, and yes, simple assault is not a CIMT, but the legislative history of the various assault statutes do not reveal the outpouring of condemnation that accompanied the enactment of America’s animal cruelty statutes. The BIA accumulates only a fraction of a voluminous literature that confirms an

314. *Ortega-Lopez III*, 27 I. & N. at 383 n.4, 386.

315. *Id.* at 390.

316. *United States ex rel. Iorio v. Day*, 34 F.2d 920, 921 (2d Cir. 1929). *See supra* at text accompanying notes 75–80.

317. *Duncan v. Louisiana*, 391 U.S. 145, 150 n.15 (1968).

318. *See, e.g., Graham v. Louisiana*, 560 U.S. 48 (2010) (holding that the sentencing a juvenile to life without parole for a crime other than homicide is cruel and unusual because it is contrary to a clear national consensus).

319. *Ortega-Lopez II*, 834 F.3d at 1018.

American consensus that animal fighting ventures are reprehensible: they involve, in our view, a grotesque celebration of suffering, which “deaden[s] the feelings of humanity, both in those who participate in it, and those who witness it.”³²⁰ The fact that a few other countries still countenance such ventures³²¹ does not negate the reality of a deep American consensus on this issue. The BIA’s 2013 and 2018 opinions acknowledged that cockfighting was still permitted in some American territories, but the Agricultural Improvement Act, signed into law in December 2018, filled this lacuna and essentially prohibited cockfighting in every U.S. jurisdiction.³²²

320. *Ortega-Lopez III*, 27 I. & N. at 388.

321. In the Philippines, cockfighting (known in Tagalog and Cebuano as *sabong*) is a major sport that is entirely legal and enjoys huge popularity. The Philippines hosts the cockfighting world championships—the World Slasher Cup—whose matches take place twice each year in a stadium in Manila that seats thousands. See <https://www.worldslasherup.ph> [<https://perma.cc/XRK3-VCP7>]; Phillip Day, *Cockfighting Thrives in Full View in Philippines*, NIKKEI ASIAN REV. (Mar. 15, 2018), <https://asia.nikkei.com/Life-Arts/Life/Cockfighting-thrives-in-full-view-in-Philippines2> [<https://perma.cc/D7PK-NN8P>]. Locals claim the practice has a 6,000-year history, and there is evidence to support this: the chicken was domesticated in India or Southeast Asia, and cockfighting “was a long-standing form of leisure in virtually all societies with domestic fowl.” Janet M. Davis, *Cockfight Nationalism: Blood Sport and the Moral Politics of American Empire and Nation Building*, 65 AM. Q. 549, 552 (Sep. 2013).

Cockfighting persists in Mexico, despite intermittent efforts to ban it. See Alisdair Baverstock, *It’s a Fight to the Death*, DAILY MAIL (Dec. 1, 2015), at <https://www.dailymail.co.uk/news/article-3339632/It-s-fight-death-ends-blood-feathers-Mexican-prize-cock-fighter-pumps-birds-HORSE-STERIODS-straps-razor-blades-claws-stops-win.html> [<https://perma.cc/2QYL-JEDM>] (“Bouts are generally short, but if both animals survive the first three minutes they are taken from the main stage to a smaller Palenque beside the bar where spectators are often showered with blood by the greater proximity to the action.”). The article includes a video of a Mexican cockfight in December 2015, with over a thousand people in attendance, and in which razor blades are strapped to the chicken’s claws prior to the fight.

More generally, some countries do not have comprehensive animal cruelty laws. For example, the term “animal welfare” was largely unknown in China prior to 1989, and public discussion of the legality of animal cruelty only began around the turn of the 21st century. Alisha F. Carpenter & Wei Song, *Changing Attitudes about the Weak: Social and Legal Conditions for Animal Protection in China*, 48 CRITICAL ASIAN STUD. 380, 382–83 (2016). The Chinese Academy of Social Sciences released a draft of a law in 2009, but it has yet to be enacted. See *id.*

322. See Pub. L. 115-334 § 12616, 132 Stat. 4490 (2018).

Even if there are subcultures within the United States that continue to regard cockfighting as part of their heritage,³²³ the BIA amply supported its conclusion of a “clear consensus in American society” that such activity is “contrary to the most basic moral standards.”³²⁴

323. The 2018 Farm Bill’s ban of cockfighting in U.S. Territories provoked criticism from some territorial representatives. Ralph D. Guerrero Torres, the current governor of the Northern Mariana Islands, responded to the bill’s passage:

Cockfighting has historical and cultural significance in the CNMI [Commonwealth of the Northern Mariana Islands] and is a recreational activity enjoyed by many of our residents. We joined in our community’s collective frustration with Congress to oppose the ban, but our voices weren’t heard in Washington. We will monitor the effects of this legislation accordingly, but purely from the local standpoint, we will maintain what is historically and culturally held by our people.

Jon Perez, *Cockfighting ban now law*, SAIPAN TRIB. (Dec. 24, 2018), <https://www.saipan-tribune.com/index.php/cockfighting-ban-now-law/> [https://perma.cc/4PMJ-YJ28]. Cockfighting is a long-established tradition in Puerto Rico, and the ban angered many Puerto Rican citizens and officials. The sport was actively regulated, and the island’s government actually has a “Rooster Affairs Commission” (*Comisión de Asuntos Galístico*) within its Department of Recreation and Sport. Beatriz Garcia, *Puerto Rico vs. U.S.: Who’s the rooster in the pen?*, AL DIA, (Dec. 18, 2019), <https://aldianews.com/articles/culture/social/puerto-rico-vs-us-whos-rooster-pen/57132> [https://perma.cc/UE7Y-GW6Z].

In fact, two Puerto Rican organizations and another in Guam unsuccessfully filed lawsuits seeking a declaration that the cockfighting ban is unconstitutional. *Club Galístico de Puerto Rico, Inc. v. United States*, 414 F. Supp. 3d 191 (D. Puerto Rico 2019); *Linsangan v. United States*, 2019 WL 6915943 (D. Guam 2019). In both cases, the district courts rejected a “cultural right” defense.

Pockets of resistance still linger even in the continental United States. Despite years of strong general support, efforts to ban cockfighting in Louisiana long failed because of opposition from rural Cajuns, who viewed it as “part of [their] rural way of life.” Adrian Florido, *Puerto Ricans Angry Over Impending Ban on Cockfighting*, NPR MORNING EDITION (Dec. 14, 2018, 5:01 AM), <https://www.npr.org/2018/12/14/676652923/congress-moves-to-ban-cockfighting-in-puerto-rico> [https://perma.cc/WZ7N-YCHF]. One rooster breeder in California says: “There are lots of illegal fights in California—we have lots of Hispanics and Filipinos and it is part of their tradition to fight the roosters.” *Day*, supra note 321. Just this year, prosecutors in Minnesota pursued a 5-day jury trial—with success—against someone who raised “Thai-fighting roosters” in his basement. See *State v. Su Vang*, 2020 WL 1488334 (Ct. App. Minn 2020).

324. *Ortega-Lopez III*, 27 I. & N. at 391.

In the most recent appeal, the Ninth Circuit afforded *Chevron* deference to the BIA's published and "well-reasoned" opinion, commending the agency for the "detailed explanation of its rationale."³²⁵ Indeed, a fair review of both BIA opinions forecloses any serious argument that the immigration authorities were "playing God" or that the CIMT provisions were so vague as to provide little guidance to the officials charged with enforcing the immigration law.

CONCLUSION: COCKFIGHTING, MANSLAUGHTER, AND THE CIMT
PUZZLE RESOLVED

The puzzle of the CIMT provisions is nonetheless neatly posed by Ortega-Lopez's case. Ortega-Lopez's actions were deemed sufficiently minor by the criminal law that his sentence was only one year's probation.³²⁶ And yet for purposes of immigration law they were deemed morally turpitudinous—that is, sufficiently serious that they may subject him, a father of three Americans, to deportation. By contrast, consider Ihar Sotnikau. An alien convicted of involuntary manslaughter, he was sentenced to five years' imprisonment.³²⁷ And yet according to the Fourth Circuit, his crime was not a CIMT and thus does not subject him to deportation. The court reasoned that because the mens rea of involuntary manslaughter under Virginia law is criminal negligence or recklessness, Sotnikau did not possess the requisite "culpable mental state" to justify a finding of a CIMT.³²⁸

To many, the results in these two cases cannot be reconciled and provide additional grounds for reconsidering the inclusion of the CIMT provisions in immigration law. Obviously, manslaughter is

325. *Ortega-Lopez IV*, 978 F.3d at 686–87.

326. *Ortega-Lopez I*, 26 I. & N. at 99.

327. *Sotnikau v. Lynch*, 846 F.3d 731, 733 (4th Cir. 2017).

328. *Id.* at 736. On the difficulty of how to characterize the mens rea of recklessness, see *supra* text accompanying notes 140–45.

a more serious crime than sponsoring a cockfighting event, as reflected in the substantial difference in punishments imposed. Why would the immigration law nonetheless require the deportation of Ortega-Lopez but not Sotnikau? Besides being difficult to administer, the CIMT provisions are shown to generate results that are not immediately defensible. It would be possible, as Senator Roth argued in 1995, to deport everyone convicted of a felony.³²⁹ Alternatively, the law could provide that any alien convicted of a felony who was sentenced to one year's incarceration should be deported. Under either framework, Ortega-Lopez would be permitted to remain, while Sotnikau, guilty of a more serious criminal offense, would be deported. Why has Congress persisted, for over a century, in preserving the CIMT provisions in immigration law when there are alternatives that are easier to administer?

This Article's answer is that criminal law and immigration law exist for different purposes. The former holds people accountable for blameworthy conduct and then punishes them; the latter decides what kind of people we want in our community. Alternatively put, the criminal law is retrospective, assessing a defendant's culpability; immigration proceedings "look prospectively," and "[p]ast conduct is relevant only insofar as it sheds light on the [alien's] right to remain."³³⁰ When immigration consequences follow from a violation of the criminal law, deportation, however "burdensome and severe for the alien, is not a punishment"; rather, it is the nation exercising its sovereign right to conclude that the alien's "continued presence here would not make for the safety and welfare of society."³³¹ But some discretion is required. Violations of the

329. See *supra* text accompanying notes 147–48.

330. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984).

331. See Elina Treyger, *The Deportation Conundrum*, 44 SETON HALL L. REV. 107, 116 (2104) ("[A]s the Supreme Court put it in 1924, the function of deportation is 'to rid the country of persons who have shown by their career and that their continued presence here would not make for the safety and welfare of society,' and implicitly, to show forbearance towards those, whose continued presence would enhance such welfare." (quoting *Mahler v. Eby*, 264 U.S. 32, 39 (1924)); *Hinds v. Lynch*, 790 F.3d 259, 264 (1st

criminal law are proxies, but only imperfectly, for the moral traits that may be deemed to disqualify someone from inclusion in our community. Furthermore, the sentences imposed by the criminal law often reflect a degree of “moral luck”—that is, the fortuity of an attendant harm, or lack thereof, can affect the severity of the punishment imposed.

Involuntary manslaughter highlights the problem. It involves a terrible outcome and demands substantial punishment, but it may not reflect a recurrent behavior that renders someone unfit to be a member of our community. Indeed, it may reflect in part very bad luck. By contrast, knowing participation in an animal fighting venture entails a web of unsavory affiliations, as well as participation in a subculture antithetical to the morals of *our* community. The doctrine of “crimes involving moral turpitude” provides an element of measured discretion in adapting the sentence imposed by the criminal law to the appropriate result in immigration law. As the previous Part discussed, in other countries, cockfighting may be legal and commonplace. But the BIA cited “[t]he clear consensus in contemporary American society,” as evidenced by the multiplication of criminal laws against animal fighting in every United States jurisdiction.³³²

American immigration law still enshrines the perhaps archaic idea that “virtue” is a useful category in sorting those who are fit for inclusion in our community and those who are not.³³³ In addition to the use of the phrase “crime involving moral turpitude,” immigration law still provides for the deportation of aliens deemed

Cir. 2015) (“By referencing a crime as a justification for removing an alien, Congress does not seek to punish an alien generally or for her particular federal or state offense. Instead, if the government seeks to remove an alien because of ‘some act the alien has committed,’ he ‘is merely being held to the terms under which he was admitted.’”) (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999)).

332. *Ortega-Lopez III*, 27 I. & N. at 390.

333. See THE FEDERALIST NO. 55 (James Madison) (arguing that republican self-government requires “sufficient virtue”).

not to be of “good moral character.”³³⁴ The law provides several examples of conduct that would reveal such character, but nonetheless it leaves the phrase open-ended, presumably for executive branch and judicial interpretation and gap-filling.³³⁵ Even the statutory examples of bad “moral character” are striking. Such bad character, justifying deportation, includes being a “habitual drunkard,” a phrase that would plainly not satisfy the criminal law’s demand for clear notice and constrained discretion.³³⁶ Another example of bad moral character is “giv[ing] false testimony for the purpose of obtaining” immigration benefits.³³⁷ In *Kungys v. United States*,³³⁸ Justice Scalia observed that a materiality requirement, which would ordinarily adhere in a criminal prosecution for a false statement to a government agency,³³⁹ is inapplicable in the context of immigration law: “The absence of a materiality requirement in § 1101(f)(6) can be explained by the fact that its primary purpose is not . . . to prevent false data from being introduced into the naturalization process *but to identify lack of good moral character.*”³⁴⁰ The

334. 8 U.S.C. § 1101(f) (2018).

335. *Id.* § 1101 (f)(9) (“The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.”).

336. *Id.* § 1101 (f)(1). Compare *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 274 (4th Cir. 2018) (invalidating criminal statute that prohibited “habitual drunkard” from possessing alcohol as “the statutes and case law fail to provide any standards of what is meant by the term ‘habitual drunkard’”) with *Ledesma-Cosimo v. Sessions*, 857 F.3d 1042, 1049 (9th Cir. 2017) (rejecting argument that 8 U.S.C. § 1101(f)(1) is unconstitutionally vague: “Because the statute is not unconstitutionally vague under the criminal law standard, it necessarily satisfies any lesser vagueness standard that might apply in a non-criminal context.”).

337. *Id.* § 1101(f)(6) (2018).

338. 485 U.S. 759, (1988).

339. *United States v. Gaudin*, 515 U.S. 506, 506–07 (1995).

340. *Kungys*, 485 U.S. at 780 (emphasis added).

CIMT provisions further exemplify immigration law's goal of identifying good character or, at a minimum, excluding bad moral character.³⁴¹

To be sure, there are cases that expose profound divisions of opinion and the absence of any "consensus" American view of moral turpitude. But this does not mean that it is impossible for officials and judges to discern a consensus view in almost all cases, nor that it is inappropriate for immigration law to be used as a vehicle to embody and affirm that consensus view. If we are to make sense of the puzzling persistence of the CIMT provisions, it must be in this way.

* * *

To some observers, it is "preposterous" that as "meaningless" a phrase as "crimes involving moral turpitude" remains a part of American immigration law,³⁴² but the term's persistence, in the face of academic and judicial hostility, is itself worthy of note. The simplest explanation is that Congress's failure to repeal these provisions is part and parcel of a comprehensive inertia in this area.³⁴³ Yet this explanation is inadequate. There have been changes in immigration law in recent decades but not to the CIMT provisions, and even proposals to amend those provisions have been only to tinker at the margins. A more plausible explanation is that Congress is wary of changing the CIMT provisions this late in the game out of fear of the unknown—that is, any attempt to replicate the

341. Even more striking, the BIA has promulgated regulations construing 8 U.S.C. § 1101(f) that provide that evidence that an applicant for citizenship lacks good moral character includes the fact that he or she "[h]ad an extramarital affair which tended to destroy an existing marriage." 8 C.F.R.316.10 (ii) (2020).

342. See *Arias v. Lynch*, 834 F.3d 823, 830 (7th Cir. 2016) (Posner, J., concurring).

343. See Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1, 5 (2012).

goals achieved by the CIMT provisions with more definite language (the solution proposed by some academics) will invite litigation and uncertainty. This Article's answer is that the language of "moral turpitude," however quaint and ridiculous to many ears, captures an older but not altogether outdated sentiment that participation in a political community presupposes at least some minimal agreement on the meaning of virtue.

WHAT IS CAESAR'S, WHAT IS GOD'S: FUNDAMENTAL PUBLIC POLICY FOR CHURCHES

LLOYD HITOSHI MAYER* & ZACHARY B. POHLMAN**

ABSTRACT

Bob Jones University v. United States is a highly debated Supreme Court decision, both regarding whether it was correct and what exactly it stands for, and a rarely applied one. Its recognition of a “fundamental public policy doctrine” that could cause an otherwise tax-exempt organization to lose its favorable federal tax status remains highly controversial, although the Court has shown no inclination to revisit the case, and Congress has shown no desire to change the underlying statutes to alter the case’s result. That lack of action may be in part because the IRS applies the decision in relatively rare and narrow circumstances.

The mention of the decision during oral argument in Obergefell v. Hodges raised the specter of more vigorous and broader application of the doctrine, however. It renewed debate about what public policies other than avoiding racial discrimination in education might qualify as fundamental and also whether and to what extent the doctrine should apply to churches, as opposed to the religious schools involved in the original case. The IRS has taken the position that churches are no different than any other tax-exempt organizations in this context, although it has only denied or revoked the tax-exempt status of a handful of churches based on this doctrine.

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The emergence of the Bob Jones University decision in the Obergefell oral argument renders consideration of these issues particularly timely, especially in light of developments over the past several decades both with respect to the legal status of churches and what arguably could be considered fundamental policy. This Article therefore explores whether there are emerging conflicts between a significant number of churches and what could be considered fundamental public policy, not only with respect to sexual orientation discrimination but also with respect to sex discrimination, sanctuary churches, and other areas. Finding that there are several current or likely future such conflicts, it then explores whether there are philosophical and legal grounds for treating churches differently from other tax-exempt organizations for purposes of applying the contrary-to-fundamental-public-policy doctrine and the related illegality doctrine. Drawing on both the longstanding concept of "sphere sovereignty" and emerging work in the area of First Amendment institutions, the Article concludes that churches should not be subject to the former doctrine, but that they still should be subject to loss of their tax benefits if they engage in or encourage significant criminal activity. The Article then concludes by applying this conclusion to the identified areas of current or likely future conflict to demonstrate how the IRS and the courts should apply the Bob Jones University decision to churches.

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INTRODUCTION

“Tell us then, what is your opinion? Is it right to pay the imperial tax to Caesar or not?” But Jesus, knowing their evil intent, said, “You hypocrites, why are you trying to trap me? Show me the coin used for paying the tax.” They brought him a denarius, and he asked them, “Whose image is this? And whose inscription?” “Caesar’s,” they replied. Then he said to them, “So give back to Caesar what is Caesar’s, and to God what is God’s.”¹

The relationship of churches and governments has a long and fraught history, including with respect to taxes.² Policymakers, church leaders, and various commentators have put forward numerous reasons both for and against preferential tax treatment for some or all churches.³ And when governments provide such preferential tax treatment, as they often do, the issue then arises of what—if any—conditions can and should apply to such treatment.

More than thirty-five years ago the United States Supreme Court’s decision in *Bob Jones University v. United States*⁴ sent shock waves through religious congregations even though the case itself involved religious schools and not churches.⁵ This was because the case suggested that any organization, even a church, that was exempt from federal income tax as a “charity” and so also eligible to receive tax deductible charitable contributions, could lose those benefits if found to have an activity or purpose that was illegal or otherwise “contrary to a fundamental public policy.”⁶ The vagueness of the latter phrase, combined with the specter of the Internal

1. *Matthew* 22:17–21 (New International Version).

2. For purposes of this Article, “churches” refers to house of worship of all types, including synagogues, mosques, and temples. For a discussion of more specific legal definitions, see *infra* Part IV.D.

3. See *infra* Parts III.B. and III.C.

4. 461 U.S. 574 (1983).

5. *Id.* at 574.

6. *Id.* at 591–92.

Revenue Service making determinations regarding what constitutes fundamental public policy, only heightened the fear that the case could usher in new and intrusive IRS supervision of churches.⁷

However, reality did not come to reflect this fear. The IRS has sought to strip tax benefits from churches based on *Bob Jones University* or the doctrine that it established only five times: once related to one of the parties in *Bob Jones University*, three times for churches involved in illegal criminal activity, and once for an unapologetically racist church where the exact reasons for the revocation are unclear.⁸ Indeed, the IRS has shown little interest in expanding the application of this case beyond situations involving either racial discrimination or significant illegal activity.⁹

Bob Jones University nevertheless remains good law, and the following exchange during oral argument in the *Obergefell v. Hodges*¹⁰ same-sex marriage case reawakened the concerns of many religious organizations and leaders:

JUSTICE ALITO: Well, in the *Bob Jones* case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?

[SOLICITOR] GENERAL VERRILLI: You know, I—I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I—I don't deny that. I don't deny that, Justice Alito. It is—it is going to be an issue.¹¹

7. See, e.g., William A. Drennan, *Bob Jones University v. United States: For Whom Will the Bell Toll?*, 29 ST. LOUIS U. L.J. 561, 588–93 (1985); Joe W. Miller, Note, *Applying a Public Benefit Requirement to Tax-Exempt Organizations*, 49 MO. L. REV. 353, 366, 368 (1984).

8. See *infra* Part I.B.

9. See *infra* note 33 and accompanying text.

10. 576 U.S. 644 (2015).

11. Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556).

This point was not lost on the dissenters in that case, who highlighted this possibility.¹² And it does not take much imagination to apply Solicitor General Verrilli's response to churches, many of which have strong positions opposing same-sex marriage.¹³

So to what extent does *Bob Jones University*, combined with changing views of what constitutes fundamental public policy, actually threaten the tax benefits enjoyed by churches? Part I of this Article considers what the Court actually decided in that case, including its (very limited) discussion of how its decision might apply to churches. Part I also reviews the few subsequent applications of that decision to churches by the IRS and the courts. Part II then identifies several existing and likely future conflicts between churches and fundamental public policy that the IRS and courts have yet to address. The remainder of this Article then explores how the IRS and courts should resolve these new conflicts. Part III begins this exploration by considering the extent to which churches enjoy preferential tax treatment in the United States, the reasons for such treatment, and the constitutional ramifications of that treatment, all of which could affect the application of *Bob Jones University* to churches. Part IV then explores the philosophical and legal basis for treating churches differently for tax purposes generally and with respect to application of *Bob Jones University* specifically. Finally, Part V pulls these strands together to provide a more complete answer to how *Bob Jones University* should apply to churches. While many other scholars have addressed the issues covered in the first four Parts, none have pulled together all of these various lines of thought to comprehensively consider how *Bob Jones University* should apply to churches in the twenty-first century.

12. *Obergefell*, 576 U.S. at 711 (Roberts, C.J., dissenting); see also Laurie Goodstein & Adam Liptak, *Schools Fear Gay Marriage Ruling Could End Tax Exemptions*, N.Y. TIMES, June 24, 2015, at A13.

13. See, e.g., Benjy Sarlin, *O'Rourke says churches against gay marriage should lose tax benefits, draws backlash*, NBC NEWS (Oct. 11, 2019), <https://www.nbcnews.com/politics/2020-election/o-rourke-says-churches-against-gay-marriage-should-lose-tax-n1065186> [https://perma.cc/U9PX-JF22].

Our conclusion is that churches should be at risk of losing their federal tax benefits only if they engage in significant criminal activities and not if their activities or purposes are only contrary to fundamental public policy. The reason for this limitation on the application of *Bob Jones University* is that the tax benefits for churches are based not only on a *quid pro quo* theory—that the societal benefits they provide are sufficient to justify those tax benefits—but also on a “soft sovereignty” theory that grants them significant autonomy from the government, including with respect to taxes, in recognition of their distinct role in society. The legal bases for this soft sovereignty approach are the First Amendment’s Religion Clauses and the need for governments generally to avoid both substantially burdening religious exercise and undue entanglement with religious institutions. However, given both the continued viability of *Bob Jones University* and other considerations discussed below, this limited application applies only to churches and not to other religious organizations, such as the religious schools in the *Bob Jones University* case. And since churches are not co-equal sovereigns with the government and so are not above the law, in the rare instances where it is conclusively shown that a church is engaging in substantial criminal activities that demonstrate a significant criminal purpose, the church should lose the tax benefits it otherwise would enjoy. In other words, this approach provides a demarcation between what in this context belongs to Caesar and what does not that appropriately balances the legal rights of churches with the legal authority of the state.

I. CHURCHES AND *BOB JONES UNIVERSITY*

Numerous commentators have described and analyzed the background, reasoning, and aftermath of *Bob Jones University* in great detail.¹⁴ The purpose of this Article is not to cover that well-trodden

14. See, e.g., Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 U. KAN. L. REV. 397 (2005); Mayer G. Freed & Daniel D. Polsby, *Race, Religion, and Public Policy: Bob Jones University v. United States*, 1983 SUP. CT. REV. 1 (1983); Miriam Galston, *Pub-*

ground in detail or the many critiques of the Court's reasoning. Rather, for purposes of this Article we will accept the case as binding—a realistic assumption, given that the Supreme Court has shown no inclination to revisit it and Congress has shown no interest in revising the applicable statutes to modify or overrule it. We will instead focus on the points most salient to the case's potential application to churches, including the few actual such applications by the IRS and the courts in the wake of that decision. One important ramification of this assumption relates to the case's application to organizations that are religious in the sense that their missions flow from sincerely held religious beliefs but are not generally considered churches, including the schools involved in the case. Since the Court squarely rejected a First Amendment free exercise of religion argument that such organizations should not be subject to the fundamental public policy doctrine as applied in the case,¹⁵ we will only briefly revisit that issue here, even though our analysis arguably could extend to such organizations.¹⁶ The focus of this Article is therefore to address an issue explicitly left open by the Court in *Bob Jones University*—to what extent the Court's holding should apply to churches.¹⁷

lic Policy Constraints on Charitable Organizations, 3 VA. TAX REV. 291 (1984); Michael Hatfield et al., *Bob Jones University: Defining Violations of Fundamental Public Policy* (Nat'l Ctr. Philanthropy & L., Topics in Philanthropy no. 6, 2000), <https://ncpl.law.nyu.edu/wp-content/uploads/pdfs/Monograph/Monograph2000Bob-Jones.pdf> [<https://perma.cc/NLQ4-B8QL>]; David J. Herzig & Samuel D. Brunson, *Let Prophets Be (Non)Profits*, 52 WAKE FOREST L. REV. 1111 (2017); Olatunde C. Johnson, *The Story of Bob Jones University v. United States: Race, Religion, and Congress' Extraordinary Acquiescence*, in STATUTORY INTERPRETATION STORIES (William N. Eskridge et al. eds., 2011); see also Drennan, *supra* note 7, at 565 n.21 (collecting academic articles written about the case as it made its way to the Supreme Court).

15. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983).

16. See *id.* at 604–05; *infra* notes 345–349 and accompanying text. For an argument that religious freedom protections should extend to religious entities that provide services to the broader public, such as schools, see generally Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341 (2016).

17. See *infra* note 29 and accompanying text.

A. *The Case*

Bob Jones University involved two nonprofit, religious, private schools with racially discriminatory policies that they based on religious doctrine.¹⁸ From 1975 through at least the time of the decision in 1983, Bob Jones University permitted African-Americans to enroll but had a disciplinary rule prohibiting interracial dating, interracial marriage, and advocacy of such; the University also did not admit applicants who were in an interracial marriage or were known to engage in such advocacy.¹⁹ Goldsboro Christian Schools, a K-12 institution, generally accepted only whites as students, although it had on occasion accepted children from racially mixed marriages in which one of the parents was white.²⁰

The statutory provisions at issue were the Internal Revenue Code sections that usually provide nonprofit schools with tax exemption and the ability to receive tax deductible contributions.²¹ For purposes of this Article, the key legal question before the Court was whether Congress intended to include in those provisions a requirement that in order to receive these benefits, an organization had to satisfy a common-law standard the Court found applicable to charitable trusts: that they “must serve a public purpose and not be contrary to established public policy.”²² The Court generally answered this question in the affirmative,²³ but left significant uncertainty regarding the exact parameters of this doctrine in at least four respects.

First, the Court subtly shifted its language from “established” public policy to “fundamental” public policy, without explaining the significance of this change.²⁴ Second, it left unclear whether an

18. See *Bob Jones Univ.*, 461 U.S. at 577.

19. *Id.* at 580–81.

20. *Id.* at 583.

21. I.R.C. §§ 170(a), (c)(2), 501(c)(3) (2018).

22. *Bob Jones Univ.*, 461 U.S. at 586.

23. *Id.* at 592.

24. Compare *id.* at 586, 591 with *id.* at 592–93, 595, 596 n.21.

organization disqualified itself from these tax benefits by *acting* contrary to such a public policy, having a *purpose* contrary to such public policy, or some combination of the two.²⁵ The Court also left unclear what level of activity or priority of purpose would be required to result in disqualification.²⁶ Third, it stated that such disqualification flowed both from illegality and from being contrary to such public policy, without explaining the difference between the two.²⁷ Finally, it concluded that the First Amendment's Free Exercise Clause did not prevent disqualification because the government's interest in eradicating racial discrimination in education was compelling and disqualification was the least restrictive means to further that interest.²⁸ However, the Court did not reach whether this holding extended to churches:

We deal here only with religious *schools*—not with churches or other purely religious institutions; here, the governmental interest is in denying public support to racial discrimination in education. As noted earlier, racially discriminatory schools "exer[t] a pervasive influence on the entire educational process," outweighing any public benefit that they might otherwise provide.²⁹

It therefore left the application of its decision to churches uncertain.

25. *See id.* at 586–87.

26. Compare *id.* at 587 & n.11 (charitable "purposes"), 589 (public "purposes"), 591 & n.18 ("purpose"), 592 & n.19 ("purpose"), with *id.* at 592 ("activity"), 593 n.20 ("activities"), 596 n.21 ("activities"), 598 ("activities").

27. *See id.* at 591.

28. *See id.* at 604. Despite the Court's use of compelling governmental interest and least restrictive means language characteristic of strict scrutiny analysis, the Court appears to have in fact applied a more deferential level of scrutiny, possibly because of the decision's tax context. See Lloyd Hitoshi Mayer, *Politics at the Pulpit: Tax Benefits, Substantial Burdens, and Institutional Free Exercise*, 89 B.U. L. REV. 1137, 1159 (2009); Elliot M. Schachner, *Religion and the Public Treasury after Taxation with Representation of Washington, Mueller and Bob Jones*, 1984 UTAH L. REV. 275, 305 (1984).

29. *Bob Jones Univ.*, 461 U.S. at 604 n.29 (emphasis in original) (alteration in original) (citations omitted) (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)).

Many scholars have addressed these areas of uncertainty in detail.³⁰ Here it is sufficient to note that in the first three areas commentators have taken a broad range of positions, and neither the Supreme Court nor the lower courts have done much to provide clarity.³¹ Similarly, the IRS has not done much to develop the concept of “fundamental” public policy.³² In fact, its subsequent applications of *Bob Jones University* have been almost entirely limited to situations involving criminal activities, racial discrimination relating to education, or, less commonly, to other contexts where such discrimination “can reasonably be expected to aggravate the disparity in the educational, economic, or social levels of [a racial] group when compared with society as a whole.”³³

However, unlike the courts, the IRS has attempted to resolve the latter three areas of uncertainty. First, it has focused on activities as evidence of purposes as opposed to considering either activities or purposes in isolation.³⁴ More specifically, it has taken the position that acts that are illegal or contrary to public policy and that are also a substantial part of an organization’s activities (taking into account the nature of the acts as well as their quantity) demonstrate a disqualifying non-charitable purpose.³⁵ Second, it has taken the position that activities can be contrary to fundamental public policy even absent violations of any federal, state, or local laws, providing

30. See, e.g., *supra* note 14.

31. See *id.*

32. See *infra* notes 33–34.

33. IRS Tech. Adv. Mem. 89-10-001 (Mar. 10, 1989); IRS Gen. Couns. Mem. 39,792 (Aug. 17, 1987). See generally Samuel D. Brunson & David J. Herzig, *A Diachronic Approach to Bob Jones: Religious Tax Exemptions after Obergefell*, 92 IND. L.J. 1175, 1189–95 (2017).

34. IRS, *Activities That are Illegal or Contrary to Public Policy*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATIONAL TECHNICAL INSTRUCTION PROGRAM FY 1985, at 109–10 (1984), <https://www.irs.gov/pub/irs-tege/eotopicj85.pdf> [<https://perma.cc/6LSH-XWS6>].

35. *Id.*; Jean Wright & Jay H. Rotz, *Illegality and Public Policy Considerations*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATIONAL TECHNICAL INSTRUCTION PROGRAM FY 1994, at 2 (1993), <https://www.irs.gov/pub/irs-tege/eotopicl94.pdf> [<https://perma.cc/VFG2-BENE>].

the situations in *Bob Jones University* as examples.³⁶ Relatedly, the IRS distinguishes between illegal activity, by which it means activity in violation of federal, state, or local statutes (usually criminal ones),³⁷ and activity contrary to fundamental public policy, for which it implicitly includes the modifier “federal,” consistent with the Supreme Court’s focus on federal policy in the *Bob Jones University* case.³⁸ Third and finally, the IRS has taken the position that churches should not be treated differently from any other type of organization claiming the tax benefits available to charities: if churches engage in “substantial” activities that are illegal or contrary to fundamental public policy, then they are disqualified from receiving those benefits.³⁹ The question then becomes what activities of a church might be illegal or contrary to fundamental public policy, with racial discrimination (assuming no church-run school) not necessarily rising to that level.⁴⁰

This last IRS position is not without its critics. For example, Professor Jerold Friedland concludes that the above-quoted footnote “suggests the Court intended to reserve its judgment on both the public policy and first amendment issues with respect to racially discriminatory churches.”⁴¹ He therefore leaves open the possibility that the Court might conclude that applying the *Bob Jones University* holding to churches violates the First Amendment. And in an analysis written shortly before the Supreme Court’s decision, Professor Douglas Laycock argued that the First Amendment, and

36. IRS, *supra* note 34, at 114; Wright & Rotz, *supra* note 35, at 3.

37. See Rev. Rul. 75-384, 1975-2 C.B. 204 (violations of local criminal ordinances); IRS, *supra* note 34, at 110–11; Hatfield et al., *supra* note 14, at 3, 95–100; Wright & Rotz, *supra* note 35, at 8, 10.

38. See *Bob Jones Univ.*, 461 U.S. at 593–95; IRS, *supra* note 34, at 114–15; Wright & Rotz, *supra* note 35, at 3, 9–10. This reading is also consistent with an earlier federal district court opinion that anticipated the *Bob Jones University* decision. See *Green v. Connally*, 330 F. Supp. 1150, 1163–64 (D.D.C. 1971) (focusing on federal public policy).

39. IRS, *supra* note 34, at 110, 116–18; see also Wright & Rotz, *supra* note 35, at 19–20.

40. See Schachner, *supra* note 28, at 310.

41. Jerold A. Friedland, *Constitutional Issues in Revoking Religious Tax Exemptions: Church of Scientology of California v. Comm’r*, 37 U. FLA. L. REV. 565, 587 (1985).

particularly the concept of church autonomy, generally prohibited government interference with the internal affairs of churches, including interference in the form of revoking the tax-exempt status of racially discriminatory churches.⁴²

We will return to the first three areas of uncertainty in Part II, when we discuss current and likely future areas of conflict between churches and fundamental public policy. As for the application of the *Bob Jones University* decision to churches generally, we will return to that unsettled issue in Part IV, after considering the basis for the tax benefits provided to churches. Before considering the tax treatment of churches more generally, however, it is worth describing the instances where the IRS has applied *Bob Jones University* specifically to churches.

B. *Subsequent Rulings and IRS Actions Involving Churches*

The IRS has rarely applied *Bob Jones University* to churches, perhaps taking to heart the now forty-year-old admonition of Professor Stephen Schwarz that “in this delicate area, the Internal Revenue Service would do well to halt at the gates of the church, preserving valuable religious and associational rights in the process.”⁴³ Nevertheless, the IRS has entered those gates while waving the *Bob Jones University* flag a handful of times.

In *Synanon Church v. United States*,⁴⁴ the U.S. District Court for the District of Columbia noted that, while the religious status of the organization at issue was in dispute, “[e]ven a bona fide church that

42. Douglas Laycock, *Tax Exemptions for Racially Discriminatory Religious Schools*, 60 TEX. L. REV. 259, 261–63 (1982).

43. Stephen Schwarz, *Limiting Religious Tax Exemptions: When Should the Church Render unto Caesar*, 29 U. FLA. L. REV. 50, 91 (1976).

44. 579 F. Supp. 967 (D.D.C. 1984), *aff'd* 820 F.2d 421 (D.C. Cir. 1987).

failed the . . . *Bob Jones* test would not be eligible for tax exemption."⁴⁵ It "reluctantly" declined, however, to apply *Bob Jones University* to resolve the case based on acts and threats of physical violence by the organization's leaders and members because the organization's fraud on the court provided a sufficient basis for ruling in the government's favor.⁴⁶

In *Church of Scientology of California v. Commissioner*,⁴⁷ the U.S. Tax Court upheld the revocation of tax-exempt status from the Church of Scientology of California based in part on the proven conspiracy by church leaders to impede the IRS in violation of federal criminal law. These actions, the court concluded, demonstrated the church's substantial illegal purpose.⁴⁸ In doing so, the court rejected the church's argument that revocation was not permitted under the First Amendment because a less restrictive means—criminal prosecution of the individual offenders—was available to address the illegal activities.⁴⁹ However, on appeal the U.S. Court of Appeals for the Ninth Circuit did not apply *Bob Jones University* because it affirmed the Tax Court's decision on other grounds.⁵⁰

The IRS also revoked the tax-exempt status of the racist World Church of the Creator, apparently based on the reasoning the Court upheld in *Bob Jones University*, although the IRS likely made its decision before the Court issued that opinion.⁵¹ That organization was, however, unable to challenge that revocation in court because

45. *Id.* at 971.

46. *Id.* at 978–79 (dismissing the case with prejudice because of fraud on the court and so not reaching the merits of the government's tax exemption decision).

47. 83 T.C. 381 (1984), *aff'd* 823 F.2d 1310 (9th Cir. 1987).

48. *Id.* at 502–09.

49. *Id.* at 503, 506–07.

50. *Church of Scientology of Cal.*, 823 F.2d at 1315.

51. See *Te-Ta-Ma Truth Foundation—Family of Uri, Inc. v. World Church of the Creator*, 297 F.3d 662, 663–64 (7th Cir. 2002) (citing *Church of the Creator v. Comm'r*, 707 F.2d 491 (11th Cir. 1983)).

of a procedural failure, and so the IRS's substantive position was not subject to judicial review.⁵²

In 1988 the IRS issued a General Counsel Memorandum discussing the proposed revocation of a church's tax-exempt status because of how it operated a school.⁵³ Having found that the church failed to meet its burden of showing that it operated the school in a bona fide nondiscriminatory manner, the IRS further concluded that since the church and school were apparently a single legal entity that was both an educational institution and a religious institution—a characterization the Supreme Court had applied to Bob Jones University in its decision—it was appropriate to revoke the tax-exempt status of that legal entity (and therefore of the church as well as of the school).⁵⁴ While the Memorandum was redacted to conceal the identity of the church and school involved, as required by taxpayer privacy laws,⁵⁵ the church almost certainly was the one associated with the Goldsboro Christian Schools involved in the *Bob Jones University* case.⁵⁶

Finally, in 2013 the IRS denied an application for recognition of exemption under Section 501(c)(3) from a church with polygamy in

52. *Church of the Creator*, 707 F.2d at 492–93.

53. I.R.S. Gen. Couns. Mem. 39,754 (July 7, 1988).

54. *Id.*; see also Robert J. Desiderio, PLANNING TAX-EXEMPT ORGANIZATIONS § 14.04 (2018) (stating a church can avoid the application of this Memorandum and so protect its own tax-exempt status by making a school that does not meet the requirements for exemption a separate legal entity). This position was consistent with the IRS's announced position prior to the *Bob Jones University* decision. See Rev. Rul. 75-231, 1975-1 C.B. 158.

55. See I.R.C. § 6103 (2018); *Taxation with Representation Fund v. IRS*, 646 F.2d 666, 668, 676 (D.C. Cir. 1981) (affirming order requiring public disclosure of General Counsel's Memoranda under the Freedom of Information Act subject to redacting tax return information protected by I.R.C. § 6103).

56. See Oliver S. Thomas, *The Power to Destroy: The Eroding Constitutional Arguments for Church Tax Exemption and the Practical Effect on Churches*, 22 CUMB. L. REV. 605, 614 nn.57–58 (1992); Albert B. Crenshaw, *IRS Revokes Church Tax Exemption for First Time*, WASH. POST (Dec. 7, 1988), <https://www.washingtonpost.com/archive/business/1988/12/07/irs-revokes-church-tax-exemption-for-first-time/041f2d82-4706-4a2b-b0e4-a83e2e8ff963/> [https://perma.cc/Q6C4-T9CT].

its beliefs and practices.⁵⁷ The IRS based the denial both on the organization's violation of state criminal law—a jury had found a leader of the group guilty of bigamy—and of the federal (presumably fundamental) policy against bigamy.⁵⁸

These five instances therefore involved illegal criminal activity in three cases, an uncertain basis for revocation in the fourth case, and a church's operation of a racially discriminatory school (and indeed a school that almost certainly was one of the subjects of the *Bob Jones University* decision) in the fifth case. Therefore, despite the IRS's general statements that *Bob Jones University* applies to churches,⁵⁹ in practice the IRS has applied that case to churches only in very limited circumstances. It is unclear, however, whether this reluctance flows from a general sense of caution in this fraught area, a more specific concern about avoiding any appearance of selectively targeting minority religious faiths, or a lack of instances where the IRS knows there is a plausible case that a church is in fact acting contrary to fundamental public policy.

II. CHURCHES AND FUNDAMENTAL PUBLIC POLICY

This Part explores whether there are any current or likely future conflicts between churches and fundamental public policy—even if the IRS has so far not chosen to act with respect to them—that would require considering if and how *Bob Jones University* applies to churches. While the IRS and the courts have also applied the illegality aspect of the *Bob Jones University* holding to churches, our focus will be on the contrary-to-fundamental-public-policy aspect, to the extent it goes beyond illegality. This is because recent instances of churches engaging in clearly illegal behavior appear to be extremely rare, which is not surprising given that such behavior could result in penalties for churches and their leaders that are much more severe than any loss of tax benefits. For example, the

57. I.R.S. Priv. Ltr. Rul. 2013-25-015 (June 21, 2013).

58. *Id.*

59. See *supra* note 39 and accompanying text.

First Church of Cannabis decided to avoid a confrontation with Indiana law enforcement authorities over sacramental use of marijuana even though it had already secured recognition of its tax-exempt status from the IRS.⁶⁰ That said, we will revisit the topic of illegality in Part V, including whether only criminal illegality should be a basis for a church losing tax benefits.

We begin by considering whether *Bob Jones University* should be limited to racial discrimination, given the arguably unique history of that form of discrimination in the United States. We conclude that it should not, and therefore we then consider discrimination on various other often prohibited grounds, including, but not limited to, sexual orientation. We also consider the sanctuary church movement that seeks to protect undocumented immigrants from enforcement of federal immigration laws and other possible conflict areas.

A. *Why the Uniqueness of Racial Discrimination in Education Should Not Control*

The IRS and ultimately the Supreme Court recognized that there was a fundamental public policy against racial discrimination in education.⁶¹ However, the Court also noted that “[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education.”⁶² As Professor Olatunde Johnson states,

60. See Mark Alesia & Gabby Ferreira, *Humor, love, police a strange mix at Cannabis Church*, INDYSTAR (July 1, 2015), <https://www.indystar.com/story/news/2015/07/01/humor-police-presence-mixed-cannabis-church-site/29561919/> [https://perma.cc/ND4N-GGGJ]; John Tuohy, *First Church of Cannabis wins IRS nonprofit status*, INDYSTAR (June 2, 2015), <https://www.indystar.com/story/news/2015/06/02/first-church-cannabis-wins-irs-nonprofit-status/28357541/> [https://perma.cc/JBE9-3L8T]. While not required to apply for recognition of exemption under I.R.C. § 501(c)(3), churches may voluntarily choose to do so as the First Church of Cannabis apparently did. See I.R.C. § 508(c)(1)(A) (exception from notification requirement to claim tax exemption under I.R.C. § 501(c)(3)); INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS, PUBLICATION 1828, at 3 (2015).

61. *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983).

62. *Id.*

“the historical context . . . provides . . . crucial context for understanding the Court’s decision.”⁶³ That context included *de facto* continuing segregation in education through the creation of numerous private schools, such as the Goldsboro Christian Schools, that limited their students to whites, often with the encouragement and even financial support of southern state governments.⁶⁴

None of the policies discussed below, and particularly not the policies relating to sex discrimination and immigration that are the most likely to qualify as fundamental currently, have a similar context. The longstanding religious teachings relating to the roles of men and women both in religious leadership and more generally are not being used to justify the creation of numerous segregated or discriminatory institutions designed to frustrate the policy against sex discrimination, although it must be acknowledged that the effect of those teachings has been and still is significant within those faiths that follow them.⁶⁵ Nor are longstanding religious teachings relating to welcoming strangers and foreigners being used to support the creation of new institutions to frustrate immigration laws, and the number of sanctuary churches and sheltered immigrants appears to be relatively small.⁶⁶ If, therefore, *Bob Jones*

63. Johnson, *supra* note 14, at 128; see also KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? 163–67 (2016) (distinguishing opposing same-sex marriage from opposing interracial marriage in the context of determining appropriate exemptions from anti-discrimination laws, in part based on the history of racial discrimination in the United States).

64. Johnson, *supra* note 14, at 131; see also Johnny Rex Buckles, *The Sexual Integrity of Religious Schools and Tax Exemption*, 40 HARV. J.L. & PUB. POL’Y 255, 317 (2017); Galston, *supra* note 14, at 319; Herzig & Brunson, *supra* note 14, at 1116; Karla W. Simon, *The Tax-Exempt Status of Racially Discriminatory Religious Schools*, 36 TAX L. REV. 477, 477 (1981); Sally Wagenmaker, *Why Religious Organizations Shouldn’t Lose Tax-Exempt Status Based on Public Policy, Post-Obergefell*, at 31 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3104688 [<https://perma.cc/6TAP-53AW>].

65. See *infra* note 91 and accompanying text.

66. See Thomas Scott-Railton, Note, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408, 421–23 (2018); Kaitlyn Schallhorn, *What’s a sanctuary church? A look at the policy and its legality in the US*, FOX NEWS (July 17, 2018), <https://www.foxnews.com/politics/whats-a-sanctuary-church-a-look-at-the-policy-and-its-legality-in-us> [<https://perma.cc/E4KK-YWGD>]; *infra* notes 114, 115, and accompanying text.

University is viewed as limited not only to “fundamental” public policies but also to situations that are historically unusual if not unique, in part because there is a concerted, large-scale effort to frustrate the policy, it does not appear any of the current conflicts rise to this level.⁶⁷

There are at least two significant problems with this approach, however. First, that is simply not what the Court (or the IRS) said with respect to the contrary-to-fundamental-public-policy doctrine. On its face, that doctrine provides that once an otherwise charitable organization’s activities are shown to be contrary to fundamental public policy, and if those activities rise to a significant enough level relative to the organization’s overall activities, then the organization loses the tax benefits that usually come with that status.⁶⁸ It does not matter whether the organization or its activities are new, whether the organization is an outlier or part of a larger movement opposing the policy at issue, or whether there are any other distinguishing historical characteristics.⁶⁹ Furthermore, this understanding of the doctrine is consistent with the overall approach of the IRS, and the underlying statutes, with respect to tax benefits; organizations qualify or fail to qualify based on their characteristics and actions, not generally based on the larger context in which they and their actions exist.⁷⁰

Second, this approach creates another ambiguous line that has to be drawn to determine if the doctrine applies. It would require the IRS and courts to wrestle not only with whether a given public pol-

67. See David A. Brennen, *A Diversity Theory of Charitable Tax Exemption—Beyond Efficiency, Through Critical Race Theory, Toward Diversity*, 4 PITT. TAX REV. 1, 53–54 (2006); Buckles, *supra* note 64, at 311–12; Shannon Weeks McCormack, *Taking the Good with the Bad: Recognizing the Negative Externalities Created by Charities and Their Implications for the Charitable Deduction*, 52 ARIZ. L. REV. 977, 1013 (2010). But see John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 837–43 (2014) (rejecting the argument that racial discrimination is distinctly worse as compared to other forms of discrimination such that the government is justified and permitted to prohibit racial but not other forms of discrimination by private groups).

68. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 586, 591–92 (1983).

69. See *id.*

70. I.R.C. §§ 501(a), (c)(3) (2018); Treas. Reg. §§ 1.501(c)(3)-1(a)–(c) (2018).

icy is “fundamental,” and whether an otherwise charitable organization’s actions contrary to that policy are relatively significant, but also whether those actions are somehow similar historically to racial discrimination. Such a determination is likely one that the IRS is even more ill-suited to make than the fundamental public policy determination. While the IRS is required to make the latter determination based on the position it asserted and the Court upheld in *Bob Jones University*, that decision does not require the former determination. This distinguishing based on historical context approach therefore appears to be both legally unjustifiable and impractical.⁷¹

We therefore need to consider whether conflicts exist now, or are likely to exist in the future, between the practices of a significant number of churches and fundamental public policies.

B. Discrimination in Employment, Services, and Membership

This Part considers the types of discrimination currently disfavored in at least some contexts by federal law to determine whether federal policy could either currently or in the near future rise to the level of a fundamental public policy and, if it could, whether that policy would conflict with the practices of a significant number of churches.⁷² More specifically, this Part details that while racial discrimination by private individuals and organizations is widely disfavored, federal law does not prohibit such discrimination in all contexts. For example, in the employment context, federal law reaches only organizations that have a certain number of employees.⁷³ Federal law also does not generally prohibit racial discrimination with respect to the membership of private organizations, although in the wake of a court decision concluding that social clubs

71. See Brunson & Herzig, *supra* note 33, at 1206–07 (rejecting treating *Bob Jones University* as an outlier).

72. See *id.* at 1213–15 (considering the use of the Civil Rights Act of 1964 to establish a framework for applying the contrary-to-fundamental-public-policy doctrine).

73. 42 U.S.C. § 2000e(b) (2018) (defining employer in the context of civil rights legislation as having fifteen or more employees).

could qualify for tax exemption even if they discriminated on the basis of race, Congress decided to deny exemption to social clubs if they have a written policy that discriminates on the basis of race, color, or religion.⁷⁴ And federal law prohibits racial discrimination in the provision of goods or services only in certain industries that provide public accommodations.⁷⁵ Similar limitations apply to federal law relating to disfavored discrimination of other types, such as those based on ethnicity, national origin, sex, religion, age, disability, and veteran status.⁷⁶

In addition, the Supreme Court has found that the First Amendment requires what has come to be known as a “ministerial exception” to employment discrimination laws in order to protect the ability of churches and other religious organizations, such as religious schools, to select their leaders.⁷⁷

1. Racial, Ethnic, and National Origin Discrimination

The employment context provides the strongest example of an anti-discrimination policy that has become fundamental. As was the case with racial discrimination in education when *Bob Jones University* was decided, federal government animus toward racial, ethnic, and national origin discrimination in employment can be found in a wide range of congressionally enacted statutes, executive

74. See I.R.C. § 501(i); *McGlotten v. Connally*, 338 F. Supp. 448, 457–59 (D.D.C. 1972); Jim Langley & Conrad Rosenberg, *Social Clubs—IRC 501(c)(7)*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1996, at 15 (1996), <https://www.irs.gov/pub/irs-tege/eo-topicc96.pdf> [<https://perma.cc/DU2H-7LVB>].

75. See 42 U.S.C. § 2000a (2018).

76. See, e.g., *id.* § 12101 (2018). But it is worth noting that not all types of discrimination are or should be prohibited. See generally Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in MATTERS OF FAITH: RELIGIOUS EXPERIENCE AND LEGAL RESPONSE (Austin Sarat ed., forthcoming) (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2087599 [<https://perma.cc/Y8W8-LG6B>].

77. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020); *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188–89 (2012).

branch pronouncements, and judicial decisions.⁷⁸ The Court has, as noted previously, created a ministerial exception to these laws for the employment of ministers by religious organizations under the First Amendment.⁷⁹ That the First Amendment may prohibit governments from flatly prohibiting such discrimination with respect to ministerial employment does not, however, necessarily mean it prohibits governments from conditioning tax benefits on not engaging in such discrimination.

But it is hard to identify any churches, much less a significant number, that openly and defiantly discriminate on the basis of race, ethnicity, or national origin in employment.⁸⁰ The denominations that historically were most supportive of first slavery and then racial segregation, such as the Southern Baptist Convention, have now denounced racial discrimination in the strongest terms.⁸¹ And the denominations that historically have been affiliated with a particular racial minority, such as the National Baptist Convention, arguably do not run afoul of this federal policy because any bias they have favors historically disadvantaged racial minorities.⁸² This is

78. See David A. Brennan, *The Power of the Treasury: Racial Discrimination, Public Policy, and "Charity" in Contemporary Society*, 33 U.C. DAVIS L. REV. 389, 403–04 (2000).

79. See *supra* note 77 and accompanying text.

80. One minor exception may be churches with strong ethnic associations, such as Orthodox Jewish synagogues and Russian or Greek Orthodox churches, that limit membership to persons of the relevant ethnic background or at least place additional membership qualifications on a believer from outside the relevant ethnic group. See Heather Miller Rubens, *"Something Has Gone Wrong": The JFS Case and Defining Jewish Identity in the Courtroom*, 29 MD. J. INT'L L. 366, 368–69 (2014) (United Kingdom court decision finding that the denial of preferential consideration for an applicant to a religious school was ethnic discrimination when it was based on their mother not being considered Jewish and their unwillingness to undergo an Orthodox conversion); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1921 (2006) (asserting "Orthodox Jewish synagogues discriminate based on ethnicity . . . in choosing rabbis and members").

81. See SOUTHERN BAPTIST CONVENTION, RESOLUTION ON RACIAL RECONCILIATION ON THE 150TH ANNIVERSARY OF THE SOUTHERN BAPTIST CONVENTION (1995), <https://www.sbc.net/resource-library/resolutions/resolution-on-racial-reconciliation-on-the-150th-anniversary-of-the-southern-baptist-convention/> [<https://perma.cc/QMU9-7QQD>].

82. See Brennan, *supra* note 78, at 439 (concluding that there is no clearly established federal public policy against affirmative action).

not to say there have not been credible allegations of isolated instances of racism; for example, in June 2018 the Southern Baptist Convention expelled a church based on “clear evidence of the church’s intentional discriminatory acts.”⁸³ So while it is possible that out of the hundreds of thousands of churches in the United States⁸⁴ the IRS might become aware of a handful that engage in intentional racial discrimination in employment, the relative rareness of such practices among churches, the assumption that such churches are likely to be small, and the First Amendment issues raised by the existence of the ministerial exception, may understandably lead the IRS to decide to deploy its limited enforcement resources elsewhere. Any conflict in this particular area would therefore be rare to nonexistent.

With respect to the provision of goods and services, the federal government also has a strong policy against racial discrimination, but only with respect to the provision of certain goods and services in “a place of public accommodation” that affects interstate commerce or is supported by a state government (such as hotels, restaurants, and entertainment venues).⁸⁵ The limited reach of most churches and the lack of direct state financial support for them would seem to place them beyond the scope of that policy. While hypothetically one can imagine a church that operated, for example, a hotel open to the public, similar to the Second Baptist Church of Goldsboro’s operating the Goldsboro Christian Schools (through the same legal entity as the church), as a practical matter such a situation is likely to be rare or nonexistent. (In addition, when a

83. Carma Henry, *Georgia Church Expelled from Southern Baptist Convention Over Racial Discrimination Charges*, WESTSIDE GAZETTE (June 13, 2018), <https://thewestsidegazette.com/georgia-church-expelled-from-southern-baptist-convention-over-racial-discrimination-charges/> [https://perma.cc/X84D-KKNA].

84. *Fast Facts About American Religion*, HARTFORD INST. FOR RELIGION RESEARCH, http://hrr.hartsem.edu/research/fastfacts/fast_facts.html#numcong [https://perma.cc/W96W-SADP].

85. See *supra* note 75 and accompanying text. Of course it is not always clear whether a group is providing a “public accommodation.” See, e.g., Nelson Tebbe, *Associations and the Constitution: Four Questions about Four Freedoms*, 92 N.C. L. REV. 917, 924–27 (2014).

church engages in racial discrimination that “can reasonably be expected to aggravate the disparity in the educational, economic, or social levels of [a racial] group when compared with society as a whole,”⁸⁶ such as by operating a racially discriminatory school, the government’s interest in extending the contrary-to-fundamental-public-policy doctrine to the church is arguably strong enough to overcome the arguments advanced in this Article for not doing so with respect to churches generally.⁸⁷)

Finally, with respect to membership, the IRS Chief Counsel’s office has concluded that “exclud[ing] from participation in or den[ying] the benefits of a program or activity to individuals solely on the basis of race so that it can be reasonably be expected to aggravate the disparity in the educational, economic, or social levels of that group when compared with society as a whole” violates fundamental public policy.⁸⁸ It is not clear, however, that this conclusion extends to membership in a church or attendance at a church gathering, absent clear evidence such membership or attendance provides significant educational, economic, or social benefits, particularly given the First Amendment associational as well as free exercise concerns raised by such an extension. Therefore, even if the IRS became aware of a church that intentionally engaged in racial discrimination with respect to its membership or attendance—which appears to be a rare circumstance under any conditions—it likely would rightly conclude that such behavior does not rise to the level of being contrary to fundamental public policy.⁸⁹ Therefore, while prohibiting racial discrimination in some, but not all,

86. I.R.S. Tech. Adv. Mem. 89-10-001 (Mar. 10, 1989); I.R.S. Gen. Couns. Mem. 39,792 (Aug. 17, 1987).

87. See *infra* text accompanying note 367.

88. *Supra* note 33.

89. While the IRS did revoke the tax-exempt status of a racist church apparently based on *Bob Jones University*, both IRS’s reasoning and the facts it deemed relevant are unclear. See *supra* note 52 and accompanying text. It is therefore impossible to tell if that decision was inconsistent with the above-cited I.R.S. General Counsel Memorandum, which Memorandum was later in time and so presumably would be a better indication of the IRS’s position in this respect under any conditions. See *supra* note 33 and accompanying text.

contexts almost certainly is a fundamental public policy, an actual conflict is unlikely in those contexts because of the lack of such behavior by a significant number of churches.⁹⁰

2. Sex Discrimination

While intentional racial discrimination appears to be rare among churches, intentional sex discrimination is much more widespread. The most obvious example is the position taken by many religious institutions, including the Catholic Church, a significant number of Protestant churches, more theologically conservative Jewish synagogues, and some bodies in other religions, that certain leadership roles are reserved for men. Some faiths also explicitly teach that women and men have different roles in society more generally.⁹¹ Beyond explicit policies with respect to leadership and societal roles, there has also been at least one recent public dispute in a major denomination relating to the treatment of women. In a decision that was controversial within that denomination, a Southern Baptist seminary decided to fire a longtime Southern Baptist leader in the wake of criticism for his alleged treatment of and teachings about women, including how he responded to two students who

90. Outside of the church context, there has been speculation (but no IRS rulings or other guidance) that tax-exempt hate groups promoting white supremacy may now run afoul of the contrary-to-fundamental-public-policy doctrine, notwithstanding First Amendment concerns. See, e.g., David J. Herzig & Samuel D. Brunson, Opinion, *White Supremacist Groups Don't Deserve Tax Exemptions*, N.Y. TIMES (Aug. 29, 2017), <https://www.nytimes.com/2017/08/29/opinion/white-supremacists-tax-exemptions.html> [https://nyti.ms/2weafRQ]; Darryll K. Jones, *House of Representatives Passes Resolution Condemning Hate Speech: Fundamental Public Policy Yet?*, NONPROFIT LAW PROF BLOG (Jan. 16, 2019), <https://lawprofessors.typepad.com/nonprofit/2019/01/house-of-representatives-passes-resolution-condemning-hate-speech-fundamental-public-policy-yet.html> [https://perma.cc/9GTF-VHMM].

91. See, e.g., THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE FAMILY: A PROCLAMATION TO THE WORLD (1995) (teaching that, “[b]y divine design, fathers are to preside over their families in love and righteousness and are responsible to provide the necessities of life and protection for their families. Mothers are primarily responsible for the nurture of their children”). See generally Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453, 458 n.30 & 459–69 (1992); Caroline Mala Corbin, *Expanding the Bob Jones Compromise*, in LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES 123, 133, 147–49 (Austin Sarat ed., 2012).

alleged they had been sexually assaulted by others and his teachings regarding “the Bible’s view of women and his belief that spousal abuse is not grounds for divorce.”⁹²

The key question in this context is therefore whether federal government policies relating to sex discrimination, in the employment context and beyond, have become fundamental. The Court in *Bob Jones University* made this determination with respect to racial discrimination in education by looking at the extent of actions of the three branches of the federal government and the time period over which those branches consistently opposed such discrimination.⁹³ With respect to sex discrimination, Congress included in Title VII of the Civil Rights Act of 1964 a prohibition on discrimination in employment on the basis of sex and a year earlier enacted the Equal Pay Act, which prohibited paying women and men unequally for equal work.⁹⁴ It also enacted Title IX of the Education Amendments of 1972, which prohibited sex discrimination in education programs receiving federal funds and broadened the reach of that provision in 1988, including refusing to exclude churches.⁹⁵

While initially the federal courts resisted a robust prohibition on sex discrimination under the Equal Protection Clause of the Fourteenth Amendment, for the past forty or so years state action involving such discrimination has been subject to an “intermediate” level of scrutiny (somewhere between the “strict scrutiny” that applies to racial discrimination and the rational basis scrutiny that applies generally).⁹⁶ This level of scrutiny led to, for example, the Supreme Court concluding that the male-only admissions policy of

92. See Sarah Pulliam Bailey, *Southern Baptist seminary drops bombshell: Why Paige Patterson was fired*, WASH. POST (June 1, 2018), <https://www.washingtonpost.com/news/acts-of-faith/wp/2018/06/01/southern-baptist-seminary-drops-bombshell-why-paige-patterson-was-fired> [https://perma.cc/ST7G-FB5X].

93. *Bob Jones Univ. v. United States*, 461 U.S. 574, 593–95 (1983); see also Hatfield et al., *supra* note 14, at 3.

94. See 29 U.S.C. § 206(d) (2018); 42 U.S.C. § 2000e-2(a) (2018).

95. See 20 U.S.C. §§ 1681–1688 (2018); Stephen L. Mikochik, *Caesar’s Coin: Federal Funds, Civil Rights, and Churches*, 9 J.L. & RELIGION 193, 193–94 (1991).

96. See Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1328–29 (2018).

the Virginia Military Institute, a public university, violated the Constitution.⁹⁷ The executive branch not only has long prohibited sex discrimination in government employment generally but, for example, has increasingly permitted women to seek combat positions in the military, most recently graduating the first female Marines from its infantry officer course in the wake of the decision to open all combat roles to women.⁹⁸ Even without the ratification of the Equal Rights Amendment (ERA) to the Constitution,⁹⁹ it therefore appears that prohibiting sex discrimination, at least in the employment context, is now a fundamental public policy since all three branches of the federal government now have a decades-long, broad, and consistent policy of rejecting it.¹⁰⁰ While the IRS has in the past decided that sex discrimination was not “clearly contrary to public policy,”¹⁰¹ those decisions do not reflect these more recent legal developments. Some commentators have therefore called upon the IRS to revoke the tax-exempt status of religious organizations that engage in this type of discrimination.¹⁰²

97. *United States v. Virginia*, 518 U.S. 515, 519 (1996).

98. See Kevin Lui, *In a Landmark First, the U.S. Marines Now Has a Female Infantry Officer*, TIME (Sept. 26, 2017), <https://time.com/4956767/us-marines-first-female-infantry-officer> [https://perma.cc/S2KV-EL68].

99. The ratification of the ERA by Virginia on January 15, 2020 does not necessarily mean the ERA is now part of the Constitution, both because Congress placed a time limit on ratification that expired in 1982 and because several states have rescinded their previous ratifications. Darlene Ricker, *What does Equal Rights Amendment ratification in Virginia mean for its chances?*, ABA JOURNAL (Jan. 16, 2020), <http://www.abajournal.com/web/article/era-ratification-in-virginia-doesnt-seal-its-fate-timing-is-everything> [https://perma.cc/VL3P-3F2Q].

100. See Hatfield et al., *supra* note 14, at 40.

101. See, e.g., I.R.S. Tech. Adv. Mem. 77-44-007 (July 28, 1977); *Moritz v. Comm’r*, 55 T.C. 113, 115 (1970).

102. See, e.g., Becker, *supra* note 91, at 485; Corbin, *supra* note 91, at 134–35, 156–58; cf. Boris I. Bittker & Kenneth M. Kaufman, *Taxes and Civil Rights: “Constitutionalizing” the Internal Revenue Code*, 82 YALE L.J. 51, 61–63 (1972) (arguing that the tax benefits enjoyed by most tax-exempt organizations are sufficient to render them state actors and so prohibited from discriminating on various grounds, including sex). But see COREY BRETTSCHEIDER, *WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?* 134–36 (2012) (arguing that the position of at least some churches with respect to women and homosexual people is not so clearly opposed to the ideal of free and equal citizenship to justify removing their federal income tax benefits); Timothy J. Tracey, Bob Jonesing: *Same-Sex*

So why has the IRS not acted in this area? A cynical explanation is that the IRS is much weaker politically than it was in the 1970s and so has no stomach for the backlash that would undoubtedly occur if it were to pursue such a controversial course of action.¹⁰³ A more principled explanation is that the IRS has concluded that since such discrimination most commonly occurs with respect to the selection of religious leaders, the constitutionally based ministerial exception—not at issue in *Bob Jones University*—would prevent revoking the tax-exempt status of a religious organization that engages in such discrimination.

3. Sexual Orientation Discrimination

As is the case with sex discrimination, many faiths intentionally discriminate on the basis of either conduct associated with sexual orientation¹⁰⁴ or, less commonly, sexual orientation itself.¹⁰⁵ Such discrimination is almost certainly more pervasive than sex discrimination, particularly given that many faiths believe that same-sex sexual relationships are inherently wrong, potentially disqualifying

Marriage and the Hankering to Strip Religious Institutions of Their Tax-Exempt Status, 11 FIU L. REV. 85, 92 (2015) (concluding without much discussion that sex discrimination is not contrary to fundamental public policy).

103. See generally Amy Moore, *Rife with Latent Power: Exploring the Reach of the IRS to Determine Tax-Exempt Status According to Public Policy Rationale in an Era of Judicial Deference*, 56 S. TEX. L. REV. 117, 138, 156–57 (2014) (arguing *Chevron* deference “has made the IRS rife with [latent] power” that Congress can choose to use when it becomes politically prudent).

104. See, e.g., CATECHISM OF THE CATHOLIC CHURCH, ¶¶ 2357–2359 (2016) (distinguishing between homosexual conduct, which is “intrinsically disordered,” and homosexual orientation); CHRISTIAN REFORMED CHURCH, HOMOSEXUALITY, <https://www.crcna.org/welcome/beliefs/position-statements/homosexuality> [<https://perma.cc/UB7M-7H53>] (distinguishing between individuals with a homosexual orientation, who can fully participate in the life of the church, and individuals practicing homosexuality, which is identified as sinful); SOUTHERN BAPTIST CONVENTION, RESOLUTION ON HOMOSEXUALITY, (1988), <http://www.sbc.net/resource-library/resolutions/resolution-on-homosexuality-5/> [<https://perma.cc/SHD4-69AF>] (citations omitted) (“That we maintain that while God loves the homosexual and offers salvation, homosexuality is not a normal lifestyle and is an abomination in the eyes of God.”).

105. Denny Burk, *Is Homosexual Orientation Sinful?*, ERLC (Feb. 18, 2014), <https://erlc.com/resource-library/articles/is-homosexual-orientation-sinful> [<https://perma.cc/YXW3-ZH9R>] (arguing that homosexual orientation, and not just behavior, is sinful).

those involved in such relationships from leadership roles and even from membership.¹⁰⁶

However, commentators generally acknowledge that the federal government as a whole has not taken a consistent position against such discrimination, much less a strong and longstanding position sufficient to render this policy fundamental.¹⁰⁷ Then-IRS Commissioner Koskinen appeared to take this position in 2015 as well, although he left the door open for reconsideration in the future.¹⁰⁸ It is true that the Supreme Court in the recent case of *Bostock v. Clayton County* takes the position that Congress has long outlawed sexual orientation discrimination in employment by outlawing discrimination based on sex.¹⁰⁹ But the repeated failure of Congress to enact an explicit prohibition on sexual orientation discrimination indicates at least some inconsistency in that branch's position.¹¹⁰ The *Obergefell* oral argument exchange was therefore at best premature; whether such discrimination by churches or other religious organizations ever truly becomes an "issue" the IRS and courts will need to wrestle with, it certainly does not rise to that level yet. This is

106. See Nicholas A. Mirkay, *Losing Our Religion: Reevaluating the Section 501(c)(3) Exemption of Religious Organizations That Discriminate*, 17 WM. & MARY BILL OF RTS. J. 715, 717–19 (2009) (providing examples).

107. See, e.g., CONG. RSCH. SERV., R44244, RECOGNITION OF SAME-SEX MARRIAGE: IMPLICATIONS FOR RELIGIOUS OBJECTIONS 27 (2015); Brunson & Herzig, *supra* note 33, at 1187; Buckles, *supra* note 64, at 308–10; Hatfield, *supra* note 14, at 90; Nicholas Mirkay, *Is It Charitable to Discriminate: The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities*, 2007 WIS. L. REV. 45, 67–68 (2007); Tracey, *supra* note 102, at 92–93; Wagenmaker, *supra* note 64, at 24–27; Kirsten Berg & Moiz Syed, *Under Trump, LGBTQ Progress Is Being Reversed in Plain Sight*, PROPUBLICA, (Nov. 22, 2019), <https://projects.propublica.org/graphics/lgbtq-rights-rollback> [https://perma.cc/S3V3-8L5M]. But see Dyllan Moreno Taxman, *What About Bob? The Continuing Problem of Federally-Subsidized LGB Discrimination in Higher Education*, 34 WIS. J.L. GENDER & SOC'Y 39, 64–65 (2019) (arguing that at least some forms of sexual orientation discrimination, such as not providing housing to same-sex married couple on the same basis as to opposite-sex married couples, may now be contrary to fundamental public policy).

108. *Hearing on Revisiting IRS Targeting: Progress of Agency Reforms and Congressional Options Before the Subcomm. on Oversight, Agency Action, Fed. Rts. and Fed. Cts. of the S. Comm. On the Judiciary*, 114th Cong. (2015) (testimony of John Koskinen, Internal Revenue Service Commissioner).

109. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020).

110. See *id.* at 1822–24 (Kavanaugh, J., dissenting).

particularly true given the protection provided to religiously motivated actions by the Religious Freedom Restoration Act, which, as the Court in *Bostock* noted, requires the government to have a compelling interest and use the least restrictive means of furthering that interest when substantially burdening a person's exercise of religion.¹¹¹ But if it did rise to the level of a fundamental public policy at some point in the future, it would likely raise issues similar to those that the IRS currently faces with respect to sex discrimination and which will be explored further in Part V below.

4. Other Forms of Discrimination

The federal government also prohibits discrimination based on certain other grounds in some contexts, including employment. Such other grounds include religion, age, disability, and veteran status.¹¹² Congress has understandably exempted religious organizations from the statutory prohibition on religious discrimination in employment,¹¹³ however, and there is no reason to conclude that the application of this particular policy would apply to churches in any other context. As for age and disability, as with racial discrimination, it appears that churches intentionally discriminating on these bases, whether in employment, provision of goods and services, or membership, are rare to nonexistent and therefore unlikely to create a significant conflict even if these policies are considered fundamental. Finally, one could imagine that those faiths with a pacifist tradition might discriminate against veterans in employment decisions, particularly for religious leaders, but it is more likely that they would discriminate based on whether an individual currently holds pacifist beliefs, which a veteran certainly could, rather than veteran status itself. So none of these federally disfavored bases for making decisions are likely to result in significant conflicts under *Bob Jones University*.

111. See 42 U.S.C. § 2000bb-1(b) (2018); *Bostock*, 140 S. Ct. at 1754.

112. See, e.g., 42 U.S.C. § 2000e-2 (2018).

113. See *id.* § 2000e-1(a).

C. *Protecting and Serving Undocumented Immigrants*

The increasingly heated debates over immigration raise a possible point of conflict outside of the discrimination context. Some churches have provided sanctuary for immigrants who are in this country illegally to protect them from possible deportation actions, based on the churches' religious convictions.¹¹⁴ To date the U.S. Department of Justice (DOJ) has criticized such actions but not pursued criminal or civil charges against the churches involved or their leaders.¹¹⁵ However, this was not the case in the 1980s, when the federal government successfully prosecuted individuals associated with the sanctuary movement.¹¹⁶ At least one commentator has argued pursuing such charges today might run afoul of the Religious Freedom Restoration Act, enacted in 1993.¹¹⁷ But should the IRS reconsider the tax benefits enjoyed by these churches under *Bob Jones University* even absent a finding by the DOJ or the courts that such activities are illegal?

114. See Schallhorn, *supra* note 66; Bobby Allyn & Michel Marizco, *Jury Acquits Aid Worker Accused Of Helping Border-Crossing Migrants in Arizona*, NPR, (Nov. 21, 2019), <https://www.npr.org/2019/11/21/781658800/jury-acquits-aid-worker-accused-of-helping-border-crossing-migrants-in-arizona> [<https://perma.cc/KLM5-HZFG>] (describing how a humanitarian aid worker employed by Unitarian Universalist Church-affiliated ministry was acquitted of helping migrants). The legal history of sanctuary, particularly under common law, is lengthy and complicated. See generally JOHN BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 553–54 (5th ed. 2019).

115. See Church Sanctuary for Illegal Aliens, 7 Op. O.L.C. 168 (1983), https://www.justice.gov/sites/default/files/olc/opinions/1983/10/31/op-olc-v007-p0168_0.pdf [<https://perma.cc/8RHM-NCP3>] (criticizing practice and concluding any asserted legal defenses would be insufficient); Jason Hanna, *Can churches provide legal sanctuary to undocumented immigrants*, CNN (Feb. 17, 2017), <https://www.cnn.com/2017/02/17/us/immigrants-sanctuary-churches-legality-trnd/index.html> [<https://perma.cc/Z9P2-CAWD>] (reporting that “[i]n general, prosecutors probably won’t go after a pastor” according to a former DOJ Office of Immigration Litigation assistant attorney general).

116. See generally Scott-Railton, *supra* note 66, at 417–19.

117. See *id.* at 419, 433–49.

The history of immigration and immigration laws in the United States is lengthy and complicated, including with respect to enforcement of those laws.¹¹⁸ That said, Congress has certainly enacted laws limiting immigration and imposing penalties—primarily deportation—for violations of those laws, and the executive branch and the courts have a long history of enforcing and applying those laws and penalties.¹¹⁹ While it could be argued that the degree of enforcement varies among administrations, preventing the deportation of immigrants who are in the United States illegally appears to be contrary to fundamental public policy given the decades-long support of all three branches for deportation of many immigrants in the country illegally.¹²⁰

Professor Ellen P. Aprill has considered this issue and is skeptical that the IRS would pursue revocation of tax exemption in sanctuary situations for a variety of reasons, including the lack of a clear finding of illegal activity by the DOJ, the fact that providing such sanctuary would likely be a relatively small part of a given church's activities, the limited resources of the IRS, and the historical unwillingness of the IRS to expand the application of the contrary-to-fundamental-public-policy doctrine beyond racial discrimination in education.¹²¹ That said, she acknowledges that in theory the IRS could apply the contrary-to-fundamental-public-policy doctrine in this context to strip sanctuary churches of their federal tax

118. See generally WALTER A. EWING, AM. IMMIGRATION COUNCIL, IMMIGRATION POL'Y CTR., OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF U.S. IMMIGRATION POLICY (2012), https://americanimmigrationcouncil.org/sites/default/files/research/opportunity_exclusion_011312.pdf [<https://perma.cc/SRM7-QPGY>].

119. See generally DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007).

120. See, e.g., Alex Nowrasteh, *Deportation Rates in Historical Perspective*, CATO AT LIBERTY (Sept. 16, 2019), <https://www.cato.org/blog/deportation-rates-historical-perspective> [<https://perma.cc/HZF4-7MKF>] (finding more than 100,000 deportations per year under the administration of President Bill Clinton and every presidential administration since).

121. See Ellen P. Aprill, *Religious Organizations, Refuge for Undocumented Immigrants, and Tax Exemption*, Loyola Law School, Los Angeles Legal Studies Research Paper No. 2017-28, 1–5 (2017).

benefits.¹²² This area therefore may be another current conflict under the contrary-to-fundamental-public-policy doctrine of *Bob Jones University*.

D. *Other Possible Conflicts*

Additionally, relatively rare situations in which a church runs afoul of *Bob Jones University* have arisen or could arise, including with respect to polygamy, marijuana, human rights violations, and sexual abuse. For example, the IRS has denied tax-exempt status as recently as 2013 to organizations that supported the (state law) criminal activity of polygamy, which the IRS concluded was also contrary to federal public policy.¹²³ The IRS based those denials on multiple grounds, including that support of polygamy is necessarily both support for violating state laws and contrary to fundamental federal policy.¹²⁴ Despite their illegality, plural marriages are still somewhat common in the United States.¹²⁵ And across the globe, there are possibly more polygamous societies than there are monogamous ones.¹²⁶ Most relevant to the current discussion, some American churches endorse the practice as part of their religion, particularly the fundamentalist Latter Day Saints churches.¹²⁷ In addition, one report estimates that anywhere from 50,000 to 100,000

122. *See id.* at 4–5.

123. I.R.S. Priv. Ltr. Rul. 2013-25-015 (June 21, 2013) (involving a church); IRS Priv. Ltr. Rul. 2013-23-025 (June 7, 2013) (involving a non-church educational and charitable organization). Despite the recent legal victories for same-sex marriage, it seems unlikely that there will be similar victories in the near future for polygamy. *See, e.g.,* John Witte, Jr., *Why No Polygamy*, in *THE CONTESTED PLACE OF RELIGION IN FAMILY LAW* 446–66 (Robin Fretwell Wilson ed., 2018).

124. *See* I.R.S. Priv. Ltr. Rul. 2013-25-015, *supra* note 57; *see also* I.R.S. Priv. Ltr. Rul. 2013-23-025, *supra* note 57.

125. *See Obergefell*, 135 S. Ct. at 2622 (Roberts, C.J., dissenting) (citing Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, *NEWSWEEK* (July 28, 2009), <https://www.newsweek.com/polyamory-next-sexual-revolution-82053> [<https://perma.cc/S9PX-9YTC>] (estimating 500,000 polyamorous families in the United States)).

126. Jack B. Harrison, *On Marriage and Polygamy*, 42 *OHIO N.U. L. REV.* 89, 94 (2015).

127. *See, e.g.,* Jason D. Berkowitz, *Beneath the Veil of Mormonism: Uncovering the Truth About Polygamy in the United States and Canada*, 38 *U. MIAMI INTER-AM. L. REV.* 615, 616

Muslims currently live in polygamous families in the United States.¹²⁸ So while to date it appears few organizations and even fewer churches have both explicitly supported the practice of polygamy and sought IRS recognition of tax-exempt status—the 2013 denials being an outlier—it is certainly possible that more conflicts over this issue could occur in the future.

In contrast and as mentioned earlier, the IRS appears not to have had a problem with recognizing the tax-exempt status of a church that was candid regarding its intent to incorporate marijuana use into its religious rituals despite the fact that such use was illegal under federal law and under the law of the state where the church was located.¹²⁹ And while this church is not unique, in that there also a number of such churches in California,¹³⁰ it does not appear the IRS is challenging the tax-exempt status of any of them. However, because the IRS does not generally provide explanations for rulings recognizing tax-exempt status or for why it is not choosing to challenge the existing tax-exempt status of an organization,¹³¹ it is unclear why it is taking this position. And, of course, its position could change if the federal government decides to more aggressively prosecute marijuana offenses.

Some churches might also support or directly engage in activities that violate human rights. For example, some churches, particularly

(2007); see also Eve D'Onofrio, *Child Brides, Inegalitarianism, and the Fundamentalist Polygamous Family in the United States*, 19 INT'L J.L. POL'Y & FAM. 373, 375–76 (2005).

128. Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR (May 27, 2008), <https://www.npr.org/templates/story/story.php?storyId=90857818> [<https://perma.cc/VE2N-VBLX>].

129. See *supra* note 60 and accompanying text.

130. See Arit John, *Inside the War For California's Cannabis Churches*, N.Y. TIMES, (Nov. 23, 2019), <https://www.nytimes.com/2019/11/23/style/weed-church-california.html> [<https://nyti.ms/2OAWCLn>].

131. See INTERNAL REVENUE SERV., IRS COMPLAINT PROCESS FOR TAX EXEMPT ORGANIZATIONS 2 (2008), <https://www.irs.gov/pub/irs-news/fs-08-13.pdf> [<https://perma.cc/KH9N-YGGB>] (noting that the IRS is prohibited from publicly disclosing whether it has initiated an examination or the result of any examination); Terri Lynn Helge, *Rejecting Charity: Why the IRS Denies Tax Exemption to 501(c)(3) Applicants*, 14 PITT. TAX REV. 1, 2 (2016) (stating that favorable IRS tax exemption determination letters “do[] not set forth the reasons why the organization’s application was approved”).

ones that could be characterized as cults, might actively work to prevent individuals from leaving the church.¹³² Other possible human rights violations could include pressuring spouses to stay in abusive marriages, or, some would argue, putting church members through “gay conversion therapy.”¹³³ The latter is unlikely to constitute the contravention of a fundamental public policy, even though now outlawed in some states,¹³⁴ but certainly allowing individuals to choose their faith is a longstanding human right recognized by the federal government,¹³⁵ and preventing domestic violence has (albeit more recently) also attained that status.¹³⁶ However, in practice, such activities rarely rise to the level of legally actionable coercion and, when they do, likely also involve illegal criminal actions that would provide a clearer basis for loss of tax-exempt status if a church directly engaged in such actions.¹³⁷ The IRS therefore might not face a situation where a church has engaged

132. See Cecilia M. Weigel, Note, *Trafficking Cults: Why Courts Should Adopt a Broad Reading of the Trafficking Victims Protection Act to Ensure Protection of Cult Victims*, 30 GEO. MASON U. C.R. L.J. 269, 272 (2020) (“In some instances, cults force their members to stay within the group.”).

133. See, e.g., Robin Fretwell Wilson, *The Overlooked Costs of Religious Deference*, 64 WASH. & LEE L. REV. 1363, 1373–77 (2007) (reporting findings that “[r]eligious groups often acquiesce in or, worse, condone family violence within the community”); Susan L. Morrow & A. Lee Beckstead, *Conversion Therapies for Same-Sex Attracted Clients in Religious Conflict: Context, Predisposing Factors, Experiences, and Implications for Therapy*, 32 COUNSELING PSYCH. 641, 642 (2004).

134. See Equality Maps: Conversion Therapy Laws, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy [<https://perma.cc/R6UD-GT2G>]; Derrick Bryson Taylor, *Colorado Bans “Conversion Therapy” for Minors*, N.Y. TIMES, (June 1, 2019) <https://www.nytimes.com/2019/06/01/us/gay-conversion-therapy-colorado.html> [<https://nyti.ms/2EHSbu7>] (finding that eighteen states have banned conversion therapy for minors).

135. See UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 18 (approved by United States); INT’L COVENANT ON CIVIL & POLITICAL RIGHTS, Art. 18 (ratified by United States).

136. See Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902.

137. See Hava Dayan, *Modern Day Slavery: A Socio-Legal Analysis of Slavery-Like Offences in Charismatic Cults*, 23 BUFF. HUM. RTS. L. REV. 41, 42 n.3 (2016); Weigel, *supra* note 132, at 274 (asserting that courts in the United States generally do not find psychological coercion alone sufficient to provide the basis for a civil legal claim).

in such activities in such a way that violates fundamental public policy but does not constitute illegal criminal activity.

Finally, the recent scandals involving various churches and alleged or proven sexual abuse could implicate the *Bob Jones University* decision but are unlikely to do so. There are few if any claims that the churches in question intentionally endorsed or directed such behavior, and so such behavior should not be attributed to them for tax exemption purposes. This remains the case even though liability might and often has attached to churches arising out of negligence relating to such abuse, under a theory of vicarious liability, or because of intentional efforts to cover up misbehavior that led to further abuse.¹³⁸

* * *

In conclusion, there are at least several areas of current or likely future conflict between many churches and fundamental public policy, including sex discrimination in employment, sexual orientation discrimination in employment, sanctuary provision to undocumented immigrants, and polygamy. It is therefore necessary to determine how *Bob Jones University* should be applied to churches involved in such conflicts.

III. CHURCHES AND TAXES

Churches have historically often enjoyed tax exemptions and other tax benefits, as have their leaders. However, the exemptions and other benefits have not always been blanket ones, in large part because of their complicated history and their shifting justifications.¹³⁹ This Part first briefly summarizes the existing tax benefits

138. See, e.g., Stephen M. Bainbridge & Aaron H. Cole, *The Bishop's Alter Ego: Enterprise Liability and the Catholic Priest Sex Abuse Scandal*, 46 J. CATH. LEGAL STUD. 65, 68 (2007); Mayo Moran, *Cardinal Sins: How the Catholic Sexual Abuse Crisis Changed Private Law*, 21 GEO. J. GENDER & L. 95, 136–41 (2019).

139. See, e.g., NINA J. CRIMM & LAURENCE H. WINER, POLITICS, TAXES, AND THE PULPIT: PROVOCATIVE FIRST AMENDMENT CONFLICTS 71–72 (2011); DEIRDRE DESSINGUE, *The Special Case of Churches*, in PROPERTY-TAX EXEMPTION FOR CHARITIES 173, 173–74 (Evelyn Brody ed., 2002).

for such organizations in the United States and related conditions on them, then considers the constitutional provisions that may either support or conflict with the existence of these benefits, and finally addresses the reasons put forward to support them.

A. *Existing Law*

Bob Jones University related to federal tax benefits, so it is appropriate to start there, especially since, for churches, those benefits are more extensive than those enjoyed by non-church religious organizations.¹⁴⁰ But there are also many tax benefits provided to churches at the state and local level, so this Part briefly discusses those benefits as well.

1. Federal Tax Law

Perhaps the most commonly known benefit, which churches share with other types of charities, is exemption from federal income tax under Internal Revenue Code Section 501(c)(3). That provision extends exemption to “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals.”¹⁴¹ This exemption is conditional in several ways, beyond the fundamental public policy condition upheld in the *Bob Jones University* decision. More specifically, Section 501(c)(3) denies exemption to an otherwise qualified organization if it distributes its net earnings to a private party, engages in a substantial amount of lobbying, or supports or opposes any candidate for elected public office.¹⁴² This exemption is also not unlimited, as it does not extend to “unrelated business taxable income” — oversimplifying, income

140. See Robert H. Wood, *Why Churches Are the Gold Standard of Tax-Exempt Organizations*, FORBES (Sept. 22, 2015), <https://www.forbes.com/sites/robertwood/2015/09/22/lets-tax-churches/?sh=6f1c608b322b> [https://perma.cc/VM2S-NVL8].

141. I.R.C. § 501(c)(3) (2018).

142. See *id.*

from any regularly carried on trade or business that is not substantially related to the organization's exempt purpose (and does not fall within a statutorily provided exception).¹⁴³ A closely related benefit that is available to almost all Section 501(c)(3) organizations is the ability to receive donations that qualify as deductible charitable contributions for donors; such donations are also generally exempt from federal estate and gift taxes.¹⁴⁴ Along with other 501(c)(3) organizations, churches are also exempt from federal unemployment tax.¹⁴⁵

Churches enjoy a number of tax benefits generally not enjoyed by other 501(c)(3)s, including exemption from initial application and annual information return requirements and special protections relating to tax inquiries and examinations.¹⁴⁶ Ministers—that is ordained, commissioned, or licensed religious leaders who usually although not always serve in churches—also enjoy a number of significant tax benefits, including the ability to exclude from their taxable income the value of housing provided to them by a church or cash compensation paid to them to provide housing.¹⁴⁷

Particularly since some benefits are only available to churches as opposed to all 501(c)(3)s, the IRS has had to determine what qualifies as a “church” for these purposes. The IRS uses a fourteen-factor test, although an organization does not have to satisfy all fourteen factors to qualify.¹⁴⁸ The courts have used this test and also an “associational test” that considers whether the organization has a

143. *See id.* §§ 511–514.

144. *See id.* §§ 170(a), (c)(2), 2055 (a)(2), 2522(a)(2).

145. *See id.* § 3306(c)(8).

146. *See id.* §§ 508(c)(1)(A), 6033(a)(3)(A)(i), 7611.

147. *See id.* § 107. This cash compensation aspect of the ministerial housing benefit was recently the subject of an ultimately unsuccessful constitutional challenge. *See infra* note 180. Other special tax benefits for churches and ministers relate to retirement plans and payroll taxes. *See* I.R.C. §§ 410(c)(1)(B), 411(e)(1)(B), 412(e)(2)(D), 414(c)(2), (e), 1402(a)(8), (e) (2018).

148. *See* *Spiritual Outreach Soc’y v. Comm’r*, 927 F.2d 335, 338 (8th Cir. 1991) (citing Remarks of IRS Commissioner Jerome Kurtz, PLI Seventh Biennial Conference on Tax Planning (Jan. 9, 1978), *reprinted in* Fed. Taxes (P-H) ¶ 54,820 (1978)); I.R.S. Tech. Adv. Mem. 88-33-001 (May 2, 1988); I.R.S. Gen. Couns. Mem. 36,993 (Feb. 3, 1977); INTERNAL

group of individuals that meets regularly for worship and other religious purposes.¹⁴⁹ The relative vagueness of both tests is driven in significant part by the need to accommodate “churches” of all faiths or even of arguably none.¹⁵⁰

2. State and Local Tax Law

States and localities of course also impose a variety of taxes, including income, property, and sales and use taxes. In general, most 501(c)(3)s qualify for exemption from these taxes in most states and localities, including almost always churches, although the scope and conditions related to them vary widely.¹⁵¹ However and in common with other 501(c)(3)s, churches often do not qualify for exemption from levies that are characterized as user fees or similarly tied to the provision of particular services, such as trash collection.¹⁵²

REVENUE SERV., “CHURCHES” DEFINED, <https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined> [<https://perma.cc/9EG7-AUQ4>]. The IRS first faced the difficult task of determining what constituted a church when Congress initially enacted the unrelated business income tax, which in its original form, exempted churches (and conventions and associations of churches) from this tax. See, e.g., Maggie Flynn, *Witchcraft and Tax Exempt Status Under Section 501(c)(3) of the Internal Revenue Code*, 21 U.S.F. L. REV. 763, 788 (1987); Schwarz, *supra* note 43, at 64–67; Wendy Gerzog Shaller, *Churches and Their Enviably Tax Status*, 51 U. PITT. L. REV. 345, 350–51 (1990); Bruce Nevin Shortt, *The Establishment Clause and Religion-Based Categories: Taking Entanglement Seriously*, 10 HASTINGS CONST. L.Q. 145, 166–67 (1982).

149. See *Found. of Human Understanding v. United States*, 614 F.3d 1383, 1388–89 (Fed. Cir. 2010).

150. See *Wash. Ethical Soc’y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957); *Washington Ethical Society*, GUIDESTAR, <https://www.guidestar.org/profile/52-0796318> [<https://perma.cc/QEN2-S47C>].

151. See Mark J. Cowan, *Nonprofits and the Sales and Use Tax*, 9 FLA. TAX REV. 1077, 1096 (sales and use tax), 1184–86 (property tax) (2010); John L. Mikesell, *State Retail Sales Tax Treatment of Nonprofits*, 64 EXEMPT ORG. TAX REV. 37, 41–42, 44–45 (2009); *50-State Chart of Nonprofit State Tax Exemptions*, NONPROFIT STARTUP GUIDE, <https://www.harborcompliance.com/information/nonprofit-income-sales-use-tax-exemptions-by-state> [<https://perma.cc/6ERM-G4EJ>].

152. See DAPHNE A. KENYON & ADAM H. LANGLEY, *THE PROPERTY TAX EXEMPTION FOR NONPROFITS AND REVENUE IMPLICATIONS FOR CITIES* 5–6 (2011), https://www.urban.org/research/publication/property-tax-exemption-nonprofits-and-revenue-implications-cities/view/full_report. [<https://perma.cc/3DUG-YZGF>].

B. *Constitutional Reasons for Tax Benefits*

The First Amendment of the Constitution of the United States provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹⁵³ The application of this provision to taxation of churches is far from clear. Both the Free Exercise Clause and the Establishment Clause have been invoked to support exempting churches from taxation and other tax benefits, while the Establishment Clause has also been invoked as a basis for holding such benefits invalid.¹⁵⁴ This Part considers each clause in turn.

1. Free Exercise Clause

The Free Exercise Clause argument is that the taxation of a church’s income would place a substantial burden on the exercise of religion both by directly reducing the financial resources of the church and by imposing other costs on the church, including administrative costs and potential chilling effects.¹⁵⁵ The argument can also be extended to the taxation of funds provided by donors to the church (if such donors are not permitted to deduct their contributions), although it is obviously weaker in that context, and to some if not all of the other tax benefits enjoyed by churches at both the federal and state levels.¹⁵⁶ The counterargument is that a mere reduction in financial resources that is not targeted at churches but instead is generally applicable to all organizations is not a substantial burden on the exercise of religion, and that even if it were it is more than justified by the revenue needs of the state.¹⁵⁷

153. U.S. CONST. amend. I.

154. See *infra* notes 170–172 and accompanying text.

155. See, e.g., Schwarz, *supra* note 43, at 55–56 (summarizing but not endorsing this argument); Christine Roemhildt Moore, Comment, *Religious Tax Exemption and the “Charitable Scrutiny” Test*, 15 REGENT U. L. REV. 295, 308–09 (2002) (same).

156. See, e.g., J. Michael Martin, *Should the Government Be in the Business of Taxing Churches?*, 29 REGENT U. L. REV. 309, 321–22 (2017).

157. See, e.g., Evelyn Brody, *Legal Theories of Tax Exemption: A Sovereignty Perspective*, in PROPERTY-TAX EXEMPTION FOR CHARITIES 145, 160 (Evelyn Brody ed., 2002) [hereinafter Brody, *Legal Theories*]; Simon, *supra* note 64, at 505–07; see also Hernandez v.

Perhaps unsurprisingly, courts have favored the counterargument even though they have not squarely ruled in its favor with respect to churches.¹⁵⁸ Even before the Supreme Court decided in *Employment Division v. Smith*¹⁵⁹ that the Free Exercise Clause does not provide a defense for violations of neutral laws of general applicability, the Court repeatedly denied free exercise claims that sought exemptions from generally applicable taxes.¹⁶⁰ For example, in *United States v. Lee*,¹⁶¹ the Supreme Court refused to exempt an Amish employer from paying Social Security taxes—to which he objected on religious grounds—because of the government’s compelling interest in the uniform application of the social security tax system.¹⁶² And as already noted, the Court in *Bob Jones University* rejected the claim that the Free Exercise Clause barred the federal government from revoking the tax benefits enjoyed by the religious schools involved.¹⁶³ In addition, attempts by religious organizations to challenge other conditions on tax exemption relating to political activity based on the Free Exercise Clause have failed in federal appellate courts.¹⁶⁴ The courts have also rejected Free Exercise Clause challenges to other requirements for Section 501(c)(3) tax-exempt status.¹⁶⁵ The only exceptions appear to be when the tax at issue is

Comm’r, 490 U.S. 680, 699 (1989) (suggesting without deciding that a denial of a charitable contribution deduction for a payment to a church may not place a substantial burden on the free exercise of religion).

158. See, e.g., Dessingue, *supra* note 139, at 177–78; Moore, *supra* note 155, at 309–11.

159. 494 U.S. 872 (1990).

160. *Id.* at 885.

161. 455 U.S. 252 (1982).

162. *Id.* at 258–59; see also *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 392 (1990) (concluding that the Free Exercise Clause does not require a state to grant an exemption to a religious organization from the collection and payment of a generally applicable sales tax); *Hernandez*, 490 U.S. at 699–700 (citing *Lee* in rejecting a free exercise challenge to the disallowance of a charitable contribution deduction for certain payments to a church); Thomas, *supra* note 56, at 612–13 (discussing *Lee*).

163. See *supra* Part I.A.

164. E.g., *Branch Ministries v. Rossotti*, 211 F.3d 137, 142–44 (D.C. Cir. 2000); *Christian Echoes Nat’l Ministry v. United States*, 470 F.2d 849, 856–57 (10th Cir. 1972); see also Schwarz, *supra* note 43, at 73–80 (discussing *Christian Echoes Nat’l Ministry*).

165. E.g., *Parker v. Comm’r*, 365 F.2d 792, 795 (8th Cir. 1966); *Church of Scientology v. Comm’r*, 83 T.C. 381, 458–60 (1984), *aff’d* 823 F.2d 1310 (9th Cir. 1987).

effectively a prior restraint on religious activity,¹⁶⁶ intentionally targets disfavored religious practices,¹⁶⁷ or is so draconian as to have a prohibitory effect.¹⁶⁸

The position that the courts have taken with respect to Free Exercise Clause claims relating to taxation is the correct one, regardless of whether that conclusion is reached using the reasoning in *Employment Division v. Smith* or a strict scrutiny analysis. Even assuming that taxation by itself imposes a substantial burden on religious exercise—which is debatable—the imposition of generally applicable tax laws in a neutral manner to churches is narrowly tailored to further the government’s compelling interest in collecting sufficient revenue in an efficient and uniform manner. Merely invoking the famous quotation that “the power to tax involves the power to destroy” is not enough to counter this argument if the tax law at issue is reasonable in amount and generally applicable; as the quoted source goes on to correctly state, “Taxation . . . does not necessarily and unavoidably destroy.”¹⁶⁹

2. Establishment Clause

The Establishment Clause’s application is trickier, in part because it can reasonably be invoked to both support and oppose tax benefits for churches. Some commentators argue that since the Establishment Clause prohibits governments not only from favoring particular faiths but also from favoring religion generally over non-religion, providing tax benefits to religious organizations is unconstitutional.¹⁷⁰ Some argue instead or in addition that such exemptions raise significant entanglement concerns, including those caused by having to determine what constitutes a “religion” or a

166. See *Jimmy Swaggart Ministries*, 493 U.S. at 389; Dessingue, *supra* note 139, at 177–78.

167. See *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 546 (1993).

168. See Kenneth C. Halcom, *Taxing God*, 38 MCGEORGE L. REV. 729, 751–52 (2007).

169. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819); see also Halcom, *supra* note 168, at 749 (making this same point).

170. See, e.g., Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 591, 600 (1990).

“church,” that render them unconstitutional.¹⁷¹ In their view the benefits provided to churches only are even more vulnerable to an Establishment Clause challenge because they are not available to any other tax-exempt nonprofits.¹⁷²

Supporters of the tax benefits for churches have in turn argued that the Establishment Clause requires those benefits because otherwise the government would become excessively entangled in the internal affairs of churches.¹⁷³ Their case is strongest in the income tax exemption context, where determining the taxable income of a church would require difficult decisions on both the income side—for example, are donations to a church excluded from gross income as “gifts” in all situations, or only when they are not motivated (compelled?) by a perceived religious obligation—and the deduction side—for example, normally only expenses incurred to generate income are deductible, so it is unclear what expenses incurred by a church would be deductible other than fundraising costs and investment fees.¹⁷⁴ Other tax contexts raise less significant entanglement concerns because, for example, the application of sales and use tax to purchases or sales by a church requires little involvement in the church’s internal affairs; while property taxes could raise difficult valuation issues for church buildings,¹⁷⁵ such taxes again do not require much if any involvement in a church’s internal affairs. At the same time, exemptions and other tax benefits are not free from entanglement concerns, in large part because of the need to determine which organizations qualify for the tax benefit at issue.

171. See, e.g., Donna D. Adler, *The Internal Revenue Code, the Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making*, 28 WAKE FOREST L. REV. 855, 900–01 (1993); Shortt, *supra* note 148, at 146, 182, 185. But see Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 1010–14 (1999) (rejecting this argument).

172. See, e.g., Shaller, *supra* note 148, at 360–61; West, *supra* note 170, at 610.

173. See, e.g., Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71, 112–13 (1991); Thomas, *supra* note 56, at 627–30.

174. See Boris I. Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285, 1298–1300 (1969).

175. See John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 410 (1991).

The courts have walked a careful line in this area. In *Walz v. Tax Commission*,¹⁷⁶ the Supreme Court determined that when a tax benefit is generally available to a broad range of organizations, including but not limited to churches and other religious organizations, and so not intended to advance religion specifically, and also does not have the effect of excessively entangling government with religion, then it is permissible under the Establishment Clause.¹⁷⁷ While that decision concerned a property tax exemption, commentators and lower courts have generally seen its reasoning as applying in other tax contexts, including income taxes.¹⁷⁸ At the same time, in one instance when a tax benefit was made available only with respect to a religious activity, the Supreme Court found that the benefit violated the Establishment Clause by favoring religious activity over non-religious activity.¹⁷⁹ Relying on the latter case, a federal district court recently found the federal income tax exemption for cash payments used for ministerial housing violated the Establishment Clause, although an appellate court reversed that decision.¹⁸⁰ The plaintiffs did not seek Supreme Court review,¹⁸¹ so it is still possible, although unlikely, that the Supreme Court might conclude this tax benefit is unconstitutional in a future case. If that were to occur, there likely would be other successful Establishment Clause challenges to church and minister-specific tax benefits.

Professor Edward Zelinsky has comprehensively considered these Establishment Clause issues in a book-length analysis that we

176. 397 U.S. 664 (1970).

177. *Id.* at 672–73, 675–76 (1970).

178. See generally King, *supra* note 171.

179. *Texas Monthly v. Bullock*, 489 U.S. 1, 14 (1989) (Brennan, J., plurality opinion), 28 (Blackmun, J., concurring).

180. *Gaylor v. Mnuchin*, 278 F. Supp. 3d 1081, 1090, 1104 (W.D. Wis. 2017), *rev'd*, 919 F.3d 420 (7th Cir. 2019). In the interests of full disclosure, on appeal one of the authors signed an amicus curiae brief in this case arguing that this tax benefit does not violate the Establishment Clause.

181. *Atheists Give up \$1B Church Tax Lawsuit*, THE BECKET FUND FOR RELIG. LIB., <https://www.becketlaw.org/media/atheists-give-1b-church-tax-lawsuit/> [https://perma.cc/75S7-K85R].

will not attempt to replicate in detail here.¹⁸² Suffice it to say that he is correct that entanglement concerns arise both when generally applicable tax laws apply (which he calls “enforcement entanglement”) and when churches are granted exemptions to such laws (which he calls “borderline entanglement”) and that therefore the Establishment Clause does not render any such benefits unconstitutional.¹⁸³ While some would go further than Professor Zelinsky and argue that the Establishment Clause requires exemption from at least federal and state income taxes in most situations,¹⁸⁴ there is little indication that the courts are open to such an argument.¹⁸⁵ Under any conditions, accepting this extension is not necessary for resolving how *Bob Jones University* should apply to churches. Instead, it is sufficient to conclude that such benefits are constitutionally permissible, as the Supreme Court held with respect to the property tax exemption at issue in *Walz*.¹⁸⁶

C. Policy Reasons for Tax Benefits

The existence of these many tax benefits naturally raises the question of why churches should receive them if they are not constitutionally required. Governments, academics, and others have provided numerous justifications for these benefits.¹⁸⁷ Critics of these benefits have also marshalled arguments for why churches should not enjoy them, whether in part or in whole.¹⁸⁸ This Part considers the historical but no longer applicable reasons, the commonly asserted *quid pro quo* rationale, and finally an autonomy or “soft sovereignty” approach, which we adopt.

182. See EDWARD A. ZELINSKY, *TAXING THE CHURCH: RELIGION, EXEMPTIONS, ENTANGLEMENT, AND THE CONSTITUTION* (2017).

183. See *id.* at xv, xvii.

184. See, e.g., Halcom, *supra* note 168, at 756, 760–62, 765–66.

185. See ZELINSKY, *supra* note 182, at 23.

186. *Walz v. Tax Comm'n*, 397 U.S. 664, 680 (1970).

187. See Lloyd Hitoshi Mayer, *The “Independent” Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 VAND. L. REV. 49, 64–69 (2012) (summarizing justifications); McCormack, *supra* note 67, at 984–989 (same).

188. See *infra* notes 204–206 and accompanying text.

1. Historical Reasons: Hard Sovereignty or Arm of the State

Churches (and often their leaders) have enjoyed tax exemptions and other tax benefits for thousands of years.¹⁸⁹ One possible reason for the earliest examples is what could fairly be characterized as a “strong sovereignty” justification—churches and their leaders are not answerable to the state, but to a separate (and powerful) sovereign (whether God or gods), and so should not be subject to tax by the state.¹⁹⁰ At a more practical level, this justification may be related to the fact that religious institutions and their leaders often constituted a separate source of significant political power that could and would resist, likely successfully and perhaps violently, any attempts by the state to tax them.¹⁹¹ However, this justification no longer holds sway either at the theoretical or the practical level in the United States, where the federal and state governments are now the only legally recognized sovereigns¹⁹² (other than Native American tribes in some respects¹⁹³).

A more well documented historical reason for providing tax benefits to some but not all churches is when the state has established a state church.¹⁹⁴ In that situation, tax benefits are justified because the state church is an arm of the government and so, like government agencies, is not subject to taxation.¹⁹⁵ In the past this also often

189. See, e.g., CRIMM & WINER, *supra* note 139, at 71 n.1; John W. Whitehead, *Tax Exemption and Churches: A Historical and Constitutional Analysis*, 22 CUMB. L. REV. 521, 522–31 (1991).

190. See, e.g., Halcom, *supra* note 168, at 736–37.

191. See, e.g., King, *supra* note 191, at 973–75.

192. Halcom, *supra* note 168, at 748; Thomas, *supra* note 56, at 610–11. See also MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 191–93 (2013) (aspects of religious establishment continued in the United States until at least the 1940s).

193. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 4.01–4.07 (2012 ed.).

194. Halcom, *supra* note 168, at 737.

195. See, e.g., CRIMM & WINER, *supra* note 139, at 75–76; WILLIAM GEORGE TORPEY, *JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA* 171 (1948); Halcom, *supra* note 168, at 737; Witte, *supra* note 175, at 374–75; Carl Zollman, *Tax Exemptions of American Church Property*, 14 MICH. L. REV. 646, 648 (1915); Christine Roemhildt Moore, Note, *Religious Tax Exemption and the Charitable Scrutiny Test*, 15 REGENT U. L. REV. 295, 298–99 (2002).

meant that churches from other faiths enjoyed only the tax benefits available to charitable entities but not those limited to the established state church, but over time governments have usually extended the tax benefits the state religion historically enjoyed to other faiths.¹⁹⁶ Often governments may have done so out of a vague idea of fairness or in the face of political pressure without much apparent consideration of why these benefits should extend to private entities that are not arms of the state.¹⁹⁷ Of course, the United States has never had a national church and the states that did have a state church no longer do, so this arm of the state justification also no longer applies.¹⁹⁸

2. *Quid Pro Quo*

Given that neither a strong sovereignty nor an arm of the state justification applies in the United States, the most commonly cited modern justification is a *quid pro quo* one.¹⁹⁹ Applied not only to churches but to all 501(c)(3)s, this justification is essentially that the societal benefits provided by these organizations, including but not limited to the provision of services that governments would otherwise provide, exceed the societal costs of the tax benefits they enjoy.²⁰⁰ More sophisticated versions of this argument include economic theories that assert certain societally beneficial goods and

196. See Witte, *supra* note 175, at 379–80.

197. See *id.* Indeed, according to Professor John Witte, the disappearance of state churches in the United States led to the first significant criticism of tax exemptions for churches in the 1810s. Witte, *supra* note 175, at 381.

198. See DEGIROLAMI, *supra* note 192, at 191; King, *supra* note 191, at 977–78; Shortt, *supra* note 148, at 161–62; Zollman, *supra* note 195, at 648–49.

199. See, e.g., EDITH L. FISCH ET AL., CHARITIES AND CHARITABLE FOUNDATIONS 246 (1974); TORPEY, *supra* note 195, at 172; Zollman, *supra* note 195, at 64647; Dessingue, *supra* note 139, at 174–75; Halcom, *supra* note 168, at 740; King, *supra* note 191, at 981; Witte, *supra* note 175, at 387. This rationale is not purely modern, however, as it can be traced back to at least the English Statute of Charitable Uses of 1601. See CRIMM & WINER, *supra* note 139, at 76–77; Halcom, *supra* note 168, at 738; Witte, *supra* note 175, at 375–76.

200. See, e.g., Schwarz, *supra* note 43, at 55; Moore, *supra* note 195, at 296–97; see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 589–92 (1983) (arguing that charitable exemptions are justified by the public benefit provided by the exempt entity). *But see* *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (“We find it unnecessary to justify the tax

services would be provided at a suboptimal level absent the support provided to 501(c)(3)s through these tax benefits²⁰¹ and political science theories that emphasize the pluralism benefits created through this support of 501(c)(3)s.²⁰² Although a separate set of modern theories relies on “tax base” arguments that the net income (or property, or sales by, or purchases by) of either churches specifically or charities generally is not part of the base of the tax under consideration when properly theorized, these theories are less favored, have acknowledged gaps, and perhaps most importantly, have not had any traction with the courts.²⁰³

One potential difficulty with this *quid pro quo* justification as applied to churches is that some commentators contest whether and to what extent churches provide societal benefits, both generally and in specific instances.²⁰⁴ The severest critics of tax benefits for churches usually view the societal benefits they provide as minimal or nonexistent, dismissing most churches as no more than social clubs for their members.²⁰⁵ While even these critics acknowledge that some churches provide beneficial services, such as soup kitchens or homeless shelters, their view is that these activities could and

exemption on the social welfare services or ‘good works’ that some churches perform for parishioners and others.”).

201. See generally John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 274–75 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

202. See, e.g., Schwarz, *supra* note 43, at 56; Terry L. Slye, *Rendering Unto Caesar: Defining “Religion” for Purposes of Administering Religious-Based Tax Exemptions*, 6 HARV. J.L. & PUB. POL’Y 219, 249 (1983); Moore, *supra* note 195, at 297; see also Walz, 397 U.S. at 689 (Brennan, J., concurring) (emphasizing the unique contribution of religious organizations to pluralism).

203. See, e.g., *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (stating that, in case involving whether a nonprofit qualified for tax benefits, “[b]oth tax exemptions and tax deductibility are a form of subsidy”); Bittker, *supra* note 174, at 1288–92 (applying these tax base theories to churches); Mayer, *supra* note 187, at 64–65 (summarizing these theories and their flaws); Schwarz, *supra* note 43, at 56–57 (applying these theories to churches and identifying issues when doing so).

204. See, e.g., Schwarz, *supra* note 43, at 55.

205. See, e.g., Miranda Fleischer, *Churches Are More Private Club than Public Good. Why Do They Need Tax Exemptions?*, WASH. POST (Sept. 17, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/09/17/churches-are-more-club-than-public-good-why-do-they-need-tax-exemptions/> [https://perma.cc/9MY6-MKZC].

should be required to be spun off into separate legal entities to enjoy their justified tax benefits, while stripping those benefits from churches.²⁰⁶

Supporters of tax benefits for churches that rely on this justification have a very different view of the effect of churches on society. They argue that churches, at least in the aggregate, provide numerous benefits to society.²⁰⁷ These benefits include not only concrete goods and services such as feeding the poor but also more difficult to measure but no less real benefits, such as moral instruction, cultivation of public spiritedness, and fostering of democratic principles.²⁰⁸ And these benefits redound not only to individuals involved with churches but society more generally.²⁰⁹

3. Autonomy (or Soft Sovereignty)

Professor Evelyn Brody has identified, but not endorsed, a “soft sovereignty” approach that may explain in large part the tax exemptions enjoyed by charities, based on the notion that taxation of at least some types of private organizations should be limited out of recognition that there are spheres of society that should be mostly beyond the state’s authority.²¹⁰ Focusing on churches specifically, adopting this approach leads to a right of churches to enjoy

206. See, e.g., Mark Oppenheimer, *Now’s the Time To End Tax Exemptions For Religious Institutions*, TIME (June 28, 2015, 11:16 AM), <https://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/> [<https://perma.cc/E64K-X3MT>]; Editorial, *Churches Should Pay Taxes!*, THE CHRISTIAN CENTURY, Apr. 9, 1947, reprinted in THE CHRISTIAN CENTURY READER 327, 328 (Harold E. Fey & Margaret Frakes eds., 1962).

207. See, e.g., Berg, *supra* note 16, at 1352–55; Schwarz, *supra* note 43, at 56 (summarizing this argument without endorsing it); Witte, *supra* note 175, at 387–88; Zollman, *supra* note 195, at 647 (summarizing this argument without endorsing it). For arguments that religion is distinctive and so deserves special legal protection, see generally KATHLEEN A. BRADY, *THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE* (2015); Christopher C. Lund, *Religion is Special Enough*, 103 VA. L. REV. 481, 493–500 (2017).

208. See, e.g., Berg, *supra* note 16, at 1352–55; Schwarz, *supra* note 43, at 56 (summarizing this argument without endorsing it).

209. Witte, *supra* note 175, at 387.

210. Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585, 587–89 (1998); *Legal Theories* at 151–53; see also Mayer, *supra* note

autonomy in most situations, including with respect to finances.²¹¹ Taxing churches risks violating this autonomy because it necessarily requires the state to become involved in the financial affairs of churches, although the extent of that involvement will vary depending on the type of tax and the type of tax benefit involved.

This autonomy or soft sovereignty justification arises from the view that, in any society where the state is not all encompassing, there necessarily are areas that should be free from state oversight and interference.²¹² Churches have a particularly strong argument for being such an area, at least with respect to their internal affairs.²¹³ That is because they provide an institutional setting for people who share a faith to practice that faith, to interact in ways designed to promote understanding and promulgation of that faith, and to consider how their faith should affect their lives outside of the church setting.²¹⁴ In other words, it is religiously significant activities that are protected, as Professor Laycock notes.²¹⁵ Any state involvement with the internal affairs of churches risks disrupting these important, private activities, particularly given both the power of the state and the fact that the state's views will almost certainly conflict with at least some of the teachings of most faiths.²¹⁶ Some commentators also find a legal basis for this justification in the Religion Clauses of the First Amendment.²¹⁷ The next

203, at 70–71 (proposing an autonomy perspective for evaluating the legal rules relating to charities).

211. *E.g.*, Brunson & Herzig, *supra* note 33, at 1202–03; Martin, *supra* note 156, at 309; *see also* IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 43–44 (2014) (describing the broader debate over church autonomy).

212. *See* Brody, *supra* note 210, at 588.

213. Douglas Laycock, *Church Autonomy Revisited*, 7 GEO. J.L. & PUB. POL'Y 253, 267 (2009).

214. *See* Lund, *supra* note 207, at 490–91.

215. Laycock, *supra* note 213, at 267–68; *see also* DEAN M. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES 41 (1977) (characterizing churches as “the central repositories of religious activity, from which may flow many kinds of partial or peripheral religious interests or ministrations”).

216. *See, e.g.*, Berg, *supra* note 16, at 1341–43.

217. *See* Richard W. Garnett, *Why churches shouldn't have to pay taxes*, U.S. CATHOLIC (Oct. 24, 2016), <https://www.uscatholic.org/articles/201610/why-churches-shouldnt-have-pay-taxes-30799> [<https://perma.cc/XHQ8-47FQ>]; *supra* Part III.B.

Part therefore focuses on this approach, exploring the philosophical and legal bases for it.

IV. WHY THE INSTITUTIONAL CONTEXT SHOULD CONTROL

The idea that the First Amendment—Religion Clauses included—protects institutions as well as individuals has gained steam in recent years.²¹⁸ In regard to churches specifically, the “soft sovereignty” approach described above lines up nicely with the idea that churches, as First Amendment institutions, should be afforded autonomy regarding their internal doctrines and practices. Under the First Amendment institutions theory, churches and other institutions that participate in activities like speech and religion should be afforded First Amendment protections as institutions. This Part first provides a more in-depth treatment of the soft sovereignty approach in light of the philosophical idea of “sphere sovereignty” and then unites it with the legal idea of First Amendment institutions and applies that understanding in the context of tax benefits. This Part concludes by distinguishing and defining churches—both as a theoretical underpinning and legal necessity.

A. Sphere Sovereignty

1. The Theory

The soft sovereignty approach is illuminated by the work of the nineteenth-century neo-Calvinist writer and former Prime Minister of the Netherlands Abraham Kuyper. Kuyper proposed that church and state interact and coexist with each other according to his theory of sphere sovereignty.²¹⁹ Spheres are social institutions in which “authority structures specific to those spheres emerge.”²²⁰ Sovereignty is the idea that spheres have a natural right to form both the

218. See *infra* Part IV.B.

219. Nicholas Wolterstorff, *Abraham Kuyper on the Limited Authority of Church and State*, 7 GEO. J.L. & PUB. POL’Y 105, 108–13 (2009).

220. *Id.* at 110.

sphere itself and the authority structure that governs it.²²¹ Thus, sphere sovereignty is the idea that certain social institutions should enjoy a degree of autonomy within their own domains.

First, we must break down Kuyper's conception of a "sphere." For Kuyper, the four main spheres are the State, Society, the Church, and the Individual.²²² This Article focuses primarily on the first three. Within society are social spheres, which encompass all aspects of life and include "the family, the business, science, art and so forth."²²³ Thus, in this respect, a church can be thought of as a social sphere, though there are important distinctions between the two.²²⁴ Kuyper describes the sphere-forming process for non-state spheres as "organic."²²⁵ People arrange themselves based on shared interests or localities pursuant to natural forces of human nature.²²⁶ Such arrangements are "natural" because forming them does not require approval by a church, the state, or any other social sphere.²²⁷ The state, conversely, is of a "mechanical" nature.²²⁸ Unlike social spheres, which are formed in a bottom-up fashion, states operate from top-down.²²⁹ Whereas daily activities occupy the spaces of social spheres, the state *qua* sphere is a "means of compelling order and of guaranteeing a safe course of life."²³⁰ Put simply, the state is the "sphere of spheres, which encircles the whole extent of human life."²³¹ The authority and responsibility inherent to each kind of sphere—social versus state—flow from these differences.²³²

221. *Id.*; see also ABRAHAM KUYPER, CALVINISM: SIX LECTURES DELIVERED IN THE THEOLOGICAL SEMINARY AT PRINCETON 121 (New York, Revell 1899) ("And in both these spheres[, social and state,] the inherent authority is sovereign, that is to say, it has above itself nothing but God.").

222. KUYPER, *supra* note 221, at 99, 139.

223. *Id.* at 116.

224. See *infra* Part IV.C.1.

225. KUYPER, *supra* note 221, at 115.

226. *Id.* at 116–17.

227. *Id.* at 110.

228. *Id.* at 116–17.

229. *Id.* at 115.

230. *Id.* at 101.

231. ABRAHAM KUYPER, *Sphere Sovereignty*, in ABRAHAM KUYPER: A CENTENNIAL READER 461, 472 (James D. Bratt ed., 1998).

232. See Wolterstorff, *supra* note 219, at 109–10.

Second, we must understand what Kuyper meant by “sovereignty.” In the organic development of social spheres, authority structures emerge by which someone “either in his own person or acting in the name of the institution . . . issue[s] directives to others that place those others under the (prima facie) obligation to obey.”²³³ Each sphere thus develops an authority structure specific to its needs.²³⁴ Besides the state itself,²³⁵ spheres do not derive their internal authority from anything or anyone outside of themselves, but it is, rather, “original to them.”²³⁶ And importantly, this inherent ability of a sphere to define the parameters of its internal authority—that is, its “sovereignty”—is not only a descriptive account but a normative one: social spheres have a natural right to organize and to govern themselves.²³⁷ These concepts are not unique to Kuyper; for example, Professor Victor Muñiz-Fraticelli’s conception of sovereignty provides an independent source of legitimacy for institutions based on the concurrence of their members and allows institutions to pursue their collective values without first obtaining permission from another authority.²³⁸

Kuyper’s approach to sovereignty also requires consideration of the authority a sphere—be it a social sphere or the state—has over other spheres. Because a sphere’s sovereignty is natural to it, each institution represents a “truly sovereign sphere[], which may not lightly be interfered with by any other sovereign.”²³⁹ Kuyper’s focus on autonomy is not only a recognition that spheres are free to organize self-governing structures, but also that they are free from outside interference in their development and self-determination.²⁴⁰

233. *Id.* at 109.

234. *Id.* at 109–10.

235. See KUYPER, *supra* note 231, at 110–16 (positing that states derive their political authority not from the consent of the governed but from the grace of God).

236. Wolterstorff, *supra* note 219, at 110.

237. *Id.*; see also KUYPER, *supra* note 221.

238. VICTOR MUÑIZ-FRATICELLI, *THE STRUCTURE OF PLURALISM* 101–17 (2014).

239. Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 96 (2009) (emphasis omitted).

240. See Wolterstorff, *supra* note 219, at 112 (“Kuyper thought that in a modern well-functioning society, the authority of an organization should be limited to activities within one particular sphere For when an institution comes under the control of

Unlike social spheres, which must abide by this “principle of non-interference,” the state has a unique role to play as the sphere of spheres.²⁴¹ Negatively, the state “may never become an octopus, which stifles the whole of life” but must “honour and maintain every form of life, which grows independently, in its own sacred autonomy.”²⁴² But Kuyper also envisioned a positive role for the state. The state has the:

right and duty: 1. Whenever different spheres clash, to compel mutual regard for the boundary-lines of each; 2. To defend individuals and the weak ones, in those spheres, against the abuse of power of the rest; and 3. To coerce all together to bear personal and financial burdens for the maintenance of the natural unity of the State.²⁴³

When it governs within these guidelines, the state acts in accord with—but does not exceed the scope of—its sphere sovereignty.²⁴⁴ But when the state uses its coercive power to control social spheres without their invitation—be it through restrictive regulations or unequal treatment of similarly situated social spheres—the state exceeds the scope of its sphere sovereignty.²⁴⁵

Kuyper envisioned a different role for the social sphere most relevant here: the church. Kuyper taught that, consistent with his theory, no single church should dominate, and, like the state, churches cannot intrude outside of their own spheres.²⁴⁶ The latter point implies not only that churches “must stay within their own province,” but that a church cannot compel membership of persons who

an institution whose guiding function lies in another sphere, activity within the former institution is almost always distorted by this ‘outside’ control.”). *See generally* Richard W. Garnett, *The Worms and the Octopus: Religious Freedom, Pluralism, and Conservatism*, in *AMERICAN CONSERVATISM: NOMOS LVI* 160 (Sanford V. Levinson et al. eds., 2016) (developing this idea).

241. *See* Wolterstorff, *supra* note 219, at 114.

242. KUYPER, *supra* note 221, at 124.

243. *Id.* at 124–25.

244. *Id.*

245. *Id.*

246. Horwitz, *supra* note 239, at 97.

would voluntarily disassociate with said church.²⁴⁷ Positively, a strong church sphere in society acts as a “fundamental limit on state-aggrandizement.”²⁴⁸ Because churches recognize that their autonomy is ultimately given by God, they are distinguished from other social spheres and, due to their unique metaphysical perspective, are particularly important for the organic development of a thriving, pluralist society.²⁴⁹

The church-state relationship that Kuyper imagined grows out of the autonomy inherent to each sphere as well as the respective role that each is to play. Describing Kuyper’s theory as creating a society of “guided and divided pluralism,” one scholar wrote:

It is guided in that each sphere has ‘its own unique set of functions and norms,’ and all of them are expressions of God’s ultimate sovereignty. It is divided in that each sphere, provided that it acts appropriately, is to remain sovereign, untouchable by church, state, or other social institutions.²⁵⁰

In sum, sphere sovereignty respects the inherent autonomy of privately and independently organized peoples—that is, social spheres. The state, itself a sphere, is tasked with ensuring that organically created spheres, including churches, continue to have opportunities to emerge and to flourish. The relationship between church and state under the sphere sovereignty approach thus provides a helpful starting point by which to approach church-state disputes. Moreover, Kuyper’s theory, with its skepticism of outside

247. *Id.* at 98.

248. Wolterstorff, *supra* note 219, at 112.

249. *See infra* Part IV.C.

250. Horwitz, *supra* note 239, at 98 (quoting Richard J. Mouw, *Some Reflections on Sphere Sovereignty*, in *RELIGION, PLURALISM, AND PUBLIC LIFE: ABRAHAM KUYPER’S LEGACY FOR THE TWENTY-FIRST CENTURY* 100 (Luis E. Lugo ed., 2000)).

interference, fits with an American society in which liberty is regarded as a most cherished right.²⁵¹ It also resonates with the Catholic principle of subsidiarity.²⁵²

Prior to discussion of the implications of the sphere sovereignty approach for the special tax treatment of churches, we must address the following objection: For the non-Christian, does it matter that Kuyper was not only a devout Calvinist but that his theory of the social structure is explicitly based on Christian ideas? In his application of Kuyper's work to First Amendment institutions,²⁵³ Professor Paul Horwitz squarely addresses this concern, and his replies are also relevant in employing sphere sovereignty as a justification for the tax benefits received by churches. Kuyper's theory, while unabashedly Calvinist, need not be tied to Calvinism or any religious belief system to retain its coherence and internal consistency.²⁵⁴ In fact, scholars who endorse sphere sovereignty have argued that sphere sovereignty, even set loose from its Calvinist roots, "has much to offer to contemporary discussions of civil society."²⁵⁵ For Professor Horwitz, this modernization of sphere sovereignty also quells concerns regarding the opposite objection—that

251. See The DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); Charles L. Cohen, *The "Liberty or Death" Speech: A Note on Religion and Revolutionary Rhetoric*, 38 WM. & MARY Q. 702 (1981) (giving an historical account of Patrick Henry's famous "Give me liberty, or give me death!" speech); see also Charles Glenn, CPJ's 2017 Kuyper Lecture, Rediscovering Sphere Sovereignty In The Age of Trump (Apr. 27, 2017), https://www.cpjustice.org/public/page/content/2017_kuyper_lecture_remarks [<https://perma.cc/PNX2-CFM7>].

252. See Robert F. Cochran, Jr., *Catholic and Evangelical Supreme Court Justices: A Theological Analysis*, 4 U. ST. THOMAS L.J. 296, 304–06 (2006); Horwitz, *supra* note 239, at 105; PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶¶ 185–88 (2004), http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html [<https://perma.cc/V6CP-VWGQ>] (the principle of subsidiarity).

253. Horwitz, *supra* note 239, at 91–99.

254. See *id.* at 93–94.

255. Richard J. Mouw, *Culture, Church, and Civil Society: Kuyper for a New Century*, 28 PRINCETON SEMINARY BULL. 48, 55 (2007); see also Horwitz, *supra* note 239, at 93–94;

to separate sphere sovereignty from Calvinism robs the theory of its force.²⁵⁶ Rather than break down each aspect of Kuyper's theory and test its secular strength, this Article simply does not rely upon those aspects of sphere sovereignty that are uniquely Calvinist (and has not thus far). Thus, sphere sovereignty remains a helpful theoretical framework for thinking about the relationship between church and state in a modern, pluralist society.²⁵⁷

However, because Kuyper is not king, the interplay between his theory and the effects that it has had on American legal thought are useful considerations before applying his metaphor in the modern tax benefits context.²⁵⁸ Some of the Founders—Thomas Jefferson, John Adams, and James Madison among them—were influenced by the early settlers' Puritan views on the roles of the state and churches within society, views that parallel Kuyper's later work.²⁵⁹ The Calvinist doctrine of covenant gave rise to the Puritan belief that church and state were "two separate covenantal associations, two coordinate seats of godly authority and power in society."²⁶⁰ Inspired by this Puritan-influenced approach to pluralism, in his drafting of the Massachusetts Constitution of 1780, John Adams "guaranteed churches the right to select their own ministers without state interference, a right that is consistent with the concept of

Johan D. Van der Vyver, *Sphere Sovereignty of Religious Institutions: A Contemporary Calvinistic Theory Of Church-State Relations*, in *CHURCH AUTONOMY: A COMPARATIVE SURVEY* (Gerhard Robbers ed., 2001).

256. Horwitz, *supra* note 239, at 93–94. See generally Mark Tushnet, *Distinctively Christian Perspectives on Legal Thought?*, 101 MICH. L. REV. 1858 (2003) (reviewing *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* (2001)) (discussing in general the application of "Christian" ideas to secular legal debates). But see George Harinck, *A Historian's Comment on the Use of Abraham Kuyper's Idea of Sphere Sovereignty*, 5 J. MARKETS & MORALITY 277 (2002) (arguing that sphere sovereignty is a *credo* that cannot be separated from its religious roots).

257. See Horwitz, *supra* note 239, at 93–94.

258. For a deeper discussion of the effects of sphere sovereignty on the American constitutional structure, see generally PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 179–82 (2013).

259. Horwitz, *supra* note 239 at 100–01.

260. JOHN WITTE, JR., *THE REFORMATION OF RIGHTS: LAW, RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM* 309 (2007).

sphere sovereignty.”²⁶¹ The early constitutions of Connecticut, Maine, and New Hampshire had similar provisions.²⁶²

Moreover, Professor Philip Hamburger observes that even late eighteenth-century Americans who supported religious exemptions would not have argued for a constitutional right to exemptions because, at the time, “the jurisdiction of civil government and the authority of religion were frequently considered distinguishable.”²⁶³ No exemptions were necessary since “Congress shall make no law”²⁶⁴ infringing upon the free exercise of religion, which “assumes Congress can avoid enacting laws that prohibit free exercise” in the first place.²⁶⁵ Likewise, Alexis de Tocqueville’s description of the nineteenth-century interaction between church and state in America was one that tracks the normative account later proffered by Kuyper.²⁶⁶ Professor Horwitz notes that “Tocqueville saw evidence in nineteenth-century America that the Calvinist Puritan ideal had taken root: in Kuyper’s words, America had embraced a pluralistic system whose watchword was ‘[a] free Church in a free State.’”²⁶⁷ These historical examples, as well as later philosophical trends that likewise track sphere sovereignty, lead Professor Horwitz to conclude that there is at least “the possibility that the ideas underlying sphere sovereignty are not alien but immanent in the American social and constitutional order.”²⁶⁸ As such, Professor Horwitz concludes that real consideration ought to be given to “how sphere sovereignty might be said to shape that order” and how it might affect First Amendment issues.²⁶⁹

We do not mean to overstate the influence that Kuyper’s theory of sphere sovereignty had on the American Founding, nor do we

261. Horwitz, *supra* note 239, at 102.

262. *See id.*

263. Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 936–37 (1992).

264. U.S. CONST. amend. I.

265. Hamburger, *supra* note 263, at 938.

266. Horwitz, *supra* note 239, at 103.

267. *Id.* at 103 (quoting KUYPER, *supra* note 221, at 128).

268. *Id.* at 107.

269. *Id.*

mean to claim that it has extensive ongoing political influence. Indeed, Professor Horwitz makes a humble claim: it is possible that sphere-sovereignty-inspired thought influenced developments in American religious liberty law.²⁷⁰ Regardless, sphere sovereignty as both a descriptive and normative concept is a useful tool for thinking about current and future First Amendment conflicts and provides at least a framework for explaining and justifying the unique place in society that churches occupy. At its simplest, sphere sovereignty is a way of illustrating the idea that churches “should generally be treated as sovereign, or autonomous, within their individual spheres [and should] coexist alongside the state . . . serving a vital role in furthering self-fulfillment, the development of a religious community, and the development of public discourse.”²⁷¹ Sphere sovereignty therefore paints a specific picture and fills in some of the philosophical gaps as to how such a pluralistic society ought to operate. This Part, while it treats sphere sovereignty as a serious theory, recognizes that it is not constitutionalized by the First Amendment but serves as a theoretical framework for illustrating the relationship between church and state in America so as to further explain the tax benefits that churches receive.

2. Possible Objections

Some scholars nonetheless reject the use of this sphere sovereignty approach to justify the (legal) autonomy of churches. In one of the more extensive critiques of church autonomy and religious institutionalism, Professors Richard Schragger and Micah Schwartzman make essentially four claims: (1) that the historical account of religious liberty that supports church autonomy is inaccurate; (2) that church autonomy is anti-republican; (3) that church autonomy justifications have no limiting principles; and (4) that churches cannot be distinguished from secular groups.²⁷² As this Part details, their anti-republican and lack of limiting principles

270. *See id.* at 105.

271. *Id.* at 114.

272. Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 932 (2013).

charges are unpersuasive on their own terms. We will address their church non-distinguishability argument in a later Part.²⁷³ Finally, their historical argument is largely levied against those who defend modern-day church autonomy based on certain eleventh century church-state events,²⁷⁴ which we do not rely on.

Professors Schragger and Schwartzman argue that church sovereignty is anti-republican because “[i]nstitutions that purport to play a special or outsized role in society should be democratically accountable. The exercise of public power, of territoriality, of jurisdiction, demands democracy.”²⁷⁵ And because churches are not democratically accountable, they have instead justified exercises of sovereignty by expanding Thomas Paine’s “church of one” in an attempt to “infuse the institutional church with all the moral authority and independence of the autonomous self.”²⁷⁶ Churches must therefore justify their authority in terms of conscience, not sovereignty, because “mediating institutions no longer exercise government power . . . [which is] a product of republican political theory.”²⁷⁷

They also make a related argument that the public-private distinction upon which sphere theorists rely is untenable for churches to support in light of their inability to distinguish themselves from non-religious private institutions.²⁷⁸ Where the liberal distinction between state and individual collapses as churches are afforded sovereignty, which, in their view, is ultimately founded upon the individual right of conscience, the public-private distinction must be replaced with something else to maintain the view that churches occupy a unique sphere of sovereignty. Thus, they argue, churches fall back on the church-state distinction—but “determining what is a church is no more tractable than determining what is a religion,

273. See *infra* Part IV.C. For an institutional critique of Professors Schragger and Schwartzman’s article, see Paul Horwitz, *Defending (Religious) Institutionalism*, 99 VA. L. REV. 1049 (2013).

274. Schragger & Schwartzman, *supra* note 272, at 933–37.

275. *Id.* at 944.

276. *Id.* at 943.

277. *Id.*

278. *Id.* at 944.

or what is private and what is public.”²⁷⁹ Because this argument largely bleeds into their critique of the indistinguishability of churches from secular groups, we address it in our later Part on that issue.²⁸⁰

Government power is distinct from sovereignty, however, and no church situated within an otherwise democratic society would have a valid claim to exercising the government’s power. Church autonomy stands for the proposition that—within its own sphere—the church may exercise sovereign control. Insofar as “[r]epublicanism demands that the people . . . constitute the sovereign,”²⁸¹ some churches are not republican—but such churches would not claim to be so in the first place. The sovereignty of many churches is understood not to derive from the people but from a higher power. Professors Schragger and Schwartzman further argue that republicanism “does not tolerate corporate entities[, including churches,] that operate outside of and in defiance of the state.”²⁸² As a matter of liberal political theory, this assertion is far from settled.²⁸³ But even accepting the proposition as true, if “defiance of the state” means violating—to borrow a constitutional term—a “neutral law of general applicability,”²⁸⁴ then the soft sovereignty approach we advance here accommodates that restriction insofar as the law is criminal in nature.²⁸⁵ The government is without authority, however, to act beyond its own laws—that is, to exceed its sovereign sphere—in controlling the beliefs or practices of churches.

279. Schragger & Schwartzman, *supra* note 272, at 944.

280. *See infra* Part IV.C.

281. Schragger & Schwartzman, *supra* note 272, at 943.

282. *Id.*

283. *See* JOHN RAWLS, *THE LAW OF PEOPLES* 63 (1999) (arguing that liberal, democratic societies must treat as equals “decent hierarchical peoples,” that is, nondemocratic societies that respect basic human rights, even if its members are not guaranteed freedom and equality).

284. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment)).

285. *See infra* Part V.C.

Moreover, if Professors Schragger and Schwartzman mean to suggest that churches themselves ought to abide by a democratically elected hierarchy to garner secular approval, that position seems to run counter to their central claim that individual “rights of conscience are doing all the relevant [legal] work.”²⁸⁶ Democracy is valued not simply because it is politically desirable but because that political desirability necessarily stems from the robust protection of individual liberties that democracies champion, rights of conscience and association chief among them. If members of a democratic society wish to arrange their religious institutions in a patently undemocratic manner, what right does a democratic government have to interfere with this conscious choice? This argument would also prove too much: if churches cannot arrange their affairs in an undemocratic manner, and if, as Professors Schragger and Schwartzman contend, churches are indistinguishable from secular groups, could any groups within a democracy be undemocratically structured? It would seem that universities, privately held corporations, and, taken to its logical extreme, the nuclear family, would potentially be disallowed under their expansive distrust of undemocratic institutions.

But the fear of vast, undemocratically accountable exercises of church sovereignty is further quelled in light of responses to their jurisdictional critique. Professors Schragger and Schwartzman are principally worried about the scope of a church’s sphere sovereignty. They ask, “What is the appropriate sphere of church sovereignty if the mission of the church is to save mankind? . . . The strong form of sphere sovereignty claims that churches have a special, unique, and exclusive mission to preach the Word, to convert the unconverted, and to glorify God.”²⁸⁷ Kuyper would likely agree with this classification.²⁸⁸ So are there limiting principles?

We wish here to reemphasize our original claim: that church autonomy is justified under a *soft* sovereignty approach. While

286. Schragger & Schwartzman, *supra* note 272, at 969.

287. *Id.* at 946.

288. See KUYPER, *supra* note 221, at 135.

Kuyper would have rejected the “hard sovereignty” approach,²⁸⁹ his “strong form of sphere sovereignty” risks a potentially overbroad application, as Professors Schragger and Schwartzman suggest.²⁹⁰ But limiting the scope of the church’s “sphere”—at least as an abstract matter—is possible, and we recognize that it’s a practical necessity if church autonomy is to be legally recognized.²⁹¹

Even under Kuyper’s theory, the church is not all-encompassing; the state, not the church, is the sphere of spheres. Thus, while escaping state membership is impossible, the state actually plays an important role in ensuring that, within its jurisdiction, those who wish to join a church may do so, and those who wish to leave a church may also do so.²⁹² This understanding comports with Kuyper’s posited “sovereignty of the individual person.”²⁹³ Indeed, the state’s “right and duty . . . [t]o defend individuals and the weak ones, in those spheres, against the abuse of power of the rest”²⁹⁴ would be hollow if it could not cabin the church’s exercise of its sphere sovereignty to governing its members.

Professors Schragger and Schwartzman respond that “because the institution of the church is the church for all, and because saving souls is central to its mission, the church’s jurisdiction can and must be extended to all. . . . [Indeed], Christianity and Islam are explicit about their claims to universality.”²⁹⁵ But this critique misses the point. Just because some churches believe they have sovereign jurisdiction over all of mankind does not confer to them such jurisdiction given the state’s dictates under the sphere sovereignty approach. A Christian may try to convert nonbelievers to the faith, but until the nonbeliever himself chooses Christianity, no Christian church may claim sovereign authority over him.²⁹⁶ Kuyper thought

289. *See id.*

290. Schragger & Schwartzman, *supra* note 272, at 946.

291. *See infra* Part V.C.

292. *See supra* notes 246–47 and accompanying text.

293. KUYPER, *supra* note 221, at 139.

294. *Id.* at 124.

295. Schragger & Schwartzman, *supra* note 272, at 947.

296. *See id.* at 957–62.

that all nations should be Christian.²⁹⁷ But even he understood that worldwide Christian rule could “never be realized except through the subjective convictions of those in authority, according to their personal views of the demands of that Christian principle.”²⁹⁸ If leaders of nation states were not rightfully subjected to the jurisdiction of the church until they themselves converted, it must be true that laymen are afforded this same personal autonomy of choice, with the state serving as the enforcer of the various spheres’ boundaries. Therefore, it is possible to limit a church’s grandiose exercise of its sovereignty to its own sphere.

Nothing in the preceding paragraphs should be taken to suggest that churches must forfeit their right to persuade others to join their faith in the public square. Just as secular social spheres may try to increase their membership, so too may churches. The preceding discussion stands for the principle that unless and until a person decides to join a church, that church has no sovereign authority over that person because that person is rightfully outside of the church’s sphere and thus its sovereign control. A church’s conception of what constitutes its sphere—for example, the Christian belief that all human persons are children of God²⁹⁹—and the exercise of sovereignty within that sphere may not always line up. Such differences are reconcilable given a state that, “[w]henver different spheres clash[,] . . . compel[s] mutual regard for the boundary-lines of each.”³⁰⁰

Thus, we agree with Professors Schragger and Schwartzman that voluntary church membership is a necessary condition for churches to exercise authority under our soft sovereignty approach.³⁰¹ That certain religions might not view membership as voluntary has no bearing on how the state must treat those churches.

297. KUYPER, *supra* note 221, at 135.

298. *Id.*

299. *Cf.* Schragger & Schwartzman, *supra* note 272, at 946 (“[C]hurches often assert that their jurisdiction extends to non-members of the institution. Indeed, it may be a central doctrine of the church that it alone appropriately rules in all spiritual and temporal matters regardless of membership.”).

300. KUYPER, *supra* note 221, at 124.

301. *See* Schragger & Schwartzman, *supra* note 272, at 957.

If a member in such a church cannot leave even though she wishes to, the state has the rightful power—and in fact, duty—to ensure the free flow of members between social spheres.³⁰² We further agree that this voluntarism disallows the state from “assisting in coercing non-members while requiring the state to enforce exit rights,”³⁰³ but we disagree that voluntary church membership necessitates church autonomy based on conscience or associational rights, as opposed to religious freedom. The soft sovereignty framework allows for sovereignty-based autonomy wherein sphere members may join and leave sovereign spheres as they please. We acknowledge that separating from a church is not always easy given the “coercive” doctrines of certain churches and other internal pressures to stay.³⁰⁴ The potential costs of leaving do not undermine that the choice of leaving is voluntary (or is at least viewed as such by the government) in the first place. As long as it is possible to leave—so ensured by the state’s obligation and duty to protect against abuses of sovereign power—the necessary condition of voluntary church membership is satisfied.³⁰⁵ Soft sovereignty is compatible with and is in fact premised upon voluntarism (which is also consistent with Kuyper’s treatment of individuals as another separate sphere).³⁰⁶

3. Sphere Sovereignty, Churches, and Tax Benefits

The tax exemption and charitable contribution deduction enjoyed by churches are justified in light of the above sphere sovereignty framework. The United States, along with state and local governments, constitutes the sphere of spheres as the state, while churches are one of a plethora of social spheres within American society.³⁰⁷ Both the United States and churches are spheres, so each must

302. See *supra* notes 239–243 and accompanying text.

303. Schragger & Schwartzman, *supra* note 272, at 960.

304. See KUYPER, *supra* note 221, at 141–42.

305. See Schragger & Schwartzman, *supra* note 272, at 960.

306. See KUYPER, *supra* note 221, at 127 (“[T]he struggle for liberty is not only declared permissible, but is made a duty for each individual in his own sphere.”).

307. *But see infra* Part IV.C. (distinguishing churches).

abide by the principle of noninterference essential to Kuyper's approach.³⁰⁸ Recall that the state has three affirmative duties, the first two of which require the state to keep peace among spheres and to defend individuals within spheres "against the abuse of power," respectively.³⁰⁹ It is from the third, "to coerce all together to bear personal and financial burdens for the maintenance of the natural unity of the State," that the state derives its legitimate power to levy taxes.³¹⁰ But this power is checked by the first two duties in conformity with the principle of noninterference.³¹¹ All spheres have the natural right to exercise the inherent sovereignty "original to them."³¹² The argument we advance herein, based on the soft sovereignty theory articulated above, provides a philosophical basis upon which the special tax treatment of churches can be explained in light of *Bob Jones University*. We later offer a number of practical, necessary line-drawing limitations to curb overzealous application of the soft sovereignty approach in this context.³¹³

First, the tax exemption. As sphere of spheres, the United States has an obligation to respect the inherent sovereignty of churches. The state does this most obviously by affording churches the autonomy to manage their own property.³¹⁴ Any taxation levied upon any entity necessarily entangles that entity with the state. When the state does not tax an entity, it reduces entanglement, increasing the autonomy afforded to that entity. Because churches are to be autonomous within their own spheres, the state ought not tax churches because in so doing, it allows churches the fullest control over their resources. Churches, as soft sovereigns, ought to be afforded the autonomy to enjoy complete control over the allocation of their property—money and otherwise—without the outside influence of the state interfering with that control. Taxes necessarily infringe upon this right. Therefore, if the state and churches truly are soft

308. See *supra* notes 240–242 and accompanying text.

309. See *supra* note 243 and accompanying text.

310. KUYPER, *supra* note 221, at 124–25 (emphasis omitted).

311. *Id.* at 125.

312. Wolterstorff, *supra* note 219, at 110.

313. See *infra* Part V.C.

314. See *supra* Part III.C.3.

sovereigns within the sphere sovereignty framework, taxing churches violates the autonomy inherent to them. Refraining from taxing churches is also consistent with the state's duty to adhere to the principle of noninterference. So while tax exemption is not necessarily constitutionally required for the reasons previously discussed, it is desirable as a policy matter. In addition, once tax exemption is granted, this soft sovereignty approach argues against taking away that benefit for violating fundamental public policy.

Second, the charitable contribution deduction is also justified in light of the sphere sovereignty approach. The United States respects the sovereignty of churches by allowing them to manage their own property.³¹⁵ It follows that the United States must afford church members this same autonomy, at least with respect to the church members' property that is charitably given to a church. To comply with the principle of noninterference in its treatment of churches, while at the same time not extending similar treatment to church members, is a contradiction in terms: What is a church—and more broadly, a sphere—if not a collection of members? Respecting the autonomy of churches to manage their property thus necessitates the charitable contribution deduction. A church member may rightly contend that his annual gift to his church is not first “his” money that upon his donation becomes “the church’s.” Rather, the donated money always belonged to the church. The member is merely the medium by which that money is transferred from one sphere, call it “the market,”³¹⁶ to another, namely, “the church.” Once there, as was shown above, that money is rightfully free from taxation. But for the charitable contribution deduction, property that belongs to churches would, in effect, be taxed via the increased tax base to which church members would be susceptible, increasing their taxes owed to the state.³¹⁷ Consequently, churches would not

315. *Id.*

316. Of course, money that remains in the sphere we have labeled “the market,” which ought to be defined extremely broadly, is susceptible to taxation under the third duty of state spheres. See *supra* note 310 and accompanying text.

317. This “tax base” argument differs from those disfavored in the text accompanying *supra* note 203. Above, the “tax base” in question is the church’s income itself. But

be afforded the sovereignty inherent to them but would instead be subjugated to the coercive power of the state in contradiction of the principle of noninterference. Of course, not all faiths teach that financial contributions to the church are obligatory, nor do all adherents of faiths that have such teachings necessarily agree with or follow them,³¹⁸ but it is reasonable to apply this policy to churches of all faiths in order to avoid the difficult task of distinguishing among them on this ground. And again, this is a policy, not constitutional, argument that both supports providing the charitable contribution for donations to churches and not taking away that benefit for violating fundamental public policy.

Moreover, the charitable contribution deduction is the government's way of fostering comity toward the church. Church members pay taxes, and the state leaves to the church its share through the charitable contribution deduction. The availability of the standard deduction as a way of effectuating the charitable contribution deduction does not undermine the philosophical basis upon which the deduction is offered because the standard deduction exists not to undermine the principles underlying itemized deductions but is instead a practical choice by Congress to simplify tax collection.³¹⁹ By allowing church members to reduce their taxable income based on money they donate to churches, through either an itemized or standard deduction, the government not only acknowledges the autonomy of churches to manage their own money, but it also recognizes that the sphere that is "the church" is composed of individuals whose allegiance to the church cannot be cause for their adverse treatment under the principle of noninterference. Without the charitable contribution deduction, church members who give to their churches would *per se* owe a higher percentage of their post-contribution income in taxes and would thus have less disposable

with the charitable contribution deduction addressed here, the "tax base" refers to a private citizen's taxable income.

318. See David W. Case, Comment, *Resolving the Conflict Between Chapter 13 of the Bankruptcy Code and the Free Exercise Clause—In re Green: A Step in the Wrong Direction*, 57 MISS. L.J. 163, 164–65 (1987).

319. Steve R. Johnson, *Administrability-Based Tax Simplification*, 4 NEV. L.J. 573, 584–86 (2004).

income than would those who do not donate to churches. Having the “right and duty” to “compel mutual regard for the boundary-lines of [different spheres]” and to “defend individuals . . . against the abuse of power,” the state cannot rightfully allow such adverse treatment between those who donate to churches and those who do not.³²⁰

Furthermore, from an empirical standpoint, seventy-four percent of churches’ revenue comes from charitable contributions.³²¹ Economists predict that without the charitable contribution deduction, charitable gifts to churches would decrease by just over twenty-two percent,³²² which would have a major impact given that in 2017 American churches received over \$127.37 billion in contributions.³²³ This figure likely is lower now because of recent tax law changes that will cause a substantial decrease in the proportion of households that itemize their deductions.³²⁴ Nevertheless, the loss of eligibility to receive tax deductible contributions almost certainly would still have a significant negative effect on giving to churches since many high-income households can still take advantage of this deduction.³²⁵ Therefore, the United States as the sphere of spheres has the power, via its taxation policies, to substantially affect churches’ budgets. To abide by the principle of noninterference, and against the reality that donations to churches have been tax deductible for generations, the government should refrain from enacting policies that reduce the amount of funds available to churches. Eradicating the charitable contribution deduction would have this effect, a clear reduction of the degree of autonomy a

320. KUYPER, *supra* note 221, at 124–25.

321. Evelyn Brody & Joseph J. Cordes, *Tax Treatment of Nonprofit Organizations: A Two-Edged Sword?*, in *NONPROFITS & GOVERNMENT: COLLABORATION & CONFLICT* 133, 137 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2011).

322. *Id.* at 138.

323. Thad S. Austin et al., *Giving to Religion*, in *GIVING USA 2018: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2017*, at 173 (2017).

324. See TAX POL’Y CTR., *What are itemized deductions and who claims them?*, <https://www.taxpolicycenter.org/briefing-book/what-are-itemized-deductions-and-who-claims-them> [<https://perma.cc/Z8QD-R3A7>].

325. *Id.*

church exercises over its resources. Consequently, if a church taught that its members ought not pay taxes to the government, the church itself would cease to abide by the principle of noninterference. Fair treatment among spheres—and especially fairness between the state and churches—runs in both directions.

B. *First Amendment Institutions*

While the concept of sphere sovereignty provides a philosophical basis for the proposed soft sovereignty approach in applying *Bob Jones University* to churches, the First Amendment provides a legal basis. About twenty years ago, dissatisfaction with the rules and categories of First Amendment law gave rise to what has been called the “institutional turn.”³²⁶ In the “pre-legal world,” individuals are not the only actors. Activities, specifically those which would otherwise be protected by the First Amendment, “happen[] . . . through and by institutions.”³²⁷ This real-world observation inspired a fresh approach to First Amendment issues, one that contends that institutions are morally relevant actors for the “definitions and distinctions drawn in First Amendment doctrine.”³²⁸ That is, under this First Amendment institution theory, the substantive guarantees of the First Amendment protect not only individuals but groups of organized individuals—namely, institutions.³²⁹

To determine what constitutes a First Amendment institution, Professor Horwitz proposes that two elements be satisfied: that the institution plays a central role in public discourse, and possesses self-regulatory norms and practices.³³⁰ The former is not so broad as to encompass any institution that contributes to public discourse but is limited to those institutions that are “fundamental” to the “infrastructure” of public discourse.³³¹ Thus, while other types of

326. HORWITZ, *supra* note 258, at 74–75; Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273, 276–84 (2008).

327. Garnett, *supra* note 326, at 277.

328. HORWITZ, *supra* note 258, at 74–75

329. *Id.*

330. *Id.* at 81.

331. *Id.* at 244.

legal entities participate in public discourse, they are not essential to its infrastructure in the way that newspapers, libraries, and universities are.³³² Additionally, institutions that are self-regulating—those that “operate according to a rich set of norms, practices, and rules”—satisfy the second prong of the First Amendment institution definition and ought to be legally recognized as such.³³³ This two-prong definition serves as a helpful guide for characterizing institutional actors for First Amendment purposes.

The above discussion on soft sovereignty supplies the theoretical basis for affording First Amendment institutions some sovereign control.³³⁴ In short, the government ought to respect the autonomy inherent to First Amendment institutions, as they are sovereign within their own spheres. This soft sovereignty approach is not, as was shown above, without its limits, and the government may still restrict the conduct of such institutions, at least in some respects.³³⁵ The rights guaranteed by the First Amendment remain, however, necessary protections against an over-intrusive state.

Building upon this institutional framework, many commentators have argued that churches should be recognized as First Amendment institutions.³³⁶ Applying Professor Horwitz’s two-part test renders churches First Amendment institutions, for they “are surely well-established, self-governing institutions with a longstanding infrastructural role in public discourse and a unique

332. *See id.*

333. *Id.* at 86.

334. HORWITZ, *supra* note 258, at 93–96.

335. *See infra* Part V.C.

336. *See, e.g.*, HORWITZ, *supra* note 258, at 174–93; Garnett, *supra* note 326; Richard W. Garnett, *The Freedom of the Church: (Toward) an Exposition, Translation, and Defense*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* 39, 45 (Micah Schwartzman et al. eds., 2016); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981); Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431, 460–61 (2011); *cf.* Steven D. Smith, *Freedom of Religion or Freedom of the Church?* (Univ. of San Diego Legal Stud. Rsch. Paper Series, Paper No. 11-061, 2011) (arguing that the First Amendment Religion Clauses are about collective religious practice), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911412 [<https://perma.cc/ZF6V-P4EN>].

set of contributions to make to it.”³³⁷ Moreover, the constitutional text supports an institutional conception of churches under the First Amendment. As Professor Richard Garnett argues, “An appreciation for the rights and independence of religious institutions, and an account of the implications of these rights for the financial, regulatory, cooperative and other relations between religious and governmental institutions, is a crucial component of any attractive account of the Religion Clauses.”³³⁸

While the Supreme Court has not explicitly applied the institutional approach to churches in First Amendment challenges relating to taxes, it has assumed that religious institutions (and churches specifically) enjoy First Amendment protections.³³⁹ In *Bob Jones University* itself, the Court assumed that Bob Jones University and Goldsboro Christian Schools—both religious schools—were protected by the Free Exercise Clause.³⁴⁰ It ultimately concluded that the government’s compelling interest in eradicating racial discrimination in education outweighed the religious schools’ free exercise rights.³⁴¹ But it nonetheless assumed that the First Amendment applied to the religious schools as such.³⁴² And in church property dispute cases, the Court has unambiguously recognized the First Amendment rights of churches.³⁴³ The leap from these precedents to affording First Amendment protections to churches in the tax context—a subset of religious organizations—is a small one at best. The next Part explores why this is the case.

337. HORWITZ, *supra* note 258, at 176; *see also id.* at 244 (“Certain entities—churches, newspapers, libraries, and so on—are clearly vital parts of that infrastructure [of public discourse].”).

338. Garnett, *supra* note 326, at 293.

339. *See infra* note 343.

340. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983).

341. *Id.* at 604.

342. *See also* *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (applying the Religion Clauses to a religious school); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–92 (2012) (same).

343. *See, e.g.*, *Jones v. Wolf*, 443 U.S. 595, 605 (1979); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 448–52 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 120–21 (1952).

C. Churches Distinguished

Theoretically, the soft sovereignty theory and First Amendment institution framework could justify the special tax treatment of many non-religious groups. In *Bob Jones University*, the Supreme Court applied the contrary-to-fundamental-public-policy doctrine to non-church religious institutions over their First Amendment objections. Because we accept *Bob Jones University* as a given for purposes of this Article, it is necessary to determine whether churches can and should be distinguished from non-churches when it comes to applying this doctrine. This Part argues that defining what constitutes a “church” is philosophically possible and is legally both possible and necessary.

1. Philosophical Basis for Distinguishing Churches

Religious skeptics—Professors Schragger and Schwartzman among them—argue that the soft sovereignty approach to church-state relations proves too much, that the sphere sovereignty justification covers not only churches but could logically be extended to encompass all social spheres, including religious schools or hospitals.³⁴⁴ Moreover, why should the neighborhood fraternal organization or local small business not enjoy the same tax benefits that churches do given the sphere sovereignty framework? And further, if religious institutions can be distinguished from secular groups, is it possible to further delineate between churches and other kinds of religious organizations such as religious schools and hospitals? Their main contention lies with the first question; once churches can be distinguished from secular groups in theory, the law becomes the forum for the finer line-drawing required to answer the second question.³⁴⁵

Professors Schragger and Schwartzman’s objection does not take up, as others have, the debate over whether religion is an inherent

344. See Schragger & Schwartzman, *supra* note 272, at 946.

345. See *id.* at 956 n.166.

good, nor do they attempt to empirically weigh the (secularly perceived) social good against the (secularly perceived) social harm that churches promulgate.³⁴⁶ Instead, they phrase and reject the sphere-theorist's claim as follows: "The religious institutionalist . . . has to claim not only that religion is good but that organized religion facilitates, promotes, or is constitutive of that good."³⁴⁷ Stated another way, the sphere-theorist's "instrumental claim . . . asserts that churches provide non-theologically-based benefits to society. But this raises the question of whether churches do so uniquely."³⁴⁸ While we have slight reservations about the characterization of what exactly sphere-theorists must prove, we nonetheless engage in the debate as so framed.

In support of their argument, Professors Schragger and Schwartzman slightly mischaracterize Kuyper's theory. They note that Kuyper taught that sovereign spheres included "the family, the business, science, art and so forth."³⁴⁹ But that litany does not preclude a distinct conception of the church-as-sphere; indeed, it is entirely silent on "the Church."³⁵⁰ Kuyper scholar Professor Nicholas Wolterstorff assures us that it is "unmistakably clear that [Kuyper] regarded the church as fundamentally unique and regarded its autonomy under God as more fundamental than that of any other institution."³⁵¹ A cursory glance at the presentment of his sphere theory shows that Kuyper was careful to maintain distinctions between the State, Society, and the Church.³⁵²

Kuyper's main, albeit implicit, distinguishing factor is that churches are necessarily rooted in religious truths, whereas non-religious groups are not.³⁵³ Churches, then, are social spheres that adhere to and practice religion, and non-churches are social spheres

346. *See id.* at 950.

347. *Id.* at 949 (emphasis omitted).

348. *Id.* at 953.

349. *Id.* at 948 n.122 (citing KUYPER, *supra* note 221, at 90).

350. *See id.* at 948–49.

351. Wolterstorff, *supra* note 219, at 116.

352. *See* KUYPER, *supra* note 221, at 99, 127.

353. *See id.* at 128–30.

that do not adhere to nor practice religion.³⁵⁴ Professors Schragger and Schwartzman do not look at the specific beliefs held by churches or any social institution as a basis for distinguishing among them, and they accordingly make two errors in not crediting “religion” as a distinctive quality of churches. First, they assume that churches justify their institutional autonomy on conscience or associational rights—as opposed to collective doctrinal adherence—in setting the parameters of the church’s sphere. Second, they rely upon that assumption to group churches together with other social institutions. But religious sphere theorists reject their first assumption in favor of a church uniqueness based on “religiosity.” If religion is unique to churches, and by all accounts it is, then Professors Schragger and Schwartzman’s conclusion that churches are indistinguishable from secular spheres fails.

Distinguishing churches from other social spheres on the basis of religion is, however, only half the battle for the religious sphere theorist. The question still remains: Why does religion deserve special treatment? That is, even if churches are distinguishable from secular spheres, what about the nature of religion requires that churches receive favors from the state?³⁵⁵ The secularly perceived benefits of a religious society are plentiful³⁵⁶ but contested.³⁵⁷ In any matter, the intangible benefits are ultimately what tip the scale in favor of a governmental structure that recognizes the importance of preserving a religious populace.

While some would disagree, we would argue that religion as a whole, albeit in its best form and in ways that vary among faiths, is a conduit for social and moral good. So promulgated by churches,

354. *See id.*

355. This is the argument Professors Schragger and Schwartzman ultimately raise. *See supra* notes 347–48 and accompanying text.

356. *See Schragger & Schwartzman, supra* note 272, at 950 n.131.

357. *See id.* at 950 n.130.

religions teach their adherents principles, in both form and substance, that are unique among other social spheres.³⁵⁸ Religion promotes respect for authority, a necessary feature of a sustainable democracy.³⁵⁹ It fosters concern for one's community and for the poor, and as one commentator put it, "Exclusive concern for self-interest is the very definition of the corruption of republican virtue."³⁶⁰ Religion occupies a unique space because "[c]hurches, as communities of spiritual discernment and moral reflection, can begin conversations about the common good within their own communities and then reach out to include other persons and institutions."³⁶¹ Religious groups make the pursuit of supernatural and moral truths their primary activity in a way that secular organizations simply do not. And in a society in which rights are perceived as God-given,³⁶² religion plays a vital role in promoting the dignity of the human person—a dignity that the law endeavors to recognize and protect.³⁶³

2. Legal Basis for Distinguishing Churches

But regardless of whether one accepts this philosophical argument, is there a legal basis for distinguishing churches from other types of religious organizations? The Court itself suggested there may be in carefully setting to the side whether its holding in *Bob*

358. See e.g., PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH (2004), http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html [<https://perma.cc/KQ7W-EDYF>].

359. See RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 82–84 (1984).

360. Robert N. Bellah, *Religion and Legitimation in the American Republic*, SOC'Y, May/June 1978, at 16, 20.

361. BRIAN STILTNER, RELIGION AND THE COMMON GOOD: CATHOLIC CONTRIBUTIONS TO BUILDING COMMUNITY IN A LIBERAL SOCIETY 124 (1999).

362. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are *endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty and the pursuit of Happiness." (emphasis added)).

363. See *id.* ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .").

Jones University applied to “churches or other purely religious institutions.”³⁶⁴ And while the Court in some decisions has extended religious liberty protections to non-church religious organizations—for example, the ministerial exception cases both involved religious schools³⁶⁵—in others it appears to have limited those protections to churches.³⁶⁶ Finally, when a non-church religious organization provides secular services or goods such as education or health care in a manner that is contrary to fundamental public policy, the government’s interest in not supporting that organization through tax benefits is significantly stronger than in the church context. This is because, as the IRS has noted, provision of such services in a manner strongly disfavored by the government can, for example in the case of racial discrimination, “reasonably be expected to aggravate the disparity in the educational, economic, or social levels of [a racial] group when compared with society as a whole,”³⁶⁷ while a typical church discriminating with respect to employment, religious services, or membership will likely not have such an effect.

Therefore, even if a religious or sphere sovereignty skeptic adheres to the conscience-based conception of church autonomy, rejects the idea of the church as a First Amendment institution, or finds the above-proffered arguments for the distinctive treatment of churches altogether unconvincing, the law has recognized that churches can be distinguished and that churches, as religious organizations, ought to receive special treatment under the First Amendment. This observation does not dismiss the justifications

364. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983).

365. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 174 (2012).

366. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 602 (1979) (affirming the First Amendment limitations on the role of civil courts to resolve church property disputes); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (identifying churches as having a particular freedom from state interference as a matter of religious liberty); *Watson v. Jones*, 80 U.S. 679, 728–29 (1871) (recognizing that decisions of church bodies are not reviewable by civil courts when based on internal church law); *see also* Ira Mark Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 CALIF. L. REV. 1378, 1403 (1981); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 57–58 (2002).

367. I.R.S. Tech. Adv. Mem. 89-10-001 (Mar. 10, 1989); *see supra* note 86.

offered above, it merely acknowledges that the law recognizes the uniqueness of churches, even if the underlying rationale for doing so has not been systematically and consistently explained. In other words, the American system has accepted the distinct space that churches occupy given the First Amendment's Religion Clauses, which themselves single out religion from other social spheres.³⁶⁸ As a practical matter then, we consider some instances in which courts have distinguished churches from non-churches so as to inform the line-drawing necessary to advance our position that *Bob Jones University* should apply in a more limited fashion to churches.

As noted earlier, the Supreme Court was careful to reserve the question of how the reasoning of *Bob Jones University* would apply to "churches or other purely religious institutions."³⁶⁹ While its basis for doing so could reasonably be viewed as the fact that the public policy at issue related to education and so only applied to schools, there is another basis for distinguishing churches (and perhaps "other purely religious institutions," whatever exactly that means) from religious schools, hospitals, and other types of entities. That basis is the same one that underlies the ministerial exception with respect to the employment of religious leaders (albeit an exception the Court has extended beyond churches),³⁷⁰ the limited role of civil courts in resolving church property disputes,³⁷¹ and the autonomy or soft sovereignty justification for the tax benefits generally enjoyed by churches³⁷²—that the internal affairs of churches should generally not be subject to government interference because of both free exercise and entanglement concerns under the First Amendment.

In addition to the theoretical factors by which to distinguish churches for tax benefit purposes, the Constitution itself offers some distinguishing characteristics unique to the church setting.

368. See generally Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515 (2007); Lupu & Tuttle, *supra* note 366.

369. *Bob Jones Univ. v. United States*, 461 U.S. 594, 604 n.29 (1983).

370. See Schragger & Schwartzman, *supra* note 272, at 975.

371. See *supra* note 366.

372. See *supra* Part III.C.3.

For example, while the Supreme Court accepted the constitutionally based ministerial exception in the context of a religious school, its reasoning applies even more strongly to churches. The Court designed the exception to prevent “government interference with an internal church decision that affects the faith and mission of the church itself.”³⁷³ The Court thus distinguished laws that incidentally burden outward expressions of religious conduct, such as the ban on the ingestion of peyote that the Court upheld even as applied to sacramental use in *Employment Division v. Smith*.³⁷⁴ While the ministerial exception cases are of course limited to the employment context, the reasoning in those cases mirrors that in cases involving internal church decisions that affect the faith and mission of the church itself, such as the church property disputes for which the Court has prohibited civil court involvement if they involve church law or ecclesiastical disputes.³⁷⁵ Such decisions would include, for example, those who may participate in religious activities and in what role.³⁷⁶ The soft sovereignty justification applies similarly to the tax context. If taxation would significantly interfere with the internal affairs of a church, then this respect for soft sovereignty should prevent such taxation. The key questions in both contexts are what falls within a church’s internal affairs and what limits may be drawn.

The legal basis for the soft sovereignty justification is therefore the First Amendment. In requiring churches to conform their internal affairs to fundamental public policy when doing so is contrary to their religious beliefs, taxing churches for failure to comply with such policy substantially burdens free exercise of religion and invites substantial entanglement, and so is not permissible constitutionally absent a compelling governmental reason to do so. If a church engages in illegal activity, especially criminal activity, then

373. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

374. *Id.*

375. See *supra* note 366.

376. See Mikochik, *supra* note 95, at 205 (freedom of expressive association protected by the First Amendment protects those “who could join in liturgy” even if, under *Employment Division v. Smith*, it does not encompass “what that liturgy could include”).

that would generally provide such a reason, but non-illegal activity that conflicts with fundamental public policy generally does not.

D. *Defining “Church”*

This Article thus far argues that employing a soft sovereignty interpretation of *Bob Jones University* applied to churches is appropriate on philosophical and legal grounds and leads to a more limited application of that decision to churches than to charities. But what exactly is a “church”? Both Kuyper and the Supreme Court hesitate to allow the government to decide what constitutes a church. Kuyper posits that it is the church’s “privilege, and not that of the State, to determine her own characteristics as the true Church, and to proclaim her own confession, as the confession of the truth.”³⁷⁷ And the Court has echoed this view, steering clear of deciding cases on the basis of “the faith and mission of the church itself.”³⁷⁸ But the church, as one social sphere among many, albeit a privileged one given the First Amendment, is not free to avoid all interactions with the government, and the Court ought not balk at deciding difficult First Amendment questions. For purposes of applying the fundamental public policy doctrine as we frame it, defining what exactly constitutes a church becomes a necessary line-drawing problem with which the courts must engage.

Which organizations should qualify as churches in the tax benefit context must be meaningfully limited. The existing IRS multi-factor test is difficult to apply and may lead to organizations that do not appear to be a church under most definitions being recognized as such for federal tax purposes.³⁷⁹ Indeed, commentators are increasingly concerned that the definition is already being stretched beyond recognition.³⁸⁰ Some courts are moving toward a test that considers many relevant factors but gives greatest weight to a

377. KUYPER, *supra* note 221, at 137.

378. *Hosanna-Tabor*, 565 U.S. at 190.

379. *See supra* note 148 and accompanying text.

380. *See, e.g.*, Lidiya Mishchenko, *In Defense of Churches: Can the IRS Limit Tax Abuse by “Church” Impostors?*, 84 GEO. WASH. L. REV. 1361, 1367–81 (2016); Christine Roem-

congregational approach.³⁸¹ Such an approach requires the regular, in-person gathering of individuals to engage in worship and other communal religious activities and appears to be better fit for what constitutionally should be viewed as a church and therefore eligible for this approach.³⁸²

The congregational approach has acquired acceptance among courts³⁸³ and commentators,³⁸⁴ perhaps because it is an easily administrable, objective test and is arguably consistent with the text and history of the Religion Clauses. Narrow definitions, like the congregational approach, ensure that our proposed application of *Bob Jones University* to churches does not encompass a larger category of tax-exempt organizations than is necessary, desirable, or constitutionally required. But whatever definition is ultimately adopted, if a categorical definition is adopted at all, it must account for the basic distinction that the congregational approach captures well: churches are a subset of religious organizations, which are themselves a subset of Section 501(c)(3) nonprofit organizations.

To the extent that a narrow, court-made definition of church would exclude some entities that would otherwise qualify as a

hildt Moore, Comment, *Religious Tax Exemption and the "Charitable Scrutiny" Test*, 15 REGENT U. L. REV. 295, 307 (2003); Sarah Pullman Bailey, *Major evangelical nonprofits are trying a new strategy with the IRS that allows them to hide their salaries*, WASH. POST, Jan. 17, 2020.

381. See cases cited *infra* note 383.

382. Transitory crises that make in-person services impossible—like pandemics—would not undermine an institution's legal status as a church, so long as it intends to resume in-person gatherings as soon as the transitory crisis ends. See Zachary B. Pohlman, "Churches" in a Time of Coronavirus, CANOPY FORUM (Oct. 2, 2020), <https://canopyforum.org/2020/10/02/churches-in-a-time-of-coronavirus/> [https://perma.cc/S6J2-KKTC].

383. See, e.g., *Found. of Hum. Understanding v. United States*, 614 F.3d 1383, 1391 (Fed. Cir. 2010); *Church of Eternal Life & Liberty, Inc. v. Comm'r*, 86 T.C. 916, 924 (1986); *Church of Visible Intelligence That Governs the Universe v. United States*, 4 Cl. Ct. 55, 65 (1983).

384. See, e.g., Mirkay, *supra* note 106, at 740; Jacob E. Dean, "Do You Have That New Church App for Your iPhone?": Making the Case for A Clearer and Broader Definition of Church Under the Internal Revenue Code, 46 CREIGHTON L. REV. 173, 202 (2013); Wendy Gerzog Shaller, *Churches and Their Enviably Tax Status*, 51 U. PITT. L. REV. 345, 351–52 (1990).

church under the IRS multi-factor test, there is no legal inconsistency. Churches, under the *Bob Jones University* framework, are a constitutional class, not a statutory or regulatory carve out. The IRS is, of course, free to exceed the constitutional floor in affording tax benefits to more groups than the Constitution requires. The IRS could not, however, exclude groups that would otherwise qualify as a church under a constitutional definition.

V. REVISITING CHURCHES AND *BOB JONES UNIVERSITY*

There are at least three ways to approach the application of *Bob Jones University* to churches today. One way would be to take the contrary-to-fundamental-public-policy doctrine as stated in that case and assume it applies with equal force to religious organizations of all types, including churches. This is the approach that the IRS takes³⁸⁵ and was the approach we took in Part II. This approach led us to identify at least two areas of current conflict—sex discrimination, particularly in employment, and sanctuary churches—where the tax benefits enjoyed by a significant number of churches could be at risk. We also identified at least two areas of likely future conflict, although opposition to the church practice does not yet rise to the level of a fundamental public policy, in the case of sexual orientation discrimination, and the practice appears rare, in the case of polygamy.

Another approach would be to limit *Bob Jones University* to its historical and factual context—both the decades-long battle against racial segregation in education and the broader civil rights movement. The question would then become whether any of the current or likely future conflicts involve a similar confluence of strong political and societal pressures. This approach essentially asks whether the public policy at issue in *Bob Jones University* is distinguishable from the ones identified in Part II even if some or all of the latter might be considered fundamental. For the reasons detailed previously, we reject this approach.³⁸⁶

385. See *supra* note 39.

386. See *supra* Part II.A.

A third approach would be to consider not whether the fundamental public policies identified are distinguishable from the policy at issue in *Bob Jones University*, but instead whether the institutions being discussed here—churches—are distinguishable from the institutions involved in that case. For the reasons discussed above, our conclusion is that this is the best approach for deciding how, if at all, *Bob Jones University* should apply to churches, subject to certain limitations detailed in this Part.

A. *Current Significant Conflicts*

1. Sex Discrimination

With respect to sex discrimination, whether in employment, membership, provision of goods or services related to religious activity, or teachings, any attempt by the government to remove tax benefits from a church for such behavior would significantly interfere with internal church decisions and affairs (assuming the discrimination is based on religious doctrine) because it would almost certainly closely relate to the faith and mission of the church. The contrary-to-fundamental-public-policy doctrine should therefore not extend to this situation due to the religious liberty protections provided by the First Amendment, subject to the limits discussed further below.

2. Protecting and Serving Undocumented Immigrants

Unlike sex discrimination, which occurs only within the “sphere” of the church, sanctuary churches present a more complicated situation. The sphere of authority inherent to churches collides with the government’s sphere of authority, both theoretically and physically, when churches harbor undocumented immigrants who would otherwise be deported. Setting aside whether churches who provide sanctuary act illegally,³⁸⁷ the question becomes whether the

387. And at least one commentator has argued that such church action likely would not be illegal today. See Scott-Railton, *supra* note 116, at 417–19.

IRS can revoke the tax benefits of churches for opposing the fundamental public policy of not interfering with legal deportations when churches provide sanctuary.

On the one hand, nothing is more private—and hence, more removed from potential state interference—than how a church conducts itself within its own four walls. If the sphere metaphor is to have any practical implications, it must at least mean that the state cannot physically intrude upon the sanctuary absent extraordinarily compelling reasons for doing so (such as to prevent criminal activity). On the other hand, part of the “good” that churches offer to society is fostering respect for authority and promoting democratic principles.³⁸⁸ Openly defying immigration law seems to cut against this justification for the special treatment of churches within society.

Consider the church whose religious doctrine necessitates safeguarding the undocumented immigrant.³⁸⁹ That church is faced with a mutually exclusive choice: obey Caesar or obey God. That is, comply with secular law (and fundamental public policy) but violate religious law by releasing the immigrant to law enforcement, thereby retaining secular tax benefits, or comply with religious law by harboring the immigrant, thereby forfeiting secular tax benefits. Were a church to face such an ultimatum, its freedom of religious expression would be seriously threatened. In fact, the sanctuary church situation presents a quintessential example of the respective

388. See *supra* notes 359–363 and accompanying text.

389. See Jonathan Zasloff, *Sanctuary, Civil Disobedience, and Jewish Law* 1 (UCLA Pub. Law & Legal Theory Rsch. Paper no. 19-33, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460605 [<https://perma.cc/WU3N-S7MX>] (Jewish law requires synagogues to shelter asylum-seekers from immigration authorities under certain circumstances); U.S. CONFERENCE OF CATHOLIC BISHOPS, AD HOC COMMITTEE FOR RELIGIOUS LIBERTY, OUR FIRST, MOST CHERISHED LIBERTY: A STATEMENT ON RELIGIOUS LIBERTY 3 (2012) (challenging state laws prohibiting the “harboring” of undocumented immigrants as conflicting with certain religious obligations), <https://www.usccb.org/committees/religious-liberty/our-first-most-cherished-liberty> [<https://perma.cc/6RVH-Z74D>]; Daniel Burke, *The Evangelical Lutheran Church in America just became the country’s first “sanctuary church body,”* CNN (Aug. 8, 2019), <https://www.cnn.com/2019/08/08/us/lutheran-sanctuary-church/index.html> [<https://perma.cc/6C77-88V4>].

authority that church and state have over their own populations. In this case, the coercive power of the state must yield to the soft sovereignty inherent to the church when its members practice their religion.

This outcome is bolstered in light of the sanctuary concept being historically and theologically tied into the concept of the church itself as a place of not only spiritual but physical shelter for those seeking safety.³⁹⁰ One aspect of the modern sanctuary movement is that churches provide their protection only to those willing to remain physically within the confines of an existing church building.³⁹¹ It is this physical limitation that ultimately tips the scale in favor of churches. For undocumented immigrants, it sharply limits their freedom and activities, and for churches, it demonstrates the integration of the sanctuary concept with the existing church's faith and mission.

B. Likely Future Significant Conflicts

Part II also identified two issues that, while not currently governed by fundamental public policy, are likely to produce conflicts in the future—namely, sexual orientation discrimination and polygamy. The social, political, and legal trajectory of the first issue is such that opposition to discrimination on the basis of sexual orientation may very well become a fundamental public policy. As for the second issue, it is possible that a greater number of churches that support polygamy may seek tax-exempt status and so create a conflict with the IRS, which has already indicated it considers opposition to polygamy to be a fundamental public policy. Should either of these developments occur, and should the IRS invoke *Bob Jones University* to repeal the tax benefits of a church that acts contrary to said fundamental public policy, the framework we offer above provides a way for courts to uphold the important religious

390. See Rhonda Shapiro-Rieser, *The Sanctuary Movement: A Brief History*, CTR. FOR RELIGIOUS AND SPIRITUAL LIFE (Mar. 1, 2017), <https://sophia.smith.edu/religious-spiritual-life/2017/03/01/sanctuary-movement-history/> [https://perma.cc/JF24-KED8].

391. See, e.g., Laurie Goodstein, *Houses of Worship Poised to Serve as Trump-Era Immigrant Sanctuaries*, N.Y. TIMES, Dec. 27, 2016.

interests at stake, while it also draws certain bright-line rules on just how far both churches and the state can encroach into the sphere of the other.

1. Sexual Orientation Discrimination

Solicitor General Verrilli's admission³⁹² merely confirmed what appeared to be true: religious organizations that discriminate on the basis of sexual orientation are potentially susceptible to a *Bob Jones University* challenge in light of *Obergefell*. And if the federal government comes to consistently oppose sexual-orientation-based discrimination such that it becomes fundamental public policy,³⁹³ how ought the IRS or reviewing courts determine whether to strip churches of their tax benefits for violating such policy? Churches could discriminate on the basis of sexual orientation in essentially two ways. They could (1) refuse to perform same-sex weddings or provide other religious services to persons with a certain sexual orientation; or (2) disallow those who have a certain sexual orientation or who engage in certain prohibited sexual conduct from assuming positions of church authority or to be members at all. While certainly related, the two instances of disparate treatment are distinct and must be analyzed separately given a contrary-to-fundamental-public-policy challenge.

First, some churches, pursuant to their religious doctrine, do not perform same-sex weddings. Applying the above framework, we

392. See *supra* note 11 and accompanying text.

393. The federal government is not yet uniform in opposing discrimination on the basis of sexual orientation. For example, while the Supreme Court recently held that Title VII of the Civil Rights Act of 1964 prohibits sexual orientation discrimination in employment, the executive branch opposed this result and members of Congress were split in their views. See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), Brief for the United States as *Amicus Curiae* Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623, *Bostock v. Clayton Cty.*, No. 17-1618 et al. (U.S. Aug. 23, 2019); Brief of *Amici Curiae* Members of Congress in Support of Employers, *Bostock v. Clayton Cty.*, No. 17-1618 et al. (U.S. Aug. 23, 2019) (eight Senators and forty Representatives); Brief Of Members of Congress as *Amici Curiae* in Support of the Employees, *Bostock v. Clayton Cty.*, No. 17-1618 et al. (U.S. July 3, 2019) (thirty-nine Senators and 114 Representatives).

must consider whether performing weddings is an essentially internal practice of a church. That is, when a church performs a wedding, is that an intrinsically religious activity, or are weddings outside the scope of a church's fundamentally religious beliefs and practices? The question answers itself. Whether a church holds religious views regarding marriage can be defined only by the church itself. Where a church holds to specific religious teachings regarding marriage, the state cannot use its coercive power of taxation to encourage or pressure a church into violating its sincerely held religious beliefs. As the Supreme Court stated in *Masterpiece Cakeshop*, "When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion."³⁹⁴ While churches are not immune from all government interference under this approach,³⁹⁵ one obvious implication of the soft sovereignty justification is that a church must retain the autonomy to decide which religious ceremonies it conducts and how those ceremonies are conducted, weddings included. If a church is unwilling to perform same-sex marriages, no act of the state—be it through revocation of tax benefits or otherwise—can compel a church to do so. Such a coercive act would cause unnecessary entanglement by the state in the internal affairs of churches by directly influencing their liturgical practices and would potentially raise serious First Amendment problems regarding a church's right to free exercise of religion.

The state's potential interference with liturgy in the marriage context is different than banning the use of peyote in religious ceremonies at issue in *Employment Division v. Smith*.³⁹⁶ *Smith* involved illegal drug use.³⁹⁷ Refusing to perform same-sex marriages is not illegal but is rather contrary only to (potential) fundamental public policy. Moreover, in *Smith*, the religious observers were prohibited

394. *Masterpiece Cakeshop v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

395. See *infra* Part V.C.

396. 494 U.S. 872 (1989).

397. *Id.* at 874.

from using peyote, but churches opposing same-sex marriage would be compelled to perform an act contrary to a sincerely held belief. When it comes to distinguishing inaction from action, requiring the latter by law implicates a much greater liberty interest. Additionally, *Hosanna-Tabor* confirms that “*Smith* involved government regulation of only outward physical acts. [Discrimination in hiring ministers], in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.”³⁹⁸ Surely weddings, which are liturgical acts that affect the faith and mission of a church, should be afforded this same protection. Thus, while the soft sovereignty approach necessitates this result, current legal doctrine likewise supports this outcome.

Moreover, *Obergefell* itself, which at least implicitly predicted that same-sex marriage would become widely accepted,³⁹⁹ recognized that:

[R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.⁴⁰⁰

Justice Kennedy envisioned that people on both sides of the same-sex marriage discussion would continue to “engage those who disagree with their view in an open and searching debate.”⁴⁰¹ He concluded the section on religion by noting that, while churches have

398. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

399. *Obergefell v. Hodges*, 576 U.S. 644, 676 (2015) (noting the numerous legislative debates, referenda, and scholarly arguments that same-sex marriage should be recognized by the state).

400. *Id.* at 679–80.

401. *Id.* at 680.

the right to disagree with same-sex marriage, “[t]he Constitution . . . does not permit the *State* to bar same-sex couples from marriage.”⁴⁰² *Obergefell* thus does not require churches to perform same-sex marriages. If anything, it makes explicit the assumption that a church cannot legally be compelled to perform any marriages that are contrary to its sincerely held beliefs.⁴⁰³ Since *Obergefell* is arguably the case—or more broadly, the moment—that will have ushered in the acceptance of same-sex marriage as fundamental public policy,⁴⁰⁴ looking to *Obergefell* for extra guidance on churches’ obligations under that policy makes sense. If the IRS does so, in accordance with the framework offered above, it must afford churches the autonomy not to perform same-sex marriages without the potential of forfeiting otherwise available tax benefits.

Second, some churches do not allow those who engage in same-sex conduct or, less commonly, who have a same-sex orientation to obtain leadership positions within the church or possibly to be members or receive goods or services.⁴⁰⁵ Assuming again that fundamental public policy would someday be opposed to such discrimination, ought churches that disallow those who engage in same-sex conduct or who have specified sexual orientations from obtaining leadership roles, being members, or receiving goods and services have to forfeit their tax benefits under a *Bob Jones University*-based challenge? Again, the answer must be “no.” In light of the soft sovereignty approach to church autonomy, churches should have complete authority over their internal hiring, membership, and goods and services provision practices—assuming al-

402. *Id.* (emphasis added)

403. *See id.*

404. *See Pavan v. Smith*, 137 S. Ct. 2075 (2017) (applying *Obergefell* to strike a state rule that did not allow both same-sex spouses to be listed as parents on their child’s birth certificate).

405. *See* Julia Zauzmer & Sarah Pulliam Bailey, *United Methodist Church votes to maintain its opposition to same-sex marriage, gay clergy*, WASH. POST (Feb. 26, 2019), <https://www.washingtonpost.com/religion/2019/02/26/united-methodist-church-votes-maintain-its-opposition-same-sex-marriage-gay-clergy/> [<https://perma.cc/Y97U-JNY8>]; *supra* note 105 and accompanying text.

ways that any discrimination is founded upon sincerely held religious beliefs. The First Amendment must allow churches to make these decisions without fear of retaliatory government action in the form of *de facto* taxation. Anything other than complete autonomy over these core church decisions would invite unnecessary and potentially unlawful entanglement by the state.⁴⁰⁶

2. Polygamy

Applying the above approach in the polygamy context renders a similar analysis but with notable distinctions. Unlike with same-sex marriage, in which the (assumed) fundamental public policy is in favor of same-sex marriage, the (IRS-assumed) fundamental public policy with regard to polygamy is strict opposition. This inverts the complications that arise in the same-sex marriage context. For one, instead of compelling churches to perform same-sex marriages by threatening revocation of tax benefits, the state, on the same threatened tax benefit revocation grounds, would prohibit a church from performing polygamous marriages. But do these distinctions make a difference? It is hard to find a principled reason that they should.

For churches that oppose same-sex marriage as a matter of religious doctrine, that doctrine is informed by views about human sexuality and what constitutes “marriage.”⁴⁰⁷ Both prongs that form the basis of such doctrine are based on “religious” assumptions. For churches that endorse polygamy, the basis of that belief rests on different doctrinal assumptions than those that oppose the practice, but churches that support polygamy nonetheless approach questions of sexuality and marriage in a religious manner.⁴⁰⁸ Since defining what constitutes “marriage” is religious, at least when defined by a church, the state has no authority to distinguish among

406. *But see infra* Part V.C. (limitations).

407. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶ 1601 (2016) (“The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring . . .”).

408. *See, e.g.*, *Plural Marriage and Families in Early Utah*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/topics/plural-marriage-and-families-in-early-utah?lang=eng> [<https://perma.cc/SCZ9-UYRN>].

and favor churches whose definitions of marriage comport with the state's preferred definition. Doing so would have the state exceed its sphere of authority by encroaching upon churches' sovereign spheres. Moreover, if the state could do so, then churches that oppose same-sex marriage would have no argument for retaining their autonomy, given their refusal to perform same-sex weddings. The state could simply reject the autonomy of such churches, compel compliance with the fundamental public policy, which is in favor of same-sex marriage, and force such churches to either lose their tax benefits or perform same-sex marriages. Assuming, then, that a church holds a sincere religious belief that endorses the practice of polygamy, the state—pursuant to the principle of noninterference and in respecting church autonomy—cannot interfere with that practice by revoking such a church's tax benefits.

But the state's noninterference need not extend so far as to endorse polygamy itself. In other words, just as the state cannot coerce a church into halting the performance of polygamous marriages, neither can a church that supports polygamy coerce the state into endorsing polygamous marriages. Thus, while the state cannot stop a church from performing a polygamous marriage, it does not have to legally recognize such marriages.⁴⁰⁹ The state need not contradict its own fundamental public policy—which (assuming *arguendo*) defines marriage as a union between two, and only two, consenting adults—by endorsing polygamous unions. Each institution is only sovereign, and thus autonomous, within its own sphere. That applies equally to churches as well to the state. In light of the view advanced in this Article, the state could not prohibit a church from performing a polygamous marriage within a religious context, but the state would not have to validate that union and act contrary to fundamental public policy by issuing marriage licenses that endorse polygamy. And if the practices of the church led to violation

409. *But see* Renuka Santhanagopalan, Note, *Ménage à What? The Fundamental Right to Plural Marriage*, 24 WM. & MARY J. RACE, GENDER & SOC. JUST. 415, 421–35 (2018) (arguing that the fundamental right to marry recognized in *Obergefell* constitutionally extends to polygamous marriages); Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977, 2044 (2015) (same).

of state criminal statutes prohibiting bigamy, as the IRS found was the case with a church that promoted polygamy,⁴¹⁰ then denial of tax-exempt status would be justified for the reasons detailed in the next Part.

C. *Limitations*

This approach has several limitations. First, as mentioned earlier it should only apply to the contrary-to-fundamental-public-policy doctrine and not the related but distinct illegality doctrine, because in our current legal system churches and their leaders are not fully separate and equal sovereigns who are above the law (or more accurately, not subject to the government's laws). Rather, the soft sovereignty approach, while recognizing church autonomy, is cognizant of the fact that churches are one of many societal spheres—the state as sphere of spheres chief among them. If churches were above the law, we would be in a world where the hard sovereignty approach to the application of tax and other laws to churches was still in place. The protections of the First Amendment do not go that far.

Therefore, if a church is found by the appropriate authority to have engaged in illegal behavior as a significant part of its activities, including with respect to sex discrimination or immigration laws, that would justify the loss of the tax benefits that churches otherwise enjoy. An extreme example of such a situation would be a church that engages in human sacrifice—that is, murder—but more realistic examples also exist, such as the church that was found to have engaged in the distribution of marijuana.⁴¹¹ Of course, in this situation the church and its leaders likely will be more concerned about the direct sanctions associated with that illegal behavior than the indirect tax consequences, as noted previously.

Second, and relatedly, there is the issue of whether the illegal behavior should be limited to criminal illegality or also extend to violations of civil laws. Given the breadth of civil laws at both the federal and state levels and the triviality of the activities they penalize

410. *See supra* note 123 and accompanying text.

411. *See supra* note 60 and accompanying text.

in many instances, we believe only criminal activities should be able to form the basis for revocation of tax-exempt status for a church under the *Bob Jones University* decision. This appears to be the approach the IRS has usually taken, including with respect to applying the illegality doctrine to churches.⁴¹²

Finally, for the reasons stated previously, this Article has accepted *Bob Jones University* as a given, and so has not questioned the Court's holding in the case that the First Amendment does not shield non-church religious organizations from the contrary-to-fundamental-public-policy doctrine. In addition, we have noted that when non-church religious organizations provided secular services or goods in a manner that is contrary to fundamental public policy, the government has a stronger interest in denying them tax benefits than it does in the case of a typical church, although some commentators would reject this distinction.⁴¹³ Accepting this limitation, if a church is engaged in secular education, health care, or similar activities the contrary-to-fundamental-public-policy doctrine would still apply. The previously discussed IRS decision to revoke the tax-exempt status of a legal entity that housed both a traditional church and a racially discriminatory school was therefore correct, especially since the church could avoid the loss of tax benefits by moving the school into a separate (taxable) legal entity.⁴¹⁴

CONCLUSION

While rarely invoked, *Bob Jones University* remains good law and so provides a potential basis for revoking the tax benefits normally

412. See *supra* Part I.B.

413. See *supra* note 367 and accompanying text (supporting this distinction); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 66 (1983) (rejecting this distinction).

414. Indeed, this is the strategy that Bob Jones University used to obtain tax-exempt status under Section 501(c)(3) for its art museum. See *Bob Jones Univ. Museum & Art Gallery v. Comm'r*, 71 T.C.M. (CCH) 3120 (1996); Victoria B. Bjorklund, *Spinoffs: Bob Jones University Museum and Beyond: Evolving Techniques for Use of For-Profit Subsidiaries, Asset Protection, and Other Multiple-Entity Structures*, ALI-ABA COURSE OF STUDY, Dec. 5, 1996.

enjoyed by certain nonprofit organizations, as highlighted by the exchange during the *Obergefell* oral argument. Moreover, there are both current and foreseeable conflicts between the activities of some churches and likely fundamental public policies. Yet while the IRS has indicated it views the decision as fully applying to churches, the Supreme Court has never so held. Based on longstanding philosophical views of how churches and the state should interact and a more recent theory regarding how the First Amendment should govern such interactions, we conclude that *Bob Jones University* should not apply with full force to churches. Instead, it should apply only if a church violates the illegality doctrine by engaging in significant criminal activities. But if instead a church's activities are only contrary to fundamental public policy, then the state should recognize a church's autonomy or soft sovereignty by providing the church with the tax benefits to which it is entitled.

IS ADMINISTRATIVE SUMMARY JUDGMENT UNLAWFUL?

ALEXANDER I. PLATT*

ABSTRACT

When the Securities and Exchange Commission (SEC) files an administrative enforcement action, the respondent is ordinarily entitled to present their case orally at an in-person hearing before one of the agency's Administrative Law Judges. But, in hundreds of administrative proceedings over the past twenty-five years, the agency has skipped over this in-person hearing, instead resolving actions on motions for "summary disposition."

This is illegal. Most SEC administrative proceedings are governed by the Administrative Procedure Act's (APA) provisions governing "formal" adjudications. One of those provisions—long overlooked or misinterpreted by scholars and courts—can only be reasonably interpreted as granting respondents an absolute right to an oral hearing in cases where the agency is seeking to impose "sanctions" like those the SEC imposes in administrative proceedings. The 1946 Congress that enacted the APA declined to follow the trans-substantive summary judgment rule that had

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been recently adopted as part of the Federal Rules of Civil Procedure, and instead followed the alternative model of the many American states that permitted summary judgment only in specifically enumerated categories of cases. The legislative history and contemporaneous interpretations confirm that the APA prohibits summary process for formal adjudications leading to "sanctions."

Administrative summary judgment is also questionable on policy grounds. Proponents argue that administrative summary judgment promotes administrative efficiency, but have overlooked how the procedure may distort agency enforcement priorities, undermine congressional control of administrative agencies, be subject to systematic abuse by agencies, and unfairly deprive some individuals of important procedural rights.

This paper provides an empirical study of SEC summary disposition from its promulgation in 1995 through 2019, examines the text and history of the APA to demonstrate the illegality of this procedure, and challenges the conventional policy justifications for the procedure.

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INTRODUCTION

When the Securities and Exchange Commission (SEC) launches an enforcement action in its administrative forum, the respondent is ordinarily entitled to an oral in-person hearing before an Administrative Law Judge (ALJ). But, in hundreds of cases, the agency has dispensed with this time-consuming hearing, instead resolving the matter on a motion for “summary disposition,” analogous to the motion for summary judgment under Federal Rule of Civil Procedure 56.¹

This is illegal.² Virtually all of the cases where the SEC obtains summary dispositions are covered by the Administrative Procedure Act’s (APA) provisions governing “formal” adjudications.³ One of those provisions—long overlooked or misinterpreted by scholars, courts, and litigants—grants respondents an absolute right to an oral hearing in formal adjudications where the agency is seeking to impose “sanctions” like those at stake in the SEC cases.⁴ In these cases, a respondent is entitled to an in-person hearing even if the government can demonstrate that there is no genuine dispute as to any material fact.

As I show below,⁵ the text of the APA provision at issue⁶ can only be reasonably read as permitting agencies to skip over oral hearings in three specifically enumerated classes of formal proceedings—those involving “rule making or determining claims for money or

1. *Infra* Part I.C.

2. Here and throughout I use the terms “unlawful” and “illegal” in a lawyerly sense, meaning that the practice is prohibited by the governing statute when that statute is construed using the traditional tools of statutory construction and that I believe a court would be likely to strike the practice down as illegal if and when presented with the interpretive evidence I present here. *Cf. infra* Part II.E (discussing three modern courts that have upheld SEC Summary Disposition without referring to the APA).

3. *Infra* Part I.B (discussing the distinction between “formal” and “informal” adjudication under the APA); *see also* Appendix A (listing SEC statutory authorities that provide for hearings “on the record”).

4. *Infra* Part II.

5. *Infra* Part II.A.

6. 5 U.S.C. § 556(d) (2018).

benefits or applications for initial licenses”⁷—and impliedly prohibits this procedure in all other cases, including those involving “sanctions.” The legislative history of the provision at issue confirms this interpretation: shortly before enactment, the Senate Judiciary Committee rejected a proposal to expand the operative provision to apply to “‘accusatory’ proceedings,” explaining that such proceedings “are traditionally the type of proceeding in which seeing and hearing the witnesses is required. . . .”⁸

Contemporary lawyers may find it impossible to believe that Congress would have wanted to force an agency to waste time on a hearing where there was no genuine dispute as to any material fact. But such an absolute guarantee would have been quite familiar to the legislators who enacted the APA in 1946.⁹ At the time, many state courts allowed for summary judgment only in a narrow subset of cases; for cases outside the specified categories, it was unavailable.¹⁰ Congress evidently followed the model of these jurisdictions when it drafted the summary judgment provision of the APA, limiting an agency’s ability to take away a defendant’s right to an in-person hearing to certain types of formal administrative adjudications just as many states limited summary judgment to certain types of actions.¹¹

Although three federal courts have upheld SEC summary disposition, none of them even considered the key provision or its history (likely because it was not pressed by the parties), and so the decisions cannot be regarded as probative.¹²

This legally suspect procedure has not only been used by the SEC to resolve hundreds of individual enforcement actions, it has also

7. *Id.*

8. *Infra* Part II.B.

9. *Infra* Part II.C.

10. *Infra* Part II.C.

11. *Id.*

12. *Infra* Part II.E.

skewed the agency's enforcement priorities at times toward bringing the type of cases that are amenable to resolution using the technique. The controversial "broken windows" enforcement program that the agency pursued under the leadership of Chair Mary Jo White rested very heavily on summary dispositions and might not have been possible without it.¹³ And many other federal agencies have been relying on administrative summary judgment in formal administrative proceedings resulting in sanctions.¹⁴

The agencies, courts, and commentators who have promoted and embraced administrative summary judgment have generally relied on a very simple appeal to the concept of administrative efficiency—the procedure allows agencies to reduce procedural costs without sacrificing meaningful procedural rights.¹⁵ But this conventional justification fails to confront the possibility that the procedure as it is actually used on the ground may distort agency enforcement priorities, undermine congressional control of administrative agencies, be subject to systematic abuse by agencies, and unfairly deprive some individuals of important procedural rights.¹⁶ Below, I illustrate these concerns using SEC summary disposition as a case study. But the scope of these (and other) problems with the administration of summary judgment across the enforcement bureaucracy is unknown. The last comprehensive study of the practice was sponsored by the Administrative Conference of the

13. *Infra* Part I.C.

14. *Infra* Part III.

15. *Infra* Part V.A.

16. Notably, agencies' own judgments regarding the policy merits of administrative summary judgment may be less relevant in this context because courts do not apply *Chevron* deference to agency interpretations of the APA. *See, e.g., Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (declining to defer to agency director's interpretation of the APA because, inter alia, "[t]he APA is not a statute that the Director is charged with administering.").

United States (ACUS) and was completed over fifty years ago.¹⁷ In this paper, I outline some key open questions for future researchers regarding how administrative summary judgment is being used across the federal government.¹⁸

This paper proceeds in five parts. Part I reviews the structure of SEC administrative enforcement including its relation to the APA. It also reviews the origins of SEC summary disposition and provides an empirical examination of how the SEC has used the tool from its creation through the first three years of the Clayton SEC. Part II shows why this procedure is illegal under the APA—examining the text of that statute, its legislative history, the historical context, early post-enactment interpretations, and then modern judicial decisions. Part III reviews other agencies across the federal government that have used administrative summary judgment in formal adjudications leading to sanctions. Part IV offers some additional explanations for why this apparently illegal procedure has survived. Part V presents and criticizes the conventional policy justification for administrative summary judgment, and outlines important open questions about how it is actually being used to shape administrative adjudication and enforcement.

17. Ernest Gellhorn & William F. Robinson, Jr., *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971) (finding the procedure effectively reduced administrative delay and encouraging broader adoption of the practice by federal agencies).

18. There are ongoing debates about the proper method for interpreting statutes. See, e.g., Lawrence Solum, *Legal Theory Lexicon: Theories of Statutory Interpretation and Construction*, LEGAL THEORY BLOG (Dec. 2, 2018), <https://lsolum.typepad.com/legaltheory/2018/12/legal-theory-lexicon-theories-of-statutory-interpretation-and-construction.html> [<https://perma.cc/4UUV-HW6J>]; Alexander I. Platt, *Debiasing Statutory Interpretation*, 39 OHIO N.U. L. REV. 275, 279–81 (2012) (discussing methodological uncertainty). Adherents of all major theories of statutory interpretation should find something of interest in this Article. Textualists can focus on the analysis of the text of § 556(d) provided in Part II.A. Intentionalists can focus on the legislative history and historical context discussed in Parts II.B and II.C, and perhaps also the post-enactment history discussed in Part II.D. Purposivists, Eskridgean dynamicists, and Posnerian pragmatists might focus on the policy arguments discussed in Part V.

I. THE RISE OF SEC SUMMARY DISPOSITION

The SEC's mission is "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."¹⁹ The SEC's Enforcement Division "primarily supports the SEC's mission by investigating and bringing actions against those who violate the federal securities laws."²⁰ Following an investigation, the Enforcement Division can refer a matter to the U.S. Department of Justice (DOJ) for consideration of criminal charges,²¹ file a civil lawsuit in federal district court, or commence an Administrative Proceeding (AP).²² This article is concerned exclusively with the final option.

This part reviews the basic structure of SEC administrative enforcement, and then provides a detailed review of the Summary Disposition procedure, including an overview of how the procedure has been used by the agency from its inception in 1995 through the first three years of Chairman Jay Clayton's leadership of the agency.

A. *SEC Administrative Proceedings*

Administrative Proceedings (APs) are governed by the SEC's own Rules of Practice.²³ An AP is initiated with an Order Instituting Proceedings (OIP), the equivalent of an indictment or complaint, which outlines the charges against the respondent and the factual

19. U.S. SEC. & EXCH. COMM'N, WHAT WE DO (June 10, 2013), <https://www.sec.gov/Article/whatwedo.html> [<https://perma.cc/G8FQ-W9JJ>].

20. *Oversight of the SEC's Division of Enforcement: Hearing Before the Subcomm. on Cap. Mkts., Sec. and Inv. of the H. Comm. on Fin. Servs.*, 115th Cong. (2018) (statement of Stephanie Avakian & Steven Peikin, Co-Directors, SEC Division of Enforcement), <https://www.sec.gov/news/testimony/testimony-oversight-secs-division-enforcement> [<https://perma.cc/2QVW-Z2R6>].

21. They may also refer matters to state securities enforcers. See Andrew K. Jennings, *State Securities Enforcers* (Apr. 26, 2020) (unpublished manuscript) (on file with author).

22. U.S. SEC. & EXCH. COMM'N, *supra* note 19.

23. 17 C.F.R. §§ 201.100–1106 (2020).

basis for those charges.²⁴ Though the SEC's Enforcement Division prosecutes the case, the OIP is issued by the Commission itself.²⁵

Actually, much action takes place before the OIP is issued. The agency typically notifies the target that it is considering filing charges ahead of time and provides an opportunity to contest the contemplated charges in writing.²⁶ If the target chooses to make such a submission, it will be forwarded along with the recommendation of the Enforcement Division to the Commission, which makes the ultimate decision of whether to initiate a proceeding.²⁷ Settlements are also often negotiated at the pre-OIP stage.²⁸

Once an OIP is filed, the SEC's Chief ALJ assigns the matter to one of the SEC's ALJs.²⁹ Depending on the "nature, complexity, and urgency" of the matter, the ALJ will set a hearing to begin approximately 120 days, 75 days, or 30 days from the date of service of the OIP.³⁰ The hearings are presumptively public³¹ and are conducted

24. *Id.* § 201.200.

25. *E.g., id.* § 201.101(a)(7).

26. U.S. SEC. & EXCH. COMM'N, ENFORCEMENT MANUAL § 2.4 (2017).

27. *Id.* §§ 2.4–2.5.

28. *E.g.,* Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L.J. F. 124, 128 (2016) ("From FY 2007 to FY 2015, between a third and one half of all defendants in primary enforcement actions settled with the SEC before the enforcement action was filed.").

29. 17 C.F.R. §§ 201.110, 200.30-10(a)(2) (2020); *see also* 5 U.S.C. § 3105 (2018) (requiring that ALJs "shall be assigned to cases in rotation so far as practicable"). In late 2019, Brenda Murray retired as SEC's Chief ALJ after twenty-five years of service in this role. *Press Release: Chief Administrative Law Judge Brenda Murray to Retire*, U.S. SEC. & EXCH. COMM'N (Nov. 27, 2019), <https://www.sec.gov/news/press-release/2019-246> [<https://perma.cc/W9WX-CZSV>]. Also in 2019, SEC ALJ Cameron Elliott left to become an ALJ at the International Trade Commission. *Press Release, U.S. International Trade Comm'n, Elliott Named New Administrative Law Judge at U.S. International Trade Commission* (Apr. 1, 2019), https://www.usitc.gov/press_room/news_release/2019/er0401111070.htm [<https://perma.cc/7SLU-79XQ>]. The remaining three ALJs include two appointed in 2014 (Jason Patil and James Grimes) and one appointed in 1996 (Carol Fox Foelak). Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1, 4 n.17 (2016).

30. 17 CFR §§ 201.360(a)(2)(i) & (ii) (2018).

31. *Id.* § 201.301.

in the physical environment of a courtroom—either at the SEC’s own headquarters or in a federal courthouse. At the hearing, the burden is on the Enforcement Division to prove its case by a preponderance of the evidence,³² and the ALJ will consider any evidence (including hearsay) that is not “irrelevant, immaterial, unduly repetitious, or unreliable.”³³

B. SEC Administrative Proceedings and APA Formal Adjudication

SEC enforcement actions arise under a variety of statutory authorities, but the vast majority of these trigger the formal adjudication rules articulated by the Administrative Procedure Act (APA). Sections 556 and 557 of the APA lay out rules for administrative adjudication that are applicable “in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.”³⁴ Courts have understood this language as triggering applicability of Sections 556 and 557 to any administrative hearings that are either (a) explicitly required by statute to be conducted “on the record,”³⁵ or (b) otherwise of a char-

32. *Steadman v. SEC*, 450 U.S. 91, 95 (1981).

33. 17 C.F.R. § 201.320.

34. 5 U.S.C. § 554(a). The statute lays out six exceptions—“except to the extent that there is involved—(1) a matter subject to a subsequent trial of the law and the facts de novo in a court; (2) the selection or tenure of an employee, except a [sic] administrative law judge appointed under section 3105 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; or (6) the certification of worker representatives.” *Id.*

35. *See Steadman v. SEC*, 450 U.S. 91, 96 n.13 (1981) (holding that an SEC administrative action filed under the authority of Investment Advisers Act 203(f) was “clearly a ‘case of adjudication’ within 5 U.S.C. § 554” because the statute required the hearing be “conducted ‘on the record.’”); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654–55 (1990) (upholding an informal agency adjudication without an oral hearing when the statute did not require a hearing to be on the record); *City of Taunton v. EPA*, 895 F.3d 120, 129 (1st Cir. 2018) (“The phrase ‘on the record’ serves to invoke formal agency adjudication under the APA.”); *R.R. Comm’n of Tex. v. United States*, 765 F.2d

acter such that the “substantive content of the adjudication” indicates formality.³⁶ Appendix A lists some of the SEC’s statutory authorities that explicitly require a hearing “on the record” or have been otherwise construed by courts as triggering the APA’s formal adjudication rules.³⁷ The Supreme Court has squarely held that SEC enforcement actions under Investment Advisers Act § 203(f) and Investment Company Act § 9(b) both trigger the APA’s requirements of formal adjudication,³⁸ and has strongly implied that others do as well.³⁹

The SEC itself acknowledges that the APA’s formal adjudication rules provide a superseding limitation on its own regulatory procedural rules in the many cases where the underlying statute requires a hearing “on the record.” In a comment to the 2003 version of the Rules of Practice, the agency explained:

[I]n any particular proceeding the APA may govern the rules or the specific procedures that the Commission is

221, 228 (D.C. Cir. 1985) (explaining that “the APA adjudication section, 5 U.S.C. § 554, only applies in cases of adjudication ‘required by statute to be determined on the record after opportunity for an agency hearing’” and finding that because “the operative statute simply does not require a hearing ‘on the record,’” “Congress has thus not seen fit to require a formal adjudication subject to 5 U.S.C. §§ 556, 557”); cf. Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 486–87 (2003) (discussing relevant Supreme Court precedent on formal rulemaking).

36. *E.g.*, *Steadman*, 450 U.S. at 96 n.13; 1 CHARLES H. KOCH & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 2:33 (3d ed. 2020) (“Congress is not always meticulous in the language it uses and hence it is often necessary to consider language which does not recite precisely the word formula used in the APA.”). *But see* 3 RICHARD J. PIERCE & KRISTIN E. HICKMAN, ADMINISTRATIVE LAW TREATISE § 6.2 (6th ed. 2018) (reviewing split among courts regarding when an agency must provide formal adjudication in the absence of express statutory command to provide a hearing “on the record”). For critical takes on the doctrine in this area, see Kent Barnett, *How the Supreme Court Derailed Formal Rulemaking*, 85 GEO. WASH. L. REV. ARGUENDO 1 (2017); Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO ST. L.J. 237 (2014).

37. *Infra* Appendix A (listing SEC provisions triggering formal adjudication).

38. *Steadman*, 450 U.S. at 96–97 n.13.

39. *See Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018) (citing APA §§ 556–557 as defining the role and responsibilities of SEC ALJs); *accord id.* at 2066 (Sotomayor, J., dissenting).

required to employ. Which requirements of the Administrative Procedure Act are applicable to a particular Commission proceeding depends on the language of the statute authorizing the proceeding. *An adjudication is subject to the requirements of 5 U.S.C. §§ 554, 556 and 557 if the Commission is authorized by statute to make its determination “on the record, after notice and opportunity for an agency hearing.”* Such adjudications are often referred to as “on the record” or formal adjudications. Other adjudications, including those where the Commission is authorized by statute to make its determination “after opportunity for hearing,” are often referred to as informal adjudications.⁴⁰

C. *SEC Summary Disposition*

In 1993, the Administrative Conference of the United States (ACUS) published a set of Model Adjudication Rules for the federal bureaucracy,⁴¹ which included a rule allowing parties to move for a “summary decision” before the hearing showing that there was

40. *Rules of Practice*, U.S. SEC. & EXCH. COMM’N (July 2003), <https://www.sec.gov/about/rulesprac072003.htm> [<https://perma.cc/3ZP5-GBSH>] (emphasis added); see also SEC, *Rules of Practice (Final Rules)*, 60 Fed. Reg. 32,738, 32,745 (June 23, 1995) (same language). In 2018 the SEC filed briefs with the Supreme Court citing APA §§ 556 and 557 as defining the role and responsibilities of SEC ALJs. Brief for Respondent Supporting Petitioners at *3–4, *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1251862; Reply Brief for Respondent Supporting Petitioners at *11, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1806836.

The Administrative Conference of the United States has collaborated with Stanford Law School to produce a compilation of information about federal adjudication regimes across the federal government. However, in conflict with the analysis presented in the text above, this ACUS resource lists SEC ALJ hearings as “Type B” adjudication, which it defines as adjudications that “do not trigger the APA.” SECOALJ0004, ADJUDICATION RESEARCH: JOINT PROJECT OF ACUS AND STANFORD LAW SCHOOL, <https://acus.law.stanford.edu/scheme/secoalj0004> [<https://perma.cc/HF8J-4T3Z>]; FAQ, ADJUDICATION RESEARCH: JOINT PROJECT OF ACUS AND STANFORD LAW SCHOOL, <https://acus.law.stanford.edu/content/user-guide> [<https://perma.cc/XE77-SEDV>].

41. MODEL ADJUDICATION RULES (ADMIN. CONF. OF THE U.S. 1993), <https://www.acus.gov/sites/default/files/documents/1993-model-adjudication-rules.pdf> [<https://perma.cc/95JV-84LC>].

no “genuine issue as to any material fact.”⁴² The SEC drew heavily on these Model Rules—including the model rule authorizing summary decision—when it adopted comprehensive amendments to the Rules of Practice governing its administrative proceedings two years later.

Under the SEC’s 1995 amendments to the rules of practice, parties were for the first time allowed to “make a motion for summary disposition of any or all allegations” before the hearing by showing that there was “no genuine issue with regard to any material fact.”⁴³ An ALJ reviewing such a motion was required to take as true “[t]he facts of the pleadings of the party against whom the motion is made.”⁴⁴

Over the ensuing decades, the Commission (and ALJs) broadened the interpretation of when the SEC could use the rule in a series of cases. The doctrinal expansion culminated in a 2007 decision where the Commission established an affirmative presumption that summary disposition would be appropriate in certain types of cases—namely “follow-on” proceedings where the Commission is seeking to impose an additional penalty on a defendant who has already been found liable for a securities-related violation in another venue.⁴⁵

42. *Id.* at 81. The genesis of ACUS’s model rule on summary decision dates to a 1971 study on the topic commissioned by the agency and published in the *Harvard Law Review*. See Gellhorn & Robinson, *supra* note 17.

43. SEC Rules of Practice, 60 Fed. Reg. 32,738, 32,767 (June 23, 1995).

44. *Id.*

45. Conrad P. Seghers, Admin. Proceedings No. 3-12433, Release No. 2656 (U.S. Sec. & Exch. Comm’n Sept. 26, 2007) (“For a follow-on proceeding, summary disposition may be inappropriate in certain rare circumstances when ‘a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct.’”) (citation omitted); see also Alexander I. Platt, Unstacking the Deck: Administrative Summary Judgement and Political Control, 34 *YALE J. ON REG.* 439 (2017) (describing the evolution of SEC cases on summary disposition). For discussion of judicial decisions to address summary disposition, see *infra* Part II.D.

In 2016, the Commission amended its rule governing summary disposition. Under the newly promulgated Section 250(a), a respondent may file a motion for a ruling on the pleadings, challenging the Commission's legal basis for proceeding, without seeking leave from the ALJ.⁴⁶ In certain less complex cases,⁴⁷ the new Section 250(b) authorized the SEC to file a motion for summary disposition without first seeking leave of the ALJ.⁴⁸ Under the rule, the motion must assert that "the undisputed pleaded facts, declarations, affidavits, documentary evidence or facts officially noted . . . show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law."⁴⁹ In more complex cases, Section 250(c) requires the division to seek leave of the ALJ before seeking summary disposition.⁵⁰

The federal register notice accompanying the 2016 amendments also reconfirmed and embraced a number of Commission prece-

46. 17 C.F.R. § 201.250(a) (2020); *see also* SEC, Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50,211, 50,224 (July 29, 2016) (the new rule "permits a respondent to seek a ruling as a matter of law based on the factual allegations in the OIP and permits either party to seek a ruling as a matter of law after the filing of an answer"); *id.* (the motion is "available to any party as a matter of right"); *see also* Platt, *supra* note 29 at 40–42, 49 (discussing the advantages of such a rule and proposing that the agency adopt it).

47. 17 C.F.R. § 201.250(b) (applying to administrative proceedings assigned to the 30 or 75 day timeline); *see also id.* at § 201.360(a)(2) (requiring the Commission to assign each case to a 30, 75, or 120 day timeline depending on "the nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors").

48. 17 C.F.R. § 201.250(b); *see also* Amendments to the Commission's Rules of Practice, 81 Fed. Reg. at 50,224 ("Leave of the hearing officer is not required to file such a motion in 30- and 75-day cases. This is consistent with existing practice in the proceedings we have designated for shorter timeframes—including, for example, proceedings pursuant to Exchange Act Section 12(j) [i.e., delinquent filing cases] as well as follow-on proceedings—where we have repeatedly observed that summary disposition is typically appropriate because the issues to be decided are narrowly focused and the facts not genuinely in dispute.").

49. 17 C.F.R. § 201.250(b).

50. 17 C.F.R. § 201.250(c).

dents regarding the interpretation of summary disposition standard. First, the standard for summary disposition was “analogous to Federal Rule of Civil Procedure 56.”⁵¹ Second, “the facts should be construed in the light most favorable to the non-moving party.”⁵² Third, a non-moving party “may not rely on bare allegations or denials but instead must present specific facts showing a genuine issue of material fact for resolution at a hearing.”⁵³ Fourth, summary disposition is “typically appropriate” in follow on-proceedings and delinquent filing cases “because the issues to be decided are narrowly focused and the facts not genuinely in dispute.”⁵⁴

The Commission recently tripled-down on this position. In a July 2020 order, the Commission held that a “disputed” delinquent filing case could *not* be resolved on a motion for judgment on the pleadings under Rule of Practice 250(a) because the defendant’s answer contained denials and other allegations which “must be taken as true” for purposes of such a motion.⁵⁵ But the Commission reiterated that cases like this could be resolved on summary disposition because facts were not “genuinely” in dispute.⁵⁶

Figure 1 shows the SEC’s use of summary disposition over time.

51. Amendments to the Commission’s Rules of Practice, 81 Fed. Reg. at 50,224.

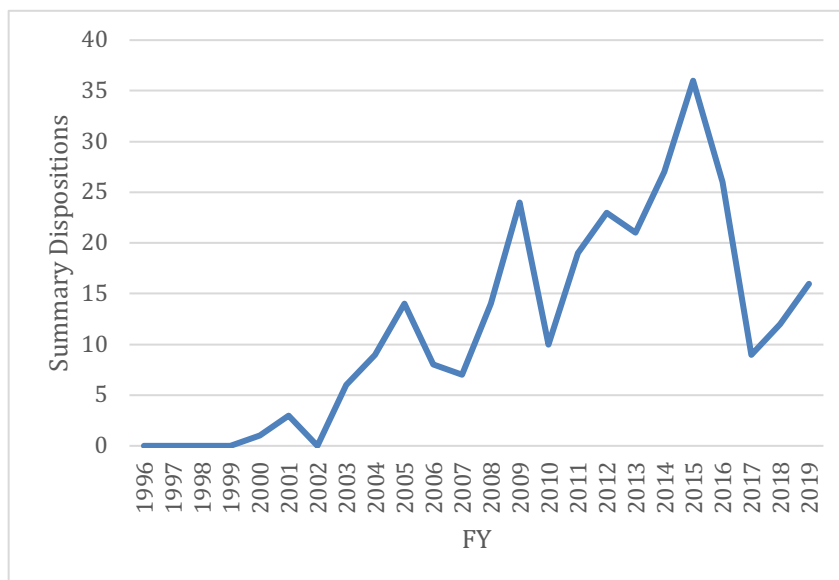
52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Healthway Shopping Network, Admin. Proc. File No. 3-19343, Release No. 89374 (U.S. Sec. & Exch. Comm’n July 22, 2020) (quoting 2016 Adopting Release, 81 Fed. Reg. at 50,224).

FIGURE 1—SEC SUMMARY DISPOSITIONS⁵⁷

The use of summary disposition peaked in 2014, 2015, and 2016. This coincides with the period when the Commission was pursuing what then-Chair Mary Jo White described as a “broken windows” enforcement strategy.⁵⁸ White announced at the beginning of this period that the SEC would aggressively prosecute “small” violations which, she explained, were “very often just the first step toward bigger ones down the road,” and so leaving them unpunished fostered “a culture where laws are increasingly treated as toothless guidelines.”⁵⁹ White explained that the SEC would be able to pursue this new policy without sacrificing focus on major violations because the agency would be able to bring and resolve the small

57. The data presented here comes from my own analysis of all ALJ Initial Decisions and Orders from the SEC website. *ALJ Initial Decisions: Administrative Law Judges*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/litigation/aljdec.shtml> [<https://perma.cc/B9M4-TK3X>]; *ALJ Orders: Administrative Law Judges*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/alj/aljorders.shtml> [<https://perma.cc/Z265-7GFD>]. Data through 2015 were presented in an earlier paper. Platt, *supra* note 45, at 264–68.

58. Mary Jo White, *Remarks at the Securities Enforcement Forum* (Oct. 9, 2013), <https://www.sec.gov/news/speech/spch100913mjw> [<https://perma.cc/Y7MM-PGXW>].

59. *Id.*

cases “quickly.”⁶⁰ The data show that summary disposition played a key part in this enforcement strategy.⁶¹

The “broken windows” policy was highly controversial: many doubted Chair White’s assurances, and worried that the agency’s reallocation of resources toward pursuing minor violations had reduced the agency’s focus on bigger cases.⁶² After Chairman Jay Clayton took over, the agency quickly abandoned the policy.⁶³

60. *Id.*

61. Chairman Jay Clayton’s abandonment of the Broken Windows policy is not the only factor contributing to the drop-off in summary dispositions after 2016. For a few months during the post-2016 period, administrative proceedings were stayed in the wake of the constitutional challenge to the administrative proceeding system in the *Lucia* case. See Pending Admin. Proceedings, Release No. 83675, 2018 WL 3494802 (U.S. Sec. & Exch. Comm’n July 20, 2018); Pending Admin. Proceedings, Release No. 83495, 2018 WL 3193858 (U.S. Sec. & Exch. Comm’n June 21, 2018); see also Pending Admin. Proceedings, Release No. 10603, 2019 WL 396878 (U.S. Sec. & Exch. Comm’n Jan. 30, 2019) (announcing an end to a fourteen-day stay caused by a lapse in appropriations).

62. Commissioner Michael S. Piowar criticized the policy with a pithy, much repeated aphorism: “If every rule is a priority, then no rule is a priority.” Michael S. Piowar, *Remarks to the Securities Enforcement Forum 2014*, U.S. SEC. & EXCH. COMM’N (Oct. 14, 2014), <https://www.sec.gov/news/speech/2014-spch101414msp> [<https://perma.cc/5LUB-A5M2>]. Other critics accused the SEC of using the “broken windows” as a cover for going soft on the big offenders. David Dayen, *A Corporate Defender at Heart, Former SEC Chair Mary Jo White Returns to Her Happy Place*, INTERCEPT (Feb. 17, 2017, 3:55 PM), <https://theintercept.com/2017/02/17/a-corporate-defender-at-heart-former-sec-chair-mary-jo-white-returns-to-her-happy-place> [<https://perma.cc/8TWN-U8GZ>]. Leading academics were also critical. See *SEC Investor Advisory Meeting*, U.S. SEC. & EXCH. COMM’N (Oct. 15, 2015), <https://www.sec.gov/news/other-webcasts/2015/investor-advisory-committee-101515.shtml> [<https://perma.cc/4DGJ-YTF7>] (comments of Don Langevoort) (“I think the idea that small case enforcement deserves an important place in the agenda is dangerous.”); John C. Coffee, Jr., *Hobson’s CHOICE: The Financial CHOICE Act of 2017 and the Future of SEC Administrative Enforcement*, U.S. SEC. & EXCH. COMM’N, n.5, (June 22, 2017), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/coffee-hobsons-choice-act.htm> [<https://perma.cc/Q3FL-8G4H>] (criticizing SEC broken windows as “overly ambitious”).

63. After the 2016 election, Commissioner Piowar, an early critic, reflected back on “broken windows” as a “misguided effort” that “proved successful at boosting our enforcement statistics” but “did not meaningfully improve investor protection.” Michael S. Piowar, *Remarks at FINRA and Columbia University Market Structure Conference*, U.S. SEC. & EXCH. COMM’N (Oct. 26, 2017), <https://www.sec.gov/news/speech/speech-piowar-2017-10-26> [<https://perma.cc/UXX7-2FG9>]. Commissioner Hester Peirce went further, repudiating the “broken windows” policy in a lengthy speech, claiming that

However, the agency has continued to routinely rely on summary dispositions.⁶⁴

Between 1995 and 2019, the SEC resolved a total of 285 cases on summary disposition. This figure (as well as the statistics discussed above) does *not* include cases where the ALJ held the respondent in default.⁶⁵ Virtually all of these cases arise under statutes that explicitly mandate a hearing “on the record” or, lacking such language, have been found by courts to trigger APA’s requirements on formal hearings anyway. Between 2015 and 2019, ninety-eight out of ninety-nine (99%) of summary dispositions granted were in cases covered by the APA’s formal adjudication provisions. All of these cases imposed at least one of following remedies: (1) associational bar; (2) revoked or suspended registration; (3) disgorgement or monetary penalties; and (4) cease and desist. Table 1 lays out the frequency with which each remedy was imposed:

the policy diverted scarce enforcement resources away “from high priority issues”; that it led the agency to avoid “important matters that would have been time-consuming to pursue”; that the enforcement statistics generated under the approach were “misleading”; that it contributed to an “unhealthy capital formation environment”; and that it weakened collaborative relationships between the SEC and the industry. Hester M. Peirce, *The Why Behind the No: Remarks at the 50th Annual Rocky Mountain Securities Conference*, U.S. SEC. & EXCH. COMM’N (May 11, 2018), https://www.sec.gov/news/speech/peirce-why-behind-no-051118#_ftnref1 [<https://perma.cc/N844-RTMM>].

64. See Figure 1.

65. Many of the respondents in these cases failed to respond to the Enforcement Division’s motion for summary disposition. While the SEC’s rules of practice authorize the ALJ in such circumstances to find the respondent in default, *see* 17 C.F.R. § 201.155(a)(2) (2020), the ALJ in all of these cases declined to take up that option and instead *granted* the Commission’s motion for summary disposition. If I am correct that the motion for summary disposition is illegal, then it is also illegal to use that motion to trigger a default.

TABLE 1—REMEDIES IN CASES RESOLVED ON SUMMARY DISPOSITION (2015-2019)

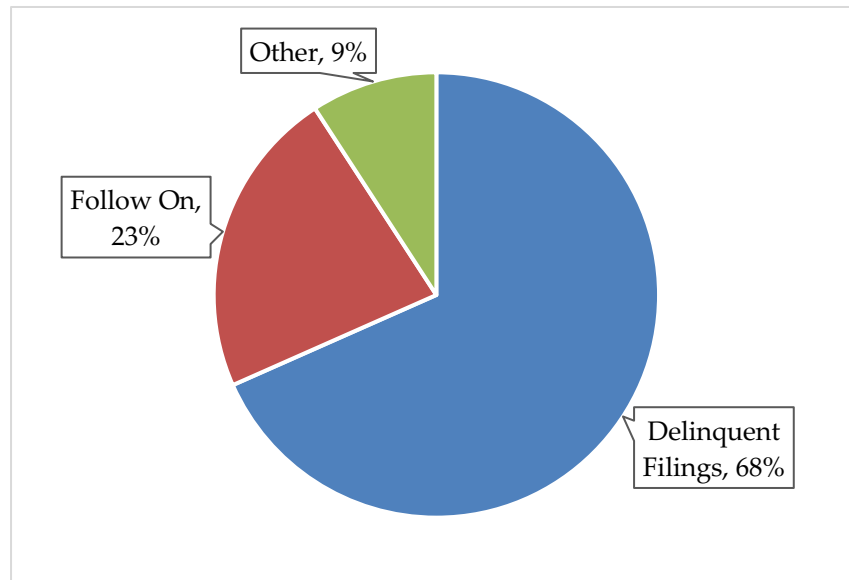
<i>Associational Bar</i>	71 (72%)
<i>Revoked or Suspended Registration</i>	26 (27%)
<i>Disgorgement or Civil Penalty</i>	7 (7%)
<i>Cease & Desist</i>	5 (5%)

These findings are consistent with earlier findings that about two-thirds of summary dispositions granted for the agency between 1996 and 2016 involved some sort of associational bar, and about one-third involved a revoked registration.⁶⁶

Two types of cases dominate: (1) “follow-on” cases, where the agency is seeking to impose an additional penalty on someone already convicted of a securities-related violation; and (2) “delinquent filing” cases, where the SEC is seeking to suspend or revoke the registration of an issuer who has failed to comply with periodic filing requirements.

66. See Platt, *supra* note 45, at 467.

FIGURE 2—TYPES OF CASES RESOLVED ON SUMMARY DISPOSITION (2015-2019)



Again, these findings are parallel to earlier work finding that similar proportions of summary dispositions between 1996 and 2014 were comprised of delinquent filings and follow-ons.⁶⁷

II. THE LEGAL CASE AGAINST SEC SUMMARY DISPOSITION

SEC summary disposition and its analogues across the federal bureaucracy are illegal under the Administrative Procedure Act (APA). A close analysis of the text of APA § 556(d) in Section A below shows that the only reasonable reading of that provision is that it provides respondents with an *absolute* right to an oral hearing in formal adjudications where the government is seeking to impose what the APA refers to as “sanctions.” The legislative history and broader historical context of the enactment of the provision in 1946, surveyed in Sections B and C, provide unequivocal support for this reading, as do immediate post-enactment interpretations by courts,

67. Platt, *supra* note 45, at 467–68.

executive branch officials, and legal scholars surveyed in Section D. Finally, as discussed in Section E, only three courts of appeals have addressed the legality of SEC summary disposition. All three have accepted it as legal, but none of these courts even considered Section 556(d). The opinions therefore cannot be considered probative.

Before proceeding, it is worth noting that because courts do not apply *Chevron* deference to agency interpretations of the APA,⁶⁸ if and when this matter comes before a court, there should be no thumb on the scale weighing in favor of the agencies' interpretation.

A. *The Text of the APA Bars Summary Disposition in Formal Adjudications Culminating in "Sanctions."*

The text of APA § 556(d) unmistakably creates an *absolute* right to a hearing for formal adjudications involving "sanctions." Section 556(d) includes six sentences:

[1] Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

[2] Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.

[3] A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in

68. *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (declining to defer to agency director's interpretation of the APA because, inter alia, "[t]he APA is not a statute that the Director is charged with administering"). *But see* Ryan D. Doerfler, *Can a Statute Have More Than One Meaning?*, 94 N.Y.U. L. REV. 213, 254–56 (2019) (questioning this rule and arguing that, although the SEC "probably has no more to say about administrative adjudication *in general* than does the EPA" the "opposite is surely the case" "with respect to administrative adjudication *under the Securities Act*" and, "[i]f that's right, why not think that Congress intends for courts to defer to the SEC concerning how to interpret the APA's adjudication provisions *in SEC proceedings?*").

accordance with the reliable, probative, and substantial evidence.

[4] The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.

[5] A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

[6] In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

In this Part, I interpret what this provision means for SEC summary disposition in four steps: (1) Sentence Five creates a general entitlement for parties in formal adjudications to present oral evidence and Sentence Six articulates specific limitations on this right; (2) Sentence Six articulates two conjunctive (not disjunctive) limitations on the general right to present oral evidence provided in Sentence Five: (i) the enumeration of three categories of cases in which an oral hearing can be deprived and (ii) the requirement that the respondent not be prejudiced by the deprivation; (3) Sentence Six's enumeration of three categories of cases where agencies can force parties to present evidence in written (not oral) form does not include cases involving what the APA refers to as "sanctions"; and (4) no other sentence or clause in Section 556(d) can be reasonably construed as providing a "backdoor" authorization of summary judgment in sanctions cases.

1. Sentence Five Creates a General Entitlement for Parties in Formal Adjudications to Present Oral Evidence and Sentence Six Articulates Specific Limitations on This Right.

The first clause of Sentence Five entitles a party to a formal adjudication to present his case or defense “by oral or documentary evidence.” When read in isolation, there are two possible readings of the “entitlement” this clause provides:

Interpretation A	Interpretation B
A party is entitled to present his evidence <i>and</i> to determine whether to present the evidence in oral or written form.	A party is entitled to present his evidence, but the agency may dictate the form of that presentation.

Under Interpretation A, Sentence Five establishes a right to present evidence *in oral form*, that is, to present it in person, before the court. Under Interpretation B, Sentence Five establishes no such right.

Reading Sentence Five in its statutory context decisively resolves the ambiguity in favor of Interpretation A.⁶⁹ The immediately following sentence (Sentence Six) defines the circumstances in which the agency may “adopt procedures for the submission of all or part of the evidence in written form.” If an agency adopts procedure for the submission of “all” of the evidence in “written form,” it is prohibiting a party from presenting his evidence in oral form. Sentence Six therefore defines circumstances in which an agency is allowed

69. *Cf. United Savings Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”).

to *force* a party to present his evidence in written form and *not* oral form. Sentence Six gives agencies the authority to deprive parties of the right to present evidence in oral form under certain precisely defined circumstances.

This restriction only makes sense if Sentence Five is governed by Interpretation A. Under that interpretation, Sentence Five establishes a general right for parties to present evidence in oral form, and then Sentence Six carves out specific exceptions to that right. This interpretation gives full meaning to both sentences. By contrast, under Interpretation B, Sentence Five would not give any right to present evidence in oral form and Sentence Six would be nonsensical and incoherent. Why would Sentence Six define the precise circumstances in which an agency may force a party to present his evidence in written form if the agency could do this in every case? Interpretation A harmonizes the two provisions and is the only plausible interpretation.⁷⁰

Put another way, the right that Sentence Five gives parties to present evidence in oral form is limited by the exceptions created by Sentence Six. The exceptions in Sentence Six would make no sense if Sentence Five had not created such a right.⁷¹

2. Sentence Six Articulates Two Conjunctive (Not Disjunctive) Limitations on the General Right to Present Oral Evidence Provided in Sentence Five.

“[1] In rule making or determining claims for money or benefits or applications for initial licenses an agency may, [2] when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.”

70. *Cf. Corley v. United States*, 556 U.S. 303, 314 (2009) (“[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .”).

71. *See id.*

Sentence Six articulates two layers of limitation on when an agency may deprive parties of their right to present evidence in oral form. The first layer of limitation provided by Sentence Six is that it articulates *three classes of cases* in which an agency *may* prohibit oral evidence: (1) rule making; (2) applications for initial licenses; and (3) claims for money or benefits. The second layer of limitation provided by Sentence Six is that it articulates a *circumstance* in which an agency may prohibit oral evidence: namely, “when a party will not be prejudiced thereby.”

The only reasonable reading of these two limitations is that they are conjunctive, not disjunctive. That is, Sentence Six is best read as limiting an agency’s ability to prohibit oral evidence to cases that meet *both* criteria, i.e., cases that fall under the three categories *and* where such prohibition would not prejudice the party. The grammatical structure of the sentence does not allow the alternative reading. Had the phrase “when a party will not be prejudiced thereby” been incorporated directly into the opening clause of the sentence enumerating three categories of cases, it might have plausibly been construed as a further refinement of that initial limitation and an explanation of Congress’s rationale in articulating the three categories of cases where summary process might be used. However, the phrase does not appear in the first clause; it appears as an interruption in the middle of the second one, defining agency power to require written proceedings. This grammatical structure shows that the phrase clearly operates as an independent limitation on that power, not as a mere explanatory refinement of the first one.⁷²

72. *Cf.* *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) (adopting the interpretation that “seems natural” “[a]s a matter of ordinary English grammar”).

Because Sentence Six limits an agency’s power to require the submission of “all *or part*” of the evidence in written form, one consequence of the interpretation I have advanced here is that, in sanctions cases, the prosecuting agency cannot move even for *partial* summary disposition. But the restriction on agency power only applies to “evidence,” not to legal disputes or procedural matters, which may still be resolved on the papers. And, in any event, nothing here prohibits a defendant in one of these cases from

3. Sentence Six's Enumeration of Three Categories of Cases Where Agencies Can Force Parties to Present Evidence in Written (Not Oral) Form does not Include Cases Where the Agency Seeks to Impose "Sanctions."

There is one APA-defined category of cases that is conspicuously omitted from the carveout in Sentence Six: cases where the agency seeks to impose "sanctions" on the respondent.⁷³ "Sanction" is the term used by the APA to refer to the various remedies that are imposed in administrative enforcement actions. The APA defines "sanction" as:

the whole or a part of an agency—(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person; (B) withholding of relief; (C) imposition of penalty or fine; (D) destruction, taking, seizure, or withholding of property; (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (F) requirement, revocation, or suspension of a license; or (G) taking other compulsory or restrictive action.⁷⁴

Sentence Six mentions every type of "agency action" enumerated by the APA except for sanctions. "Sanction" is one of five varieties of "agency action" enumerated by the APA.⁷⁵ The other four are rules, orders, licenses, and relief.⁷⁶ "Orders" is an extremely capacious category, defined to include every final agency action except

voluntarily waiving his right to present evidence orally and agreeing to the submission of all or part of the evidence in written form.

73. *Cf.* *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (explaining that the canon *expressio unius est exclusio alterius* applies where there is a "sensible inference that the term left out must have been meant to be excluded").

74. 5 U.S.C. § 551(10) (2018).

75. *Id.* § 551(13).

76. The definition also includes "the equivalent or denial thereof, or failure to act."
Id.

for rulemaking.⁷⁷ So there are really only three substantive categories of agency action other than sanctions: rules, licenses, and relief. The three types of adjudications mentioned in Sentence Six of 556(d) directly correspond with each of these non-sanctions types of “agency action.” Sentence Six mentions “rule making,” which is equivalent to the agency action of making “rules.” Sentence Six mentions “determining claims for money or benefits,” which corresponds to “relief,” defined by the APA as (inter alia) an agency’s “grant of *money* . . . recognition of a *claim*, . . . or . . . taking of other action . . . *beneficial* to . . . a person.”⁷⁸ Finally, Sentence Six mentions “applications for initial licenses,” which refers to a subset of the agency action of “licenses.”

Further, the types of licensing actions implicitly *excluded* from Sentence Six are specifically *included* in the APA’s definition of sanctions. The APA defines “licensing” as “agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.”⁷⁹ Sentence Six’s reference to “applications for initial licenses” logically refers to some of these licensing actions—e.g., a “grant” or “denial”—but not others, which necessarily posit an *existing* license—e.g., a “revocation” or “suspension.” This is further evidence that Sentence Six was crafted to exclude “sanctions,” which includes the “revocation” and “suspension” of licenses.⁸⁰

77. *Id.* § 551(6).

78. *Id.* § 551(11) (emphasis added).

79. *Id.* § 551(9). The APA defines a “license” as the “whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.” *Id.* § 551(8).

80. It is true that one of the specifically enumerated categories in Section 556(d) does arguably include one small subset of cases involving “sanctions.” The APA defines the term “sanctions” as including, in part, the “withholding of relief.” Section 556(d) authorizes summary process in cases “determining claims for money or benefits,” which as I showed above, has some overlap with what the APA defines as “relief.” So, to be more precise: under § 556(d), summary disposition *would* be appropriate in cases involving one variety of “sanctions”—namely the “withholding of relief”—but not in any other variety.

Additionally, Section 556(d) itself mentions “sanctions” in Sentence Three, imposing the substantial evidence standard, making the failure to include it in Sentence Six more conspicuous.

Finally, interpreting Sentence Six to create a more stringent procedural standard for cases involving “sanctions,” including the revocation or suspension of licenses, is consistent with other provisions of the APA imposing heightened procedures for taking away licenses and diminished procedures for applications for initial licenses.⁸¹

4. Nothing Else In Section 556(d) (or the rest of the APA) Provides Covert Authorization of Summary Judgment in Sanctions Cases.

Other clauses and sentences of Section 556(d) do not overcome Sentence Six (as construed above) and provide a backdoor authorization of summary judgment in sanctions cases.

For instance, the rules of evidence encompassed in Sentence Two cannot be reasonably read as providing a covert authorization for eliminating oral hearings altogether in cases involving sanctions. The sentence requires agencies to exclude “oral . . . evidence” that is “irrelevant, immaterial, or unduly repetitious.” Just like Sentence Five, the grant of authority here to exclude evidence is necessarily limited by the more specific rule articulated by Sentence Six, which prohibits agencies from entirely skipping over oral hearings for certain types of proceedings.⁸² Reading Sentence Two as authorizing agencies to exclude *all* oral evidence—and thereby skip the hearing

81. *See infra* Part III. As I show in Part II.B, the legislative history suggests that Congress was especially concerned about protecting procedural rights in the context of enforcement proceedings. Beyond the specific legislative history, it seems quite plausible for Congress to have provided a heightened level of protection for defendants in “sanctions” proceedings, in which the burden of proof rests on the government, as compared to benefits or initial licensing proceedings, in which the burden rests with the movant.

82. *Cf. RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (“[I]t is a commonplace of statutory construction that the specific governs the general.” (citations omitted)).

altogether—would essentially read Sentence Six as a nullity, contravening well-established principles of statutory interpretation.⁸³ It would also controvert well-established rules in the law of evidence against allowing motions *in limine* to function as de facto motions for summary judgment.⁸⁴

Similarly, Sentence Five's final, limiting phrase—"as may be required for a full and true disclosure of the facts"—cannot be read as a covert blanket authorization for summary judgment even in sanctions cases. The best reading of this sentence is that this limiting phrase only modifies a party's entitlement to conduct cross-examination. Sentence Five gives a party three entitlements—"[1] to

83. *E.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . ." (citations omitted)).

84. *E.g.*, *Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1162 n.4 (9th Cir. 2013) ("A motion in limine is not the proper vehicle for seeking a dispositive ruling on a claim . . ."); *Meyer Intellectual Props. Ltd. v. Bodum, Inc.*, 690 F.3d 1354, 1378 (Fed. Cir. 2012) ("Because we conclude that it was procedurally improper for the court to dispose of [defendant's] inequitable conduct defense on a motion *in limine*, we reverse the court's decision and remand for further proceedings."); *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1363 (7th Cir. 1996) (finding that although argument regarding sufficiency of evidence "might be a proper argument for summary judgment or for judgment as a matter of law, it is not a proper basis for a motion to exclude evidence prior to trial"); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069 (3d Cir. 1990) ("Unlike a summary judgment motion, which is designed to eliminate a trial in cases where there are no genuine issues of fact, a motion *in limine* is designed to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions."); *Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 192 (Tenn. Ct. App. 2008) ("Thus, a motion in limine should not be used as a substitute for a dispositive motion such as a motion for summary judgment."); *Cannon v. William Chevrolet/Geo, Inc.*, 794 N.E.2d 843, 849 (Ill. App. Ct. 2003) ("Motions in *limine* are not designed to obtain rulings on dispositive matters but, rather, are designed to obtain rulings on *evidentiary* matters outside the presence of the jury."); *Lin v. Gatehouse Constr. Co.*, 616 N.E.2d 519, 524 (Ohio Ct. App. 1992) ("[A]n evidentiary motion is not the proper way to dismiss those causes of action not otherwise settled by the parties."); *BHG, Inc. v. F.A.F., Inc.*, 784 A.2d 884, 886 (R.I. 2001) ("[A] motion in limine is not intended to be a dispositive motion." (quoting *Ferguson v. Marshall Contractors, Inc.*, 745 A.2d 147, 150 (R.I.2000))); *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375, 379 (Iowa Ct. App. 1989) ("A motion in limine is not ordinarily employed to choke off an entire claim or defense."); *Cass Bank & Trust Co. v. Mestman*, 888 S.W.2d 400, 404 (Mo. Ct. App. 1994) ("[A motion *in limine*] is not a substitute for a summary judgment motion.").

present his case or defense by oral or documentary evidence, [2] to submit rebuttal evidence, and [3] to conduct such cross-examination”—and then closes with the limiting phrase “as may be required for a full and true disclosure of the facts.” Under the well-established “rule of the last antecedent,” “a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.”⁸⁵ Applying that principle here, the limiting phrase would be restricted to only the last entitlement, namely the right to conduct cross-examination. Further, the reference to “cross-examination” is the only one of the three entitlements that is preceded by the modifier “such,” which signals that this entitlement is going to be uniquely subject to a limitation.

Finally, the APA’s instruction in Section 706 that courts reviewing agency action (including adjudications) should take “due account” of the “rule of prejudicial error” does not create a covert authorization of summary judgment.⁸⁶ Sentence Six of Section 556(d) specifically excludes considerations of “prejudice” from decisions about whether respondents in sanctions proceedings are entitled to a hearing. Construing the general instruction in Section 706 as somehow sweeping prejudice back in makes no sense and defies well-accepted principles of statutory interpretation.⁸⁷

* * *

These four points provide strong textual evidence that Section 556(d) provides an *absolute* right to an oral hearing for respondents

85. *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)); *see also id.* at 963 (“This Court has applied the rule from our earliest decisions to our more recent.”).

86. 5 U.S.C. § 706 (2018).

87. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (“[I]t is a commonplace of statutory construction that the specific governs the general.” (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992))).

facing formal adjudications leading to sanctions.⁸⁸ Any residual doubt is resolved by the legislative history discussed in the next Part.

B. Legislative History Confirms That The APA Bars Summary Disposition In Formal Adjudications Leading To Sanctions.

The direct legislative history of the APA confirms that this provision was intended and understood by Congress as permitting summary adjudication (for example, adjudication on the papers) of only certain specified classes of formal adjudications and prohibiting it in all others.

The January 1941 Attorney General's Report on Administrative Adjudication⁸⁹ recommended that the APA promote "expedition and simplification" by providing for the "substitution" of written evidence for an oral hearing in an "appropriate" subset of formal administrative proceedings.⁹⁰ The Report specifically endorsed the "'shortened procedure' used in certain cases by the Department of

88. There is nothing in the text of Sentence Six or § 556(d) that purports to limit its applicability to the subset of "procedures" adopted by an agency that are made applicable to all cases and not to those (like summary disposition) where one party (for example, the agency) must file a motion. That is, both the grant of authority to skip oral hearings and the limitations on that authority would, by the plain text of the statute, apply equally to (a) a "procedure" eliminating oral hearings in all cases; and (b) a "procedure" enabling a party to file a motion asking the ALJ to eliminate the oral hearing.

89. See JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 65–73 (2012) (describing the work of the Attorney General's committee and its "significant" influence on the legislative process leading to the APA); Cass R. Sunstein, *Chevron as Law*, 107 *GEO. L.J.* 1613, 1646 (2019) ("Because of the influence and prestige of the Committee, and its role in defining the debate that eventually led to the APA, that report deserves careful attention."); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 *NW. U. L. REV.* 1557, 1594–98, 1631–36 (1996) (describing in detail the committee's work and influence).

90. OFFICE OF THE ATTORNEY GENERAL, *FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE* 69 (1941).

Agriculture and the Interstate Commerce Commission.”⁹¹ In the latter case, the Report acknowledged that the procedure was used “only if the parties consent.”⁹² The sole model for modern administrative summary judgment was drawn from the Department of Agriculture. As the Report explains, this agency’s “most complete utilization of written evidence as a substitute for the testimonial process” was in a subset of the agency’s “reparation” proceedings—essentially private actions for damages by growers, merchants and others related to interstate agricultural transactions—where the complainant was seeking less than \$500 in damages.⁹³ In such cases, the Department of Agriculture’s regulations provided that a “hearing will not be held unless deemed necessary or desirable by the Department’s officers, or unless granted upon application of complainant or respondent ‘setting forth the peculiar facts making such hearing necessary for a proper presentation of the case.’”⁹⁴ Instead, in these cases, “the issues will be determined upon the sworn statements of facts submitted by the parties in support of the complaint and answer,’ and upon depositions in respect of those facts which are within the knowledge of persons other than the complainant or respondent.”⁹⁵

Later that year, the Senate considered a bill sponsored by the minority of the Attorney General’s committee that addressed the issue of written evidence in formal adjudications.⁹⁶ The bill provided that, in formal administrative adjudications:

Reasonable cross-examination in open hearing shall be permitted in the sound discretion of the presiding officer except that . . . any agency may adopt procedures for the disposition of contested matters in whole or part upon the

91. *Id.*

92. *Id.*

93. *Id.* at 405.

94. *Id.*

95. *Id.*

96. *Administrative Procedure: Hearings on S. 674, S. 675, and S. 918 Before a Subcomm. on the Judiciary, 77th Cong. 14 (1941).*

submission of written evidence, particularly with respect to technical matters and matters of conclusion or inference upon readily available and generally undisputed data, but subject always to rebuttal or cross-examination upon demand.⁹⁷

A subcommittee of the Senate Judiciary Committee held extensive hearings on this bill and others, but consideration was suspended because of World War II.⁹⁸

In January 1945, the Senate Judiciary Committee began consideration of a bill that included a different provision governing the use of written evidence in formal adjudications:

Every party shall have the right of reasonable cross-examination and to submit rebuttal evidence except that in rule making or determining applications for licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of written evidence subject to opportunity for such cross-examination and rebuttal.⁹⁹

Whereas the original pre-War proposed provision would have allowed agencies to skip oral hearings in all types of cases, this new post-War version limited this power to particular types of cases: namely, “rule making or determining applications for licenses.”¹⁰⁰

The Judiciary Committee accepted a suggestion that this “written-evidence provision should be made applicable to claims and reparation cases,” amending the provision so that it read: “In rule

97. *Id.* (quoting S. 674, 77th Cong. § 309(i) (1942)).

98. See HISTORY OF ADMINISTRATIVE PROCEDURE LEGISLATION 1933–1946, at 6. (Hein).

99. Administrative Procedure Act, H.R. 1203, 79th Cong. § 7(c) (1945) (reprinted in *Administrative Procedure: Hearing Before the H. Comm. on the Judiciary*, 79th Cong. 159 (1945)); see STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON THE ADMINISTRATIVE PROCEDURE ACT 11 (Comm. Print 1945) (noting that Sen. McCarran introduced a bill with the same text as HR 1203); see also *id.* (discussing this provision and explaining that the “[s]ubmission of written evidence was . . . recommended by the Attorney General’s Committee.”).

100. H.R. 1203 § 7(c).

making or determining claims for money or benefits or applications for licenses any agency may”¹⁰¹ They also broke the provision into two separate sentences—one granting parties the right to present “oral or documentary evidence,” and the second empowering agencies to require the submission of written evidence in three categories of cases.¹⁰² Finally, they also added the word “initial” to the phrase “applications for licenses.”¹⁰³

Critically, the Committee also rejected a “suggestion” to expand this provision to apply to “adjudications (or ‘accusatory’ proceedings).”¹⁰⁴ In justifying its rejection, the Committee explained that such proceedings “are traditionally the type of proceeding in which seeing and hearing the witnesses is required. . . .”¹⁰⁵

As reported by the Committee, Section 7(c) provided that:

Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.¹⁰⁶

The Senate Judiciary Committee Report summarized the provision as follows:

The written evidence provision of the last sentence of the subsection is designed to cover situations in which, as a matter of general rule or practice, the submission of the whole or substantial portions of the evidence in a case is

101. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON THE ADMINISTRATIVE PROCEDURE ACT 31 (Comm. Print 1945) (emphasis added).

102. S. REP. NO. 752, at 221 (1945).

103. *Id.*

104. STAFF OF S. COMM. ON THE JUDICIARY, *supra* note 99, at 31.

105. *Id.* at 30–31.

106. S. REP. NO. 752, at 221.

done in written form. In those situations, however, *the provision limits the practice to specified classes of cases and, even then, only where and to the extent that "the interest of any party will not be prejudiced thereby."*¹⁰⁷

The Committee Report also warned that "[t]he exemption of rule-making and determining initial applications for licenses from provisions of . . . 7(c) . . . may require change if, in practice, it develops that they are too broad," and reiterated that "where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions."¹⁰⁸

Along the way, in an October 1945 submission, the Attorney General explained that, under the Section, agencies would be "empowered . . . to dispense with oral evidence *only in the types of proceedings enumerated*; that is, in instances in which normally it is not necessary to see and hear the witnesses in order properly to appraise the evidence."¹⁰⁹

This version was subsequently passed by the Senate in February 1946,¹¹⁰ and was introduced in the House, where it was referred to the House Judiciary Committee.¹¹¹ The May 1946 House Report on the bill included the same language as the Senate report describing this provision as limiting the practice of requiring written evidence to "specified classes of cases, and even then, only where and to the extent that 'the interest of any party will not be prejudiced thereby.'"¹¹² The House approved the bill and the President signed it into law in June 1946.¹¹³

107. *Id.* at 208–09 (emphasis added).

108. *Id.* at 216.

109. ADMINISTRATIVE PROCEDURE ACT: HEARING ON H.R. 1203 BEFORE THE H. COMM. ON THE JUDICIARY, 79th Cong. 411 (1946) (appendix to Attorney General's statement at 408) (emphasis added).

110. Administrative Procedure Act § 7(c).

111. H.R. REP. NO. 1980, at 235 (1946).

112. *Id.* at 270–71.

113. Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 236 (1946).

This language as enacted is virtually identical to the version still in force today.¹¹⁴ Further, as enacted, the statute drew the same distinction as it does today between “applications for initial licenses” and other types of licensing decision,¹¹⁵ and also defines the term “sanctions” and uses the term throughout.¹¹⁶

* * *

This legislative history supports the key textual points discussed in the prior Part.

First, the penultimate sentence of Section 7(c) provides a general entitlement to parties to present oral evidence, subject to the limitations imposed by the final sentence.¹¹⁷ Plainly, this is what the 1941 Attorney General’s Committee Report had in mind with the proposal to expedite and simplify formal adjudications by authorizing agencies to force the “substitution” of written evidence for oral evidence in certain situations.¹¹⁸ The initial 1941 version of the provision made this explicit—providing a grant of a right to an oral hearing and a limitation on that right in the same sentence, and stat-

114. Compare Administrative Procedure Act § 7(c) with 5 U.S.C. § 556(d) (2018). The differences are as follows: (1) instead of “every” party, the statute now applies to “a” party; (2) instead of “any agency” the statute now applies to “an agency”; and (3) instead of “where the interest of any party will not be prejudiced thereby” the statute now reads “when a party will not be prejudiced thereby.” None of these differences seem to be meaningful.

115. See Administrative Procedure Act § 7(c); *id.* § 5(c) (exempting separation of functions rules proceedings “determining applications for initial licenses”); *id.* § 8(a) (providing flexible rules for initial decisions in cases involving “rule making or determining applications for initial licenses”); see also *id.* § 9(b) (providing for special procedures that apply to the “withdrawal, suspension, revocation, or annulment of any license”).

116. *Id.* §§ 2(f), 7(c).

117. *Id.* § 7(c).

118. OFFICE OF THE ATTORNEY GENERAL, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE at 69 (1941).

ing that the grant was applicable “except” where the limitation supervened.¹¹⁹ Although later versions of the bill broke these into two sentences and dropped the word “except,” there is no reason to think that this was done to change the relationship between the two sentences. Further, the House and Senate Committee Reports both describe the provision as articulating a “limit[]” on agencies’ power to force parties to submit written evidence.¹²⁰

Second, the “no prejudice” requirement and the three classes of cases are two *conjunctive* limitations on agencies’ power to deprive parties of an oral hearing. The House and Senate Committee reports make this explicit: “[T]he provision limits the practice to specified classes of cases and, even then, only where and to the extent that ‘the interest of any party will not be prejudiced thereby.’”¹²¹

Finally, the three enumerated classes of cases where Congress authorized agencies to take away a parties’ right to an oral hearing excludes cases involving the imposition of “sanctions.”¹²² The Senate Judiciary Committee considered and specifically rejected a proposal to extend this power to what they referred to as “accusatory” proceedings, because (they explained) such proceedings “are traditionally the type of proceeding in which seeing and hearing the witnesses is required. . . .”¹²³

In sum, the legislative history confirms what the text already demonstrates: APA Section 556(d) provides parties facing formal adjudications that may result in the imposition of sanctions with an *absolute* right to an oral hearing, even if they would not be “prejudiced” by losing that hearing.

119. *Administrative Procedure: Hearings*, *supra* note 109 (reciting S. 674, 77th Cong. § 309(i) (1941)).

120. H.R. REP. NO. 1980, *supra* note 111 at 271 (1946); S. REP. NO. 752, at 208–09 (1945).

121. H.R. REP. NO. 1980, at 271.

122. *Id.*

123. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON THE ADMINISTRATIVE PROCEDURE ACT 30–31 (Comm. Print 1945).

C. *Historical Context: The Persistence of Subject-Limited State Summary Judgment Rules After the Enactment of the FRCP.*

To a modern lawyer, providing an “absolute” right to a hearing may seem odd.¹²⁴ But the Representatives and Senators who enacted the APA in the 1940s would have been intimately familiar with this practice.¹²⁵

In the late nineteenth and early twentieth centuries, many states adopted rules authorizing summary judgment and virtually all of

124. *E.g.*, P.R. Aqueduct & Sewer Auth. v. EPA, 35 F.3d 600, 605 (1st Cir. 1994) (“To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless, and would suffocate the root purpose for making available a summary procedure. Indeed, to argue—as does petitioner—that a speculative or purely theoretical dispute—in other words, a non-genuine dispute—can derail summary judgment is sheer persiflage.”); *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 750 (6th Cir. 2004) (“It would seem strange if disputes could not be decided without an oral hearing when there are no genuine issues of material fact. Given that federal district courts can decide cases as a matter of law without an oral hearing when it is clear there are no genuine material disputes to be resolved in a trial, it would be bizarre if administrative agencies, which are in many respects modeled after the federal courts and which indeed often have more informal proceedings than federal courts, could not follow a similar rule.”); *see also* Platt, *supra* note 45, at 442–445 (collecting commentators and courts talking about the irrationality of limiting summary judgment to certain classes of cases).

125. *Cf.* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 829–30 (2018) (describing the new “APA Originalism,” which attends not only to the text and formal legislative history of the statute but also “to the relevant historical context—including the linguistic, epistemological, institutional, and legal premises from which those who enacted the APA proceeded.” (emphasis added)); Sunstein, *supra* note 89, at 1643 (conducting a self-described “APA Originalism” analysis of the *Chevron* doctrine and finding that, for such an analysis, “there is no escaping . . . [the] central question [of] judicial practice at the time that the APA was enacted.”); *see generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (providing detailed reconstruction of judicial deference to executive interpretation prior to and contemporaneous with the enactment of the APA in order to evaluate the *Chevron* doctrine); Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1308–09 (2014) (challenging the interpretation of the APA as adopting a presumption of reviewability based on, *inter alia*, “[t]he absence of an established pre-APA practice of presuming review in the face of statutory ambiguity or silence.”).

these rules explicitly limited the types of actions in which summary judgment could be employed.¹²⁶ For instance, many states limited summary judgment to actions seeking recovery of a “debt or liquidated demand.”¹²⁷ Other states included a somewhat broader list

126. Ilana Haramati, *Procedural History: The Development of Summary Judgment as Rule 56*, 5 N.Y.U. J.L. & LIBERTY 173, 179 (2010) (“every state initially passed much narrower summary judgment statutes”); Eugene A. Gordon, *The New Summary Judgment Rule in North Carolina*, 5 WAKE FOREST INTRAMURAL L. REV. 87, 87–88 (1969) (“Several states, long prior to the adoption of the federal rules, adopted a summary judgment rule but in most cases restricted its application.”). *But see* Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 470 (1929) (“Only in Indiana and Virginia is it available generally in civil actions. . . . In all other jurisdictions, the kinds of action in which it may be employed are carefully specified.”); Hon. Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 234 n.9 (2011) (“By the 1920s, only Indiana and Virginia made summary judgment procedures available in all types of actions.”).

127. A few key examples:

- NEW YORK authorized summary judgment in 1921, limiting it to actions “to recover a debt or liquidated demand arising . . . on a contract . . . or . . . on a judgment for a stated sum” Thomas McCall, *Summary Judgment Under New York Rules*, 10 A.B.A. J. 22, 22 (1924); *Waxman v. Williamson*, 175 N.E. 534, 536 (N.Y. 1931); Clark & Samenow, *supra* note 126, at 445; Felix Cohen, *Summary Judgments in the Supreme Court of New York*, 32 COLUM. L. REV. 825, 837 (1932); Leonard S. Saxe, *Summary Judgments in New York A Statistical Study*, 19 CORNELL L. Q. 237, 237 (1934); Frank T. Boesel, *Summary Judgment Procedure*, 6 WIS. L. REV. 5, 5 (1930); Hubert Dee Johnson, *Depositions, Discovery, and Summary Judgments Under the Proposed Uniform Federal Rules*, 16 TEX. L. REV. 191, 202 (1938); EDWARD J. BRUNET, MARTIN H. REDISH & MICHAEL A. REITER, SUMMARY JUDGMENT FEDERAL LAW AND PRACTICE § 6.01 n.17 (1994); *see also* Haramati, *supra* note 126, at 182 (describing the New York rule as “extremely circumscribed”); Bernard L. Shientag, *Summary Judgment*, 74 N.Y. L. REV. 187, 188 (1940) (“The Rule as first adopted was narrow in scope.”).
- CALIFORNIA authorized summary judgment only in actions “to recover upon a ‘debt or liquidated demand.’” Hilton H. McCabe, *Summary Judgment*, 11 S. CAL. L. REV. 436, 438 (1938).
- WISCONSIN authorized summary judgment in actions “to recover a debt or liquidated demand arising on contract, or on judgment for a sum stated.” Louis C. Ritter & Evert Magnuson, *The Motion for Summary Judgment and Its Extension to All Classes of Actions*, 21 MARQ. L. REV. 33, 39 (1936) (citing Wis. Stat. § 270.635); *see also* Evan Haynes, *The Pending Summary Judgment Bills*, 8 ST. B. J. 39, 41 n.7 (1933); *see also* Robert Wyness Millar, *Notabilia of American Civil Procedure 1887–1937*, 50 HARV. L. REV. 1017, 1055–56 (1937) (“[I]n New York and Wisconsin, although the proceeding does not lie in any

of cases that could be amenable to summary judgment, but even these broader rules still excluded many types of actions.¹²⁸ Subject-

case of tort demands, it is available in the case of a suit to foreclose a lien or mortgage, or a suit to compel an accounting under a written contract.”).

- *MASSACHUSETTS* allowed for summary judgment “[i]n any action of contract where the plaintiff seeks to recover a debt or liquidated demand.” *Norwood Morris Plan Co. v. McCarthy*, 4 N.E.2d 450, 453 (Mass. 1936); Ernest A. Fintel, *Methods of Objecting to Pleadings and of Obtaining Summary Judgment*, 4 MO. L. REV. 114, 154 (1939).

- *NEW JERSEY* authorized summary judgment only “in an action brought to recover a debt or liquidated demand arising (a) upon a contract express or implied, sealed or not sealed; or (b) upon a judgment for a stated sum; or (c) upon a statute.” Haynes, *supra* note 127, at 41; Boesel, *supra* note 127, at 5–6; Clark & Samenow, *supra* note 126, at 442–43; *Katz v. Inglis*, 160 A. 314, 315 (N.J. 1932); *Grossman v. Brick*, 139 A. 490, 491 (N.J. Sup. Ct. 1927); *Haramati, supra* note 126, at 179.

- *RHODE ISLAND* allowed summary judgment “in a contract action where the plaintiff sought to recover a debt or liquidated demand in money payable by the defendant.” *Fisher v. Sun Underwriters Ins. Co. of New York*, 179 A. 702, 703 (R.I. 1935); Stephen J. Fortunato, Jr., *Summary Judgment in Rhode Island: Is It Time to Wrap the Mantra in Celotex?*, 2 ROGER WILLIAMS U. L. REV. 153, 155 n.2 (1997).

- *THE DISTRICT OF COLUMBIA* limited summary judgment to contract actions. Boesel, *supra* note 127, at 8 (quoting DC Rule 73 as authorizing summary judgment “[i]n any action arising ex contractu”); Clark & Samenow, *supra* note 126, at 457 (explaining that the DC Rule was “limited . . . to contract actions.”).

- *ILLINOIS* similarly limited summary judgment to contract. Clark & Samenow, *supra* note 126, at 459.

128. A few key examples:

- *CONNECTICUT* authorized summary judgment “in any action to recover a debt or liquidated demand in money . . . arising (*First*) (a) on a negotiable instrument, a contract under seal or a recognizance; (b) on any other contract . . . excepting *quasi* contracts; (c) on a judgment for a stated sum; (d) on a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt; (e) on a guaranty, . . . when the claim against the principal is in respect of a debt or liquidated demand only; and (*Second*) in any other action (f) for the recovery of specific chattels, . . . (g) to quiet and settle the title to real estate . . . (h) to discharge any claimed invalid mortgage . . .” *CONNECTICUT PRACTICE BOOK* § 52 (1934) *quoted in* Fintel, *supra* note 127, at 168; *See* Charles E. Clark, *The New Summary Judgment Rule in Connecticut*, 15 A.B.A. J. 82, 82–83 (1929); Clark & Samenow, *supra* note 126, at 440; *see also* *Haramati, supra* note 126, at 181 (“Connecticut permitted summary judgment to be used in many categories of actions in which the amount of money in question was

matter limitations for summary judgment were so dominant that, in 1937, the *American Law Reports* published a lengthy annotation dedicated to construing these subject-matter limitations in state summary judgment rules.¹²⁹

Congress broke from this tradition in 1938 by enacting Federal Rule of Civil Procedure (FRCP) 56, which allowed for summary

uncontested. Connecticut, however, still did not permit summary judgment in cases with indeterminate damages." (footnote omitted)).

- *NEW YORK* expanded its Rule 113 in 1932 to authorize a few more categories, but continued to prohibit summary judgment in others, including in all tort law actions. Shientag, *supra* note 127, at 189; Ritter & Magnuson, *supra* note 127, at 36; Saxe, *supra* note 127, at 240–41; Fintel, *supra* note 127, at 117; Johnson, *supra* note 127, at 202; Haramati, *supra* note 126, at 183–84.

- *CALIFORNIA* expanded its summary judgment rule to include actions "to enforce or foreclose a lien or mortgage." McCabe, *supra* note 127, at 438; Louis C. Levy, *Summary Judgment*, 8 ST. B.J. 17, 17 (1934) ("Generally, the California enactment is a prototype of New York's with one outstanding exception, to-wit: California expressly authorizes foreclosure of mortgages, while New York does not."); Haynes, *supra* note 127, at 41–42 ("Recent statutes, rules, and amendments thereto in other jurisdictions have materially extended the scope of summary judgment procedure The question arises whether or not the proposed California provision should be extended to include some or all of these classes of cases, or other classes. It is submitted that for the time at least it should not").

- *WISCONSIN* expanded its initial summary judgment statute to include some additional categories of cases. Ritter & Magnuson, *supra* note 127, at 40; *see also* Schafer v. Bellin Mem'l Hosp. of Wis. Conf. of Methodist Episcopal Church, 264 N.W. 177, 180 (Wis. 1935) (explaining that the summary judgment statute applies, *inter alia*, "in an action to recover a debt or liquidated demand arising on a contract, express or implied, sealed or not sealed."); Slama v. Dehmel, 257 N.W. 163, 164 (Wis. 1934) (explaining that the summary judgment statute "by its terms applies only to actions 'to recover a debt or liquidated demand arising on a contract.'").

- *ILLINOIS* also expanded its rule to cover additional categories of cases. *See* Ritter & Magnuson, *supra* note 127, at 37–38; *see also* Charles E. Clark, *The New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 209, 211 n.8 (1933) (explaining that under the new Illinois statute, "[t]he provisions for summary judgment . . . are still over-restricted in the kinds of actions to which they apply . . .").

129. What amounts to "debt," "liquidated demand," "contract," etc., within contemplation of summary or expedited judgment statutes, 107 A.L.R. 1221 (1937).

judgment in *all actions*.¹³⁰ States would gradually follow this trans-substantive approach—but the movement was nowhere near complete by the mid-1940s, when Congress was considering and ultimately enacting the APA provision governing summary judgment

130. FED. R. CIV. P. 56 advisory committee's note on rules (1937) ("This rule is applicable to all actions, including those against the United States or an officer or agency thereof."); *see also* MacDonald v. Du Maurier, 144 F.2d 696, 702 (2d Cir. 1944) (Clark, J., dissenting) ("[T]he [FRCP], unlike all earlier procedural systems in this country or England, make the remedy of summary judgment available for all—not a selected few—civil actions . . ."); Arnstein v. Porter, 154 F.2d 464, 479 (2d Cir. 1946) (Clark, J., dissenting), *abrogated by* Zhang v. INS, 386 F.3d 66 (2d Cir. 2004) ("The clear-cut provisions of F.R. 56 conspicuously do not contain either a restriction on the kinds of actions to which it is applicable (unlike most state summary procedures) or any presumption against its use . . ."); Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 569 (1952) ("The striking difference between the federal rule [adopted in 1938] and previous models is that the procedure is available in any civil action."); Charles E. Clark, *Summary Judgments: A Proposed Rule of Court*, 2 F.R.D. 364, 365 (1941) ("[U]ntil the adoption of the new federal rules [in 1938], which by Federal Rule 56 swept away all these complicating restrictions, the general pattern of the reform had been one of stating its application in only designated, although steadily augmented, types of actions."); James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure: II*, 38 COLUM. L. REV. 1436, 1456 (1938) ("Several features are found in the new [Federal] Rules which have heretofore not generally appeared in summary judgment statutes. First, there is no limitation as to the type of action in which the remedy is available . . .") (footnote omitted); J. Palmer Lockard, *Summary Judgment in Pennsylvania: Time for Another Look at Credibility Issues*, 35 DUQ. L. REV. 625, 636 (1997) ("Rule 56 completed summary judgment's metamorphosis into a trans-substantive rule . . . Rule 56, at the time of its adoption marked a major, if not revolutionary, change in summary process in American law.") (footnote omitted); Alexander Holtzoff, *Origins and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1078 (1955) ("For the first time, . . . as far as the author is aware, summary judgments were made applicable to actions of all kinds without exception Theretofore wherever they were permitted the custom had been to limit them to specific types of actions."); Chas. S. Coffey, *Summary Judgment Procedure for Tennessee*, 16 TENN. L. REV. 393, 396 (1940) ("The widest scope yet given the procedure in America, and perhaps in any jurisdiction, is found in the new Federal Rules."); 4 ILL. PRAC., CIVIL PROCEDURE BEFORE TRIAL § 38:1 (2d ed.) ("Federal Rule 56 was one of the first provisions that authorized a summary judgment by either party in any civil action."); Johnson, *supra* note 127, at 202 (quoting Martin Conboy, *Depositions, Discovery and Summary Judgments*, 22 A.B.A. J. 881, 884 (1936)) ("The [federal summary judgment] rules now under consideration are a departure from the existing English and American rules, inasmuch as there is here no restriction to any class of action, whereas there are such restrictions in other jurisdictions."); Brunet et al., *supra* note 127, at 153 ("Prior to the 1938 enactment of the Federal Rules, some jurisdictions had allowed summary judgment only for certain types of claims.").

in formal adjudication. At least eleven states had subject-matter limitations in their summary judgment rules well into the 1940s, including California,¹³¹ Connecticut,¹³² Illinois,¹³³

131. See *Loveland v. City of Oakland*, 159 P.2d 70, 72 (Cal. Dist. Ct. App. 1945) (“Section 437c [of the California Civil Code] provides that a motion for summary judgment may be made ‘. . . in an *action* to recover upon a *debt* or upon a *liquidated demand* . . . or to recover an *unliquidated debt* or *demand for a sum of money only* arising on a *contract* express or implied in fact or in law”); *Bromberg v. Bank of Am. Nat. Tr. & Sav. Ass'n*, 135 P.2d 689, 690 (Cal. Dist. Ct. App. 1943) (quoting 437c of the Code of Civil Procedure as permitting summary judgment “in an action to recover upon a debt”); *Haupt v. Charlie's Kosher Mkt.*, 112 P.2d 627, 628 (Cal. 1941) (“[T]he second count of the complaint states a cause of action ‘upon a liquidated demand’ and ‘to enforce . . . a lien’ therefor, within the meaning of section 437c of the Code of Civil Procedure authorizing summary judgment in such cases.”); *State ex rel. Mitchell v. Wolcott*, 83 A.2d 759, 761 (Del. 1951) (“[T]he controlling California statute provides that summary judgment applies only to ‘an action to recover upon a debt or upon a liquidated demand * * * or to recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law * * *.’ Code Civ. Proc. § 437c.”); 6 WITKIN, CAL. PROC. 5TH PWT § 203 (2020) (“Prior to [1953], the statute, originally limited to ‘an action to recover a debt or liquidated demand,’ went through a gradual process of amendment to include actions to foreclose a lien or mortgage, to recover property, and for specific performance and accounting. The 1953 revision eliminated this list of actions and adopted the broad approach of Fed. R. Civ. P. 56, containing no restrictions.”).

132. See DAVID GEORGE PASTON, SUMMARY JUDGMENT IN NEW YORK: INCLUDING SUMMARY JUDGMENT RULES IN OTHER STATES AND IN U.S. DISTRICT COURTS 405–06 (1958) (quoting Conn. Gen. Stat. § 7655, amended by Conn. Gen. Stat. § 3129D (Supp. 1955)); *Rifkin v. Safenovitz*, 40 A.2d 188, 189 (Conn. 1944) (holding that an action qualified for summary judgment under Connecticut Practice Book § 52 because it was “one to recover a ‘liquidated demand in money’ arising on a ‘contract’ within the provisions of the section.”); *Perri v. Cioffi*, 109 A.2d 355, 356 (Conn. 1954) (“Section 52 of the Practice Book empowers the court to render a summary judgment in actions to recover a debt or a liquidated demand in money and in certain other classes of action specifically mentioned.”).

133. See *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 603 N.E.2d 1215, 1219–20 (Ill. App. Ct. 1992) (“Prior to a revision in 1955, however, the [Illinois summary judgment] motion was applicable only in contract actions, actions on a judgment for the payment of money, actions to recover possession of land, and actions to recover possession of specific chattels. In 1955, authority for the entry of summary judgments was extended to all civil cases.”); *Fisher v. Hargrave*, 48 N.E.2d 966, 971 (Ill. App. Ct. 1943) (“Under Rule 113 of the New York Civil Practice Act, summary judgment is permitted ‘in an action * * * to recover a debt or liquidated demand arising on a contract express or implied * * *.’ This provision is substantially identical with § 57 of the Illinois act.”); *Eagle Indem. Co. v. Haaker*, 33 N.E.2d 154, 155 (Ill. App. Ct. 1941) (“The suits to which

the statute is applicable are suits on contracts, express or implied, and judgments 'for the payment of money.'"); 4 ILL. PRAC., CIVIL PROCEDURE BEFORE TRIAL § 38:1 (2d ed.) ("Prior to the revision of 1955, however, the motion was applicable only in contract actions, actions on a judgment for the payment of money, actions to recover possession of land, and actions to recover possession of specific chattels. In 1955, authority for the entry of summary judgments was extended to all civil cases, thereby establishing the summary judgment practice in Illinois in the general form it possesses today." (footnote omitted)).

Iowa,¹³⁴ Massachusetts,¹³⁵ New Jersey,¹³⁶ New York,¹³⁷ Rhode Island,¹³⁸ West Virginia,¹³⁹ Wisconsin,¹⁴⁰ and Virginia¹⁴¹—comprising

134. See IOWA CODE § 237 (1946) (summary judgment is available “in an action . . . which is either: (a) to recover a debt or some other money demanded which is liquidated, or on a recognizance, or on a judgment for a stated sum, or on any contract, . . . except quasi contract; or (b) To recover a sum under a statute fixing its amount or creating a liability in the nature of a contract; or (c) On a guaranty of a debt, or of some other claim that is liquidated; or (d) To recover specific chattels . . . ; or (e) To quiet or settle title to real estate . . . (f) To discharge an invalid lien or mortgage.”); *Kriv v. Nw. Sec. Co.*, 24 N.W.2d 751, 753 (Iowa 1946) (quoting Rule 237: “Summary judgment may be entered in an action . . . to quiet or settle title to real estate . . .”); *Paston*, *supra* note 132, at 407–08 (same rule in effect as of 1958); *Humboldt Livestock Auction, Inc. v. B & H Cattle Co.*, 155 N.W.2d 478, 484 (Iowa 1967) (“Rule 237, R.C.P., so far as applicable here, then stated: ‘Summary judgment may be entered in an action, upon any claim * * * (a) to recover a * * * money demand which is liquidated * * * arising on a negotiable instrument * * * or on any contract * * *.’”).

135. See *Cnty. Nat. Bank v. Dawes*, 340 N.E.2d 877, 880 & n.4 (Mass. 1976) (noting that the “limited predecessors” to the MA summary judgment rule, which “permitted a plaintiff in an action of contract who sought to recover a debt or liquidated demand to move for the immediate entry of judgment for the amount claimed” was not repealed until 1975); *Paston*, *supra* note 132, at 415 (noting that, as of 1958, Massachusetts allowed summary judgment “[i]n any action of contract where the plaintiff seeks to recover a debt or liquidated demand . . .”).

136. See *Clark*, *The Summary Judgment*, *supra* note 130, at 569. (“New Jersey, which had had the restricted rule, substituted the more general rule in its adoption of federal procedure in 1948”); see also *Chapman v. Mitchell*, 44 A.2d 392, 393 (N.J. Sup. Ct. 1945) (“Supreme Court Rule 81, N.J.S.A. Tit. 2, requiring an affidavit verifying the cause of action, stating the amount claimed, and the plaintiff’s belief that there is no defense to the action, is applicable only when the motion is for summary judgment upon a debt or liquidated demand arising upon a contract, a judgment for a stated sum, or upon a statute.”).

137. See *Tenny v. Tenny*, 36 N.Y.S.2d 704, 707 (N.Y. Sup. Ct. 1942) (“There are eight subdivisions under Rule 113 which specify the type of actions in which such a motion may be made.”); *Garlick v. Garlick*, 53 N.Y.S.2d 321, 322 (N.Y. Sup. Ct. 1945) (“A motion for summary judgment is maintainable in this type of action, which is essentially one to recover a liquidated indebtedness.”); *McGreevy v. McGreevy*, 108 N.Y.S.2d 643, 644 (N.Y. App. Div. 1951) (“A motion by plaintiff for summary judgment may not be granted unless the action comes within one of the first eight subdivisions of Rule 113”); *Wolfman v. Wilson Bldg. Inc.*, 162 N.Y.S.2d 786, 787–88 (N.Y. Sup. Ct. 1956) (discussing several limitations on the scope of Summary judgment under Rule 113); EDWARD Q. CARR, ET AL., *CARMODY’S MANUAL OF NEW YORK CIVIL PRACTICE* 361–63 (1946) (quoting Rule 113); *Paston*, *supra* note 132, at 393–94 (same); see also *Clark*, *The Summary Judgment* (1952), *supra* note 130, at 569 (criticizing New York in 1952 for re-

a substantial portion of the states that had any sort of summary judgment rule.¹⁴²

taining explicit limitations on the types of cases amenable to summary judgment); SAMUEL S. TRIP, *GUIDE TO MOTION PRACTICE: LITIGATED MOTIONS IN THE NEW YORK CIVIL COURTS* 277 (1949–1955) (“Summary judgment is distinguished from judgment on the pleadings in that in the former the plaintiff is limited to cases specified in the eight subdivisions of Rule 113 of the Rules of Civil Practice, whereas in the latter the plaintiff may move in any case.”); *id.* at 284 (“A plaintiff may obtain summary judgment only if the action is embraced in one of the eight subdivisions of Rule 113.”); Jack B. Weinstein & Harold L. Korn, *Preliminary Motions in New York: A Critique*, 57 COLUM. L. REV. 526, 527 (1957) (“The present limitation of summary judgment in New York to enumerated types of action serves no purpose save to spawn a great number of irreconcilable decisions as to whether particular cases fall within or without the enumerated nine.”).

138. *See Goucher v. Herr*, 14 A.2d 651, 653 (R.I. 1940) (“The summary judgment statute contemplates the final disposition of a case by execution on a judgment for a ‘debt or liquidated demand in money.’”); Paston, *supra* note 132, at 429 (noting that, as of 1958, Rhode Island permitted summary judgment in “any action founded on contract, express or implied, where the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant . . .”).

139. *See City of Beckley v. Craighead*, 24 S.E.2d 908, 909 (W. Va. 1943) (“[N]otice of motion for judgment to recover money due on contract brought under Code, 56–2–6, must allege that the amount sought to be recovered is due and payable to the plaintiff from the defendant by virtue of the terms of a contract, either express or implied, with which the defendant has failed to comply.”); W. Va. Code § 56-2-6 (1961) (“Any person entitled to recover money by action on any contract may, on motion . . . obtain judgment for such money . . .”).

140. *See Unmack v. McGovern*, 296 N.W. 66, 67 (Wis. 1941) (quoting sec. 270.635, Wisconsin stats.: “Summary judgment may be entered as provided in this section in an action (a) To recover a debt or demand arising on a contract, express or implied (other than for breach of promise to marry); or . . .”); *but see* Joseph A. Ranney, *Practicing Law in 20th Century Wisconsin: Continuity and Change in Everyday Legal Life, Part 2*, 70 WIS. LAW. 20, 22 (1997) (“At first summary judgment was limited to actions on debts, liquidated damages and judgments, but it proved to be a popular and effective tool for reducing caseloads and in 1941 the court expanded it to encompass all types of actions.”).

141. Thomas D. Terry, *Summary Judgment in Virginia*, 2 WM. & MARY L. REV. 353, 356 (1960) (In 1950, Virginia Rule 3:20 “extend[ed] summary judgment to include all types of actions . . .”).

142. *See Clark, The Summary Judgment, supra* note 130, at 568 n.9 (finding that just twenty-eight states had some rule for summary judgment as of 1949). Some of the states with no summary judgment rules in place later enacted rules that were subject-matter limited. In 1955, New Hampshire enacted its first summary judgment rule and limited it to “any action founded on contract, in which the plaintiff seeks to recover a debt or liquidated demand . . .” *Nashua Tr. Co. v. Sardonis*, 136 A.2d 332, 333 (N.H. 1957).

Contemporaneous courts and commentators observed the reluctance of states to embrace trans-substantive summary judgment in the wake of FRCP 56. In 1941, Charles E. Clark, a principal architect of the federal rules, aggressively criticized all the “complicating restrictions” that many states retained on the substantive scope of summary judgment.¹⁴³ A decade later, Clark was still making the same complaint, criticizing jurisdictions where summary judgment could “be had only in the actions named and designated in the rule or statute.”¹⁴⁴

Similarly, a 1950 Note in the *University of Pennsylvania Law Review* explained that “in many cases the remedy is still more or less restricted to [certain] types of actions.”¹⁴⁵ And, in 1951, the Supreme Court of Delaware observed that “[a] number of states in this country have statutes specifying the types of action in which motions for summary judgment may be resorted to.”¹⁴⁶ In 1961, a commentator observed that “[i]n some states [summary judgment] is limited in its use to certain types of actions and parties.”¹⁴⁷ As late as 1970, a court observed “considerable divergence” among the jurisdictions authorizing summary judgment “as to the kinds of cases in which it may be used,” noting that the “the most frequent limitation is restriction to claims for liquidated damages and to contract transactions.”¹⁴⁸

In sum, as Congress was considering and ultimately enacting the APA in the 1940s, many states still restricted summary judgment to a select subset of cases. The trans-substantive revolution launched

143. Charles E. Clark, *Summary Judgments and a Proposed Rule of Court*, 25 J. AM. JUD. SOC'Y 20, 21 (1941).

144. Clark, *supra* note 130, at 569.

145. E.H. Heisler, Note, *Summary Judgment in the Federal Courts*, 99 U. PA. L. REV. 212, 212 (1950).

146. *State ex rel. Mitchell v. Wolcott*, 83 A.2d 759, 761 (Del. 1951).

147. Robert H. Hall, *Effective Use of Motions for Summary Judgment in Georgia*, 23 GA. B.J. 439, 439 (1961).

148. *Pridgen v. Hughes*, 177 S.E.2d 425, 426 (N.C. Ct. App. 1970).

by the FRCP in 1938 would gradually eradicate subject-matter limitations on state summary judgment rules—but that movement was still in its infancy when Congress was drafting and enacting the APA.

Above, I showed that Section 556(d) of the APA is best understood as providing an *absolute* right to an in person hearing for any party subject to a formal adjudication resulting in sanctions—that is, such a party would have a right to an oral hearing even if there is no genuinely disputed issue of material fact. Modern lawyers might find this strange, but it is entirely consistent with the practice of many U.S. jurisdictions at the time the APA was enacted.

D. Courts and Commentators Widely Confirmed This Understanding After Enactment of the APA.

Post-adoption practice can provide further insight into the contemporary Congress's understanding of the APA.¹⁴⁹ Sources published immediately following the enactment of the APA further confirm that Congress provided an *absolute* right to an oral hearing for actions falling outside the specifically listed types of adjudication.

The 1947 U.S. Attorney General Manual (AG Manual) on the APA¹⁵⁰ noted that the statute permitted submission of all or part of the evidence in written form only in “proceedings involving rule making or determining claims for money or benefits or applications

149. See, e.g., Sunstein, *supra* note 89, at 1652–56 (examining “post-1946 practice” as part of self-described “APA Originalism” analysis of *Chevron* doctrine).

150. Scholars have noted that this source may not be entirely reliable because it expressed the administration's preferred views—that is minimizing the restrictions on agencies. E.g., Sunstein, *supra* note 89, at 1652 n.204 (relying on the AG Manual in his self-described APA Originalism analysis of the *Chevron* doctrine while noting that it “might not be counted as an authoritative (or neutral) understanding of the meaning of the APA”); Shepherd, *supra* note 90, at 1666 (noting that the AG manual “interpreted the act [sic] in a manner that suppressed to a minimum the bill's limits on agencies”). These concerns serve only to amplify my point here: the Manual *itself* concedes limits on the power of agencies to skip over hearings.

for initial licenses” and explained the logic of the limitation as follows: “Typically, in these cases, the veracity and demeanor of witnesses are not important.”¹⁵¹

Northwestern Law School Professor Nathaniel L. Nathanson recognized immediately after enactment that Section 7(c) created an “*absolute* guaranty of the right to oral examination” for cases other than rule making or determining claims for money or benefits or applications for initial licenses, and that in those cases “the agency *cannot* compel any party to submit evidence in writing rather than orally.”¹⁵² Nathanson himself suspected that this rule was “too rigid,” but concluded that it was what Congress intended both from the text and the committee reports (surveyed above).¹⁵³

Similarly, NYU Law Professor Bernard Schwartz recognized immediately after enactment that Section 7(c) created a right to an oral hearing, but limited that right “only to cases which partake of a judicial character” and not necessarily to “rule-making or determining claims for money or benefits or applications for initial licenses.”¹⁵⁴ He also recognized in a later work that the APA distinguished between “applications for initial licenses” and “licensing” more generally (which encompassed both applications and revocation/suspension procedures), and acknowledged that the requirement of an oral hearing in Section 7(c) did “not apply with full effect to *initial* license proceedings.”¹⁵⁵

151. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 78 (1947).

152. Nathaniel L. Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 402–04 (1947) (emphasis added); see also Grisinger, *supra* note 89, at 76 (relying on Nathanson's article in her influential history of the APA).

153. *Id.*

154. Bernard Schwartz, *The American Administrative Procedure Act, 1946*, 63 L.Q. REV. 43, 54 (1947); see also Shepherd, *supra* note 89, at 1657 (relying on this Schwartz article in his influential history of the APA); Grisinger, *supra* note 89, at 82 (relying on other contemporaneous work by Schwartz in her influential history of the APA).

155. Bernard Schwartz, *Administrative Terminology and the Administrative Procedure Act*, 48 MICH. L. REV. 57, 73 (1949) (emphasis added).

Similarly, in the few decades following enactment, many courts carefully construed the text of Section 556(d) as carving out an exception to the right to an oral hearing in the three specifically enumerated classes of cases. For instance, in 1971, the Supreme Court relied on Section 556(d)'s applicability to "claims for money or benefits" to allow for the consideration of written reports submitted as evidence in the context of a social security disability case.¹⁵⁶ Two years later, the Court explained how Sentence Six of Section 556(d) operated to allow agencies to skip over oral hearings in the context of formal rulemakings:

[E]ven where the statute requires that the rulemaking procedure take place "on the record after opportunity for an agency hearing," thus triggering the applicability of § 556, subsection (d) provides that the agency may proceed by the submission of all or part of the evidence in written form if a party will not be "prejudiced thereby." Again, the Act makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by evidentiary submission in written form only.¹⁵⁷

Judge Henry Friendly reached a similar conclusion in an earlier case, finding that Section 556(d) empowered an agency to skip oral hearings even for the subset of rulemakings that triggered the "formal" requirements of APA §§ 556–557:

What Congress gave by that provision of the APA, it partially took away by another. The final sentence of § 556(d) provides:

....

Congress thus determined that even when rulemaking had to be done by a hearing "on the record," the record

156. *Richardson v. Perales*, 402 U.S. 389, 409 (1971); *id.* at 408–10; *see also* Platt, *supra* note 45, at 452 n.63 (collecting cases).

157. *United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 241 (1973).

did not always have to be made in the traditional manner.¹⁵⁸

Lower courts also relied on the text of Section 556(d) to allow written procedures in the context of applications for initial licenses.¹⁵⁹

* * *

To be sure, not everyone followed the text of the APA. In his 1958 *Administrative Law Treatise*, Professor Kenneth Culp Davis acknowledged that Section 556(d)'s authorization to skip over oral hearings "seems to be limited to particular types of proceedings."¹⁶⁰ Nevertheless, he asserts that "one may assume" that the provision authorizes agencies to skip oral hearings "in any type of proceeding."¹⁶¹ This seems to be an example of Davis's tendency in his post-APA writings to "consistently favor an understanding of the APA's provisions that would allow for administrative flexibility that [he] thought normatively desirable."¹⁶²

More broadly, in the post-New Deal era, many commentators "openly celebrated administrative law's common law character"¹⁶³—and administrative summary judgment was no exception.

158. *Long Island R.R. Co. v. United States*, 318 F. Supp. 490, 498 (E.D.N.Y. 1970) (Friendly, J., for a three-judge district court).

159. *E.g.*, *Gencom Inc. v. FCC*, 832 F.2d 171, 174 n.2 (D.C. Cir. 1987) (affirming the FCC's "adoption of a paper hearing procedure" under the APA because "§ 556(d) of the APA contains an express exemption which provides that, in processing applications for initial licenses, 'an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.'"); *Nat. Res. Def. Council v. EPA*, 859 F.2d 156, 191 (D.C. Cir. 1988) (explaining that § 556(d) "explicitly exempts [initial licensing] from some elements of formal adjudication"); *Cellular Mobile Sys., Inc. v. FCC*, 782 F.2d 182, 198 (D.C. Cir. 1985) ("the APA expressly authorizes 'paper hearings' in licensing cases when a party will not be prejudiced by that procedure"); *see also* Platt, *supra* note 45, at 452 n.63 (collecting cases).

160. 2 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 14.16 (1st ed. 1958).

161. *Id.*

162. Bernick, *supra* note 125, at 845.

163. Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1317 (2012); *see also* Bernick, *supra* note 125, at 825.

For instance, a landmark 1972 *Harvard Law Review* article by leading administrative law scholars endorsed the adoption of trans-substantive administrative summary judgment across the federal government as a rational method to “reduce delay” in the administrative system.¹⁶⁴ But, although the authors acknowledged that APA § 556(d) constituted the relevant legal “authority” for agencies “to adopt a summary decision rule,” they failed altogether to confront the limitations contained in that provision regarding the parameters of the procedure.¹⁶⁵ As discussed below, some courts have followed the same course—endorsing broad, policy-based rationales for administrative summary judgment without regard for the limitations on the practice imposed by the text of Section 556(d).¹⁶⁶

164. Gellhorn & Robinson, *supra* note 17, at 612; *see also* Platt, *supra* note 45, at 443-45.

165. Gellhorn & Robinson, *supra* note 17, at 630 n.89. In addition to § 556(d), the authors identify two other purported sources of authority for summary decision rules. First, they point to the following language in APA § 555(b): “With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.” *Id.* This language evinces a general concern with timeliness in administrative actions, but cannot trump any of the specifically defined procedural rights contained in other sections, including the absolute right to a hearing provided to parties in formal adjudications resulting in sanctions. *E.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (“[I]t is a commonplace of statutory construction that the specific governs the general”). Second, the authors point to agency-specific enabling statutes which often give the agency power to adopt “such rules and regulations as are necessary to implement the purposes of the act.” *Id.* (citing, as an example, the National Labor Relations Act § 6, 29 U.S.C. § 156 (1964)). But an open-ended rulemaking authority does not empower an agency to override any specific statutory command, including the specific procedural commands of the APA. *E.g.*, *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

166. *See* Platt, *supra* note 45, at 452-53.

E. Three Modern Courts Have Considered and Upheld SEC Summary Disposition, but All Three Ignored the Text and History of Section 556(d).

More recently, three U.S. Courts of Appeals have upheld the SEC's use of summary disposition to resolve formal adjudications that impose sanctions.¹⁶⁷ However, all three courts failed to even consider Section 556(d)—likely because it was not raised by the parties—and therefore these opinions cannot be regarded as probative into the issue of whether the APA permits administrative summary judgment.

1. *Kornman v. SEC* (D.C. Circuit)

In *Kornman v. SEC*,¹⁶⁸ the D.C. Circuit upheld the SEC's use of summary disposition in an enforcement action brought under Investment Advisers Act § 203(f) that imposed a collateral bar—that is, a license revocation.¹⁶⁹ As discussed above, the APA's plain text and well-established precedents require that the hearing in such an action (required by statute to be “on the record”) comply with the APA's rules governing formal adjudication, including Section 556(d).¹⁷⁰ In fact, the Supreme Court had specifically recognized that an action brought by the SEC under Investment Advisers Act § 203(f) was “clearly ‘a case of adjudication’ within 5 U.S.C. § 554” — thus triggering the APA's formal adjudication rules, including Section 556.¹⁷¹ As shown above, Section 556(d) plainly entitles the respondent in such an action an *absolute* right to an oral hearing.¹⁷²

167. *Kornman v. SEC*, 592 F.3d 173, 189 (D.C. Cir. 2010); *Gibson v. SEC*, 561 F.3d 548, 555 (6th Cir. 2009); *Brownson v. SEC*, 66 F. App'x 687, 688 (9th Cir. 2003).

168. 592 F.3d 173 (D.C. Cir. 2010).

169. *Id.* at 176.

170. *Supra* Part I.B.

171. *Steadman v. SEC*, 450 U.S. 91, 97 n.13 (1981).

172. *Supra* Part II.A-D.

The D.C. Circuit—in an opinion joined by then-Judge Kavanaugh—reached the opposite conclusion.¹⁷³ The court did not explain why Section 556(d) did not bar the agency’s practice—the court failed to even mention the APA in its opinion.¹⁷⁴ Instead, the court found that the Investment Advisers Act § 203(f) did not define the word “hearing” and so determined that it was proper for the court to defer to the agency’s own determination regarding what that word required.¹⁷⁵ The court noted that there was a “well-established” pattern of agencies construing the word “hearing” as permitting a hearing solely “on the pleadings,” without requiring any opportunity for in person testimony, and found that many courts had approved this practice.¹⁷⁶

But the D.C. Circuit relied on cases that were simply inapposite to the Section 556(d) analysis.¹⁷⁷ Several of the cases on which the court based its decision involved hearings that were not required by statute to be conducted “on the record” and therefore (unlike Investment Advisers Act § 203(f)) did not trigger the application of APA § 556(d).¹⁷⁸ For instance, the D.C. Circuit relied on the Supreme Court’s decision in *Weinberger v. Hynson, Westcott & Dunning, Inc.*,¹⁷⁹ but the statute at issue did not require the hearing to be conducted “on the record,” and the Court in that case specifically held that the proceeding involved was *not* subject to the APA’s hearing provisions of Sections 556 and 557.¹⁸⁰ The D.C. Circuit also

173. *Kornman*, 592 F.3d at 188.

174. *See generally id.*

175. *Id.* at 182.

176. *Id.*

177. *E.g.*, *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 (1973); *John D. Copanos & Sons, Inc. v. Food & Drug Admin.*, 854 F.2d 510 (D.C. Cir. 1988).

178. *Id.*

179. 412 U.S. 609 (1973).

180. *Id.* at 623 n.19 (“Under the Administrative Procedure Act, a court reviews agency findings to determine whether they are supported by substantial evidence only

relied on its own earlier decision in *John D. Copanos & Sons, Inc. v. FDA*,¹⁸¹ however the court did not discuss the applicability of the APA in that case, and the statute involved did not specify that the hearing needed to be conducted “on the record.”¹⁸²

Other cases the D.C. Circuit relied on involved applications for initial licenses, or rulemakings, and therefore would qualify under Section 556(d) as the type of formal adjudications where summary disposition is permissible.¹⁸³

The D.C. Circuit cited only one case that involved a formal APA adjudication outside of the exempted categories: the Sixth Circuit’s decision in *Crestview Parke Care Ctr. v. Thompson*.¹⁸⁴ That case involved an action by the Centers for Medicare and Medicaid Services to impose a civil monetary penalty (a “sanction”) in a hearing arising under a statute that required it to be held “on the record.”¹⁸⁵ The *Crestview* court correctly acknowledged that this statute triggered the requirements of APA formal adjudication but nevertheless upheld the use of summary judgment.¹⁸⁶ The *Crestview* court reasoned as follows:

It would seem strange if disputes could not be decided without an oral hearing when there are no genuine issues of material fact. Given that federal district courts can decide cases as a matter of law without an oral hearing when it is clear there are no genuine material disputes to be resolved in a trial, it would be bizarre if administrative

in a case subject to the hearing provisions of 5 U.S.C. §§ 556 and 557 or ‘otherwise reviewed on the record of an agency hearing provided by statute . . .’. This is not such a case.”).

181. 854 F.2d 510 (D.C. Cir. 1988).

182. *Id.* at 518.

183. *E.g.*, *P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 605–07 (1st Cir. 1994) (application for initial license); *United States v. Storer Broad. Co.*, 351 U.S. 192, 202, 205 (1956) (same); *Costle v. Pac. Legal Found.*, 445 U.S. 198, 208, 211 (1980) (application for extension of license).

184. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743 (6th Cir. 2004).

185. *Id.* at 748.

186. *Id.* at 750.

agencies, which are in many respects modeled after the federal courts and which indeed often have more informal proceedings than federal courts, could not follow a similar rule. It may make as good, if not more, policy sense to have a standard for summary judgment in HHS administrative proceedings as it does to have one in federal court proceedings.¹⁸⁷

This policy analysis may or not be persuasive,¹⁸⁸ but it is squarely in conflict with the text and history of Section 556(d) detailed above.¹⁸⁹

Thus, in *Kornman*, the D.C. Circuit failed to consider the APA or Section 556(d) specifically and relied mainly on legally inapposite cases. The only case it relied on that was on the right legal point turned on a pure policy analysis that similarly failed to consider the text or history of the operative statute.¹⁹⁰

2. *Gibson v. SEC* (6th Circuit)

In *Gibson v. SEC*,¹⁹¹ the Sixth Circuit upheld the use of summary disposition by the SEC in a follow-on action filed under Exchange Act § 15(b) and Investment Advisers Act § 203(f) imposing a broker-dealer and investment adviser bar.¹⁹² The Court did not consider the APA, much less Section 556(d), in upholding the practice. In fact, the court relied on cases upholding the use of summary judgment in a district court action where the APA obviously does not apply.¹⁹³

187. *Id.* (citation omitted).

188. *Cf. infra* Part V (analyzing policy arguments for and against administrative summary disposition).

189. *Supra* Part II.A–D.

190. In an earlier case, the D.C. Circuit came close to addressing the issue but found that the respondent had waived the argument and so did not address it. *Seghers v. SEC*, 548 F.3d 129, 133 (D.C. Cir. 2008).

191. *Gibson v. SEC*, 561 F.3d 548 (6th Cir. 2009).

192. *Id.* at 554.

193. *Id.* at 553 (relying on *SEC v. George*, 426 F.3d 786 (6th Cir. 2005) and *SEC v. Waco Fin., Inc.*, 751 F.2d 831 (6th Cir. 1985)).

3. *Brownson v. SEC* (9th Circuit)

The other opinion to address the issue is an unpublished opinion by the Ninth Circuit in *Brownson v. SEC*.¹⁹⁴ The Ninth Circuit upheld the use of summary disposition by the SEC in a follow-on action under Exchange Act § 15(b) imposing a Broker-Dealer bar.¹⁹⁵ The court did not cite the APA, much less analyze Section 556(d).¹⁹⁶

* * *

Three out of three appellate courts to evaluate SEC Summary Disposition have upheld the practice. But none of those cases even considered the relevant statutory provision—Section 556(d) of the APA. Accordingly, these decisions cannot be regarded as probative.

III. ILLEGAL ADMINISTRATIVE SUMMARY JUDGMENT ACROSS THE ENFORCEMENT BUREAUCRACY

The SEC is not alone in utilizing summary disposition in the context of formal agency adjudications involving the imposition of sanctions in contravention of Section 556(d) of the APA. This Part reviews some other examples of agencies engaged in this practice. This list is not comprehensive. If the legal arguments presented in this paper are correct, each of these agencies may have to abandon its summary judgment practices.

A. *Department of Health and Human Services*

The Department of Health and Human Services (HHS) and its subsidiary agencies, including the Centers for Medicare and Medicaid Services (CMS), have the power to impose various sanctions

194. *Brownson v. SEC*, 66 F. App'x 687 (9th Cir. 2003).

195. *Id.* at 688.

196. *Id.*

(including monetary penalties) on regulated healthcare entities.¹⁹⁷ Targets of at least some of these regulatory enforcement actions are entitled to a hearing “on the record” covered by the APA’s rules on formal adjudication.¹⁹⁸ HHS has adopted rules of procedure that govern these formal adjudications which authorize any party to move for summary judgment.¹⁹⁹ CMS has relied on “summary judgment” in formal adjudications resulting in sanctions, and this practice has been upheld by an ALJ, HHS’s Departmental Appeals Board, and at least one circuit court.²⁰⁰

197. *E.g.*, 42 U.S.C. § 1395i-3(h)(2)(B)(ii) (2018) (the HHS Secretary “may impose a civil money penalty in an amount not to exceed \$10,000 for each day of noncompliance.”).

198. *E.g.*, *id.* § 1320a-7a(c)(2) (“The Secretary shall not make a determination adverse to any person under subsection (a) or (b) [of this section] until the person has been given written notice and an opportunity for the determination to be made *on the record* after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person.” (emphasis added)); *id.* § 300gg-22 (“The entity assessed shall be afforded an opportunity for hearing by the Secretary upon request made within 30 days after the date of the issuance of a notice of assessment. In such hearing the decision shall be made on the record pursuant to section 554 of Title 5.”); *see also* *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 748 (6th Cir. 2004) (“The statute authorizing the imposition of penalties on skilled nursing facilities, such as *Crestview*, requires CMS to hold a hearing ‘on the record.’”).

199. *Alternatives to an oral hearing*, U.S. DEPT OF HEALTH AND HUMAN SERV., <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-alj/procedures/center-for-tobacco-products-case-form-and-informal-briefs/index.html> [<https://perma.cc/4XNG-62CT>] (“An oral hearing (*i.e.*, a hearing at which witnesses are called and testify) is not the only procedure that the ALJ may use to hear and decide a case. . . . Any party to a case may file a motion for summary judgment at any time prior to the scheduling of a hearing, or as directed by the ALJ. . . . Matters presented to the ALJ for summary judgment will follow Rule 56 of the Federal Rules of Civil Procedure and federal case law related thereto or they will proceed in accordance with an ALJ order.”).

200. *Crestview*, 373 F.3d at 747; *Rosewood Care Ctr. of Inverness v. CMS*, DAB No. 2120, 2007 WL 3306481, at *1 (Oct. 9, 2007); *see also* *Fal-Meridian, Inc. v. HHS*, 604 F.3d 445, 449 (7th Cir. 2010) (Posner, J.) (resolving appeal from HHS civil penalty case that was resolved before the ALJ on summary judgment without considering the legality of the procedure); *Cedar Lake Nursing Home v. HHS*, 619 F.3d 453, 456 (5th Cir. 2010) (similar); *Cnty. Home Health v. HHS*, 2010 WL 11561593, at *6 (N.D. Ala. Feb. 24, 2010) (“No challenge is made here to the agency’s use of summary judgment procedure *per se.*”); *Nawaz v. Price*, No. 4:16CV386, 2017 WL 2798230, at *3 (E.D. Tex. June 28, 2017)

B. *Federal Mine Safety and Health Review Commission*

The Federal Mine Safety and Health Review Commission (FMSHRC) is an independent adjudicatory agency that provides administrative trial and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977 (Mine Act), which is administered by the Mine Safety and Health Administration, a sub-agency of the Department of Labor.²⁰¹ Under the Mine Act, the Secretary of Labor (and her representatives) may issue citations and civil penalties to regulated mines for violations of the act.²⁰² If the mine requests a hearing within thirty days, it is entitled to one conducted by one of FMSHRC's ALJs "in accordance with section 554 of Title 5," that is, the APA's rules on formal adjudication.²⁰³ FMSHRC's rules of procedure allow the Secretary of Labor to move for "summary decision,"²⁰⁴ and the Secretary has taken advantage of this procedure in numerous cases involving the imposition of civil penalties.²⁰⁵

(rejecting constitutional challenge to HHS summary judgment where the "[p]laintiffs cite no authority suggesting they are entitled to oral argument and concede 'an ALJ is empowered to grant summary judgment, just as a Court is'").

201. *About FMSHRC*, FED. MINE SAFETY AND HEALTH REV. COMM'N, <https://www.fmsshrc.gov/about> [<https://perma.cc/TQ6E-YUDD>]; see also Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 380, 396 (2019).

202. 30 U.S.C. §§ 814, 815(a) (2018).

203. *Id.* § 815(d).

204. 29 C.F.R. § 2700.67 (2020).

205. *E.g.*, Sec'y of Labor v. Higgins Ranch, FMRSHR No. CENT 2006-258-M (July 27, 2007) (Manning, Arb.); Sec'y of Labor v. Nyrstar Gordonsville, LLC, FMRSHR No. SE 2015-136-M (Bulluck, Arb.); Sec'y of Labor v. John Richards Constr., FMRSHR No. WEST 2014-440-M (Aug. 25, 2015) (Bulluck, Arb.); Sec'y of Labor v. Royal Cement Co., Inc., FMRSHR Docket No. WEST 2007-844-M (Dec. 9, 2009) (Manning, Arb.); Sec'y of Labor v. Hammerlund Constr., Inc., FMRSHR Docket No. LAKE 2014-124-M (Bulluck, Arb.); Sec'y of Labor v. Poland Sand & Gravel, LLC, FMRSHR Docket No. YORK 2017-0096 (Dec. 28, 2018) (Bulluck, Arb.); Sec'y of Labor v. Pocahontas Coal Co., LLC, FMRSHR Docket No. WEVA 2015-854 (Dec. 24, 2015); Sec'y of Labor v. Tilden Mining Co., LC, FMRSHR Docket No. LAKE 2008-503-M (Apr. 18, 2011) (Paez, Arb.); Sec'y of Labor v. Kanaval's Excavating Gravel, FMRSHR Docket No. YORK 2013-217-M (Oct. 24, 2014) (Paez, Arb.); Sec'y of Labor v. Warrior Coal LLC, FMRSHR Docket No. KENT 2009-870 (May 23, 2013).

C. *Commodity Futures Trading Commission*

The Commodity Futures Trading Commission (CFTC) is authorized to impose various sanctions—including monetary penalties, suspending and revoking registrations, and trading bans—on regulated persons and entities who violate the Commodity Exchange Act and regulations promulgated thereunder.²⁰⁶ Targets of at least some of these enforcement actions are entitled to a hearing “on the record,” governed by the APA’s rules on formal adjudication.²⁰⁷ The CFTC’s rules of procedure governing these hearings permit the agency to move for summary disposition,²⁰⁸ and the agency has taken advantage of this procedure in formal adjudications resulting in sanctions.²⁰⁹

206. *E.g.*, *Enforcement*, COMMODITY FUTURES TRADING COMM’N, <https://www.cftc.gov/LawRegulation/Enforcement/OfficeofDirectorEnforcement.html> [<https://perma.cc/4BAV-AETP>].

207. 7 U.S.C. § 8(a) (2018) (“In the event of a refusal to designate or register as a contract market or derivatives transaction execution facility any person that has made application therefor, the person shall be afforded an opportunity for a hearing on the record before the Commission”); *id.* § 8(b) (“The Commission is authorized to suspend for a period not to exceed 6 months or to revoke the designation or registration of any contract market or derivatives transaction execution facility Such suspension or revocation shall only be made after a notice to the officers of the contract market or derivatives transaction execution facility or electronic trading facility affected and upon a hearing on the record”); *id.* § 9(4) (“If the Commission has reason to believe that any person (other than a registered entity) is violating or has violated this section, or any other provision of this chapter (including any rule, regulation, or order of the Commission promulgated in accordance with this section or any other provision of this chapter), the Commission may serve upon the person a complaint. . . [which shall include] a notice of hearing . . . [which] may be held before . . . an administrative law judge designated by the Commission, under which the administrative law judge shall ensure that all evidence is recorded in written form and submitted to the Commission.”); *see also* *Monson v. DEA*, 589 F.3d 952, 959 (8th Cir. 2009) (“[T]he Commodity Exchange Act[] provides that a person aggrieved by a Commodities Futures Trading Commission (CFTC) decision or targeted by a CFTC administrative action is entitled to a full hearing on the record before the agency or an administrative law judge (ALJ).”).

208. *See* 17 C.F.R. § 10.91(a) (2020) (“Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law may move for a summary disposition in his favor of all or any part of the proceeding.”).

209. *E.g.*, *Brenner v. CFTC*, 338 F.3d 713, 715 (7th Cir. 2003).

D. Nuclear Regulatory Commission

The Nuclear Regulatory Commission (NRC) has authority to impose various sanctions on regulated entities for violations of the Atomic Energy Act and Energy Reorganization Act and regulations promulgated thereunder, including revoking or suspending licenses and imposing civil penalties.²¹⁰ Targets of at least some of these enforcement actions are entitled to a hearing “on the record” covered by the APA’s rules governing formal adjudications.²¹¹ The NRC’s rules of procedure authorize the filing of motions for summary disposition.²¹² The agency has taken advantage of this procedure, though it is unclear if it has done so in any cases covered by the APA’s formal hearing requirements resulting in sanctions.²¹³

210. *Enforcement Program Overview*, U.S. NUCLEAR REGULATORY COMM’N, <https://www.nrc.gov/about-nrc/regulatory/enforcement/program-overview.html> [https://perma.cc/4LCQ-QWCB].

211. *E.g.*, 42 U.S.C. § 2282a(c)(2)(A) (2018) (“[T]he Secretary shall assess the penalty, by order, after a determination of violation has been made *on the record* after an opportunity for an agency hearing pursuant to section 554 of Title 5 before an administrative law judge appointed under section 3105 of such Title 5.” (emphasis added)). *But see id.* § 2239(a)(1)(A) (“In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.”); *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 348 (1st Cir. 2004) (“For years, the courts of appeals have avoided the question of whether section 2239 requires reactor licensing hearings to be on the record.”).

212. 10 C.F.R. § 2.710 (2020) (“Any party to a proceeding may move, with or without supporting affidavits, for a decision by the presiding officer in that party’s favor as to all or any part of the matters involved in the proceeding.”).

213. *Cf. Advanced Med. Sys., Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995) (granting summary disposition to suspend a license under § 2239(a)(1)(A) which does not require a hearing “on the record”).

E. *Administrative Conference of the United States*

The Administrative Conference of the United States (ACUS) is an independent federal agency, with an exceptional reputation among administrative law scholars, “charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure.”²¹⁴ As discussed above, in 1993 ACUS promulgated a set of Model Adjudication Rules as a resource for agencies considering changes to their own rules.²¹⁵ The 1993 model rules were intended to apply to “formal adjudication” including adjudications conducted pursuant to the APA.²¹⁶ They included a rule allowing any party to move for “Summary Decision” without regard to whether the proceeding involved sanctions.²¹⁷

According to ACUS, “Numerous agencies have relied on the Model Rules to improve existing adjudicative schemes, and new agencies, like the Consumer Financial Protection Bureau, have relied on them to design their procedures.”²¹⁸ For instance, the SEC adopted its rule providing for summary disposition just two years after the ACUS model rules were released, and borrowed heavily from those model rules.²¹⁹

214. *The Administrative Conference of the United States (ACUS)*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/acus> [<https://perma.cc/LR4W-23VY>].

215. MODEL ADJUDICATION RULES (1993) (ADMIN. CONF. OF THE U.S.), <https://www.acus.gov/sites/default/files/documents/1993-model-adjudication-rules.pdf> [<https://perma.cc/HL9N-MUFV>].

216. Kent H. Barnett, *Preface* to MODEL ADJUDICATION RULES, at iv (ADMIN. CONF. OF THE U.S. 2018), https://www.acus.gov/sites/default/files/documents/Model%20Adjudication%20Rules%209.13.18%20ACUS_0.pdf [<https://perma.cc/G6X4-UBQJ>].

217. MODEL ADJUDICATION RULES (1993), *supra* note 215, § 250.

218. *Model Adjudication Rules (2018 Revisions)*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/research-projects/model-adjudication-rules-2018-revisions> [<https://perma.cc/H2HM-CXFP>].

219. *Supra* text accompanying notes 41–42.

In 2018, ACUS released an updated revised version of the Model Adjudication rules.²²⁰ Again these rules were intended to apply to, inter alia, adjudications covered by the APA's rules.²²¹ And again, they contain a rule providing for summary decision, without regard to whether there are "sanctions" involved.²²²

* * *

This is not a comprehensive account of agencies using administrative summary judgment in formal proceedings resulting in sanctions, but it serves to illustrate the scope of the practice. If the legal arguments presented above are correct, all of these agency practices are unlawful.

IV. EXPLAINING THE PERSISTENCE OF ILLEGAL ADMINISTRATIVE SUMMARY JUDGMENT

I have argued that the APA prohibits summary dispositions of formal adjudications involving sanctions.²²³ But I have also shown that many agencies continue to do this.²²⁴ Why has the apparently illegal practice managed to survive for so long?

I have already flagged two important explanations:

First, as noted in Part II.C, contemporary lawyers and judges may find it impossible to believe that the 1946 Congress meant to require that agencies conduct in-person, oral hearings in certain classes of cases even when there was no genuine dispute of material fact. In fact, it's not only possible, it's the best interpretation. When the APA was drafted and enacted in the 1940s, many important U.S. jurisdictions explicitly allowed for summary judgment only in certain classes of cases, and prohibited courts from skipping over trials

220. *Supra* note 218.

221. *Id.* at 1.

222. *Id.* at 55.

223. *See supra* Part II.

224. *See supra* Parts I.C & III.

in all other types of cases.²²⁵ This practice has changed, and subject-matter restrictions on summary judgment are virtually unheard of.

Second, as discussed above in Part II.E and below in Part IV, the agencies, courts, and scholars that have embraced administrative summary judgment have apparently been convinced of the merits of the procedure based on a very simple argument that it promotes administrative efficiency without depriving anyone of meaningful procedural rights. But, on closer inspection, this simple and appealing argument does not hold up. There are reasons to worry that the procedure may be abused by agencies, may distort enforcement priorities, and may unfairly deprive some individuals of important procedural rights. There are a slew of unanswered questions about how administrative summary judgment *actually* shapes enforcement and adjudication.

This Part turns to offer two additional explanations for the persistence of administrative summary judgment in sanctions cases: (A) a common misperception about the “trans-substantive” nature of the APA’s rules governing formal adjudications; and (B) the changing norms of judicial review of agency action.

A. *The Myth of the Trans-Substantive APA*

Scholars often refer to the APA as a “trans-substantive” procedural statute.²²⁶ The truth is that while the APA is generally trans-

225. See *supra* Part II.C.

226. E.g., David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 1213 (2014) (“Congress, by a unanimous vote, passed the trans-substantive APA in 1946”); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1365 (2010) (discussing the “explicitly transsubstantive . . . federal Administrative Procedure Act (APA).”); Gillian B. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1898 (2015) (referring to the “trans-substantive APA”); Thomas W. Merrill, *Step Zero after City of Arlington*, 83 FORDHAM L. REV. 753, 759 (2014) (referring to “trans-substantive statutes like the Administrative Procedure Act”); Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 152 (2006) (referring to “the APA[] and other transsubstantive procedural statutes”); Michael Asimow, *Best Practices for Evidentiary Hearings Outside the Adminis-*

substantive, it also contains some important exceptions.²²⁷ The same is true of the APA's provisions governing formal adjudication; these are generally trans-substantive, but there are some limits.²²⁸

This paper brings one of these into focus: the APA allows agencies to move for summary judgment in some formal adjudications but not others, depending on the type of remedy at issue. Summary judgment is permitted in formal adjudications involving claims for money or benefits like SSA disability adjudications, but not in formal adjudications involving sanctions like SEC enforcement actions.

But this is not the only example of non-trans-substantive provisions in the APA. Below, this Part discusses a few other examples.

Overgeneralization about "trans-substantivism" of APA's formal adjudication procedures may help explain the puzzle at the heart of this paper. I have shown that the SEC relied on an illegal procedure for several decades in hundreds of cases without facing any serious challenge. No respondent ever raised Section 556(d) in a legal challenge—nor did any ALJ, commissioner²²⁹ or circuit court judge²³⁰ raise the issue *sua sponte*. The "summary disposition" rule

trative Procedure Act, 26 GEO. MASON L. REV. 923, 938 (2019) (referring to "trans-substantive statute[s] like the APA"). *But see* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 500 (2011) (surveying the proliferation "agency-specific" administrative law precedents and suggesting that "the universality of administrative law doctrine may not be as pervasive as is commonly assumed.").

227. Not unlike the FRCP. *See* Fed R. Civ. P. 9. I do not dispute that the APA is trans-substantive in the sense that it applies equally to enforcement matters filed by the SEC as to the FTC. Rather, I am showing that the APA is not trans-substantive in the sense that it does not apply equally to formal adjudications that involve "sanctions" as those that do not.

228. A related but distinct point is that most administrative adjudication is conducted outside the parameters of the APA's cross-cutting uniform rules. *See* Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351 (2019); Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749 (2020).

229. *Cf.* Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541 (2017).

230. *See supra* Part II.E.

went through numerous rounds of notice and comment,²³¹ but no commentator ever raised the issue of Section 556(d)—nor did (evidently) the SEC’s General Counsel.²³² The common over-generalization about the trans-substantive nature of the APA’s rules governing formal adjudications might provide a clue as to why the summary disposition procedure survived for so long without any serious legal challenge.

Identifying the special, differentiated treatment of “sanctions” cases under the APA is also relevant to active debates about the future of administrative adjudication. The independence of administrative adjudicators has been called into question by a series of recent events. First, the Supreme Court’s 2018 decision in *Lucia v. Securities and Exchange Commission*²³³ held that these ALJs were “Officers of the United States” within the meaning of the Constitution’s Appointments Clause,²³⁴ and therefore must be appointed directly by the “Head of the Department” — that is, the Commission itself — instead of other, less political actors.²³⁵ Second, and as predicted by the dissenting Justices,²³⁶ this holding catalyzed (ongoing) constitutional challenges to the statutory “for cause” removal protections that Congress afforded for ALJs to insulate them from political influence.²³⁷ Third, shortly after the *Lucia* decision, President Trump

231. *E.g.*, SEC Amendments to the Commission’s Rules of Practice, 81 Fed. Reg. 50211 (Sept. 26, 2016); SEC Rules of Practice, 60 Fed. Reg. 32738 (June 23, 1995).

232. *Cf. Office of the General Counsel, U.S. SEC. & EXCH. COMM’N*, <https://www.sec.gov/ogc> [<https://perma.cc/GG7E-HKMV>] (“The OGC Legal Policy Group provides legal . . . analysis and advice to the Commission . . . concerning the federal securities laws, *administrative laws*, and other applicable laws. The Group analyzes all . . . regulatory recommendations to the Commission from the operating divisions and offices.” (emphasis added)).

233. 138 S. Ct. 2044 (2018).

234. U.S. CONST. art. II, § 2, cl. 2.

235. *Id.*

236. *Id.* at 2057 (Breyer, J., concurring in the judgment in part and dissenting in part).

237. *E.g.*, *Cochran v. SEC*, 969 F.3d 507 (5th Cir. 2020), as revised (Aug. 12, 2020) (denying claims on jurisdictional grounds); *Gibson v. SEC*, 795 F. App’x 753 (11th Cir. 2019) (same).

issued an order eliminating the stringent competitive hiring rules and examinations for the hiring of ALJs that were designed to ensure that ALJs were picked based on their qualifications rather than their likelihood of favoring the agency.²³⁸

These events have led some to rethink the fundamentals of administrative adjudication. Some scholars have come to the conclusion that a system of administrative adjudication ought to treat *enforcement* matters differently than other types of adjudications (for example, those involving claims for money or benefits).²³⁹ This pa-

238. Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018).

239. Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 862 (2018) (proposing “that all the current ALJs assigned to agencies whose actions deprive a person of life, liberty, or property be defunded and that Congress should appropriate funds to create new Article III Administrative Law Courts, the judges of which should be nominated by the President and confirmed by the Senate” and clarifying that this proposal “would not apply to the hundreds of statutory ALJs and hearing examiners who decide Social Security or disability cases or who rule on tax and immigration claims” but rather those “in the EPA, the NLRB, the FCC, the FTC, FERC, the SEC, and OSHA”); Michael Greve, Remarks at Administrative Conference of the United States Symposium on Federal Agency Adjudication, Panel 4: Alternatives to Traditional Agency Adjudication, at 9:20-50 (Aug. 27, 2020), <https://www.acus.gov/meetings-and-events/event/symposium-federal-agency-adjudication> [<https://perma.cc/9MSZ-YR8X>] (proposing creation of a new “Administrative Court” with jurisdiction over agency “coercive interferences with private conduct—the FTC, the SEC, OSHA, the FCC, EPA, and the like—to the exclusion of tax matters, benefit determinations and rulemaking proceedings,” review of which would remain as it is today); Ronald Cass, Remarks at Administrative Conference of the United States Symposium on Federal Agency Adjudication, Panel 4: Alternatives to Traditional Agency Adjudication, at 41:50-42:50 (Aug. 27, 2020), <https://www.acus.gov/meetings-and-events/event/symposium-federal-agency-adjudication> [<https://perma.cc/9MSZ-YR8X>] (arguing that, outside of enforcement cases, it is good for agency heads to have direct authority over the adjudication system, but that “[t]here are some cases, however, where clearly we are dealing with questions of rights, where the government is seeking to enforce its view of what the law is against individuals, who do have private rights. . . . [These] enforcement actions by the government . . . are the sort of enforcement actions that really should be viewed as implicating private rights. They are decided sometimes by ALJs, sometimes by AJs, sometimes by other mechanisms within the government. I think that requires a very careful look because those sort of questions, that really are matters of right, ought to be decided by

per shows that the APA’s drafters generally agreed with this principle—that, within the domain of formal adjudications, the APA provided *additional* procedural rights for cases involving the imposition of “sanctions,” above and beyond what it required in other cases.

* * *

Defining “Adjudication”—The APA’s rules governing formal adjudications in Sections 556 and 557 apply to all hearings “required by statute to be determined on the record after opportunity for agency hearing.”²⁴⁰ But these rules do *not* apply to all hearings required by law to be “on the record.”²⁴¹ A hearing “on the record” is exempt from the APA’s requirements if it involves:

- (2) the selection or tenure of an employee, except a[n] administrative law judge . . . ;
- (3) proceedings in which decisions rest solely on inspections, tests, or elections;
- (4) the conduct of military or foreign affairs functions;
-
- (6) the certification of worker representatives.²⁴²

Separation of Functions—The APA mandates a separation of the prosecutorial from the adjudicatory functions of an agency in the context of formal adjudications, providing:

Article III courts.”); Michael B. Rappaport, *Replacing Agency Adjudication With Independent Administrative Courts*, 26 GEO. MASON L. REV. 811, 826–27 (2019) (proposing “administrative court regime” under which “agencies would make enforcement decisions, but the adjudication would be heard by independent courts” and excluding Social Security and Medicare adjudications).

240. 5 U.S.C. § 554(a) (2018).

241. *Id.*

242. *Id.*

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings.²⁴³

But this “separation of functions” requirement does not apply to *all* formal adjudications. The statute specifically exempts from this requirement those formal adjudications involving “applications for initial licenses” or “proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.”²⁴⁴

Recommended Decisions—The APA requires that, when an agency makes a decision in a formal adjudication “without having presided at the reception of evidence, the presiding employee . . . shall first recommend a decision.”²⁴⁵ However, this stringent requirement does not apply all formal adjudications. In cases involving “rule making or determining applications for initial licenses,” the agency “may issue a tentative decision” or another employee may recommend a decision.²⁴⁶

Taking away a License—The APA provides a special set of procedural rights for the subset of formal adjudications in which the agency is seeking to take away a license. 5 U.S.C. § 558(c) provides:

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and

243. *Id.* § 554(d).

244. *Id.*

245. *Id.* § 557(b)

246. *Id.* § 557(b)(1).

- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.²⁴⁷

The specific notice requirement and the opportunity to correct the wrongdoing are not available to respondents in all formal adjudications involving the imposition of “sanctions,” but only to the subset of cases involving the agency’s attempt to take away a license.

B. A New Paradigm of Judicial Review of Agency Action

The leading historian of the SEC, Joel Seligman, argues that the agency’s laws “endured as well as they did long after enthusiasm for the New Deal period’s policies generally had waned” because “the SEC has shown unusual prowess in exploiting the flexibility of the administrative process.”²⁴⁸ There are countless examples. Just months after the 1933 Securities Act was enacted, the SEC devised a “comment letter” process to advise companies on how to fix faulty disclosures without resorting to the exclusive (and very costly) statutory remedy of stop-order proceedings.²⁴⁹ Also early on, the agency devised the “no-action” letter process so that companies could request informal advice from the agency before taking an action that gets close to the line of legality.²⁵⁰ In the 1970s, the agency devised the “Wells” process to engage potential enforcement targets in dialogue prior to the commencement of formal enforcement proceedings.²⁵¹ In these cases and others, the SEC has gone outside of its specifically delegated statutory authority to

247. *Id.* § 558(c).

248. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE* 619 (3d ed. 2003).

249. *Id.* at 620; see also Alexander I. Platt, *Gatekeeping in the Dark: SEC Control Over Private Securities Litigation Revisited*, 72 *ADMIN. L. REV.* 27, 55–62 (2020) (providing an overview of the contemporary comment letter process).

250. SELIGMAN, *supra* note 248 at 620.

251. Paul S. Atkins & Bradley J. Bondi, *Evaluating the Mission: A Critical Review of the History and Evolution of the SEC Enforcement Program*, 13 *FORDHAM J. CORP. & FIN. L.* 367, 375–83 (2008).

develop new administrative techniques. Many of these innovations subsequently became fundamental parts of the securities enforcement landscape.

Summary disposition is another example of the SEC attempting to “exploit[] the flexibility of the administrative process.”²⁵² But this procedural innovation that played such a key (and often beneficial) role in the development of the U.S. securities regulation regime may no longer be possible. Historically, the agency benefitted from accommodating judicial constructions of the underlying statutory regime and a hefty amount of deference to the agency’s judgment as to what procedures were wise and best suited to administer the law. But courts today operate under a different paradigm. It goes by different names—Neoclassical Administrative Law,²⁵³ APA Originalism,²⁵⁴ APA Fundamentalism,²⁵⁵ Anti-Administrativism,²⁵⁶

252. SELIGMAN, *supra* note 248 at 619.

253. Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 898–99 (2020) (“The neoclassicist takes the APA and other organic statutes seriously and is inclined to reject judicial doctrines that depart from legislative instructions on point. . . . The neoclassicist will look to the original understanding of the APA and, in the event that the APA prescribes concrete rules of decision, favor treating those instructions as fixed, enduring law, not a springboard for common law that contradicts that entrenched understanding.”).

254. Bernick, *supra* note 125, at 841; Sunstein, *supra* note 89, at 1619–20; *see also* Michael E. Herz, *Breaking News: New Form of Superior Agency Guidance Discovered Hiding in Plain Sight*, JOTWELL (Feb. 16, 2017), <https://adlaw.jotwell.com/breaking-news-new-form-of-superior-agency-guidance-discovered-hiding-in-plain-sight/> [<https://perma.cc/ZUV6-4EEP>] (coining the term “APA Originalism”); *cf.* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 58 (“I am skeptical of efforts to broadly replace administrative common law with a textual and originalist approach to the APA” because “the original meaning of the APA was and remains contested.”); Daniel B. Rodriguez, *Bias in Regulatory Administration* 31–32 (Nw. Pub. L. Research Paper No. 19-14, 2019) (discussing whether Justice Kavanaugh was committed to “a novel version of so-called APA originalism”).

255. Sunstein, *supra* note 89, at 1634 n.94.

256. Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 38 (2017) (discussing the “Judicial Turn” at the core of anti-administrativist movement as “particularly evident in the efforts to replace interpretive deference with independent judicial judgment”).

Asymmetrical Formalism²⁵⁷—but the bottom line is that courts today are less likely to let agencies play fast and loose with their statutory authority, even where agencies have a very compelling policy-based rationale for doing so. Under this more stringent regime, the SEC’s program of summary disposition is unlikely to pass legal muster.

Given the SEC’s long and important history of exploiting the “flexibility” of its statutes and the administrative process, it is unsurprising that the agency appears to be struggling to adapt to the new more stringent regime of judicial review. A recent string of losses at the Supreme Court is a testament to this.²⁵⁸ Summary disposition seems like just one more SEC practice that may be felled by the shift to a more stringent and skeptical model of judicial review.

257. Daniel E. Walters, *Symmetry’s Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 484–85 (2020).

258. E.g., Dave Michaels, *Supreme Court Justices Indicate They May Further Narrow SEC’s Enforcement Authority*, WALL ST. J. (Mar. 3, 2020), <https://www.wsj.com/articles/supreme-court-justices-indicate-they-may-further-narrow-secs-enforcement-authority-11583265540> [<https://perma.cc/9L69-VEAD>] (noting that the SEC “has lost a string of important appeals before the high court”); see, e.g., *Liu v. SEC*, 140 S. Ct. 1936, 1947–49 (2020) (curtailing the agency’s ability to seek disgorgement); *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017) (finding that SEC disgorgement constituted a “penalty” and therefore a more stringent statute of limitations was applicable to these enforcement actions); *Gabelli v. SEC*, 568 U.S. 442, 454 (2013) (applying a more stringent statute of limitations to certain SEC enforcement actions); see also *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (finding the agency’s ALJ’s had been unconstitutionally appointed); Platt, *supra* note 45, at 462 (discussing various constitutional challenges to SEC enforcement provoked by Dodd-Frank); cf. Alexander I. Platt, *The SEC’s Proposal To Raise the § 13(f) Reporting Threshold Rests on a Misinterpretation of the Provision’s Legislative History*, YALE J. ON REG.: NOTICE & COMMENT (July 16, 2020), <https://www.yalejreg.com/nc/the-secs-proposal-to-raise-the-%C2%A7-13f-reporting-threshold-rests-on-a-misinterpretation-of-the-provisions-legislative-history-by-alexander-i-platt/> [<https://perma.cc/SFD5-KBUD>] (flagging legal error in SEC’s recent proposal to eliminate quarterly reporting for all but the biggest ten percent of institutional investment managers).

V. THE UNCERTAIN POLICY CASE FOR ADMINISTRATIVE SUMMARY JUDGMENT

There are also reasons to worry as a policy matter about how administrative summary judgment is being used by administrative agencies across the board. This Part reconstructs the policy arguments made in support of administrative summary judgment, articulates concerns with the procedure and shows why the conventional justifications are incomplete, and outlines some open questions for future research on administrative summary judgment.²⁵⁹

A. *Conventional Justifications for Administrative Summary Judgment*

Until the early 1970s, very few agencies used administrative summary judgment.²⁶⁰ This began to change after the publication of an article by Professor Ernest Gellhorn and William Robinson in the *Harvard Law Review* in 1971.²⁶¹ The article, presenting the results of a study sponsored by the Administrative Conference of the United States, urged agencies to “take a leaf from the federal rules of civil procedure” and use administrative summary judgment “to reduce delay.”²⁶² They argued that the statutory right to a hearing was no obstacle because “statutory . . . rights to a hearing should not be interpreted as prohibiting the use of summary judgment by an agency to eliminate futile evidentiary hearings.”²⁶³ The right to a hearing could be properly dispensed with, therefore, in those cases where “the absence of a hearing could not affect the decision,”²⁶⁴

259. This Part draws on Platt, *supra* note 45.

260. Gellhorn & Robinson, *supra* note 17, at 622–28.

261. Gellhorn & Robinson, *supra* note 17.

262. *Id.* at 612.

263. *Id.* at 620.

264. *Id.* at 617.

and “when the papers filed with the motion clearly reveal that an evidentiary hearing would serve no useful purpose.”²⁶⁵

Armed with a justification for dispensing with statutory hearing rights, agencies embraced administrative summary judgment. And, when challenged, courts upheld it based on the same rationale.²⁶⁶ They reasoned that holding a statutory hearing that would not enhance the accuracy of the outcome would be “strange,”²⁶⁷ a “waste [of] time,”²⁶⁸ would defy “[c]ommon sense,”²⁶⁹ and “serve no useful purpose,”²⁷⁰ and so such a design “cannot [be] impute[d] to Congress.”²⁷¹

265. *Id.* at 616.

266. *See* *Weinberger v. Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 621 (1973) (“If FDA were required automatically to hold a hearing for each product . . . even though many hearings would be an exercise in futility, we have no doubt that it could not fulfill its statutory mandate”); *Costle v. Pac. Legal Found.*, 445 U.S. 198, 215 (1980) (rejecting the requirement of a hearing in all cases except where the agency demonstrates a lack of genuine issue of material fact because this procedural requirement would “raise serious questions about the EPA’s ability to administer the . . . program.”); *Nat’l Indep. Coal Operators’ Ass’n v. Kleppe*, 423 U.S. 388, 399 (1976) (upholding regulations which keyed the statutory requirement of a hearing to a request for such a hearing in part where “[e]ffective enforcement of the Act would be weakened if the Secretary were required to make findings of fact for every penalty assessment including those cases in which the mine operator did not request a hearing and thereby indicated no disagreement with the Secretary’s proposed determination.”); *P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 605–07 (1st Cir. 1994) (“[S]ummary judgment often makes especially good sense in an administrative forum, for, given the volume of matters coursing through an agency’s hallways, efficiency is perhaps more central to an agency than to a court.”).

267. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 750 (6th Cir. 2004).

268. *United States v. Storer Broad. Co.*, 351 U.S. 192, 205 (1956).

269. *Veg-Mix, Inc. v. U.S. Dep’t of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987).

270. *Hess & Clark, Div. of Rhodia, Inc. v. FDA*, 495 F.2d 975, 985 (D.C. Cir. 1974).

271. *Weinberger*, 412 U.S. at 621; *see also* *P.R. Aqueduct & Sewer Auth.*, 35 F.3d at 606 (“Due process simply does not require an agency to convene an evidentiary hearing when it appears *conclusively* from the papers that, on the available evidence, the case only can be decided one way.” (emphasis added)); *Burnele v. Powell, Administratively Declaring Order: Some Practical Applications of the Administrative Procedure Act’s Declaratory Order Process*, 64 N.C. L. REV. 277, 284 (1986) (“[N]o good reason exists for proceeding with a formal hearing in the absence of any genuine issue of material fact.”); *id.* at 282 (administrative summary judgment “ensures that neither members of the public nor federal agencies are allowed to gain unfair advantages as a result of *meaningless*

This justification for administrative summary judgment implicitly reflects an economic view of civil procedure. Judge Posner set the terms in 1973, articulating the goal of procedure as the minimization of the sum of “error costs” and “direct costs.”²⁷² Though “error costs” is a capacious term, encompassing *all* social costs imposed by the adjudication, Posner traced these costs to “judicial error”—i.e., inaccurate adjudication.²⁷³ Others have followed this approach, emphasizing the tradeoff between procedural cost and outcome accuracy.²⁷⁴ Reframed in these terms, this justification for administrative summary judgment embraces it as a way to avoid time-consuming and expensive hearings wherever the benefits (reduced procedural costs) outweigh the costs (inaccuracy).²⁷⁵

procedural steps.” (emphasis added)); R. Cammon Turner, Note, *Streamlining EPA’s NPDES Permit Program With Administrative Summary Judgment: Puerto Rico Aqueduct & Sewer Authority v. Environmental Protection Agency*, 26 ENVTL. L.J. 729, 730 (1996) (administrative summary judgment “effectively resolve[s] disputes without expending valuable agency resources or infringing on a party’s statutory right to a hearing.”). D.C. Circuit Judge Harold Leventhal framed the point most colorfully: “[T]he right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing.” *Citizens for Allegan Cty., Inc. v. Fed. Power Comm’n*, 414 F.2d 1125, 1128 (D.C. Cir. 1969).

272. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400 (1973).

273. See *id.* at 401 (“[R]eduction of error is a goal of the procedural system” because such error is a “source of social costs.”); George J. Stigler, *The Optimum Enforcement of Laws*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 55, 56 (Gary S. Becker & William M. Landes eds., 1974) (“There is one decisive reason why the society must forego ‘complete’ enforcement of the rule: enforcement is costly.”).

274. See, e.g., Daniel Klerman, *The Economics of Civil Procedure*, 11 ANN. REV. OF L. & SOC. SCI. 353, 354 (defining “error costs” as efficiency losses caused by “inaccurate adjudication”). For a more nuanced view, see Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1186–87 n.536 (2001) (“Legal procedures that produce more accurate outcomes typically will lead to more desirable behavior” but “[w]e do not mean to suggest that effects on accuracy are the only relevant features of procedure besides cost.”).

275. Klerman, *supra* note 274, at 355 (“By terminating cases early, [dispositive motions] reduce direct costs, such as the cost of discovery and trial. Whether they increase error costs depends on the standards used. If motions are granted only when the probability that the plaintiff would prevail at trial is zero or very low, then motions increase error costs by little or nothing.”).

Courts that have upheld administrative summary judgment have also drawn on and expanded Gellhorn and Robinson's analogy to summary judgment in the civil context. One court explained:

Given that federal district courts can decide cases as a matter of law without an oral hearing when it is clear there are no genuine material disputes to be resolved in a trial, it would be bizarre if administrative agencies, which are in many respects modeled after the federal courts and which indeed often have more informal proceedings than federal courts, could not follow a similar rule.²⁷⁶

Another explained: "[S]ummary judgment is less jarring in the administrative context; after all, even under optimal conditions, agencies do not afford parties full-dress jury trials."²⁷⁷

B. Some Doubts About the Conventional Justification For Administrative Summary Judgment

The conventional justification for Administrative Summary Judgment articulated above is focused on decisions that an agency makes at the *individual* case level, analyzing whether an in-person hearing would be beneficial in the context of a particular case.²⁷⁸ Because there are many more possible violations than there are resources available to investigate and enforce them, a critically important function of agencies like the SEC is to choose which cases

276. *Crestview Parke Care Ctr. v. Thompson*, 373 F.3d 743, 750 (6th Cir. 2004) (citation omitted).

277. *P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994); *see also* *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621–22 (1973) ("If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment").

278. *See supra* Part I.A.

to pursue and which to ignore.²⁷⁹ Authorizing administrative summary judgment may make an agency more likely to pursue certain cases by making them more amenable to a cheap and easy resolution without the expense of a full hearing or trial.

A key question—one that is not addressed by administrative summary judgment’s proponents—is whether this shift in enforcement priorities is likely to improve or undermine effective enforcement. For an ideal public enforcer—that is, one who selects its portfolio of cases based completely on legitimate public policy goals—adding administrative summary judgment to its toolbox would facilitate the speedy resolution of some additional, worthy cases, effectively allowing the agency to expand its footprint. But we know that public enforcers do not always live up to this ideal—scholars have devoted thousands of pages to critiquing enforcement priorities of prosecutors and administrative agencies and calling attention to the perverse incentives that may skew these priorities away from the pursuit of the public interest.²⁸⁰

279. See e.g., Margaret H. Lemos, *Democratic Enforcement: Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 933–34 (2017) (“No public enforcers—at least not in the U.S.—have the resources to pursue every possible violation of the law. They have to pick and choose, to set priorities and goals.”).

280. For discussions focused on the SEC, see for instance Urska Velikonja, *Politics in Securities Enforcement*, 50 GA. L. REV. 17, 19–20 (2015) (“The ultimate result of congressional oversight during the last decade is an increase in enforcement targeting strict-liability violations and follow-on cases, obscured almost entirely by meaningless reporting of enforcement results—a result that both Congress and SEC leadership seem to be comfortable with, although it does not improve compliance with the law, and can produce embarrassing enforcement failures like Bernie Madoff’s Ponzi scheme.”); Urska Velikonja, *Reporting Agency Performance: Behind the SEC’s Enforcement Statistics*, 101 CORNELL L. REV. 901, 933–40 (2016) (similar); Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL’Y 639, 643–47 (2010); Jed S. Rakoff, *Is the SEC Becoming A Law Unto Itself?*, Keynote Address at PLI’s 46th Annual Securities Regulation Institute, at 10 (Nov. 5, 2014), <https://www.akingump.com/a/web/37251/Sec.Reg.Inst.final.pdf> [<https://perma.cc/D3ZE-5EPG>], (suggesting the SEC may be “tempted” to avoid hard cases in federal court to avoid the embarrassment of “well-publicized defeats”); and Alexander I. Platt, *The Non-Revolving Door*, J. CORP. L. (forthcoming Apr. 2021) (reviewing literature on how the SEC “revolving door” may skew its enforcement priorities).

Some enforcement agencies have particularly strong incentives to set priorities in a manner designed to please congressional overseers or the broader public at the expense of the agency's own expert policy judgment.²⁸¹ And these constituencies, in turn, may cause the agency to abuse administrative summary judgment in a way that undermines effective enforcement. For instance, under the leadership of Chair Mary Jo White, the SEC's Enforcement Division seemed to be trying to appease congressional overseers by deliberately maximizing the total number of enforcement actions it pursued during a given fiscal year, even though this statistic had no meaningful correlation to the actual efficacy of the enforcement program.²⁸² Administrative summary judgment would be a very useful tool for such an agency to rack up cheap and easy wins to build up the total number of cases filed—without actually contributing to overall effectiveness of the agency's enforcement program and perhaps even detracting from it by the misallocation of resources.²⁸³ Sure enough, the SEC's use of administrative summary judgment evidently peaked during the height of the SEC's "broken windows" enforcement strategy under Chair White.²⁸⁴ Even

281. *E.g.*, Platt, "Gatekeeping" in the Dark, *supra* note 249, at 43 (collecting sources).

282. *E.g.*, Platt, *Unstacking the Deck*, *supra* note 45, at 472–75. *But see* Hester M. Peirce, SEC Comm'r, Lies and Statistics: Remarks at the 26th Annual Securities Litigation and Regulatory Enforcement Seminar (Oct. 26, 2018), <https://www.sec.gov/news/speech/peirce-speech-lies-statistics-102618> [<https://perma.cc/BW8F-EPRP>] ("I commend Chairman Clayton and our co-directors of the Enforcement Division, Stephanie Avakian and Steven Peikin, for trying to lead the enforcement program in a direction that focuses on serious violations and deemphasizes penalties and case counts.").

283. The concern is that the agency's shift to low-impact cases comes at the expense of more serious ones. On the other hand, given that these cases are, by definition, cheap and easy to resolve, it may be that they did not meaningfully detract from the agency's prosecution and investigation of more serious matters. It is difficult—if not impossible—to prove or disprove these hypotheses. However, it does seem clear that the agency used the "broken windows" cases to undermine effective congressional oversight of the enforcement program by creating a false sense of productivity based on the raw number of cases filed.

284. *Supra* Part I.C.

though each individual case under the program may well have satisfied the Posnerian equation (reduced procedural cost without sacrificing accuracy), the overall result is not captured by that narrow analysis—a change in the composition of the types of cases that the agency brings in the first place.

Other departures from the idealized implementation of administrative summary judgment posited by its proponents are also possible. While the conventional justification implicitly assumes that administrative law judges will cabin administrative summary judgment to appropriate cases, there are reasons to worry.²⁸⁵ Administrative prosecutors have a structural interest in pushing for the broadest possible domain for summary judgment. The fact that they appear in every case may create a repeat player effect, and give them the ability to “play for rules” — that is, select cases strategically to advance more permissive rulings on the availability of administrative summary judgment.²⁸⁶

285. For discussion of mounting concerns regarding ALJ independence after *Lucia*, see Kent H. Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695 (2020) and Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39 (2020).

286. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 100–01 (1974); see also Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1704 (1996) (“[A]ctors who benefit more from inefficient rules than from efficient rules have every incentive to litigate the latter while settling disputes arising under the former. . . . [There is] ample reason to believe that repeat players can exploit the institutional constraints binding courts in order to effect doctrinal changes that redistribute wealth to them.”). Galanter focused on ordinary civil litigation where certain parties tend to appear in different cases in similar roles. Others have developed the argument further—tracing certain developments in civil procedure to the strategic advantages of “repeat players.” See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010) (discussing motions to dismiss); Samuel Issacharoff & George Loewenstein, *Second Thoughts about Summary Judgment*, 100 YALE L.J. 73 (1990) (summary judgment); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 166–67 (2002) (“Procedural rule-making has become another arena to be captured by institutional interests. The effects of repeat-player defendants have been tracked in the limitations imposed on discovery and in the promotion of non-court based decisionmaking . . .”). There is an even

The development of the doctrine on use of SEC summary disposition in follow-on cases provides a case in point. Follow-on cases involve a respondent who has already been found liable for a securities violation in some other forum.²⁸⁷ The SEC then brings an action to impose a separate penalty.²⁸⁸ These may be severe, including monetary fines and lifetime bars from the industry.²⁸⁹ In exercising their discretion to choose an appropriate punishment, SEC's ALJs are required to weigh various factors including "the sincerity of the defendant's assurances against future violations," "the degree of scienter involved," "the defendant's recognition of the wrongful nature of his conduct," and "the likelihood of future violations."²⁹⁰ These factors seem to be exactly the kind of issues that an in-person hearing would be helpful to elucidate: they require individualized credibility assessments and investigation into facts beyond those required to establish the underlying violation.²⁹¹ Nevertheless, a few years after the summary disposition rule was created in 1995, SEC prosecutors began seeking summary disposition in follow-on actions. The Commission confronted the question for the first time in 2002.²⁹² Respondent John Brownson had already pleaded guilty to criminal securities fraud charges when the Enforcement Division commenced an AP, based on the same conduct leading to his guilty

stronger basis to suppose it is true in the administrative context, where the government always appears in the same role.

287. See Platt, *supra* note 45, at 467.

288. *Id.*

289. For a review of SEC Bars, see James Fallows Tierney, *Reconsidering Securities Industry Bars* (Sept. 15, 2020) (unpublished manuscript) (on file with author).

290. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979) (quoting *SEC v. Blatt*, 583 F.2d 1325, 1334 n.29 (5th Cir. 1987)), *aff'd on other grounds*, 450 U.S. 91 (1981).

291. Indeed, the progenitors of the conventional justification for administrative summary judgment, Gellhorn and Robinson, proposed restrictions on administrative summary judgment in cases where "motive and intent play leading roles" or which "involve[d] a question of witness credibility." Gellhorn & Robinson, *supra* note 17, at 614 n.9, 618.

292. See Brownson, Exchange Act Release No. 34-46161, 77 SEC Docket 3097, 3097 (July 3, 2002).

plea, seeking to bar him from associating with any broker or dealer.²⁹³ The Division moved for summary disposition, and the ALJ granted the motion.²⁹⁴ Brownson appealed to the Commission, claiming he was entitled to present his evidence regarding the various penalty factors in a live, oral hearing.²⁹⁵ The Commission sided with its prosecutors.²⁹⁶ It conceded that "[s]ummary disposition may not be appropriate in every case," since some follow-on respondents "may present genuine issues with respect to facts that could mitigate his or her misconduct" pursuant to the public interest factors, but held that Brownson (who was a pro se respondent) had "wholly fail[ed] to specify" what evidence he expected to present "or explain how it would establish circumstances, such as rehabilitation or mitigating factors that would counter a determination that it is in the public interest to bar him."²⁹⁷ This was hardly a blanket approval. Nevertheless, SEC prosecutors ran with it, and (with ALJ acquiescence) began systematically dispensing with hearings in follow-on actions. And, in a 2007 decision, when the Commission considered the issue again, it established a full-blown *presumption in favor of summary disposition* for follow-on proceedings.²⁹⁸ Some of these cases may fail the Posnerian equation—the reduction in procedural costs in these cases may well come at the expense of accuracy.

Further, the conventional justification for administrative summary judgment rests on a technocratic tradeoff between accuracy

293. *Id.* at 3097–98.

294. *Id.* at 3098.

295. *Id.*

296. *Id.* at 3099.

297. *Id.* at 3099, n.12.

298. See Seghers, Investment Advisers Act Release No. IA-2656, 91 SEC Docket 1945, 1949 (Sep. 26, 2007) ("For a follow-on proceeding, summary disposition may be inappropriate in certain rare circumstances when 'a respondent may present genuine issues with respect to facts that could mitigate his or her misconduct.'") (quoting *Brownson*, 77 SEC Docket at 3099 n.12)).

and the costs of adjudication; when a costly hearing would not enhance accuracy, the agency can skip it, regardless of what the statute says. But administrative procedure is not just a machine to maximize administrative efficiency. Among other values, administrative procedure serves as a key mechanism that Congress uses to control executive branch agencies.²⁹⁹ Authorizing agencies to skip over statutorily mandated hearings *undermines* that control.³⁰⁰

The conventional justification for administrative summary judgment also relies on a flawed analogy between administrative and civil variants of summary judgment—if the procedure is good enough for federal court, then surely it is good enough for administrative adjudication. First, as just discussed, administrative procedure serves a distinct political function—accountability to Congress—for which there is no analogue in the context of civil procedure. Second, some features of administrative adjudication arguably call for *more* protective procedures than civil litigation, not less. Article III judges might well be reasonably trusted to wield the power of summary judgment, which requires making a decision with less information than after a full blown hearing, without entailing that ALJs be similarly trusted.³⁰¹ Moreover, parties subjected to formal APA hearings may not have access to the full panoply of discovery rights available in federal court, and without effective discovery, a party opposing an agency’s motion for summary judgment is at a disadvantage.³⁰² Finally, the analogy to the civil motion fails because formal adjudications involving sanctions may bear a

299. See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 94 (1992); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244 (1987); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 443 (1989).

300. Platt, *supra* note 45, at 441.

301. See *id.* at 446–47.

302. See *id.* at 447.

closer resemblance to criminal prosecutions than civil proceedings.³⁰³ While ALJs do not have the power to incarcerate, they do hand out significant penalties,³⁰⁴ including (in the case of the SEC), lifetime bars on individuals from participating in an entire area of the economy.³⁰⁵ For criminal sentencings, most jurisdictions recognize a defendant's right of allocution.³⁰⁶ Depriving an administrative defendant of his statutory right to face the judge who will impose his "sentence" conflicts with broadly accepted norms.³⁰⁷

Even assuming the analogy between civil and administrative summary judgment was airtight, this would hardly provide a complete policy justification for the latter. For generations, scholars have raised a host of concerns about FRCP 56, many of which might present parallel worries about administrative summary judgment: for example, that it might discourage settlement,³⁰⁸ fundamentally alter the balance of the underlying procedural regime in favor of

303. See, e.g., Steven R. Glaser, *Statutes of Limitations for Equitable and Remedial Relief in SEC Enforcement Actions*, 4 HARV. BUS. L. REV. 129, 130–31 (2014).

304. The SEC would object to the terminology "penalty." See *id.* at 133. Officially, bars are supposed to be "remedial" not to penalize the respondent. See *id.* at 146.

305. See Tierney, *supra* note 289, at 1–2.

306. 6 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 26.4(g), at 779–80 (3d ed. 2007) (collecting sources).

307. Cf., e.g., Arthur F. Matthews, *Litigation and Settlement of SEC Administrative Proceedings*, 29 CATH. U. L. REV. 215, 259–60 (1980) ("Since the Commission must tailor its sanction to comply with public interest criteria, character witness testimony can constitute a crucial underpinning of a respondent's trial strategy. In this respect, trial of the administrative proceeding resembles criminal litigation much more than routine civil litigation.").

308. E.g., John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 547 (2007). But see Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 697 (2012).

one party,³⁰⁹ impose heavy costs on adjudicators,³¹⁰ and put too much weight on efficiency and not enough on other important procedural values.³¹¹

C. *Some Open Questions On Administrative Summary Judgment*

Notwithstanding the confident statements of administrative summary judgment's promoters, the true impact of the procedure in the enforcement context is actually complicated and uncertain.

The practice of administrative summary judgment has not been subject to comprehensive study in the fifty years since the Administrative Conference study by Gellhorn and Robinson.³¹² It is time to revisit the issue. Future research might examine how ASJ has been actually implemented by analyzing the procedure "on the ground" by agencies through qualitative legal analysis of agency rules, guidance (for example, enforcement manuals), filings, adjudicatory decisions, quantitative analysis of administrative filings and decisions, and interviews with current and former agency personnel. Researchers might also analyze the impact of ASJ on agencies themselves (including on their enforcement priorities and the

309. Bronsteen, *supra* note 308, at 547; Issacharoff & Loewenstein, *supra* note 286, at 103; Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1914 (1998); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1132 (2003). These concerns are subject to empirical debate. Compare Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 896 (2007), with Jonah B. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663, 1673 (2014).

310. Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 178–79 (2007).

311. Miller, *supra* note 309, at 1048.

312. Summary Decision in Agency Adjudication (Recommendation 70–3), 38 Fed. Reg. 19,785 (July 23, 1973) (Administrative Conference of the United States); Gellhorn & Robinson, *supra* note 17.

In this article and a prior one, I looked at the SEC's use of Summary Disposition, but to my knowledge there is no similar study of any other agency, much less any effort to examine ASJ more globally.

types of cases pursued) as well as on the private parties who appear in agency proceedings.

There are many open questions for future researchers to address, including the following:

1. *SUBSTANTIVE LIMITS*—Writing in 1971, Gellhorn and Robinson understood that summary judgment under FRCP 56 was categorically unavailable in certain cases, including those turning on “novel or significant” legal questions,³¹³ on “policy questions of first impression or public importance,”³¹⁴ or on an individual’s state of mind.³¹⁵ Their endorsement of ASJ was expressly contingent on ASJ being subject to parallel limitations.³¹⁶ Since Gellhorn and Robinson’s Report, however, many of these boundaries on summary judgment in federal court have eroded,³¹⁷ and there is reason to believe that at least some agencies have similarly broadened the applicability of ASJ beyond the domain originally envisioned by Gellhorn and Robinson. For instance, as discussed above, the SEC has made frequent use of ASJ to determine what penalty should be imposed on a defendant—an issue that, by law, turns (in part) on the party’s state of mind.³¹⁸

OPEN QUESTION: What, if any, substantive limitations have agencies imposed on the use of ASJ?

313. Gellhorn & Robinson, *supra* note 17, at 614.

314. *Id.* at 618.

315. *Id.* at 614.

316. *Id.* at 614, 616, 618, 631.

317. For example, fifteen years after Gellhorn and Robinson’s report, the Supreme Court issued a “trilogy” of decisions that have been understood as encouraging broader use of Summary Judgment in federal litigation. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *see, e.g., Issacharoff & Loewenstein, supra* note 286, at 73 (arguing that the Supreme Court’s “trilogy” “significantly expanded the applicability of summary judgment”).

318. Platt, *supra* note 45, at 480–83, 489.

2. *PROCEDURAL PREREQUISITES*—Gellhorn and Robinson defended ASJ against charges of unfairness by defining several procedural prerequisites that must be in place in order for an agency to use the procedure. For instance, they suggested that an agency should not use ASJ when the defendant or respondent was not represented by counsel because “summary disposition by motion could take unfair advantage of a party's lack of legal training.”³¹⁹ They also suggested ASJ should be unavailable where the defendant did not have a “sufficient opportunity to obtain defensive facts” through discovery.³²⁰ But not all agencies have implemented these procedural limitations. For instance, the SEC has used ASJ extensively against unrepresented defendants.³²¹

OPEN QUESTION: What, if any, procedural prerequisites have agencies incorporated into ASJ practice and procedure?

3. *SYMMETRY*—Gellhorn and Robinson insisted that ASJ must be “double-edged”—that is, it must be available not only to agencies, but to private parties as well.³²² However, even where a procedure is technically available to private parties, as a practical matter it may not be truly available. For instance, in a prior article, I showed that although the SEC’s rule authorized “any party” to move for summary disposition, between 1996 and 2014, defendants won just five motions for summary disposition, while the Agency’s Enforcement Division won 186.³²³

319. Gellhorn & Robinson, *supra* note 17, at 617–18.

320. *Id.*

321. Platt, *supra* note 45, at 478.

322. Gellhorn & Robinson, *supra* note 17, at 619.

323. Platt, *supra* note 45, at 466; *see also id.* at 479 (quoting the SEC’s Chief ALJ at a hearing in 2014 explaining that the Commission “does not want motions for summary disposition granted” in favor of defendants “because you’re second guessing their decision that the case needs to get set down for hearing and that there is a legal basis for it”).

OPEN QUESTION: To what extent is ASJ used offensively (by agencies) and defensively (by private parties)? What are the explanations for any asymmetry?

4. *DELAY*—Reducing delay in the administrative process was the primary goal articulated by both ACUS and Gellhorn and Robinson in endorsing ASJ.³²⁴ But Gellhorn and Robinson also recognized that ASJ could itself become a source of additional delay, particularly when combined with a right of interlocutory appeal.³²⁵ Some agencies have adopted procedures designed to minimize the risk that ASJ would cause additional delay. For instance, the FTC has provided for certain time-sensitive dispositive motions to be made directly to the Commission rather than the ALJ in the first instance.³²⁶ The SEC requires a defendant to obtain “leave” from the ALJ before moving for summary disposition in certain cases.³²⁷ And the FCC permits the ALJ to “take any action deemed necessary to assure that summary decision procedures are not abused” including by ruling “in advance of a motion that the proceeding is not appropriate for summary disposition,” and by referring frivolous

324. The opening sentence of ACUS' Recommendation 70-3 reads as follows: “Delays in the administrative process can be avoided by eliminating unnecessary evidentiary hearings where no genuine issue of material fact exists.” Summary Decision in Agency Adjudication (Recommendation 70-3), 38 Fed. Reg. 19,785 (July 23, 1973). The opening sentence of Gellhorn and Robinson's report reads as follows: “Delay is widely acknowledged as a major inadequacy of the administrative process.” Gellhorn & Robinson, *supra* note 17, at 612.

325. Gellhorn & Robinson, *supra* note 17, at 625 (“Requiring the submission of all facts and arguments in written form when the case is complicated and the evidence is voluminous would probably only introduce further delay into many agency procedures.”); *id.* at 627 (criticizing the FTC's practice of reviewing almost all interlocutory decisions appealed by disappointed parties which “may ensure that summary decision motions will become the latest sport of attorneys seeking delay.”); *id.* at 629 n.88 (“unless interlocutory review is restricted, the summary decision rule could readily become another device for delay”).

326. 16 C.F.R. § 3.22 (2020).

327. 17 C.F.R. § 201.250(c) (2020).

and bad faith motions to the Commission for possible disciplinary action against the filing attorney.³²⁸

OPEN QUESTION: Has ASJ been successful at reducing delay in the administrative process? What procedural adaptations have individual agencies put in place to minimize the potential for additional delay?

5. *SHAPING ENFORCEMENT PROGRAMS*—Gellhorn and Robinson were focused exclusively on ASJ’s ability to help an agency quickly resolve the cases it has *already* decided to bring.³²⁹ They overlooked the possibility that the availability of ASJ could impact the types of cases that the agency brings in the first instance. As discussed above, there is reason to suspect that the availability of ASJ does affect the types of cases an agency chooses to initiate.³³⁰ In a regime without ASJ, enforcement is expensive: there are substantial fixed costs for each litigated proceeding, because the respondent will be entitled to an oral hearing before an ALJ regardless of the complexity of a case. The agency will therefore be disinclined to risk scarce resources on low-level cases. Even if many of them will settle, the few that do not will prove not worth the procedural costs. ASJ allows the agency to quickly dispose of the easiest cases without the cost of a hearing even where the defendant refuses to settle. By lowering the procedural costs of a given action, ASJ essentially empowers the agency to *process* cases, rather than *adjudicate* them. ASJ makes enforcement cheaper, and thereby makes easy but trivial cases much more attractive because it allows the agency to match the procedural cost with the significance of the action. For example,

328. 47 C.F.R. § 1.251 (2020).

329. Gellhorn & Robinson, *supra* note 17.

330. *See supra* note 273.

as shown above, the SEC's well-publicized shift to a "Broken Windows" enforcement program under Chair Mary Jo White³³¹ was facilitated by an expansive use of ASJ.³³²

OPEN QUESTION: How has the availability of ASJ shaped agencies' enforcement programs by impacting the types of cases the agency brings in the first instance?

CONCLUSION

The SEC and other agencies are using administrative summary judgment to impose sanctions on defendants in formal administrative adjudications without conducting any in-person, oral hearing. This practice is prohibited. The plain text of Section 556(d) of the APA, the legislative history of the provision, and the contemporaneous legal practice all indicate that Congress permitted agencies to skip over the in-person hearing only in a subset of formal adjudications—those involving "rule making or determining claims for money or benefits or applications for initial licenses"—and not those involving the imposition of "sanctions." The judicial opinions that have upheld administrative summary judgment in sanctions cases are unpersuasive because they fail to confront this provision or its historical context.

Proponents' attempts to justify the procedure in an easy appeal to administrative efficiency fall short because (inter alia) these arguments fail to account for the ways the procedure may be (and seems to already have been) used to skew enforcement priorities, undermine congressional control of administrative agencies, and impair important procedural rights for some defendants.

331. *E.g.*, Mary Jo White, Chair, Sec. and Exch. Comm'n, Remarks at the Securities Enforcement Forum (Oct. 9, 2013) (announcing a new enforcement program modeled after the "broken windows" theory of policing—that is, the idea that "when a broken window is not fixed, it 'is a signal that no one cares, and so breaking more windows costs nothing.'" (quoting George L. Kelling & James Q. Wilson, *Broken Windows: The police and neighborhood safety*, ATL. MONTHLY, Mar. 1982, at 29)).

332. See sources cited *supra* note 57; *supra* Figure 1.

APPENDIX A
SEC ENFORCEMENT STATUTES THAT TRIGGER APA FORMAL AD-
JUDICATION RULES

PROVISION	TRIGGER FOR APA FORMAL ADJUDICATION
Exchange Act § 12(j)	The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, <i>ON THE RECORD AFTER NOTICE AND OPPORTUNITY FOR HEARING</i> , that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder.
Exchange Act § 15(b)(4)	The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, <i>ON THE RECORD AFTER NOTICE AND OPPORTUNITY FOR HEARING</i> , that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer . . .
Exchange Act § 15(b)(6)(A)	With respect to any person who is associated, who is seeking to become associated, or, at the time of the alleged misconduct, who was associated or was seeking to become associated with a broker or dealer, or any person participating, or, at the time of the alleged misconduct, who was participating, in an offering of any penny stock, the Commission, by order, shall censure, place limitations on the activities or functions of such person, or suspend for a period not exceeding 12 months, or bar any such person from

	being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds, <i>ON THE RECORD AFTER NOTICE AND OPPORTUNITY FOR A HEARING</i> , that such censure, placing of limitations, suspension, or bar is in the public interest and that such person . . .
Exchange Act § 17A(c)(3)	The appropriate regulatory agency for a transfer agent, by order, shall deny registration to, censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding 12 months, or revoke the registration of such transfer agent, if such appropriate regulatory agency finds, <i>ON THE RECORD AFTER NOTICE AND OPPORTUNITY FOR HEARING</i> , that such denial, censure, placing of limitations, suspension, or revocation is in the public interest and that such transfer agent, whether prior or subsequent to becoming such, or any person associated with such transfer agent . . .
Exchange Act § 17A(c)(4)(C)	The appropriate regulatory agency for a transfer agent, by order, shall censure or place limitations on the activities or functions of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with the transfer agent, or suspend for a period not exceeding 12 months or bar any such person from being associated with any transfer agent, broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or nationally recognized statistical rating organization, if the appropriate regulatory agency finds, <i>ON THE</i>

	<i>RECORD AFTER NOTICE AND OPPORTUNITY FOR HEARING</i> , that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has . . .
Investment Advisers Act § 203(e)	The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any investment adviser if it finds, <i>ON THE RECORD AFTER NOTICE AND OPPORTUNITY FOR HEARING</i> , that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated . . .
Investment Advisers Act § 203(f)	The Commission, by order, shall censure or place limitations on the activities of any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding 12 months or bar any such person from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, if the Commission finds, <i>ON THE RECORD AFTER NOTICE AND OPPORTUNITY FOR HEARING</i> , that such censure, placing of limitations, suspension, or bar is in the public interest and that such person has . . . <i>CASES: Steadman v. SEC, 450 U.S. 91 n.13 (1981).</i>

Investment Company Act § 9(b)	CASES: <i>Steadman v. SEC</i> , 450 U.S. 91 n.13 (1981).
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JOHN ADAMS, LEGAL REPRESENTATION, AND THE “CANCEL CULTURE”

EUGENE SCALIA*

We recently celebrated the 100th anniversary of Justice Holmes’s famous articulation of the value of free speech in his dissent in *Abrams v. United States*.¹ The First Amendment embodies the view, Holmes wrote, that “the ultimate good desired is better reached by free trade in ideas.”² It is “the theory of our Constitution” that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”³

Now, I admit to some doubt that fundamental truths are established in the same manner as the value of pork bellies. But Justice Holmes was right that the free exchange of ideas is at the core of the First Amendment and at the heart of our democratic government. And yet it is disfavored in some quarters today. That is most apparent at colleges and universities where conservative speakers have been disinvited, banned, assaulted, and—when allowed to speak—accused of harming students merely by expressing ideas

* Secretary of Labor. The following is an excerpt from Secretary Scalia’s address at the 2019 Federalist Society’s National Lawyers Convention. It has been edited for length and clarity.

1. 250 U.S. 616 (1919).

2. *Id.* at 630 (Holmes, J., dissenting).

3. *Id.*

that run counter to some students' preconceptions.⁴ This intolerance is not isolated to our universities; it is a broad trend, so much so that it has drawn criticism from former President Obama.⁵

Intolerance and pressure to suppress ideas that may be unwelcome to some poses a special threat to the legal profession. One of the great traditions of the profession is respect for the right to representation of those with whom we disagree, and even to undertake that representation ourselves. John Adams's defense of the British soldiers charged with the Boston Massacre is one of the Nation's most important stories about the practice of law. Adams later described his defense of the soldiers as "one of the most gallant, generous, manly, and disinterested actions of my whole life."⁶

4. See, e.g., Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, THE ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/> [<https://perma.cc/DE9G-FJNH>] (recounting how student riots prevented Charles Murray from speaking and sent a Middlebury professor to the hospital); Morgan Baskin, *Cal State L.A. cancels conservative speaker, speaker coming anyway*, USA TODAY (Feb. 24, 2016), <https://www.usatoday.com/story/college/2016/02/24/cal-state-la-cancels-conservative-speaker-speaker-coming-anyway/37413335/> [<https://perma.cc/XDA8-3MNZ>] (Ben Shapiro's invitation was revoked by California State University Los Angeles after students and faculty complained "Shapiro's remarks would promote 'racist, classist, misogynist, sexist, homophobic' speech."); Kristina Sgueliglia, *Condoleezza Rice declines to speak at Rutgers after student protests*, CNN (May 5, 2014), <https://www.cnn.com/2014/05/04/us/condoleezza-rice-rutgers-protests/index.html> [<https://perma.cc/GN8C-35JM>] (Condoleezza Rice declined to speak "at the Rutgers University commencement this year, following student protests against her appearance.").

5. See Ashe Schow, *Obama defends free speech in comment on campus protests*, WASH. EXAMINER (Nov. 16, 2015), <https://www.washingtonexaminer.com/obama-defends-free-speech-in-comments-on-campus-protests> [<https://perma.cc/W5E3-6AWR>] ("I've heard of some college campuses where they don't want to have a guest speaker who is too conservative or they don't want to read a book if it has language that is offensive to African-Americans or somehow sends a demeaning signal toward women. I've got to tell you, I don't agree with that, either. I don't agree that you, when you become students at colleges, have to be coddled and protected from different points of view.")

6. DAVID MCCULLOUGH, JOHN ADAMS 68 (2001).

Adams was not our most modest Founder. But on this he was right. It is appropriate, admirable, and necessary for lawyers to take on clients and advance positions that may offend some observers; in this sense lawyers have a professional commitment to the free trade in ideas praised by Justice Holmes. They should be among its staunchest defenders and should recognize, too, in Justice Jackson’s words, that the “freedom to differ is not limited to things that do not matter much.”⁷

There are growing indications, however, that our most powerful law firms have become uncomfortable with this commitment. Last term the Supreme Court decided the “DACA” case, concerning President Trump’s cancellation of the Obama Administration program under which certain young people who entered the country illegally received forbearance from deportation.⁸ By my count, twenty-five large law firms filed amicus briefs opposing the President’s action, on top of the three large firms representing the plaintiffs. Not a single large firm filed a brief supporting the Administration’s position.

Similarly, in the same term, the Court decided a case concerning whether Title VII’s prohibition of sex discrimination includes discrimination based on sexual orientation.⁹ Around twenty large law firms filed amicus briefs supporting plaintiffs in a broad reading of Title VII; not a single large firm filed a brief supporting the defendant.

As should be apparent from my remarks thus far, I have no objection to any of these firms providing the representation they did. I congratulated colleagues at my former firm on their successes in left-of-center representations; I may have disagreed with their cli-

7. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

8. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019).

9. *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019).

ents and legal arguments, but I respected their lawyering and freedom to take the matter on.¹⁰ My concern is not the particular position taken by any individual firm in any specific case, but the complete absence of any large firm on the other side of either of those two recent Court cases, and a similar imbalance in other cases involving hot-button issues.

Everyone familiar with the practice of law knows that these lopsided representations had nothing to do with the legal merits of the two cases, or an absence of lawyers at large firms who would have been interested in representing a client on the other side. There are lawyers in large firms who would have welcomed the opportunity to file a brief supporting the government's position in the DACA case or supporting the defendant employer in the Title VII case.

One factor preventing that, in these and other cases I believe, is self-censorship. Elite law firms are hesitant to let their lawyers get involved in cases that might generate criticism from the left or that conflict with the views many lawyers in the firm hold personally. Second, and related, firms fear repercussions from certain well-heeled corporate clients if they take positions disfavored by progressives. And sadly, there's reason for that concern. Some years ago, a prominent law firm was pressured by clients to end its representation of the House of Representatives in connection with the Defense of Marriage Act. To his credit, former Solicitor General Paul Clement, the lawyer for the House, left the firm in response.

In the aftermath of that episode, I believe that firms are even more hesitant to get involved in high-profile, controversial cases taking right-of-center positions. Today, it is difficult for certain clients to obtain representation from our top law firms because the firms fear repercussions for doing so. Fortunately, smaller, boutique litigation

10. These remarks should not, therefore, be construed as a criticism of that firm, which represented some of the DACA plaintiffs.

firms often step in to provide representation. But it remains troubling that the largest law firms increasingly shrink from representing clients in right-of-center positions in controversial cases. John Adams would be concerned by this trend, and it should trouble the legal profession too.

Lawyers should be leading defenders of Justice Holmes's vision of a free trade in ideas. Law firms should pride themselves, as they have in the past, on representing people and positions that are disfavored in some quarters. They should educate the public that a firm's representation of a particular client or its presentation of a particular position does not necessarily reflect its lawyers' personal views, much less the position of the firm itself. And firms should staunchly push back on clients who seek to judge or muscle them because of the firm's representation of another client.

Corporate executives cannot be expected to know, respect, or defend the values of the legal profession. That is the role of members of the bar. Firms therefore must explain to clients that no single representation defines the firm. The firm will allow its lawyers to provide pro bono representation to murderers without approving of murder. Its lawyers will represent companies charged with securities violations without approving of defrauding widows and orphans. And its lawyers will represent the Little Sisters of the Poor without, heaven forbid, accepting the teachings of the Catholic Church.

This independence of the lawyer from his client is integral to the freedom and autonomy that are among the privileges of private practice, and it is essential to lawyers' effective performance of their role in our system of justice. Among other things, it facilitates firms' representation of corporate clients accused of troubling misconduct. Today, a corporation accused of environmental crimes objects to a lawyer at its outside law firm filing a brief in support of the unborn. Tomorrow, why can't someone schooled in today's cancel

culture use the same logic to attack the firm for defending that company's environmental depredations?¹¹ To answer, "this is different—we profit from this work," is not going to satisfy critics in a culture that devalues the First Amendment, and which has lost sight of the special place and independence of members of the bar. Instead, firms must be prepared to explain that attorneys at the firm represent diverse clients advancing a range of positions, and positions taken on behalf of a client are not thereby the position of the firm. Rather, representing a person with whom we may disagree is a hallowed, essential tradition of the profession.

* * *

A central reason many of us attend meetings like this is the Federalist Society's commitment to the principle I've been discussing: the free exchange of competing ideas. As has been observed in the past, if this were an organization dedicated to promoting one single narrow-minded view of the law, it invites the wrong people to come talk. I hope that when you return home, each of you has occasion to promote these First Amendment principles within our profession as a whole.

11. See Umair Irfan, *The surprising protest of Exxon's law firm at Harvard Law*, VOX (Jan. 16, 2020), <https://www.vox.com/2020/1/16/21067763/harvard-law-climate-protest-exxon-paul-weiss> [<https://perma.cc/UM8P-RJTL>] ("A group of Harvard Law School students on Wednesday shouted down speakers and stalled a campus recruitment dinner hosted by a major law firm that represents fossil fuel interests in climate change lawsuits.").

***PARENS PATRIAE* AND STATE ATTORNEYS GENERAL: A SOLUTION TO OUR NATION'S OPIOID LITIGATION?**

State attorneys general have tried to take the lead in responding to the national opioid crisis by suing pharmaceutical companies and distributors on behalf of their states' citizens.¹ An attorney general's standing to bring these suits relies on the common law doctrine of *parens patriae*, which allows a state to assert "quasi-sovereign interest[s]" in a judicial forum, including "the health and well-being—both physical and economic—of its residents."² Several state and federal laws codify this concept in particular areas of the law, such as antitrust, by explicitly providing for *parens patriae* actions.³ But on the whole, the doctrine's precise boundaries remain ill-defined.⁴

Recently, however, two state attorneys general invoked *parens patriae* in petitions seeking to halt opioid lawsuits brought by local governments. Their petitions argued that local government lawsuits illegally impaired each state's ability to protect its citizens

1. See, e.g., Berkeley Lovelace Jr., *Nearly every US state is now suing OxyContin maker Purdue Pharma*, CNBC (June 6, 2019, 1:47 PM), <https://www.cnbc.com/2019/06/04/nearly-every-us-state-is-now-suing-oxycontin-maker-purdue-pharma.html> [https://perma.cc/2G34-TX4N]; Sara Randazzo, *In the Opioid Litigation, It's Now States v. Cities*, WALL ST. J. (Aug. 6, 2019, 5:27 PM), <https://www.wsj.com/articles/in-the-opioid-litigation-its-now-states-v-cities-11565123075> [https://perma.cc/4FN6-KNSQ].

2. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel. Barez*, 458 U.S. 592, 607 (1982).

3. See, e.g., 15 U.S.C. § 15c (2018); COLO. REV. STAT. § 6-4-111 (2018); OHIO REV. CODE ANN. § 109.81 (2017).

4. Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 S.M.U. L. Rev. 759, 764 (2016).

through state-controlled suits.⁵ Both petitions failed, but no court has squarely addressed the possibility that *parens patriae* standing may prevent local governments from bringing claims for harms to their residents. The remainder of this paper refers to this concept as “*parens patriae* preclusion.” I intend this term to cover several distinct ideas, each of which might bar local government suits on the basis of a state’s unique *parens patriae* role.

The first possibility is that local governments simply lack standing (at least in federal courts) to sue based on harms to their residents, because municipal governments lack the sovereign capacity necessary to bring claims on their residents’ behalf as *parens patriae*. This concept would not involve “preclusion” in the *res judicata* sense, but nonetheless merits discussion because the attorneys general packaged it within their broader preclusion arguments. Another possibility is that state-level settlements of *parens patriae* cases preclude local governments from litigating broad-based public (and possibly also private) claims by *res judicata*. Finally, local governments might be barred from litigating these claims even if no settlement has been reached at the state level. This bar might be inherent in the sovereignty that states have and local governments lack or might only arise when states initiate litigation. This note will attempt to delineate clearly between these ideas, although it is not always possible to isolate which of these ideas a party intended to advance. Elaborating on this set of ideas (which, again, this note refers to collectively as “*parens patriae* preclusion”) is worthwhile because they could profoundly influence opioid litigation should they gain judicial acceptance. This note will ask (and take a position on) whether this *parens patriae* preclusion concept has any legal merit, how it would likely affect pending opioid litigation, and whether these effects would be normatively positive.

5. See *infra* notes 8, 13, 15.

First, this note will introduce the two instances where state attorneys general have made explicit *parens patriae* preclusion arguments. Part I will then examine the sparse legal materials on the scope and effect of *parens patriae* standing, and argue that they lend enough support to certain aspects of the arguments made by the attorneys general to make these arguments plausible as a matter of legal theory. Part II will explore how active assertions of *parens patriae* preclusion might operate on pending opioid litigation. Part III will discuss innovative proposals to address perceived problems with the current path of opioid litigation, their likelihood of success, and how *parens patriae* preclusion might interact with them. The note concludes by arguing that, under any foreseeable set of circumstances, continued development and court acceptance of a *parens patriae* preclusion doctrine is normatively desirable because it would promote the goals of facilitating nationwide settlement agreements and proper allocation of settlement funds.

INTRODUCTION

On August 30, 2019, Ohio Attorney General Dave Yost filed a petition for a writ of mandamus asking the Sixth Circuit to enjoin the U.S. District Court for the Northern District of Ohio from holding a bellwether trial of suits that two Ohio counties, Cuyahoga and Summit, brought against several opioid manufacturers and distributors.⁶ In this petition, Yost argued, “[t]he counties advance claims that belong to the State,”⁷ that, if allowed to proceed, “will cripple

6. Alison Frankel, *As Ohio AG tries to shut down opioid bellwether trial, MDL leaders say he’s ‘outlier,’* REUTERS (Sept. 3, 2019, 5:30 PM), <https://www.reuters.com/article/us-otc-opioids/as-ohio-ag-tries-to-shut-down-opioid-bellwether-trial-mdl-leaders-say-hes-outlier-idUSKCN1VO2OE> [<https://perma.cc/Q866-KNZ9>].

7. Petition for Writ of Mandamus at 3, *In re National Prescription Opiate Litigation* (6th Cir. 2019) (No. 19-3827), <https://static.reuters.com/resources/media/editorial/20190903/opioidsMDL--ohioAGmandamus.pdf> [<https://perma.cc/M6Z7-FUDJ>].

the federal dual-sovereign structure of these United States.”⁸ Hyperbole aside, the petition offers an argument with intuitive appeal: states, not their political subdivisions, have standing as *parens patriae* to “recover money for harms to the general health, safety, and physical and economic wellbeing of Ohioans.”⁹ The counties’ claims, based on harms to their residents and requesting relief similar to that which Ohio requests, interfere with this power by making it more difficult for the Attorney General to negotiate a settlement with the defendants.¹⁰ The defendants, knowing that the counties’ suit would survive a settlement with the state and would continue to threaten liability for the same harms a settlement with the Attorney General would address, would be disincentivized to negotiate. On October 10, 2019, a three-judge panel disregarded this argument in its denial of Ohio’s petition.¹¹ The opinion rejected the petition as untimely without addressing the question of whether Ohio’s *parens patriae* claims precluded the counties’ similar claims.¹²

Arkansas Attorney General Leslie Rutledge advanced a closely analogous argument when she petitioned the Arkansas Supreme Court for a writ of mandamus to halt an opioid lawsuit brought by seventy-five counties, fifteen cities, and a district attorney.¹³ Rutledge argued that the suit would usurp her sole authority to

8. *Id.* at 2.

9. *Id.* at 20.

10. *See id.* at 8–9.

11. *In re National Prescription Opiate Litigation* (6th Cir. 2019) (No. 19-3827) (order denying writ of mandamus), 1–3, <https://images.law.com/contrib/content/uploads/documents/292/54976/Opioid-6th-Cir-Ohio-ruling.pdf> [<https://perma.cc/6AVS-SXLA>].

12. *Id.*

13. David Ramsey, *Attorney General Leslie Rutledge in spat with cities and counties over opioid lawsuits*, ARK TIMES: ARK BLOG (Apr. 5, 2018, 6:44 AM), <https://arktimes.com/arkansas-blog/2018/04/05/attorney-general-leslie-rutledge-in-spat-with-cities-and-counties-over-opioid-lawsuits> [<https://perma.cc/KWV5-WXZG>].

bring lawsuits on behalf of the state as *parens patriae*.¹⁴ The Arkansas Supreme Court responded with a one-sentence opinion that reads: “Petitioner’s emergency petition for writ of mandamus is denied.”¹⁵ Because both the Sixth Circuit and Arkansas Supreme Court declined to analyze thoroughly the argument that *parens patriae* standing prevents local governments from bringing lawsuits parallel to a state attorney general, it remains an open question whether this argument is well-founded.

I. IS THERE A LEGAL BASIS FOR *PARENS PATRIAE* PRECLUSION?

Now that two state attorneys general have argued that states’ *parens patriae* standing is exclusive and therefore bars local governments from bringing suits based on injuries to their residents, an attempt to determine whether a legal basis exists to support this claim is in order. Supreme Court precedent and the origins and history of *parens patriae* standing suggest that local governments lack standing (at least in federal courts) to bring lawsuits on behalf of their citizens. This concept does not turn on whether a state has already asserted *parens patriae* standing, but focuses instead on local governments’ incapacity to do so. It therefore does not involve *res judicata*. This note nonetheless includes this concept under the umbrella term *parens patriae* preclusion because both attorneys general bundled it with arguments that truly implicate *res judicata*.

14. *Id.* Rutledge took particular issue with the participation of an executive branch official in this lawsuit. *Id.*

15. Wesley Brown, *AG Rutledge loses ‘writ of mandamus’ request, second opioid lawsuit may proceed with ‘state actor,’* TALK BUS. & POL. (April 6, 2018, 4:29 PM), <https://talkbusiness.net/2018/04/ag-rutledge-loses-writ-of-mandamus-request-second-opioid-lawsuit-may-proceed-with-state-actor> [<https://perma.cc/6WYG-9YG2>].

A. *Parens Patriae History, Theory, and Case Law*

Beginning in the thirteenth century, as a prerogative of the English Crown to initiate legal action as guardian of the mentally infirm,¹⁶ the *parens patriae* concept expanded dramatically in the United States throughout the nineteenth century as states asserted standing to vindicate other “quasi-sovereign interests,” including the abatement of public nuisances.¹⁷ This rapid common law development left the boundaries of *parens patriae* standing anything but clearly defined. The Supreme Court has never ventured “an exhaustive formal definition nor a definitive list of” what constitutes a “quasi-sovereign interest,”¹⁸ and justices have offered divergent views as to whether a state’s assertion of *parens patriae* standing heightens or relaxes courts’ standing analysis.¹⁹ Still, tracing the Court’s treatment of the concept provides some insight into the potential extent of its reach.

The Supreme Court has justified the expansion of *parens patriae* standing by reasoning from two theories: “universal sovereignty theory,” which posits that *parens patriae* standing is a privilege that inherently belongs to all sovereign governments; and “sovereignty transference theory,” which posits that *parens patriae* authority transferred from the British Crown to the states when they achieved independence.²⁰ The Court has not cleanly differentiated between

16. See generally Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978).

17. See Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1866–71 (2000).

18. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel. Barez*, 458 U.S. 592, 607 (1982).

19. Compare *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (stating that Massachusetts, as *parens patriae*, “is entitled to special solicitude in our standing analysis”) with *id.* at 538 (“[P]arens patriae actions raise an additional hurdle for a state litigant.”) (Roberts, C.J., dissenting).

20. Gabrielle J. Hanna, *The Helicopter State: Misuse of Parens Patriae Unconstitutionally Precludes Individual and Class Claims*, 92 WASH. L. REV. 1955, 1969–72 (2017).

these two related theories,²¹ but both, whether applied separately or in combination, make plausible the argument that states' *parens patriae* authority precludes local government lawsuits for harms to their residents.

The Supreme Court first endorsed "universal sovereignty theory" in 1890 when it proclaimed, in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,²² that "[t]his prerogative of *parens patriae* is inherent in the supreme power of every State" and is "often necessary to be exercised in the interests of humanity."²³ The Court has never repudiated this rationale.²⁴ When combined with the Court's labelling of lawsuits that protect the public welfare as exercises of *parens patriae*,²⁵ this theory would arguably preclude local governments from pursuing lawsuits to address harms to their residents. The argument would go that local governments' interest in protecting their residents is a public welfare concern—a quasi-sovereign interest that only a quasi-sovereign actor can assert. Because the Supreme Court has repeatedly held that local governments lack any measure of sovereignty,²⁶ any suit by a local government for injuries to its residents would be an impermissible exercise of *parens patriae* standing by a non-sovereign entity. Put differently, all of the power to use litigation to protect the public welfare rests with sovereign government entities with none left over for local governments. In our federal system, only the national and state governments (but not localities) share sovereignty and, by extension, *parens patriae* authority.

21. See generally *Alfred L. Snapp*, 458 U.S. at 592.

22. 136 U.S. 1 (1890).

23. *Id.* at 57.

24. See *Hanna*, *supra* note 20, at 1971–72.

25. *Alfred L. Snapp*, 458 U.S. at 607.

26. See, e.g., *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 437 (2002); *Cnty. Comm'ns Co. v. City of Boulder*, 455 U.S. 40, 53–54 (1982).

“Sovereignty transference theory” supports a similar conclusion. The Supreme Court explicitly invoked this theory in 1972, proclaiming in *Hawaii v. Standard Oil Co. of California*²⁷ that, “[i]n the United States, the ‘royal prerogative’ and the ‘parens patriae’ function of the King passed to the States.”²⁸ The people of the states presumably surrendered some of their sovereignty (and with it some of the *parens patriae* function) to the national government by ratifying the Constitution. As with “universal sovereignty theory,” this leaves local governments with no measure of sovereignty. Therefore, they may not bring lawsuits protecting the public welfare because this requires *parens patriae* standing, which belongs only to “quasi-sovereign” actors.

Both the “universal sovereignty” and “sovereignty transference” theories bar local governments from suing in federal courts on behalf of their residents, regardless of whether a state has affirmatively acted as *parens patriae* by filing its own lawsuit. The disability stems not from a prior action of the state, but from the localities’ immutable status as non-sovereigns. As a matter of legal theory, then, the portions of Arkansas and Ohio’s mandamus petitions in which the states argued that local government suits conflicted with suits that they were actually pursuing may have been unnecessary.²⁹

Ohio sought to prevent claims from proceeding in federal court. Thus, if the state had successfully demonstrated that the local governments were surreptitiously trying to invoke *parens patriae*, and not some alternative theory of standing that would be permissible,

27. 405 U.S. 251 (1972).

28. *Id.* at 257.

29. See Ramsey, *supra* note 13 (“[District Attorney] Ellington’s action, she said, jeopardizes the state’s ability to pursue its own case against opioid manufacturers.”); Petition for Writ of Mandamus, *supra* note 7, at 5 (“The complaints, from States and localities alike, all tell a similar story, and all assert nearly identical claims.”).

the Supreme Court's precedents would seem to determine the result in Ohio's favor. However, Arkansas faced an extra wrinkle. It sought to bar local government claims brought before a state court, which need not adhere to the Supreme Court's formulation of the *parens patriae* function.

It seems likely that a state court would follow the Supreme Court and the common law here, but states have not universally or unquestioningly, adopted the common law of *parens patriae*. Indeed, some states have legislatively modified the common law concept of *parens patriae* standing. Take, for example, the provision of Colorado's antitrust statute that directly authorizes *parens patriae* actions. Under the statute, the attorney general may sue on behalf of Colorado residents at his discretion,³⁰ but may sue "on behalf of any governmental or public entity, [only] *with the written consent of such entity*, injured, either directly or *indirectly*."³¹ In other words, to the extent that this statute prevents the attorney general from pursuing a local government's antitrust claim without its written consent, Colorado has modified its common law right to act as *parens patriae*. This language allows a Colorado local government to argue plausibly that it has the capacity to pursue an antitrust claim for an "indirect injury" that closely resembles a *parens patriae* claim, despite its lack of sovereign authority to officially act as *parens patriae*. State courts might easily expand this reasoning to allow local governments to bring lawsuits on behalf of their residents.

B. *Scope of Res Judicata Under Parens Patriae Preclusion*

Part I's analysis of *parens patriae*'s theoretical underpinnings and treatment speaks only to the argument that local governments lack

30. COLO. REV. STAT. § 6-4-111(3a) (2018).

31. *Id.* § 6-4-111(2) (2018) (emphasis added).

the capacity to bring suits resembling *parens patriae* actions. This Part will focus instead on the potential *res judicata* effects of a state's actual assertion of *parens patriae* standing on parallel local government suits. *Res judicata* and *parens patriae* standing are common law doctrines whose application varies widely across courts and according to state law.³² This lack of uniformity, combined with the absence of guiding statutory language, makes it difficult to draw broad conclusions about the proper scope of *parens patriae* preclusion. Nevertheless, a pair of Ninth Circuit cases and federal and state statutes codifying *parens patriae* actions offer some insight into how courts might apply *parens patriae* preclusion. These sources can be distilled to suggest three versions of *res judicata* through *parens patriae* preclusion: narrow, broad, and broadest.

1. Narrow *Res Judicata* Through *Parens Patriae* Preclusion

In 2003, in *City of Martinez v. Texaco Trading & Transportation, Inc.*,³³ a panel of the Ninth Circuit considered whether a settlement between Texaco and the California Department of Fish and Game precluded the city's subsequent lawsuit asserting multiple causes of action related to the same oil spill that the settlement addressed.³⁴ Texaco characterized the city's suit as an impermissible attempt to enforce "public rights."³⁵ The Ninth Circuit drew a distinction among the causes of action, precluding the city's "public claims," but allowing a claim arising from the spill's interference with a "private easement" that the city held in an affected marsh.³⁶ Thus the prior state-level settlement of a *parens patriae* case barred the city

32. See generally Hanna, *supra* note 20, at 1956–57.

33. 353 F.3d 758 (9th Cir. 2003).

34. *Id.* at 760–62.

35. Brief for Appellee at 24, *City of Martinez*, 353 F.3d 758 (No. 02-16436).

36. *City of Martinez*, 353 F.3d at 763.

from bringing “public claims” that cast the city in a *parens patriae*-like role, but did not affect its property claims.

Extrapolating this logic onto potential *parens patriae* preclusion in opioid litigation would bar local government suits based on harms to their residents (i.e. “public claims”) where the state had settled a public welfare suit,³⁷ while leaving local governments free to recover their direct costs from the opioid epidemic (such as increased first responder and law enforcement expenses).³⁸ Ohio Attorney General Yost contemplated an expansion of this “narrow” version of *parens patriae* preclusion via an unintroduced piece of legislation his office helped draft. The bill would give the state exclusive control over only claims affecting citizens in at least five Ohio counties, thus allowing local governments to pursue private claims to recover their direct crisis-related costs.³⁹ It goes further than the City of Martinez holding because it would bar municipal governments from pursuing “public claims” even if the state has not reached a settlement in, or even initiated, a parallel *parens patriae* action. The statute would give the state the exclusive right to decide whether, when, and in what forum to pursue these claims.

Assuming that the draft bill is consistent with Yost’s view of *parens patriae* preclusion, its five-county trigger for suits involving harms to residents illustrates an ambiguity in the *parens patriae* preclusion theory: are local governments’ lawsuits on behalf of their own residents impermissible only when their residents’ injuries are

37. *Supra* Part I.A.

38. See Elizabeth Weeks & Paula Sanford, *Financial Impact of the Opioid Crisis on Local Government: Quantifying Costs for Litigation and Policymaking*, 67 U. KAN. L. REV. 1061, 1063 (2019) (identifying discrete costs of the opioid crisis to local governments).

39. Jeremy Pelzer, *Bill seeks to give AG Dave Yost control over local opioid lawsuits*, CLEVELAND.COM (updated Aug. 28, 2019), <https://www.cleveland.com/open/2019/08/bill-seeks-to-give-ohio-ag-dave-yost-control-over-local-opioid-lawsuits.html> [<https://perma.cc/UEH6-T48N>]; see also *infra* Part II.B.

indistinguishable from those of state residents at large (as demonstrated by similar injuries among citizens in five counties), or categorically because suing on behalf of one's residents is inherently a "public welfare" action belonging solely to the state? If the first is true, the state's role as *parens patriae* would not bar a local government suit for harms to its residents if no one outside of that local government's jurisdiction suffered the same or similar harm. According to the second position, the state's *parens patriae* status continuously radiates independent force barring local governments from bringing lawsuits that implicate quasi-sovereign interests.

Ohio's unsuccessful mandamus petition argued at times from both positions. The petition first identifies the problem as being that "[t]hese are widespread, statewide harms, not local harms The bellwether trial therefore will not focus on the particular Ohio county plaintiffs."⁴⁰ This is an argument from the first position. By implication, no problem would exist if the trial were to focus on the counties suing, instead of on the state as a whole, even though the counties are seeking damages for harms to their residents.⁴¹ Just three pages later, the petition jumps to position two, asserting that "a political subdivision may not sue to enforce its residents' rights,"⁴² apparently regardless of whether these rights are shared with residents of the state outside the municipality. In an amicus brief supporting the petition, the attorneys general of thirteen states and the District of Columbia took the second position, arguing that local governments may not sue to redress harms to their residents "in the absence of a state legislative grant of authority to pursue

40. Petition for Writ of Mandamus, *supra* note 7, at 7.

41. *See id.*

42. *Id.* at 10 (quoting Jackson v. Cleveland Clinic Found., No. 1:11 CV 1334, 2011 U.S. Dist. LEXIS 101768, at *17–18 (N.D. Ohio Sept. 9, 2011)).

these claims.”⁴³ This is so regardless of how widespread or localized the harm.⁴⁴

This second position is similar to the theories of *parens patriae* standing that the Supreme Court has articulated in that it would prevent local governments from suing on behalf of their residents in all instances, regardless of whether the state has acted.⁴⁵ It is distinct, however, because it reasons from states’ sovereign status, rather than localities’ lack of sovereignty. The first position—that the state’s authority to act as *parens patriae* bars local government suits to redress harm to their residents only when the harm is too widely shared with other residents of the state outside the locality—has more pragmatic appeal because it would allow localities to sue immediately to redress localized harms whereas the second position risks leaving localized harms unaddressed if the state delays or fails to give specific authorization for suits by local governments.

Also, practical reasons not to allow local government suits, namely the risks of impeding state-level lawsuits for similar claims and appropriating value from residents of other areas of the state, do not arise when public harms are sufficiently local. For these reasons, courts would likely be less willing to accept the second position as compared to the narrower first position, especially in the context of current opioid litigation where accepting the second position would require dismissal of local government suits that are already far along. This note does not insist that “narrow” *parens patriae* preclusion—prohibiting local government suits on behalf of their residents (in at least some instances) while leaving them free to recover direct costs—must rest on one of these bases to the ex-

43. Brief of Amici Curiae at *3, *In re National Prescription Opiate Litigation* (6th Cir. 2019) (No. 19-3827), 2019 WL 4390968.

44. *Id.*

45. *See supra* Part I.A.

clusion of the other. Because the opioid crisis' harms are widespread, state attorneys general can continue making arguments from both positions without committing to either of them.

2. Broad *Res Judicata* Through *Parens Patriae* Preclusion

Another Ninth Circuit case could be understood to take *parens patriae* preclusion one step further. *Alaska Sport Fishing Ass'n v. Exxon Corp.*⁴⁶ decided how a settlement between Exxon and Alaska affected a private fishing organization's lost recreational use claims.⁴⁷ The settlement disposed of a suit that Alaska brought as *parens patriae* under provisions of the Clean Water Act and CERCLA that specifically provided for *parens patriae* actions.⁴⁸ The court held that the organization's claims were not "private," and were therefore barred because the settlement discharged all "public" claims.⁴⁹ Although the decision was technically one of statutory interpretation and extended only to "private" claims, it can be read to support the remarkable proposition that *parens patriae* actions preclude even private parties from bringing "public" claims that arise from the same incident as the *parens patriae* action.

From a policy perspective, the Ninth Circuit's decision that a *parens patriae* suit precludes all subsequent "public" claims was probably an attempt to ensure Exxon's survival by placing finite limits on its liability. Courts hearing lawsuits against pharmaceutical companies that are expected to liquidate would lack this incentive to apply *parens patriae* preclusion to private parties.

46. 34 F.3d 769 (9th Cir. 1994).

47. *Id.* at 770.

48. *Id.* at 771.

49. *Id.* at 770.

3. Broadest *Res Judicata* Through *Parens Patriae* Preclusion

Translating *Alaska Sport Fishing* to the opioid litigation context would preclude individuals' narrower personal injury claims only if one reasons that personal injury claims are "public" because the injuries—addiction and the costs thereof—are no different than those of thousands of other state citizens, and are therefore properly pursued only by the states or an individual suffering a special injury. On this reading, *Alaska Sport Fishing's* extension of *parens patriae* preclusion to private parties serves as a logical stepping-stone to extend the concept to reach "private" claims. This broadest version of common law *parens patriae* preclusion would allow state attorneys general to seek money damages for individuals' direct injuries, thus precluding individuals from pursuing their own claims.

Though it might take a strained reading of existing common law doctrine to arrive at "broadest" *parens patriae* preclusion, this formulation has statutory parallels in federal and state antitrust law.⁵⁰ But these laws barring private claims also recognize a limit that the attorneys general did not concede in their formulation of a "narrow" *parens patriae* preclusion applying only to "public" claims:⁵¹ the statutes necessarily require that the state actually bring a lawsuit before claims-holders' suits are precluded.⁵² If it were otherwise, no non-sovereign party could initiate any civil action in response to a widespread harm without permission from the state attorney general or legislature.

50. *Supra* note 3.

51. *See supra* Part I.B.ii.

52. *See, e.g.*, 15 U.S.C. § 15c (1980); COLO. REV. STAT. § 6-4-111 (2018); *supra* Part I.A.

A look at the *parens patriae* provision of the federal antitrust statute helps give shape to this “broadest” version of *parens patriae* preclusion. 15 U.S.C. § 15c provides that, “[a]ny attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons . . . to secure monetary relief,”⁵³ and that the “final judgment in [any such action] shall be *res judicata* as to . . . [all antitrust claims] by any person on behalf of whom such action was brought.”⁵⁴ This statute authorizes state attorneys general to litigate individuals’ antitrust claims for direct injuries with preclusive effect, but, to insulate the actions from due process challenges, the statute also requires notice to affected individuals⁵⁵ and an opportunity to opt-out.⁵⁶ A common law *parens patriae* preclusion doctrine that applies to parties’ direct injuries would almost certainly also require notice and an opportunity to opt-out to conform to constitutional due process guarantees.⁵⁷

Although all three versions have plausible legal support and any may yet be invoked in opioid litigation, the remainder of this paper uses the term *parens patriae* preclusion to signify the “narrow” version described above because both real-world assertions of *parens patriae* preclusion thus far have been articulations of this version. This fact could be interpreted as evidence that the “narrow” version is least politically objectionable and therefore also the version most likely to be asserted in future opioid litigation.

53. 15 U.S.C. § 15c(a)(1) (2018).

54. *Id.* § 15c(b)(3).

55. *Id.* § 15c(b)(1).

56. *Id.* § 15c(b)(2).

57. See Hanna, *supra* note 20, at 1955.

II. PARENS PATRIAE PRECLUSION APPLIED TO OPIOID LITIGATION

Part I explained how state attorneys general can make a plausible legal argument that states' status as guardian of their citizens precludes local governments from asserting claims based on harm to their residents (as opposed to direct harms to the local governments themselves). Local government lawsuits might be precluded (1) because local governments lack the capacity to assert such claims, (2) because a state has already brought sufficiently similar claims as *parens patriae*, or (3) out of some power emanating from states' sovereign status.

Part II will examine how an operationalized *parens patriae* preclusion doctrine might affect opioid litigation. Because preclusion arguments and their potential effects must be understood in light of state and local government actors' fears and incentives, this Part opens with a discussion of some of these concerns and motives.

A. Underlying Concerns

Arkansas and Ohio proffered *parens patriae* preclusion arguments as an attempt to gain the upper hand in the struggle between state and local governments for influence in litigation against the opioid industry. Both levels of government want to control spending of settlement money. Cities and counties fear a repeat of the 1998 "Master Settlement Agreement" ("MSA"), which forty-six state attorneys general negotiated to end nationwide tobacco litigation without local government input.⁵⁸ The Agreement released participating tobacco companies from all liability to government entities in exchange for ongoing payments, but less than one percent of

58. *Master Settlement Agreement*, PUB. HEALTH L. CTR., <https://www.publichealthlawcenter.org/topics/commercial-tobacco-control/commercial-tobacco-control-litigation/master-settlement-agreement> [<https://perma.cc/7NEZ-9TW8>].

MSA funds were earmarked for tobacco prevention programs.⁵⁹ The vast majority of settlement money went instead to state treasuries' general funds, and then on to pay for state highway projects and to cover other state budgetary shortfalls.⁶⁰ This outcome angered local governments, which received little or no compensation for the harms that tobacco addiction inflicted on their residents—and on their budgets.⁶¹ Taking the lesson of the past to be that local governments lose when they leave mass tort litigation to the states, county and city governments fear that *parens patriae* preclusion of their lawsuits would also mean preclusion from settlement funds.

Meanwhile, the outcome of Oklahoma's lawsuits against industry giants Purdue Pharma and Teva Pharmaceuticals seemingly confirmed these fears. First, in March 2019, Purdue agreed to a \$270 million settlement, of which only \$12.5 million went to local governments.⁶² Incensed that it received no money from the Purdue deal, the Oklahoma legislature, two days before Teva settled with the state, enacted a law requiring that all future settlement money enter the state treasury.⁶³ To local governments' horror, the law leaves the state in control of the \$465 million verdict entered against Johnson & Johnson in November 2019.⁶⁴ Local governments may

59. PUB. HEALTH L. CTR., *THE MASTER SETTLEMENT AGREEMENT: AN OVERVIEW* 8 (Jan. 2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/MSA-Overview-2019.pdf>.

60. Ashley Fuoco Antonelli, *Overwhelmed by all the multi-million dollar opioid settlements? Here's everything you need to know.*, ADVISORY BD. (Oct. 30, 2019), <https://www.advisory.com/daily-briefing/2019/10/30/opioid-settlements> [<https://perma.cc/H9TL-R922>].

61. *Id.*

62. Lenny Bernstein, *In Oklahoma, opioid case windfall starts winners squabbling*, WASH. POST (June 20, 2019, 12:44 PM), https://www.washingtonpost.com/health/in-oklahoma-opioid-case-windfall-starts-winners-squabbling/2019/06/20/92ce0f60-92bb-11e9-b570-6416efdc0803_story.html [<https://perma.cc/68MS-94G9>].

63. *Id.*

64. Colin Dwyer, *Oklahoma Judge Shaves \$107 Million Off Opioid Decision Against Johnson & Johnson*, NPR (Nov. 15, 2019 3:31 PM), <https://www.npr.org/2019/11/15/>

once again receive little of that money despite having absorbed many of the opioid epidemic's costs.⁶⁵

Nor are state legislatures the only competitors for settlement funds with whom local governments must contend. In states that grant their attorney general discretion to decide how to spend damages awards, these officials have sometimes misallocated settlement funds to projects intended to boost their chances of reelection or election to higher office.⁶⁶ Former West Virginia Attorney General Darrell McGraw, for example, used funds from settlements with pharmaceutical companies to create a nursing program at the University of Charleston headed by the State Senate President's wife and to construct an enormous fitness center at a state police academy facility.⁶⁷

Unsurprisingly, state attorneys general have voiced their own concerns. Foremost among these is that local government lawsuits create uncertainty for the defendant companies making it more difficult for states to settle their own lawsuits with them.⁶⁸ The resulting confusion and threat of continued liability, states contend, only delay the process of obtaining a recovery for victims, victims' families, and taxpayers.⁶⁹

779439374/oklahoma-judge-shaves-107-million-off-opioid-decision-against-johnson-johnson [https://perma.cc/7VWS-4ZR7].

65. See Weeks & Sanford, *supra* note 38, at 1063.

66. Cary Silverman & Jonathan L. Wilson, *State Attorney General Enforcement of Unfair or Deceptive Acts and Practices Laws: Emerging Concerns and Solutions*, 65 U. KAN. L. REV. 209, 251–55 (2016).

67. *Id.* at 254–55.

68. Letter from 27 Attorneys General to Judge Dan Polster, N.D. of Ohio (June 24, 2019), [https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2019/Press/Negotiation%20Class%20Letter%20TX-CA%20Final%20\(002\).pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2019/Press/Negotiation%20Class%20Letter%20TX-CA%20Final%20(002).pdf) [https://perma.cc/CML3-CB8E].

69. *Id.*

Another concern is that local government lawsuits tend to rely heavily on private attorneys charging contingency fees.⁷⁰ As a result, huge portions of settlement funds end up in plaintiffs' attorneys' pockets instead of restoring the public welfare. The Arkansas local government suit that Attorney General Rutledge unsuccessfully opposed bore out this concern. There, the private attorneys whom the Arkansas counties and cities hired were to receive twenty-one percent of any future settlement.⁷¹ Although some state attorneys general have also heavily relied on private attorneys, particularly in consumer protection cases,⁷² they may be less likely to do so in opioid cases where the alternative of teaming up with other states' attorney general's offices to pool resources will be available.

B. *Parens Patriae Preclusion's Potential Effects on Opioid Litigation*

By far the most important question surrounding *parens patriae* preclusion arguments is how they might change the ultimate fate of settlement funds. Intuition suggests that states would use a *parens patriae* preclusion doctrine to keep all settlement funds for their treasuries, but actual events tell a more nuanced story. First, although the Oklahoma settlements suggest that states will eagerly grasp at any opportunity to keep control over funds in the statehouse and away from local governments,⁷³ the Oklahoma legislature has yet to decide how to distribute the funds it seized control over, and may allocate significant sums to local governments.⁷⁴

70. See Andrew Joseph, *A veteran New York litigator is taking on opioid makers. They have a history*, STAT NEWS (Oct. 10, 2017), <https://www.statnews.com/2017/10/10/opioid-law-suits-paul-hanly/> [<https://perma.cc/QN5T-NR93>].

71. Brown, *supra* note 15.

72. Silverman & Wilson, *supra* note 66, at 217.

73. *Supra* Part II.A.

74. See Bernstein, *supra* note 68.

Moreover, the position that Ohio Attorney General Yost actually took when elaborating on his preclusion argument belies the state-as-settlement-hog stereotype. Indeed, events in Ohio demonstrate that political accountability may in fact steer settlement funds toward local governments by restraining state government actors' freedom to spend them on unrelated projects as they did following the tobacco settlement. First, Attorney General Yost has been careful to stipulate that he wants local governments to receive a substantial portion of any settlement he negotiates for the state.⁷⁵ Yost released a statement claiming that his push for the state to have exclusive control over litigation, far from a power grab, is actually a response to "[c]ities and counties that individually race to the courthouse, hoping for the luck of the draw and attempting to get any money that they can."⁷⁶ State control will put an end to this wasteful racing and ensure that "[the state] can fairly deliver equitable relief to communities based on impact," rather than letting most or all settlement money go to those cities and counties first off the starting-line.⁷⁷ The Ohio Attorney General's office followed up by working with state legislators to draft an unintroduced bill that precludes local government lawsuits competing with state efforts, but guarantees that at least 20 percent of any resulting settlement goes to affected local governments.⁷⁸

Ohio Governor Mike DeWine's public disagreement with Yost's decision to file the failed mandamus petition asserting *parens patriae* preclusion in the first place,⁷⁹ is another piece of evidence that local governments' loudly expressed concerns constrain states' ability to

75. Pelzer, *supra* note 44.

76. *Id.*

77. *Id.*

78. *Id.*

79. Frankel, *supra* note 8.

spend settlement funds self-interestedly. Local governments' ability to curry public sympathy by warning of a repeat of states' unsavory behavior following the 1998 tobacco settlement has forced Ohio's elected governor and attorney general to make concessions to local governments. All parties understand that a repeat of the 1998 Master Settlement Agreement is politically impossible. The Ohio situation indicates that, even if courts were to accept state attorneys general's arguments that states' role as *parens patriae* precludes local government suits, public opinion would still ensure that local governments receive considerably more funds from opioid settlements than they received from the tobacco MSA.

The tobacco settlement's lessons may significantly alter another likely effect of *parens patriae* preclusion should courts begin to accept the concept. If these arguments begin to succeed, state attorneys general, notorious for their political ambitions as "Aspiring Governors,"⁸⁰ might assert *parens patriae* preclusion to halt local government lawsuits for the sole purpose of later, during a campaign for higher office, claiming all of the credit for having negotiated a settlement. In a pre-tobacco litigation world, such an unsubtle move might have evaded public detection with the result being all settlement funds finding their way into the state treasury and political benefit to the attorney general. But today the media, with its attention focused on opioids⁸¹ and eager to draw parallels to the

80. Larry J. Sabato, *The AG: Attorney General as Aspiring Governor*, RASMUSSEN REPORTS (April 23, 2010), https://www.rasmussenreports.com/public_content/political_commentary/commentary_by_larry_j_sabato/the_ag_attorney_general_as_aspiring_governor [https://perma.cc/872G-SXL5].

81. See generally Fiona Webster, Kathleen Rice, & Abhimanyu Sud, *A critical content analysis of media reporting on opioids: The social construction of an epidemic*, 244 SOC. SCI. & MED. 112642 (Jan. 2020).

still-controversial tobacco litigation,⁸² is far more likely to detect and report on such posturing.

Consequently, any attorney general hoping to reap political benefit by claiming to have single-handedly fought pharmaceutical companies and won would need to credibly make the additional claim that his seizure of control produced a fairer allocation of settlement funds than piecemeal local government litigation would have. Ambitious attorneys general would thus have an incentive to negotiate settlements that specifically earmark a large percentage of funds for local governments or require public disclosure of how funds are spent.⁸³ By building in these safeguards, state attorneys general would position themselves to claim credit later for having protected localities from the depredations of both the state legislature and other localities racing to the courthouse for a disproportionate recovery. Therefore, even if judicial acceptance of *parens patriae* preclusion resulted in all or nearly all states petitioning for dismissal of local lawsuits, state attorneys general's political ambitions, combined with heightened media scrutiny, might counterintuitively bring benefits to local governments.

There is also reason to believe that, in many cases, *parens patriae* preclusion would facilitate faster and larger settlements uncomplicated by piecemeal local government litigation, just as state attorneys general have argued.⁸⁴ Scholars have recognized that *parens patriae* actions, even without precluding parallel local government

82. See, e.g., Jan Hoffman, *States Clash With Cities Over Potential Opioids Settlement Payouts*, N. Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/health/opioids-litigation-settlement.html> [<https://perma.cc/B4GG-L7BT>]; Randazzo, *supra* note 1.

83. Arizona and Arkansas have passed statutes requiring their attorneys general to report on how settlement funds are actually spent. Silverman & Wilson, *supra* note 66, at 267.

84. See *supra* text accompanying notes 6–15.

suits, increase the odds of settlement.⁸⁵ Defendants sued by individuals or local governments face less potential liability if they go to trial and lose, and therefore face less pressure to settle.⁸⁶ Defendants in these cases are more likely to risk trial in hopes of establishing a pattern of no liability that would discourage potential future claimants.⁸⁷ States, on the other hand, can bring much larger damages claims than most county or city governments by suing on behalf of all of their citizens as *parens patriae*. This makes defendants more likely to settle rather than risk liability for the claims of an entire state's population.⁸⁸ *Parens patriae* preclusion would likely amplify this effect by preventing comparatively low-stakes local government suits from establishing patterns of no-liability.

On the whole, if courts were to embrace *parens patriae* preclusion arguments similar to those that Arkansas and Ohio advanced, the primary effect would likely be to give states, as opposed to local governments, increased control over funds recovered in opioid settlements. Despite their loss of control, local governments might nonetheless fare well in the allocation of these funds because statewide lawsuits would extract larger settlements, and the media scrutiny that would inevitably surround attorneys general's assertions of *parens patriae* preclusion would force them to consider local governments' interests when negotiating settlements and making distribution decisions.

85. See generally Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 915–16 (2008).

86. *Id.*

87. *Id.*

88. *Id.*

III. PARENS PATRIAE AND OTHER INNOVATIONS IN OPIOID LITIGATION

Whatever effects a *parens patriae* preclusion doctrine might have on opioid litigation in a static environment, the concept does not operate in a vacuum. Understanding the implications of *parens patriae* preclusion therefore requires consideration of how the concept would interact with the moves that state attorneys general and other institutional actors are making in response to the opioid crisis. This Part will address three of those moves: proposed congressional legislation directing states' use of settlement funds, the certification of a "Negotiation Class" comprising nearly every local government in the United States, and a state-led \$48 billion global settlement framework that would extinguish all state and local government claims against five defendants.

A. Congressional Response: The Opioid Settlement Accountability Act

Proposed Congressional legislation might offer local governments additional protection in the event that *parens patriae* preclusion arguments gain traction in the courts. On November 21, 2019, Representatives Marcy Kaptur (D-OH) and David B. McKinley (R-WV) introduced a bill entitled the "Opioid Settlement Accountability Act" ("OSAA"), designed to prevent states from misallocating settlement funds as they did following the 1998 tobacco settlement.⁸⁹ As matters stand, the OSAA is expected to die in the House Energy and Commerce Committee,⁹⁰ but if courts began holding that states' *parens patriae* actions preclude local governments' parallel lawsuits, a wave of public concern about the fate of settlement

89. Opioid Settlement Accountability Act, H.R. 5242, 116th Cong. (2019).

90. H.R. 5242: *Opioid Settlement Accountability Act*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr5242> [<https://perma.cc/P4SM-BV3G>].

funds could push the bill to enactment. The bill, an amendment to title XIX of the Social Security Act, which creates Medicaid, directs that all Medicaid-related funds that states recover from the pharmaceutical industry be spent toward opioid abuse prevention and treatment programs, supporting first responders, or other “public health-related activities.”⁹¹ If the bill became law, local governments would indirectly benefit from this state spending, and the bill’s limitations on how else states may spend settlement funds would incentivize states to allocate more to local governments.

Yet the OSAA, if enacted, would be vulnerable to states’ constitutional challenges as violating federalism principles contained in the Tenth Amendment. First, the bill might impermissibly commandeer the machinery of state legislatures by issuing them a direct command, which encroaches on the states’ sphere of autonomous action and thus upsets the constitutionally mandated balance between state and national governments. In *Murphy v. National Collegiate Athletic Ass’n*,⁹² the Supreme Court’s most recent anti-commandeering case, the Court held that Congress may not issue direct orders to state governments.⁹³ Section 2 of the proposed OSAA contains an imperative that does just that: “A State shall use amounts recovered . . . as part of comprehensive or individual settlement, or a judgment for [approved purposes only].”⁹⁴ Just as Justice Alito wrote of the PASPA provision at issue in *Murphy*, “[i]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals.”⁹⁵ An attentive Congress could obviate this objection by rewording the bill to achieve its purpose without using

91. H.R. 5242 § 2(a).

92. 138 S. Ct. 1461 (2018).

93. *Id.* at 1476.

94. H.R. 5242 § 2(a).

95. *Murphy*, 138 S. Ct. at 1478.

commandeering language, as Justice Ginsburg's *Murphy* dissent noted.⁹⁶

Even if anti-commandeering concerns serve only as a drafting guide, OSAA may be infirm as an unconstitutional condition exceeding Congress' power under the Spending Clause.⁹⁷ States objecting to OSAA would argue that it is a condition placed on states' receipt of Medicaid funds that attached only after the funds had already left the Treasury. This appears to violate *South Dakota v. Dole*'s⁹⁸ requirement that conditions on states' receipt of federal funds be unambiguous.⁹⁹ However, in *National Federation of Independent Business v. Sebelius*,¹⁰⁰ Justices Ginsburg, Sotomayor, Breyer, and Kagan read *Dole* in a way that would seemingly make OSAA consistent with *Dole*'s requirement that conditions be unambiguous. Those four justices took the position that conditions must be unambiguous at the time states receive and use federal money, not when the money is initially allocated.¹⁰¹

But the analogy to *Dole* and *NFIB* is imperfect. OSAA conditions states' use of Medicaid-related funding not received directly from Congress, but rather obtained through judgments against pharmaceutical companies. This difference strengthens the logic of the argument against OSAA because a major concern underlying the Supreme Court's Spending Clause decisions—that state governments cannot serve a meaningful role unless there are limits to Congress's power to spend for the general welfare—is still more acute when Congress places a second round of conditions on funds it has already allocated. Allowing Congress to add this tool to its Spending

96. *Id.* at 1490 (Ginsburg, J., dissenting).

97. U.S. CONST. art. I, § 8, cl. 1.

98. 483 U.S. 207 (1987).

99. *Id.* at 207.

100. 567 U.S. 519 (2012).

101. *Id.* at 639 (Ginsburg, J., concurring in part and dissenting in part).

Clause toolbox would allow it to exert still greater control over state governments, and leave the states with still less room to exercise their traditional “police powers” free from Congressional influence.

Despite the unlikelihood that OSAA will actually become law, the very threat of congressional legislation may incentivize state attorneys general to incorporate provisions specifically earmarking funds or imposing reporting requirements into the settlements they negotiate. Doing so would serve states’ interests by soothing the concerns that might rally political will to pass OSAA, and thus avert the risk of new federally-imposed limits on their decision-making autonomy. For state attorneys general, this self-restraint is more attractive than risking OSAA’s passage because it would be costly, both economically and politically, for them to challenge an enacted OSAA in federal court. even if the challenge is ultimately successful.

B. Local Governments’ Response: The Proposed “Negotiation Class”

The analysis has thus far assumed that the alternative to state control of opioid litigation through *parens patriae* preclusion of local government lawsuits would be piecemeal litigation. However, local governments and their private attorneys, driven by a desire to avoid a repeat of the tobacco MSA, proposed an innovative class-action vehicle called a “Negotiation Class” that would allow local governments to negotiate a single nationwide settlement with the pharmaceutical industry.¹⁰² Unlike a settlement class action, the Ne-

102. Hoffman, *supra* note 82.

negotiation Class contemplates the opt-out process and class certification occurring before a settlement is reached.¹⁰³ If viable, this Negotiation Class would render inapplicable the piecemeal litigation-premised policy arguments that attorneys general have cited as reasons to dismiss local government suits.

The Negotiation Class would comprise nearly every local government in the country, some 34,000 entities.¹⁰⁴ This block would attempt to negotiate a universal settlement that would preclude all future local government lawsuits and result in the dismissal of the more than 2,600 individual county and municipal suits that have been consolidated before Judge Polster in the Northern District of Ohio as Multi-District Litigation Case 2804, “*In re: National Prescription Opiate Litigation*.”¹⁰⁵ A settlement would need to be accepted by 75 percent of class members, and would be allocated based on a county-level formula.¹⁰⁶ Judge Polster certified this novel class proposal on September 11, 2019.¹⁰⁷ Even though any Negotiation Class settlement would not bind states, leaving state attorneys general free to continue their pending state court lawsuits,¹⁰⁸ thirty-seven state attorneys general sent Judge Polster a joint letter opposing the class as inconsistent with Federal Rule of Civil Procedure 23, which governs class actions, and failing to provide prospective class members with due process.¹⁰⁹ This letter does not contain the phrase “*parens patriae*,” but it does claim that attorneys general have

103. See *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 667 (6th Cir. 2020).

104. Hoffman, *supra* note 82.

105. Antonelli, *supra* note 60.

106. *Nat'l Prescription Opiate Litig.*, 976 F.3d at 668.

107. Alison Frankel, *Opioid MDL judges [sic] Oks novel negotiating class as 'likely to promote global settlement'*, REUTERS (Sept. 12, 2019, 5:20 PM), <https://www.reuters.com/article/us-otc-opioids/opioid-mdl-judges-oks-novel-negotiating-class-as-likely-to-promote-global-settlement-idUSKCN1VX2RE> [<https://perma.cc/Q7QD-LY93>].

108. See Letter from 27 Attorneys General, *supra* note 68.

109. Frankel, *supra* note 107.

the right to “speak[] on behalf of . . . governmental entities from their own states.”¹¹⁰ This is a clear indication that the attorneys general understand themselves to have exclusive discretion over opioid litigation involving political subdivisions of their states.

In a September 24, 2020 decision on interlocutory appeal, the Sixth Circuit reversed Judge Polster’s decision to certify the Negotiation Class as an abuse of discretion.¹¹¹ Judge Clay’s opinion criticized the proposed class as “wholly untethered from Rule 23,” which does not authorize a Negotiation Class as a separate category of certification distinct from a settlement or litigation class.¹¹² The court’s reasoned that the class as-proposed would qualify as neither a litigation nor settlement class, and that even if Rule 23 did authorize certification of a Negotiation Class as a separate category, the district court failed to conduct a full Rule 23(b)(3) analysis because it considered only federal (not parallel state-law) claims when determining that common questions predominate.¹¹³ Despite rejecting the Negotiation Class proposal, the court suggested that Rule 23 might yet facilitate a settlement, noting “[t]here is no apparent reason why some of the procedural elements of the negotiation class, such as the supermajority voting scheme and county-level allocation formula, could not be used to facilitate the participation of more Plaintiffs in a lawful settlement class.”¹¹⁴ Moreover, that Judge Moore wrote a forty-one page dissent arguing that certifying the Negotiation Class is consistent with Rule 23 suggests that another circuit might permit such a class in future mass tort litigation.¹¹⁵ This possibility of future negotiation classes makes it

110. Letter from 27 Attorneys General, *supra* note 68.

111. *Nat’l Prescription Opiate Litig.*, 976 F.3d at 677.

112. *Id.* at 672.

113. *Id.* at 672–76.

114. *Id.* at 676.

115. *Id.* at 677–708.

worthwhile to consider how this vehicle could have affected the current MDL litigation had it been allowed to proceed.

Had the Sixth Circuit allowed nearly all of the country's local governments to negotiate as a single block, it could have largely abated the concern of local governments "racing" one another to reach individual settlements before defendants run out of money. But the Negotiation Class would have done nothing to end the race between state and local governments because the latter would lack power to bind the former. As the state attorneys general reminded Judge Polster in their letter opposing certification, only a settlement reached by the states can release defendants from liability to both state and local governments.¹¹⁶ Moreover, the Negotiation Class did not offer to extinguish liability to all local governments in one fell swoop as its proponents hoped. Instead, 541 local governments, many of them in West Virginia and other areas of the country most heavily affected by the opioid crisis, opted out of the Negotiation Class in favor of pursuing individual litigation.¹¹⁷ This would make opioid manufacturers and distributors less willing to settle with the Negotiation Class because they would know that the settlement would not release these localities' relatively large claims. State-led negotiations would therefore still be more likely to result in quick, favorable settlements, and are accordingly more normatively desirable than even the proposed unified Negotiation Class of local governments.

As a matter of pure theory, *parens patriae* preclusion applies with full force to the Negotiation Class because the class consists entirely of non-sovereign entities asserting a "quasi-sovereign interest" in

116. See Letter from 27 Attorneys General, *supra* note 68.

117. Tom Hals, *U.S. regions hard hit by opioids to ditch class action, pursue own lawsuits*, REUTERS (Dec. 3, 2019, 1:34 PM), <https://www.reuters.com/article/us-usa-opioids-litigation/u-s-regions-hard-hit-by-opioids-to-ditch-class-action-pursue-own-lawsuits-idUSKBN1Y72C6> [<https://perma.cc/W9U8-4KX4>].

residents' general welfare.¹¹⁸ The Negotiation Class could have been expected to argue that its claims (two under RICO, and one under the Controlled Substances Act)¹¹⁹ do not assert a quasi-sovereign general welfare interest, but rest instead on injuries to the governmental units themselves. This would place the Negotiation Class claims squarely within the body of caselaw that holds that governmental units have standing to bring RICO claims for injuries to the governmental units themselves.¹²⁰ However, an equally well-developed body of law holds that RICO does not provide a cause of action for governmental units to bring claims on behalf of their citizens.¹²¹ The basis for the Negotiation Class's RICO claims—that defendants misled the public and failed to monitor and prevent suspicious opioid sales¹²²—relies heavily on these actions' effect on the general public. These claims therefore appear to be impermissible assertions of *parens patriae* jurisdiction. In practice, even if the Negotiation Class was consistent with Rule 23, it would be normatively desirable for state attorneys general to offer, and the Sixth Circuit to accept, an argument that states' *parens patriae* suits preclude the Negotiation Class's MDL lawsuit. Dismissal of this suit would allow defendants to focus on negotiating with states settlements that could actually release the defendants from all liability to municipal governments.

118. See *supra* Part I.A.

119. *Frequently Asked Questions*, IN RE: NATIONAL PRESCRIPTION OPIATES LITIGATION, <https://www.opioidsnegotiationclass.info/Home/FAQ> [<https://perma.cc/T4TN-R4X5>].

120. See JOHN J. HAMILL ET AL., A GUIDE TO CIVIL RICO LITIGATION IN FEDERAL COURTS 73 n.15 (2014), <https://jenner.com/system/assets/assets/9961/original/Civil%20RICO%202014.pdf> [<https://perma.cc/R3M6-86GZ>].

121. *Id.* at 73 n.16.

122. See *Frequently Asked Questions*, *supra* note 119.

C. *The States' Response: The Global Settlement Framework*

The policy benefit of *parens patriae* preclusion—facilitating quick settlement of all state and local government claims in a single negotiation—is potentially greater when states negotiate settlements in groups rather than individually because defendants face correspondingly fewer negotiations with individual states, and therefore less uncertainty. Four state attorneys general understood this when they proposed a global settlement framework that, if all states were to join, would settle all state and local government claims against opioid distributors Cardinal Health, McKesson, and Amerisource-Bergen and manufacturers Teva and Johnson & Johnson in return for installments of payments, products, and services worth \$48 billion made over the course of eighteen years.¹²³ State and local governments would each receive 15 percent of the money, with the remaining 70 percent going to fund efforts to combat the crisis.¹²⁴ Although some state attorneys general, including West Virginia's Patrick Morrisey, have expressed unwillingness to participate if the settlement distributes money based on state population instead of need,¹²⁵ the framework offers a promising starting point for a truly nationwide settlement.

State assertions of *parens patriae* preclusion, if successful in persuading courts to dismiss local government suits against defendants participating in the global settlement framework, would increase the likelihood of a nationwide settlement by allowing all parties to focus their attention and resources on this single set of

123. *Opioid Framework Factsheet*, N.C. DEP'T JUST., <https://ncdoj.gov/wp-content/uploads/2019/10/OpioidFrameworkFactSheetv3.pdf> [<https://perma.cc/JMQ8-RQBT>].

124. Tom Hals & Nate Raymond, *Several states wary of \$48 billion opioid settlement proposal*, REUTERS (Oct. 24, 2019, 6:11 AM), <https://www.reuters.com/article/us-usa-opioid-lawsuits/several-states-wary-of-48-billion-opioid-settlement-proposal-idUSKBN1X315P> [<https://perma.cc/W4ET-T9WK>].

125. *Id.*

negotiations. States would also likely receive better terms because there would be no pending local government lawsuits to cause trepidation among, or draw value out of, defendants. Because *parens patriae* preclusion of local government lawsuits would, in these ways, help produce a global settlement of all opioid crisis-related state and local government lawsuits, it would be normatively desirable for courts to accept and apply a *parens patriae* preclusion doctrine to opioid litigation. The doctrine would positively interact with state attorneys general's efforts to work together to achieve nationwide settlements that draw on the lessons of the 1998 tobacco settlement to simultaneously ensure that defendants obtain release from all liability to government entities and that funds are properly allocated to relevant programs and local governments.

CONCLUSION

State attorneys general have twice argued in mandamus petitions that states' unique capacity to represent their residents as *parens patriae* bars local governments from bringing substantially similar lawsuits. The courts in both instances rejected the petitions without discussing this argument. State attorneys general should nonetheless continue making *parens patriae* preclusion arguments, and courts should give them more serious consideration. A doctrine preventing local governments from bringing lawsuits based on harms to their residents not only finds plausible support in the sparse legal materials delimiting *parens patriae* standing, but would also encourage state attorneys general and pharmaceutical industry defendants to agree to nationwide or statewide settlements that avoid the 1998 tobacco Master Settlement Agreement's principal flaws.

Arkansas and Ohio's formulations of *parens patriae* preclusion were highly ambiguous, and neither made much effort to identify

a theoretical basis for the concept or define its limits. These shortcomings are no doubt the result of the time constraints each state faced when writing its emergency mandamus petition. If state attorneys general more precisely formulate these arguments, root them in a coherent theory of *parens patriae* standing that draws on Supreme Court precedent and the common law, and highlight the concept's potential to encourage relatively quick nationwide settlements with mass tort defendants, courts might begin to take the arguments seriously. The resulting dialogue between state attorneys general and courts would help resolve the ambiguities apparent in this note's discussion of the multiple possible forms of a *parens patriae* preclusion doctrine by settling on a definite rationale with defined limits. The end result would be more clarity in the law and a doctrinal vehicle for more efficiently and equitably resolving mass tort suits involving wide swaths of the nation's population and an entire industry.

Nick Cordova

JURISDICTIONAL AVOIDANCE: RECTIFYING THE LOWER COURTS' MISAPPLICATION OF *STEEL CO.*

INTRODUCTION

It is well established that the federal judicial power extends only to “Cases” and “Controversies.”¹ And that “[f]ederal courts are courts of limited jurisdiction, possessing ‘only that power authorized by Constitution and statute.’”² Therefore, as the Supreme Court explained in *Steel Co. v. Citizens for a Better Environment*,³ “[t]he requirement that jurisdiction be established as a threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’”⁴ “Without jurisdiction the court cannot proceed at all in *any* cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”⁵

The majority in *Steel Co.* thus set forth a simple rule: In “every” case, “the first and fundamental question is that of jurisdiction.”⁶ This is consistent with a long and venerable line of Supreme Court

1. U.S. CONST. art. III, § 2; *see, e.g.*, *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016).

2. *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

3. 523 U.S. 83 (1998).

4. *Id.* at 94–95 (second alteration in original) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

5. *Id.* at 94 (emphasis added) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

6. *Id.* (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)).

precedent,⁷ and the rule also makes eminent sense. “The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.”⁸ Simply put, “[f]or a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.”⁹

At the same time, *Steel Co.* rejected the concept of “hypothetical jurisdiction,” “the practice of deciding the cause of action before resolving Article III jurisdiction.”¹⁰ Some lower courts had previously embraced such an approach when: “(1) the merits question [was] more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied.”¹¹ But writing for the Court, Justice Scalia denounced this method of leapfrogging over the “threshold jurisdictional question.”¹² A federal court could no longer—nor could it ever—decide “an ‘easy’ merits question . . . on the assumption of jurisdiction.”¹³ And this holding is more than just a matter of good judicial practice. It is constitutionally compelled by Article III’s case or controversy requirement.¹⁴ “Hypothetical jurisdiction produces nothing more

7. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 94–95 (1968); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934); *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Great Southern Fire Proof Hotel*, 177 U.S. at 453; *McCardle*, 74 U.S. at 514; *Rhode Island v. Massachusetts*, 37 U.S. (12 Peters) 657, 718 (1838); *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 410 n.2 (1792);.

8. *Steel Co.*, 523 U.S. at 101.

9. *Id.* at 101–02.

10. *Id.* at 98.

11. *Id.* at 93–94 (collecting cases); see also Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235, 260–64 (1999) (detailing the doctrine’s overuse prior to *Steel Co.*).

12. *Steel Co.*, 523 U.S. at 102.

13. *Id.* at 99.

14. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 385 (1989) (“According to express provision of Article III, the judicial power of the United States is limited to ‘Cases’ and

than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by [the Supreme] Court from the beginning.”¹⁵

As the sweeping language above shows, *Steel Co.*'s prohibition on hypothetical jurisdiction is absolute.¹⁶ It is not subject to exception. The wrinkle—which spawned the problem that this Note addresses—is that the Court did acknowledge that two cases which it declined to overrule seemed to “dilute[] the absolute purity of the rule that Article III jurisdiction is always an antecedent question.”¹⁷ As a consequence, the lower courts have misread those cases to continue practicing the hypothetical jurisdiction that *Steel Co.* explicitly forbade. But, as the *Steel Co.* Court's explanation makes clear, neither case (nor any other) grants a federal court license to assume jurisdiction.¹⁸ Such a transgression of jurisdictional boundaries is antithetical to the “proper—and properly limited—role of the courts in a democratic society.”¹⁹

Part I of this Note argues that the cases *Steel Co.* declined to overrule fail to support even a limited departure from the inflexible rule that jurisdiction is the first and fundamental question in every dis-

‘Controversies.’ In implementing this limited grant of power, we have refused to issue advisory opinions or to resolve disputes that are not justiciable.” (citation omitted)).

15. *Steel Co.*, 523 U.S. at 101 (citing *Muskrat v. United States*, 219 U.S. 346, 362 (1911); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.2 (1792)); see *Flast v. Cohen*, 392 U.S. 83, 97 (1968) (“Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.”).

16. See, e.g., *Steel Co.*, 523 U.S. at 94–95 (“The requirement that jurisdiction be established as a threshold matter . . . is ‘inflexible and without exception.’” (quoting *Mansfield, C & L.M. Ry. Co.*, 111 U.S. 379, 382 (1884))).

17. *Id.* at 101.

18. See *id.* But cf. *Idleman*, *supra* note 11, at 285 (“For all its merit, the *Steel Co.* Court's repudiation of hypothetical jurisdiction is, when viewed as a whole, not an exemplar of clarity, which itself is perhaps one more ironic feature of the decision.”).

19. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

pute. Part II then explains how and why the lower courts have misinterpreted those cases to revive one particular hypothetical jurisdiction practice which runs afoul of *Steel Co.*—one the appellate courts have deemed the “foreordained” exception.²⁰ Finally, Part III closes by recommending that the lower courts must themselves rectify their own mistake going forward.

I. AN OSTENSIBLE EXCEPTION TO THE JURISDICTIONAL RULE

The wrinkle alluded to above can be ironed out by a close examination of the “extraordinary procedural postures” of the two enigmatic cases *Steel Co.* retained as good law²¹—*Secretary of Navy v. Avrech*²² and *Norton v. Mathews*.²³ When read correctly and in light of *Steel Co.*, neither authorizes the circuit courts to “bypass [a] jurisdictional question and proceed directly to the [merits]”²⁴ as they have continued to do.

First, prior to the Court’s ruling in *Avrech*, the merits issue in the case had been conclusively resolved by a companion case argued the same day.²⁵ Following oral argument, the Court noticed a potential issue that it (erroneously) characterized as “jurisdictional” and ordered that the parties submit supplemental briefing.²⁶ But because the merits issue had been definitively resolved by a companion case, the *Avrech* Court concluded that “[w]ithout the benefit of

20. See, e.g., *Starkey ex rel. A.B. v. Boulder Cty. Soc. Servs.*, 569 F.3d 1244, 1260 (10th Cir. 2009).

21. *Steel Co.*, 523 U.S. at 98.

22. 418 U.S. 676 (1974) (per curiam).

23. 427 U.S. 524 (1976).

24. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 144 (1st Cir. 2007).

25. *Avrech*, 418 U.S. at 677–78 (citing *Parker v. Levy*, 417 U.S. 733 (1974)); see also *Steel Co.*, 523 U.S. at 99.

26. *Avrech*, 418 U.S. at 677.

further oral argument, [it was] unwilling to decide the difficult jurisdictional issue which the parties ha[d] briefed.”²⁷ It did so on the “belie[f] that even the most diligent and zealous advocate could find his ardor somewhat dampened in arguing a jurisdictional issue where the decision on the merits [was] thus foreordained.”²⁸

This language notwithstanding, and as *Steel Co.* noted, “[t]he first thing to be observed about *Avrech* is that the supposed jurisdictional issue was technically not that.”²⁹ Although *Avrech* “characterized [the] question as jurisdictional,” the Supreme Court “later held squarely that it was not.”³⁰ That means that *Avrech* never involved a question of hypothetical jurisdiction in the first place. And that explains why *Steel Co.* declined to overrule the case. Bypassing a *non-jurisdictional* question was not an error.³¹

The second (and far more complex) case seeming to support hypothetical jurisdiction was *Norton*. There, the dispute came to the Supreme Court on direct appeal from a three-judge district court.³² Once again, a companion case had squarely resolved the merits issue,³³ and the unique procedural posture was critical to the result. At the time, a now-repealed statute had required a three-judge district court to convene for any request for an “injunction restraining

27. *Id.*

28. *Id.* at 678. This is a reason for voluntary dismissal by the parties, not jurisdictional neglect by the Court.

29. *Steel Co.*, 523 U.S. at 99.

30. *Id.* (citing *Schlesinger v. Councilman*, 420 U.S. 738, 753 (1975)) (“The issue was whether a court-martial judgment could be attacked collaterally by a suit for back-pay.”).

31. *See id.* (“To the contrary, the fact that the [*Avrech*] Court ordered briefing on the jurisdictional question *sua sponte* demonstrates its adherence to traditional and constitutionally dictated requirements.”).

32. *Norton v. Mathews*, 427 U.S. 524, 528–29 (1976).

33. *Id.* at 530 (citing *Mathews v. Lucas*, 427 U.S. 495 (1976)); *see also Steel Co.*, 523 U.S. at 98 (“We declined to decide that jurisdictional question, because the merits question was decided *in a companion case*, with the consequence that the jurisdictional question could have no effect on the outcome” (citation omitted)).

the enforcement, operation, or execution of any Act of Congress for repugnance to the Constitution.”³⁴ *Norton* presented a subtle issue as to whether an injunction was available at all.

Petitioner Gregory Norton, Jr., was born out of wedlock and, after his father died in Vietnam, his grandmother filed an application for a surviving child’s benefit under the Social Security Act (SSA).³⁵ Norton lost in an administrative hearing and then again on appeal “because his father, at the time of his death, was neither living with [him] nor contributing to [his] support.”³⁶ Norton then sought judicial review against the Secretary of Health, Education, and Welfare on both statutory and constitutional grounds. Setting aside the statutory issue, Norton argued that the SSA discriminated against illegitimate children by denying them the “presumption of dependency,” allegedly in violation of the Constitution’s guarantee of equal protection.³⁷

This is where the subtle jurisdictional issue comes in. The SSA provided that after a final decision by the Secretary, “[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of title 28 to recover on any claim arising under [the SSA].”³⁸ Accordingly, the Solicitor General argued that a district court lacked the authority to issue an injunction in Norton’s case, “because § 205(h) [of the Social Security Act] specifically exclude[d] any other source of review,” and § 205(g) “specifie[d] that a district court may enter a judgment only

34. 28 U.S.C. § 2282 (1970), *repealed by* Pub. L. No. 94-381, §§ 1, 2, 90 Stat. 1119 (1976).

35. *Norton*, 427 U.S. at 525-26.

36. *Id.* at 526-27.

37. *Id.* at 527.

38. 42 U.S.C. § 405(h) (1970). When the statute was enacted, “prior to the 1948 recodification of Title 28, § 41 contained all of that title’s grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes.” *Weinberger v. Salfi*, 422 U.S. 749, 756 n.3 (1975).

'affirming, modifying, or reversing the decision of the Secretary.'"³⁹ As *Norton* explained, "[i]f the court was not empowered to enjoin the operation of a federal statute, then three judges were not required to hear the case," and in turn, the Supreme Court would lack jurisdiction to entertain the direct appeal.⁴⁰

Writing for the Court, Justice Blackmun "did not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed,"⁴¹ as some courts have erroneously suggested.⁴² "Rather, the Court held that it did not need to decide *the particular jurisdictional question at issue* in *Norton* in order to affirm on the merits because under either possible answer to that question, the outcome would be the same."⁴³ It explained:

Assuming that the three-judge court was correctly convened, and that we have jurisdiction over the appeal, the appropriate disposition, in the light of [the companion case], plainly would be to affirm the judgment entered in this case in favor of the Secretary. Assuming, on the other hand, that we lack jurisdiction because the three-judge court was needlessly convened, the appropriate disposition would be to dismiss the appeal. When an appeal to this Court is sought from an erroneously convened three-judge district court, we retain the power "to make such corrective order as may be appropriate to the enforcement of the limitations" which 28 U.S.C. § 1253 imposes. What we have done recently, and in most such cases where the jurisdictional issue was previously

39. *Norton*, 427 U.S. at 530 n.7 (quoting 42 U.S.C. § 405(g) (1970)).

40. *Id.* at 529.

41. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98 (1998).

42. *See, e.g., Clow v. United States Dep't of Hous. & Urban Dev.*, 948 F.2d 614, 616 (9th Cir. 1991) (per curiam).

43. *Id.* at 626 (O'Scannlain, J., dissenting) (cited approvingly by the *Steel Co.* majority in its discussion of *Norton*. 523 U.S. at 98).

unsettled . . . has been to vacate the district court judgment and remand the case for the entry of a fresh decree from which an appeal may be taken to the appropriate court of appeals. . . . In the present case, however, the decision in *Lucas* has rendered the constitutional issues insubstantial and so much so as not even to support the jurisdiction of a three-judge district court to consider their merits on remand. Thus, there is no point in remanding to enable the merits to be considered by a court of appeals.⁴⁴

As the latter two sentences reveal—and as Justice Scalia observed—*Norton* “seems to have regarded the merits judgment that it entered on the basis of *Lucas* as equivalent to a jurisdictional dismissal for failure to present a substantial federal question.”⁴⁵ Such a disposition on (perhaps tenuous) jurisdictional grounds would be consistent with the “two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits.”⁴⁶ And indeed this type of dismissal for direct appeals was commonplace at the time, when the Supreme Court routinely heard more than 150 cases per year—more than double its current caseload.⁴⁷ Calling a federal question “insubstantial” essentially provided a mechanism for the overworked Court to dismiss cases that it was statutorily required to hear.⁴⁸

44. *Norton*, 427 U.S. at 531–32 (citations omitted) (quoting *Bailey v. Patterson*, 369 U.S. 31, 34 (1962)).

45. *Steel Co.*, 523 U.S. at 98; cf. *Bell v. Hood*, 327 U.S. 678, 682–83 (1946) (holding that a suit which is “wholly insubstantial and frivolous” or “patently without merit” does not create federal question jurisdiction).

46. *Steel Co.*, 523 U.S. at 98.

47. See *FAQs—General Information: How many cases are appealed to the Court each year . . . ?*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/faq_general.aspx [<https://perma.cc/TBN2-GSDF>] (last visited Dec. 3, 2020) (noting the Court grants an oral argument for approximately eighty cases a year).

48. The “accuracy of calling these dismissals jurisdictional has been questioned.” *Bell*, 327 U.S. at 683. And the Court has repeatedly conceded that this type of jurisdictional handwaving is “more ancient than analytically sound.” *Hagens v. Lavine*, 415 U.S.

But even if it did not so view the case, there is an alternative explanation as to why *Norton* does not violate the *Steel Co.* rule. In particular, Justice Blackmun implicitly recognized the *certainty* of the district court's jurisdiction on remand. After all, "a determination that the three-judge district court was improperly convened in *Norton* would not have meant the absence of district court jurisdiction *altogether*; it would only have meant that there was no jurisdiction for a *three-judge* district court" in the first instance.⁴⁹ The question thus became which of two jurisdictional schemes were to be exercised on remand. And regardless of the answer, "the same party would prevail and would do so *on the merits*" in light of *Lucas*.⁵⁰ Indeed, this on-the-merits decision would inevitably be rendered in a district court—and this is critical—of competent jurisdiction. There was, in other words, no lurking problem of jurisdiction *vel non*.⁵¹

The point is, *Steel Co.*'s decision left both *Norton* and *Avrech* intact because neither case affected its central holding: The federal courts can never exercise hypothetical jurisdiction.⁵² *Avrech* did not involve a jurisdictional issue at all. And in the "peculiar case" of *Norton*,⁵³ the Court still recognized the certainty of the district court's

528, 538 (1974) (quoting *Rosado v. Wyman*, 397 U.S. 397, 404 (1970)). The Court has therefore retreated somewhat to acknowledge that "[a]bsent . . . frivolity, 'the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.'" *Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (quoting *Bell*, 327 U.S. at 682). It would be odd indeed to deem the merits issue in *Norton* "frivolous," given that three Justices dissented on that very issue in *Mathews v. Lucas*, 427 U.S. 495 (1976).

49. *Clow v. United States Dep't of Hous. & Urban Dev.*, 948 F.2d 614, 626 (9th Cir. 1991) (O'Scannlain, J., dissenting).

50. *Id.* at 627.

51. *See id.*

52. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998) ("declin[ing] to endorse" the "bold[] point" made by Justice Stevens and several Courts of Appeals "that jurisdiction need not be addressed first").

53. *Id.* at 98.

jurisdiction in one form or another. At bottom, “nothing depended upon a resolution of the precise *nature* of that jurisdiction,”⁵⁴ and “the consequence [was] that the jurisdictional question could have no effect on the outcome.”⁵⁵

II. THE APPELLATE COURTS HAVE MISREAD *STEEL CO.*

Since *Steel Co.* was decided in 1998, many of the appellate courts have failed to heed its admonition. Most notably, in an opinion written by then-Judge Sotomayor, the Second Circuit in *Center for Reproductive Law and Policy v. Bush*⁵⁶ carved out an exception to the prohibition against hypothetical jurisdiction. It latched on to *Steel Co.*'s statement that it “must be acknowledged [that previous decisions by the Court] have diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question.”⁵⁷ From this statement, and from the fact that the Court declined to overrule either *Norton* or *Avrech*, the Second Circuit mistakenly concluded that *Steel Co.* left the door open to hypothetical jurisdiction in certain circumstances. Specifically, then-Judge Sotomayor suggested that:

[T]he majority opinion in *Steel Co.* appears to allow an exception to the rule against assuming the existence of standing in those “peculiar circumstances” where the outcome on the merits has been “foreordained” by

54. *Clow*, 948 F.2d at 627 (O’Scannlain, J., dissenting) (emphasis added).

55. *Steel Co.*, 523 U.S. at 98.

56. 304 F.3d 183 (2d Cir. 2002) [hereinafter *Bush*].

57. *Id.* at 193 (quoting *Steel Co.*, 523 U.S. at 101). Note that *Steel Co.* readily distinguished three other cases in addition to *Avrech* and *Norton*. See *Steel Co.*, 523 U.S. at 99–100 (citing *United States v. Augenblick*, 393 U.S. 348 (1969) (same issue as *Norton*); *Philbrook v. Glodgett*, 421 U.S. 707, 721–22 (1975) (substantive issue would have been decided in the same case even if District Court concluded that the Secretary was not properly a party); *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 86–88 (1970) (Court’s decision on exhaustion grounds was itself jurisdictional).

another case such that “the jurisdictional question could have no effect on the outcome,” provided the court “d[oes] not use the pretermission of the jurisdictional question as a device for reaching a question of law that otherwise would have gone unaddressed.”⁵⁸

The circuit court then held that whenever “a governmental provision is challenged as unconstitutional, and a controlling decision of [the same Circuit] Court has already entertained and rejected the same constitutional challenge to the same provision, the Court may dispose of the case on the merits without addressing a novel question of jurisdiction.”⁵⁹ It went so far as to proclaim that in such a situation, “it is the adjudication of the *standing* issue that resembles an advisory opinion.”⁶⁰

Not so. This perceived “foreordained” exception is wholly inconsistent with *Steel Co.*, and the analysis in *Bush* suffers from three fundamental flaws. First, the *Bush* court drew a mistaken analogy to *Norton* and *Avrech*. Second, it neglected the inherent differences between a circuit court and the Supreme Court. And third, it mistakenly suggested that the adjudication of a jurisdictional issue in a live case or controversy would somehow produce an advisory opinion by the lower court. These three shortcomings are discussed below in turn.

A. *A Mistaken Analogy*

When read in their proper context, neither *Norton* nor *Avrech* lend any support to the *Bush* decision. On the one hand, *Bush* presented a garden-variety case wherein the Second Circuit had previously

58. *Bush*, 304 F.3d at 194 (second alteration in original) (quoting *Steel Co.*, 523 U.S. at 98).

59. *Id.* at 195.

60. *Id.* (emphasis added).

ruled on a very similar merits question. In the Second Circuit's view, then:

We find ourselves in largely the same situation as the Supreme Court found itself in *Norton* and *Avrech*: plaintiffs in this case challenge a governmental provision (the use of the Standard Clause) as unconstitutional, and there is a controlling case in which this Court entertained and rejected the same constitutional challenge to the same provision.⁶¹

But this similarity to *Norton* and *Avrech* is immaterial. As discussed above, what mattered to the Supreme Court were the “extraordinary procedural postures” which compelled the outcome on the merits, regardless of the answer to the particular jurisdictional question.⁶² For instance, in *Norton*, Supreme Court precedent would have bound either a one-judge or three-judge district court on remand—both in the exact same way—and the district court *would have had* jurisdiction.

The same cannot be said in *Bush*, which did not even involve a set of simultaneous companion cases like *Avrech* or *Norton*. Instead, the decision bypassed the threshold question of Article III standing to hold that a Second Circuit opinion from more than a decade earlier—in fact, a pre-*Steel Co.* case which *itself* exercised hypothetical jurisdiction—controlled the outcome.⁶³ And, to make matters worse, it did so even though the plaintiffs argued that both factual distinctions

61. *Id.*

62. *Steel Co.*, 523 U.S. at 98–99. One could argue that *Avrech* still treated the issue as jurisdictional, even if it did so erroneously. But given the absence of any constitutional misstep, there was no reason for *Steel Co.* to overrule *Avrech*.

63. See *Planned Parenthood Fed. of Am., Inc. v. Agency for Int'l Dev.*, 915 F.2d 59, 66 (2d Cir. 1990) (“Having found no constitutional rights implicated here, we do not address the government's arguments concerning standing.”).

and intervening precedent cast doubt on the applicability of the previous decision.⁶⁴

In any event, despite its recognition of a potential jurisdictional infirmity,⁶⁵ and despite the district court's recognition that it had to address standing first,⁶⁶ the Second Circuit improperly then went on to profess on substantive law. It considered the weight of the "somewhat different context" as "a legal matter," and ultimately deemed the factual distinctions and the plaintiffs' legal arguments "unavailing."⁶⁷ This plainly violated the rule that "[f]ederal courts *must* determine that they have jurisdiction before proceeding to the merits."⁶⁸ For if the court lacked jurisdiction, its unnecessary pronouncements on the law "produce[d] nothing but an impermissible advisory opinion."⁶⁹ Quite the opposite of what the Second Circuit suggested.

B. Inherent Differences Between the Supreme Court and Circuit Courts

In addition to the faulty analogy to *Norton* and *Avrech*, invoking the "foreordained" exception in the inferior courts is a particularly problematic transgression of judicial authority. For even if *Bush* were correct that *Norton* licenses the Supreme Court to assume its way into the merits in certain cases, that does not justify the same practice in the lower courts. This is because in the lower courts, a

64. See *Bush*, 304 F.3d at 191; Reply Brief for Plaintiffs-Appellants at 17–20, Ctr. for Reprod. Law & Policy v. Bush (No. 01–6168), 304 F.3d 183 (2d Cir. 2002), 2001 WL 34366665.

65. See *Bush*, 304 F.3d at 191–93.

66. Ctr. for Reprod. Law & Policy v. Bush, 01 Civ. 4986 (LAP), 2001 U.S. Dist. LEXIS 10903, at *20 (S.D.N.Y. July 31, 2001) ("Here, were I to ignore defendants' 12(b)(1) motion and instead turn to an analysis of the merits of the case, I would be engaging in a form of hypothetical jurisdiction."); see *id.* at *38 (dismissing for lack of standing).

67. *Bush*, 304 F.3d at 190–91, 193.

68. *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (emphasis added).

69. *McCullen v. Coakley*, 573 U.S. 464, 500 (2014) (Scalia, J., concurring).

ruling on a dispositive issue like jurisdiction or the merits is not necessarily the end of the road. A losing party can still petition for certiorari or an en banc rehearing, and that may be the precise reason the claim is initially brought. After all, why would a party press a claim if the result were truly “foreordained” in the opposition’s favor? The question begs the answer—that the ultimate result is usually not so certain.

Indeed, the answer to the jurisdictional question in *Bush* certainly could have had an “effect on the outcome.”⁷⁰ To illustrate, consider a scenario wherein *Bush* is appealed to the Supreme Court and certiorari is granted. If jurisdiction were then found to be lacking, the Court would plainly be restricted to “announcing the fact and dismissing the cause.”⁷¹ But if it were instead satisfied, the Court could have held either way on the merits, as there would be no binding precedent on point. Thus, as this example shows, a prior *circuit court* opinion does not “foreordain” the result like a Supreme Court opinion might.⁷² And it is simply wrong for an intermediate court to suggest that a case “cannot go forward” just because there is a previous panel precedent on point.⁷³ In the same vein, even if one accepts that a “wholly insubstantial and frivolous” claim renders a federal court without jurisdiction,⁷⁴ it defies reason to characterize a claim as such just because a three-judge panel in a lower court has addressed the matter in the wake of Supreme Court silence. All of

70. *Bush*, 304 F.3d at 194 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 98 (1998)).

71. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869); *Steel Co.*, 523 U.S. at 94.

72. *Steel Co.* implicitly recognized as much. See *Steel Co.*, 523 U.S. at 98–99 (explaining that *Norton* and *Avrech* both “involved an instance in which an intervening *Supreme Court* decision definitively answered the merits question” (emphasis added)).

73. *Bakalian v. Cent. Bank of the Republic of Turk.*, 932 F.3d 1229, 1236 (9th Cir. 2019).

74. *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015) (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1946)).

these institutional factors serve to fundamentally distinguish *Bush* and its misguided progeny from *Norton*.

These critical distinctions between the circuit courts and the Supreme Court raise a further set of practical concerns. The “foreordained” exception is aimed largely at promoting the virtue of judicial economy.⁷⁵ And yet, assuming jurisdiction in a lower court can create its own inefficiencies in subsequent proceedings.⁷⁶ Consider again the example wherein *Bush* is appealed. The Supreme Court would of course not be bound as to the merits by the Second Circuit precedent, which had purportedly “foreordained” the decision below. But the Supreme Court could very well have to dismiss on standing grounds instead, which would then render the Second Circuit’s own exposition on the merits a waste of time.⁷⁷ Meanwhile, the Supreme Court would have to make this standing determination without the benefit of the lower courts’ views.⁷⁸ And that is particularly undesirable when the jurisdictional issue presents a fact-intensive inquiry such as the presence of Article III standing. Further compounding the inefficiency, the Supreme Court might,

75. See *Lemma v. Hispanic Nat’l Bar Ass’n*, 318 F. Supp. 3d 21, 24–25 (D.D.C. 2018) (noting that “reaching the merits of [a] claim might serve the interests of judicial economy” in some cases “by achieving greater finality in the disposition of the case”).

76. See Joshua S. Stillman, *Hypothetical Statutory Jurisdiction and the Limits of Federal Judicial Power*, 68 ALA. L. REV. 493, 540–41 (2016). In *Firearms Policy Coalition, Inc. v. Barr*, 419 F. Supp. 3d 118, 123 (D.D.C. 2019), the plaintiff attempted to argue that a prior *district court* opinion foreordained the merits such that a standing inquiry was unnecessary. The district court correctly addressed the standing issue first, noting that a “decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” *Id.* (quoting *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011)).

77. See *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (“We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below.”).

78. Cf. *United States v. W. Elec. Co., Inc.*, 907 F.2d 1205, 1210 (D.C. Cir. 1990) (articulating the appellate court’s “prefer[ence] not to rule dispositively on [an] issue without the benefit of the district court’s views”).

as it has in the past, have to remand for an initial resolution of the standing issue, precisely because the lower courts are better equipped for the factfinding often needed to address the issue adequately.⁷⁹ What's more, if the petitioner did in fact lack standing, the Second Circuit might have "also suffer[ed] serious legitimacy costs by being shown to have acted beyond [its] authority."⁸⁰ After all, the institutional legitimacy of America's unelected and politically unaccountable federal judiciary hinges largely on judges' scrupulous adherence to their jurisdictional boundaries.⁸¹ These concerns can be avoided entirely, however, if the lower courts just address any jurisdictional issues that come to their attention in the first place.

C. *The Advisory Opinion Misnomer*

Bush committed a third basic error. It correctly stated that the "concern of the *Steel Co.* majority was that deciding a case on the mere assumption of jurisdiction can lead to the rendering of advisory opinions in violation of Article III."⁸² But then ironically citing Justice Stevens' concurrence—one that Justice Scalia's majority opinion flatly rejected⁸³—*Bush* flipped the majority's position on its

79. See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 n.2 (1976); *Rogers v. Paul*, 382 U.S. 198, 200 (1965); cf. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 249 (1990) (Stevens, J., concurring in part and dissenting in part) ("I would remand for an evidentiary hearing on the standing issues.").

80. Stillman, *supra* note 76, at 541; cf. *Lemma*, 318 F. Supp. 3d at 25 ("[T]he economy of [reaching the merits without deciding jurisdiction] is diminished by the uncertainty that exists regarding the Court's authority to resolve even a straightforward motion to dismiss for failure to state a claim before resolving a personal jurisdiction defense.").

81. See Brian Kulp, Note, *Counteracting Marbury: Using the Exceptions Clause to Overrule Supreme Court Precedent*, 43 HARV. J.L. & PUB. POL'Y 279, 299–300 (2020).

82. *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 195 (2d Cir. 2002).

83. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–97 (1998).

head by characterizing the “adjudication of the standing issue” as itself “resembl[ing] an advisory opinion.”⁸⁴

That is not true. An advisory opinion is one that abstractly opines on the law in the absence of any concrete and adversarial dispute.⁸⁵ Such a theoretical legal pronouncement is of course forbidden by Article III’s case-or-controversy requirement.⁸⁶ Yet contrary to *Bush*’s suggestion, there is simply nothing advisory about answering a threshold jurisdictional question when a live case or controversy remains, as one did in that case. Indeed, if jurisdiction were proper, the Second Circuit or Supreme Court would still have possessed the judicial power to depart from the past precedent.⁸⁷

Moreover, “it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction.”⁸⁸ Accordingly, as *Steel Co.* reiterated, “[e]very federal appellate court has a special *obligation* to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.”⁸⁹ Doing so is an absolute prerequisite to any constitutional exercise of the judicial power. And this means that, on a jurisdictional question, it is the federal courts’ “duty to permit argument, and to take the time required for

84. *Bush*, 304 F.3d at 195.

85. See, e.g., *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *Aetna Life Ins. Co. v. Hawthorn*, 300 U.S. 227, 241 (1937); *Muskrat v. United States*, 219 U.S. 346, 357 (1911).

86. See *U.S. Nat’l Bank*, 508 U.S. at 446.

87. For a discussion of the prior-panel-precedent rule, see *infra* Part III.B.

88. *United States v. Ruiz*, 536 U.S. 622, 628 (2002); see *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (“When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.” (alterations adopted) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986))); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).

89. *Steel Co.*, 523 U.S. at 95 (emphasis added) (quoting *Arizonans for Official English*, 520 U.S. at 73).

such consideration as it might need.”⁹⁰ It does not matter whether the parties raise the issue. Nor may a court bypass the threshold subject-matter-jurisdiction inquiry even when the parties stipulate to its existence.⁹¹

Whenever jurisdiction is lacking, then, “the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III.”⁹² In such circumstances, the federal courts must refrain from indulging “the precedent-shattering general proposition that an ‘easy’ merits question may be decided on the assumption of jurisdiction.”⁹³ The Second Circuit in *Bush* ignored that mandate, misunderstood the nature of an advisory opinion, and improperly assumed its way into the merits. In doing so, it spawned a growing movement in the lower courts that has unconstitutionally restored the exercise of hypothetical jurisdiction.

D. Other Flawed Justifications for Invoking the “Foreordained” Exception

Despite *Bush* being wrongly decided, its ill-conceived exception to the absolute prohibition on hypothetical jurisdiction has now gained traction in a number of lower courts, including the First, Second, Third, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits.⁹⁴ The

90. *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947) (quoting *United States v. Shipp*, 203 U.S. 563, 573 (1906)).

91. *Sosna v. Iowa*, 419 U.S. 393, 398 (1975). Of course, *personal* jurisdiction may still be waived because it provides an “individual right.” See, e.g., *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 (1982).

92. *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

93. *Steel Co.*, 523 U.S. at 99 (emphasis omitted).

94. See, e.g., *Seale v. INS*, 323 F.3d 150, 155 (1st Cir. 2003); *Sinapi v. R.I. Bd. of Bar Exam’rs*, 910 F.3d 544, 550 (1st Cir. 2018); *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 195 (2d Cir. 2002); *United States v. Skeffery*, 283 F. App’x 75, 77 (3d Cir. 2008); *United States v. King*, 123 F. App’x 144, 146 n.1 (5th Cir. 2004); *United States v. Blewett*, 746 F.3d 647, 650 (6th Cir. 2013) (en banc); *id.* at 661–62 (Moore, J., concurring); *Bakalian*

result has been a snarled morass of self-affirming jurisprudence, with the circuits relying on one another's mistakes.

In these attempts to circumvent thorny jurisdictional issues, some courts have offered an additional justification for the exception. Namely, some have urged that a "court does not exercise its 'power to declare the law,' and thus need not resolve difficult questions of its jurisdiction, when a prior judgment of the court forecloses the merits issue."⁹⁵ But this too is unavailing. Every time a court reaffirms its precedent, it is declaring what the law is, it is declaring that the law has not changed, and it is proclaiming that the prior precedent squarely applies to the particular circumstances.⁹⁶ By doing so, a court moreover acts to clarify the rights of the parties and thus unconstitutionally injects itself into an issue that it has no authority to resolve.⁹⁷

Not only that, but this additional proffered rationale exposes another shortcoming in the exception. That is, the merits are not truly "foreordained" just because the same court has previously ruled on an issue. "*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'"⁹⁸ In other words, while faithfulness to precedent is wise as a matter of judicial custom, it is not a constitutional

v. Cent. Bank of the Republic of Turk., 932 F.3d 1229 (9th Cir. 2019); *Starkey v. Boulder Cty. Soc. Servs.*, 569 F.3d 1244, 1260–61 (10th Cir. 2009); *All. of Artists & Recording Cos. v. DENSO Int'l Am., Inc.*, 947 F.3d 849, 860–61 (D.C. Cir. 2020); *Sherrod v. Breitbart*, 720 F.3d 932, 937 (D.C. Cir. 2013); *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 920 (D.C. Cir. 2013).

95. *Sherrod*, 720 F.3d at 937 (quoting *Steel Co.*, 523 U.S. at 94) (citation omitted).

96. *Cf. Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 190 (2d Cir. 2002) (holding that "no intervening Supreme Court case law alter[ed the] precedential value" of the case decided twelve years earlier).

97. *See Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005) ("[A]bsence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties.").

98. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

compulsion. By contrast, rigid adherence to the jurisdictional limitations of the federal courts is a “traditional and constitutionally dictated requirement[.]”⁹⁹ The latter must therefore prevail.

Alternatively, other circuit courts have reasoned that, even if it is impermissible to exercise hypothetical jurisdiction when Article III questions are at stake, a court may assume jurisdiction when the question is “a matter of statutory, not constitutional, dimension.”¹⁰⁰ This “is ultimately based on the premise that statutory subject-matter jurisdiction limitations are not as important, fundamental, and deserving of respect as Article III limitations, and therefore may be bypassed even though their constitutional counterparts may not be.”¹⁰¹

But that premise is simply untenable. In granting Congress the power to “ordain and establish” the inferior courts as it saw fit,¹⁰² the Framers afforded Congress the concomitant, “plenary” authority to sculpt the lower courts’ jurisdiction within constitutional bounds.¹⁰³ Consistent with Article III, *Steel Co.* hence recognized that the “statutory” elements of jurisdiction are “an essential ingredient of separation and equilibration of powers” just the same.¹⁰⁴ Such subject-matter limitations “keep the federal courts within the bounds the Constitution and Congress have prescribed,” meaning

99. *Steel Co.*, 523 U.S. at 99; *see also* *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (“Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level.”).

100. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 144 (1st Cir. 2007).

101. *Stillman*, *supra* note 76, at 513.

102. U.S. CONST. art. III, § 1.

103. *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality opinion) (“These provisions reflect the so-called Madisonian Compromise, which resolved the Framers’ disagreement about creating lower federal courts by leaving that decision to Congress.”); *see also* *Bowles v. Russell*, 551 U.S. 205, 212 (2007) (“Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.”).

104. *Steel Co.*, 523 U.S. at 101.

both constitutional and statutory subject-matter delineations alike “must be policed by the courts on their own initiative” at all levels.¹⁰⁵ Lest the courts act in contravention of the separation-of-powers and federalism principles embodied in Article III, they cannot dispense with the statutory elements of jurisdiction any more than the constitutional ones just because there is circuit precedent on point.¹⁰⁶

In sum, the *Bush* doctrine has resuscitated the unconstitutional practice of hypothetical jurisdiction that *Steel Co.* repudiated two decades ago. But as reaffirmed by the Supreme Court in an unbroken line of cases following *Steel Co.*,¹⁰⁷ a federal court simply “may not assume jurisdiction for the purpose of deciding the merits of the case.”¹⁰⁸ It must always first “satisfy itself of its jurisdiction, no

105. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999).

106. *See Stillman*, *supra* note 76, at 516–20 (arguing that “Article III itself dictates that statutory limits on jurisdiction are no less inviolable than their constitutional counterparts”).

107. The Supreme Court’s repeated acceptance of the *Steel Co.* majority’s position refutes a view which initially percolated in some lower courts—that Justice O’Connor’s concurrence relegated Justice Scalia’s opinion to plurality status. *See Idleman*, *supra* note 11, at 286–87; *Steel Co.*, 523 U.S. at 110–11 (O’Connor, J., concurring) (“I also agree with the Court’s statement that federal courts should be certain of their jurisdiction before reaching the merits of a case. . . . I write separately to note that, in my view, the Court’s opinion should not be read as cataloging an exhaustive list of circumstances under which federal courts may exercise judgment in ‘reserv[ing] difficult questions of . . . jurisdiction when the case alternatively could be resolved on the merits in favor of the same party[.]’” (alteration in original) (quoting *Norton v. Mathews*, 427 U.S. 524, 532 (1976))).

108. *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007); *see also Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam); *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005); *Haywood v. Drown*, 556 U.S. 729, 755 (2009) (Thomas, J., dissenting) (noting jurisdiction is “a condition precedent to reaching the merits of a legal dispute”); *cf. Ruhrgas*, 526 U.S. at 584 (“*Steel Co.* reasoned that subject-matter jurisdiction necessarily precedes a ruling on the merits” (emphasis added))).

matter how difficult.”¹⁰⁹ And this means that “[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.”¹¹⁰ Ever. It is time that the courts stop turning a blind eye to their jurisdictional boundaries.

III. ELIMINATING THE “FOREORDAINED” EXCEPTION

In his partial concurrence in *Steel Co.*, Justice Breyer characteristically argued in functionalist terms that a federal court assuming jurisdiction in order to reach certain merits issues makes “practical sense” and avoids “cumbersome” proceedings.¹¹¹ So, with such judicial economy in mind, “it is not difficult to see how the prospect of preempting nonmeritorious suits could be sufficiently attractive that a court might be willing, from time to time, to bend the jurisdictional rules.”¹¹² That is precisely what *Bush* and its progeny have done in resurrecting hypothetical jurisdiction as a means for producing hypothetical judgments.

Even from a functional standpoint, however, the efficiency gains of exercising hypothetical jurisdiction are overblown. First, doing so will frequently serve only to perpetuate uncertainty on thorny jurisdictional issues and thereby encourage future litigation over the same. This occurred, for example, in *Hausler v. JP Morgan Chase*

109. *United States v. Blewett*, 746 F.3d 647, 661 (6th Cir. 2013) (en banc) (Moore, J., concurring in the judgment); see also CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.1 (3d ed. 1999 & Supp. 2007) (“[T]he Supreme Court appears to have ruled that a court may never bypass a difficult and important Article III [justiciability] question in favor of resolving an easy and nonprecedential question on the merits.”).

110. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978).

111. *Steel Co.*, 523 U.S. at 111–12 (Breyer, J., concurring in part and concurring in the judgment).

112. Idleman, *supra* note 11, at 310.

Bank, N.A.,¹¹³ where the Second Circuit ignored a jurisdictional question despite it being briefed by the parties.¹¹⁴ The appellate court then overstepped its way into the merits, leaving a wake of uncertainty as to the jurisdictional question that proliferated in the circuit for more than five years. And, lo and behold, this eventually required the Second Circuit to reverse a district court ruling on that very same issue.¹¹⁵ Properly addressing jurisdiction at the outset in *Hausler*—a case which the Second Circuit had no power to hear—would have definitively resolved the issue in the second case, thereby preventing *both* the district court and appellate court from having to analyze the issue anew. Second, and as noted above,¹¹⁶ hypothetical jurisdiction creates inefficiencies of its own when employed by the lower courts as the case winds its way through further appeals—proceedings in which an en banc panel or the Supreme Court would not be bound by the circuit precedent. Finally, there is a federalism concern at stake too. Because the hypothetical judgments created by the “foreordained” exception will likely still be given preclusive effect in subsequent litigation,¹¹⁷ exercising hypothetical jurisdiction can also “threaten[] both the judicial autonomy of the states and the very notion of the separation of powers

113. 770 F.3d 207 (2d Cir. 2014).

114. See *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.*, 946 F.3d 120, 137 n.22 (2d Cir. 2019).

115. See *id.* at 145.

116. See *supra* notes 75–81 and accompanying text.

117. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999) (“When a court has rendered a judgment in a contested action, the judgment [ordinarily] precludes the parties from litigating the question of the court’s subject matter jurisdiction in subsequent litigation.” (alteration in original) (quoting Restatement (Second) of Judgments § 12 (Am. Law. Inst. 1980))). Even if the judgment is not given preclusive effect, that would create its own inefficiencies by allowing the parties to relitigate seemingly resolved merits issues. See Stillman, *supra* note 76, at 541–44.

that is essential to the maintenance of a democratic government.”¹¹⁸ It allows the federal courts to overstep their way into cases that Congress or the Constitution have committed to the states.

With these constitutional and prudential concerns in mind, this Part will argue that, although the Supreme Court is unlikely to correct the lower courts’ misapplication of *Steel Co.*, it is incumbent on the lower courts to remedy their own past wrongs.

A. *The Supreme Court is Unlikely to Tackle the Issue*

Although the “foreordained” exception has garnered widespread acceptance amongst the lower courts, the Eleventh Circuit has flatly rejected the concept. In *Friends of the Everglades v. EPA*,¹¹⁹ Judge William Pryor proclaimed that “[e]ven if the resolution of the merits were foreordained—an issue we do not decide—the Supreme Court has explicitly rejected the theory of ‘hypothetical jurisdiction.’”¹²⁰ The Eleventh Circuit recognized that *Steel Co.* “reaffirmed” the inviolable principle “that an inferior court must have both statutory and constitutional jurisdiction before it may decide a case on the merits,”¹²¹ thereby creating a rather lopsided circuit split.

Nevertheless, even in the face of a circuit split, it is unlikely that the Supreme Court will address the propriety of the “foreordained” exception any time soon. For one, there is little incentive for a losing

118. Ely Todd Chayet, *Hypothetical Jurisdiction and Interjurisdictional Preclusion: A “Comity” of Errors*, 28 PEPP. L. REV. 75, 77 (2000).

119. 699 F.3d 1280 (11th Cir. 2012).

120. *Id.* at 1288.

121. *Id.*; see also *id.* at 1289 (“Because we conclude that section 1369(b)(1) does not grant original subject matter jurisdiction over these petitions, we *may not* address the merits of this controversy.” (emphasis added)); *Amerijet Int’l, Inc. v. NLRB*, 520 F. App’x 795, 798 (11th Cir. 2013) (“*Amerijet* also seems to say that the district court may exercise jurisdiction over the matter anyway because the resolution of the merits is clear. The problem is that we cannot create jurisdiction in the district court in the face of a congressional pronouncement that leaves the power to conduct an initial inquiry solely in the hands of the NLRB’s General Counsel.”).

plaintiff to appeal the issue, as prevailing will only shift dismissal from one on the merits to one on jurisdictional grounds. This could be useful for *res judicata* purposes,¹²² as when the plaintiff seeks to press a separate claim otherwise barred by claim preclusion.¹²³ But short of that, dismissal by the Supreme Court on jurisdictional grounds will definitively extinguish the underlying claim.

In the alternative, the Court could address the issue in dicta if it concluded that a lower court invoking the “foreordained” exception had jurisdiction but was wrong on the merits.¹²⁴ However, this would generally require the coincidence of: (1) a merits issue of sufficient import to attract the Court’s attention; (2) a lower court that despite the import of the issue is willing to skip the jurisdictional inquiry after finding the merits so clear as to be “foreordained” by its own precedent; (3) a “difficult and perhaps close”¹²⁵ jurisdictional question which ultimately falls on the side of jurisdiction;

122. See, e.g., *United States v. Lucchese*, 365 U.S. 290, 291 (1961) (recognizing that a judgment for a defendant based on lack of jurisdiction does not bar a plaintiff from bringing an action on the same cause in a court having jurisdiction); *Griener v. United States*, 900 F.3d 700, 705 (5th Cir. 2018) (“[A] dismissal for want of jurisdiction bars access to federal courts and is *res judicata* only of the lack of a federal court’s power to act. It is otherwise without prejudice to the plaintiff’s claims.’ A decision by a court without subject-matter jurisdiction is not conclusive of the merits of the claim asserted, meaning judgment should be entered without prejudice.” (citations omitted) (quoting *Voisin’s Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188 (5th Cir. 1986)); cf. *FED. R. CIV. P.* 41(b) (“Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.”).

123. See, e.g., *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 8 (1st Cir. 2009).

124. “Carefully considered Supreme Court dicta, though not binding [on lower courts], ‘must be accorded great weight and should be treated as authoritative.’” *Igartúa v. United States*, 626 F.3d 592, 605 n.15 (1st Cir. 2010) (quoting *Crowe v. Bolduc*, 365 F.3d 86, 92 (1st Cir. 2004)).

125. See *Norton v. Mathews*, 427 U.S. 524, 530 (1976). Note that the first and second requirements are in tension. A merits issue worthy of Supreme Court review is unlikely to be so clear cut in the circuit court. And even if it is, the weight of the issue will likely

and (4) a Supreme Court willing to confront an issue unnecessary to the resolution of the case. That combination seems improbable.

B. The Circuit Courts Should Abandon or Revisit Their Mistaken Precedents

In light of these considerations, it is up to the lower courts to jettison the “foreordained” exception on their own accord. This can be done in one of two ways. First, and more preferably, the courts can simply abandon the practice. Certainly, “[n]othing in *Steel Co.*” or any other Supreme Court case “bars a court from addressing a thorny threshold jurisdictional question, even if the merits question lends itself to straightforward resolution.”¹²⁶ Even those courts that have recognized the exception view it as wholly discretionary.¹²⁷ A lower court faced with the “foreordained” exception can therefore correct its mistaken course—without having to overrule any existing precedent—by just declining to follow this constitutionally dubious practice. Indeed, it *must* do so. As Justice Scalia avowed in *Steel Co.*, “[m]uch more than legal niceties are at stake here.”¹²⁸ The elements of jurisdiction “are an essential ingredient of separation

incentivize a lower court to dismiss the case on a jurisdictional ground, rather than on the merits.

126. *Greensprings Baptist Christian Fellowship Tr. v. Cilley*, 629 F.3d 1064, 1066 n.1 (9th Cir. 2010) (emphasis added).

127. See, e.g., *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 195 (2d Cir. 2002) (“[Where] a governmental provision is challenged as unconstitutional, and a controlling decision of this Court has already entertained and rejected the same constitutional challenge to the same provision, the Court *may* dispose of the case on the merits without addressing a novel question of jurisdiction.” (emphasis added)); *Emory v. United Air Lines, Inc.*, 720 F.3d 915, 920 (D.C. Cir. 2013) (purporting there is a “narrow set of circumstances in which a court *could* ‘decid[e] the cause of action before resolving Article III jurisdiction’” (emphasis added) (alterations in original) (citations omitted) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 98 (1998))); *Firearms Policy Coal., Inc. v. Barr*, 419 F. Supp. 3d 118, 123 (D.D.C. 2019) (noting the “exception appears to be discretionary”).

128. *Steel Co.*, 523 U.S. at 101.

and equilibration of powers.”¹²⁹ And any misguided attempt to operate “beyond the bounds of authorized judicial action” cannot be countenanced—in any circumstances.¹³⁰

Second, the lower courts can formally revisit their mistaken precedents through an en banc rehearing the next time the exception is used to avoid a jurisdictional concern. Yet for the same reasons that the issue will probably not reach the Supreme Court,¹³¹ this too is unlikely. It would take the rare case where the losing party *wants* to lose on jurisdictional grounds—as opposed to on the merits—for the opportunity even to arise.¹³² At the same time, an ordinary three-judge panel on a Court of Appeals is practically bound to reject the chance to correct a prior panel’s mistake by itself. Although the panel would still hold the power to reverse course, “every circuit court has prescribed the prudential rule that a later panel may not overrule a decision issued by a prior panel; only the en banc court or the Supreme Court may take that step.”¹³³

As matters stand, the courts find themselves in an ironic bind. The “foreordained” exception has revived the unconstitutional practice of hypothetical jurisdiction, but the procedural niceties of those cases triggering the exception do not provide a realistic way to correct the error. Going forward then, the lower courts should exercise forbearance and simply cast aside these mistaken precedents. They must instead follow the Supreme Court’s direction that

129. *Id.*

130. *See id.* at 94.

131. *See generally* discussion *supra* Part III.A.

132. This did occur in *Firearms Policy Coalition*, where, because of the unique procedural posture of the case, the plaintiff sought dismissal on the merits in order to seek en banc review later; the defendant, however, sought dismissal on standing grounds. *See* 419 F. Supp. 3d at 123.

133. Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 2008 FED. CTS. L. REV. 1, 1 (2008) (collecting cases).

the establishment of jurisdiction is “vital” whenever “the court proposes to issue a judgment on the merits.”¹³⁴ They must recognize that there is no place in the constitutional scheme for jurisdiction “to be expanded by judicial decree.”¹³⁵

CONCLUSION

“Subject-matter jurisdiction properly comprehended . . . refers to a tribunal’s ‘power to hear a case,’ a matter that ‘can never be forfeited or waived.’”¹³⁶ *Steel Co.* reaffirmed this core tenet of constitutional law, and it categorically proscribed the exercise of hypothetical jurisdiction to resolve a case on the merits. However, since then, many federal courts have flouted this principle. They have continued to hear and decide cases where they might lack jurisdiction, at least where a relatively easy merits question is “foreordained” by a prior decision of the appellate court. This practice cannot be squared with Article III. Nor can it be squared with *Steel Co.* Nor is it wise. The lower courts should therefore abandon this exception, heed *Steel Co.*’s admonitions, and return the jurisdictional inquiry to its proper place as “the first and fundamental question” in each and every case.¹³⁷

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134. *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006)).

135. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

136. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81 (2009) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)).

137. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (citation omitted).