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PREFACE

Debates over federalism, the treatment of religious exercise, and the judicial role in regulating the administrative state stand out as pivotal features of our current legal discourse. In this Issue, the *Harvard Journal of Law & Public Policy* has the great privilege of presenting Articles on each of these topics: addressing the role of the states in formulating drug policy, arguing that *Employment Division v. Smith* should be overruled, and calling for judges to repudiate the major questions doctrine on textualist grounds.

Our first Article, by Branton Nestor, dives into the debate surrounding *Employment Division v. Smith*, which held that neutral laws of general applicability do not violate the Free Exercise Clause even if they incidentally burden religious practice. Nestor argues that *Smith* has become irreconcilable with the Court's broader Free Exercise and Establishment Clauses jurisprudence, undermining the weight of the decision for purposes of *stare decisis*. Our second Article, by Chad Squitieri, addresses the major questions doctrine, a canon of statutory interpretation that allows courts to reject statutory constructions that delegate the resolution of "major questions" to administrative agencies, and which several Justices have proposed as an alternative or supplement to the nondelegation doctrine. Squitieri contends that textualists should reject the doctrine, as it requires judges to step outside their judicial role in determining whether a particular question is in fact "major." Finally, we conclude with a Book Review, by Paul J. Larkin, Jr., reviewing Professor Jonathan H. Adler's recent collection of essays, *MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE*. Larkin, using the essays as a jumping-off point to discuss the curious nature

of our contemporary drug policy, critiques the set of conflicting federal and state policies that have developed with respect to drug laws, suggests that the problem is ripe for congressional intervention, and offers thoughts on what solutions might be practicable.

In addition to these Articles, it is always a pleasure to present writing from our own members. We are happy to conclude this issue with a Note from Jasjaap Sidhu, one of our student editors, in which he discusses the “watershed” exception to the Court’s general doctrine that new rules of constitutional law do not apply retroactively on collateral review. Sidhu argues that the focus of the exception should be on whether a rule promotes the reliability of criminal convictions, and he suggests that the Court’s recent decision in *Ramos v. Louisiana* provides a prime opportunity to make this clear.

As was the case in the previous Issue, and as will be the case in the next Issue, the work of the *Journal* remains entirely remote. Despite the massive challenges that this raises—in addition to the difficulties posed by remote learning in general—the *Journal*’s staff continue to outdo themselves. In the previous Issue, I noted the contributions of many of the members of our upper masthead, including our Deputy Editor-in-Chief, Jay Schaefer, our Articles Chair, Jason Muehlhoff, our Managing Editors, John Ketcham and Stuart Slayton, and our Chief Financial Officer, Cooper Godfrey. In addition to the superb work performed by these individuals, without which the *Journal* literally could not function, I would also like to recognize the hard work contributed by some of our other student editors. In particular, the Deputy Managing Editors—Catherine Cole, Jacob Harcar, Alexander Khan, Kevin Lie, and Eli Nachmany—take on the mammoth task of conducting the final review for each of our Articles. They accomplish this brilliantly. Our Senior Articles Editors—John Acton, Davis Campbell, Jessica Tong, and Seanhenry Van Dyke—manage the critical role of

making substantive suggestions to the Articles we publish and of reviewing incoming submissions. They, aided by our indispensable Articles Editors, consistently raise the standard of the *Journal's* scholarship. Our Notes Editors, Jason Altabet and Nick Cordova, singlehandedly run the entire Notes process, from submissions to subciting. And finally, our first-year Editors, Senior Editors, and Executive Editors cumulatively spend several hundred hours reviewing each Issue, scrutinizing everything from incorrectly italicized commas to factual errors. I am sure that this may seem like a thankless task at times; in truth, I could not be more grateful. Our members make the *Journal* great. It is a tremendous privilege to work with them.

Max J. Bloom
Editor-in-Chief

**REVISITING SMITH:
STARE DECISIS AND FREE EXERCISE DOCTRINE**

BRANTON J. NESTOR*

Congress shall make no law respecting an establishment
of religion, or prohibiting the free exercise thereof

—U.S. CONST. amend. I

The Supreme Court held in Employment Division v. Smith that the Free Exercise Clause does not generally protect religiously motivated conduct from neutral laws of general applicability. That holding, although good law, remains controversial, with many scholars and judges now asking whether, if Smith was wrong, it should be overturned. Wading into this debate, this Article suggests that one common stare decisis consideration—a precedent’s consistency with related decisions—likely cuts against retaining Smith, at least to the extent that Smith’s holding and rationale are compared to the Supreme Court’s broader approach to the Religion Clauses. This Article first argues that Smith broke from prior Free Exercise Clause precedent and that, although Smith remains good law, it is in tension with many strains of Free Exercise Clause precedent today. This Article next argues that Smith is in tension with the ascendant focus on text, history, and tradition that has become increasingly

* Harvard Law School, J.D. 2019; Westmont College, B.A. 2016. I am grateful to my family, friends, and mentors, in addition to the *Harvard Journal of Law & Public Policy*. An early version of this Article was written for a seminar taught by Professors Mary Ann Glendon and Mark Rienzi at the Harvard Law School, and I am grateful for their advice and mentorship. I am also grateful to Judge Julius N. Richardson, in addition to my co-clerks, Beatriz Albornoz, Daniel Johnson, and Kim Varadi, who taught me a great deal while I worked on this Article. I would also like to thank Ashley Estebo and Samuel Settle for their helpful comments and revisions. Finally, I am indebted to Max Bloom, John Ketcham, Jason Muehlhoff, Eli Nachmany, and Jessica Tong, as well as all the excellent editors at the *Harvard Journal of Law & Public Policy*.

central to contemporary Establishment Clause doctrine. While this Article does not fully resolve Smith's stare decisis fate, it suggests one important weakness confronting any attempt to defend Smith on stare decisis grounds—with that weakness, and the doctrinal tensions it reveals, pointing the way toward how to reform contemporary Free Exercise Clause doctrine to better account for the text, history, and tradition of the Religion Clauses.

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INTRODUCTION

Breaking with prior precedent, the Supreme Court held in *Employment Division v. Smith*¹ that the Free Exercise Clause does not generally protect religiously motivated conduct from neutral laws of general applicability.² That decision has provoked extended debate over the years,³ and even today it “remains controversial in many quarters.”⁴ But one question—until recently⁵—has received less attention: even if *Smith* was wrongly decided, does stare decisis counsel in favor of retaining it today? Wading into the unfolding debate, this Article suggests that one important stare decisis consideration—a precedent’s consistency with related judicial decisions—presents some challenges for any attempt to defend *Smith* on stare decisis grounds. The most important of these challenges is that *Smith*’s approach to the Free Exercise Clause is in deep tension with many aspects of the Supreme Court’s broader Religion Clauses jurisprudence.

To explore this particular challenge, this Article proceeds in two parts. Part I sets the stage by summarizing the Supreme Court’s modern approach to stare decisis, with particular focus on how a

1. 494 U.S. 872 (1990).

2. *See id.* at 878–79. For the test that the Supreme Court had previously applied to free exercise cases, see, for example, *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940); *Sherbert v. Verner*, 374 U.S. 398, 402–04, 406 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 215, 219–20 (1972); and *United States v. Lee*, 455 U.S. 252, 257–58, 260 (1982). For thoughtful commentary discussing this break, see *Smith*, 494 U.S. at 893–901 (O’Connor, J., concurring in the judgment); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 564 (1993) (Souter, J., concurring in part and concurring in the judgment); and Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1120–28 (1990).

3. Compare *City of Boerne v. Flores*, 521 U.S. 507, 537–44 (1997) (Scalia, J., concurring in part) (defending *Smith*), with *id.* at 544–65 (O’Connor, J., dissenting) (critiquing *Smith*); compare also Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916–17 (1992) (defending *Smith*’s historical foundation), with Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1427–28 (1990) (critiquing *Smith*’s historical foundation).

4. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring).

5. *See, e.g.,* *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020).

precedent's consistency with related judicial decisions is relevant to assessing that precedent's stare decisis weight. Part II then explains why *Smith's* holding and rationale are in deep tension with the Supreme Court's broader Religion Clauses jurisprudence. Part II.A first argues that *Smith* broke from prior Free Exercise Clause precedent, and that *Smith* has been undermined and muddled by subsequent free exercise precedent. Part II.B next argues that *Smith* is in tension with several lines of decision arising from the other half of the Religion Clauses—most importantly, the focus on text, history, and tradition that have long remained important and now seem dominant in contemporary Establishment Clause jurisprudence. Part II.C concludes by focusing on the doctrine of judicial consistency and offering some preliminary thoughts for why *Smith's* tensions with the Religion Clauses not only favor revisiting *Smith*, but also favor ensuring that *Smith's* replacement accounts for the text, history, and tradition of the Free Exercise Clause.

To be sure, this Article's focus on the tensions between *Smith* and the Court's Religion Clauses jurisprudence does not fully resolve *Smith's* stare decisis fate. After all, this Article generally assumes conventional stare decisis principles, only focuses on one potential stare decisis consideration, and only discusses that consideration as far as Religion Clauses precedent is concerned. But if this Article is right, it suggests a simple takeaway: *Smith* is in tension with many strains of Religion Clauses jurisprudence, and those tensions both undermine *Smith's* stare decisis weight and help point the way forward to where Free Exercise Clause doctrine should go from here.

I. AN OVERVIEW OF STARE DECISIS DOCTRINE

The doctrine of stare decisis guides the judiciary in determining whether to overturn a settled decision.⁶ Rooted in the “judicial power” vested by Article III,⁷ the doctrine of stare decisis “reflects respect for the accumulated wisdom of judges who have previously

6. See, e.g., *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018).

7. U.S. CONST. art. III, § 1.

tried to solve the same problem.”⁸ Over the years, the Supreme Court’s view of that accumulated wisdom has changed,⁹ and the precise role of stare decisis in our constitutional tradition remains deeply contested even today.¹⁰ To some, stare decisis is a question of judicial policy, calling judges to weigh the legal merits and the practical consequences of overturning a settled rule.¹¹ To others, stare decisis is ultimately a question of epistemic humility, calling judges to consider the accumulated wisdom of the past but requiring them to subordinate that wisdom to the clear declarations of the written law.¹² At least as it currently stands, the Supreme Court’s prevailing approach is decidedly one of judicial policy and weighs several interrelated considerations in an effort to strike an appropriate balance between reaching the right legal result and safeguarding important rule-of-law values such as consistency, predictability, and judicial restraint.¹³ Within this prevailing multifactor framework, one important consideration—and a consideration that is embraced by most stare decisis theories today, whether they are grounded in policy or humility—is whether a precedent is consistent with related judicial decisions. In order to better contextualize this Article’s explanation for why this consideration counsels against retaining *Smith*, this first Part briefly summarizes the Supreme Court’s prevailing stare decisis doctrine and explains why a precedent’s consistency with related judicial decisions is relevant for stare decisis purposes.

A. *The Contemporary Doctrine*

The Supreme Court’s contemporary stare decisis doctrine is not

8. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part); see also THE FEDERALIST NOS. 37, 48, 78, 82 (Clinton Rossiter ed., 2003); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69–71 (1765). Cf. *Gamble v. United States*, 139 S. Ct. 1960, 1980–89 (2019) (Thomas, J., concurring).

9. See, e.g., *Ramos*, 140 S. Ct. at 1414–15 (Kavanaugh, J., concurring in part).

10. Compare, e.g., *id.*, with *Gamble*, 139 S. Ct. at 1980–89 (Thomas, J., concurring).

11. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

12. See, e.g., *Gamble*, 139 S. Ct. at 1980–89 (Thomas, J., concurring).

13. See *Payne*, 501 U.S. at 827–28; *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

an “inexorable command.”¹⁴ Instead, it is the “preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”¹⁵ As far as this Article’s consideration of *Smith*’s stare decisis value is concerned, two features of this contemporary doctrine are most relevant—and so are briefly summarized (without endorsement or critique).

1. The Type of Precedent

The first feature of contemporary stare decisis doctrine that is most relevant for considering *Smith*’s stare decisis value is the Supreme Court’s practice of generally affording different stare decisis weights to different types of precedents.¹⁶ Under this prevailing approach, the Supreme Court generally gives relatively weaker weight to constitutional decisions,¹⁷ at least when the political branches cannot adequately respond to those decisions, or when those decisions reflect a narrower construction of a constitutional right than the Court would adopt today.¹⁸ In doing so, the Supreme Court’s more flexible treatment of its constitutional precedent might be viewed as resting on two general rationales. The first rationale—explicit in the case law—focuses on the extent to which erroneous constitutional decisions are generally more difficult for the political branches to reverse than erroneous statutory (or common law) decisions.¹⁹ The second rationale—perhaps implicit in the

14. *Payne*, 501 U.S. at 828.

15. *Id.* at 827; see also *Janus v. AFSCME*, 138 S. Ct. 2448, 2478 (2018).

16. See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting); compare *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 455–56 (2015) (statutory interpretation), with *Janus*, 138 S. Ct. at 2478 (constitutional interpretation), and *South Dakota v. Wayfair, Inc.*, 138 U.S. 2080, 2096–97 (2018) (constitutional common law interpretation).

17. See *Janus*, 138 S. Ct. at 2478; *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

18. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

19. See *Burnet*, 285 U.S. at 406–07 (Brandeis, J., dissenting); *Janus*, 138 S. Ct. at 2478 (2018); BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT’S OVERRULING OF CONSTITUTIONAL PRECEDENT, 8 n. 52 (2018) (collecting, among others, the following sources); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008);

“one-way ratchet theory” of contemporary jurisprudence—may be viewed as focusing on the normative and institutional importance of the judiciary’s role as a counter-majoritarian protector of individual rights.²⁰ Indeed, placing these two rationales together—the first explicit, the second implicit—may provide one explanation for both the general rule and the most important caveats, as well as the way in which they have played out in individual cases. Whatever the merits of this approach (or these rationales), this reduced stare decisis weight for decisions that adopt a narrower interpretation of a constitutional right remains relevant for any consideration of *Smith*’s stare decisis value—but one which is ultimately left aside here, given this Article’s narrow focus on *Smith*’s precedential consistency with Religion Clauses jurisprudence.

2. The Multifactor Balancing Test

The second feature of contemporary stare decisis doctrine that is relevant for considering *Smith*’s stare decisis value is the Supreme Court’s use of a multifactor balancing test in deciding whether to overrule past decisions²¹—a multifactor balancing test that might be explained primarily as a creature of policy,²² perhaps one that currently reflects the liquidated meaning of Article III’s “judicial power.”²³ Notwithstanding variations in which factors are

Casey, 505 U.S. at 954–55 (Rehnquist, J., concurring in the judgment in part and dissenting in part); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Smith v. Allwright*, 321 U.S. 649, 665 (1944).

20. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (overturning *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

21. This approach is, concededly, open to critique. See *Gamble v. United States*, 139 S. Ct. 1960, 1988 (2019) (Thomas, J., concurring); cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1776–78 (1989).

22. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

23. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) (“As the Court has exercised the ‘judicial Power’ over time, the Court has identified various *stare decisis* factors. In articulating and applying those factors, the Court has, to borrow James Madison’s words, sought to liquidate and ascertain the meaning of the Article III ‘judicial Power’ with respect to precedent.” (citing THE FEDERALIST NO. 37, at 236 (James Madison) (J. Cooke ed., 1961))).

employed (or how they are weighed against each other),²⁴ the Supreme Court has identified several factors that may be most relevant, which include, *inter alia*: (1) the quality of the decision's reasoning; (2) the workability of the decision's rule; (3) factual developments since the decision was handed down; (4) reliance on the decision; and (5) the decision's consistency and coherence with previous or subsequent judicial decisions.²⁵ As Justice Kavanaugh recently explained in his partial concurrence in *Ramos*, these factors tend to fold into several broad, shared considerations—in his view, for example, whether the precedent was egregiously wrong, has caused significant jurisprudential or real-world consequences, and has induced significant reliance interests—which reflect the extent to which the traditional *stare decisis* considerations are interrelated and motivated by a shared set of functional and doctrinal underpinnings.²⁶

B. *One Ecumenical Stare Decisis Consideration:
A Precedent's Consistency with Related Decisions*

Within this multifactorial framework, one important consideration—and the consideration that this Article focuses upon—is a precedent's consistency with related decisions.²⁷ That consideration, which focuses on a precedent's consistency with both previous and subsequent judicial decisions,²⁸ has long remained an important part of the Supreme Court's effort to craft a *stare decisis* doctrine that “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”²⁹

24. See, e.g., *id.*; Michael S. Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1172 (2008).

25. See Paulsen, *supra* note 24, at 1172–98; *Janus v. AFSCME*, 138 S. Ct. 2448, 2478–79 (2018).

26. See *Ramos*, 140 S. Ct. at 1414–16 (Kavanaugh, J., concurring in part).

27. See, e.g., *id.*; *Janus*, 138 S. Ct. at 2478.

28. See *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part).

29. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

A precedent's consistency with related judicial decisions—or what might be termed the doctrine of judicial consistency—might be viewed as resting on several grounds. Perhaps most uniquely amongst the conventional *stare decisis* values, the doctrine of judicial consistency reflects the law's need to work itself pure—to maintain internal coherence as an essential element of legality. This impulse ensures that the accumulated wisdom of the past is not stacked haphazardly into accidental and disjointed piles, but instead ordered into a coherent, integrated structure. In doing so, the doctrine of judicial consistency also furthers a variety of important goods with venerable foundations in rule-of-law values and sound judicial policy. Among other things, the doctrine promotes stability, notice, efficiency, fairness, and related judicial goods by culling jurisprudential anomalies, mitigating unpredictable surprises, and smoothing over jurisprudential tensions where distinct lines of doctrine meet. In short, the doctrine of judicial consistency constitutes both an inherent and an instrumental good, with these features justifying its role within the contemporary *stare decisis* framework.

A precedent's consistency with related judicial decisions interacts with other *stare decisis* considerations—such as, for example, considerations focused on legal soundness, workability, and reliance—in interesting ways.

Take legal soundness, for example. A precedent's legal soundness is informed by its consistency with related decisions. This consistency may generally enhance confidence that the precedent's result or methodology is correct.³⁰ It may also confirm that the precedent coheres with the law's basic requirement of internal consistency, or suggest that a once ambiguous legal question has been settled under the agreed-upon terms of liquidation. Of course, precedential consistency (or dissonance) is not dispositive of the legal merits.³¹ Prior or subsequent precedents might be built on a set of false assumptions or an unsound methodology, and so might be

30. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part).

31. See, e.g., THE FEDERALIST NO. 37 (Clinton Rossiter ed., 2003); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019).

wrong. But as far as the legal merits are concerned, precedential consistency remains helpful both because it provides an opportunity for epistemic pause when the Court stumbles across a jurisprudential fork, and because it provides some indication of which fork the Court should ultimately take.

Next, take workability. If a precedent has been undercut by subsequent decisions, those intervening decisions may risk undermining the precedent's workability by tasking judges to navigate potentially conflicting rules or adverse methodological or substantive frameworks, particularly when a precedent has become riddled with internal exceptions that require judges to determine how far to extend the immediate decision in addressing new and unanticipated circumstances.³² Those considerations also hold when a precedent has purported to leave older decisions standing, but those older decisions present rationales and holdings that judges must square with conflicting rationales and instructions from subsequent cases.³³ Similarly, even if the precedent's own internal line has remained intact, different precedential lines often interact in surprising ways—leading to challenges when judges are tasked to synthesize doctrinal lines that embrace different methodologies and distinct premises.³⁴

Another example comes from the relationship between a precedent's consistency with related decisions and the extent of reliance interests on that decision. To the extent that a decision has been subsequently confirmed time and again, then the justification for relying on that decision (and the likelihood that such reliance has occurred) increases; conversely, to the extent that a decision has been slowly eroded over time, the justification for such reliance (and the likelihood of such reliance) is less.³⁵ These examples, noncomprehensive, suggest a relatively simple point: the various

32. See MURRILL, *supra* note 19, at 13–14.

33. See *id.* at 15.

34. See *id.* at 15–16.

35. See, e.g., *Janus*, 138 S. Ct. at 2484–85 (noting that reliance is generally given less weight when previous decisions indicate that an overruling of the precedent in question is impending).

stare decisis factors frequently overlap, share similar concerns and questions, and influence each other's resolution and relevance.

Even apart from the Supreme Court's prevailing framework, there may be good reasons why a precedent's consistency with related decisions matters for a stare decisis framework that treats the accumulated wisdom of the past as epistemically useful but still requires judicial precedent to be subordinated to the clear declarations of the written law. As an initial matter, a precedent's consistency with previous and subsequent decisions may be epistemically useful.³⁶ To the extent that judicial precedents represent the accumulated wisdom for how past judges addressed a challenging question or reflect a set of shared methodological or substantive commitments (such as, for example, originalism or textualism), a precedent's consistency with the broader corpus juris may very well be relevant.³⁷ Moreover, a precedent's consistency with related judicial decisions may also be relevant insofar as precedential consistency is a component of one's first principles view of stare decisis or to the extent a settled line of cases may resolve a once-ambiguous legal answer under the agreed-upon rules of liquidation.³⁸ And a precedent's consistency with related judicial decisions may also help address the problem of second-best answers. Because the practical and systemic consequences of a decision frequently turn on the doctrinal decisions made in other areas of law, focusing on a precedent's relationship to the broader corpus juris may allow jurists to best preserve the overarching legal content or practical effect of a particular doctrine, even when substantive and methodological changes in the surrounding law risk upsetting the nature and balance of the original doctrinal framework.³⁹ And so, for most stare decisis approaches, doctrinal consistency remains important.

36. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part); cf. William Baude & Ryan D. Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319 (2018).

37. See MURRILL, *supra* note 19, at 7.

38. See, e.g., *Ramos*, 140 S. Ct. at 1411, 1414–16 (Kavanaugh, J., concurring in part); see generally Baude, *supra* note 31.

39. See *Janus*, 138 S. Ct. at 2469–70; cf. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011).

* * *

To summarize Part I, contemporary stare decisis doctrine, which generally affords constitutional precedents weaker weight, employs a multifactorial balancing test that considers, inter alia, a precedent's consistency with related decisions. That consideration remains of ecumenical importance, and it is the focus of the discussion that follows.

II. SMITH AND STARE DECISIS: CONSISTENCY WITH RELATED DECISIONS

Having laid the groundwork, this Article now turns to consider what the Supreme Court's contemporary stare decisis doctrine means for *Smith*. In *Smith*, the Supreme Court held that the Free Exercise Clause does not generally protect religiously motivated conduct against neutral laws of general applicability. This Part argues that one stare decisis consideration—a precedent's consistency with related decisions—raises challenges for retaining *Smith* on stare decisis grounds in light of the Court's broader Religion Clauses jurisprudence. Subpart A focuses on this stare decisis consideration and argues that *Smith* is in tension with many previous and subsequent decisions drawn from the Supreme Court's Free Exercise Clause jurisprudence. Subpart B then turns to the other half of the Religion Clauses and argues that *Smith* is in tension with the focus on text, history, and tradition that has become increasingly dominant in the Supreme Court's Establishment Clause jurisprudence. And Subpart C then suggests that these tensions between *Smith's* approach to the Free Exercise Clause and the Supreme Court's broader approach to the Religion Clauses help point the way toward a doctrine focused on text, history, and tradition. This Part leaves much aside—it only focuses on one stare decisis factor (a precedent's consistency with related decisions), and it only considers that factor insofar as *Smith's* relationship with the Religion Clauses is concerned. But taken as true, it suggests a simple conclusion: to the extent that a precedent's consistency with related judicial decisions matters for stare decisis purposes, there are

significant challenges for defenders of *Smith*.

A. *First Things: The Free Exercise Clause*

The first way in which *Smith* is likely in tension with related judicial decisions focuses on *Smith*'s relationship with the Court's broader Free Exercise Clause jurisprudence. Perhaps most importantly, *Smith*'s holding and rationale broke with a settled line of free exercise jurisprudence that held that religiously motivated conduct generally enjoys heightened protection even against neutral laws of general applicability.⁴⁰ And while *Smith* remains good law, the resulting doctrine after *Smith*—which consists of both the decisions that *Smith* purported to leave in place and subsequent decisions in tension with *Smith*'s rationale and substantive outcome—presents important challenges to the predictability, coherence, and stability that a precedent's consistency with related judicial decisions is designed to further.

1. *Smith*'s Break with Precedent

Smith's holding and rationale broke with a settled line of a free exercise jurisprudence that had held that—subject to only a few, well-delineated exceptions—the Free Exercise Clause provided heightened protection for religiously motivated conduct against even neutral laws of general applicability. Prior to *Smith*, preexisting free exercise jurisprudence rested on two foundational principles: first, that the Free Exercise Clause generally protected religious belief and religious conduct,⁴¹ and second, that religious conduct generally warranted heightened protection even against neutral laws of general applicability.⁴² While *Smith* purported to accept the former, it declined to accept the latter in a large variety of circumstances—replacing heightened scrutiny with rational-basis

40. See, e.g., *Smith*, 494 U.S. at 893–901 (O'Connor, J., concurring in the judgment); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559–71 (1993) (Souter, J., concurring in part and concurring in the judgment); *McConnell*, *supra* note 2, at 1120–28 (1990).

41. See *Wisconsin v. Yoder*, 406 U.S. 205, 219–20 (1972).

42. See *id.*; *Sherbert v. Verner*, 374 U.S. 398, 402–04, 406 (1963).

scrutiny where neutral laws of general applicability were concerned, a significant doctrinal break.⁴³

The first principle embraced by pre-*Smith* doctrine—which *Smith* purported to accept—was that the Free Exercise Clause generally protects religious belief and religious conduct. As *Yoder* explained, since incorporating the Free Exercise Clause, the Supreme Court had consistently maintained that the Free Exercise Clause protected both “religious belief and practice.”⁴⁴ That was not always a foregone conclusion, at least not in the sense that the post-incorporation Court took it. In the 1879 case of *Reynolds v. United States*,⁴⁵ for example, the Court rejected a claim for religious exemptions from criminal prohibitions on polygamy only after emphasizing (in terms that left *Reynolds’s* full scope somewhat unclear) that “[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”⁴⁶ “To permit [an exemption here],” the Court stated, “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself, [with the result that] Government could exist only in name under such circumstances.”⁴⁷ Nevertheless, the broader reading of *Reynolds* had been abandoned well before *Smith* by a line of decisions that had gradually eroded and narrowed that case and had embraced the conclusion that, while the state had greater leeway in regulating conduct than conscience, the free exercise of religion necessarily meant protection for religiously motivated conduct—not just belief.⁴⁸

In the seminal decision incorporating the federal Free Exercise

43. Compare *Smith*, 494 U.S. at 886–890 (majority opinion), with *id.* at 899–901 (O’Connor, J., concurring in the judgment).

44. *Yoder*, 406 U.S. at 219. This Article brackets the question of the Free Exercise Clause’s original public meaning and adopts a narrower temporal focus.

45. 98 U.S. 145 (1879).

46. *Id.* at 166.

47. *Id.* at 166–67; see also *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940); *Smith*, 494 U.S. at 879 (drawing from these lines).

48. See *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940); *Yoder*, 406 U.S. at 215, 219–20.

Clause against the states, the Supreme Court in *Cantwell v. Connecticut*⁴⁹ rejected a broad reading of *Reynolds* and invalidated the convictions of three proselytizing Jehovah's Witnesses for inciting a breach of the peace and for violating a state statute that prohibited the solicitation of money for religious and other causes without prior approval from a state official.⁵⁰ The Court began by observing that "[t]he constitutional inhibition of legislation on the subject of religion has a double aspect."⁵¹ Because "[o]n the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship," and "[o]n the other hand, it safeguards the free exercise of the chosen form of religion," the Court reasoned that "the Amendment embraces two concepts, — freedom to believe and freedom to act."⁵² To be sure, *Cantwell* recognized that *Reynolds* still had some purchase and emphasized that, because the "freedom to act . . . cannot be [absolute]" and "[c]onduct remains subject to regulation for the protection of society," "[t]he freedom to act must [still] have appropriate definition to preserve the enforcement of that protection."⁵³ "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."⁵⁴ But religious exercise still meant religious conduct.⁵⁵

That central insight — potentially consistent with *Reynolds*, potentially a break with *Reynolds*'s central holding — was confirmed (and, arguably, expanded) in a long line of cases following *Cantwell* and had been a settled principle by the time *Smith* arose. One example comes from *Wisconsin v. Yoder*,⁵⁶ where the Supreme Court upheld a challenge by Amish parents seeking a religious exemption from a mandatory school attendance law.⁵⁷ Confirming *Cantwell*'s

49. 310 U.S. 296 (1940).

50. *See id.* at 300–11.

51. *Id.* at 303.

52. *Id.*

53. *Id.* at 303–04.

54. *Id.* at 304.

55. *See id.*

56. 406 U.S. 205 (1972).

57. *See id.* at 215, 219–20.

instructions that the Religion Clauses protected the “freedom to believe and the freedom to act,”⁵⁸ the Court in *Yoder* emphasized that “belief and action cannot be neatly confined in logic-tight compartments” and instructed that “to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*.”⁵⁹

Similarly, in the public benefits lines of cases that both preceded and followed *Yoder*, the Supreme Court held that conditioning public benefits upon an individual’s agreement to cease engaging in religiously motivated conduct burdened the free exercise of religion because it “put[] substantial pressure on an adherent to modify his behavior and to violate his beliefs.”⁶⁰ And in the context of a variety of other criminal and civil prohibitions even outside the context of the *Yoder* and *Sherbert* lines, the Supreme Court had followed its traditional approach of interpreting the Free Exercise Clause to protect religiously motivated conduct, finding the Free Exercise Clause to be implicated by individuals’ religious objections to being required to pay Social Security taxes in *Lee*⁶¹ and to serve in the military in *Gillette*.⁶² Indeed, the *Smith* majority itself conceded that “the ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts,”⁶³ suggesting some broad-level agreement with the first principle that had long animated the free exercise jurisprudence leading up to *Smith*. But *Smith*’s broad level agreement on this first principle did not extend to the second principle that

58. *Cantwell*, 310 U.S. at 303.

59. *Yoder*, 406 U.S. at 220 (emphasis added).

60. *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981); *see also Frazee v. Ill. Dep’t of Emp. Sec.*, 489 U.S. 829, 832–33, 835 (1989); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141–42 (1987); *Sherbert v. Verner*, 374 U.S. 398, 402–04, 406 (1963).

61. *See United States v. Lee*, 455 U.S. 252, 257–58, 260 (1982).

62. *See Gillette v. United States*, 401 U.S. 437, 462 (1971).

63. *See Emp. Div. v. Smith*, 494 U.S. 872, 877 (1990).

animated the free exercise jurisprudence from which *Smith* departed.

The second principle embraced by pre-*Smith* doctrine—and the key principle that *Smith* rejected—was that the Free Exercise Clause protects against both the targeting *and* the incidental burdening of religiously motivated conduct.⁶⁴ Religious targeting, *Smith* agreed, warranted heightened scrutiny. But not so for incidental burdens stemming from neutral laws of general applicability—those laws, *Smith* maintained, would be subject only to rational basis review. While it remains necessary to consider what pre-*Smith* case law thought about the relationship between the first and the second principles (as argued below, these principles were generally viewed by pre-*Smith* case law as going hand-in-hand), one might start the analysis here by noting—as Justice O’Connor and Professor Michael W. McConnell have—that the first principle might be most sensibly understood (under a certain set of methodological and substantive commitments) to encompass (or imply) the second principle.⁶⁵

But whatever the best interpretation of the Free Exercise Clause, the first principle (that the Free Exercise Clause protects religiously motivated conduct) does not *necessarily* logically require the second principle (that the Free Exercise Clause protects against incidental burdens). In other words—and this is the explanation embraced by *Smith*—the fact that the Free Exercise Clause protects conduct does not necessarily answer what that conduct is protected *from*.⁶⁶ On the one hand, the Free Exercise Clause might merely provide

64. See *Yoder*, 406 U.S. at 215, 219–20; *Sherbert*, 374 U.S. at 402–04.

65. See *Smith*, 494 U.S. at 894 (1990) (O’Connor, J., concurring in the judgment) (“The First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices . . . Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice.”); McConnell, *supra* note 2, at 1115 (suggesting that the more natural reading of “prohibiting” is that it prevents the government from making a religious practice illegal, rather than merely preventing the deliberate targeting of the religious practice).

66. See, e.g., Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1185 (1996).

heightened protection against laws that target religiously motivated conduct (the *Smith* principle); on the other hand, the Free Exercise Clause might extend more broadly, providing heightened protection against laws that only incidentally burden that conduct (the *Sherbert* principle).⁶⁷ But while either a *Smith*-style “targeting” rule or a *Sherbert*-style “incidental burdening” rule might potentially be logically consistent with protection for religiously motivated conduct, the important point for the purposes of this Article is that free exercise jurisprudence leading up to *Smith* generally embraced the *Sherbert*-style “incidental-burdening view” rather than the *Smith*-style “targeting-view.” In other words, for pre-*Smith* jurisprudence, the first and second principles were both critical for understanding the Free Exercise Clause—but *Smith* rejected the latter.

Prior to *Smith*, laws incidentally burdening religiously motivated conduct were generally subjected to heightened scrutiny. While the early case of *Reynolds* had observed that laws could “reach actions which were in violation of social duties or subversive of good order,”⁶⁸ and the later case of *Cantwell* had confirmed (in weaker form) that “[c]onduct remains subject to regulation for the protection of society” and is not “absolute,”⁶⁹ the free exercise jurisprudence leading up to *Smith* did not give legislators and regulators carte blanche to override religious exemption claims in all instances. Instead, the Supreme Court, building on *Cantwell*’s clarification that “the power to regulate must be so exercised as not, in attaining a permissible end, [to] unduly . . . infringe the protected freedom,”⁷⁰ generally subjected incidental burdens on religious exercise to a form of heightened scrutiny, instructing that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”⁷¹

67. See *Smith*, 494 U.S. at 877–78; Dorf, *supra* note 66, at 1185 (suggesting that even if “the text is not dispositive, some readings are more sensible than others”).

68. *Reynolds v. United States*, 98 U.S. 145, 164 (1879).

69. *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

70. *Id.* at 304.

71. *Wisconsin v. Yoder*, 406 U.S. 205, 215, 219–20 (1972).

One example of this heightened scrutiny approach in the years before *Smith* comes from the Supreme Court's decision in *Yoder*, in which the Supreme Court granted religious exemptions from neutral and generally applicable compulsory attendance laws to parents of Amish school children.⁷² After concluding that the Free Exercise Clause protected religiously motivated conduct and that the compulsory attendance law substantially burdened that conduct, the Supreme Court invalidated the law only after engaging in a balancing of the competing interests at play.⁷³ On the one hand, the Court reasoned, the state had a "high responsibility for education of its citizens," and so had the undoubted power "to impose reasonable regulations for the control and duration of basic education."⁷⁴ On the other hand, that important interest "is not totally free from a balancing process when it impinges on fundamental rights," and the "values underlying [the Religion Clauses] have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance."⁷⁵ As a result, even though the compulsory attendance law at issue was neutral and generally applicable (in the manner later contemplated by *Smith*), the *Yoder* Court concluded that it must be subject to heightened scrutiny.⁷⁶ "[O]nly those interests of the highest order and those not otherwise served," the Court explained, "can overbalance legitimate claims to the free exercise of religion."⁷⁷ While "religiously grounded conduct must often be subject to the broad police power of the State," the Court refused "to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."⁷⁸ In short, balancing the competing interests at play, *Yoder* embraced a heightened scrutiny

72. See *id.* at 215, 219–20.

73. *Id.*

74. *Id.* at 213.

75. *Id.* at 214.

76. See *id.* at 215.

77. *Id.*

78. *Id.* at 220.

standard for religious exercise.

Another line of heightened-scrutiny cases in the years before *Smith* comes from the Supreme Court's review of the denial of unemployment benefits to religious claimants in *Sherbert*,⁷⁹ *Thomas*,⁸⁰ *Hobbie*,⁸¹ and *Frazee*.⁸² In these cases, the Supreme Court was tasked to review whether the denial of unemployment benefits to religious claimants who, for example, declined to seek employment that required labor on a religious day of rest,⁸³ or declined to continue working at a manufacturing plant that produced military resources, violated the Free Exercise Clause.⁸⁴ Recognizing that "even when the [religious] action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions,"⁸⁵ the Supreme Court instructed that if the state unemployment requirements are "to withstand [the claimant's] constitutional challenge, it must be for one of two reasons, either: (1) "[the claimant's] disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise," or (2) "any incidental burden on the free exercise of [the claimant's] religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate[.]'"⁸⁶ In the Court's view, neither condition was satisfied.

The Court recognized that the denial of unemployment benefits—a denial that is likely less severe than the criminal sanctions posed by the type of law contemplated in *Smith*—was an infringement on the claimant's religious exercise. As the *Sherbert* Court explained, it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing

79. See *Sherbert v. Verner*, 374 U.S. 398, 402–04, 406 (1963).

80. See *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981).

81. See *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141–42 (1987).

82. See *Frazee v. Ill. Dep't of Emp. Sec. Div.*, 489 U.S. 829, 832–33, 835 (1989).

83. See *Sherbert*, 374 U.S. at 402–04, 406.

84. See *Thomas*, 450 U.S. at 709.

85. *Sherbert*, 374 U.S. at 402 (alteration in original) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961)).

86. *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

of conditions upon a benefit or privilege.”⁸⁷ Although the burden on the claimant was only “indirect,” this indirect burden “force[d] the claimant] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.”⁸⁸

The Court also instructed that even in the context of indirectly and incidentally imposed burdens, the state law would only pass muster if it was justified under a heightened scrutiny standard. “It is basic,” the Court explained, “that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, ‘[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.’”⁸⁹ Instead, the Free Exercise Clause required the state to “demonstrate that unbending application of its regulation to the religious objector ‘is essential to accomplish an overriding governmental interest,’ or represents ‘the least restrictive means of achieving some compelling state interest.’”⁹⁰ And so, like *Yoder*, the unemployment benefits cases employed a heightened scrutiny test for incidental burdens on religious exercise.⁹¹

In doing so, the *Sherbert* unemployment cases—like *Yoder*—were representative of the Supreme Court’s more general treatment of neutral laws of general applicability in most other contexts. In case after case—whether dealing with challenges to mandatory Social Security taxes,⁹² military conscription,⁹³ child labor laws,⁹⁴ Sunday

87. *Id.* at 404.

88. *Id.*

89. *Id.* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

90. *Emp. Div. v. Smith*, 494 U.S. 872, 899 (1990) (O’Connor, J., concurring in the judgment) (quoting *United States v. Lee*, 455 U.S. 252, 257–58 (1982); *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)).

91. Compare *Wisconsin v. Yoder*, 406 U.S. 205, 215, 219–20 (1972), with *Sherbert*, 374 U.S. at 402–04, 406.

92. See *Lee*, 455 U.S. at 257–61.

93. See *Gillette v. United States*, 401 U.S. 437, 462 (1971).

94. See *Prince v. Massachusetts*, 321 U.S. 158, 164–67 (1944).

closing laws,⁹⁵ or anti-discrimination tax-deduction schemes⁹⁶—the Supreme Court carefully weighed the competing interests at play and applied some form of *Sherbert*-style heightened scrutiny. To be sure, the Supreme Court had declined to apply heightened scrutiny in certain unique contexts—which are discussed below, but generally fall into categories traditionally open to broader governmental regulation, such as the military and prisons,⁹⁷ or the context of the government’s internal operations or development and use of its own land and resources.⁹⁸ But outside of these unique contexts, *Sherbert*-style heightened scrutiny constituted the general rule applied by the Court to neutral laws of general applicability—at least, before *Smith*.

* * *

The conclusion that laws incidentally and substantially burdening religiously motivated conduct were generally subject to heightened scrutiny, even in the context of *Smith*-style neutral laws of general applicability, is not a novel one. Indeed, the same point was made by Justice O’Connor’s concurrence in the judgment in *Smith* itself and Justice Souter’s later partial concurrence in *Lukumi*, with both opinions emphasizing the many times that the Supreme Court had subjected laws incidentally and substantially burdening religiously motivated conduct to heightened scrutiny.⁹⁹ In Justice O’Connor’s *Smith* concurrence, she summarized the state of the doctrine leading up to *Smith* as markedly at odds with *Smith*’s holding and rationale, reasoning:

95. See *Braunfeld v. Brown*, 366 U.S. 599, 603–07 (1961) (plurality opinion).

96. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983); *Hernandez v. Comm’r*, 490 U.S. 680, 699–700 (1989).

97. See *Goldman v. Weinberger*, 475 U.S. 503, 507, 509–10 (1986); *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349–50 (1987).

98. See *Bowen v. Roy*, 476 U.S. 693, 699–701 (1986); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449–52 (1988).

99. See *Emp. Div. v. Smith*, 494 U.S. 872, 893–901 (1990) (O’Connor, J., concurring in the judgment); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 559–71 (1993) (Souter, J., concurring in part and concurring in the judgment); see also McConnell, *supra* note 2, at 1141–49.

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order." "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens."¹⁰⁰

Similarly, Justice Souter's concurrence in *Lukumi* pointed out that the Supreme Court's traditional practice of applying heightened scrutiny to even neutral and generally applicable laws that substantially and incidentally burdened religiously motivated conduct was more than a little hard to square with *Smith*, observing:

[W]e have applied the same rigorous scrutiny to burdens on religious exercise resulting from the enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious exercise: "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Other

100. *Smith*, 494 U.S. at 894–95 (O'Connor, J., concurring in the judgment) (citations omitted) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Bowen*, 476 U.S. at 732 (O'Connor, J., concurring in part and dissenting in part)).

cases in which the Court has applied heightened scrutiny to the enforcement of formally neutral, generally applicable laws that burden religious exercise include *Hernandez v. Commissioner*, 490 U.S. at 699; *Frazee v. Illinois Dep't of Employment Security*, 489 U.S. 829, 835 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. at 141; *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *United States v. Lee*, 455 U.S. 252, 257 - 258 (1982); *Thomas*, 450 U.S., at 718; *Sherbert v. Verner*, 374 U.S. 398, 403 (1963); and *Cantwell v. Connecticut*, 310 U.S. 296, 304–307 (1940).¹⁰¹

And so, it is challenging to escape the conclusion that *Smith*, in holding that neutral laws of general applicability are subject only to rational basis review, marked a sharp break with the Supreme Court's traditional approach to the Free Exercise Clause.

* * *

Notwithstanding these apparent breaks with the past, the *Smith* majority suggested two defenses of its coherence with preexisting precedent. Neither is particularly persuasive.

Beginning with *Smith's* first defense, the *Smith* majority first concluded that its holding that the Free Exercise Clause did not provide heightened protection against neutral laws of general applicability was justified by *Reynolds* (upholding a prohibition on polygamy) and *Gobitis* (upholding a mandatory pledge of allegiance for school children).¹⁰² In *Smith's* view, the provision of religious exemptions from neutral laws of general applicability would conflict with *Reynolds's* instructions that “[l]aws . . . are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”¹⁰³ That is, to permit “a man [to] excuse his practices to the contrary because of his religious belief” would “make the professed doctrines of

101. *Lukumi*, 508 U.S. at 565–66 (Souter, J., concurring in part and concurring in the judgment) (citation omitted) (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978)).

102. *Smith*, 494 U.S. at 878–79; see *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940).

103. *Smith*, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166).

religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself.”¹⁰⁴ That principle, *Smith* argued, was a necessary one, because the rule urged by the challenger would “open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”¹⁰⁵ And in a similar vein, the *Smith* majority added, was Justice Frankfurter’s conclusion in *Gobitis* that:

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities . . .¹⁰⁶

But the *Smith* majority’s reliance on the *Reynolds-Gobitis* principle is unpersuasive—as far as *Smith*’s consistency with related decisions is concerned.

As an initial matter, the principles that *Smith* distilled from *Reynolds* and *Gobitis* and sought to rely upon had already been rejected by the Supreme Court before *Smith* arose. As for *Reynolds*, since incorporating the Free Exercise Clause in *Cantwell*,¹⁰⁷ the Supreme Court had rejected *Reynolds*’s apparent premise that the Free Exercise Clause only protected religious conscience but not religious conduct,¹⁰⁸ and it had subjected *Reynolds*-style generally applicable laws to a *Sherbert*-style heightened scrutiny standard.¹⁰⁹ Without repeating the discussion above, it is worth recalling that in *Yoder*, for example, the Supreme Court had concluded that the Free Exercise Clause protected both religious “belief and action,” which “cannot

104. *Id.* (quoting *Reynolds*, 98 U.S. at 166–67).

105. *Smith*, 494 U.S. at 888.

106. *Id.* at 879 (quoting *Gobitis*, 310 U.S. at 594–95).

107. See *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

108. See *Wisconsin v. Yoder*, 406 U.S. 205, 215, 219–20 (1972); *Sherbert v. Verner*, 374 U.S. 398, 402–04, 406 (1963).

109. See *Yoder*, 406 U.S. at 215, 219–20; *Sherbert*, 374 U.S. at 402–04, 406.

be neatly confined in logic-tight compartments,”¹¹⁰ a conclusion that was borne out by the Court’s decision to subject incidental burdens on religiously motivated conduct to heightened scrutiny both before¹¹¹ as well as after *Yoder*.¹¹²

And as for *Gobitis*, the *Smith* Court’s reliance on Justice Frankfurter’s rejection of religious exemptions for schoolchildren runs into similar problems with these same subsequent cases—a consideration only strengthened by recalling that, only three years after *Gobitis* was announced, the Court in *Barnette* overruled it and abandoned its central rationale (over Justice Frankfurter’s dissent).¹¹³

Moreover, to the extent that *Smith* relied on *Reynolds*’s functional considerations that religious exemptions would open the floodgates and make “every citizen . . . a law unto himself”¹¹⁴ and undermine “civic obligations of almost every conceivable kind,”¹¹⁵ those functional considerations had not only been rejected by the Supreme Court’s precedent but had been foreclosed by the Supreme Court’s practice.¹¹⁶ As Justice O’Connor’s concurrence in *Smith* observed, “[t]he Court’s parade of horrors not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.”¹¹⁷ Indeed, in cases addressing the specific cases that Justice Scalia had warned would be undermined by religious exercise, the Court had *upheld* the law against free exercise claims under a heightened standard of

110. *Yoder*, 406 U.S. at 219–20.

111. See *Sherbert*, 374 U.S. at 402–04, 406.

112. See, e.g., *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141–42 (1987); *Frazee v. Ill. Dep’t of Emp. Sec.*, 489 U.S. 829, 832–33, 835 (1989).

113. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

114. *Reynolds v. United States*, 98 U.S. 145, 167 (1879).

115. See *Emp. Div. v. Smith*, 494 U.S. 872, 888 (1990).

116. See *id.* at 901–02 (O’Connor, J., concurring in the judgment); cf. Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018).

117. *Smith*, 494 U.S. at 902 (O’Connor, J., concurring in the judgment) (citation omitted).

review.¹¹⁸ For example, applying a form of heightened scrutiny, the Court upheld compulsory military service in *Gillette*,¹¹⁹ mandatory taxation in *Lee*,¹²⁰ routine traffic laws in *Cox*,¹²¹ wage-and-hour laws in *Tony* and child-labor laws in *Prince*,¹²² and anti-discrimination laws in *Bob Jones*.¹²³ Similarly, in more specialized contexts—such as the military uniform requirement in *Goldman*,¹²⁴ the prison regulations in *O’Lone*,¹²⁵ or the specialized government operations at stake in *Lyng*¹²⁶ and *Bowen*¹²⁷—the Court had upheld routine government functions from religious-based challenges based on a more deferential standard, reflecting the Court’s ability to appropriately adapt the test to unique circumstances.

Turning to *Smith*’s second defense, the *Smith* majority next concluded that its holding and rationale were consistent with preexisting free exercise precedent. First, *Smith* reasoned that *Sherbert*-style heightened protection for religious exercise no longer represented the predominant, governing test.¹²⁸ That was so, in the Court’s view, because heightened scrutiny for religious exercise had been reserved for two exceptional areas of law: *Sherbert*-style individual exemption schemes and *Yoder*-style hybrid rights.¹²⁹ And second, *Smith* also reasoned that the Court in recent years had either declined to apply such heightened scrutiny in a variety of contexts and, even when applying it, had almost always found it satisfied.¹³⁰ But *Smith*’s effort to cabin and avoid such unfavorable precedent is

118. See *id.* at 896 (collecting cases).

119. See *Gillette v. United States*, 401 U.S. 437, 462–63 (1971).

120. See *United States v. Lee*, 455 U.S. 252, 257–58, 260 (1982).

121. See *Cox v. New Hampshire*, 312 U.S. 569, 573–75 (1941).

122. See *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 304–05 (1985) (concluding that the challenged Act did not interfere with the claimant’s religious exercise rights); *Prince v. Massachusetts*, 321 U.S. 158, 164–71 (1944).

123. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983).

124. See *Goldman v. Weinberger*, 475 U.S. 503, 507, 509–10 (1986).

125. See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349–50 (1987).

126. See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449–52 (1988).

127. See *Bowen v. Roy*, 476 U.S. 693, 699–701 (1986).

128. See *Smith*, 494 U.S. at 883.

129. See *id.* at 881–83.

130. See *id.* at 883.

unpersuasive for three reasons.

First, the decisions that *Smith* relied upon to establish the individual exemption and hybrid rights exceptions—most importantly, *Sherbert* and *Yoder*—were not so limited. Instead, their interpretation and understanding of the free exercise right reflected the view that the Free Exercise Clause generally required heightened scrutiny for even incidental burdens on religiously motivated conduct, regardless of whether the asserted free exercise right turned on an individual exemption scheme or a hybrid right situation.¹³¹

Start with *Smith's* reliance on the 'individual exemption' theory.¹³² Contrary to *Smith's* interpretation of the unemployment compensation cases, those decisions did not turn on the presence of an unemployment scheme or individualized exemptions.¹³³ Instead, as discussed above, they turned on the incidental burdening of a religious adherent's religiously motivated conduct more generally. As the Court in *Thomas* observed:

"[A] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." . . . Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.¹³⁴

Nothing in that analysis turned on the presence of other, individualized exemptions, as demonstrated by the application of the

131. See *id.* at 893–97 (O'Connor, J., concurring in the judgment).

132. See *id.* at 882–84 (majority opinion).

133. See *Sherbert v. Verner*, 374 U.S. 398, 402–04, 406 (1963); *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 771–18 (1981); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141–42 (1987); *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 832–33, 835 (1989).

134. *Thomas*, 450 U.S. at 717–18 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972)).

Sherbert-style heightened scrutiny to areas outside of the unemployment compensation context, as discussed above.

Next, take *Smith*'s reliance on the hybrid rights theory.¹³⁵ Notwithstanding *Smith*'s insistence that *Sherbert*'s application outside of the unemployment context had only ever involved hybrid rights, the main cases upon which *Smith* sought to derive its hybrid rights theory—most importantly, *Yoder*—had not purported to rely on any type of hybrid rights analysis.¹³⁶ Instead, although various liberty interests were at stake, the analysis turned on the free exercise of religion itself.¹³⁷ In *Yoder*, the Supreme Court granted certiorari to address whether “respondents’ convictions of violating the State’s compulsory school-attendance law were invalid under the Free Exercise Clause of the First Amendment.”¹³⁸ Recognizing that “[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education,” the Court emphasized that “a State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.”¹³⁹

While *Yoder* focused on the traditional interest of parents in the religious upbringing of their children—*Smith*'s hook for cabining *Yoder* to hybrid-rights cases—the *Yoder* decision was not so limited on its own terms. Instead, the best reading of *Yoder* is that it turned not on the “hybrid” nature of the rights at stake, but on the fact that the specific parental interest at issue was a subset of the basic right to the free exercise of religion. As *Yoder* explained, “It follows that in order for [the State] to compel school attendance beyond the eighth grade against a claim that such attendance interferes with

135. See *Smith*, 494 U.S. at 881–82.

136. See *id.*

137. See *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940); *Yoder*, 406 U.S. at 219–20.

138. *Yoder*, 406 U.S. at 207.

139. *Id.* at 213–14.

the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”¹⁴⁰ After concluding that the religiously motivated practice “ha[d] the protection of the Religion Clauses” and that “[t]he impact of the compulsory-attendance law on respondents’ practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs,” the *Yoder* Court concluded that the State had failed to make the “particularized showing” necessary to “justify the severe interference with religious freedom” presented by the mandatory attendance scheme.¹⁴¹ So, while portions of *Yoder* reference the rights of parents as a distinct aspect of the free exercise right, the best reading of *Yoder* is as a discussion of the free exercise of religion—driven by that right and turning on it. As Justice O’Connor observed in her *Smith* concurrence, although the majority “endeavors to escape from [the Court’s] decisions in *Cantwell* and *Yoder* by labeling them ‘hybrid’ decisions . . . there is no denying that both cases expressly relied on the Free Exercise Clause and that [the Court] ha[s] consistently regarded those cases as part of the mainstream of [its] free exercise jurisprudence.”¹⁴²

Second, the Supreme Court purported to apply heightened scrutiny to incidental burdens on religious exercise even outside the context of *Sherbert*-style individual exemption schemes and without any mention of the *Yoder*-style hybrid rights doctrine—further suggesting that, far from representing isolated and anomalous doctrines, the *Sherbert* and *Yoder* lines reflected a broad and cohesive free exercise doctrine that *Smith* fundamentally altered. For example, the Supreme Court in *United States v. Lee*¹⁴³ rejected a religion-

140. *Id.* at 214.

141. *Id.* at 215–16, 218, 227.

142. *Emp. Div. v. Smith*, 494 U.S. 872, 896 (1990) (O’Connor, J., concurring in the judgment) (citations omitted).

143. 455 U.S. 252 (1982).

based challenge to mandatory Social Security taxes only after subjecting the Social Security tax mandate to heightened scrutiny—even though no hybrid-rights theory was advanced and none of the analysis turned on an individual exemption scheme.¹⁴⁴ Similarly, the Supreme Court in *Gillette v. United States*¹⁴⁵ rejected a religion-based challenge to a military conscription regime under a heightened scrutiny standard, even though no hybrid right was asserted and no one had suggested that the analysis hinged on the availability of other types of individual exemptions.¹⁴⁶

And while the Supreme Court had not applied heightened scrutiny in a few exceptional cases,¹⁴⁷ nowhere before *Smith* did the Supreme Court suggest that heightened scrutiny was necessarily inappropriate outside of the context of individualized-exemption regimes or hybrid-rights situations. In two of the cases in which the Court had declined to apply *Sherbert—Bowen* (rejecting a challenge to the government's use of social security number for dispensing welfare benefits)¹⁴⁸ and *Lyng* (rejecting a challenge to government development on sacred Native Americans lands)¹⁴⁹—the Court had not repudiated *Sherbert*-style heightened scrutiny but had instead rejected the immediate challenges by reasoning that “the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.”¹⁵⁰ So *Bowen* and *Lyng* did not address a circumstance like the criminal prohibition in *Smith*, which necessarily dealt with what the government could do to an individual, and left

144. *See id.* at 257–58, 260.

145. 401 U.S. 437 (1971).

146. *See id.* at 461–62.

147. *See Bowen v. Roy*, 476 U.S. 693, 699–701 (1986) (involving internal government operations); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449–52 (1988) (involving government development of its own land); *Goldman v. Weinberger*, 475 U.S. 503, 507, 509–10 (1986) (involving the sensitive area of internal military regulations); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349–50 (1987) (involving the unique context of prison regulations).

148. *Bowen*, 476 U.S. at 699–701 (1986).

149. *Lyng*, 485 U.S. at 449.

150. *Smith*, 494 U.S. at 900 (O'Connor, J., concurring in the judgment) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

the Court's broader free exercise doctrine in such circumstances undisturbed. And in the other two cases in which the Court had declined to apply *Sherbert—Goldman* (rejecting a challenge to military dress regulations)¹⁵¹ and *O'Lone* (rejecting a challenge to a prison's decision to decline to exempt an inmate from work duties to attend religious service)¹⁵²—the Supreme Court dealt with specialized contexts that lent themselves to particularly deferential judicial review, and did not purport to disturb the Court's more general free exercise doctrine.¹⁵³ And confirming that the unique cases of *Bowen*, *Lyng*, *Goldman*, and *O'Lone* had not abandoned *Sherbert*'s heightened scrutiny test more generally, two decisions in the years immediately leading up to *Smith—Hobbie* (a challenge to unemployment compensation denial) and *Hernandez* (a challenge to payment of income taxes)—affirmed the ongoing vitality of the *Sherbert* heightened-scrutiny regime.¹⁵⁴

And third, the *Smith* majority's focus on the Court's de facto retreat from a religious exemption regime—tallying up the win-loss rates for different free exercise challenges before the Court—failed to fully address the central question of whether *Smith*'s holding and rationale were consistent with the Court's preexisting free exercise precedent. To be sure, the fact that the Supreme Court had consistently rejected free exercise challenges against a wide variety of government programs (even under *Sherbert*-style heightened scrutiny), as well as the fact that *Smith*'s results largely cohered with those cases' real-world results, were certainly relevant considerations.¹⁵⁵ And perhaps given the precedential hurdles that the *Smith* majority faced—as the majority seemed to acknowledge by nodding to cases in which the Court had “purported to apply the *Sherbert* test in

151. *Goldman*, 475 U.S. at 507, 509–10 (1986).

152. *O'Lone*, 482 U.S. at 349–50.

153. See *Smith*, 494 U.S. at 900–02 (O'Connor, J., concurring in the judgment).

154. See *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141–42 (1987); *Hernandez v. Comm'r*, 490 U.S. 680, 699–700 (1989).

155. Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414–16 (2020) (Kavanaugh, J., concurring in part); Luke Goodrich, *Will the Supreme Court Replace the Lemon Test?*, HARV. L. REV. BLOG (Mar. 11, 2019), https://blog.harvardlawreview.org/will-the-supreme-court-replace-the-_lemon_-test/ [<https://perma.cc/KSU7-R5LL>].

contexts other than [unemployment compensation challenges]¹⁵⁶—this practical answer of de facto retreat was the best option available to the Court, save overruling those unfavorable cases. But the fact that *Smith*'s practical results largely mapped on to the holdings of these previous cases is not a perfect answer, either practically or doctrinally. As a practical matter, the small sample of cases that had come before the Court does not necessarily provide a universe of cases that are representative or predictive of the types of free exercise challenges that might arise. Additionally, even that win-loss rate does not necessarily require accepting *Smith*'s conclusion that there is little practical daylight between the results of a *Smith*-style rational basis test and *Sherbert*-style heightened scrutiny test. And as a doctrinal matter, it is certainly relevant that *Smith*'s rationale remained strikingly at odds with many of those cases. So, whatever the force of *Smith*'s de facto retreat argument, it is not fully satisfactory, even if it helps mitigate some of the practical consequences of *Smith*'s potential inconsistencies with the Court's prior free exercise precedent.

2. Ongoing Tensions and Confusion

While *Smith* remains good law,¹⁵⁷ the state of free exercise jurisprudence after *Smith*—which consists not only of *Smith* itself, but also of the decisions that *Smith* purported to leave in place (such as *Yoder* and *Sherbert*),¹⁵⁸ as well as subsequent decisions—reflects a doctrine at war with itself. Significant tensions and ambiguities left by *Smith*, or created by later efforts to cabin *Smith*, have undermined the internal coherence, doctrinal stability, and practical workability of the Court's free exercise doctrine, suggesting that much good may come from revisiting the *Smith* regime today.

One challenge to *Smith*'s ability to foster a consistent and predictable free exercise jurisprudence stems from the difficulties

156. *Smith*, 494 U.S. at 883.

157. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019–21 (2017); *City of Boerne v. Flores*, 521 U.S. 507, 512–14 (1997); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

158. See *Smith*, 494 U.S. at 881–85.

associated with determining whether a law is generally applicable and thus subject to *Smith's* rational-basis primary rule. As Professor Douglas Laycock and Steven T. Collis have argued, the central difficulty posed by the general applicability inquiry is that general applicability inevitably rests on "circular categories and circular government interests," in which "[e]very law applies to everything it applies to."¹⁵⁹ Some laws may come closer to resembling the type of "across-the-board . . . prohibitions" contemplated by *Smith* (consider, for example, a statewide ban on marijuana use).¹⁶⁰ But most laws do not. Instead, they reflect determinations about what comparably weighty government interests to pursue or leave aside. They make determinations about how to best pursue those interests, with the decision of what conduct to proscribe/discourage or permit/encourage turning on both the nature of the compromise-based legislative process and the inevitable necessity of deciding how far to pursue particular interests at the expense of other cross-cutting interests. Consider, for example, how a statewide ban on marijuana use may leave comparable conduct unregulated or may contain various exceptions for medicinal, research, or other uses.¹⁶¹

In light of such circular categories and circular government interests, judges tasked to consider whether a law is generally applicable for the purposes of *Smith* have a challenging task. Among other things, they must determine whether exempted or nonregulated secular conduct (for example, the medicinal marijuana exception) is "comparable" to non-exempted religious conduct. That determination turns on a challenging comparison of the relative harms to the asserted legislative purposes that are posed by the non-exempt religious conduct, and it also turns—at least to some extent—on the relevant comparative benefits associated with both the exempted secular conduct and the non-exempted religious conduct.¹⁶² This

159. Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 16 (2016); see also Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1540–42 (1999).

160. See Laycock & Collis, *supra* note 159, at 9–23.

161. See *id.*; Volokh, *supra* note 159, at 1540–42.

162. See *Emp. Div. v. Smith*, 494 U.S. 872, 878–79, 882–84 (1990).

determination—which quickly begins to resemble the types of policy judgments that judges are traditionally reluctant to engage in—is further complicated by considering the frequent variant in which secular exemptions are available to religious and secular adherent alike but no specific exemptions for religiously motivated conduct have been provided.¹⁶³ On the one hand, as Professor Laycock and Collis argue, providing exemptions for secular conduct but not for comparable religious conduct must constitute “unequal treatment of religious and secular conduct.”¹⁶⁴ After all, controlling for benefits and harms, if the state permits marijuana to be used for medicinal usage but not for religious usage—assuming the absence of some other justification or meaningful distinction between these practices—the law appears unlikely to be generally applicable. On the other hand, such controlled assumptions are frequently contested and uncertain in practice. It may very well be the case that providing across-the-board secular exemptions makes it challenging to determine whether religious conduct has been singled out or merely incidentally burdened. While the former description may be more persuasive as a general matter, determining which description matches a particular law raises significant workability challenges—particularly because it requires generalist judges to make expert decisions regarding the similarity of particular sets of religious and secular conduct, and how the religious conduct fits with the “circular categories and circular government interests” represented by the statutory scheme.¹⁶⁵

To be sure, it might be the case that problems associated with *Smith*'s general applicability standard will only prove troublesome for a small minority of statutes—leaving the doctrine's application generally workable in most cases. But that argument is likely unpersuasive. As an initial matter, most apparently generally applicable laws still involve “circular categories and circular government interests.”¹⁶⁶ That is so, as Professor Laycock and Collis explain,

163. *See id.*

164. Laycock & Collis, *supra* note 159, at 27.

165. *Id.* at 16.

166. *Id.*

because those laws make determinations of what interests to pursue and forego, and what conduct to regulate or leave alone.¹⁶⁷ And the problems of circular categories and circular government interests are particularly pronounced where, as in contemporary legislation and regulation, most prohibitions and regulations of conduct are carefully tailored in their regulatory scope. These laws and regulations frequently fail to regulate categories of roughly comparable secular conduct and provide numerous secular and related exemptions, complicating the decision about whether, in a given case, a particular law is truly generally applicable.¹⁶⁸

A second challenge to the coherence, stability, and predictability of contemporary free exercise jurisprudence arises from the extent to which *Smith* purported to leave *Yoder* and *Sherbert* standing as good law.

As an initial matter, these cases are in significant doctrinal dissonance with the *Smith* decision—undermining the internal coherence of the Court’s free exercise doctrine. Contrary to *Smith*’s holding, both *Yoder* and *Sherbert* concluded, “in language hard to read as not foreclosing the *Smith* rule, that the Free Exercise Clause embraces more than mere formal neutrality, and that formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality.”¹⁶⁹ That was so because *Yoder* and *Sherbert* instructed that religious exercise encompassed religiously motivated conduct and that conduct was subject to heightened protection even from neutral laws of general applicability. In *Yoder*, for example, the Court reasoned:

[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of

167. See *id.* at 16–17; cf. John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 74–75 (2006) (discussing the fine-tuned nature of the compromise-based legislative process and the relevant role of judges in interpreting legislative enactments).

168. Cf. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1723–24 (2018).

169. *Lukumi*, 505 U.S. at 565 (Souter, J., concurring in part and concurring in the judgment).

individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. . . . [I]n this context belief and action cannot be confined in logic-tight compartments. . . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.¹⁷⁰

Similarly, the Supreme Court in *Thomas*—affirming *Sherbert* in the same language offered by *Yoder*—confirmed that “[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.”¹⁷¹

In this way, the *Yoder* and *Sherbert* lines—representative of the Court’s broader free exercise jurisprudence at the time¹⁷²—embraced a logical framework that was deeply at odds with *Smith*’s holding that incidental burdens on religious conduct were subject only to rational basis scrutiny, as well as *Smith*’s functional, institutional, and related rationales for why that holding made sense. While that break from the past is significant in its own right, the *Smith* majority’s decision to formally retain—even if in modified form—the *Yoder* and *Sherbert* decisions suggests another problem. As Justice Souter put it in his *Lukumi* concurrence, “Because *Smith* left those prior cases standing, we are left with a free-exercise

170. *Wisconsin v. Yoder*, 406 U.S. 205, 219–20 (1972) (citations omitted).

171. *Thomas v. the Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981) (quoting *Yoder*, 406 U.S. at 220); see also *Sherbert v. Verner*, 374 U.S. 398, 402–04, 406 (1963).

172. See *supra* Part II.A.1.

jurisprudence in tension with itself, a tension that should be addressed.”¹⁷³

Recognizing the tension between the rule it announced and the rationale underlying *Yoder* and *Sherbert*, the *Smith* majority sought to cabin these cases by relegating *Yoder* to the realm of “hybrid rights” situations and *Sherbert* to the zone of “individual exemption” regimes. While this effort was understandable, and perhaps the best way to establish *Smith*’s rule without overruling *Yoder* and *Sherbert* outright, the result seems to be neither doctrinally stable nor practically workable. This suggests that, despite best efforts, *Smith*’s unresolved inconsistencies with *Sherbert* and *Yoder* have undermined the coherence, stability, and predictability of the free exercise jurisprudence that *Smith* sought to synthesize, thereby undermining *Smith*’s stare decisis value.

Start with the *Yoder* exception. As an initial matter, *Smith*’s attempted relegation of *Yoder* to the context of “hybrid rights” is likely unstable and incoherent. Even leaving aside the fact that *Yoder* did not purport to restrict itself to hybrid rights situations,¹⁷⁴ it is challenging to conclude that its internal logic—that the Free Exercise Clause itself protects religiously motivated conduct even against incidental burdens from neutral laws of general applicability—depends, in any sense, on the presence or absence of additional, possibly coextensive rights claims. Once the Free Exercise Clause protects religiously motivated conduct, and once that protection is understood to require *substantive* rather than *formal* equality, the *Smith* majority’s attempt to limit *Yoder* to hybrid rights seems unlikely to fully grapple with the doctrinal dissonance at stake. That dissonance was central to Justice Souter’s critique of *Smith* in his *Lukumi* concurrence, in which he concluded:

[T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid

173. *Lukumi*, 508 U.S. at 564 (Souter, J., concurring in part and concurring in the judgment).

174. See *Yoder*, 406 U.S. at 219–20.

exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.¹⁷⁵

Particularly as the scope of other constitutional rights—such as those provided by the First Amendment’s Free Speech Clause or the Fourteenth Amendment’s Due Process Clause—grows, the conceptual problems with *Smith*’s effort to limit *Yoder* to the situation of “hybrid rights” seem likely to present significant practical consequences.

Moreover, *Smith*’s interpretation of *Yoder* to recognize a “hybrid rights exception” leaves at least three important issues unaddressed—leaving insufficient guidance for future courts and causing *Smith*’s apparently simple categorical rule to devolve into a case-by-case balancing test.

First, *Smith* fails to articulate how strong the components of the “hybrid right” must be to count toward the heightened scrutiny threshold, and exactly what those components must be. It is unclear, for example, whether the rights asserted alongside the free exercise right must merely be alleged or colorable or must instead be sufficient to secure protection with or without the free exercise right. It is also unclear whether the rights asserted alongside the free exercise right are limited to certain categories of rights (whether common law, statutory, or constitutional) or certain subcategories of that right (perhaps particularly “fundamental” constitutional rights). And, perhaps most importantly, it is unclear how judges are to consistently make the probability-of-success or weight-of-the-interest determinations, even had clearer instructions been provided.

175. *Id.* at 567.

Second, in addition to its failure to explain which variables count for the sum, *Smith* also fails to articulate how to conduct the ultimate “hybrid rights” analysis. *Smith* does not provide instructions as to how to address the assertion of multiple rights in conjunction with a free exercise claim, leaving it unclear whether each hybrid right pair must be analyzed separately or whether courts must engage in an exercise of rights arithmetic that takes the sum of the liberty interests presented and weighs them, in the aggregate, against the asserted government interest.

And third, *Smith* also fails to provide instruction as to what level of scrutiny to apply to different validly asserted hybrid rights. Not only is it unclear what type of heightened scrutiny *Smith* contemplated would apply as a baseline matter to “hybrid rights” claims, but—given that *Smith* seems to contemplate rights “reinforc[ing]” each other¹⁷⁶—it remains unclear whether hybrid rights of differing strengths might warrant different levels of scrutiny. And these uncertainties—complicated by the dramatic expansions in other rights doctrines (such as substantive due process or the freedom of speech)—increase the risk that *Smith*’s advertised bright-line holding may devolve into the very case-by-case adjudication and balancing that *Smith* purported to reject.¹⁷⁷

Next, take the *Sherbert* exception. As an initial matter, *Smith*’s effort to limit *Sherbert* to the context of individualized exemption regimes raises problems of internal coherence and doctrinal stability. Like *Yoder*, *Sherbert*—taken on its own terms—did not purport to limit itself to individualized exemption regimes, and for good reason. It is challenging to conclude that *Sherbert*’s internal logic—that the state may not place undue pressure on a religious adherent to choose between engaging in particular religiously motivated conduct and the receipt of government benefits, even if the state does so incidentally—depends, in any meaningful sense, on the presence of an individualized-exemption regime or the possibility of

176. *Emp. Div. v. Smith*, 494 U.S. 872, 882 (1990).

177. See Ryan S. Rummage, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1189–96 (2015) (surveying lower court confusion).

comparable secular exemptions.¹⁷⁸ Because *Sherbert* was premised on a broader requirement of “substantive neutrality,” while *Smith* was premised on a minimal requirement of “formal neutrality,”¹⁷⁹ the premises of *Sherbert* and *Smith* are in tension with one another. But even accepting *Smith*’s restatement of *Sherbert*’s rule as only requiring heightened scrutiny when a state has in place an individualized exemption regime, the *Sherbert* exception may still swallow the *Smith* rule in a large variety of cases.¹⁸⁰ In many cases today—perhaps in most cases—conflicts between religiously motivated conduct and state interests arise in the context of statutes or regulatory schemes that are riddled with individualized exemptions, suggesting that the type of neutral and generally applicable law contemplated by *Smith* may increasingly be the outlier and the individualized exemption scheme falling under *Sherbert* now the dominant rule.¹⁸¹ And even in the context of across-the-board prohibitions that lack any individualized exemptions and are truly neutral and generally applicable, those prohibitions frequently involve individualized discretion along the way to penalizing the religious adherent, as Professor McConnell has argued, whether that discretion is performed by prosecutors, conducted during the trial or adjudication process, or at the back-end through commutation or pardoning.¹⁸² While the scope of judicial review of such decisions is narrow under our current doctrine, there is certainly a greater level of individualized decisionmaking that *Smith* contemplated.

Moreover, *Smith*’s interpretation left behind several challenging questions that risk blurring the lines between *Smith*’s main rule and the

178. See *Frazee v. Ill. Dep’t of Emp. Sec.*, 489 U.S. 829, 832–33, 835 (1989); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141–42 (1987); *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717–18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 402–04, 406 (1963).

179. See *Lukumi*, 508 U.S. 520, 576 (1993) (Souter, J., concurring in part and concurring in the judgment).

180. See *supra* Part II.A.2.

181. See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018).

182. See, e.g., McConnell, *supra* note 2, at 1124; *In re Stevens*, 956 F.3d 229, 233–34 (4th Cir. 2020) (Richardson, J.).

Sherbert exception, thereby undermining the consistent and predictable application of *Smith's* central instructions. As discussed above, most statutes and regulations involve complex schemes—reflecting the “circular government interests” and “circular categories” articulated by Professor Laycock and Collis—that contain fairly significant individualized (and categorical) exceptions. These exceptions may relate to what reasons may permit an exemption, what costs or benefits should be attached to such an exemption, and—relating to enforcement—whether to take an adverse action against an individual and what that enforcement action should look like.¹⁸³ Because few laws pursue a particular interest at all costs, and even fewer—perhaps none—require their executing officials to do so without any discretion attuned to broader policy objectives or individualized circumstances, it is often challenging to determine where *Smith* ends and *Sherbert* begins.¹⁸⁴

For instance, it is unclear whether a law with categorical exceptions—consider, for example, a flat ban on marijuana possession that categorically excepts comparably potent and deleterious substances or that categorically exempts marijuana possession for research purposes—falls under *Smith's* formal rule or the various heightened scrutiny exceptions. Moreover, given that most laws contain some form of individualized exemption or at least require individualized determinations, policing the line between the *Smith* rule and the *Sherbert* exception in a manner that will avoid the exception swallowing the rule has become particularly challenging, even leaving aside the questions of prosecutorial discretion or trial-like individualized determinations that are at stake. And finally, in determining whether withholding a religious exemption in a particular context is permissible, it is difficult to determine whether the religious conduct that would be covered by an exemption is indeed comparable to exempted secular conduct, and whether the state has offered a sufficiently good reason for declining to exempt that religious conduct.¹⁸⁵

183. See Laycock & Collis, *supra* note 159, at 15–16.

184. Cf. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025–2026 (2017) (Gorsuch, J., concurring).

185. Compare *Sherbert v. Verner*, 374 U.S. 398 (1963) (analyzing tailored exemption scheme), with *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018)

* * *

Although *Smith* remains good law,¹⁸⁶ the Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,¹⁸⁷ announcing a "ministerial exception" from a neutral law of general applicability, reflects two ways in which *Smith*'s stare decisis weight has been undermined.¹⁸⁸

The first way in which *Hosanna-Tabor* has undermined *Smith*'s stare decisis weight is the extent to which *Hosanna-Tabor* relied heavily on history and tradition for its interpretation of the original meaning of the Free Exercise Clause—a historically oriented approach that was at odds with *Smith*'s own approach and, depending on one's view of the history, might ultimately point to a conclusion that is contrary to *Smith* in substance.¹⁸⁹

Start with the methodological differences. As an initial matter, while *Smith* principally relied on a combination of functionalist, institutional, and precedential justifications for its interpretation of the Free Exercise Clause,¹⁹⁰ the *Hosanna-Tabor* decision relied heavily (although not entirely) on the historical origins and traditional understanding of the Religion Clauses, a consideration that was largely absent from the *Smith* decision.¹⁹¹ In *Hosanna-Tabor*, the Court concluded that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers," before immediately turning to emphasize that "[c]ontroversy between church and state over religious offices is hardly new."¹⁹² Indeed, the Court observed, our history has long

(similarly analyzing tailored exemption scheme).

186. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993); *Trinity Lutheran Church*, 137 S. Ct. at 2019–21.

187. 565 U.S. 171 (2012).

188. See *id.* at 173.

189. Compare *id.* at 182–85 (engaging in in-depth historical analysis), with *Emp. Div. v. Smith*, 494 U.S. 872, 876–90 (1990).

190. See *Smith*, 494 U.S. at 876–90 (engaging in primarily doctrinal and functional analysis).

191. Compare *Hosanna-Tabor*, 565 U.S. at 182–85, with *Smith*, 494 U.S. at 879 (relying on *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

192. *Hosanna-Tabor*, 565 U.S. at 181–82.

been marked by significant conflicts between church and state over the selection and control of a church's minister—with those conflicts represented by, among other things, the very first clause of the Magna Carta, the Acts in Restraint and of Uniformity promulgated to centralize the English religious establishment, and the varied policies of the early colonies.¹⁹³ The Court then concluded that “[i]t was against this background that the First Amendment was adopted.”¹⁹⁴ After tracing a few additional examples that the Court concluded reflected this interpretation as the historical and traditional view of the Religion Clauses, the Court explained why this interpretation was also reflected in subsequent precedent, before concluding:

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.¹⁹⁵

In contrast, the *Smith* majority, although it relied in *Reynolds* and subsequent precedent, had declined to perform the same type of originalist-oriented inquiry, which suggests a methodological tension between *Smith* and *Hosanna-Tabor*.¹⁹⁶

193. *See id.* at 182–83.

194. *Id.* at 183.

195. *See id.* at 188–89.

196. Perhaps the best defense of *Smith*'s methodological consistency with a historically-driven approach to the Religion Clauses comes from *Reynolds*. *Smith* relied on

The second way in which *Hosanna-Tabor* has undermined *Smith*'s stare decisis weight is the extent to which *Hosanna-Tabor*'s rationale and holding have raised tensions with *Smith*'s rationale and blurred *Smith*'s clear delineating boundaries. Although acknowledging *Smith*'s core holding, the *Hosanna-Tabor* Court held that *Smith*'s general rule was ultimately inapplicable because, while "*Smith* involved government regulation of only outward physical acts," religious issues like the selection of a minister constituted "internal church decision[s] that affect[] the faith and mission of the church,"¹⁹⁷ implicating the difference between "the government's regulation of 'physical acts'" and its "lend[ing] its power to one or the other side in controversies over religious authority or dogma."¹⁹⁸ In so distinguishing *Smith*, the *Hosanna-Tabor* Court appears to have adopted a line of analysis that is at odds with that case. To the extent that the internal "faith and mission of the church" rationale extends beyond the selection of ministers, it may often be unclear which religious acts are external, physical acts subject to *Smith* and which are internal church decisions that affect the faith and mission of the church itself. In many cases, the line is not

Reynolds's view of the Free Exercise Clause, see *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990), and *Reynolds* itself was based in larger part on the Supreme Court's view of the history of the Free Exercise Clause, see *Reynolds v. United States*, 98 U.S. 162–64 (1879). But this argument does not fully stave off the charge that *Smith* is out of step with the text, history, and tradition test. First, it is challenging to read *Smith*'s reliance upon *Reynolds* as reflecting *Smith*'s embrace of an originalist approach (even assuming that *Reynolds*'s originalism is the same originalism embraced by the Supreme Court in recent years). Essentially nowhere in the opinion does *Smith* engage in any in-depth historical analysis. Nor does *Smith*, in relying on *Reynolds*, purport to embrace *Reynolds*'s originalist commitments or analysis. And in reaching its result, *Smith* brushes past decades of precedents that had, themselves, relied in significant part upon history and tradition to reach their decisions, making it hard to read *Smith* as a truly originalist opinion (let alone one with a particularly rigorous historical methodology). And second, even if *Smith* were read to reflect an originalist methodology, that would not resolve the other charge—that *Smith*'s result is out of step with what text, history, and tradition identify as the requirements of the Free Exercise Clause. As a result, the *Reynolds*-based defense of *Smith* is respectable, but unlikely to be all that persuasive—let alone dispositive, when weighed against the relevant countervailing considerations.

197. *Hosanna-Tabor*, 565 U.S. at 190.

198. *Id.* (quoting *Smith*, 494 U.S. at 877).

so clear. Consider communion wine, for instance. On the one hand, as in the case of peyote, the *Smith* principle might permit the government to prohibit its ingestion by minors insofar as ingestion of alcohol is a physical act of external concern that the state has a legitimate interest in controlling.¹⁹⁹ On the other hand, the *Hosanna-Tabor* principle may protect communion insofar as it is a central component of the faith and mission of the church itself.²⁰⁰ But perhaps more importantly, the rationale for distinguishing *external* from *internal* church acts may be subject to some tension. Given that the state interest frequently remains the same between the two (consider an across-the-board antidiscrimination statute, for example), and the analysis turns to consider the *weight* of the religious interest, it is unclear whether internal, personnel decisions in church leadership may not be of comparable weight to other, potentially external decisions (like communion, for example). These examples suggest that there may be considerable conceptual and practical difficulties with distinguishing between physical, external acts and conduct that implicates the faith and mission of the church or its internal organization, undermining *Smith's* consistency and predictability.

B. *The Other Half of the Religion Clauses:
The Establishment Clause*

A second important consideration for assessing *Smith's* consistency with related decisions requires comparing *Smith's* approach to the Free Exercise Clause with the Supreme Court's approach to the other half of the Religion Clauses—the Establishment Clause.²⁰¹ Determining this relationship is important, given the

199. See *Smith*, 494 U.S. at 877–79.

200. See *Hosanna-Tabor*, 565 U.S. at 188; cf. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 439 (upholding a preliminary injunction against the Controlled Substance Act's ban of a religious sect's sacramental use of substance in religious ceremonies).

201. One important point warrants emphasis at the beginning. Despite acknowledged tensions between the Free Exercise Clause and the Establishment Clause, the Supreme Court has consistently held that the Establishment Clause does not require *Smith's* test or result. See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 409–10 (2004) (citing

textual, historical, and functional relationship between the Free Exercise and Establishment Clauses, but also challenging, given the broad uncertainty over current Establishment Clause doctrine. Because the Establishment Clause dust has yet to settle, and a variety of potential theories of the Establishment Clause remain relevant and viable, this Subpart proceeds to consider *Smith's* consistency with the Supreme Court's Establishment Clause jurisprudence by comparing *Smith* with the largely ascendant "history and tradition" test advanced by *Town of Greece v. Galloway*,²⁰² *Hosanna-Tabor*,²⁰³ and the *American Legion v. American Humanist Association*²⁰⁴ plurality.

While this "history and tradition" test does not formally govern in all Establishment Clause cases, it has become increasingly important in some Establishment Clause contexts and attracted wide support from a broader coalition of current members of the Court. In general, there are two potential ways in which *Smith* is in tension with this "history and tradition" test, relating to *Smith's* jurisprudential methodology and its substantive outcome. While more definitive conclusions about the stare decisis weight of *Smith's* interpretation of the Free Exercise Clause require greater clarity in the Court's Establishment Clause doctrine, this Subpart suggests that there are significant reasons for concluding that the Court's Establishment Clause jurisprudence raises important tensions with *Smith*.²⁰⁵

Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)); *Wisconsin v. Yoder*, 406 U.S. 205, 220–21 (1972); see also *Smith*, 494 U.S. at 890; cf. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

202. See 572 U.S. 565, 578 (2014).

203. See 565 U.S. at 182–85.

204. See 139 S. Ct. 2067, 2087–89 (2019) (plurality opinion).

205. While this Article leaves aside any comparison of *Smith* and *Lemon*, it is worth noting that whatever conceptual coherence (or tension) may exist between these lines must also take account of the extent to which *Lemon* has been repeatedly diminished, see *Hunt v. McNair*, 413 U.S. 734, 741 (1973), ignored, see, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), and replaced or rejected, see *Marsh v. Chambers*, 463 U.S. 783, 786–92 (1983); *Van Orden v. Perry*, 545 U.S. 677, 686–90 (2005) (plurality opinion); *Town of Greece*, 572 U.S. at 575–78; see generally *Am. Legion*, 139 S. Ct. 2067, by the Supreme Court in a number of contexts—reducing (although not entirely preventing) *Lemon's* ability to offer assistance to *Smith's* stare decisis defense. Indeed, any comparison of *Lemon* and *Smith* might lead one to

1. Methodological Tensions

The first potential way in which *Smith* is in tension with the “history and tradition” test relates to methodology. In contrast to the increasingly important role that history and tradition have played in the Establishment Clause context—sometimes governing the Court, other times driving influential pluralities and concurrences²⁰⁶—the Supreme Court’s holding in *Smith* rested to a great extent on functionalist and institutional concerns.²⁰⁷ While *Smith* concluded that religious exemptions would be contrary to “constitutional tradition and common sense,” it declined—apart from a brief discussion of *Reynolds*²⁰⁸ and more recent precedents²⁰⁹—to stake its holding on the historical or traditional practice of religious exemptions. Instead, it grounded its rationale in a combination of (a) functional concerns that a contrary rule would “open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind”²¹⁰, and (b) structural commitments that would both preclude judges from weighing the value of different religious beliefs and require the zone of conduct to be left to the political process as “an unavoidable consequence of democratic government.”²¹¹ Thus, the *Smith* majority never staked its holding on the type of in-depth review of the various historical practices and longstanding traditions that the Supreme Court relied upon in its Establishment Clause decision in *Town of Greece*²¹² or, as discussed in the previous Subpart, its Free Exercise Clause decision

wonder why, at least up until now, the *Smith* rule has not driven the outcome of any free exercise cases since it was announced. Cf. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (raising similar questions about *Lemon*). This issue, however, is noted rather than resolved in order to focus on the emerging focus of Establishment Clause doctrine.

206. See, e.g., *Town of Greece*, 572 U.S. at 575–78; *Marsh*, 463 U.S. at 786–92; *Am. Legion*, 139 S. Ct. at 2087–89 (plurality opinion); *Lynch v. Donnelly*, 465 U.S. 668, 673–78 (1984); *Van Orden*, 545 U.S. at 686–90 (plurality opinion).

207. See *Emp. Div. v. Smith*, 494 U.S. 872, 877–90 (1990).

208. See *id.* at 879 (relying on *Reynolds v. United States*, 98 U.S. 145, 164–67 (1879)).

209. See *id.* at 877–90.

210. *Id.* at 888.

211. *Id.* at 890.

212. See *Town of Greece*, 572 U.S. at 575–78.

in *Hosanna-Tabor*.²¹³ That *Smith* is not an originalist—or somewhat originalist—decision is not necessarily dispositive, for much of the Free Exercise or Establishment Clause precedent is not. But to the extent that history and tradition play a central role in the broader Establishment Clause context, and to the extent that they appears critical from the Court’s more recent precedents, *Smith*’s relatively scant attention to history or tradition, in favor of relying almost entirely on a distinct set of functionalist and institutionalist concerns, presents one methodological tension with the Court’s Establishment Clause jurisprudence.²¹⁴

2. Substantive Tensions

The second way in which *Smith* is potentially in tension with the “history and tradition” test relates to substance. While this Article cannot resolve the historical or traditional conception of either the Free Exercise Clause or the Establishment Clause, it draws from the work of others to identify a few of the more important tensions between *Smith* and some of the more salient views of the Religion Clauses that have been proposed in recent years.

As an initial matter, *Smith*’s holding conflicts with the view, advanced by some, that the Free Exercise Clause was originally and traditionally understood to provide religious exemptions even from neutral laws of general applicability.²¹⁵ Drawing from Professor McConnell’s review of the origins and historical understanding of the free exercise of religion²¹⁶—a review which draws from, inter

213. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182–85 (2012).

214. See McConnell, *supra* note 2, at 1116–19 (“Interestingly, the Court did not pause to consider whether the historical context surrounding the adoption of the Free Exercise Clause might have a bearing on the . . . permissible readings of the text. This is particularly surprising because the author of the majority opinion, Justice Scalia, has been one of the Court’s foremost exponents of the view that the Constitution should be interpreted in light of its original meaning.”).

215. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 544–65 (O’Connor, J., dissenting); McConnell, *supra* note 3, at 1427–28.

216. See, e.g., McConnell, *supra* note 3, at 1421–73; Note, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 HARV. J.L. & PUB. POL’Y 971 (2019).

alia, early colonial charters, state constitutions, understandings reflected in prevailing popular, theological, and political philosophical conceptions, and the text and structure of the federal Free Exercise Clause—Justice O'Connor has argued that "[t]he historical evidence casts doubt on the Court's current interpretation of the Free Exercise Clause," concluding that "[t]he record instead reveals that its drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with [the Court's] pre-*Smith* jurisprudence."²¹⁷ To be sure, that historical conclusion—or its relevance for constitutional jurisprudence today—is subject to some critique. Drawing from Professor Hamburger's work,²¹⁸ for example, Justice Scalia has defended *Smith's* functional conclusion as reflecting the original meaning of the Free Exercise Clause, as well as its state predecessors.²¹⁹ And others, questioning the entire enterprise, might very well question whether the original meaning of the Free Exercise Clause is even sufficiently determinate, let alone jurisprudentially relevant, to inform our understanding of the Free Exercise Clause today. But to the extent that history is relevant to interpreting the Free Exercise Clause,²²⁰ *Smith's* methodological and substantive inconsistencies with an originalist interpretation of the Free Exercise Clause suggest one potential problem for *stare decisis* defenses of *Smith*.

Moreover, *Smith's* holding that the Free Exercise Clause does not provide religious exemptions from neutral laws of general applicability may also be in tension with the original meaning and historical tradition of the Establishment Clause—depending, of course, on one's views of the particular relationship between the two clauses.²²¹ While definitive conclusions on these potential tensions

217. *City of Boerne*, 521 U.S. at 549 (O'Connor, J., dissenting).

218. See Hamburger, *supra* note 3, at 818–19.

219. See *City of Boerne*, 521 U.S. at 537–44 (Scalia, J., concurring in part).

220. Cf. McConnell, *supra* note 3, at 1415 ("Even opponents of originalism generally agree that the historical understanding is relevant, even if not dispositive.").

221. See generally, e.g., Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991) (discussing the relationship between the two clauses); McConnell, *supra* note 3 (explaining the original public meaning of the Free Exercise

are beyond the scope of this Article, one potential view of the Establishment Clause—such as the view that it embodies a “benevolent neutrality,”²²² which reflects “the best of our traditions” and respect for “the religious nature of our people”²²³—may present some tensions with *Smith*. Under this view, the types of historical accommodations for religion asserted by some to characterize Founding-era constitutional, legislative, and executive practice may very well constitute the types of historical protections for religious exercise (on the Free Exercise Clause side) and communal religious expression and support for religion (on the Establishment Clause side) that are relevant for avoiding the “callous indifference” presented when religious exercise is burdened by neutral laws of general applicability.²²⁴ While that view is not clearly the current status of the Establishment Clause—and rests on a variety of historical and jurisprudential assumptions outside the scope of this Article—it suggests one potential way in which *Smith* may risk becoming further out of step with significant strands within the Supreme Court’s Establishment Clause jurisprudence.

C. *Reforming the Free Exercise Clause Doctrine*

This Article so far has argued that *Smith* is inconsistent with the Supreme Court’s overarching approach to the Religion Clauses, and that this inconsistency provides one reason for revisiting the *Smith* decision. In closing, this Subpart suggests one additional line of thought to address where the Supreme Court should go from here.²²⁵ *Smith*’s inconsistency with related judicial decisions is not only relevant to the question of whether *Smith* should be

Clause); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003) (explaining the original public meaning of the Establishment Clause).

222. *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970).

223. See *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

224. *Id.* at 673 (quoting *Zorach*, 343 U.S. at 314).

225. That is a relevant question today. See Transcript of Oral Argument at 30, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (No. 19-123) (question of Barrett, J.) (“What would you replace *Smith* with? Would you just want to return to *Sherbert v. Verner*?”).

overturned. It is also relevant to the question of what *Smith* should be replaced *with*. To the extent that text, history, and tradition have become increasingly important to the Supreme Court's approach to the Religion Clauses, the doctrine of judicial consistency offers significant justification for replacing the *Smith* doctrine with a basic inquiry into the text, history, and tradition of the Free Exercise Clause. Under this suggested reform, the doctrinal transition would be relatively simple. Rather than asking whether a statute or regulation is "a valid and neutral law of general applicability,"²²⁶ the Supreme Court would instead ask whether a law is consistent with the text, history, and tradition of the Free Exercise Clause.²²⁷ To explain why such a doctrinal shift may be justified, this Subpart briefly outlines a two-step argument that draws from this Article's broader analysis. The purpose is not to determine *Smith's* replacement, but to highlight some relevant considerations that counsel in favor of ensuring that the Religion Clauses doctrine after *Smith* adequately accounts for text, history, and tradition.

1. Judicial Consistency's Relevance to Reform

The first step of the analysis, which has more or less been explained above,²²⁸ is that the doctrine of judicial consistency bears not only on the question of whether to overturn a decision, but what to replace that decision with. This first step seems uncontroversial. The need for judicial consistency, after all, counsels in favor of both culling old doctrinal anomalies, and of ensuring that new doctrinal lines are planted in a neat, orderly, and consistent fashion. Judicial consistency represents an inherent rule-of-law value, reflecting a need for internal coherence that is rooted in one view of the nature of legality itself. It also serves several other important values, such as notice, stability, and fairness in the law. And the doctrine also seems to have relatively strong historical

226. See *Emp. Div. v. Smith*, 494 U.S. 872, 878–79 (1990).

227. See, e.g., *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182–85 (2012); cf. *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008).

228. See *supra* Part I.B.

foundations—a point that seems relevant to the extent that an originalist jurist is contemplating replacing *Smith* with a doctrine that is itself tied to the text, history, and tradition of the Religion Clauses. The principles and values justifying the doctrine of judicial consistency, like the internal logic of the doctrine, seem likely to apply to both the question of whether to overturn an old precedent, and how to do so.

2. One Reform: Accounting for Text, History, and Tradition

The second step of the analysis requires putting the doctrine of judicial consistency into conversation with the tensions between *Smith's* approach to the Free Exercise Clause and the Supreme Court's Religion Clauses jurisprudence. This step of the analysis is complicated by the fact that, over the years, the Supreme Court has adopted a variety of substantive and methodological commitments in the context of the Religion Clauses.²²⁹ Some decisions are originalist; others are not. And some decisions reflect benevolent accommodation and encouragement of religion, while others insist on strict separation and neutrality. Despite this inconsistency, this Article submits that at least one lesson can be drawn from the Supreme Court's decisions so far. Because text, history, and tradition constitute an important aspect of the Supreme Court's approach to the Religion Clauses, the doctrine of judicial consistency suggests that text, history, and tradition should similarly inform the Supreme Court's approach to the Free Exercise Clause. To explain why, the following analysis discusses each half of the Religion Clauses in turn.

Start with the Establishment Clause. Text, history, and tradition have long been important to the Supreme Court's interpretation of the Establishment Clause. In the first decision incorporating the Establishment Clause, the Supreme Court in *Everson v. Board of Education*²³⁰ observed that “[t]he meaning and scope of the First

229. Compare *Lemon v. Kurtzman*, 403 U.S. 602 (1971), with *Hosanna-Tabor*, 565 U.S. at 171.

230. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

Amendment, preventing establishment of religion or prohibiting the free exercise thereof,” had traditionally been interpreted “in the light of its history and the evils it was designed forever to suppress.”²³¹ This traditional approach was carried forward in several decisions that followed, including the Court’s decisions in *McGowan* (upholding Sunday closing laws),²³² *Torcaso* (invalidating state religious test for office),²³³ and *Walz* (upholding state tax exemptions for churches).²³⁴ To be sure, this traditional approach has not always emerged triumphant over the years. The *Lemon* test, for example, is more than a little hard to square with an historical understanding of the Establishment Clause—at least on one historical account of the Establishment Clause.²³⁵ So, too, are many of the *Lemon*-era decisions that invalidated longstanding, historically accepted practices and traditions.²³⁶ But in recent years, the Supreme Court has reaffirmed the traditional focus on text, history, and tradition that characterized many of its early Establishment Clause

231. *Id.* at 14–15; see also *id.* at 33 (Rutledge, J., dissenting) (“No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history.”).

232. *McGowan v. Maryland*, 366 U.S. 420, 437, 439–40 (1961) (upholding Sunday closing laws by relying on both *Everson* and *Reynolds* for the proposition that history should drive the analysis and finding “the place of Sunday Closing Laws in the First Amendment’s history both enlightening and persuasive”).

233. *Torcaso v. Watkins*, 367 U.S. 488, 489–95 (1961) (striking down a state religious test for office under the First Amendment more generally after relying upon “prior cases . . . [that] have thoroughly explored and documented the history behind the First Amendment, the reasons for it, and the scope of the religious freedom it protects” and concluding that this historical tradition prohibited religious tests for office).

234. *Walz v. Tax Comm’n of the City of New York*, 397 U.S. 664, 680 (1970) (upholding tax exemptions for churches by observing that “at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religion Clauses of the First Amendment”); see also *id.* at 675–76 (relying on historical practice and noting Justice Holmes’s aphorism that “a page of history is worth a volume of logic” (quoting *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921))).

235. See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring in the judgment).

236. See *id.* Consider, for example, *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989), or *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

cases. In *Town of Greece*,²³⁷ the Supreme Court—building on *Marsh*'s historical approach to legislative prayer²³⁸—upheld the constitutionality of a public prayer tradition at city council meetings by holding that the “Establishment Clause must be interpreted ‘by reference to historical practices and understandings,’” and so “[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”²³⁹ Similarly, in *Hosanna-Tabor*,²⁴⁰ the Court—in a decision recently built upon by *Our Lady of Guadalupe*—²⁴¹ recognized the “ministerial exception” by turning, in large part, to the “background [against which] the First Amendment was adopted.”²⁴² And in *American Legion*,²⁴³ the Court—building upon the *Van Orden* plurality’s historical approach to passive religious monuments²⁴⁴—upheld a war-cross memorial by affirming that text, history, and tradition were critical factors in understanding the demands of the Establishment Clause.²⁴⁵ And so, while Establishment Clause doctrine has sometimes reflected a wavering commitment to originalism, the dominant trend—particularly in recent years—has been to rely upon text, history, and tradition as important considerations in interpreting the Establishment Clause. So too, the doctrine of judicial consistency counsels, should these considerations inform the other half of the Religion Clauses.

Next, take the Free Exercise Clause. While text, history, and tradition have featured less prominently in the Free Exercise Clause

237. *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

238. See *Marsh v. Chambers*, 463 U.S. 783 (1983).

239. *Town of Greece*, 572 U.S. at 575–77 (citation omitted) (quoting *Cty. of Allegheny*, 492 U.S. at 670).

240. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

241. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

242. *Hosanna-Tabor*, 565 U.S. at 183, 188.

243. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2087–90 (2019).

244. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality opinion) (noting that its “analysis is driven both by the nature of the monument and by our Nation’s history”).

245. See *Am. Legion*, 139 S. Ct. at 2081–82, 2081 n. 16 (plurality opinion); *id.* at 2097 (Thomas, J., concurring in the judgment); *id.* at 2101–02 (Gorsuch, J., concurring in the judgment).

jurisprudence than in that of the Establishment Clause, there are two reasons why relying upon text, history, and tradition cohere with the doctrine of judicial consistency. These reasons relate to both the methodology and substance of existing Free Exercise Clause precedents.

The first reason is methodological. As an initial matter, several of the Supreme Court's early religious exercise cases relied upon text, history, and tradition. In the 1879 decision of *Reynolds*, for example, the Court explained that because "the word 'religion' is not defined in the Constitution. . . . [The Court] must go elsewhere . . . to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted."²⁴⁶ In reaching its conclusion that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order" (a conclusion since repudiated by *Cantwell* and *Yoder*, among other cases), the *Reynolds* Court focused extensively on the historical understanding and evolution of the free exercise of religion—turning to early colonial, state, and federal legislation, and the ratification history of the First Amendment.²⁴⁷ Similarly, while much of the ensuing Free Exercise precedent did not expressly use a similarly originalist approach, several decisions relating to the free exercise of religion found text, history, and tradition to be important considerations. For example, in *Meyer v. Nebraska*,²⁴⁸ the Court recognized that the Due Process Clause protected, among other things, the right "to worship God according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."²⁴⁹ For another example, in the *Torcaso* decision (discussed above), the Supreme Court relied upon the history

246. *Reynolds v. United States*, 98 U.S. 145, 162 (1879). Recall that this decision was a principal precedent upon which *Smith* relied. See *supra* Part II.A.1.

247. See *Reynolds*, 98 U.S. at 162–64.

248. 262 U.S. 390 (1923).

249. *Id.* at 399.

of the Religion Clauses to strike down religious tests,²⁵⁰ while also collecting a variety of cases “in this Court [that] have thoroughly explored and documented the history behind the First Amendment, the reasons for it, and the scope of the religious freedom it protects,” including the Supreme Court’s decisions in *Reynolds* (upholding a polygamy ban against Free Exercise Clause challenge), and *Everson* (upholding public funding for busing to parochial school against Establishment Clause challenge).²⁵¹

And even after *Smith*, the text, history, and tradition of the Free Exercise Clause has begun to reassert its importance. For example, the Supreme Court’s recent decision in *Hosanna-Tabor* relied heavily on text, history, and tradition in reaching its holding (which rested on both the Establishment Clause and the Free Exercise Clause).²⁵² As discussed above, the Court in *Hosanna-Tabor* concluded that the Religion Clauses protected a church’s ministerial selection decisions only after interpreting the Religion Clauses in light of the “background [against which] the First Amendment was adopted.”²⁵³

The second reason for turning to text, history, and tradition is substantive. This substantive rationale, however, is strengthened by making an important assumption about what doctrine emerges from these considerations—specifically, by assuming that the text, history, and tradition of the Free Exercise Clause result in a doctrine that looks more like *Sherbert* and less like *Smith*. That assumption is contentious, with scholars and judges landing on both sides of this originalist debate. Some, like Justice Scalia and Professor Philip Hamburger, argue that the Free Exercise Clause *did not* originally protect religiously motivated conduct from neutral laws of general applicability (a doctrine that looks like *Smith*).²⁵⁴ Others, like Justice

250. *Torcaso v. Watkins*, 367 U.S. 488, 490–92 (1961).

251. *Id.* at 492 & n.7 (citing, among other cases, *Reynolds v. United States*, 98 U.S. 145 (1879), and *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)).

252. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

253. *See id.* at 182–83.

254. *See* Hamburger, *supra* note 2, at 916–17; *Emp. Div. v. Smith*, 494 U.S. 872, 878–79 (1990).

O'Connor and Professor McConnell, argue that the Free Exercise Clause did originally provide such protections—exempting religiously motivated conduct from neutral laws of general applicability absent a sufficient government interest and sufficient tailoring in pursuit of that interest (a doctrine that looks, more or less, like *Sherbert*).²⁵⁵

In any event, to the extent that text, history, and tradition support a *Sherbert*-style heightened scrutiny regime, rather than a *Smith*-style rational basis regime, the substantive reasons for turning to text, history, and tradition on account of the doctrine of judicial consistency are particularly strong. That is so because such a move is supported by the decades of heightened-scrutiny precedent that prevailed before *Smith*, as well as being consistent with the substantive commitments that characterize the *Hosanna-Tabor* doctrine. In other words, under a particular set of assumptions about the doctrinal output of an originalist inquiry here, there is a strong substantive case rooted in the doctrine of judicial consistency for turning to text, history, and tradition in the context of the Free Exercise Clause.

There are, of course, several significant objections to the argument that the doctrine of judicial consistency requires replacing *Smith* with an inquiry into text, history, and tradition—again, assuming that *Smith* and originalism part ways. First, an inquiry into text, history, and tradition may be objectionable on its own terms—perhaps because originalism is legally flawed, normatively undesirable, or too difficult or costly to implement effectively. Second, an inquiry into text, history, and tradition may be objectionable from a comparative standpoint—perhaps because originalism does not govern all of the most relevant areas of constitutional law, or because incorporating originalism at this point would cause too much disruption in existing Free Exercise Clause precedent. Third, even if judicial consistency favors turning away from *Smith* and toward originalism, such consistency remains just one relevant

255. See McConnell, *supra* note 2, at 1427–28; *Smith*, 494 U.S. at 893–901 (O'Connor, J., concurring in the judgment).

consideration—with other considerations, such as legal merit and functional consequences remaining relevant as well. And fourth, even if this Article’s basic analysis is right, it may be objected that more work remains to be done. Perhaps most important is the need to see what the substantive outcome of an inquiry into text, history, and tradition actually looks like—that is, whether it looks more like *Smith* or *Sherbert*. Any effort to replace the *Smith* doctrine with an inquiry into text, history, and tradition will need to respond to these objections. It will require analyzing the historical meaning of the Free Exercise Clause (and the Establishment Clause). It will also require explaining why that historical meaning matters here—explaining why originalism (or at least, greater focus on the historical meaning) makes sense, why it is supported in enough of the surrounding law, and why the relevant considerations (including judicial consistency) favor an originalist approach to the Free Exercise Clause over the approach and outcome in *Smith*. While this Article cannot fully respond to the relevant objections and offer the necessary response here, it can offer this modest conclusion: to the extent that doctrinal consistency matters, the Court’s reliance on text, history, and tradition in the context of the Religion Clauses suggests that any post-*Smith* doctrine should at least account for the text, history, and tradition of the Free Exercise Clause.

* * *

In short, this Subpart has suggested a two-step argument for why the doctrine of judicial consistency provides some support for revisiting *Smith* and replacing it with a basic inquiry into the text, history, and tradition of the Free Exercise Clause. First, the doctrine of judicial consistency—described and explained above—is relevant not only to the question of whether to overturn a decision, but also to what to replace that decision with. And second, because text, history, and tradition reflect an important consideration in the Supreme Court’s contemporary approach to the Religion Clauses generally, the doctrine of judicial consistency provides some support for turning toward text, history, and tradition for purposes of understanding the Free Exercise Clause specifically.

CONCLUSION

This Article has suggested that one stare decisis consideration—a precedent’s consistency with related judicial decisions—counsels against retaining *Smith* to the extent that *Smith*’s holding and rationale are compared to the Supreme Court’s Religion Clauses jurisprudence more generally. To be sure, this Article has not resolved *Smith*’s stare decisis fate. Other stare decisis considerations are relevant (consider, for example, legal soundness, workability, factual assumptions, and reliance interests). And other doctrinal lines beyond the Religion Clauses merit comparisons to *Smith* as well (consider, for example, the Fourteenth Amendment). But if this Article is right, it suggests a simple takeaway. *Smith*’s approach to the Free Exercise Clause is in tension with many aspects of the Supreme Court’s broader approach to the Religion Clauses. Those tensions matter both because they favor revisiting *Smith* and because they suggest how Free Exercise Clause doctrine should be reformed moving forward.

WHO DETERMINES MAJORNNESS?

CHAD SQUITIERI*

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INTRODUCTION

Do federal courts have the constitutional authority to definitively determine questions of politics? The answer would appear obvious: No. Separation-of-powers principles mandate that the judiciary play no direct role in the political process. Instead, federal courts are limited to faithfully applying the outcome of the political process (*i.e.*, law) to particular sets of facts.¹ Peculiar then is the major questions doctrine, which calls on courts to determine policy questions’ “economic and political significance.”²

The major questions doctrine is said to do one thing but in practice does another. What is more, at least two sitting Supreme Court Justices have proposed strengthening the major questions doctrine so that it does something else entirely.³ Both of those Justices are

1. See U.S. CONST. art. III, § 2 (describing the “judicial Power” as extending to “Cases” and “Controversies”); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 115–16 (1962) (“One of the chief faculties of the judiciary, which is lacking in the legislature and which fits the courts for the function of evolving and applying constitutional principles, is that the judgment of courts can come later, after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society; the judgment of courts may be had in concrete cases that exemplify the actual consequences of legislative or executive actions.”); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 438 (2005) [hereinafter *Textualism and Legislative Intent*] (“Textualists focus on the end product of the legislative process”); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 276 (2005) (referring to judicial restraint as “reinforc[ing] the basic theory on which our political system is grounded”).

2. *King v. Burwell*, 576 U.S. 473, 486 (2015) (referring to “a question of deep ‘economic and political significance’” (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (*UARG*))); see *UARG*, 573 U.S. at 324 (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160)); *Brown & Williamson*, 529 U.S. at 133 (“[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”); *MCI Telecomms. Corp. v. Am. Tel. & Telegram Co.*, 512 U.S. 218, 231 (1994) (“It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to ‘modify’ rate-filing requirements.”).

3. See *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the

committed textualists.⁴ The present moment thus calls for a thorough explanation as to why textualists should reject the major questions doctrine—including what the doctrine is said to be, what the doctrine actually does in practice, and what the doctrine might soon become.

The major questions doctrine is *said* to assist courts in identifying whether Congress has delegated authority. As the Supreme Court put it, “We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”⁵ Baked into that understanding of the major questions doctrine is an implicit presumption that has gone unexamined in present scholarship—namely, that it is *Congress* who decides what is major. How else could Congress fairly be “expect[ed]” to more clearly delegate major authority than non-major authority if Congress does not itself determine what is major?

If the major questions doctrine truly implies a need for courts to elucidate and respect congressional determinations of majorness, textualists should reject the doctrine. That is because textualists understand the 535-member Congress as having no single conception as to what is politically major. Different legislators (and the President exercising the veto power) have different understandings as to which policy questions are major. Thus, from the textualist’s perspective, tasking courts with elucidating a single majorness determination shared by all of Congress is to task courts with conducting an ordinarily futile task.

Even if elucidating a congressional determination of majorness were in some instances theoretically possible, textualists should be suspect of the current doctrine’s reliance on the judge-made

denial of certiorari). The proposal to strengthen the major questions doctrine is discussed in Part I.C.

4. See, e.g., Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 908–09 (2016) (“Respectfully, it seems to me an assiduous focus on text, structure, and history is essential to the proper exercise of the judicial function.”); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (“If the text is sufficiently clear, the text usually controls”).

5. *UARG*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 160).

“presumption” that Congress “intends to make major policy decisions itself, not leave those decisions to agencies.”⁶ That judge-made presumption is in tension with the enacted text of the Congressional Review Act (CRA).⁷ That Act presumes that federal agencies will answer major questions through major rules, and that those rules are to be given legal effect unless Congress expressly says otherwise.⁸

Textualism is also incompatible with what the major questions doctrine does in practice. As an analysis of the relevant major questions doctrine cases will reveal, courts are entirely unconcerned with elucidating congressional determinations of majorness. Courts are instead interested in determining majorness themselves. So although the major questions doctrine is said to speak to *whether Congress has* delegated authority, in practice, the major questions doctrine is invoked to *tell Congress how* it may delegate authority.

The difference between those two perceptions of the current major questions doctrine is subtle because the end result is the same: Congress makes its major delegations explicit. But there is a non-trivial distinction between a judicial attempt to elucidate and respect a congressional determination of majorness (a task textualists should reject as ordinarily futile and statutorily suspect), and a judicial mandate to use particularly clear legislative language when discussing those policy questions that a court declares to be major. The latter amounts to courts improperly inserting themselves into the Article I, Section 7 lawmaking process. Because Article I, Section 7 establishes the exclusive lawmaking procedures within which courts are to play no role, textualists should reject the major questions doctrine for what it allows in practice.⁹

Textualists should also reject what the major questions doctrine might soon become. In its current form, the major questions

6. U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (describing a presumption upon which the major questions doctrine is grounded).

7. See 5 U.S.C §§ 801–808 (2018).

8. See *infra* Part II.B.3.

9. See U.S. CONST. art. I, § 7.

doctrine is already a product of the Supreme Court's historical reluctance to enforce the nondelegation doctrine, which itself prohibits Congress from delegating its legislative powers.¹⁰ But although the current major questions doctrine might be motivated by underenforced nondelegation principles, the current major questions doctrine stops short of prohibiting Congress from delegating any authority. Instead, as long as Congress clearly delegates the authority to decide major questions, the current major questions doctrine is satisfied. In two recent opinions, however, Justice Gorsuch (writing for three)¹¹ and Justice Kavanaugh (writing alone)¹² have proposed strengthening the major questions doctrine so that it could be used to *prohibit* Congress from delegating major authority. To wit, a strengthened major questions doctrine would prohibit Congress from delegating the "authority to decide major policy questions," while leaving Congress free to delegate "the authority to decide less-major or fill-up-the-details decisions."¹³

For those eager to breathe new life into the nondelegation doctrine, strengthening the major questions doctrine may seem like a step in the right direction. After all, preventing "major" delegations may seem better than not preventing any delegations. On the other side of the same coin, those who fear that a fully reinvigorated

10. See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 781 & n.9 (2017) ("[T]he M[ajor questions exception] indirectly polices the limits of the nondelegation doctrine."); Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 21–22 (2010) ("Taking the elephants-in-mouseholes doctrine seriously as a doctrine, this Article proposes that the decisions are . . . driven . . . by long-standing tenets of administrative law, particularly concerns over excessive delegation to the Executive Branch. We argue, then, that what really lies in the mousehole is neither an elephant nor a mouse—but the ghost of the nondelegation doctrine."); *Thomas v. Reeves*, 961 F.3d 800, 825 (5th Cir. 2020) (Willett, J., concurring in the judgment) (noting that the major questions doctrine was "born of nondelegation concerns").

11. See *Gundy v. United States*, 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting). Justice Gorsuch was joined in his dissent by Chief Justice Roberts and Justice Thomas. *Id.* at 2131. Justice Alito additionally signaled his willingness to "revisit" the nondelegation doctrine in a different case. *Id.* (Alito, J., concurring in the judgment).

12. See *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

13. *Id.* (interpreting Justice Gorsuch's *Gundy* dissent).

nondelegation doctrine would spell disaster for the modern administrative state may see an extended major questions doctrine as a more palatable half-measure. But despite the doctrine's potential to serve as a *modus vivendi*, textualists should reject a strengthened major questions doctrine. This means that, for textualist jurists interested in reviving the nondelegation doctrine, strengthening the major questions doctrine is the wrong way forward. Failing to acknowledge as much risks tying a revived nondelegation doctrine to a majorness inquiry that, at bottom, asks courts to exercise the same type of political discretion that has doomed the current nondelegation doctrine to decades of underutilization.¹⁴

After providing a brief overview of the relevant doctrines in Part I, Part II explains why textualists should reject the major questions doctrine—both in its present and strengthened forms. Explaining as much requires answering a threshold question that courts and scholars have yet to address: Who determines majorness? As noted above, there are two possible answers, either Congress or the courts. Neither answer is acceptable from the textualist's perspective.

After explaining why textualists should reject the major questions doctrine, Part III highlights two pre-decisional contexts in which courts may consider policy questions' "importance" in an effort to advance nondelegation principles. First, in considering petitions for writs of certiorari, the Supreme Court may consider whether a case presents an "important" federal question.¹⁵ Second, federal courts of appeals may consider a case's "importance" when considering whether the case warrants en banc review.¹⁶ From the textualist's perspective, these two "importance" inquiries are less objectionable than the major questions doctrine because Congress has granted federal courts the statutory authority to consider "importance" in pre-decisional contexts, but not "majorness" when deciding cases on the merits.¹⁷ Thus, those textualist jurists who wish

14. See *infra* Part I.A.

15. SUP. CT. R. 10(c).

16. FED. R. APP. P. 35(a)(2).

17. *Infra* Part III.

to limit a revived nondelegation doctrine to major questions may prefer to do so in part by applying the revived doctrine to those cases identified as presenting important nondelegation questions.

I. DOCTRINAL OVERVIEW

The nondelegation doctrine considers what authority Congress *can* delegate. Currently, the major questions doctrine is said to speak to *whether* Congress has delegated authority—although in practice the doctrine is used to tell Congress *how* it can delegate authority. Part I provides a brief overview of the current state of both the nondelegation and major questions doctrines, as well as the recent proposal to strengthen the latter doctrine into a revived form of the first.

A. *The Nondelegation Doctrine*

Derived from the Constitution's vesting of "all legislative Powers" in Congress, the nondelegation doctrine prohibits Congress from delegating its legislative powers to other entities, such as administrative agencies.¹⁸ Today the doctrine permits Congress to delegate decision-making discretion to agencies so long as the agency's discretion is cabined by an "intelligible principle" set by Congress.¹⁹ The "intelligible principle" test is not difficult to satisfy, making the modern nondelegation doctrine something of a dead letter. As Professor Cass Sunstein put it, the nondelegation doctrine "has had one good year," and over two hundred "bad ones."²⁰

In the good year, 1935, the Supreme Court considered a provision in the National Industrial Recovery Act (NIRA) that purported to prohibit the transportation of oil produced in excess of quotas set

18. U.S. CONST. art. I, § 1; *see also* BICKEL, *supra* note 1, at 223 ("In the . . . delegation cases . . . the Court finds that the legislature, if it did anything, did too much all at once; and that is deemed too little.").

19. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 414 (2015) (citing *J.W. Hampton, Jr. & Co. v United States*, 276 U.S. 394, 409 (1928)).

20. Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

by “order of the President.”²¹ Pursuant to that authority, the President approved a “Code of Fair Competition for the Petroleum Industry.”²² Oil industry plaintiffs sued to prevent the enforcement of the code, arguing that the Recovery Act constituted “an unconstitutional delegation to the President of legislative power.”²³

In considering the challenge, the Court observed that Congress had not “establishe[d]” any “criterion to govern the President’s course,” nor had Congress “declare[d]” any “policy as to the transportation of the excess production.”²⁴ Instead, Congress had provided “the President an unlimited authority to determine the policy” himself, thereby “commit[ting] to the President the functions of a legislature rather than those of an executive or administrative officer.”²⁵ The NIRA’s purported delegation of authority was therefore unconstitutional.²⁶

A few months later the Court considered another NIRA provision, pursuant to which the President had approved a “Live Poultry Code.”²⁷ The defendants in that case were indicted for reasons relating to a variety of the code’s provisions, including the selling of “an unfit chicken.”²⁸ In considering whether Congress could delegate the authority to promulgate the code, the Court again “look[ed] to the statute to see” if Congress had “itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.”²⁹ Because the NIRA offered few guiding principles to limit the President’s discretion, the Court invalidated the code as resulting from an unconstitutional

21. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 406 (1935) (quoting National Industrial Recovery Act § 9(c), 48 Stat. 195, 200 (1933)).

22. *Id.* at 408–09.

23. *Id.* at 411.

24. *Id.* at 415.

25. *Id.* at 415, 418–19.

26. *See id.* at 433.

27. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521, 523 (1935) (citing National Industrial Recovery Act. § 3, 48 Stat. 195, 196–97 (1933)).

28. *Id.* at 528.

29. *Id.* at 530.

“delegation of legislative power.”³⁰

The canonical story of the nondelegation is said to end there, after which the Supreme Court is said to have turned its back on the doctrine and paved the way for the rise of the modern administrative state.³¹ The Court’s historical reluctance to invoke the nondelegation doctrine is often attributed to the difficulty in developing a judicially manageable standard,³² something that at least one notable textualist has written about in detail. As Justice Scalia explained, “while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.”³³ That conclusion aligned with his earlier writings, where he had noted that, without a “workable test” for courts to apply, the nondelegation doctrine “is no doctrine at all, but merely an invitation to judicial policy making in the guise of constitutional law.”³⁴ Any effort to “successful[ly] reform . . . the nondelegation doctrine”³⁵ therefore requires addressing the concern that “the line drawing” required by the nondelegation doctrine “is not a legal analysis at all, but is instead political (because it is discretionary) at its core.”³⁶

30. *Id.* at 537, 551.

31. See Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 380–81 & n.6 (2017) (describing the familiar “narrative”).

32. See Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 821 n.170 (2009) (“The Article I nondelegation doctrine serves largely as a ‘theoretical’ prohibition because, as many commentators have observed, courts have not found a judicially manageable standard for enforcing it.” (citation omitted)).

33. *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting); see also Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 354 (2002) (“[Justice Scalia] made clear [in *Mistretta*] that he regards the degree of discretion to be vested in administrators as essentially a political question that cannot (at least in the normal run of cases) be evaluated by courts.”).

34. Antonin Scalia, *A Note on the Benzene Case*, 4 REG. 25, 28 (1980).

35. Adam White, *Nondelegation’s Gerrymander Problem*, YALE J. REG. (Dec. 16, 2019), <https://www.yalejreg.com/nc/nondelegations-gerrymander-problem> [<https://perma.cc/78MH-QLPH>].

36. William K. Kelley, *Justice Scalia, The Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107, 2118 (2017); Lawson, *supra* note 33, at 354.

Despite the nondelegation doctrine's "somewhat moribund"³⁷ state, at least five sitting Supreme Court Justices have expressed interest in developing a workable doctrine. In *Gundy v. United States*,³⁸ Justice Gorsuch suggested in a dissenting opinion—joined by Chief Justice Roberts and Justice Thomas—that the "intelligible principle" test was constitutionally suspect.³⁹ The three Justices expressed a desire to "revisit" how much legislative authority Congress can "hand[] off" to the executive branch.⁴⁰ In a brief concurrence, Justice Alito noted that he too would "support th[e] effort" to "reconsider[]" the intelligible principle doctrine in a different case.⁴¹ Several months later, a newly seated Justice Kavanaugh had the opportunity to explain that his colleagues' desire to revisit the nondelegation doctrine "raised important points that may warrant further consideration in future cases."⁴² One of those "important points" was the major questions doctrine.⁴³

B. *The Major Questions Doctrine*

The major questions doctrine is said to be a statutory canon assisting courts in determining whether Congress has delegated to agencies the authority to decide major questions.⁴⁴ As Part II.C.1 will explain, that understanding of the major questions doctrine does not precisely track how the major questions doctrine works in practice. But for purposes of the brief doctrinal overview offered here, the major questions doctrine is accepted at face value.

37. Transcript of Oral Argument at 56, *Sebelius v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (No. 13–354), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2013/13-354_3ebh.pdf [<http://perma.cc/J7XT-J43D>].

38. 139 S. Ct. 2116 (2019).

39. *Id.* at 2139 (Gorsuch, J., dissenting) ("This mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked.").

40. *Id.* at 2131.

41. *Id.* (Alito, J., concurring).

42. *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring in denial of certiorari).

43. *Id.*

44. See Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 (2016).

The major questions doctrine defines major questions as those having major “economic and political significance.”⁴⁵ The specifics of the major questions doctrine are underdeveloped and frequently evolving. Depending on one’s court, the doctrine has been deployed in at least three stages of analysis, all of which concern *Chevron*⁴⁶ deference.⁴⁷

Where *Chevron* applies, a court must not “impose its own construction” of a statute if the “statute is silent or ambiguous with respect to” the legal issue at hand.⁴⁸ Instead, the court is limited to determining “whether the agency’s answer is based on a permissible construction of the statute.”⁴⁹ The *Chevron* test is often described as having three steps: at Step Zero, courts consider whether *Chevron*’s analysis should apply at all;⁵⁰ at Step One, courts consider whether a statute is “ambiguous”; at Step Two, courts consider whether the agency’s interpretation of that ambiguous statute is “reasonable.”⁵¹

The Supreme Court first invoked the major questions doctrine in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*⁵² At issue in *MCI* was the Communications Act of 1934, which provided the Federal Communications Commission (FCC) with authority to “modify” certain rate-filing requirements.⁵³ Purporting to

45. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *see also* *King v. Burwell*, 576 U.S. 473, 486 (2015) (referring to “a question of deep ‘economic and political significance’” (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (*UARG*))); *UARG*, 573 U.S. at 324 (referring to “decisions of vast economic and political significance”).

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

47. *See* Kent Barnett & Christopher J. Walker, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 149 (2017); Loshin & Nielson, *supra* note 10, at 26.

48. *Chevron*, 467 U.S. at 843.

49. *Id.*

50. *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190–91 (2006) [hereinafter *Chevron Step Zero*]; Barnett & Walker, *supra* note 47, at 150.

51. *Chevron Step Zero*, *supra* note 50, at 190 (describing the two-step inquiry as “famously” understood).

52. 512 U.S. 218 (1994).

53. *Id.* at 224 (quoting Communications Act of 1934, 47 U.S.C. § 203(b)(2) (1988 ed. and Supp. IV)).

exercise its power to *modify* those requirements, the FCC had issued a rule *exempting* certain telephone companies from having to comply with the rate-filing requirements.⁵⁴ But because the rate-filing requirements were of “enormous importance” to the overall “statutory scheme,”⁵⁵ the Court concluded that the FCC had overstepped its congressionally delegated authority.⁵⁶ It would have been “highly unlikely,” the Court explained, for “Congress [to] leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.”⁵⁷

The Court next invoked the major questions doctrine in *FDA v. Brown & Williamson Tobacco Corp.*⁵⁸ In *Brown & Williamson*, the Food and Drug Administration (FDA) sought to regulate tobacco under statutory references to “drugs” and “devices.”⁵⁹ According to the Court, however, regulating tobacco was a matter of major “economic and political significance.”⁶⁰ Thus, “[a]s in *MCI*,” the Court was “confident” that Congress had not “intended to delegate” such a “significan[t]” decision “to an agency in so cryptic a fashion.”⁶¹ This was particularly true in light of several statutes that Congress had enacted after granting the FDA the authority to regulate drugs and devices.⁶² Those later-enacted statutes created a complex statutory scheme suggesting that Congress had not intended to grant the FDA the authority to regulate tobacco.⁶³ If Congress wished to delegate the authority to regulate something as major as tobacco, the then-burgeoning major questions doctrine expected Congress to have made that delegation explicit.

A third example of the major questions doctrine was displayed in

54. *See id.* at 220–22.

55. *Id.* at 231.

56. *Id.* at 231–32.

57. *Id.* at 231.

58. 529 U.S. 120 (2000).

59. *Id.* at 126 (quoting 21 U.S.C. §§ 321(g)–(h), 393 (1994 ed. and Supp. III)).

60. *Id.* at 160.

61. *Id.*

62. *See id.* at 144.

63. *See id.*

Utility Air Regulatory Group v. EPA (UARG).⁶⁴ Unlike both *MCI* and *Brown & Williamson*, where the Court invoked the major questions doctrine at *Chevron* Step One,⁶⁵ the *UARG* Court invoked the doctrine at *Chevron* Step Two.⁶⁶ After rejecting the Environmental Protection Agency's (EPA's) assertion that the relevant statute was unambiguous,⁶⁷ the Court explained that the EPA's proposed interpretation was "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."⁶⁸ "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" the Court explained, "we typically greet its announcement with a measure of skepticism."⁶⁹ Indeed, the Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"⁷⁰

The major questions doctrine has also been invoked at *Chevron* Step Zero. There the major questions doctrine acts as a sort of exception to *Chevron*.⁷¹ In *King v. Burwell*⁷² the Court considered whether the Affordable Care Act authorized tax benefits for insurance purchased on federal exchanges.⁷³ Despite language in the statute suggesting that the tax benefits applied only to insurance purchased on state exchanges, the Internal Revenue Service (IRS) interpreted the statute to apply the tax benefits to insurance purchased on federal exchanges and state exchanges alike.⁷⁴ The *King* Court explained that it was tasked with deciding an "'extraordinary case[],'" since "[t]he tax credits are among the [Affordable

64. 573 U.S. 302 (2014).

65. See Barnett & Walker, *supra* note 47, at 150 n.11.

66. See Coenen & Davis, *supra* note 10, at 790.

67. See *UARG*, 573 U.S. at 312.

68. *Id.* at 324.

69. *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159).

70. *Id.* (quoting *Brown & Williamson*, 529 U.S. at 160).

71. See *Chevron Step Zero*, *supra* note 50, at 189 (referring to *Chevron* as "a kind of counter-*Marbury* for the administrative state").

72. 135 S. Ct. 2480 (2015).

73. See *id.* at 2485.

74. See *id.* at 2487.

Care] Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people."⁷⁵ Determining "[w]hether those credits are available on Federal Exchanges" required answering "a question of deep 'economic and political significance.'"⁷⁶ "[H]ad Congress wished to assign that question to an agency," the Court explained, Congress "surely would have done so expressly."⁷⁷

Having determined the question to be major, the *King* Court concluded that it could not defer to the IRS's statutory interpretation.⁷⁸ Instead, the Court went on to independently "determine the correct reading" of the statutory provision.⁷⁹ The correct reading, according to the Court, was that the tax benefits were applicable to state and federal exchanges.⁸⁰

Lower courts have engaged with the major questions doctrine as well.⁸¹ Perhaps most notable is *United States Telecom Ass'n v. FCC*, where then-Judge Kavanaugh dissented from the D.C. Circuit's denial of rehearing en banc.⁸² Referring to the "major rule" doctrine, then-Judge Kavanaugh understood the doctrine as requiring courts to look for "clear congressional authorization for an agency's major rule."⁸³ That requirement was grounded in two presumptions: first,

75. *Id.* at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at 159).

76. *Id.* at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

77. *Id.* (citations omitted).

78. *See id.* at 2489.

79. *Id.*

80. *See id.* at 2489, 2496. Justice Scalia dissented on textualist grounds, taking issue with the majority's "absurd" holding "that when the . . . Affordable Care Act says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.'" *Id.* at 2496 (Scalia, J., dissenting). To be sure, the majority resisted the argument that its holding was inconsistent with the statutory text. According to the majority, the statute could "fairly be read" to apply to both state and federal exchanges. *Id.* (majority opinion). Justice Scalia, joined by Justices Thomas and Alito, remained unconvinced. *See, e.g., id.* at 2500 (Scalia, J., dissenting) ("This Court 'does not revise legislation . . . just because the text as written creates an apparent anomaly.'" (alteration in original) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014))).

81. *See, e.g.,* Coenen & Davis, *supra* note 10, at 796–99 (2017) (listing lower court cases).

82. *See U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

83. *Id.* at 435.

“a separation-of-powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch,” and second, “a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies.”⁸⁴

Applying the major questions doctrine to the FCC’s net neutrality rule then at issue, then-Judge Kavanaugh outlined two questions: “(1) Is the net neutrality rule a major rule? (2) If so, has Congress clearly authorized the FCC to issue the net neutrality rule?”⁸⁵ As to the first question, then-Judge Kavanaugh acknowledged that the Supreme Court had “not articulated a bright-line test that distinguishes major rules from ordinary rules,” but explained that “the Court’s cases indicate that a number of factors are relevant.”⁸⁶ Those factors included “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue.”⁸⁷ Acknowledging that the majorness inquiry had “a bit of a ‘know it when you see it’ quality,” then-Judge Kavanaugh concluded that the net neutrality rule qualified as major “under any conceivable test.”⁸⁸ Because the net neutrality rule was a major rule that “Congress ha[d] not clearly authorized the FCC to issue,” then-Judge Kavanaugh would have held the rule unlawful.⁸⁹

C. *Strengthening the Major Questions Doctrine*

Although the major questions doctrine may be motivated by a desire to scratch the nondelegation itch, the doctrine does not currently prohibit Congress from delegating major authority so long as Congress does so explicitly. Justices Gorsuch and Kavanaugh, however, seem prepared to take things a step further.

84. *Id.* at 419.

85. *Id.* at 422.

86. *Id.*

87. *Id.* at 422–23.

88. *Id.* at 423.

89. *Id.* at 418.

Acknowledging in *Gundy v. United States*⁹⁰ that the nondelegation doctrine has been underenforced, Justice Gorsuch explained that “[w]hen one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines.”⁹¹ Given that hydraulic pressure, the Court “still regularly rein[s] in Congress’s efforts to delegate legislative power” with the help of alternative tools.⁹² One alternative tool is the major questions doctrine, which Justice Gorsuch described as having been deployed “in service of the constitutional rule that Congress *may not* divest itself of its legislative power.”⁹³

Justice Gorsuch referred to the major questions doctrine as “nominally” being a statutory canon.⁹⁴ This description is perhaps a hint that the current doctrine is better understood as empowering courts to *tell Congress how* it may delegate major authority, rather than a passive statutory canon informing courts as to *whether Congress has* delegated such authority. Regardless of what Justice Gorsuch meant to suggest, his *Gundy* dissent could be read as stopping short of proposing that the major questions doctrine be strengthened to *prohibit* Congress from delegating the authority to decide major questions. Justice Kavanaugh, however, did not read Justice Gorsuch’s dissent as being so limited. He instead read Justice Gorsuch’s conception of the major questions doctrine as “*not allow[ing] . . . congressional delegations to agencies of authority to decide major policy questions . . . even if Congress expressly and specifically delegates that authority.*”⁹⁵

Justice Gorsuch and Justice Kavanaugh’s opinions should not be treated as idiosyncratic statements. Jurists have long alluded to a distinction between “major” and “non-major” questions—even if

90. 139 S. Ct. 2116 (2019).

91. *Id.* at 2141 (Gorsuch, J., dissenting).

92. *Id.*

93. *Id.* at 2142 (emphasis added).

94. *Id.*

95. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (emphasis added).

not in those precise terms, and even if the line between those two categories has not been clearly demarcated. Chief Justice Marshall, for example, once distinguished “those *important* subjects, which must be entirely regulated by the legislature itself, from those of *less interest*, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”⁹⁶ For his part, Justice Kavanaugh paid particular attention to the views expressed “by then-Justice Rehnquist some 40 years ago” in the *Benzene* case.⁹⁷ In the *Benzene* case, then-Justice Rehnquist understood Congress to have “improperly delegated” to the Secretary of Labor “one of the most difficult issues that could confront a decisionmaker: whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths.”⁹⁸ Such “important choices of social policy” had to be “made by Congress, the branch of our Government most responsive to the popular will.”⁹⁹ It followed, according to then-Justice Rehnquist, that Congress *could not* delegate the authority to decide such major questions.¹⁰⁰ Further historical support comes from Justice Thomas, who expressed his view that “the *significance* of [a] delegated decision” may in some instances be “too great for the decision to be called anything other than ‘legislative.’”¹⁰¹

To date, courts have not substantially expanded on these historical references. It therefore remains unclear how an important or significant question is identified, and whether those inquiries call for the same exercise of political considerations necessitated by the

96. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825) (emphasis added).

97. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., statement respecting the denial of certiorari) (citing *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685–686 (1980) (*Benzene*) (Rehnquist, J., concurring in the judgment)). Jacob Loshin and Aaron Nielson similarly traced the major questions doctrine to “an attempt to ‘doctrinalize’ the *Benzene* approach into a workable test.” Loshin & Nielson, *supra* note 10, at 22.

98. *Benzene*, 448 U.S. at 672 (Rehnquist, J., concurring).

99. *Id.* at 685–86.

100. *See id.* at 672.

101. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (emphasis added).

major questions doctrine. Justice Gorsuch and Justice Kavanaugh's recent efforts to build upon these historical references therefore require serious thought, which this Article will now attempt to provide.

II. THE TEXTUALIST CRITIQUE

The major questions doctrine is underdeveloped in both scholarship and case law. Indeed, one important threshold question has yet to be answered: Who determines majorness? One answer to this question—the answer implied by current doctrine—is that majorness is determined by Congress. If that answer were correct, a court's task would be to elucidate congressional determinations of majorness. Textualists should reject that task as being ordinarily futile and based on a statutorily suspect presumption.

A second answer to the threshold question is that majorness is determined by the judiciary, and a court's task is to exercise its own political discretion to determine which policy questions are major. A review of the relevant precedent reveals that, as a descriptive matter, this answer best explains how the current major questions doctrine works in practice. This answer also underlies the strengthened form of the major questions doctrine proposed by Justices Gorsuch and Kavanaugh. Under that strengthened form of the doctrine, Congress would not only be prohibited from implicitly delegating authority thought by the courts to be major, but would be entirely prohibited from delegating such authority—even if Congress disagrees as to the court's political determination. Textualists should reject this understanding of the major questions doctrine because it improperly inserts courts into the Article I, Section 7 law-making process.¹⁰²

102. Theoretically there is a third answer to the threshold question: the executive branch could determine majorness. This Article does not thoroughly examine that possibility because, if majorness were definitively determined by the executive branch, there would be little need for a major questions doctrine to begin with. Consider those situations where the executive branch (through either the Office of Information and Regulatory Affairs, *see infra* Part II.B.3, or the agency issuing the challenged rule)

A. *Textualism Defined*

By “textualist,” this Article refers to those who understand courts to be faithful agents of “the people,” as that term is used in the Constitution.¹⁰³ The people can express their will—within constitutional limits—in statutes enacted through the Article I, Section 7 lawmaking process. To interpret the people’s will as expressed in such

determined a rule to be major, and a litigant brought suit to challenge that majoriness determination. In those situations, courts would either quickly rule in favor of the plaintiff (where the court concludes that Congress did not, or could not, delegate major authority), or quickly rule in favor of the agency (where the court concludes that Congress did, and could, delegate major authority). In those other situations where the executive branch determined the rule to be non-major, courts would simply dismiss the case in the agency’s favor. And to the extent that courts would merely consider the executive branch’s majoriness determination to be persuasive (but not dispositive) evidence, the majoriness inquiry is better understood as calling on courts to determine majoriness for themselves. *See generally infra* Part II.C (examining judicial considerations of majoriness).

103. U.S. CONST. pmb. (“We the people of the United States . . .”). Many textualists refer to themselves as faithful agents of Congress, referencing that legislative body as a shorthand for the people who vested it with authority. *See* Amy C. Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2208–11 (2017) (referring to competing textualist theories of faithful agency). Other textualists, such as Justice Scalia, have more clearly stated that “courts are assuredly not agents of the legislature” but instead “are agents of the people.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 138 (2012). Following Justice Scalia’s lead, this Article opts to more clearly refer to textualists as being faithful agents of the people. Although the difference in terminology may be little more than semantic for the purposes of this Article, there are two reasons for more clearly referring to the people. First, the judiciary and the Congress are coequal branches; neither is an agent or principal of the other. Second, referring to Congress alone gives short shrift to the President, whom the people have also empowered to participate in the federal lawmaking process by exercising the veto power, U.S. CONST. art. I, § 7, cl. 2, and by “recommend[ing] to [Congress] . . . such measures as [the President] shall judge necessary and expedient.” U.S. CONST. art. II, § 3. Justice Story understood the latter as enabling the President “to point out the evil, and . . . suggest the remedy.” 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1555, at 413 (1833); *see also* Kathryn Marie Dessayer, Note, *The First Word: The President’s Place in “Legislative History”*, 89 MICH. L. REV. 399, 404–05 (1990) (“James Madison’s notes from the Constitutional Convention reveal that the Framers specifically designed the recommendation clause to place an affirmative obligation on the President. . . . Presidents have faithfully presented messages since President Washington’s first term.”).

statutes, textualists look to the statutes' objectified intent.¹⁰⁴ Objectified intent means the intent that an objective reader would take a text to have at the time the text was enacted.¹⁰⁵ The inquiry is limited to objectified intent because textualists understand the legislative process to be complicated and chock-full of political bargains that cannot (and need not) be fully understood by individual legislators, let alone politically insulated jurists.¹⁰⁶ What matters is that the collective legislature voted for a law with a particular text, and that text had a particular public meaning when it was enacted.

Textualists do not suggest that objectified intent is always

104. See SCALIA & GARNER, *supra* note 103, at 20 (“[T]he textualist routinely takes purpose into account, but in its concrete manifestations as deduced from close reading of the text.”); see also *Textualism and Legislative Intent*, *supra* note 1, at 430 (Textualists “believe that in our system of government, federal judges have a duty to ascertain and implement as accurately as possible the instructions set down by Congress (within constitutional bounds).”); Cory R. Liu, *Textualism and the Presumption of Reasonable Drafting*, 38 HARV J. L. & PUB. POL’Y 711, 726 (“Textualists therefore refuse to go beyond the legislature’s textually-recorded intent, a concept Justice Scalia has called ‘objectified intent.’”).

105. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997) (“We look for a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 61 (1988). (“Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem”); Barrett, *supra* note 103, at 2201–02 (explaining objectified intent as described by Justice Scalia and Judge Easterbrook).

106. See *Textualism and Legislative Intent*, *supra* note 1, at 430–31 (“[T]extualists . . . think it impossible to tell how the [legislative] body as a whole actually intended (or, more accurately, would have intended) to resolve a policy question not clearly or satisfactorily settled by the text. . . . [L]egislative policies are reduced to law only through a cumbersome and highly intricate lawmaking process.”); Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010) [hereinafter *Substantive Canons*] (“The defining tenet of textualism is the belief that it is impossible to know whether Congress would have drafted the statute differently if it had anticipated the situation before the court. The legislative process is path-dependent and riddled with compromise.”); Amy C. Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61, 71 (2017) (book review) [hereinafter *Countering*] (“Modern textualists in particular have emphasized the ways in which the battle between competing interests shapes legislation.”).

obvious on the face of a law.¹⁰⁷ To the contrary, an objective reader utilizes familiar judicial tools to decipher objectified intent—legal precedent and treatises, for example, can provide the necessary context to understand a law’s meaning.¹⁰⁸ Even after resorting to such tools, textualists can sometimes disagree as to what a statute’s objectified intent holds. Justice Gorsuch and Justice Kavanaugh’s dueling textualist opinions in *Bostock v. Clayton County*¹⁰⁹ provide one notable example. Both Justices offered textualist interpretations of statutory language prohibiting an employer from discriminating “because of . . . sex.”¹¹⁰ Justice Gorsuch concluded that the statutory language prohibited discrimination based on homosexual or transgender status,¹¹¹ while Justice Kavanaugh came to the opposite

107. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 696 (1997) [hereinafter *Textualism as a Nondelegation Doctrine*] (“Not even the most committed textualist would claim that statutory texts are inherently ‘plain on their face,’ or that all interpretation takes place within the four corners of the Statutes at Large.”).

108. See SCALIA & GARNER, *supra* note 103, at 33 (referring to “a reasonable reader, fully competent in the language,” and explaining that “[t]he endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research”); *Textualism as a Nondelegation Doctrine*, *supra* note 107, at 695; Michael Francus, *Digital Realty, Legislative History, and Textualism After Scalia*, 46 PEPP. L. REV. 511, 518–19 (2019) (referring to “today’s textualism, known for its insistence on the primacy of text; use of dictionaries and canons; and rejection of legislative history”); cf. John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1339–42, (1998) [hereinafter *Role of The Federalist*] (arguing that modern textualists should “approach *The Federalist* the same way a reasonable ratifier would have,” by looking to *The Federalist* as persuasive, not authoritative, evidence of the Constitution’s meaning).

109. 140 S. Ct. 1731 (2020).

110. *Id.* at 1738 (quoting 42 U.S.C. § 2000e-2(a)(1) (2018)). In a separate dissent, Justice Alito similarly interpreted the relevant statutory language on textualist grounds. See *id.* at 1755–56, 1766–67 (Alito, J., dissenting); Jonathan Skrmetti, *Symposium: The triumph of textualism: “Only the written word is the law”*, SCOTUSBLOG (June 15, 2020, 9:04 PM), <https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/> [<https://perma.cc/ET8S-58T3>] (“In sum, the three *Bostock* opinions are a master class in defining and applying textualism.”).

111. See *Bostock*, 140 S. Ct. at 1753 (referring to “today’s holding” as being “that employers are prohibited from firing employees on the basis of homosexuality or transgender status”).

conclusion.¹¹²

Despite the potential for disagreement on some issues, textualists generally agree on the proper approach to legal questions. Because textualists understand the legislative process outlined in Article I, Section 7 as the exclusive avenue for the people to express their will through federal legislation, textualists do not look to legislative history to elucidate congressional intent.¹¹³ Nor do textualists rely on views expressed by individual legislators after a law is enacted, such as those views that are sometimes expressed in amicus briefs or newspaper articles.¹¹⁴

Textualists reject those types of legislative materials because relying on them would allow individual legislators to delegate legislative authority to themselves by purporting to define a law's meaning outside of the Article I, Section 7 process.¹¹⁵ Additionally, and more foundationally, such materials provide only a limited and biased view into the intricate and complicated process that turns proposed policies into law. That process, which requires bicameralism and presentment, necessitates collaboration and leads to interrelated political bargains that can result in a final legislative bargain (*i.e.*, law).¹¹⁶ Different legislators (and the President

112. See *id.* at 1823 & n.1 (Kavanaugh, J., dissenting) (stating that “[a]s written, Title VII does not prohibit employment discrimination because of sexual orientation” and that “[a]lthough this opinion does not separately analyze discrimination on the basis of gender identity, this opinion’s legal analysis of discrimination on the basis of sexual orientation would apply in much the same way to discrimination on the basis of gender identity”).

113. See Max Alderman & Duncan Pickard, *Justice Scalia’s Heir Apparent?: Judge Gorsuch’s Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 186 (2017); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1528 (1998); see also *Textualism and Legislative Intent*, *supra* note 1, at 431.

114. Cf. Neal Devins, *Measuring Party Polarization in Congress: Lessons from Congressional Participation as Amicus Curiae*, 65 CASE W. RES. L. REV. 933, 946 (2015) (arguing that increased polarization will affect the nature of congressional amicus filings).

115. See *Textualism as a Nondelegation Doctrine*, *supra* note 107, at 711.

116. Pursuant to Article I, Section 7’s bicameralism requirement, all bills must be approved by both chambers of Congress. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L. J. 523, 523 (1992). Pursuant to Article I, Section 7’s presentment requirement, all bills must be presented to the President, who can then veto the bill (sending it back to Congress) or sign the bill into law. See *id.*

exercising the veto power) have different opinions as to whether one policy is more or less significant than another. Such opinions are of no concern to textualists, who limit the relevant inquiry to deciding what an objective reader would take a law's enacted text to mean.

B. *Congressional Determinations of Majoriness*

One way to conceptualize the major questions doctrine is to understand it as tasking courts to determine what Congress perceived (or perceives) to be a major question. This theory could provide a theoretical underpinning of the current major questions doctrine; however, as Part II.C.1 shows, the theory does not track how the major questions doctrine works in practice. But even if this first theory were a good fit for the current major questions doctrine, textualists should reject it as calling for a task that is both ordinarily futile and statutorily suspect. The task is ordinarily futile because a collective Congress typically has no shared understanding as to which policies are more politically significant than others. The task is statutorily suspect because it is based on the presumption that Congress wishes to keep major decisions for itself, despite that presumption being in conflict with the CRA.¹¹⁷

1. *Past or Present*

If the major questions doctrine calls on courts to elucidate congressional determinations of majoriness, courts must first determine which Congress matters. There are two options. First, courts could look to the enacting Congress—that is, focus on what Congress would have considered to be major when Congress enacted the relevant text. Second, courts could focus on a later Congress—that is, focus on what Congress would consider to be major at a later date, such as when an agency issues a challenged rule or when a court considers the legality of the challenged rule in a lawsuit.

For most textualists, the second option is quite easily dismissed;

117. See 5 U.S.C §§ 801–808 (2018).

a law's text has a particular public meaning when it is enacted.¹¹⁸ The only way Congress can change that meaning is to enact new law through the Article I, Section 7 process. This protects private parties, who are legally bound by the objective meaning of the law when it was enacted, and who have the right to expect Congress to speak through the Article I, Section 7 process when Congress wishes to alter legal rights.¹¹⁹ The remainder of Part II.B will therefore work

118. See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) (“This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.”); *id.* at 1825 (Kavanaugh, J., dissenting) (“The ordinary meaning that counts is the ordinary public meaning at the time of enactment”); SCALIA & GARNER, *supra* note 103, at 16 (“In their full context, words mean what they conveyed to reasonable people at the time they were written”); *Role of The Federalist*, *supra* note 108, at 1339 (“Textualists subscribe to an objective theory of interpretation, pursuant to which interpreters ask what a reasonable lawmaker, familiar with the relevant context, would have believed that he or she was voting for.”); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 367–68 (2005) (“When interpreting old statutes, moreover, the typical textualist judge seeks to unearth the statutes’ *original* meanings rather than enforcing whatever modern readers might take the statutes’ language to mean.”).

In the sense that textualism requires looking to the original public meaning of a law, textualism is essentially indistinguishable from originalism. See ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 131 (2017) (“My general point is that if originalism means looking at the text, the historical background, the historical purposes, the intent of the authors, linguistic conventions, and so on to try to assess what the words of the Constitution (or any legal text) *mean*, and subsequently what legal effect that meaning has, then that seems no different than textualism.”). *But see* J.T. Hutchens, *A New New Textualism: Why Textualists Should Not Be Originalists*, 16 KAN. J.L. & PUB. POL’Y 108, 115 (2006) (proposing “evolutionary textualism” pursuant to which “court[s] should interpret the law through the eyes of the reasonable, present-day (that is, at the time of interpretation) target of the legislation”).

119. See *Bostock*, 140 S. Ct. at 1738 (referring to “the right to continue relying on the original meaning of the law [that the people] have counted on to settle their rights and obligations”); *id.* at 1749 (“The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”); *id.* at 1825 (Kavanaugh, J., dissenting) (“Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.”); Nelson, *supra* note 118, at 352 (“[E]mphasizing . . . that people should not be held to legal requirements of which they lacked fair notice, textualists suggest that interpretation should focus ‘upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean.’” (quoting Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION*:

under the assumption that, if textualists are to accept the first theory of the major questions doctrine, the doctrine must at least call on courts to focus their inquiry on the last time Congress spoke to the issue through enacted law.¹²⁰ Even limiting the inquiry to the enacting Congress, however, proves to be incompatible with textualism.

2. Ordinarily Futile

Today, for a bill to become a law, it must first obtain majority support from a 435-member House of Representatives and a 100-member Senate.¹²¹ After that, the bill must be presented to the President, who may sign the bill into law or veto the bill and return it back to Congress.¹²² These bicameralism and presentment requirements are mandated by Article I, Section 7 of the Constitution,¹²³

FEDERAL COURTS AND THE LAW, *supra* note 105, at 129, 144)); Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 557 (2009) (defending textualism as providing fair notice and thereby protecting “the importance of interpreting laws as their subjects would fairly have expected them to apply.”); *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783 (2018) (Thomas, J., concurring) (“[W]e are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.”).

120. This does not preclude textualist jurists from performing the “classic judicial task of reconciling many laws enacted over time, and getting them to “make sense” in combination.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (quoting *United States v. Fausto*, 484 U.S. 439, 453 (1988)). Where the Article I, Section 7 process results in new objectified intent as exhibited in new law, such law must be faithfully applied by courts. *But see* *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995) (describing limits on Congress’s ability to intrude on the judicial power by purporting to reopen final judgments through new statutes).

121. *See* U.S. CONST. art. I, § 7, cl. 2; Reapportionment Act of 1929, ch. 28, § 22, 46 Stat. 21, 26–27 (codified as amended at 2 U.S.C. § 2a (2018)).

122. *See* U.S. CONST. art. I, § 7, cl. 2. The President need not formally issue a veto in order to influence the legislative process, but may instead simply signal an intention to veto a bill should the opportunity present itself. *See* Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 88 (2007) (noting that “the President may help shape legislation prior to presentment” by, among other things, “threaten[ing] to veto legislation” on either legal or political grounds).

123. Article I, Section 7 of the Constitution provides:

All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

and advance the Framers' belief "that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials."¹²⁴ As Justice Gorsuch explained it, "Article I's detailed processes for new laws were . . . designed to promote deliberation."¹²⁵ Influenced by the writings of Locke and Montesquieu, the Framers created a "Constitution reflect[ing] a political theory that places representative, collective lawmaking power at the foundation of political society."¹²⁶

Given the wide cast of political actors involved in the Article I, Section 7 process, textualists consider it nonsensical to ask whether "Congress" (as a single entity) views a particular policy as being

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

124. *INS v. Chadha*, 462 U.S. 919, 949 (1983); see also John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1919 (2015) [hereinafter *Inside Congress's Mind*] ("The numerous veto gates erected by the rules of the two Houses build in a bias against enactment, so each bill has a thousand ways to die.").

125. *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

126. Neomi Rao, *Why Congress Matters: The Collective Congress In The Structural Constitution*, 70 FLA. L. REV. 1, 8–9 (2018) (citing Gordon S. Wood, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 151–52, 162 (1969)).

major.¹²⁷ Congress is a “they,” not an “it.”¹²⁸ Each legislator might weigh the value of a particular policy differently—indeed, that is often how the collective lawmaking process functions.¹²⁹ And because each legislator has his or her own “list[] of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.”¹³⁰

Even if courts could unearth a shared hierarchy of majorness by unraveling the many political bargains that led to a law’s enacted text, the task becomes more difficult over time. Interpreting the meaning of old texts is already difficult enough; attempting to recreate the political bargains that resulted in such texts is harder yet.¹³¹ This additional, practical concern is of particular note where,

127. See Loshin & Nielson, *supra* note 10, at 52 (arguing from a textualist perspective that the elephants-in-mouseholes’ “searching for a comprehensive purpose is often a futile exercise”). Such “intent skepticism” is not limited to textualists, but is instead shared by scholars belonging to other schools of thought such as legal realism, modern pragmatism, Dworkinian constructivism, and Legal Process purposivism. See *Inside Congress’s Mind*, *supra* note 124, at 1917–24; Loshin & Nielson, *supra* note 10, at 50 (“One need not be a card-carrying textualist, however, to acknowledge that the legislative process is complicated and that legislation is often the result of many congressional compromises, which are reflected in statutory text.”); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2400 (2017) (“In work ranging from legal realism to Legal Process purposivism to the formalist ‘new textualism,’ a long line of Harvard judges and law professors have resisted that intentionalist frame of analysis.”).

128. *But see* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 982, 999–1000 (2017) (referring to, and arguing against, the “common refrain” that Congress is a “they,” not an “it”).

129. See SCALIA & GARNER, *supra* note 103, at 22 (“[I]t is precisely because people differ over what is sensible and what is desirable that we elect those who will write our laws—and expect courts to observe what has been written.”).

130. Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

131. See *Role of The Federalist*, *supra* note 108, at 1365 (“To the extent that it is possible for twentieth-century judges to make sense of the implications of the text, structure, and history of so old a document, the task, done well, is not a simple one.”). *But see* Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, TIME (Sept. 6, 2019, 8:00 AM), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/> [https://perma.cc/GCY9-MU3Y] (“Living constitutionalists often complain we can’t know the original understanding because the document’s too old and cryptic. Hardly. We figure out the original meaning of old and difficult texts all the time. Just ask any English professor who teaches Shakespeare or Beowulf.”).

as is often the case, an agency traces its authority to a decades-old statute.¹³² Searching such historical statutes for a shared hierarchy of majorness would require courts to inquire into long-forgotten political controversies, raising the real possibility of anachronistic analyses.¹³³ Such practical difficulties provide textualists with an additional reason to reject any attempt to engage in the ordinarily futile task of assigning a shared hierarchy of majorness to Congress as a whole.¹³⁴

132. See Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1941 (2020) (“Agencies using their delegated power are often drawing on statutory authority granted many years (or decades) earlier.”).

133. See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 680 (2013) (“That is why these arguments are inherently anachronistic. People in the past did not know how the future would turn out; therefore they did not understand themselves or their actions in terms of the narratives we craft today.”).

134. The adjective “ordinarily” is used to acknowledge the theoretical possibility that Congress could provide a codified majorness determination within a statute’s enacted text. For example, Congress could enact a law stating that “Agency A has the authority to regulate technological widgets,” and stating further that “regulating Widget X is a matter of non-major significance.” In that hypothetical, even textualists would admit that Congress’s majorness determination could be readily elucidated since it was enacted into law. Such hypothetical examples are examined in greater detail in Parts II.C.2 and III.C.3, where the examples are used to highlight the consequences of courts having the authority to determine majorness for themselves. But it is worthwhile to here briefly explain why, if the major questions doctrine were to call for congressional determinations of majorness, the theoretical possibility that Congress could enact majorness determinations into law does not save the major questions doctrine from being unacceptable to textualists.

The problem lies in the relative uselessness of Congress offering boilerplate codifications of majorness in an enacted law. If Congress had the foresight to state that “regulating Widget X is a matter of non-major significance,” Congress could have just as easily answered the underlying delegation question more directly by stating that “Agency A is delegated the authority to regulate Widget X.” But of course, the major questions and nondelegation doctrines exist *because* Congress does not always have such foresight. Put differently, to say that a major questions doctrine tasking courts with elucidating congressional determinations of majorness could be acceptable to textualists because Congress could theoretically speak to a policy question’s majorness ignores the reality that the only set of cases in which the major questions doctrine is helpful is the set of cases where Congress did not speak directly to the particular question at hand.

More foundationally, as far as the major questions doctrine is concerned, the legal effect of Congress stating (A) “regulating Widget X is a matter of non-major

3. Statutorily Suspect

Not only is assigning a shared hierarchy of majorness to Congress an ordinarily futile task, it is also a task premised on a statutorily suspect presumption. As previously mentioned, the current major questions doctrine is premised on the “presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies.”¹³⁵ But that judicially crafted presumption is in tension with the CRA,¹³⁶ within which Congress established a presumption that all “major rules” must be given legal effect unless Congress affirmatively enacts a new law stating that a particular major rule should not be given legal effect. In short, where the major questions doctrine presumes that Congress wishes to answer major questions itself, the CRA exhibits a congressional presumption that agencies will answer major questions through major rules.

Enacted in 1996, the CRA provides that “[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress . . . a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, *including whether it is a major rule*; and (iii) the proposed effective date of

significance,” is the same as the legal effect of Congress stating (B) “Agency A is delegated the authority to regulate Widget X.” In both instances, Agency A has the authority to regulate Widget X. Since the legal effect between those two alternatives is the same, textualist jurists would need to identify some reason, based in the *text* of the Constitution or other relevant law, justifying the requirement that Congress use the judicially-preferred language laid out in alternative (A). As Professor John F. Manning has argued, “clear statement rules . . . impose something of a clarity tax upon legislative proceedings,” and such a tax “demand[s] a justification other than the raw expression of judicial value preferences.” John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010). Put differently, textualists do not understand the judicial task as permitting courts to order Congress to use specific language just for kicks. Instead, textualists understand the judicial task as calling only for the interpretation of the words that Congress and the President have themselves settled upon during the Article I, Section 7 lawmaking process—a process affording courts no opportunity to express bare policy preferences.

135. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

136. 5 U.S.C. §§ 801–808 (2018).

the rule.”¹³⁷ The CRA’s definition of “major rule” is strikingly similar to the major questions doctrine’s definition of “major questions.”¹³⁸ The CRA defines “major rule” as follows:

The term “major rule” means any rule that [the Office of Information and Regulatory Affairs (OIRA)] finds has resulted in or is likely to result in—

(A) an annual effect on the economy of \$100,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.¹³⁹

Both the CRA and the major questions doctrine speak to economic significance (subsections (A) and (B) in the CRA provision above) as well as political significance (subsection (C) in the CRA provision above).¹⁴⁰

In enacting the CRA, Congress tasked OIRA with applying the statutory definition of “major rule” to determine whether any particular rule qualifies as major.¹⁴¹ Major rules, according to Congress, *must* be given legal effect sixty days after the agency transmits the

137. *Id.* § 801(a)(1)(A) (emphasis added). For discussions on a perceived impetus for the CRA, see Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POLY. 187, 197 n.21 (2018); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2164 (2009).

138. The major questions doctrine defines major questions as those with “economic and political significance.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

139. 5 U.S.C. § 804(2) (2018).

140. *See, e.g., Brown & Williamson*, 529 U.S. at 160 (referring to “economic and political significance”).

141. *See* 5 U.S.C. § 804(2) (2018).

rule to Congress or publishes the rule in the Federal Register; the only exception mentioned in the CRA is if Congress affirmatively enacts a new law disapproving of the major rule.¹⁴² The CRA carefully outlines the procedural steps that Congress may take to disapprove of a major rule.¹⁴³ For example, the CRA states that a new law disapproving of a major rule should explicitly state “[t]hat Congress disapproves the rule submitted by the ___ relating to ___, and such rule shall have no force or effect.’ (The blank spaces being appropriately filled in).”¹⁴⁴

The judge-made presumption in the major questions doctrine threatens to turn the CRA’s detailed sixty-day *disapproval* process on its head to instead require Congress to take special steps to *approve* an agency’s major rule. There are legislative proposals before Congress that would achieve a similar result.¹⁴⁵ If Congress were to enact such proposals, courts could more credibly claim that Congress generally intends to retain an exclusive authority to decide major questions. But until such proposals are enacted, courts should not purport to “protect” an allegedly implicit congressional intent to retain the exclusive authority to decide major questions when the CRA explicitly anticipates that agencies will decide major questions through major rules.

142. *See id.* § 801(a)(3). Rules determined to be non-major are also set to go automatically into effect, although they do so without any added delay. *See id.* § 801(a)(4) (“Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress . . .”).

143. *See id.* § 801(a) (referring to a “joint resolution”); *id.* § 801(a)(3)(B) (referring to the presidential veto process); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2169 (2009) (referring to “the presentment requirement of the CRA”).

144. 5 U.S.C. § 802(a) (2018) (parenthetical in original).

145. *See, e.g.*, Regulations from the Executive in Need of Scrutiny Act of 2019 H. R. 3972, 116th Cong. (2019) [hereinafter “REINS Act”]. The REINS Act would amend the CRA to require congressional approval for major rules. *See id.* § 801. Non-major rules would still go into effect unless explicitly disapproved by Congress. *See id.* § 803. The REINS Act was first introduced into Congress nearly a decade ago, and has been reintroduced since. *See* Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 131, 133 (2013); Press Release, Senators Reintroduce REINS Act (Jan. 10, 2019), <https://www.paul.senate.gov/news/senators-reintroduce-reins-act-0> [<https://perma.cc/3P6S-FWVF>].

To be sure, it is theoretically possible for the major questions doctrine to be consistent with the CRA. Although the CRA presupposes agency authority to issue major rules, it could be that Congress only intends to elsewhere grant such major authority. In other words, it could be that the CRA presumes that *some* agencies may issue major rules, so long as Congress has elsewhere given those agencies the explicit statutory authority to do so. But that attempt to harmonize the major questions doctrine with the CRA must take on the heavy burden of overcoming the CRA's broad definition of "Federal agency."¹⁴⁶

The CRA's definition of "Federal agency" essentially covers *all* federal agencies, even "historically independent agencies."¹⁴⁷ Given as much, the CRA's presumption that federal agencies will answer major questions through major rules is not a narrow presumption limited to a small number of agencies that are elsewhere provided with major authority. Instead, the CRA's broad definition of "Federal agency" suggests that the CRA anticipates major questions being answered through major rules issued by nearly *every* federal agency. In light of the CRA's wide-reaching presumption, it is difficult for courts to maintain that the major questions doctrine is

146. The CRA applies to each "Federal agency" as that term is defined in the Administrative Procedure Act. *See* 5 U.S.C. § 804(1) (2018) ("The term 'Federal agency' means any agency as that term is defined in section 551(1)."). The Administrative Procedure Act, in turn, defines the term quite broadly. *See id.* § 551(1) ("'[A]gency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them; (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory; or (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix.").

147. Off. of Mgmt. & Budget, Exec. Off. of the President, Memorandum for the Heads of Executive Departments and Agencies: Guidance on Compliance with the Congressional Review Act, M-19-14, 2 (Apr. 11, 2019) <https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-14.pdf> [<https://perma.cc/B2WW-WXDR>] [hereinafter *CRA Guidance*].

only a statutory canon seeking to protect a congressional desire to in most instances retain the authority to answer major questions.¹⁴⁸

C. *Judicial Determinations of Majorness*

A second way to conceptualize the major questions doctrine is to understand it as calling for courts to determine majorness themselves. Pursuant to that understanding of the doctrine, a court's task is to exercise its own political discretion to determine whether a policy question is major. As a descriptive matter, this second theory best explains how the major questions doctrine currently works in practice. This second theory also describes how a strengthened major questions doctrine might operate in the future. Textualists should reject this understanding of the major questions doctrine as impermissibly permitting courts to insert themselves into the Article I, Section 7 lawmaking process. This objection applies to both the current and strengthened form of the major questions doctrine, albeit in slightly different ways.

In the current version of the major questions doctrine, allowing courts to decide majorness is to empower courts to selectively demand that explicit legislative language be used to delegate the authority to answer those questions that courts determine to be major. That authority is similar to how a President might threaten to veto a bill that does not satisfactorily address those topics that the President deems to be of particular political significance. But unlike a

148. Another way to try to harmonize the CRA with the major questions doctrine is to argue that Congress did not intend the judiciary to pay much attention to OIRA's determinations of majorness. Indeed, the CRA provides that "[n]o determination, finding, action, or omission under [the CRA] shall be subject to judicial review." 5 U.S.C. § 805 (2018). But even if OIRA's determinations are not judicially reviewable, one might presume the Court to at least refer to OIRA's determinations if the Court were seeking to elucidate congressional determinations of majorness so that Congress's delegatory decision could be respected. For similar reasons, even if the Court did not understand OIRA's congressionally mandated determinations to be perfect substitutes for congressional determinations of majorness, one who understands the major questions doctrine as calling on courts to elucidate congressional determinations of majorness might expect the Court to at least note that Congress has spoken to what is "major" in the CRA. See *CRA Guidance*, *supra* note 147, at 4 (referring to OIRA's "statutory duty" to make the necessary majorness determination).

President who might threaten an overridable veto in return for different legislative language, the power exercised by courts invoking the current form of major questions doctrine is supreme. That is to say, even if all of Congress disagreed with a court as to whether a policy question was major, the court could disregard Congress's political calculation and continue to require that a particular delegation be made more clearly.

In the strengthened form of the doctrine, to allow courts to decide majorness is to similarly empower courts to selectively prohibit Congress from delegating the authority to answer those questions that courts determine to be major. In this sense, the courts are again empowered to act similarly to the President, who for idiosyncratically held political reasons may veto a bill and prevent it from becoming law. But unlike the President's veto, which may be overridden by a super-majority in Congress, the judicial veto exercised by a court invoking a strengthened major questions doctrine would be supreme. Congress could never delegate the authority to answer questions determined by the courts to be major—even if Congress made its delegation explicit, and even if all of Congress disagreed as to whether a particular question was major.

1. Descriptive Account

Before outlining the specific objections to a major questions doctrine empowering courts to determine majorness, it is helpful to evidence how, in practice, the major questions doctrine already empowers just that.¹⁴⁹ Take for example *MCI* and *Brown & Williamson*, which the Court has colorfully cited for the proposition that “Congress . . . does not . . . hide elephants in mouseholes.”¹⁵⁰ In both cases the Court purported to define the relevant “elephant” for itself. In neither case did the Court even suggest that it was seeking to determine what Congress would understand to be an

149. See Loshin & Nielson, *supra* note 10, at 48 (arguing that the “elephants-in-mouseholes doctrine” places the court “on a dangerous path to ‘I know it when I see it’”).

150. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (citing *MCI Telecomms. Corp. v. Am. Tel. & Telegram Co.*, 512 U.S. 218, 231 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)).

“elephant,” even though one might assume that to be the relevant inquiry if one were aiming to protect Congress’s unspoken desire to keep the “elephants” for itself.

“*[W]e think,*” the Court wrote in *MCI*, that “an elimination of the crucial provision of the statute for 40% of a major sector of the industry is much too extensive to be considered a ‘modification.’”¹⁵¹ In coming to that decision, the Court determined for itself that: (1) the relevant statutory provision was more “crucial” than the rest of the statute; (2) the relevant industry sector was a “major” one; and (3) “40%” of that sector was a meaningful percent.¹⁵²

Similarly, in *Brown & Williamson*, the Court noted that “*[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.*”¹⁵³ True, that passage refers to what “Congress . . . intended,” suggesting that the Court may have been concerned with elucidating and respecting a congressional decision. But a closer reading reveals that the Court was at most concerned with Congress’s decision to use “cryptic” text. It was the Court that determined the threshold question of majorness—that is, that regulating tobacco would be of “great economic and political significance.”¹⁵⁴ Although the Court’s “confiden[ce]” was bolstered by “the plain implication of Congress’s subsequent tobacco-specific legislation,”¹⁵⁵ those later-enacted statutes are best understood as speaking to the size of the relevant “mousehole,” not the “elephant.” Less illustratively, the Court first determined for itself that the regulation of tobacco was a major question. Then, after deciding majorness, the Court looked to the statutory grants of “drug” and “device.”¹⁵⁶ In examining those statutory grants, the Court concluded that, in light of its own majorness determination and Congress’s later-enacted statutes, the statutory grants were “cryptic” at

151. *MCI*, 512 U.S. at 231 (emphasis added).

152. *See id.* at 131.

153. 529 U.S. at 160 (emphasis added).

154. *Id.*

155. *Id.* at 131.

156. *Id.*

best.¹⁵⁷

Consider also *King*, where the Court determined for itself that “[t]he tax credits are among the [Affordable Care] Act’s key reforms.”¹⁵⁸ Nowhere did Congress itself identify those tax credits as being “key.” To be sure, the Court hypothesized that “had Congress wished to assign” a question of such “deep economic and political significance . . . to an agency, it surely would have done so expressly.”¹⁵⁹ This could suggest an attempt to elucidate and respect a congressional decision, at least if taken at face value. But

157. *Id.* at 160. The *Brown & Williamson* majority cited to a 1986 article published by then-Judge Breyer, in which he argued that a “court may . . . ask whether the legal question is an important one.” Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) [hereinafter *Judicial Review*] (emphasis added). The *Brown & Williamson* majority cited then-Judge Breyer’s article to support the proposition that, “[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” *Brown & Williamson*, 529 U.S. at 159 (citing *Judicial Review*, *supra*, at 370). It is unclear whether then-Judge Breyer’s early conception of the major questions doctrine calls for judicial or congressional determinations of majorness. To be sure, the above-quoted language from his 1986 article states that “court[s]” can ask whether the legal question is major. *Judicial Review*, *supra*, at 370. But then-Judge Breyer elaborated on that rationale by arguing that “Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.” *Id.* (emphasis added). Regardless of what then-Judge Breyer would have thought, Justice Breyer has distanced himself from the major questions doctrine on at least one notable occasion. Dissenting in *Brown & Williamson*, Justice Breyer noted that “if there is . . . a background canon” pursuant to which courts “should assume in close cases that a decision with ‘enormous social consequences’ should be made by democratically elected Members of Congress rather than by unelected agency administrators I do not believe [such a canon] controls the outcome here.” 529 U.S. at 190 (Breyer, J., dissenting) (citation omitted) (quoting Regulation of Tobacco Products (Part 1): Hearings Before the H. Subcomm. on Health & the Env’t, 103d Cong. 69 (1994)). Scholars have described Justice Breyer’s dissent in *Brown & Williamson* as being in tension with his 1986 article. See Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 459 (2016) (“Breyer dissented [in *Brown & Williamson*], contradicting his 1986 article by arguing that tobacco regulation is such a major political question that it is appropriately addressed by one of the politically-accountable branches—whether it be Congress or the Executive Branch—rather than the courts.”); *Chevron Step Zero*, *supra* note 50, at 242 (“[Justice Breyer’s] argument [in *Brown & Williamson*] casts serious doubt on his own claims to the contrary in 1986.”).

158. *King v. Burwell*, 576 U.S. 473, 485 (2015).

159. *Id.* at 486.

again, in practice it was the Court that first determined for itself that the question was “deep” (*i.e.*, major). Only then, after the Court had determined the question to be “deep,” did the Court look for express statutory language.¹⁶⁰ Examples such as *King* make clear that the major questions doctrine is not used to help determine whether Congress has delegated authority in the past. The doctrine is instead used to issue a forward-looking mandate establishing that now, after the Court has identified a question to be major, Congress must use judicially-preferred language (*i.e.*, explicit language) if Congress wishes to delegate the authority to decide that question.

Similarly, in *UARG*, it was again the Court itself that identified the EPA’s proposed statutory interpretation as “bring[ing] about an enormous and transformative expansion in EPA’s regulatory authority.”¹⁶¹ The Court also determined for itself that the EPA was seeking to “regulate a significant portion of the American economy.”¹⁶² Nowhere did the Court suggest that it was channeling Congress’s viewpoint as to which rules were “enormous” or “significant.”¹⁶³ The Court was instead concerned with declaring what it thought to be major so that Congress was put on notice of the judicial mandate to use explicit language as to certain questions.

Then-Judge Kavanaugh’s opinion in *United States Telecom Ass’n* is particularly instructive since it showcases a lower court judge seeking to faithfully apply Supreme Court precedent. Recall that then-Judge Kavanaugh considered two questions: “(1) Is the net neutrality rule a major rule? (2) If so, has Congress clearly authorized the FCC to issue the net neutrality rule?”¹⁶⁴ Note that, in the first question, then-Judge Kavanaugh asked whether the rule “[i]s” major. The second question, by comparison, focused on what “Congress” had decided to do. Juxtaposing those two questions leaves the impression that then-Judge Kavanaugh understood majorness to be

160. *Id.*

161. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014).

162. *Id.* (quotations omitted).

163. *Id.*

164. *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

something that courts determine for themselves.¹⁶⁵ Indeed, in conceding that the major questions doctrine had “a bit of a ‘know it when you see it’ quality,”¹⁶⁶ then-Judge Kavanaugh harkened back to Justice Stewart’s infamous test for the *judicial*-identification of obscene materials.¹⁶⁷

Understanding the current major questions doctrine as a call for judicial determinations of major questions could explain why the Court has not yet cited the CRA in any major questions doctrine case. The CRA would seem to be particularly on point if one were seeking to elucidate and respect congressional determinations of major questions. As noted in Part II.B.3, both the major questions doctrine’s definition of “major question”¹⁶⁸ and the CRA’s definition of “major rule” speak to political¹⁶⁹ and economic¹⁷⁰ indications of major questions. Like the major questions doctrine’s focus on “economic and political significance,”¹⁷¹ the CRA’s major rule requirement considers “a rule’s relative importance and economic impacts.”¹⁷² In light of the similarity between the CRA and the major questions doctrine, the Court’s failure to cite the CRA in any case involving the major

165. See also Mila Sohoni, *King’s Domain*, 93 NOTRE DAME L. REV. 1419, 1435–36 (2018) (examining then-Judge Kavanaugh’s views on major questions).

166. *U.S. Telecom*, 855 F.3d at 423 (Kavanaugh, J., dissenting).

167. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

168. The major questions doctrine defines major questions as those with “economic and political significance.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000).

169. The CRA’s definition of “major rule” includes those rules found to have “significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.” 5 U.S.C. § 804(2)(C) (2018).

170. The CRA’s definition of “major rule” also includes those rules found to have “an annual effect on the economy of \$100,000,000 or more” as well as those rules found to have “a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.” *Id.* § 804(2)(A)–(B).

171. *Brown & Williamson*, 529 U.S. at 160.

172. *CRA Guidance*, *supra* note 147, at 2. OIRA is housed within the Office of Management and Budget. See 44 U.S.C. § 3503(a) (2018).

questions doctrine suggests that the Court is not concerned with elucidating congressional determinations of majorness so that Congress's delegatory decisions may be respected.

Consider again *Brown & Williamson*, which involved an FDA tobacco rule issued less than five months after the CRA was enacted.¹⁷³ Pursuant to the CRA, OIRA determined the FDA's tobacco rule to be "major."¹⁷⁴ Although the Court similarly determined that the rule was of "economic and political significance," the Court made no mention of OIRA's congressionally mandated determination.¹⁷⁵ Consider also *UARG*, where the Court and OIRA were again in agreement: the rule was major.¹⁷⁶ But again, like in *Brown & Williamson*, the *UARG* Court made no reference to OIRA's determination.

The most informative case for present purposes, however, is the Supreme Court's opinion in *King*. In that case, OIRA and the Court were in disagreement. Applying Congress's definition of "major rule," OIRA determined the IRS rule at issue to be "Non-Major."¹⁷⁷ By contrast, the *King* Court determined the rule to have answered "a question of deep 'economic and political significance.'"¹⁷⁸ The *King* Court's implicit rejection of OIRA's congressionally mandated majorness determination provides even stronger evidence that,

173. See 61 Fed. Reg. 44,395 (Aug. 28, 1996). The CRA was signed into law on March 29, 1996. Congressional Review Act, Pub. L. No 104-121, 110 Stat. 874 (1996). The FDA's Tobacco Rule was the thirty-third rule ever reviewed under the CRA. *Congressional Review Act: Database of Rules*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://tinyurl.com/y9kxocc> [<https://perma.cc/QU8C-T22C>].

174. *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/fedrules/103281> [<https://perma.cc/SEA4-B9EB>].

175. *Brown & Williamson*, 529 U. S. at 160.

176. See *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/fedrules/161898> [<https://perma.cc/QNU8-398X>]; see generally *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014).

177. U.S. Gov't. Accountability Office, *Health Insurance Premium Tax Credit*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/fedrules/171784> [<https://perma.cc/69PP-7XNA>].

178. *King v. Burwell*, 576 U.S. 473, 486 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

when determining majorness, the Court does not purport to be elucidating congressional determinations of majorness in an attempt to determine whether Congress has delegated authority.¹⁷⁹ As *King* illustrates, the Court is instead concerned with announcing its own majorness determination so that Congress is on notice to legislate accordingly.¹⁸⁰

2. Political Veto

Having established that the current form of the major questions doctrine is best understood as tasking courts with determining majorness for themselves, this Article will now explain why textualists should reject that task. Explaining as much is of increased importance since the strengthened form of the major questions doctrine is also best understood as tasking courts with determining majorness themselves. Textualists should reject the task both as it

179. Then-Judge Kavanaugh similarly did not cite the CRA in *U.S. Telecom Ass'n*. His non-cite is interesting because, by referring to the “major rules doctrine (usually called the major questions doctrine),” one might have expected him to acknowledge that the CRA explicitly addressed “major rules.” *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc). But then-Judge Kavanaugh may have avoided referencing the CRA for two reasons. First is that, prior to 2019, “historically independent agencies” (such as the FCC) did not submit rules for OIRA review. See *CRA Guidance*, *supra* note 147, at 2 (“The CRA applies to all Federal agencies, including the historically independent agencies.”). Second is that the CRA’s definition of “major rule” specifically excludes rules promulgated pursuant to the Telecommunications Act amendments, which the FCC had traced its net neutrality authority to. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of Title 47, Chapter 5 of the U.S. Code.); 5 U.S.C. § 804(2) (2018) (“The term [“major rule”] does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.”); *U.S. Telecom*, 855 F.3d at 417 (Kavanaugh, J., dissenting) (“[B]ecause Congress never passed net neutrality legislation, the FCC relied on the 1934 Communications Act, as amended in 1996, as its source of authority for the net neutrality rule.”).

180. At the end of the day, it might be that the *King* Court failed to acknowledge the CRA because the Court was simply unaware of how the statute might interact with the major questions doctrine. Indeed, the parties failed to raise the CRA in their Supreme Court merits briefing. See generally Brief for Petitioners, *King v. Burwell*, 576 U.S. 473 (2015) (No. 14-114); Brief for Respondents, *King v. Burwell*, 576 U.S. 473 (2015) (No. 14-114); Reply Brief for Petitioners, *King v. Burwell*, 576 U.S. 473 (2015) (No. 14-114). Another possibility is that the Court is simply unaware of the CRA’s potential significance, or at least has not had the opportunity to formally consider the question.

exists in the current and strengthened forms of the doctrine. In both instances, the objection is that the major questions doctrine purports to provide the judiciary with an unenumerated political veto power, although that veto appears slightly different in each form of the major questions doctrine.

Before outlining the precise contours of the veto, it is critical to first explain why the veto is best understood as purporting to empower courts to act politically, rather than legally. After all, courts exercising the power of judicial review might also be understood as “vetoing” a law, although for legal (rather than political) reasons. The political nature of the veto power provided to courts in the current and strengthened forms of the major questions doctrine is therefore central to the textualist’s objection to it.¹⁸¹

The political nature of the major questions doctrine’s veto is perhaps most obviously exhibited by the doctrine’s explicit call to consider a question’s “political significance.”¹⁸² And the doctrine’s call to additionally consider “economic” significance does not save the inquiry from being political. To the contrary, the economic inquiry highlights the majorness inquiry’s inherently political focus. In many instances, a policy question’s economic significance is the very characteristic driving its political significance. In *King*, for example, the Court appeared to define the Affordable Care Act’s tax credits as being “key” political reforms *because* they involved “billions of dollars in spending.”¹⁸³ Similarly, then-Judge Kavanaugh

181. Recent textualist objections to the judicial exercise of political discretion come from Justices Gorsuch and Kavanaugh themselves. As Justice Gorsuch acknowledged in *Bostock*, “[a]s judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise.” *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020). Writing in dissent, Justice Kavanaugh agreed with Justice Gorsuch’s distinguishing between judges and the peoples’ elected representatives: Allowing judicial decisions to be based on a judge’s “own policy views,” Justice Kavanaugh explained, would result in “the Judiciary . . . becom[ing] a democratically illegitimate super-legislature—unelected, and hijacking the important policy decisions reserved by the Constitution to the people’s elected representatives.” *Id.* at 1824 (Kavanaugh, J., dissenting).

182. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (referring to “economic and political significance”).

183. *King*, 576 U.S. at 485.

noted that the FCC's net neutrality rule was major in part because its "financial impact" was "staggering."¹⁸⁴

It is difficult to hypothesize a policy question that has both "major" economic significance and "non-major" political significance; political debates quite regularly turn on the relevant price tag. But should such a policy question exist, the major questions doctrine's call for a consideration of both "economic *and* political significance" ensures the inquiry is necessarily political by definition.¹⁸⁵

Besides, even if the major questions doctrine could be reoriented so that courts could focus exclusively on economic concerns, textualists would be eager to see where in the Constitution it says that Congress's ability to delegate legislative powers turns on economic calculations. Such an argument would appear awfully close to constitutionalizing "Mr. Herbert Spencer's Social Statics."¹⁸⁶

184. *U.S. Telecom*, 855 F.3d at 423 (Kavanaugh, J., dissenting).

185. *Brown & Williamson*, 529 U.S. at 160 (emphasis added); see also *King*, 576 U.S. at 486 (referring to "a question of deep 'economic *and* political significance'" (emphasis added) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (*UARG*))); *UARG*, 573 U.S. at 324 (referring to "decisions of vast 'economic *and* political significance'" (emphasis added) (quoting *Brown & Williamson*, 529 U.S. at 160)).

Although this Article is primarily concerned with providing a textualist critique of the major questions doctrine, empowering courts to exercise political discretion raises concerns that are shared by textualists and non-textualists alike. Consider Professor Adrian Vermeule, who is very much not a textualist. Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> [<https://perma.cc/V79V-LM92>] (arguing in favor of "common-good constitutionalism" and calling it a "mistake" to think "that the common good and its corollary principles have to be grounded in *specific* texts"). Because Professor Vermeule understands the "lines between law, fact, and policy discretion" to be inherently "uncertain and unstable," he takes issue with any attempt to draw a "sharp distinction between review of legal questions, on the one hand, and review of facts and discretionary policymaking, on the other." Adrian Vermeule, *Neo-?*, 133 HARV. L. REV. FORUM 103, 107 (2020). From Professor Vermeule's perspective, then, the incorrectness of a major questions doctrine's call for judicial determinations of political majorness is all the more obvious—if judicial supremacy over mixed questions of law and politics is a step too far, judicial supremacy over matters that the judiciary explicitly defines to be questions of politics should be rejected out of hand.

186. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); see also Rebecca L. Brown, *The Art of Reading Lochner*, 1 N.Y.U. J. L. & LIBERTY 570, 572 n.3 (2005) (noting that "most readers" of Justice Holmes's *Lochner* dissent take it as "suggest[ing]

In the current major questions doctrine, the judicial exercise of a political veto takes the shape of a judicial mandate that Congress speak explicitly if it wishes to delegate the authority to answer a question that a court determines to be major. This is objectionable to textualists since it risks upsetting the legislative bargains that result in particular words being enacted into law. Like a court invoking the current form of the major questions doctrine, individual legislators (and the President) are likely to have their own views as to which policy questions are major. The culmination of those views is reflected in the final wording of a particular statute, which might have been intentionally drafted to implicitly delegate the authority to answer certain questions. Consider a hypothetical.

Assume that Congress enacts a law delegating to Agency A the authority to regulate “technological widgets.” Pursuant to that authority, Agency A promulgates a rule to regulate Widget X, which Agency A understands to be “technological.” Manufacturers of Widget X sue, alleging that its widgets are not “technological,” and thus Agency A has no statutory authority to regulate Widget X. In considering the case on appeal, the Supreme Court invokes the current form of the major questions doctrine and determines that, in the Court’s opinion, the decision to regulate Widget X is a question of major economic and political significance. For that reason, the Court concludes that Congress failed to correctly (*i.e.*, explicitly) delegate to Agency A the authority to answer the question as to whether Widget X should be regulated.

For the major questions doctrine to be doing any real work in the above hypothetical, the Court must read (or anticipate having to read) the statute as being broad enough to implicitly cover Widget X. Otherwise the Court could brush the majorness inquiry to the side and simply rule that, as a matter of straightforward statutory

that the Court was improperly resolving a constitutional dispute by favoring a contested tenet of economic theory”). *But see* Sohoni, *supra* note 165, at 1433 (reading *King* as being limited to those instances where “the agency claims that a statute implicitly delegates to the agency the power to cause large amounts of federal money to be spent”).

interpretation, Widget X is not covered by the statutory language.¹⁸⁷ But by invoking the major questions doctrine, the Court risks favoring its political view (that the regulation of Widget X is a major policy question) over the views of legislators and the President who might have approved broad language because they considered the policy question to be a non-major question that did not need to be specifically noted.

As Professor John F. Manning explains from a textualist's perspective, "[m]uch legislation reflects the fruits of legislative compromise, and such compromises often lead to the articulation of broad policies for agencies and courts to specify through application."¹⁸⁸ By narrowing the statute to not cover Widget X, the Court in the above hypothetical "threatens to unsettle the legislative choice implicit in adopting a broadly worded statute."¹⁸⁹ Moreover, the Court's narrowing of the statute additionally distorts the political process in the future. Politicians wishing to amend the statute

187. Even larger issues would arise if the Court truly treated the major questions doctrine as a threshold issue that must be answered before the Court even considered developing an opinion as to whether the statute is broad enough to cover Widget X. That approach would require the Court to unnecessarily announce its political determinations in cases where the Court would not need do so (that is, in cases where the statute does not cover the relevant agency action, regardless of its majorness). This approach is slightly distinguishable from *King*, where the Court ultimately concluded that the statute was broad enough to cover the IRS's proposed interpretation. See *King*, 135 S. Ct. at 2489–90.

188. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 228 (2000) [hereinafter *Canon of Avoidance*]; see also *Substantive Canons*, *supra* note 106, at 114 (referring to Professor Manning as "the most prominent academic textualist").

189. *Canon of Avoidance*, *supra* note 188, at 228; see also *Countering*, *supra* note 106, at 71 ("[W]ithin each house, '[b]ills are shaped by a process that entails committee approval, the scheduling of a floor vote, logrolling, the threat of filibuster, the potential for presidential veto, and an assortment of other procedural obstacles.' Passing these veto gates requires proponents to compromise with opponents, and compromise can produce awkward language." (second alteration in original) (footnotes omitted) (quoting John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2417 (2003))); *Substantive Canons*, *supra* note 106, at 120–21 ("For example, Justice Scalia's suggestion that clear statement rules reflect the ordinary use of language comes at the end of a long passage characterizing them as 'dice-loading rules' that pose 'a lot of trouble' for the 'honest textualist.'" (quoting SCALIA, *supra* note 105, at 27–29)).

to explicitly cover Widget X may have to give up more political capital to earn the support of their colleagues who might have already understood the original statute to cover Widget X, but who later seize the opportunity to extract additional political deals in return for explicit Widget X language.¹⁹⁰

The political veto power which would be exercised by courts pursuant to a strengthened form of the major questions doctrine would be even more objectionable from the textualist's perspective. An elaboration on the Widget X example helps illustrate why. Assume that after the Court ruled that regulating Widget X involved a question of major economic and political significance, Congress sought to make its delegatory intention clear. Specifically, assume that Congress amended the relevant statute to state that "Agency A's authority to regulate technology widgets includes the authority to regulate Widget X." Agency A then promulgates a new Widget X rule and litigation ensues. What now?

Pursuant to a strengthened major questions doctrine, the Court would be empowered to hold that Congress *cannot* delegate to Agency A the authority to decide whether Widget X will be regulated—even though Congress clearly expressed its intention to delegate that authority. Similar to a President who declares that a bill cannot become law for political reasons, the Court in this hypothetical would be declaring that Congress's delegation cannot be given legal effect because the Court has determined it to be too politically important.

The political veto power purportedly provided to courts in the current and strengthened forms of the major questions doctrine must be rejected by textualists because such veto power is nowhere mentioned in Article I, Section 7. That Section of the Constitution, which outlines the exclusive procedures through which federal law may be enacted,¹⁹¹ was the subject of significant debate at the Constitutional Convention. The substantial influence that a political veto (or "negative") could exert on the legislative process was not

190. Cf. *Countering*, *supra* note 106, at 71–72 ("[I]t may be necessary to narrow or broaden language in order to bring others on board.").

191. The text of Article I, Section 7 is provided in its entirety at note 123.

lost on the Framers. In an early draft of the Declaration of Independence, for example, Thomas Jefferson complained that King George had “prostituted his negative for suppressing every legislative attempt to prohibit or to restrain” the slave trade.¹⁹² Familiar with a veto’s utility, the Framers considered creating several different veto powers at the Constitutional Convention.¹⁹³

Most important for present purposes was a proposal in the Virginia Plan to vest a political veto power in a “Council of Revision” made up of the President and members of the federal judiciary.¹⁹⁴ The proposal was not entirely novel; New York’s Constitution of 1777 had vested a veto power in a similarly constituted Council of Revision.¹⁹⁵ The New York Council, which was made up of the Governor, the state Chancellor, and the state justices, could veto any legislative bill by majority vote.¹⁹⁶

192. Thomas Jefferson, Notes of Proceedings in the Continental Congress, (June 7–Aug. 1, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 1760–1776, at 317–18 (1950).

193. See, e.g., Alison L. LaCroix, *What if Madison Had Won? Imagining a Constitutional World of Legislative Supremacy*, 45 IND. L. REV. 41, 41–42 (2011) (“Madison argued that the United States government must be armed with a ‘negative,’ or a veto, on state legislation. The negative would be vested in Congress—most likely the Senate—and would operate as a broad check by the federal legislature on the states. Madison even went so far as to suggest that congressional approval would be the ‘necessary final step’ in the states’ legislative processes.” (footnotes omitted) (quoting ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 138–39, 153 (2010))).

194. James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 235 (1989) [hereinafter *The Council of Revision*].

195. See *id.* at 243. The New York Constitution of 1777 provided:

And whereas laws inconsistent with the spirit of this constitution, or with the public good, may be hastily passed: Be it ordained that the governor for the time being, the chancellor, and the judges of the supreme court, or any two of them, together with the governor, shall be and hereby are, constituted as a council to revise all bills to be passed into laws by the legislature

Id. at 244–45, quoted in BENJAMIN PERLEY POORE, 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1332 (GPO, 2d ed. 1878).

196. See *The Council of Revision*, *supra* note 194, at 245; see also Richard H. Fallon, Jr., *Common Law Court or Council of Revision?*, 101 YALE L.J. 949, 951 (1992) (review of HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION (1990)) (noting that the federal Council of Revision “could have vetoed legislation on grounds of morality or prudence, not just irreconcilability with constitutional commands.”); Richard Albert, *The*

Modeling a federal proposal that was in part based on the New York Council, the Virginia Plan presented at the Constitutional Convention proposed in part:

Resd. that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of said Council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [] of the members of each branch.¹⁹⁷

The resolution was defeated after substantial debate.¹⁹⁸ In *The Federalist No. 73*, Alexander Hamilton provides “two strong reasons” for why the resolution was defeated.¹⁹⁹ First was that “judges, who are to be the interpreters of the law, might receive an improper bias, from having given a previous opinion in their revisionary capacities.”²⁰⁰ Second was that “by being often associated with the Executive, [judges] might be induced to embark too far in the political views of that magistrate, and thus a dangerous combination might by degrees be cemented between the executive and judiciary departments.”²⁰¹

Hamilton’s second concern might have been addressed by an alternative framework proposed by Madison, which was itself the subject of much debate.²⁰² In the end the Framers settled on an

Constitutional Imbalance, 37 N.M. L. REV. 1, 22 (2007) (noting that the Council of Revision had “a very broad power of review”).

197. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

198. See *The Council of Revision*, *supra* note 194, at 249–57.

199. THE FEDERALIST NO. 73, at 445 (Alexander Hamilton) (Clinton Rossiter ed., 2003); see also Albert, *supra* note 196, at 25 (listing “general objections” raised against the Council of Revision).

200. THE FEDERALIST NO. 73, *supra* note 199, at 445.

201. *Id.*

202. Pursuant to Madison’s proposal, bills would have been separately sent to the President and judiciary; either branch could then independently exercise a political

Article I, Section 7 framework within which the President could exercise a “qualified” veto overridable by a super-majority in Congress.²⁰³ Missing from that Article I, Section 7 framework, of course, was any vesting of a veto power in the federal judiciary.

This constitutional history illustrates what textualists already assume: enacted legal text is the end result of various political bargains.²⁰⁴ As the Supreme Court has acknowledged, “[t]he procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself.”²⁰⁵ Indeed, “[f]amiliar historical materials provide abundant support for the conclusion that the power to enact statutes may only ‘be exercised in accord with a single, finely wrought and exhaustively considered, procedure.’”²⁰⁶ Respecting—even if not fully understanding—the constitutional bargains that resulted in Article I, Section 7’s text requires textualists to reject the unenumerated political veto called for by the current and strengthened forms of the major questions doctrine.

In rejecting the major questions doctrine’s political veto, textualists are on sound precedential footing. Consider the fate of the “one-house” veto examined in *INS v. Chadha*.²⁰⁷ In *Chadha*, Congress had granted the Attorney General the discretion to determine whether an otherwise removable alien could remain in the United

veto power. See 2 FARRAND’S RECORDS, *supra* note 197, at 80. Presumably referring to the similarity between Madison’s proposal and the Virginia Plan’s already-rejected proposal for a council of revision, Elbridge Gerry argued that Madison’s proposal “comes to the same thing with what has been already negated.” *Id.* at 298. Charles Pinckney similarly opposed Madison’s proposal, arguing that it would lead to “the interference of the Judges in the Legislative business” by “involv[ing] them in parties” and “giv[ing] a previous tincture to their opinions.” *Id.* Perhaps unsurprisingly, then, Madison’s proposal was rejected. The *Council of Revision*, *supra* note 194, at 257.

203. See U.S. CONST. art I, § 7, cl. 2; THE FEDERALIST NO. 73, *supra* note 199, at 444.

204. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 59–60 n.237 (2001) (“[T]he debates concerning the Council of Revision” are not citable as “authoritative evidence of the Founders’ ‘intent,’” but “are relevant precisely because their premises fit tightly with inferences that reasonably emerge from the constitutional structure itself.”).

205. *Clinton v. City of New York*, 524 U.S. 417, 439 (1998).

206. *Id.* at 439–40 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

207. 462 U.S. 919 (1983).

States.²⁰⁸ Wishing to retain some influence over the Attorney General's exercise of that discretion, the relevant statute purported to reserve for each house of Congress the authority to independently overrule the Attorney General's determination.²⁰⁹ The Court referred to that power as a "veto," and concluded that it unconstitutionally empowered an individual house of Congress to exercise authority that Article I, Section 7 vested in the bicameral legislature.²¹⁰

Consider also the "line-item" veto held unconstitutional in *Clinton v. City of New York*.²¹¹ The President's constitutional veto is thought to be an all-or-nothing authority in that it only permits the President to accept or reject entire bills.²¹² But in *Clinton*, Congress had sought to provide the President with the statutory authority to veto particular portions of bills.²¹³ The Court examined the "important differences between" that statutory authority and "the President's 'return' of a bill pursuant to [the veto process outlined in] Article I, § 7."²¹⁴ In considering whether Congress could grant the President the statutory authority to veto portions of bills, the

208. *See id.* at 923–24.

209. *See id.* at 925.

210. *See id.* at 951–59.

211. *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

212. *See* U.S. CONST. art. I, § 7 ("Every bill . . . shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . .").

213. *See id.* at 436. Some scholars have critiqued *Clinton* for focusing on Article I, Section 7 instead of the nondelegation doctrine. *See, e.g.,* Lawson, *supra* note 33, at 389 ("Under the Act [at issue in *Clinton*], the President signs the entire bill into law, but the effective dates of certain portions of the law are made contingent on subsequent presidential action. The question is whether the President's authority to determine effective dates crosses the line from execution to legislation. That has nothing to do with the procedures in Article I, Section 7 and everything to do with the nondelegation doctrine."); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 285–86, 290 (2001) (noting "the Court did not address whether the Act violated the nondelegation doctrine" despite that question being "obvious," and arguing "[t]he central problem with the Court's opinion is its failure to justify applying a stricter standard to the delegation of cancellation authority than to other delegations to the executive.>").

214. *Clinton*, 524 U.S. at 439.

Court explained that there were “powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition.”²¹⁵ Quoting *Chadha*, the Court concluded that the line-item veto was “not the product of the ‘finely wrought’ procedure that the Framers designed.”²¹⁶ Like in *Chadha* and *Clinton*, where the Court rejected two novel veto powers not referred to in Article I, Section 7, textualists should reject the political veto power purportedly vested in courts by the current and strengthened forms of the major questions doctrine.

3. Supreme Nature

As explained above, textualists should reject the current and strengthened forms of the major questions doctrine for providing courts with a political veto power. But the “supreme” nature of that political veto should doubly trouble textualists. Both the current and strengthened forms of the major questions doctrine purport to provide the judiciary with a supreme political veto, although each form of the doctrine presents textualists with distinct objections.

The veto provided to courts in the current major questions doctrine is supreme in the sense that it definitively withholds legal validity from implicit delegations of major authority. Consider a variation of the Widget X hypothetical mentioned above.²¹⁷ Assume that after the Court ruled that regulating Widget X involved a question of major economic and political significance, Congress expressed a conflicting view by amending the relevant statute to provide that “regulating Widget X is an issue of non-major political and economic significance.” Were Agency A to issue a new Widget X rule and were litigation to follow, the Court could invoke the current form of the major questions doctrine to refuse to credit Congress’s majorness determination. More concretely, the Court could point to its own identification of the Widget X decision as being major, and hold that Congress cannot delegate the authority to decide if Widget X will be regulated by Agency A—even if Congress

215. *Id.*

216. *Id.* at 440.

217. See *supra* Part II.C.2.

disagreed with the Court as to whether that decision was of major political importance. Unlike a presidential veto, which can be overridden by a supermajority in Congress,²¹⁸ the Court's declaration that a particular question demands explicit legislative language could never be challenged.

The supreme nature of this judicial veto power is even more obvious in a strengthened form of the major questions doctrine. To best see how, consider one last variation of the Widget X example. Assume that after the Court initially ruled that regulating Widget X involved a question of major economic and political significance, Congress made two amendments to the relevant statute: (1) an amendment stating that "regulating Widget X is an issue of non-major political and economic significance"; and (2) an amendment stating that "even if the decision to regulate Widget X were of major political and economic significance, Agency A is hereby delegated the authority to decide whether Widget X will be regulated." Here the Court could invoke the strengthened form of the major questions doctrine to again ignore Congress's determinations. The Court could forever ban Congress from delegating to Agency A the authority to decide if Widget X should be regulated—*even if* Congress expressed its view that the authority involved answering only a non-major question, and *even if* Congress made the delegation explicit. The only way Congress could ever delegate such authority in the future would be if the Supreme Court, acting as what could only be described as a super-legislature, changed its own political calculation and declared the question at hand to no longer be major. For the textualist who takes the Article I, Section 7 process seriously, the strengthened major questions doctrine's supreme, unenumerated veto power—which purports to be stronger than the President's qualified, enumerated veto power—must be rejected out of hand.

218. See U.S. CONST. art I, § 7, cl. 2. Even the veto exercised by the rejected Council of Revision was inferior in the sense that it could be overridden by Congress. See Fallon, *supra* note 196, at 958 & n.69 (citing 1 FARRAND'S RECORDS, *supra* note 197, at 21); Albert, *supra* note 196, at 22 (citing N.Y. CONST. of 1777, art. III).

III. PRE-DECISIONAL CONSIDERATIONS OF IMPORTANCE

For the reasons outlined in Part II, textualists should reject the major questions doctrine—including what the doctrine is said to be, what the doctrine actually does in practice, and what the doctrine might soon become. But textualists need not be ignorant of the fact that some cases raise more important policy questions than others. To the contrary, judicial considerations of “importance” are statutorily permissible in at least two pre-decisional contexts.

First, the Supreme Court may consider whether a case presents an “important” question when the Court considers adding a case to its discretionary docket.²¹⁹ Second, federal courts of appeals may consider a case’s “importance” when considering whether the case is appropriate for en banc review.²²⁰ Because the exercise of discretion in those pre-decisional contexts has been implicitly approved by Congress, those textualist jurists who wish to limit the nondelegation doctrine to “major” questions may in part do so by selecting cases that present “important” questions in the certiorari and en banc processes.²²¹ In exercising such discretion, the Supreme Court and en banc courts could largely limit their nondelegation holdings to those cases raising “important” questions.

219. SUP. CT. R. 10(c).

220. FED R. APP. P. 35(a)(2).

221. The term “in part” is used because there may be instances where courts may nonetheless deem it appropriate to grant certiorari or en banc review in cases raising non-important nondelegation questions. For example, a case might raise an important issue unrelated to the nondelegation question in addition to raising a non-important question related to the nondelegation doctrine. While courts may sometimes limit their review to one issue at the exclusion of others, such limited review is not always appropriate or permissible. Moreover, the term “in part” is particularly appropriate in regard to courts of appeals, which more frequently decide cases through three-judge panels than through en banc sittings. Because three-judge panels do not typically have any discretion in selecting the cases they decide, those panels cannot engage in the same sort of “importance” inquiry applicable to the en banc selection process. Finally, “in part” is used to recognize those categories of cases the Supreme Court remains required to consider. *See, e.g.*, 28 U.S.C § 1253 (2018) (direct appeals from decisions of three-judge courts).

A. *Clarifying Points*

Four clarifying points should be made before turning to address how textualist jurists may consider importance in pre-decisional contexts. The first clarifying point is that this Article perceives no meaningful substantive difference between considerations of “importance” and considerations of “majorness.” Given as much, this Article must clarify why textualists can engage in the first inquiry but not the latter. This Article offers two reasons.

First, as further outlined below, there is clear (presumptively constitutional) statutory authority for courts to consider “importance” in certain pre-decisional contexts.²²² The judicially created major questions doctrine, by comparison, provides no clear textual foundation for a court’s consideration of “majorness” when deciding cases. A second reason is that, in considering “importance,” courts do not purport to be exercising a supreme authority. Congress could enact new statutes changing how the Supreme Court selects the cases it will hear, and changing how the courts of appeals select

222. The phrase “presumptively constitutional” is used to acknowledge potential constitutional issues, not addressed here, regarding the judiciary’s ability to draft its own court rules and select the cases it will hear. See Edward H. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After The Judges Bill*, 100 COLUM. L. REV. 1643, 1713–30 (2000) (examining the relationship of discretionary review with the classic justification for judicial review and the rule of law); Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1408 (2017) (listing the Rules Enabling Act as an example statute that “seem[s] to grant courts wide discretion and invite or require them to engage in substantial lawmaking”); Josh Blackman, *Does the Rules Enabling Act violate the Non-Delegation Doctrine?*, JOSH BLACKMAN’S BLOG (Jan. 28, 2015), <http://joshblackman.com/blog/2015/01/28/does-the-rules-enabling-act-violate-the-non-delegation-doctrine/> [https://perma.cc/H3VU-NWE4] (“Is there much of an intelligible principle [in the Rules Enabling Act] about what kind of rules are to be prescribed for procedure and evidence? Other than the adjective ‘general,’ I think the answer is no.”); Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221, 225–51 (2016) (examining the relationship between a court’s mode of decisionmaking, docket management, and sense of institutional role).

The narrow point here is only that, from the textualist’s perspective, pre-decisional considerations of “importance” are less objectionable than those of “majorness.”

cases for en banc review.²²³ For now, however, Congress has granted courts the authority to exercise certain discretion over their dockets, making the judicial exercise of such discretion less objectionable from the textualist's perspective.

A second clarifying point is that, although courts may exercise political discretion in the pre-decisional contexts described below, such discretion must be distinguished from partisan behavior.²²⁴ For purposes of this Article, "political discretion" means the discretion to draw lines based on policy reasons (*e.g.*, the XYZ Act affects a lot of people), not partisan reasons (*e.g.*, the XYZ Act is good for a particular political party).

The third clarifying point, related to the second, is that courts should be cognizant of the risk that judicial exercises of political discretion may be perceived as being partisan. Avoiding even the appearance of engaging in partisan behavior is important for the judiciary, a branch particularly reliant on being perceived to be legitimate. As Alexander Hamilton explained, the judiciary has "neither force nor will, but merely judgment."²²⁵ To meaningfully exercise that "judgment" without the assistance of the "sword" or "purse," the judiciary's rulings must be (and be perceived to be) non-partisan.²²⁶

The fourth clarifying point is that this Article assumes without deciding that the nondelegation doctrine could be *successfully* revived. That is to say, this Article assumes that the nondelegation doctrine could be revived in a way that does not require courts to

223. Melody Wang, *Don't Let the Court Choose Its Cases*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html> [<https://perma.cc/JW6V-U7RX>] ("Just as Congress granted this power, so can Congress take it away.").

224. See RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT 128 (2018) ("[L]egitimacy in judicial decision making therefore requires the Justices to rely only on reasons that reasonable citizens would acknowledge as enjoying the status of reasons—as distinguished from idiosyncratic, partisan, or narrowly theistic concerns—even if they might reach different ultimate judgments.").

225. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

226. *Id.* at 466.

exercise political discretion when deciding cases.²²⁷ Developing such a revived doctrine would require much more thought than can be provided here. The discussion which follows speaks only to how a successfully revived nondelegation doctrine could at least be partially limited to “important” (*i.e.*, major) questions without upsetting the entire endeavor by requiring courts to decide “majorness” when actually deciding cases.

B. Discretionary Docket

Historically, the Supreme Court was obliged to hear many cases.²²⁸ Over the last two hundred years, however, Congress has gradually granted the Supreme Court the authority to exercise more discretion in selecting which cases it will hear.²²⁹ In accordance with those congressional grants of discretion, today the Rules of the Supreme Court “indicate the character of the reasons the Court considers” when granting petitions for a writ of certiorari.²³⁰ The rules provide that the Court is more likely to grant a petition if the underlying case involves an “important” federal question.²³¹

The precise meaning of “important” is left undefined by the Rules of the Supreme Court.²³² But case law establishes that, circularly, a question is “important” when “at least four members of the Court”

227. See *supra* Part I.A (noting that the lack of a judicially manageable standard is often attributed as a reason for the nondelegation doctrine’s underutilization).

228. See Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 710 (2018) (“For the first century of its existence, the Supreme Court had no authority to choose what cases it would decide.”); S. Sidney Ulmer, *Revising the Jurisdiction of the Supreme Court: Mere Administrative Reform or Substantive Policy Change*, 58 MINN. L. REV. 121, 124–26 (1973) (providing a historical account of obligatory jurisdiction).

229. For an account of the various historical statutes granting such discretion, see Epps & Ortman, *supra* note 228, at 710–11.

230. SUP. CT. R. 10(c). The Court is clear to note that its stated reasons are “neither controlling nor fully measuring the Court’s discretion.” *Id.*

231. *Id.*; Coenen & Davis, *supra* note 10, at 795 n.86 (“[T]he Court’s certiorari practice, after all, directs it to consider a case’s national importance.”).

232. See, e.g., *United States v. Muniz*, 374 U.S. 150, 151 (1963) (“[T]he decision below involves an important question in the construction of the Federal Tort Claims Act.”); *Hollingsworth v. Perry*, 558 U.S. 183, 203 (2010) (Breyer, J., dissenting) (“The technical validity of the procedures followed below does not implicate an open ‘important question of federal law.’” (quoting SUP. CT. R. 10(c))).

deem the question “important.”²³³ And the broad judicial discretion associated with certiorari is even more apparent where parties petition the Supreme Court before a lower federal court has issued its final ruling. In those extraordinary instances, a petition will be “granted only upon a showing that the case is of such imperative public *importance* as to justify deviation from normal appellate practice and to require immediate determination in [the Supreme] Court.”²³⁴

Textualists and non-textualists alike would no doubt call on the Court to prudently exercise its discretion in the certiorari process. It is doubtful, however, that an objective reader of the relevant certiorari statutes understands those statutes as requiring the Court to select cases by figuratively throwing darts at the wall.²³⁵ Indeed, given the scope of the Court’s influence, some political (not partisan) awareness may be helpful.

If the Court could decide an issue of law by granting one of two petitions—the first of which concerns an area of law that the political branches are actively reshaping, and the second of which concerns an area of the law that is relatively stable—it might be preferable for the Court to decide the case by accepting the second petition. Doing so would allow the Court to decide the relevant legal question without directly interfering with the active work of the political branches. On the other hand, some might argue that the Court should accept the first petition, on the theory that the extra political attention could attract the interest of premier legal advocates or alert the political branches to a legal requirement that might as well be addressed through the political process. Whether one would argue in favor of the Court granting the first or second petition is irrelevant. The point is only that the relevant statutes make

233. *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 74 (1955).

234. SUP. CT. R. 11 (emphasis added); see also BICKEL, *supra* note 1, at 126 (“The certiorari jurisdiction is professedly discretionary and based on few articulated standards.”).

235. For a proposal that could take power out of the hands of the Court, see Epps & Ortman, *supra* note 228, at 707 (“[W]e propose that the Court—or Congress, by statute—supplement the traditional certiorari docket with a small number of cases randomly selected from final judgments of the circuit court.”).

it such that textualist Justices (like their non-textualist colleagues) *may* take such considerations into account when considering petitions for writs of certiorari.

By considering importance in the certiorari context, the Court could shape its docket to in large part address only those nondelegation cases raising “important” (*i.e.*, major) questions. In doing so the Court could alert Congress to similar nondelegation issues presented in other statutes. Put differently: by holding one or two carefully selected statutes to be unconstitutional on nondelegation grounds, the Court could alert Congress to the need to correct issues of nondelegation more broadly. As Justice Scalia explained in the wake of the *Benzene* case, “[E]ven those who do not relish the prospect of regular judicial enforcement of the . . . [non]delegation doctrine might well support the Court’s making an example of one—just one—of the many enactments that appear to violate the principle. The educational effect on Congress might well be substantial.”²³⁶

The certiorari process provides the Court with an opportunity to engage in the type of limited review to which Justice Scalia referred. Encouraging Congress to address constitutional questions may sound disagreeable to modern ears accustomed to the constitutional Muzak that is judicial supremacy. But the idea is far from revolutionary: “In earlier times heated constitutional debate did take place at the congressional level.”²³⁷

C. *En Banc Review*

Although federal courts of appeals do not exercise much discretion in deciding which cases make up their general dockets, the courts of appeals do have significant discretion in selecting cases for en banc consideration. As background, federal courts of appeals typically decide cases through randomly assembled three-judge

236. Scalia, *supra* note 34, at 28.

237. *Id.*

panels.²³⁸ Although those panels have authority to rule on behalf of the entire court, cases are sometimes heard or (more commonly) reheard by the entire en banc court.²³⁹ Federal Rule of Appellate Procedure 35 permits appellate judges to order en banc review where “the proceeding involves a question of exceptional *importance*.”²⁴⁰ Congress has given legal effect to that rule through the Rules Enabling Act—although the constitutionality of Congress’s outsourcing of rule drafting to the courts could itself be questioned on non-delegation grounds.²⁴¹

Even if constitutional objections can be lodged against the Rules Enabling Act, the narrow point here is that Congress’s having given legal effect to Rule 35 makes the judicial exercise in discretion called for in Rule 35 less objectionable to textualists than the discretion exercised pursuant to the judge-made major questions doctrine. For now it suffices to say that, in determining what constitutes “a question of exceptional importance,” Congress has granted to the courts of appeals the authority to exercise broad discretion.²⁴² Indeed, a 1998 amendment to Rule 35 changed language speaking to “when

238. See Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 66 (2017) (“It is common knowledge that the federal courts of appeals typically decide cases in panels of three judges.”).

239. See FED. R. APP. P. 35(a) (referring to “hearing or rehearing”); Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 2001, 2004 (2014).

240. FED. R. APP. P. 35(a)(2) (emphasis added). In rare instances, judges may call for en banc review before a panel has considered the merits in the first instance. See, e.g., Lorelei Laird, *Hawaii asks to go straight to 9th Circuit en banc review of Trump travel ban preliminary injunction*, ABA J. (Apr. 12, 2017, 5:48 PM CDT), https://www.abajournal.com/news/article/hawaii_asks_to_skip_straight_to_en_banc_review_of_trump_travel_ban_prelimin [https://perma.cc/K74F-CE6F] (describing “the usual procedure, in which a three-judge panel makes the initial decision and the parties have the option to appeal to the full court”).

241. See 28 U.S.C. § 2071 (2018) (“The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business.”); see also A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 657 n.9 (2019) (explaining the process through which Congress oversees the judiciary’s rule creation process). But see Blackman, *supra* note 222 (questioning the constitutionality of the Rules Enabling Act).

242. See Sadinsky, *supra* note 239, at 2018–20 (describing various courts’ considerations of “importance”).

hearing or rehearing in banc *will* be ordered” to instead speak to “when hearing or rehearing en banc *may* be ordered.”²⁴³ That amendment highlights the discretionary nature associated with ordering en banc review, pursuant to which courts of appeals may exercise a form of discretion similar to that exercised by the Supreme Court in the certiorari process.²⁴⁴ By exercising such discretion, en banc courts could largely limit their nondelegation holdings to those statutes that the courts determine to present “important” (*i.e.*, major) questions.

CONCLUSION

A threshold question relating to the major questions doctrine has yet to be answered: Who determines majorness? One possible answer is that Congress decides what is major. Indeed, that answer appears to be an implicit presumption underlying the current major questions doctrine, pursuant to which courts are understood as determining whether Congress has delegated authority. But if Congress determines majorness, textualists should reject the major questions doctrine as calling on courts to complete a task that is ordinarily futile and statutorily suspect.

A second possible answer to the threshold question is that the courts determine majorness for themselves. That answer best describes how the major questions doctrine currently works in practice. The answer also describes how a strengthened form of the doctrine might be used in the future as part of a revived nondelegation doctrine. But if courts are to determine majorness for themselves, textualists should reject the doctrine as purporting to provide courts with a supreme political veto power upsetting the exclusive

243. FED. R. APP. P. 35 advisory committee's note to 1998 amendment (emphasis in original) (capitalization altered).

244. The twelve geographic circuit courts of appeals each have internal operating procedures relating to en banc procedures. *See, e.g.*, 1ST CIR. R. 35(a) (referring to FED. R. APP. P. 35(a), which states that en banc review is not favored and ordinarily will not be ordered unless “the proceeding involves a question of exceptional importance”); 11TH CIR. R. 35-3 (en banc consideration is intended “to bring to the attention of the entire court a precedent-setting error of exceptional importance”).

lawmaking procedures outlined in Article I, Section 7.

For textualists interested in reviving the nondelegation doctrine, then, strengthening the major questions doctrine is the wrong way forward. Instead of burdening a revived nondelegation doctrine with the baggage accompanying the judicially crafted major questions doctrine, textualists wishing to limit the application of the nondelegation doctrine to “major” questions may find themselves more comfortable exercising the grants of discretion afforded to courts in the certiorari and en banc processes. By exercising such discretion, en banc courts could largely limit their nondelegation holdings to those statutes that the courts determine to present “important” (*i.e.*, major) questions.

BOOK REVIEW

REFLEXIVE FEDERALISM

MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE.
Edited by Jonathan H. Adler. Brookings Inst. Press (2020).

PAUL J. LARKIN, JR.*

State and federal law once clearly and uniformly treated marijuana as contraband.¹ The current legal status of that drug nationwide, however, is anything but clear and uniform. The federal government still outlaws cannabis altogether.² Since 1996, however, more than thirty states have decided to permit the regulated sale and use of marijuana for medical and recreational purposes.³ The

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In the interest of full disclosure, I was one of the lawyers who represented the United States in a case cited below: *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993).

1. RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* 51 (Lindesmith Ctr. 1999) (1974).

2. *See, e.g.*, 21 U.S.C. § 812 (2018).

3. Since 1996, thirty-six states and the District of Columbia have revised their laws to permit medicinal use of cannabis. *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 10, 2020), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/8FTQ-THGR>]; Jeremy Berke, Shayanne Gal & Yeji Jesse Lee, *All the states where marijuana is legal—and 5 more that just voted to legalize it in November*, BUS. INSIDER (Jan. 7, 2021), <https://www.businessinsider.com/legal-mariju->

result is this: Three decades ago, the marijuana laws were clear to everyone and the same everywhere, but to some people they were misguided. Today, those laws are anything but clear to anyone and differ widely, but to some people they are still misguided—albeit to different people for different reasons.

Professor Jonathan Adler's recent book *Marijuana Federalism: Uncle Sam and Mary Jane*⁴ is a valuable and timely addition to the discussion of the two subjects conjoined in its title.⁵ *Marijuana Federalism* is a collection of essays by numerous scholars who approach from different perspectives—legal, policy, and otherwise—the issue of whether cannabis should be regulated by the federal or state governments.⁶ The book discusses the legal and practical problems that the incongruity between federal and state law causes the public

ana-states-2018-1?r=US&IR=T [https://perma.cc/59SY-HST4]. There is considerable regulatory variation among those states; see, e.g., DRUG POLICY AND THE PUBLIC GOOD 245–54 (Thomas Babor et al., ed., 2d ed. 2018); Rosalie Liccardo Pacula et al., *Words Can Be Deceiving: A Review of Variation among Legally Effective Medical Marijuana Laws in the United States*, 7 J. DRUG POL'Y ANALYSIS 1 (2014).

4. MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan H. Adler ed., 2020) [hereinafter ADLER].

5. For some earlier stabs at the subject, see Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (2015); Brannon P. Denning, *Vertical Federalism, Horizontal Federalism, and Legal Obstacles to State Marijuana Legalization Measures*, 65 CASE W. RES. L. REV. 567 (2015); Brianne J. Gorod, *Marijuana Legalization and Horizontal Federalism*, 50 U.C. DAVIS L. REV. 595 (2016); Todd Grabarsky, *Conflicting Federal and State Marijuana Policies: A Threat to Cooperative Federalism*, 116 W. VA. L. REV. 1 (2013); Mark A.R. Kleiman, *Cooperative Enforcement Agreements and Policy Waivers: New Options for Federal Accommodation to State-Level Cannabis Legalization*, 6 J. DRUG POL'Y ANALYSIS 1 (2013); Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise?*, 91 OR. L. REV. 1029 (2013).

6. Jonathan H. Adler, *Our Federalism on Drugs*, in ADLER, *supra* note 4, at 1–13; Julie Andersen Hill, *Banks and the Marijuana Industry*, in ADLER, *supra* note 4, at 139–54; William Baude, *The Contingent Federal Power to Regulate Marijuana*, in ADLER, *supra* note 4, at 171–84; Angela Dills et al., *The Effect of State Marijuana Legalizations*, in ADLER, *supra* note 4, at 35–84; John Hudak & Christine Stenglein, *Public Opinion and America's Experimentation with Cannabis Reform*, in ADLER, *supra* note 4, at 15–34; Robert A. Mikos, *Murphy's Mistake, and How to Fix It*, in ADLER, *supra* note 4, at 103–22; Zachary S. Price, *Federal Nonenforcement: A Dubious Precedent*, in ADLER, *supra* note 4, at 123–38; Cassandra Burke Robertson, *Legal Advice for Marijuana Business Entities*, in ADLER, *supra* note 4, at 155–70; Ernest A. Young, *The Smoke Next Time: Nullification, Commandeering, and the Future of Marijuana Regulation*, in ADLER, *supra* note 4, at 85–102.

and businesses in the cannabis industry, and it assumes the burden of trying to make sense of the law by encouraging us to rethink it entirely. Its virtue lies, not only in its content (which is excellent), but also in its approach (ditto). *Marijuana Federalism* focuses on the implications of an unusual late twentieth and early twenty-first century phenomenon: namely, the growth of distinct and antagonistic federal and state approaches to the regulation of the drug botanically known as cannabis but popularly called marijuana.

The issues raised by the intersection of those two subjects, along with the excellent treatment given them by the contributing essayists, are the primary contributions of *Marijuana Federalism* to contemporary scholarship. After all, the Framers were well aware of (and persuaded by) the potential benefits of a federalist system,⁷ cannabis has been around for thousands of years,⁸ and the number of studies, books, and articles on marijuana policy or federalism is enormous.⁹ What is novel is the recent and unprecedented decision by a majority of states to abandon the approach that they and the federal government had pursued in common for more than eighty

7. See, e.g., *New York v. United States*, 505 U.S. 144, 155–66 (1992); ALISON L. LA-CROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2011).

8. BRITISH MED. ASS'N, *THERAPEUTIC USES OF CANNABIS* 7 (1997); Sunil K. Aggarwal et al., *Medicinal use of Cannabis in the United States: Historical perspectives, current trends, and future directions*, 5 J. OPIOID MGMT. 153, 157 (2009); LESLIE L. IVERSEN, *THE SCIENCE OF MARIJUANA*, 12–13, 17–18, 21–24, 116–121 (2d ed. 2008); Solomon H. Snyder, *Foreword to IVERSEN, supra*.

9. For discussions of marijuana policy, see, for example, WILLIAM J. BENNETT & ROBERT A. WHITE, *GOING TO POT: WHY THE RUSH TO LEGALIZE MARIJUANA IS HARMING AMERICA* (2015); *POT POLITICS: MARIJUANA AND THE COSTS OF PROHIBITION* (Mitch Earleywine ed., 2006); MARK A. R. KLEIMAN, *MARIJUANA: COSTS OF ABUSE, COSTS OF CONTROL* (1989); ROBIN ROOM ET AL., *CANNABIS POLICY: MOVING BEYOND STALEMATE* (2010); *CONTEMPORARY HEALTH ISSUES ON MARIJUANA* (Kevin A. Sabet & Ken C. Winters eds., 2018); see generally Paul J. Larkin, Jr., *Introduction to a Debate: Marijuana: "Legalize, Decriminalize, or Leave the Status Quo in Place?"*, 23 BERKELEY J. CRIM. L. 73 (2018) (collecting authorities). For discussions of federalism, see, for example, SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (Reprint. Ed. 1998); *KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM* (Martha Derthick ed., 2001); ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* (2001); EDWARD A. PURCELL, JR., *ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY* (2007); JOSEPH F. ZIMMERMAN, *CONTEMPORARY AMERICAN FEDERALISM: THE GROWTH OF NATIONAL POWER* (2d ed. 2009).

years about how to regulate cannabis. How that development happened; what significance it has for federalism, drug policy, and the law; and what step forward is best—these questions raise important public policy issues. *Marijuana Federalism* brings together an impressive array of scholars to contribute to the debate over these issues.

The importance of having a free and intelligent debate over subjects like cannabis legalization cannot be said or emphasized enough. Too often today we see efforts made—ones that, lamentably, are sometimes successful—to prevent or shut down free discussion of both sides of a disputed issue. The one discussed in *Marijuana Federalism* deserves—indeed, needs—to be fully aired. For too long now, Congress has refused to address the conflict between federal and state law, preferring instead to hope that “this cup [will] pass from me.”¹⁰ I disagree with several of the arguments made by the contributors to *Marijuana Federalism*, and I believe that the book omits an important part of the federalism debate: namely, whether there are certain scientific or technical subject matters that should be in the hands of the federal government because only it has experts with the education, training, experience, and assets needed to best address a problem of that type. Nonetheless, I applaud the editor’s and essayists’ willingness to participate in the debate. Like *Marijuana Federalism*, this Book Review hopes to move that discussion forward.

The essays focus on different aspects of the issue. Rather than address each one seriatim, this Book Review will discuss them in the course of explaining where we are, the problems that we have, the solutions that *Marijuana Federalism* offers, and a proposal of my own. Accordingly, this Book Review is organized as follows: Part I will summarize the state of the law governing cannabis policy that has resulted from the decisions of a majority of states to go their own way. As Part II explains, the recent but widespread and now entrenched conflict between federal and state approaches to cannabis policy is a problem that only Congress can—and must—resolve.

10. *Matthew 26:39* (King James).

Part III will analyze the solutions that contributors to *Marijuana Federalism* have offered to rationalize the state of the law. Part IV will discuss an alternative approach that could supplement the ones discussed in the book. (Spoiler alert: Part IV will also explain the significance of the title of this review.¹¹)

I. THE CURRENT DISARRAY IN THE LAW

For most of the twentieth century, the federal government and all fifty states treated marijuana as contraband.¹² Beginning in the 1960s, however, our historic policy came under challenge. More and more college-age students experimented with marijuana and found it to be just as much an enjoyable intoxicant and social lubricant as alcohol was to their parents' generation.¹³ Over time, marijuana not only lost its taboo status, but also became a political symbol. On college campuses, openly smoking marijuana, like publicly burning draft cards, came to symbolize a generation rebelling against the Vietnam War, the status quo, and all things square.¹⁴

The appropriate treatment of marijuana was more than a subject of late-night dormitory raillery between buzzed collegians. Considerable public controversy arose regarding how to treat the drug.¹⁵ Some maintained that marijuana should remain outlawed because (among other reasons) it was a "gateway" drug—that is, one that progressively leads to the use of even more dangerous ones, such

11. If you cannot wait, read the last four paragraphs immediately preceding the Conclusion.

12. For a history of the law's treatment of marijuana, see BONNIE & WHITEBREAD, *supra* note 1.

13. See, e.g., Herbert J. Cross & Randall R. Kleinhesselink, *The Impact of the 1960s on Adolescence*, 5 J. EARLY ADOLESCENCE 517 (1985).

14. See DANIELLE DAVENPORT, CANNABIS INC.: THE JOURNEY FROM COMPASSION TO INDUSTRY CONSOLIDATION 52 (2019) ("It wasn't long before these two grassroots movements became indissolubly linked: Marijuana activism was subsumed into the antiwar movement, and the drug was omnipresent at rallies and antiwar protests across the country. If it wasn't already, cannabis had become fiercely political.").

15. For recent accounts of that period and later developments, see JONATHAN P. CAULKINS ET AL., MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW (2d ed. 2016); Dills et al., *supra* note 6, at 37–42.

as heroin. Others responded that marijuana should be legalized—that is, altogether removed from the penal code—or at least decriminalized—that is, treated as a minor infraction—on the ground that it was a relatively mild intoxicant and produced far less social harm than alcohol.¹⁶ Respected academics and commentators argued in favor of reconsidering our marijuana policy.¹⁷ Even a commission appointed by President Richard Nixon recommended that the nation reexamine its longstanding treatment of cannabis as a dangerous drug (a recommendation that he immediately rejected).¹⁸ Some states and locales even took a few steps to reduce the seriousness of marijuana crimes, such as treating the possession of small amounts of cannabis as the equivalent of a traffic offense.¹⁹ A policy that the states and federal government had endorsed for decades appeared to have a very uncertain future.

Federal law, however, endured and remained clear. No one could lawfully import, cultivate, sell, or own marijuana, and no physician

16. See Paul J. Larkin, Jr., *Medical or Recreational Marijuana and Drugged Driving*, 52 AM. CRIM. L. REV. 453, 461 n.30 (2015) (discussing “legalization” versus “decriminalization”).

17. For contemporary accounts of the debate by participants and observers, see U.K. HOME OFF., ADVISORY COMMITTEE ON DRUG DEPENDENCE, WOOTTON REP. (1968); E.R. BLOOMQUIST, MARIJUANA (1968); MARIJUANA (Erich Goode ed., 1969); LESTER GRINSPOON, MARIHUANA RECONSIDERED (1971); JOHN KAPLAN, MARIJUANA: THE NEW PROHIBITION (1970); HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 333 (1968) (“A clearer case of misapplication of the criminal sanction would be difficult to imagine.”); JOHN ROSEVEAR, POT: A HANDBOOK OF MARIHUANA (1967); MICHAEL SCHOFIELD, THE STRANGE CASE OF POT (1971); THE MARIHUANA PAPERS (David Solomon ed., 1968); Geoffrey Richard Wagner Smith, Note, *Possession of Marijuana in San Mateo County: Some Social Costs of Criminalization*, 22 STAN. L. REV. 101, 103 (1969) (“In the same week that the President of the United States declared an all-out war on marijuana smuggling, . . . the Wall Street Journal reported discussion in the business world on the potential profit in legalized marijuana.” (footnote omitted)).

18. See FIRST REP. OF THE NAT’L COMM’N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING (1972); JOHN GELUARDI, CANNABIZ: THE EXPLOSIVE RISE OF THE MEDICAL MARIJUANA INDUSTRY 121 (2010) (noting Nixon’s rejection).

19. See JONATHAN P. CAULKINS ET AL., RAND CORP., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 1 (2015) (“[I]n the 1970s, 12 states removed or substantially reduced criminal penalties for possession of small amounts of marijuana.” (footnote omitted)).

could prescribe it to treat any disease.²⁰ The principal federal law governing marijuana, the Controlled Substances Act of 1970, placed marijuana in the same category of drugs as (for example) heroin, ones considered dangerous, addictive, and unnecessary for treatment.²¹ Working separately or in task forces, federal, state, and local vice officers (or, to use the vernacular, “narcs”) investigated cannabis offenses. Successful prosecutions could result in lengthy terms of imprisonment.²² The federal (and state) courts consistently rejected claims that the parallel treatment of marijuana and heroin was arbitrary and unconstitutional.²³ In short, everyone knew that marijuana distribution and possession was verboten. Indeed, it was precisely that knowledge that made publicly smoking cannabis into an unmistakable symbol of political and social protest by members of the Baby Boomer Generation.

20. *See, e.g.*, 21 U.S.C. § 841 (2018). From 1978 to 1992, the FDA established a small-scale “Investigational New Drug Compassionate Access Program” that allowed “patients whose serious medical conditions could be relieved only by marijuana to apply for and receive marijuana from the federal government.” Mark Eddy, Cong. Research Serv., *Medical Marijuana: Review and Analysis of Federal and State Policies*, No. RL33211, at 8 (Apr. 2, 2010), <https://fas.org/sgp/crs/misc/RL33211.pdf> [<https://perma.cc/5F9S-PK9F>]. The program was not a clinical trial of marijuana’s effectiveness with an eye toward ultimate approval, and the government closed the program to new applicants in 1992. *Id.*

21. The CSA assigns drugs to one of five schedules according to their potential benefits and risks. *See* 21 U.S.C. §§ 812, 841 (2018).

22. *See, e.g.*, *Hutto v. Davis*, 454 U.S. 370, 371, 375 (1982) (forty years’ imprisonment for possessing less than nine ounces of marijuana); *Gonzalez v. Texas*, 323 S.W.2d 55, 55 (Tex. Crim. App. 1959) (twenty-five years’ imprisonment for marijuana possession).

23. *See, e.g.*, *United States v. Fogarty*, 692 F.2d 542, 547–48 (8th Cir. 1982); *United States v. Kiffer*, 477 F.2d 349, 352–57 (2d Cir. 1973); *United States v. Rodriguez-Camacho*, 468 F.2d 1220, 1221–22 (9th Cir. 1972); *United States v. Scales*, 464 F.2d 371, 373–76 (6th Cir. 1972); *State v. Kells*, 259 N.W.2d 19, 24 (Neb. 1977); *State v. Leins*, 234 N.W.2d 645, 645–48 (Iowa 1975); *State v. Donovan*, 344 A.2d 401, 405–06 (Me. 1975); *Blincoe v. State*, 204 S.E.2d 597, 598–600 (Ga. 1974); *State v. Tabory*, 196 S.E.2d 111, 112–13 (S.C. 1973); *State v. Parker*, 256 A.2d 159, 160 (N.H. 1969); *Commonwealth v. Leis*, 243 N.E. 2d 898, 901–05 (Mass. 1969); *People v. Stark*, 400 P.2d 923, 926–28 (Colo. 1965) (all rejecting various claims that federal or state bans on marijuana distribution or possession are unconstitutional); *cf. Crane v. Campbell*, 245 U.S. 304, 307–08 (1917) (ruling that there is no federal constitutional right to possess or use alcohol).

In 1996, California changed all that. It went from being the first state to prohibit the distribution of cannabis to being the first state to legalize its use. Voters enacted a statewide initiative—Proposition 215, also called the Compassionate Use Act—that became the nation’s first state-law based medical marijuana program.²⁴ The initiative authorized cannabis to be grown, sold, and used to treat various medical problems.²⁵ Since then, more than thirty other states have followed suit with their own programs.²⁶ In fact, eleven states (including California) and the District of Columbia have also modified their criminal codes to allow cannabis use for purely recreational purposes.²⁷ Although federal law still prohibits the medical or recreational use of marijuana, more than seventy percent of the states have gone their separate ways.²⁸

Congress has left the substance of federal law unchanged since 1996, so cannabis distribution can still land someone in federal prison. There are legal restrictions, however, on what the federal government can do to enforce federal law. Since 2014, Congress has regularly passed appropriations bills containing a rider prohibiting the U.S. Department of Justice from halting state efforts to implement medical marijuana programs.²⁹ The riders clearly do not pro-

24. 2 CAL. HEALTH & SAFETY CODE § 11362.5 (West 2019). For a summary of the background to and early implementation of Proposition 215, see GELUARDI, *supra* note 18, at 35–47.

25. Paul J. Larkin, Jr., *Reconsidering Federal Marijuana Regulation*, 18 OHIO ST. J. CRIM. L. 99, 103 n.16 (2020).

26. *Id.* at 106.

27. Wayne Hall & Michael Lynskey, *Assessing the Public Health Impacts of Legalizing Recreational Cannabis Use: The U.S. Experience*, 19 WORLD PSYCH. 179, 179 (2020).

28. Larkin, *supra* note 25, at 106; *supra* note 3.

29. See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014); Continuing Appropriations Act, 2016, Pub. L. No. 114-53, § 104, 129 Stat. 502, 506 (2015); Further Continuing Appropriations Act, 2016, Pub. L. No. 114-96, 129 Stat. 2193 (2015); Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015); Continuing Appropriations Act, 2017, Pub. L. No. 114-223, 130 Stat. 857, 908–20 (2016); Further Continuing Appropriations Act, 2017, Pub. L. No. 114-254, § 101, 130 Stat. 1005, 1005–06 (2016); H.J. Res. 99, Pub. L. No. 115-30, 131 Stat. 134 (2017); Consolidated Appropriations Act, 2017, Pub.

hibit all federal enforcement of the CSA's provisions outlawing marijuana distribution. Rather, they forbid the expenditure of appropriated funds only to "prevent" states from "implementing" state medical marijuana programs,³⁰ and, since violation of the riders is a felony, the courts must read their terms strictly.³¹ Nonetheless,

L. No. 115-31, 131 Stat. 135, 228 (2017); Continuing Appropriations Act, 2018, Pub. L. No. 115-56, §§ 103–04, 131 Stat. 1139, 1139–47 (2017); Further Continuing Appropriations Act, 2018, Pub. L. No. 115-90, 131 Stat. 1280 (2017); Further Additional Continuing Appropriations Act, 2018, Pub. L. No. 115-96, 131 Stat. 2044 (2017); Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, 132 Stat. 29 (2018); Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2018, Pub. L. No. 115-141, § 538, 132 Stat. 351, 444–45 (2018); Continuing Appropriations Act, 2019, Pub. L. No. 115-245, §§ 101–103, 312 Stat. 3123, 3123 (2018); H.J. Res. 143, Pub. L. No. 115-298, 132 Stat. 4382 (2018); Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, § 101, 113 Stat. 10, 10 (2019); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 91, 138 (2019); Continuing Appropriations Act, 2020, Pub. L. No. 116-59, § 101, 113 Stat. 1093, 1093–94 (2019); Further Continuing Appropriations Act, 2020, Pub. L. No. 116-69, § 101, 133 Stat. 1134 (2019); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2020, Pub. L. No. 116-93, § 531, 133 Stat. 2385, 2433 (2019); Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 113 Stat. 2534 (2019).

30. See Consolidated and Further Continuing Appropriations Act, 2015, *supra* note 29, at § 538.

31. A government official who violates an appropriations law limitation can be criminally prosecuted for his actions under the Antideficiency Act. See 31 U.S.C. § 1341(a)(1)(A) (2018) ("An officer or employee of the United States Government or of the District of Columbia government may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation . . ."); 31 U.S.C. § 1350 (2018) ("An officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating section 1341(a) or 1342 of this title shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both."). The appropriations rider has the effect of a criminal law, which means it cannot be read broadly and any doubt as to its meaning must be resolved by application of the Rule of Lenity, even in a civil case. See, e.g., *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) (holding that "the rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them"); *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 n.8 (2004) (explaining that if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context"); *Scheidler v. Nat'l Org.*

whether to avoid breaking the law or for other (largely practical) reasons, the Justice Department officials have not aggressively enforced the CSA provisions prohibiting marijuana distribution since the riders went into effect.³² The result is that CSA's provisions dealing with cannabis are effectively on standby.³³

for Women, Inc., 537 U.S. 393, 408–409 (2003) (applying rule of lenity in civil case asserting claims under Hobbs Act); For a discussion of how far that prohibition reaches, see Paul J. Larkin, Jr., *Marijuana Edibles and “Gummy Bears”*, 66 BUFF. L. REV. 313, 356–65 & n.104 (2018).

32. On January 4, 2018, then-Attorney General Jeff Sessions decided to revisit the Obama Justice Department's CSA marijuana enforcement policy and stated that U.S. Attorneys should make charging decisions based on the seriousness of cannabis trafficking in their respective jurisdictions. See Memorandum from Jeff Sessions, Att'y Gen., U.S. Dep't of Just., on Marijuana Enforcement to All U.S. Att'ys (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/W7MW-LMJT>]; Press Release, U.S. Dep't of Just., Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy> [<https://perma.cc/2ZKC-QZVC>]; cf. Charlie Savage & Jack Healy, *Trump Administration Takes Step That Could Threaten Marijuana Legalization Movement*, N.Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/us/politics/marijuana-legalization-justice-department-prosecutions.html> [<https://perma.cc/P7RX-XMPQ>]. Apparently, local U.S. Attorneys have decided to focus their attention elsewhere, perhaps (in part) for the practical reasons discussed *infra* note 33.

33. There are a host of practical considerations at work too. Congress cannot compel state legislators to revise their own laws or order state and local police officers to enforce federal law. See *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (ruling that Congress cannot order a state to pass a state criminal law); *Printz v. United States*, 521 U.S. 898 (1997) (ruling that Congress cannot require state law enforcement officers to enforce a federal criminal law); *New York v. United States*, 505 U.S. 414 (1992) (ruling that Congress cannot order a state to adopt a federal regulatory regime as a matter of state law). Federal law enforcement agencies are on their own when it comes to enforcing the CSA. There is an insufficient number of federal agents in the principal federal agency devoted to the investigation of federal drug crimes—the Drug Enforcement Administration—for them to go it alone nationwide. See DRUG ENFORCEMENT ADMIN., STAFFING AND BUDGET (last accessed Mar. 18, 2020) (noting that, in 2019, the DEA had 10,169 total personnel, of whom 4,924 were federal law enforcement officers), <https://www.dea.gov/staffing-and-budget> [<https://perma.cc/S99B-26YS>]; Young, *supra* note 6, at 88 (noting the state and local law enforcement officers outnumber federal agents by a ratio of 10:1). The President or Attorney General could try to make up for the shortfall by reassigning other federal law enforcement officers to investigate federal

It is difficult to believe that anyone who voted for the CSA—let alone anyone who voted for the Constitution at the Convention of 1787 or in the Ratification Debates—believed that they were creating a system in which, as a practical matter, the states could hand out licenses to commit federal crimes. Yet, that is the law today. To call it odd does not adequately express the bizarre status of our cannabis policy. A “potential train wreck” is not too strong a description.³⁴

The states that liberalized their laws are not the only ones to blame for that discord; the federal government is guilty too. Professor Zachary Price makes that point well in his chapter in *Marijuana Federalism* entitled *Marijuana Nonenforcement: A Dubious Precedent*.³⁵ It turns out that the burgeoning cannabis industry we see today was not the product of California’s 1996 decision to legalize medical marijuana use. No, the widespread commercialization of marijuana did not occur for more than a decade afterwards. What triggered that phenomenon was a series of decisions by the Obama Justice

marijuana law violations. Yet, that would divert them from their everyday assignments, leaving other federal laws underenforced or unenforced entirely. See Paul J. Larkin, Jr., Essay, *A New Law Enforcement Agenda for a New Attorney General*, 17 GEO. J.L. & PUB. POL’Y 231, 239–41 (2019) (discussing the provenance and responsibilities of several different federal law enforcement agencies). That would harm the public because there are numerous offenses that the federal government is far better at investigating than state or local police—such as crimes that have an international or interstate aspect—and some that, practically speaking, only the federal government can investigate at all—such as crimes involving the corruption of state or local public officials. *Id.* at 236–38. Finally, law enforcement agencies measure their success or failure by metrics documenting the number of cases opened, arrests made, convictions obtained, and length of the sentences imposed. *Id.* at 242–45. The uncertainty as to whether a particular lead can bring measurable positive results doubtless discouraged the federal government from opening as many domestic marijuana investigations in 2020 as it did earlier. See Young, *supra* note 6, at 89 (“Colorado and likeminded states . . . are simply betting that, without state and local cooperation, federal authorities will be unwilling to deploy sufficient resources to enforce national marijuana laws on their own. So far, it has been a good bet.”).

34. See STUART TAYLOR, JR., MARIJUANA POLICY AND PRESIDENTIAL LEADERSHIP: HOW TO AVOID A FEDERAL-STATE TRAIN WRECK, GOVERNANCE STUDIES AT BROOKINGS 3 (Apr. 2013), https://www.brookings.edu/wp-content/uploads/2016/06/Marijuana-Policy-and-Presidential-Leadership_v27.pdf [<https://perma.cc/GY8A-8W3B>].

35. Price, *supra* note 6, at 123–38.

Department beginning in 2009 to publicly issue charging policy memoranda stating that the federal government would not prosecute the growth, distribution, or possession of cannabis done in compliance with state law.³⁶ The memoranda effectively told the states and marijuana industry that the legal status of marijuana, as well as the vigor with which the criminal law should and would be enforced, was in their hands. Each state was free to decide how to treat marijuana within its own jurisdiction. Put differently, each one could clean its own room or leave it a mess. As long as each state did not foul up a sibling's room, all was fine with Daddy.

To be sure, unlike a statute or regulation, those memoranda did not have the force of law.³⁷ They merely expressed the Justice Department's then-current enforcement policy, which President Obama or Attorney General Eric Holder (and any of their successors) could revise or abandon at any time.³⁸ Nonetheless, since the department essentially turned a blind eye to seeing precisely how compliant cannabis businesses were with state law, the memoranda had the effect of serving as "Get Out Of Jail, Free" cards for any enterprise that did not embarrass the administration by flaunting its illegal conduct.³⁹ As the result, Professor Price concludes, "the Obama Justice Department effectively opened the door to state-

36. *See id.* at 134–35 n.1 (citing Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Attorneys regarding Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., for United States Attorneys regarding Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 1 (June 29, 2011); Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., for United States Attorneys regarding Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013); Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Just., for United States Attorneys regarding Guidance Regarding Marijuana Related Financial Crimes 2 (Feb. 14, 2014)).

37. *See, e.g.,* *Service v. Dulles*, 354 U.S. 363, 386 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265–68 (1954) (both ruling that an agency must comply with its own regulations).

38. Albeit not without litigation challenging any such change in policy. *See infra* note 72.

39. *See* Larkin, *supra* note 25, at 107–08 & n.35.

level experimentation with marijuana legalization."⁴⁰ Entrepreneurs immediately leapt through it. The result: "a multi-billion dollar marijuana industry now operates openly in many states, apparently undeterred by its blatant criminality under federal law."⁴¹

The Obama Justice Department's policy technically is no longer in effect, although its legacy remains with us. In January 2018, Trump Administration Attorney General Jeff Sessions revoked the Obama Justice Department memoranda, giving notice to the cannabis industry that it was once again in potential federal legal jeopardy.⁴² Sessions, however, did not direct the department's lawyers to ramp up enforcement efforts.⁴³ He left that decision to the judgment of U.S. Attorneys, who could decide whether to enforce the CSA against businesses selling marijuana in their jurisdictions based on their superior knowledge of that particular locale.⁴⁴ For whatever reason, the U.S. Attorneys did not take that opportunity to aggressively enforce federal law,⁴⁵ and they are unlikely to start now. In January 2019, Sessions' successor, Attorney General Bill Barr, told Congress that he was troubled by upsetting the expectations that had grown up since 1996 and that Congress must resolve this matter.⁴⁶ Perhaps that helps explain why Barr did not direct the Justice Department to aggressively pursue marijuana prosecutions. Of course, members of Congress have generally avoided the issue like the plague, praying for deliverance from voting on an issue that will make enemies however they vote, so Congress is not likely to take up this cross anytime soon. Thus, we were effectively in the

40. Price, *supra* note 6, at 123.

41. *Id.*

42. Memorandum from Jeff Sessions, Att'y Gen., U.S. Dep't of Just., for All United States Attorneys regarding Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [<https://perma.cc/W7MW-LMJT>].

43. *Id.*

44. *See supra* note 33.

45. *See id.*

46. Young, *supra* note 6, at 93; Sarah N. Lynch, *U.S. Attorney General Nominee Will Not Target Law-Abiding Marijuana Businesses*, REUTERS (Jan. 15, 2019, 3:30 PM), <https://www.reuters.com/article/us-usa-trump-barr-marijuana/us-attorney-general-nominee-will-not-target-law-abiding-marijuana-businesses-idUSKCN1P92JO> [<https://perma.cc/WQU7-MXDR>].

same position under President Donald Trump that we were under President Obama. The more things change⁴⁷

That is unfortunate because only Congress can decide whether the federal government or the states should set cannabis policy. The states can exempt medical or recreational use programs from their own criminal laws, but those exemptions cannot immunize someone from federal prosecution.⁴⁸ By contrast, Congress may outlaw all interstate or intrastate sales of marijuana,⁴⁹ or exempt from the CSA states with medical or recreational cannabis programs.⁵⁰ But those are decisions for Congress, not the Attorney General or even the President. Congress may make or revise the law; the other two must implement whatever laws Congress passes.⁵¹

47. See Larkin, *supra* note 25, at 108. A related issue is the effect of this legal confusion on banks. Julie Anderson Hill offers an excellent summary of the problems that the CSA creates for banks. See Hill, *supra* note 6, at 139–54. At bottom, banks cannot offer cannabis businesses their financial services because doing so would make them co-conspirators to marijuana distribution, in violation of the CSA, as well as constitute money laundering, in violation of the federal banking laws. *Id.* Professor Price notes that the House has sought to create a carve-out for banks. See Price, *supra* note 6, at 127. In 2019, the House passed a bill—the Secure and Fair Enforcement (SAFE) Banking Act of 2019, H.R. 1595, 116th Cong. (2019)—that would grant financial institutions a safe harbor from a federal money laundering prosecution or adverse administrative action for providing financial services to cannabis-related business. Price, *supra* note 6, at 127, 136 n.15; see H.R. Rep. No. 116-104 pt. 1, at 9–13, 116th Cong. (2019). The opportunity to satisfy marijuana liberalization’s supporters and banks in one bill—a two-fer—must have seemed too big an opportunity to pass up. Deciding to go big or go home, late in 2020 (*after* the November election) the House voted to remove cannabis from the CSA entirely. Marijuana Opportunity Reinvestment and Expungement (MORE) Act, H.R. 3884, 116th Cong. (2020). The Senate did not vote on either bill in the 116th Congress.

48. See *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483, 494–95 (2001) (rejecting a medical necessity defense to federal prosecution in a state with a medical marijuana program).

49. See *Gonzalez v. Raich*, 545 U.S. 1 (2005) (Congress can prohibit individuals from growing marijuana for their own medical use).

50. See *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) (Congress may allow lottery-related advertising only in states authorizing lotteries).

51. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad”).

Rather than urge Congress to make that choice, three of our four presidents in office since 1996—Bill Clinton, George W. Bush, and Donald Trump—decided to become bystanders. Why? Perhaps they wanted to see how the state law developments played out. Perhaps they were hoping for some major political event to move the issue to the head of the public policy queue.⁵² Perhaps they sympathized with the plight of the disabled and dying who sought relief from misery and suffering. Perhaps they agreed with the reformers' goals. Perhaps they were preoccupied with other issues. Or perhaps they just didn't care one way or the other. Whatever the explanation might be, none of them used his political capital or bully pulpit to place the issue on the public agenda and demand that voters pressure Congress to resolve it.⁵³

52. A common way for policies to become law. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 2010); Paul J. Larkin, Jr., *John Kingdon's "Three Streams" Theory and the Antiterrorism and Effective Death Penalty Act of 1996*, 28 J.L. & POL. 25, 29–30 (2012).

53. President Obama was less a bystander than a cheerleader. He stands out from the others because his Justice Department effectively encouraged the private sector to take advantage of the opportunities that liberalization offered—even though doing so was a crime. Those memoranda told the cannabis industry precisely how to avoid prosecution for conduct that was clearly a federal offense. That was quite remarkable. Aside from the fact that the Justice Department does not ordinarily act as in-house counsel for an organized criminal enterprise, the entire undertaking was at least facially inconsistent with President Obama's Article II obligation to enforce the law faithfully. In *Marijuana Federalism*, Professor Price seems to agree. See Price, *supra* note 6, at 127 ("The federal Constitution presumes an executive branch that executes acts of Congress, not one that picks and chooses which laws to give effect. After all, the Constitution not only allows Congress to enact statutes over a presidential veto, but also expressly obligates the president to 'take care that the Laws be faithfully executed.'" (footnote omitted)); *id.* at 126–27, 136 n.11. That conduct came perilously close to the type of "dispensation" or "nullification" of lawful acts of the legislature that has been prohibited under Anglo-American law since the English Bill of Rights of 1688, see Bill of Rights 1688, 1 W. & M. sess. 2 c. 2 ("That the pretended Power of Suspending of Laws or the Execution of Laws by Regal Authority without Consent of Parliament is illegal. That the pretended Power of Dispensing with Laws or the Execution of Laws by Regal Authority as it hath been assumed and exercised of late is illegal." (seventeenth-century English modernized)), and that is utterly inconsistent with the President's sworn obligation to enforce the law. See, e.g., U.S. CONST. art. II, § 3 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will

Professor Price is correct that we should not want the President to use a nonenforcement policy in lieu of seeking legislative reform for an act of Congress he finds unwise.⁵⁴ Refusing to enforce laws simply because the current administration disfavors them produces a host of undesirable side effects. A President's decision to forego prosecution rather than seek a change in the law, in Professor Price's words, leaves "a tangle of further questions in its wake."⁵⁵

faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (ruling that the Take Care Clause denied the President "a dispensing power" authorizing him to act *contra legem*); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1848–51 (2016); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2141–78 (2019); cf. SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 92–93 (2015) (agreeing that the President cannot suspend the law).

Nonetheless, Professor Price argues in *Marijuana Federalism* that the Obama Administration's actions were "dubious but defensible." Price, *supra* note 6, at 128. Why?—because the nonenforcement policy "made no guarantees," it "gave no prospective license for legal violations," and it did not "provide categorical assurance that those outside the stated priorities were safe from enforcement." *Id.* As a result, "[t]hose relying on the policy had clear notice that they were taking their chances." *Id.* (footnote omitted). Yes, and those present at Julius Caesar's funeral heard Marc Antony quite literally say that he came "to bury Caesar, not to praise him." WILLIAM SHAKESPEARE, *JULIUS CAESAR*, act 3, sc. 2, l. 83. Yet, we know that his intent was to the contrary. After all, the Obama Justice Department cared little whether marijuana businesses actually complied with state-law requirements that, under the Justice Department's policy, were a precondition for the Justice Department to skip federal enforcement. See GOV'T ACCOUNTABILITY OFF., *STATE MARIJUANA LEGALIZATION: DOJ SHOULD DOCUMENT ITS APPROACH TO MONITORING THE EFFECTS OF STATE MARIJUANA LEGALIZATION* 8–9 (Dec. 2015). Professor Price is right, though, that there was no judicial remedy available if the Obama Administration had acted unlawfully. Prosecutorial decisions *not* to bring charges are generally not subject to judicial review, see *Heckler v. Chaney*, 470 U.S. 821, 835 (1985)—which is almost certainly why the Justice Department phrased its policy as an exercise of its prosecutorial discretion. The remedy would have been for Congress to impeach and remove Deputy Attorney General David Ogden, who signed the first memorandum, Deputy Attorney General James Cole, who signed the later ones, Attorney General Eric Holder, or President Obama himself.

54. Price, *supra* note 6, at 129.

55. *Id.*

President Obama gave the cannabis industry the equivalent of a Papal blessing by almost guaranteeing its members immunity from federal prosecution if they complied with state law⁵⁶—and then studiously ignored whether they were in fact complying. By choosing nonenforcement in lieu of persuading Congress to revise the CSA, President Obama might have reached a short-term accommodation between what some think is an outdated law and contemporary social values. In Professor Price's words, President Obama might have helped to "unstick a frozen issue" that Congress has proved unwilling to resolve itself.⁵⁷ Maybe President Obama thought that he could force Congress to act by making a hash of our cannabis policy. If he did, he was wrong. Strike One. If he thought his actions would energize the public into demanding congressional reform, he was wrong again. Strike Two. If, however, he thought that allowing a massive number of crimes to go unprosecuted on his watch would enable the rise of a billion dollar industry that no successor would dare seek to eliminate (that's my guess), he might have been right about that. If that was his plan, perhaps he succeeded. Yet encouraging people to become scofflaws—pardon me, *rich* scofflaws—is hardly a legitimate law enforcement strategy. Strike Three.

There are multiple adverse long-term consequences whenever a President takes the law into his own hands. Start with the fact that the President corrodes respect for the rule of law,⁵⁸ which is necessary for the public's belief in its legitimacy, as well as individuals' willingness to comply and cooperate with its enforcement.⁵⁹ Excus-

56. See *supra* text accompanying note 36.

57. Price, *supra* note 6, at 126.

58. See JOHN PHILLIP REID, *RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* (2004).

59. See TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (arguing that people are more likely to follow the law if they respect it than if they just fear its penalties); PETER YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 9 (1991) ("As criminologists have long known, where laws lack legitimacy, violation rates are likely to be relatively high, other factors held constant.").

ing the President for willful ostrich-like behavior despite his responsibility to enforce the law⁶⁰ fosters the belief that we are a government of men, not laws, a proposition that the Supreme Court's most famous (and important) decision, *Marbury v. Madison*, expressly disavowed⁶¹ and the Court reaffirmed not long ago.⁶² Selective nonenforcement also creates an undesirable precedent for future chief executives. Future Presidents might use President Obama's nonenforcement policy to justify inaction in response to other types of "unwise" legislation. After all, it would always be easier to refrain from enforcing a statute (for example, the federal estate tax) or some feature of one (for example, a corporate income tax above a certain rate) than it would be to convince Congress to repeal or revise the law. Repetition of his policy would make a bad precedent even worse. Prosecutorial charging decisions would become a function, not of the strength of the proof of guilt, but of whether someone has the "right" policy views on a disputed social issue. Excusing the President from carrying out his law enforcement oversight duty also makes it look like he is above the law,⁶³ because the government does not allow private parties to get away with remaining willfully blind of criminal wrongdoing they are responsible for stopping.⁶⁴ Finally, by temporarily shutting off enforcement of the criminal law without guaranteeing that it won't

60. See U.S. CONST. art. II, § 3 (directing the President to "take Care that the Laws be faithfully executed").

61. 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

62. In *United States v. Stevens*, 559 U.S. 460 (2010), the Court declined the federal government's invitation to uphold the constitutionality of a facially overbroad criminal law on the ground that the government would prosecute only truly "bad guys." As Chief Justice Roberts put it, "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Id.* at 480. The Chief did not cite *Marbury*, but he was surely channeling Chief Justice John Marshall.

63. Cf. *United States v. Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law.").

64. See, e.g., *Spurr v. United States*, 174 U.S. 728, 735 (1899) (ruling that a bank officer would violate a law making it a crime to willfully permit an overdraft "if the [bank]

later come back on, the President undermines the predictability of the legal rules that companies and the people they employ need to make long-term investment and life decisions.⁶⁵ Presidential non-enforcement is no long-term substitute for the traditional lawmaking process.

But it's even worse than all that. Remember that the unenforced law—the CSA—is a criminal statute. An elementary rule of criminal and constitutional law is that the government must adequately notify the public what conduct is a crime.⁶⁶ The disagreement between cannabis' status under the federal and state codes already confuses the public whether a criminal law—one with some rather unpleasant terms of imprisonment—is in effect. (If you haven't yet seen someone make that mistake when traveling interstate, just wait; you will.⁶⁷) That confusion even makes life difficult for banks, as Julie Anderson Hill explains in her *Marijuana Federalism* article.⁶⁸ Banks cannot offer financial services to cannabis business for fear of becoming co-conspirators to violations of both the CSA and the federal money laundering statutes. Yet, the burden of confusion is not evenly distributed across the public. Banks and other large businesses have in-house counsel units and can obtain expensive legal advice from large white-shoe law firms.⁶⁹ The average person

officer purposely keeps himself in ignorance of whether the drawer has money in the bank"); see generally *Global Tech Appliances v. SEB S.A.*, 563 U.S. 754, 766–68 (2011) (collecting cases defining “willful blindness”).

65. See Ibrahim F.I. Shahata, *The Role of Law in Business Development*, 20 *FORDHAM INT'L L.J.* 1577, 1578–79 (1996).

66. See, e.g., *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

67. See Scott McCartney, *The Baffling Legal Gray Zone of Marijuana at the Airport*, *WALL ST. J.* (Sept. 4, 2019, 5:30 AM), https://www.wsj.com/articles/the-baffling-legal-gray-zone-of-marijuana-at-the-airport-11567589405?mod=article_inline [<https://perma.cc/H76W-ZN6S>].

68. Hill, *supra* note 6, at 139–54.

69. Of course, I might be assuming too much by saying that large companies can obtain legal advice on how to avoid breaking the law. Cassandra Burke Robertson's article *Legal Advice for Marijuana Business Entities* describes the minefield that lawyers must traverse when advising someone how to comply with state programs permitting activities that the federal government still treats as a crime. See generally Robertson, *supra* note 6, at 155–69.

doesn't and can't.⁷⁰ That is a problem. The criminal law must be sufficiently clear that "a person of ordinary intelligence" can readily understand where the line falls between what is and is not a crime without consulting an attorney.⁷¹ Ordinarily, any blame for that problem rests with a legislature. If the text of a federal criminal law is vague, that is Congress's fault. By contrast, if the public is confused whether an old federal criminal law is still in effect—especially when the formerly identical state law is not—because of a President's too clever exercise of prosecutorial discretion, that is his fault. President Obama's non-enforcement policy helps Presidents slough off blame that is rightfully theirs.⁷²

* * *

The bottom line is this: We need to stop using prosecutorial discretion as a form of presidential lawmaking, while also eliminating the chaotic state of today's cannabis policy. Disarray in the law

70. See Price, *supra* note 6, at 129–30 ("While lawyers and sophisticated large-scale operators, perhaps, can be expected to understand the difference between enforcement policy and statutory law, it seems doubtful that every participant in the burgeoning, openly tolerated marijuana marketplace fully appreciates the degree of risk they are assuming."). Professor Price is right to be concerned about the effect on small businesses of the need to pay lawyers to know whether they run the risk of arrest. See Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 792 (2014) ("The CEO for DuPont has a white-shoe law firm on speed dial; the owner of a neighborhood dry cleaner does not.").

71. See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); see also Paul J. Larkin, Jr., *The Folly of Requiring Complete Knowledge of the Criminal Law*, 12 LIBERTY U. L. REV. 335, 342 (2018) ("[The] constitutional requirement of definiteness is violated by a criminal statute that fails to give a *person of ordinary intelligence* fair notice that his [or her] contemplated conduct is forbidden by the statute." (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954))); *id.* at 342 ("A 'person of ordinary intelligence,' a 'person of common intelligence,' 'the common world'—those are the phrases that the Supreme Court has used to describe how to decide whether a statute is understandable.").

72. Even though the CSA has prohibited marijuana trafficking since 1996 and still does today, there certainly would be litigation over the revitalization of Justice Department efforts to prosecute marijuana traffickers. Cf. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905–15 (2020) (ruling that the Trump Administration's decision to rescind the Obama Administration's Deferred Action for Childhood Arrival immigration program was reviewable and also arbitrary and capricious). That litigation does not benefit the public and should be avoided.

gives legislators the same opportunity for reform that a social catastrophe affords them.⁷³ Congress can reaffirm the vitality of the CSA or it can decentralize the nation's approach to marijuana regulation. It can't, and shouldn't, do both.⁷⁴

II. USELESS DISARRAY OR FERTILE OPPORTUNITY?

However anomalous (if not downright bizarre) the current state of affairs might be, it gives us an opportunity to reconsider the allocation of authority between the states and federal government. *Marijuana Federalism* does not take on the quixotic challenge of persuading the Supreme Court to abandon decades of precedent expanding Congress's economic regulatory authority and to return its Commerce Clause power to a pre-New Deal era status,⁷⁵ particularly at a time (unforeseen, of course, by the book's contributors)

73. Cf. Editorial Board, *The Pelosi-Schumer Coronavirus Contagion*, WALL ST. J. (Mar. 23, 2020, 7:34 PM), <https://www.wsj.com/articles/the-pelosi-schumer-contagion-11585006077> [<https://perma.cc/PC6G-Z8AS>] ("House Majority Whip James Clyburn was heard last week advising Democrats to view the crisis as a 'tremendous opportunity to restructure things to fit our vision.'"); Jack Rosenthal, *A Terrible Thing to Waste*, N.Y. TIMES (July 31, 2009), <https://www.nytimes.com/2009/08/02/magazine/02FOB-on-language-t.html> [<https://perma.cc/WC7E-FEWE>] (quoting White House Chief of Staff Rahm Emanuel: "You never want a serious crisis to go to waste.").

74. It could be argued that the cannabis industry is perfectly content with de facto legality and de jure criminality. If so, Congress's inaction has the scent of nefarious collaboration with a multi-billion dollar marijuana industry operating openly in many states despite its blatant criminality under federal law. That is obviously problematic. On the other hand, if the marijuana industry is unsatisfied with the status quo, then congressional inaction truly becomes a worst of all possible worlds scenario. It is a dereliction of duty for Congress to leave the American public to the consequences of de facto legalization without their elected representatives' consent while also leaving a sword hanging over the head of the industry. Congress's abdication won't make for a new chapter in a revised edition of *Profiles in Courage*. JOHN F. KENNEDY, *PROFILES IN COURAGE* (1956).

75. The classic example of the breadth of Congress's New Deal-era Commerce Clause authority is *Wickard v. Filburn*, 317 U.S. 111 (1942). The Court held that Congress can regulate the amount of wheat that an individual farmer grows for his family's own consumption because of the potential effect on interstate commerce of every American farmer's parallel decision to reserve all of his crop for his or her personal use. *Id.* at 132-33.

when the nation has been looking to Congress to return our economy to its pre-COVID-19 heights.⁷⁶ Instead, what the book does (and does well) is suggest how greater reliance on principles of federalism can improve the current confused state of the law.

Professor Adler and the contributors to *Marijuana Federalism* analyze the federalism implications of our current situation from several different directions. As editor, Professor Adler sets the stage for the other contributors. In his cleverly entitled introduction “*Our Federalism on Drugs*,”⁷⁷ Professor Adler argues that the transition we have witnessed since California took the law into its own hands in 1996 gives us the opportunity to decide whether to use cannabis as an occasion for a practical experiment in the benefits of federalism.⁷⁸ Often described by the Supreme Court as a system of “dual sovereignty,”⁷⁹ our federalist system of governance might produce a variety of approaches to the treatment of marijuana. Some states might continue to deem it contraband, the status that marijuana has under federal law. Or they might allow their residents to use cannabis for whatever medical or recreational purposes their distinct electorates from Alabama to Wyoming see fit.⁸⁰ For the last fifty years, however, the CSA has prevented any experimentation with different regulatory approaches by banning marijuana for any purpose whatever. Uniformity has reigned.

76. See, e.g., Siobhan Hughes & Natalie Andrews, *Trump Signs \$2 Trillion Coronavirus Stimulus Bill After Swift Passage by House*, WALL ST. J. (Mar. 27, 2020, 8:00 PM), <https://www.wsj.com/articles/house-lawmakers-race-to-washington-to-ensure-coronavirus-stimulus-passes-11585318472> [https://perma.cc/MG4P-XABF]; Eric Morath & Sarah Chaney, *U.S. Employers Cut 701,000 Jobs in March*, WALL ST. J. (Apr. 3, 2020, 2:32 PM), https://www.wsj.com/articles/u-s-jobs-report-likely-to-show-start-of-record-labor-market-collapse-11585906617?mod=hp_lead_pos1 [https://perma.cc/FZ2L-DTME].

77. The introduction draws on 1980s-era anti-drug use television commercials sponsored by the Partnership for a Drug-Free America. See, e.g., Partnership for a Drug-Free America, *This Is Your Brain . . . This Is Your Brain On Drugs—80s Partnership For A Drug Free America*, YOUTUBE (Mar. 21, 2010), <https://www.youtube.com/watch?v=GOEN-VyIxPI> [https://perma.cc/K9C2-UNSA].

78. See generally Adler, *supra* note 6, at 1–13.

79. See, e.g., Fed. Mar. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

80. Adler, *supra* note 6, at 5.

We now have a chance, Professor Adler argues, to reconsider whether we want a uniform, top-down, Washington, D.C.-centric approach to marijuana regulation. If we choose instead to respect the Framers' belief in the value of dual sovereignty, we could generate "a system of competitive federalism in which states are under pressure to innovate in public policy" by "providing different bundles of policies and services."⁸¹ That innovation, in turn, could produce the two classic benefits that are the hallmark of a federalist system. One is the increased likelihood that "more people will live in jurisdictions with policies that match their preferences."⁸² The other is an enhanced prospect that the nation will discover the best answer to a policy dilemma by allowing each state, in Justice Brandeis's famous words, to "serve as a laboratory" and "try novel social and economic experiments without risk to the rest of the country."⁸³ Freed from the "dampening" effect of a uniform, nationwide ban preventing perhaps fifty different approaches to cannabis regulation, federalism could generate "a framework for interjurisdictional competition and discovery."⁸⁴ The current disarray in the law gives us the opportunity to reconsider the federal monopoly over marijuana control. States could try out a host of different approaches to every aspect of the production, distribution, regulation, taxation, marketing, and use of cannabis.⁸⁵

Contributors John Hudak and Christine Stenglein find the present to be an opportune time for the nation to have that debate. In their article *Public Opinion and America's Experimentation with Cannabis Reform*, they analyzed polling data measuring the public's attitudes regarding the state-level revolution that we have witnessed since 1996.⁸⁶ Their opinion is that "Americans' support for cannabis

81. *Id.*

82. *Id.* (footnote omitted).

83. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also John O. McGinnis, *Federalism as a Discovery Process and a Catalyst for Humility*, 35 HARV. J.L. & PUB. POL'Y 115, 118 (2012); Adler, *supra* note 6, at 6.

84. Adler, *supra* note 6, at 7.

85. See *id.* at 6–7.

86. Hudak & Stenglein, *supra* note 6, at 15–34.

reform has reached an all-time high.”⁸⁷ Americans welcome any new drug that can alleviate pain, inflammation, anxiety, and other disabling side effects of different ailments.⁸⁸ “Medical cannabis has exploded in popularity since California passed the first medical cannabis initiative” in 1996, they argue, and “that support extends across age groups, races and ethnicities, partisanship, ideology, and gender.”⁸⁹ Polls have consistently shown that a very large percentage of Americans, ranging from eighty-four to ninety-four percent, believe that physicians should be able to prescribe cannabis for their patients, “making it one of the most popular policy proposals in the United States.”⁹⁰ Even some groups ordinarily regarded as conservative in their political outlook, such as Veterans of Foreign Wars, have supported liberalizing the cannabis laws.⁹¹ Public support is at its peak for medical use of cannabis, and most Americans believe that cannabis is safer than other drugs and that its use will not inevitably serve as a “gateway” to consumption of more dangerous drugs, such as heroin.⁹² Although the intensity of most Americans’ attitudes toward cannabis legalization remains low, “a majority of Americans across age groups, and across all regions, support legalization.”⁹³

87. *Id.* at 31. I’m sure that the pun was intended.

88. *See id.* at 21 (authors indicate that “Americans embrace the idea that cannabis can be used for medical purposes—to relieve pain”).

89. *Id.* at 21.

90. *Id.* at 21–23 (footnote omitted). An almost equally large percentage—seventy-two percent in one nationwide poll—responded that possession of small amounts of marijuana should not lead to incarceration. *Id.* at 28.

91. *Id.* at 23–24. It is quite possible, perhaps even more likely than not, that this support comes principally from veterans who fought in the Vietnam War and the ones since then. Hudak and Stenglein do not address that issue.

92. Hudak & Stenglein, *supra* note 6, at 27, 31.

93. *Id.* at 31. Hudak and Stenglein also do not mention an additional benefit from re-examining the CSA. Opponents of the nation’s marijuana laws often argue that the states and federal government passed them early in the twentieth century in part due to a racist fear of crimes committed by Mexicans who had recently entered the United States and used that drug. *See* DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 218–20 (3d ed. 1999); Dills et al., *supra* note 6, at 37. Because there

To be sure, Hudak and Stenglein acknowledge that various shortcomings in polling processes or results could weaken their conclusions or even point in another direction. Polls can confuse “decriminalization” — that is, treating possession and use of small quantities as akin to a traffic ticket — with “legalization” — removing cannabis from the criminal code altogether.⁹⁴ That ambiguity could lead people to register support for changing the law to avoid what respondents believe are unduly severe terms of imprisonment for possession of a doobie or two, rather than to allow greater legal use of cannabis. National polling results might not reflect the views of each state’s residents, which might affect the likelihood that Congress will revise the CSA.⁹⁵ Particular states and districts elect individual members,⁹⁶ and the voters in Alabama might have very different opinions than the residents in California. Voting results might not represent the majority’s views because the people who vote might not hold the same attitudes as the bulk of residents.⁹⁷ And so forth. Poll respondents also might not realize that physicians could *not* prescribe marijuana tomorrow even if Congress repealed the CSA today. For those reasons, data is more valuable than the potentially uneducated answers made by self-selecting respondents to possibly ambiguous polling questions.

Three contributors to *Marijuana Federalism* try to fill that need. Professor Angela Dills, Sietse Goffard, and Jeffrey Miron analyzed data available as of 2016 from various states with medical or recreational legalization programs to learn whether the upbeat forecasts offered by liberalization’s supporters or the gloomy ones made by

are legitimate bases for not legalizing cannabis use, reconsidering the status of marijuana today could moot that criticism. *Compare* *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding a facially neutral state constitutional provision barring felons from voting unconstitutional on the ground that the original enactment was motivated by racial discrimination, in violation of the Equal Protection Clause), *with* *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (en banc) (ruling that re-enacted state law ban on federal voting eliminated any taint on the original state constitutional provision).

94. Hudak & Stenglein, *supra* note 6, at 18.

95. *Id.* at 15.

96. U.S. CONST. art. I, § 2, cl. 1; *id.* § 3, cl. 1; *id.* amend. XVII.

97. Hudak & Stenglein, *supra* note 6, at 20–21.

opponents were closer to the mark.⁹⁸ To gauge the positive, negative, or neutral effects of cannabis initiatives, they analyzed the evidence concerning several post-liberalization factors: the amount of marijuana use by adults⁹⁹ and teenagers,¹⁰⁰ its price (a surrogate for its supply),¹⁰¹ the rate of violent crime¹⁰² and traffic crashes,¹⁰³

98. Dills et al., *supra* note 6, at 35–83.

99. *Id.* at 44 (regarding Colorado: “The data do not show dramatic changes in use rates corresponding either to the expansion of medical marijuana or legalization.”). What Professor Dills, Goffard, and Miron fail to ask, however, is whether there was a great increase in the number of people (and amount of marijuana used) after Colorado adopted a medical marijuana program in 2001, and liberalized that program in 2009—which occurred three years *before* the state adopted a recreational cannabis program in 2012. *Id.* at 40–41. Some people reasonably believe think the market was already saturated by 2012 because the state’s medical marijuana program was a sham. See Gerard Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 MCGEORGE L. REV. 127, 130 (2012) (As comedian Jon Stewart noted, by 2011 “Colorado seemed to have changed almost overnight from ‘the healthiest state in the country’ to ‘one of the sickest.’”). The 2012 recreational legalization law therefore just honestly did what the 2001 and 2009 laws accomplished in a *sub rosa* fashion.

100. Dills et al., *supra* note 6, at 50. The data from California, Colorado, and Massachusetts “clearly reveal that the downward trend of suspensions and expulsions remains unchanged in the wake of marijuana legalization.” *Id.* The criticism mentioned above regarding adult use could also apply here as well.

101. *Id.* at 45–46 (regarding Colorado, Oregon, and Washington State: “One hypothesis before legalization was that use might soar because prices would plunge. . . . Overall, these data suggest no major drop in marijuana prices after legalization and, consequently, less likelihood of soaring use because of cheaper marijuana.”).

102. *Id.* at 47 (“Opponents think these substances cause crime through psychopharmacological and other mechanisms, and they note that such substances have long been associated with crime, social deviancy, and other undesirable aspects of society. . . . [M]onthly crime rates from Denver, Colorado, for all reported violent and property crimes . . . remain essentially constant after 2012 and 2014; we do not observe substantial deviations from the illustrated cyclical crime pattern.”).

103. *Id.* at 49 (“No spike in fatal traffic accidents or fatalities [per 100,000 residents] followed the liberalization of medical marijuana in 2009. Although fatality rates have reached slightly higher peaks in recent summers, no obvious jump occurs after either legalization in 2012 or the opening of stores in 2014. Likewise, neither marijuana milestone in Washington appears to have substantially affected the fatal crash rate or fatality rate Although few post-legalization data were available [for Oregon] at the time of publication, we observe no signs of deviations in trend after the opening of medical marijuana dispensaries in 2013. . . . [A]nnual data on crash fatalities in Alaska, Nevada, Maine, and Massachusetts . . . show no discernible increase after legalization.” (footnotes omitted)).

statewide economic effects,¹⁰⁴ and tax receipts.¹⁰⁵ Professor Dills, Goffard, and Miron concluded that the states with liberalized schemes have seen only relatively minimal effects. With one potential short-term exception—state tax revenue—a comparison of the pre- and post-liberalization evidence revealed only minor differences. None of the factors they considered proved that the states with liberalized marijuana laws were decidedly better or worse for having revised their codes. “Our conclusion is that state-level marijuana legalizations to date have been associated with, at most, modest changes in marijuana use and related outcomes.”¹⁰⁶ Put differently, the Age of Aquarius has not dawned, but the sky hasn’t fallen either. That should comfort policymakers who fear that further reform would lead to catastrophic outcomes.

Yet, there is reason to be cautious when deciding whether to accept their conclusions. Some rest on an incomplete scientific record. For example, Professor Dills, Goffard, and Miron suggest that “the pain-relieving element of medical marijuana may help patients avoid more harmful prescription painkillers and tranquilizers.”¹⁰⁷ While it is true that numerous individuals have long argued (and some government reports and private studies have even concluded) that the psychoactive ingredient in cannabis has an analgesic effect for some types of pain,¹⁰⁸ so too does the ethanol in Wild

104. *Id.* at 51 (“Advocates also argue that legalization boosts economic activity by creating jobs in the marijuana sector, including ‘marijuana tourism’ and other support industries, thereby boosting economic output. . . . The impact of legalization [in Colorado], however, was still small relative to the entire economy. . . . Data from the Bureau of Economic Analysis show little evidence of significant gross domestic product (GDP) increases after legalization in any state.” (footnotes omitted)).

105. *Id.* at 51–52 (stating that “[o]ne area where legal marijuana has reaped unexpectedly large benefits is state tax revenue,” but also noting that “tax revenues in these states may moderate as legalizations continue.”).

106. *Id.* at 36; *see id.* at 52.

107. *Id.* at 46 (footnote omitted).

108. *See, e.g.*, NAT’L ACAD. OF SCIS., ENG’G, & MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS 54 Tbl. 2-2, 128 Box 4-1 (2017) (listing conditions for which marijuana is a treatment, with varying degrees of scientific support); Gemayel Lee et al., *Medical Cannabis for Neuropathic Pain*, 22 CURRENT PAIN & HEADACHE REPS. 8 (2018)

Turkey, which we do not classify as a medicine.¹⁰⁹ Professor Dills, Goffard, and Miron cited little support for their hope,¹¹⁰ and later studies reveal that it has gone unfulfilled.¹¹¹ Finally, the nation's

("Nearly 20 years of clinical data supports the short-term use of cannabis for the treatment of neuropathic pain."); Barth Wisley et al., *Low Dose Vaporized Cannabis Significantly Improves Neuropathic Pain*, 14 J. PAIN 136 (2013).

109. Dr. Peter Bach, a physician and Director of the Center for Health Policy and Outcomes at the Memorial Sloan Kettering Cancer Center, certainly would not classify either one as a medicine. Peter B. Bach, *If Weed Is Medicine, So Is Budweiser*, WALL ST. J. (Jan. 17, 2019, 7:23 PM), <https://www.wsj.com/articles/if-weed-is-medicine-so-is-budweiser-11547770981> [<https://perma.cc/9HDG-JR8E>]. In his words, "Claims that marijuana relieves pain may be true. But the clinical studies that have been done compare it with a placebo, not even a pain reliever like ibuprofen. That's not the type of rigorous evaluation we pursue for medications." *Id.* Moreover, "every intoxicant would pass that sort of test because you don't experience pain as acutely when you are high. If weed is a pain reliever, so is Budweiser." *Id.*

110. As support, Professor Dills, Goffard, and Miron cite an article by drug policy experts and economists. Dills et al., *supra* note 6, at 46, 78 n.48 (citing David Powell et al., *Do Medical Marijuana Laws Reduce Addictions and Deaths Related to Pain Killers?*, 58 J. HEALTH ECON. 29 (2018)). The Powell article, however, is limited in several respects. It considers only the effect of *medical* marijuana laws, not *recreational* ones. Granted, often the only difference between the two is that the latter are honest about their purposes. *See* Larkin, *supra* note 16, at 509–12. Moreover, the Powell article does not find that medical marijuana programs per se reduce opioid overdose fatalities, only that state laws protecting medical marijuana dispensaries have some effect by offering people an alternative to the *illegal* purchase of opioids, not their use under a lawful prescription, *id.* at 30, which is what Professor Dills, Goffard, and Miron claim in their article, *see supra* text accompanying note 108. Finally, the Powell article does not consider earlier and more recent analyses showing that cannabis is not an adequate substitute for opioids and creates additional problems for people already suffering from opioid use disorder. *See, e.g.,* Fiona A. Campbell et al., *Are Cannabinoids an Effective and Safe Treatment in the Management of Pain? A Qualitative Systematic Review*, 323 BRIT. MED. J. 1, 16 (2001) ("We found insufficient evidence to support the introduction of cannabinoids into widespread clinical practice for pain management—although the absence of evidence of effect is not the same as the evidence of absence of effect. . . . Cannabis is clearly unlikely to usurp existing effective treatments for postoperative pain."); *infra* notes 111–18.

111. A 2017 paper published in the peer-reviewed journal *Lancet Public Health*, based on a four-year longitudinal cohort study, concluded that cannabis does not provide long-term relief from chronic non-cancer pain. Gabrielle Campbell et al., *Effect of Cannabis Used in People with Chronic Non-Cancer Pain Prescribed Opioids: Findings from a 4-year Prospective Cohort Study*, 3 LANCET PUB. HEALTH e341 (2018). In fact, a 2019 study

opioid overdose epidemic has metastasized into its third stage. What began as overreliance on prescription opioids transitioned into the use of illegal narcotics, like heroin, and finally became a resort to illegal drugs cut with extraordinarily more powerful painkillers, like fentanyl.¹¹² Liberalized marijuana laws, even if they might have been helpful years ago, are not a reasonable response to today's opioid problem.

That should come as no surprise. Cannabis is an insufficiently potent analgesic to mollify the severe acute pain caused by surgery, gunshot wounds, late-stage cancer, motor vehicle crashes, and similar illnesses and events.¹¹³ Neither cannabis nor any other drug can

published by the National Academy of Sciences concluded that states with liberal cannabis laws witnessed an *increase* in opioid deaths. Chelsea L. Shover et al., *Association Between Medical Cannabis Laws and Opioid Overdose Mortality Has Reversed Over Time*, 116 PROCEEDINGS NAT'L ACAD. SCI. 12624 (2019). See also, e.g., DEVAN KANSAGARA ET AL., U.S. DEP'T OF VETERANS AFFS., BENEFITS AND HARMS OF CANNABIS IN CHRONIC PAIN OR POST-TRAUMATIC STRESS DISORDER: A SYSTEMATIC REVIEW (2017); Campbell et al., *supra*; Deborah S. Hasin et al., *U.S. Adults With Pain, A Group Increasingly Vulnerable to Nonmedical Cannabis Use and Cannabis Use Disorder: 2001–2002 and 2012–2013*, AM. J. PSYCH., Jan. 22, 2020, <https://ajp.psychiatryonline.org/doi/10.1176/appi.ajp.2019.19030284> [<https://perma.cc/E622-8V6A?type=image>]; Keith Humphreys & Richard Saitz, *Should Physicians Recommend Replacing Opioids with Cannabis?*, 321 JAMA 639, 639 (2019) (“There are no randomized clinical trials of substituting cannabinoids for opioids in patients taking or misusing opioids for treatment of pain, or in patients with opioid addiction treated with methadone or buprenorphine. . . . Many factors other than cannabis may affect opioid overdose deaths, such as prescribing guidelines, opioid rescheduling, Good Samaritan laws, incarceration practices, and availability of evidence-based opioid use disorder treatment and naloxone.”); Suzanne Nielsen et al., *Opioid-Sparing Effect of Cannabinoids: A Systematic Review and Meta-Analysis*, 42 NEUROPSYCHOPHARMACOLOGY 1752 (2017); Mark Olsson et al., *Medical Marijuana and the Opioid Epidemic: Response to Theriault and Schlesinger*, 175 AM. J. PSYCH. 284 (2018); Gabriel Rada, EPISTEMONIKOS FOUND., <https://isof.epistemontos.org/#/finding/593584b2e3089d0fec24dc01> [<https://perma.cc/BP55-CAWD>]; see generally Paul J. Larkin, Jr. & Bertha K. Madras, *Opioids, Overdoses, and Cannabis: Is Marijuana an Effective Therapeutic Response to the Opioid Abuse Epidemic?*, 17 GEO. J.L. & PUB. POL'Y 555, 571–95 (2019) (collecting studies).

112. See Larkin & Madras, *supra* note 111, at 588–89; R. Vincent Pohl, *Time Trends Matter: The Case of Medical Cannabis Laws and Opioid Overdose Mortality 3–4* (June 22, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192703 [<https://perma.cc/4AVA-ZQ4D>].

113. See, e.g., Abhiram R. Bhashyam et al., *Self-Reported Marijuana Use Is Associated*

match the acute pain-killing effectiveness of opioids.¹¹⁴ Marijuana also is not a proven therapeutic substitute for, or complement to, opioids (or other drugs) in the treatment of chronic pain, for several reasons.¹¹⁵ In fact, people who use both drugs do not reduce their intake of opioids,¹¹⁶ and the combination of the two makes it more

with Increased Use of Prescription Opioids Following Traumatic Musculoskeletal Injury, 100 J. BONE & JOINT SURGERY 2095, 2096 (2018) (“Prior research provided moderate evidence supporting marijuana use for chronic pain. However, the current literature is inadequate to draw meaningful conclusions as to the effectiveness of marijuana as an acute pain reliever.”); Campbell et al., *supra* note 111 (“We found insufficient evidence to support the introduction of cannabinoids into widespread clinical practice for pain management—although the absence of evidence of effect is not the same as the evidence of absence of effect. . . . Cannabis is clearly unlikely to usurp existing effective treatments for postoperative pain.”); David Raft et al., *Effects of Intravenous Tetrahydrocannabinol on Experimental and Surgical Pain*, 21 CLINICAL PHARMACOLOGY & THERAPEUTICS 26 (1976).

114. JERROLD S. MEYER & LINDA F. QUENZER, *PSYCHOPHARMACOLOGY: DRUGS, THE BRAIN, AND BEHAVIOR* 305–06 (2d ed. 2018) (“As a class, [opioids] are the very best painkillers known to man.”).

115. *See generally* Larkin & Madras, *supra* note 111, at 579 (“There are four reasons to doubt claims that permitting marijuana use for chronic pain can alleviate the opioid crisis. First, there is insufficient evidence to support the claim that marijuana is a safe and effective analgesic for chronic pain. Second, states with liberal marijuana laws should have seen a decline in opioid overdose deaths, but that has not been the case. Third, individuals using marijuana for pain relief should have shown a reduction of or stoppage in opioid use, but evidence indicates that they have continued to use or even increased opioid use. And fourth, the concomitant use of marijuana and opioids conceivably interferes with treatment for opioid use disorder.”).

116. *See, e.g.,* Ziva Cooper et al., *Impact of Co-Administration of Oxycodone and Smoked Cannabis on Analgesia and Abuse Liability*, 43 NEUROPSYCHOPHARMACOLOGY 2046, 2050–51 (2018) (“Overall, these findings demonstrate opioid-sparing effects of cannabis for analgesia that is accompanied by increases in some measures of abuse liability.”); Louisa Degenhardt et al., *Experience of Adjunctive Cannabis Use for Chronic Non-Cancer Pain: Findings from the Pain and Opioids IN Treatment (POINT) Study*, 147 DRUG & ALCOHOL DEPENDENCE 144, 146 (2015) (“Those who had used cannabis for pain reported higher pain severity, greater interference from and poorer coping with pain, and more days out of role in the past year, compared to those who had not used [marijuana].”); Shannon M. Nugent et al., *Patterns and Correlates of Medical Cannabis Use for Pain among Patients Prescribed Long-Term Opioid Therapy*, 50 GEN. HOSP. PSYCH. 104, 108 (2018) (“[P]atients prescribed LTOT [long-term opioid therapy] who endorsed the use of medical cannabis for pain were at greater risk for prescription opioid misuse.”); Mark Olfson et al., *Cannabis Use and Risk of Prescription Opioid Use Disorder in the United States*,

difficult for patients to terminate opioid use through drug treatment.¹¹⁷ In sum, marijuana is not a substitute for opioids. Using the two in combination only harms people already suffering from opioid use disorder, and marijuana can harm users in other ways.¹¹⁸

175 AM. J. PSYCH. 47, 49–50 (2018); Marian Wilson et al., *Cannabis Use Moderates the Relationship Between Pain and Negative Affect in Adults with Opioid Use Disorder*, 77 ADDICTIVE BEHAVIORS 225, 230–31 (2018) (concluding that cannabis use strengthens, rather than weakens, the relationship between pain and depression or anxiety).

117. See Alexandra M. Franklyn et al., *The Impact of Cannabis Use on Patients Enrolled in Opioid Agonist Therapy in Ontario, Canada*, PLOS ONE (Nov. 8, 2017), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0187633> [<https://perma.cc/B44Q-58ZW>]; Mohammadali Mojarrad et al., *Marijuana Use and Achievement of Abstinence from Alcohol and Other Drugs Among People with Substance Dependence: A Prospective Cohort Study*, 42 DRUG & ALCOHOL DEPENDENCE 91, 95–97 (2014).

118. See, e.g., Anees Bahji et al., *Prevalence of Cannabis Withdrawal Symptoms Among People with Regular or Dependent Use of Cannabinoids: A Systematic Review and Meta-analysis*, JAMA NETWORK OPEN (Apr. 9, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2764234?resultClick=1> [<https://perma.cc/F2BV-JQPT>]; Magdalena Cerda et al., *Association Between Recreational Marijuana Legalization in the United States and Changes in Marijuana Use and Cannabis Use Disorder from 2008 to 2016*, 77 JAMA PSYCH. 165, 165–67 (2020), <https://jamanetwork.com/journals/jamapsychiatry/article-abstract/2755276?widget=personalizedcontent&previousarticle=2755275> [<https://perma.cc/P6W7-45ED>]; Lauren R. Gorfinkel et al., *Association of Depression with Past-Month Cannabis Use Among US Adults Aged 20 to 59 Years, 2005 to 2016*, JAMA NETWORK OPEN (Aug. 18, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2769386?resultClick=1> [<https://perma.cc/66B8-MQQQ>]; Deborah S. Hasin et al., *Prevalence of Marijuana Use Disorders in the United States Between 2001–2002 and 2012–2013*, 72 JAMA PSYCH. 1235, 1236 (2015); Lindsey A. Hines et al., *Use of High-Potency Cannabis Use with Mental Health and Substance Use in Adolescents*, 77 JAMA PSYCH. 1044, 1045–46 (2020), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2765973?resultClick=1> [<https://perma.cc/K2SV-9BA9>]; Robin M. Murray & Wayne Hall, *Will Legalization and Commercialization of Cannabis Use Increase the Incidence and Prevalence of Psychosis?*, 77 JAMA PSYCH. 777, 777–78 (2020), <https://jamanetwork.com/journals/jamapsychiatry/article-abstract/2763798> [<https://perma.cc/4GXD-674H>]; Chelsea L. Shover et al., *Association of State Policies Allowing medical Cannabis for Opioid Use Disorder with Dispensary Marketing for this Indication*, JAMA NETWORK OPEN (July 14, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2768239> [<https://perma.cc/V54S-B3CW>] (“[A] large proportion of [cannabis] dispensaries make unsupported claims regarding the effectiveness of cannabis as a treatment for OUD [Opioid Use Disorder], including that cannabis should replace FDA-approved MOUDs [Medications for Opioid Use Disorders].”); Zara Latif & Nadish Garg, *The Impact of Marijuana on the Cardiovascular System: A Review of the Most Common Cardiovascular Events Associated with Marijuana Use*, 9 J.

The conclusion that Professor Dills, Goffard, and Miron reached with regard to roadway crashes is also open to question. Because most of us have been driving since we were (at least) seventeen years old, we tend to forget that it is “a complex activity requiring alertness, divided-yet-wide-ranging attention, concentration, eye-hand-foot coordination, and the ability to process visual, auditory, and kinesthetic information quickly.”¹¹⁹ The changing roadway environment requires a driver to respond immediately to unforeseen and repeated dangers.¹²⁰ Like the ethanol in liquor, the THC in cannabis slows our ability to quickly and effectively process information, make decisions, and implement or revise them when behind the wheel.¹²¹ The impairing effect of THC can last even after a

CLINICAL MED. 1925, 1936 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7355963/> [<https://perma.cc/VAA4-AA6R>] (“Although it is widely viewed as a safe drug, marijuana has been strongly linked to various cardiovascular adverse events over the years. Many cases have linked marijuana to myocardial infarction, especially in young healthy men with no other risk factors. Marijuana has also been associated with a worse mortality rate post MI [(myocardial infarction, or heart attack)]. Cases of marijuana precipitating arrhythmias, stress cardiomyopathy, and arteritis have all been described. With the rise in cannabis use among older patients, who are the most vulnerable to cardiovascular events, it is expected that these reports will increase in the next few years.”); Pramod Theetha Kariyanna et al., *Marijuana and Microcirculation—A Review*, 8 AM. J. MED. CASE REP. 284, 286 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7410519/pdf/nihms-1612767.pdf> [<https://perma.cc/8B7W-JW7Z>] (“Evidence suggests that marijuana increases the risk of acute myocardial infarction and ischemic stroke, even in young and otherwise healthy users, in the acute setting.”).

119. Larkin, *supra* note 16, at 454; *see also* ROBERT L. DUPONT, *THE SELFISH BRAIN: LEARNING FROM ADDICTION* 135 (rev. ed., 2000); Gary M. Reisfield et al., *The Mirage of Impairing Drug Concentration Thresholds: A Rationale for Zero Tolerance Per Se Driving Under the Influence of Drugs Laws*, 36 J. ANALYTICAL TOXICOLOGY 353, 353 (2012).

120. *See* Larkin, *supra* note 16, at 454.

121. *See* BRIT. MED. ASS'N, *supra* note 8, at 66 (“Impairment of psychomotor and cognitive performance, especially in complex tasks, has been shown in normal subjects in many tests. Impairments include slowed reaction time, short term memory deficits, impaired attention, time and space distortion, [and] impaired coordination. These effects combine with the sedative effects to cause deleterious effects on driving ability or operation of machinery.” (citations omitted)); *id.* at 19–20 (listing marijuana's pharmacological actions in people); *see also* NAT'L INST. ON DRUG ABUSE, *MARIJUANA* 10, 12–13 (2017); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *MARIJUANA, ALCOHOL, AND ACTUAL*

DRIVING PERFORMANCE, 39–40 (1999); NEW ZEALAND TRANSP. AGENCY, RISKS OF DRIVING WHEN AFFECTED BY CANNABIS, MDMA (ECSTASY) AND METHAMPHETAMINE AND THE DETERRENCE OF SUCH BEHAVIOUR: A LITERATURE REVIEW 6 (2020) [hereinafter NZ CANNABIS DRIVING RISKS], <https://www.nzta.govt.nz/resources/research/reports/664> [<https://perma.cc/48YL-DB7L>] (“[T]he relative crash risk of cannabis for a sober driver is around 1.5 for lower doses of cannabis and around 2 for higher doses of cannabis.”); *id.* (noting the following effects of cannabis use on driving in a simulator: “[i]ncreased reckless driving”; “[s]lower driving, larger headways”; “[m]ore signaling errors”; “[i]mpaired control of speed, headway and lateral position”; “[d]ecreased car control as task demand increases”; “[d]ecreased performance on road tracking tasks”; “[d]ecreased psychomotor skills, reaction time, visual functions, attention and encoding”); *id.* at 7 (“[C]annabis users may try to mitigate their impairment by not overtaking, slowing down and focusing their attention in anticipating an expected event for which a known response is required. Of course, this cannot happen when an event is unexpected.”); MINISTRY OF TRANSP. (NEW ZEALAND), ENHANCED DRUG IMPAIRED DRIVER TESTING 6 (May 2019) (finding that 27 percent of the drivers killed in crashes had used cannabis and that 59 percent of the drivers “stopped by Police and determined to be impaired by drugs” had used cannabis); *id.* at 7 (“The negative effects of high doses of cannabis on driving performance are well documented and cannabis use is associated with increased risk of being killed or injured.” (footnote omitted)); NAT’L ACAD. OF SCI., ENG’G, & MED., *supra* note 108, at 85–99, 230; IVERSEN, *supra* note 8, at 27–65, 189 (2d ed. 2008); Robert L. DuPont et al., *Marijuana-Impaired Driving: A Path Through the Controversies*, in CONTEMPORARY HEALTH ISSUES ON MARIJUANA 183, 186 (Kevin A. Sabet & Ken. C. Winters eds., 2018) (“Today there is a wealth of evidence that marijuana is an impairing substance that affects skills necessary for safe driving.”); Mark Asbridge et al., *Acute Cannabis Consumption and Motor Vehicle Collision Risk: Systematic Review of Observational Studies and Meta-Analysis*, 9 *BMJ* 344, 344–45 (2012); Robert M. Chow et al., *Driving Under the Influence of Cannabis: A Framework for Future Policy*, 128 *ANESTHESIA & ANALGESIA* 1300, 1301 (2019) (“Several studies have found acute marijuana use to be associated with a ≥ 2 -fold higher risk of crashing while driving a motor vehicle when compared to driving unimpaired. In some cases, drivers under the influence of cannabis were more aware of their deficits and attempted to compensate by driving slower and taking less risks. However, these behaviors do not equate to a reduced risk of accidents. The deleterious cognitive and psychomotor effects of marijuana that increase with multitasking or task complexity cannot be ignored. Studies evaluating the effects of cannabinoids on driving ability have found that participants perform worse on divided attention tasks, during situations with decision-making dilemmas, and during long monotonous drives followed by sudden changes requiring a quick reaction.” (footnotes omitted)); Rebecca L. Hartman & Marilyn A. Huestis, *Cannabis Effects on Driving Skills*, 59 *CLINICAL CHEM.* 478, 478–79 (2013); Eduardo Romanoa et al., *Cannabis and Crash Responsibility While Driving Below the Alcohol Per Se Legal Limit*, 108 *ACCIDENT ANALYSIS & PREVENTION* 37, 37–38, 41–42 (2017). There is less of an adverse effect in simulators and when drivers perform simple on-road maneuvers, but “if speed increases, as it does on a highway, then reaction time can’t keep up,” and “if a driver

considerable period of abstinence.¹²² Yet, ironically and alarmingly, THC's potentially enduring effect might not matter a great deal because studies show that a good number of people drive shortly after

faces multiple tasks . . . performance goes to hell pretty quickly." DAVID CASARETT, *STONED: A DOCTOR'S CASE FOR MEDICAL MARIJUANA* 160 (2015); see generally Larkin, *supra* note 16, at 473–78.

122. See M. Kathryn Dahlgren et al., *Recreational Cannabis Use Impairs Driving Performance in the Absence of Acute Intoxication*, 208 *DRUG & ALCOHOL DEPENDENCE*, no. 107771, 2020, at 8 ("The current study demonstrates residual driving impairment in nonintoxicated cannabis users, which appears specific to those with early onset cannabis use."), <https://reader.elsevier.com/reader/sd/pii/S0376871619305484?token=77B6250A44A47439AD0E665BF9C48268BDE0223B5726398A1D2FBB9DD375A0745DDAEFC75C7E2411636DFF6FD2A47338> [https://perma.cc/9538-TB2E]; DuPont et al., *supra* note 121, at 187 ("A study of chronic, daily marijuana users assessed over a three-week period of abstinence showed prolonged impairment of psychomotor function on critical tracking and divided attention tasks necessary for driving safely.").

consuming marijuana.¹²³ What is worse is that people also commonly use marijuana *and* alcohol.¹²⁴ That combination further impairs someone's ability to handle a motor vehicle safely, because

123. The percentages vary considerably, but all of them are worrisome. See Alejandro Azofeifa et al., *Driving Under the Influence of Marijuana and Illicit Drugs Among Persons Aged ≥ 16 Years—United States, 2018*, 68 MORBIDITY & MORTALITY WKLY. REP. 1153, 1153 (2019) (“During 2018, 12 million (4.7%) U.S. residents reported driving under the influence of marijuana in the past 12 months; 2.3 million (0.9%) reported driving under the influence of illicit drugs other than marijuana. Driving under the influence was more prevalent among males and among persons aged 16–34 years.”); NAT’L HIGHWAY TRAFFIC SAFETY ADM’N, RESULTS OF THE 2013–2014 NATIONAL ROADSIDE SURVEY OF ALCOHOL AND DRUG USE BY DRIVERS 1–2 (2015) (stating that almost 20 percent of drivers tested positive for potentially impairing legal and illegal drugs other than alcohol); NZ CANNABIS DRIVING RISKS, *supra* note 121, at 10 (“Of the 11% who had used cannabis in the previous 12 months, 36% of those who drove during that time reported driving under the influence of cannabis.”); Scott MacDonald et al., *Driving Behavior Under the Influence of Cannabis or Cocaine*, 9 TRAFFIC INJURY PREVENTION 190, 191 (2008) (stating that 22% of marijuana users in Ontario, Canada have driven while under its influence, and 90% of users surveyed said that they were willing to drive after consuming a typical dose); Thomas R. Arkell et al., *Driving-Related Behaviours, Attitudes and Perceptions among Australian Medical Cannabis Users: Results from the CAMS 18–19 Survey*, 148 ACCIDENT ANALYSIS & PREVENTION, no 105784, 2020, <https://pubmed.ncbi.nlm.nih.gov/33017729/> [<https://perma.cc/F9N7-DCY7>] (“A key finding of the current study is that a substantial proportion of medical cannabis users are driving shortly after using cannabis, with some driving during the time of peak effects when impairment tends to be greatest. More than 19.0% of users reporting driving within one hour of consuming cannabis and 34.6% of all users within 3 hours of use . . . The finding that 71.9% of respondents felt that their medical cannabis use does not impair their driving is consistent with previous reports showing that cannabis users tend to perceive DUIC [Driving Under the Influence of Cannabis] as relatively low risk, especially when compared with alcohol.” (citations omitted)). *But see id.* (“In a recent review, Ceilius et al. found that most patients with multiple sclerosis-related spasticity who were being treated with nabiximols actually showed an improvement in driving ability, most likely due to a reduction in spasticity and/or improved cognitive function.” (citation omitted)).

124. See, e.g., AZOFEIFA ET AL., *supra* note 123, at 1154 (“In a study of injured drivers aged 16–20 years evaluated at level 1 trauma centers in Arizona during 2008–2014, 10% of tested drivers were simultaneously positive for both alcohol and [THC].” (footnote omitted)); BECKY BUI & JACK K. REED, COLO. DEP’T OF PUB. SAFETY, DRIVING UNDER THE INFLUENCE OF DRUGS AND ALCOHOL: A REPORT PURSUANT TO HOUSE BILL 17-1315, at 7 (July 2018) (noting that in 2016 alcohol and THC are the most common drug combination in cases with test results); DARRIN T. GRONDELL ET AL., WASH. TRAFFIC SAFETY COMM’N, MARIJUANA USE, ALCOHOL USE, AND DRIVING IN WASHINGTON STATE 1–2

each drug enhances the incapacitating effect of the other.¹²⁵ Consuming marijuana alone might not put someone “one token over the line,”¹²⁶ but a “marijuana-alcohol cocktail” likely would do so.¹²⁷

(Apr. 2018) (“Poly-drug drivers (combinations of alcohol and drugs or multiple drugs) is now the most common type of impairment among drivers in fatal crashes.”); 5 ROCKY MTN. HIGH-INTENSITY DRUG TRAFFICKING AREA STRATEGIC INTEL. UNIT, THE LEGALIZATION OF MARIJUANA IN COLORADO: THE IMPACT—UPDATED 10 (2019) (depicting that 43 percent of the drivers who tested positive for marijuana also had used alcohol); EUROPEAN MONITORING CENTRE FOR DRUGS AND DRUG ADDICTION, DRIVING UNDER THE INFLUENCE OF DRUGS, ALCOHOL AND MEDICINES IN EUROPE—FINDINGS FROM THE DRUID PROJECT 17 (2012) (“[I]n the majority of cases [involving drivers “seriously injured or killed”], illicit drugs were found in combination with other psychoactive substances, mainly alcohol. THC (and/or THC-COOH) seemed to be one of the most prevalent illicit drugs”); CAULKINS ET AL., *supra* note 19, at 44 (“Marijuana users are much more likely than are nonusers to drink and to abuse alcohol. For example, current marijuana users are five times as likely as nonusers to meet DSM-IV criteria for alcohol abuse or dependence (26 percent versus 5 percent); that is, one in four current marijuana users is a problem drinker (calculated using 2012 NSDUH data using the SAMHSA online tool). Indeed, simultaneous use is common. The national household survey asks people what, if any, other substances they used the last time they drank alcohol. Among the 15.4 million people who used both alcohol and marijuana at some time in the past 30 days, 54 percent reported using marijuana along with alcohol the last time they drank, a proportion that rises to 83 percent among daily or near-daily marijuana users.” (footnote omitted)); ROBERT L. DUPONT, INST. FOR BEHAV. & HEALTH, IMPLEMENT EFFECTIVE MARIJUANA DUID LAWS TO IMPROVE HIGHWAY SAFETY 1 (Oct. 12, 2016); Johannes E. Ramaekers, *Driving Under the Influence of Cannabis: An Increasing Public Health Concern*, 319 JAMA 1433 (2018). See generally Larkin, *supra* note 16, at 478–79 & nn.104–07.

125. See, e.g., BRIT. MED. ASS’N, *supra* note 8, at 71 (noting the “additive effect” when marijuana and alcohol are combined); IVERSEN, *supra* note 8, at 96 (“It may be that the greatest risk of marijuana in this context is to amplify the impairments caused by alcohol when, as often happens, both drugs are taken together”); Percy Bondallaz et al., *Cannabis and Its Effects on Driving Skills*, 268 FORENSIC SCI. INT’L 92 (2016); R. Andrew Sewell et al., *The Effect of Cannabis Compared with Alcohol on Driving*, 18 AM. J. ADDICTION 185 (2009); see generally Larkin, *supra* note 16, at 478–80 & nn.105–08 (collecting authorities).

126. MIKE BREWER & TOM SHIPLEY, ONE TOKE OVER THE LINE (Kama Sutra Records 1971).

127. See, e.g., Nat’l Highway Traffic Safety Admin., *Marijuana and Alcohol Combined Severely Impede Driving Performance*, 35 ANNALS OF EMERGENCY MED. 398, 398 (2000); Stanford Chihuri et al., *Interaction of Marijuana and Alcohol on Fatal Motor Vehicle Crash Risk: A Case-Control Study*, 4 INJURY EPIDEMIOLOGY, no. 8, 2017, at 6; Guohua Li et al., *Role of Alcohol and Marijuana Use in the Initiation of Fatal Two-Vehicle Crashes*, 27 ANNALS

The recent numbers bear out that concern. Data from 2018 and 2019 in Colorado and Washington show a considerable increase in the number of drivers who tested positive for THC in crashes resulting in fatalities.¹²⁸ The Colorado data, in fact, represents roughly one person killed every three days.¹²⁹ Those facts make it easy to understand why the federal agencies responsible for improving roadway safety—such as the National Highway Traffic Safety Administration and the National Transportation Safety Board,¹³⁰ along

OF EPIDEMIOLOGY 342, 346 (2017); Adi Ronen et al., *The Effect of Alcohol, THC and Their Combination on Perceived Effects, Willingness to Drive and Performance of Driving and Non-Driving Tasks*, 42 ACCIDENT ANALYSIS & PREVENTION 1855, 1862 (2010); Mark R. Rosekind et al., *Reducing Impaired Driving Fatalities: Date Need to Drive Testing, Enforcement and Policy*, 180 JAMA INTERNAL MED. 1068, 1068 (2020) (“[E]very year more than 10 000 individuals die on US roads as a result of crashes in which a driver had a blood alcohol concentration of greater than 0.08 g/dL, accounting for about one-third of motor vehicle crash deaths annually. As this significant alcohol-impaired driving problem continues, public health and safety professionals are justifiably concerned by the introduction of an additional legal intoxicant into our communities and onto our roads.” (footnote omitted)); Julian Santaella-Tenorio et al., *Association of Recreational Cannabis Laws in Colorado and Washington State with Changes in Traffic Fatalities, 2005-2017*, 180 JAMA INTERNAL MED. 1061, 1064 (2020) (finding an increase in marijuana-related traffic fatalities in Colorado but not Washington State); L.R. Sutton, *The Effects of Alcohol, Marihuana and Their Combination on Driving Ability*, 44 J. STUD. ALCOHOL 438, 442 (1983). *But see* Julian Santaella-Tenorio et al., *US Traffic Fatalities, 1985-2014, and Their Relationship to Medical Marijuana Laws*, 107 AM. J. PUB. HEALTH 336, 338 (2017) (finding a decrease in traffic fatalities in states with medical marijuana programs); *see generally* Larkin, *supra* note 16, at 478–80 & nn.104–09 (collecting authorities).

128. *See, e.g.*, ROCKY MTN. HIGH-INTENSITY DRUG TRAFFICKING AREA STRATEGIC INTEL. UNIT, *supra* note 124, at 5–17; COLO. DEP’T OF PUBLIC SAFETY, DIV. OF CRIM. JUST., OFF. OF RES. & STAT., *IMPACTS OF MARIJUANA LEGALIZATION IN COLORADO: A REPORT PURSUANT TO SENATE BILL 13-283 51* (Oct. 2018).

129. ROCKY MTN. HIGH-INTENSITY DRUG TRAFFICKING AREA STRATEGIC INTEL. UNIT, *supra* note 124, at 5.

130. *See, e.g.*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., *DRUG-IMPAIRED DRIVING*, <https://www.nhtsa.gov/risky-driving/drug-impaired-driving> [<https://perma.cc/83EL-TEP7>] (last accessed Aug. 23, 2020); NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., *MARIJUANA, ALCOHOL AND ACTUAL DRIVING PERFORMANCE 4–15* (1999); Heidi King, Deputy Dir., Nat’l Highway Safety Admin., *DUID: A Vision for the Future* (Feb. 27, 2018), <https://www.nhtsa.gov/speeches-presentations/duid-vision-future> [<https://perma.cc/83EL-TEP7>]; *Planes, Trains, and Automobiles: Operating While Stoned: Hearing Before the Subcomm. on Operations of the H. Comm.*

with the White House Office of National Drug Control Policy¹³¹—are troubled by the risks posed by DUI-D: that is, Driving Under the Influence of Drugs. We would be foolish to discount their concerns in any debate over the future of our marijuana policy. The bottom line is that Professor Dills, Goffard, and Miron are too quick to dismiss the potential harm of marijuana-impaired driving.¹³²

* * *

Where does that leave us? If polls are to be believed, our historically negative attitude toward cannabis has withered away, and people in the mainstream of political discourse disagree over how to treat the drug. A majority of states have passed medical or recreational marijuana programs despite the obvious fact that they are

on Oversight and Government Reform, 113th Cong. 9–23 (2014) (statement of Hon. Christopher Hart, Acting Chairman, Nat'l Transp. Safety Bd.); *id.* at 24–25 (statement of Jeffrey P. Michael, Assoc. Adm'r of Rsch. & Program Dev., Nat'l Highway Traffic Safety Admin., U.S. Dep't of Transp.); *id.* at 42 (statement of Patrice M. Kelly, Acting Dir., Off. of Drug & Alcohol Pol. and Compliance, U.S. Dep't of Transp.); *id.* at 44 (statement of Ronald Flegel, Dir., Div. of Workplace Programs, Ctr. for Substance Abuse Prevention, Substance Abuse & Mental Health Serv. Admin., U.S. Dep't of Health & Human Servs.).

131. In 2010, ONDCP concluded that drugged driving poses as great a threat to roadway safety as alcohol-impaired driving and demands an “equivalent” response from the government and society. *See* OFF. OF NAT'L DRUG CONTROL, NATIONAL DRUG CONTROL STRATEGY 2010, at 23 (2010).

132. For a recent validation of that proposition, see Russell S. Kamer et al., *Change in Traffic Fatality Rates in the First 4 States to Legalize Recreational Marijuana*, 180 JAMA INTERNAL MED. 1119, 1119–20 (June 22, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/article-abstract/2767643> [https://perma.cc/NPY5-YS9F] (“[L]egalization of recreational marijuana is associated with increased traffic fatality rates. Applying these results to national driving statistics, nationwide legalization would be associated with 6800 (95% CI, 4200-9700) excess roadway deaths each year.”); *see also* Jaeyoung Lee et al., *Investigation of Associations between Marijuana Law Changes and Marijuana-Involved Fatal Traffic Crashes: A State-Level Analysis*, 10 J. TRANSP. & HEALTH 194, 201 (2018) (“We found that simply legalizing medical marijuana has no association with the number of drivers who are under the influence of marijuana in fatal crashes. On the other hand, all other types of changes in marijuana policy: decriminalization, additional medical legalization (in states that already decriminalized marijuana), and recreational legalization significantly increased the number of drivers involved in fatal crashes who were impaired by marijuana because all adults can more easily access marijuana.”).

encouraging state residents to violate federal law. The federal government has not torpedoed those programs, and for a while even gave them its blessing.¹³³ Former U.S. Attorney General Bill Barr told Congress that only a legislative resolution is now appropriate. For those reasons (and some others too), it is time to re-examine the status of marijuana under federal law.¹³⁴

III. THE OPPORTUNITY TO RECONSIDER OUR APPROACH FROM SCRATCH

So far, Congress has largely decided to “pay no attention to that man behind the curtain”¹³⁵—that is, to the thirty-plus states acting as if the CSA were advice, not law, but who are really pulling the strings of contemporary cannabis policy. The Members hope that this problem will go away without having to vote on potential reform of federal law, because any vote will anger some voters whichever button they push. A new Congress might think and act differently, but there is no certainty of that happening. As a result, because the states cannot exempt themselves from the CSA,¹³⁶ the only option left to rationalize federal and state law, some people might say, is to persuade the Supreme Court to find a basis in the Constitution to do Congress’s job.

Their likelihood of being successful, however, is not high. The system was not designed to work that way; the Court’s role is to

133. Emily Kopp, *States Turn to Unenforced Federal Law to Slow Medical Marijuana Legalization*, ROLL CALL (Mar. 4, 2020, 5:30 AM), <https://www.roll-call.com/2020/03/04/states-turn-to-unenforced-federal-law-to-slow-medical-marijuana-legalization/> [<https://perma.cc/2MZA-9UTR>].

134. See generally Peter Bensinger, *Weighing the Consequences of Legalization*, WALL ST. J. (Jan. 2, 2020), <https://www.wsj.com/articles/the-america-that-legal-marijuana-has-wrought-11577984718> [<https://perma.cc/GR3J-Y4>]. The House of Representatives recently passed the Marijuana Opportunity Reinvestment and Expungement (MORE) Act, H.R. 3884, 116th Cong. (2020), which would remove cannabis from the schedules of controlled substances in the Controlled Substances Act of 1970.

135. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

136. See *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483, 494–95 (2001) (ruling that medical necessity is not a defense to cannabis distribution even in a state with a medical marijuana program).

keep Congress from going off the rails, not to tell Congress where it must or should go. The Court is reticent to assume a legislative role for a host of institutional and political reasons, even when Congress refuses to do its job. Even if the Court were inclined to do so, it is not likely that the Court would find that eliminating the incoherence plaguing this subject is sufficiently important to justify wearing a legislative hat.

Professors Robert Mikos, Ernest Young, and William Baude take a different, more traditional approach. Each one is a well-recognized scholar in the field of cannabis regulation or constitutional law, and each one believes that the Supreme Court has gone too far in letting Congress override the states' authority to permit marijuana to be grown, sold, and used within their borders.¹³⁷ Rather than ask the Supreme Court to legislate a solution to this problem, they urge the Court to revisit its precedents to recognize that the state should have greater room to regulate entirely in-state conduct free from congressional oversight.¹³⁸ If anyone could persuade the Supreme Court to adopt a reasonable, constitutionally justified, and federalism-friendly alternative to today's messy state of the law, one or more of them can.¹³⁹

137. See generally Robert A. Mikos, *Marijuana Localism*, 65 CASE WES. RES. L. REV. 715 (2015); Ernest A. Young, *Federalism as a Check on Executive Authority*, 22 TEX. REV. L. & POL. 305 (2017–2018); William Baude, *The Contingent Power to Regulate Marijuana*, at 171–84.

138. *Id.*

139. Professors Mikos and Young have written extensively about one subject or the other in the book's title. For a sampling of Professor Mikos' scholarship on cannabis policy, see ROBERT A. MIKOS, *MARIJUANA LAW, POLICY, AND AUTHORITY* (2017); Robert A. Mikos, *Marijuana Localism*, 65 CASE WES. RES. L. REV. 715 (2015); Robert A. Mikos, *Preemption under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5 (2013); Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENVER U. L. REV. 997 (2012); Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633 (2011); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421 (2009). For a sampling of Professor Young's scholarship on federalism, see Ernest A. Young, *Federalism as a Check on Executive Authority*, 22 TEX. REV. L. & POL. 305 (2018); Ernest A. Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057 (2015); Ernest A. Young, *The Puzzling Persistence of Dual*

Professor Mikos addresses the marijuana federalism issue from a preemption perspective.¹⁴⁰ His concern is with the argument that the CSA preempts state legalization provisions.¹⁴¹ Invoking implicit preemption principles, opponents of legalization have argued that the CSA preempts state cannabis legalization laws because they frustrate the policy underlying the CSA of deterring the sale or consumption of marijuana.¹⁴² In response, Professor Mikos both relies

Federalism, 55 NOMOS 34 (2014); Ernest A. Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39 (2013); Ernest A. Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874 (2006). For an article of Professor Young's spanning the divide between both subjects, see Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after Gonzales v. Raich*, 2005 SUP. CT. REV. 1 (2005). Professor Baude's oeuvre focuses (but not exclusively) on constitutional theory. For a sampling of his scholarship, see William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019); William Baude, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809 (2019); William Baude et al., *A Call for Developing a Field of Positive Legal Methodology*, 84 U. CHI. L. REV. 1 (2017); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

140. Mikos, *supra* note 6, at 103. Professor Young does as well, *see* Young, *supra* note 6, at 89–92, but Professor Mikos focuses on the issue. For convenience, I will refer only to Professor Mikos's argument.

141. Mikos, *supra* note 6, at 114.

142. For some time the Supreme Court has stated that federal law implicitly preempts state law when the latter imposes an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also, e.g., Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1912 (2019) (Ginsburg, J., concurring in the judgment); *Wyeth v. Levine*, 555 U. S. 555, 563–64 (2009). The *Virginia Uranium* case, however, calls that principle into question. Writing the lead opinion for the Court, Justice Gorsuch, joined by Justices Thomas and Kavanaugh, concluded that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Virginia Uranium*, 139 S. Ct. at 1901 (lead opinion) (citation and internal punctuation omitted); *see also id.* at 1905 ("Start with the fact that this Court has generally treated field preemption inquiries like this one as depending on *what* the State did, not *why* it did it."). As Justice Gorsuch elaborated, "A sound preemption analysis cannot be as simplistic as that. No more than in field preemption can the Supremacy Clause be deployed here to elevate abstract and unenacted legislative desires above state law; only federal laws 'made in pursuance of' the Constitution, through its prescribed processes of bicameralism and presentment, are entitled to preemptive effect. Art. VI, cl. 2 So any '[e]vidence of pre-emptive

on and quarrels with the Supreme Court's 2018 decision in *Murphy v. National Collegiate Athletic Association*,¹⁴³ the third of three decisions addressing what has come to be known as the "Anticommandeering Doctrine."¹⁴⁴ He relies on *Murphy* for the rule that Congress cannot issue diktats to state legislatures telling them what must be a crime. Professor Mikos quarrels with the Court's reasoning, however, because it did not go far enough to protect state decisions to liberalize their criminal laws, particularly the ones dealing with marijuana.¹⁴⁵

Murphy involved a Tenth Amendment challenge to the constitutionality of a federal law, the Professional and Amateur Sports Protection Act (PASPA).¹⁴⁶ The PASPA ostensibly sought "to safeguard the integrity of sports"¹⁴⁷ by telling the states that they could not "authorize" sports gambling.¹⁴⁸ New Jersey decided to cash in on

purpose,' whether express or implied, must therefore be 'sought in the text and structure of the statute at issue.'" *Id.* at 1907 (citation omitted). Those three justices would not allow for preemption based on a "frustration of the purposes" rationale. *Id.* at 1900. If two additional justices joined those three, there would be no good argument that the CSA preempts the state legalization measures. In any event, there is no need to invoke the "anticommandeering doctrine" to fend off a preemption challenge, as explained below. *See infra* note 177.

143. 138 S. Ct. 1461 (2018).

144. Mikos, *supra* note 6, at 103–122; *Murphy*, 138 S. Ct. at 1472.

145. Mikos, *supra* note 6, at 111–114.

146. 28 U.S.C. §§ 3701–3704 (2018).

147. *Murphy*, 138 S. Ct. at 1470. I say "ostensibly," because the PASPA grandfathered the state laws then in effect—think: Nevada—or any such law that New Jersey passed within a year after the PASPA became law. *Id.* at 1471 & nn.25–27. It is difficult to believe that the millions of dollars annually bet on sports gambling in those states does not risk "the integrity of sports."

148. 28 U.S.C. § 3702 (2018) ("It shall be unlawful for—(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games."); *see* S. Rep. No. 102-248 at 9 (1991) (Senate Report accompanying the Professional and Amateur Sports Protection Act (PASPA)).

that enterprise,¹⁴⁹ and its legislature, in a meandering way, eventually did just that.¹⁵⁰ The Supreme Court read the PASPA as forbidding New Jersey from repealing a state criminal law banning sports gambling and held that, in so doing, the PASPA violated the Court's Anticommandeering Doctrine.¹⁵¹ That doctrine denies Congress the power to treat states as if they were federal agencies whom Congress can boss around.¹⁵² Just as Congress cannot order a state to pass a state law,¹⁵³ so too Congress cannot direct a state to leave one unmodified.¹⁵⁴ The Court also rejected the argument that the PASPA was an ordinary exercise of Congress's Supremacy Clause power to regulate interstate gambling and, in the process, preempt contrary state law.¹⁵⁵ That defense failed, the Court concluded, because "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States."¹⁵⁶ By contrast, the PASPA spoke only to the states without also prohibiting private sports gambling.¹⁵⁷

149. I know; that's a horrible pun. But I couldn't help myself.

150. *Murphy*, 138 S. Ct. at 1469–72.

151. *See id.* at 1474–75.

152. *Id.* at 1475 ("The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States.").

153. That was the holding of the "pioneering case," *id.* at 1476, in the Anticommandeering Doctrine, *New York v. United States*, 505 U.S. 144 (1992). *New York* held that Congress cannot order a state to assume "title" to radioactive waste or regulate it as Congress directs. *Id.* at 176–78.

154. *Murphy*, 138 S. Ct. at 1478–79.

155. *Id.* at 1479.

156. *Id.* at 1481.

157. *Id.* ("Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. (It does not give them a federal right to engage in sports gambling.) Nor does it impose any federal restrictions on private actors. If a private citizen or company started a sports gambling operation, either with or without state authorization, [28 U.S.C.] § 3702(1) would not be violated and would not provide any ground for a civil action by the Attorney General or any other party. Thus, there is

Professor Mikos's criticism of *Murphy* is not that the Supreme Court mistakenly held the PASPA unconstitutional, but that the Court's ruling did not go far enough to protect state sovereignty.¹⁵⁸ The holding is underinclusive, he argues, because it does not keep Congress from adopting a simple workaround.¹⁵⁹ Congress could easily nullify the Court's holding by passing a statute that adds to the PASPA's text a provision forbidding any private party from engaging in sports gambling.¹⁶⁰ The Court likely did not intend to create that loophole, as they note, but it is there for all to see, and other commentators have spotted it too.¹⁶¹

Professor Mikos is not concerned with the potential resurrection of the PASPA.¹⁶² What troubles him is the risk that *Murphy* would not be an answer to the argument that the CSA preempts state cannabis legalization programs.¹⁶³ As discussed above, the inconsistency between federal and state law is plain for all to see.¹⁶⁴ Accordingly, the preemption argument would be that, by regulating rather than prohibiting the sale of marijuana, the state liberalization statutes conflict with a fundamental purpose of the CSA—namely, to stop the distribution of cannabis. Because the CSA clearly applies

simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.”).

158. Mikos, *supra* note 6, at 112–113.

159. *Id.*

160. Professor Mikos even kindly drafts the text Congress could use. *Id.* at 112–13 (“It is unlawful for any private actor to sponsor, operate, advertise, or promote sports gambling.”).

161. Young, *supra* note 6, at 91; Mikos, *supra* note 6, at 113, 120 n.25. It is unlikely that Congress will use that loophole to salvage the PASPA. The statute did not make sports gambling a federal offense, and it exempted sports gambling in Nevada casinos from its terms. *Murphy*, 138 S. Ct. at 1470–71; *supra* note 148. Given the centrality of gambling to Nevada's economy, that compromise likely was necessary to secure the PASPA's passage. The political muscle necessary to demand that exemption is likely to stop Congress from making sports gambling a federal offense. Congress's theoretical ability to plug the hole necessary for preemption to be effective and save the PASPA is likely to remain just that, theoretical.

162. Mikos, *supra* note 6, at 118.

163. *Id.* at 115–16.

164. *See supra* Part I.

to private conduct, the argument would go, it does not violate the Anticommandeering Doctrine, and it preempts all state marijuana liberalization laws.

To defend against that argument, Professor Mikos urges the Supreme Court to refine the Anticommandeering Doctrine.¹⁶⁵ He maintains that to decide whether Congress has merely regulated private conduct or has trespassed on state sovereignty, a court should look to the substance of state, not federal, law and discern whether the state has regulated or deregulated private conduct.¹⁶⁶ Why? “Congress may preempt state law only to the extent the *state* law imposes restrictions or confers rights—that is, only to the extent *state* law regulates private actors.”¹⁶⁷ By contrast, “Congress may not preempt state law if it, instead, removes such restrictions on rights—that is if the state law deregulates private actors.”¹⁶⁸

I doubt that the Supreme Court will want to adopt a rule resembling Wesley Newcomb Hohfeld’s analysis of legal rights as the difference between forbidden commandeering and lawful preemption.¹⁶⁹ One of the two biggest selling points of the Anticommandeering Doctrine is its simplicity (the other is its apparent facial plausibility). Article I identifies the process that Congress must follow to legislate, as well as the subjects its legislation may govern.¹⁷⁰

165. Mikos, *supra* note 6, at 116–18.

166. *See id.*

167. *Id.* at 116.

168. *Id.* Professor Young suggests that perhaps the Supreme Court will reconsider its ruling in *Gonzalez v. Raich*, 545 U.S. 1 (2005), if “the *de facto* patchwork of contemporary law fails to cause chaos in the states where prohibitions are still enforced.” Young, *supra* note 6, at 97. That suggestion is similar to Professor Baude’s argument (both offer essentially the same suggestion, just from different directions), which I discuss below. *See infra* text accompanying notes 187–90.

169. *See, e.g.*, WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter Wheeler Cooke ed., 2010) (1964); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); *see generally* Heidi M. Hurd & Michael S. Moore, *The Hohfeldian Analysis of Rights*, 63 AM. J. JURIS. 295 (2018).

170. U.S. CONST. art. I, §§ 7–9.

It does not permit Congress to sidestep those limitations by conscripting a state into acting, in Justice Scalia's felicitous phrase, as a "junior-varsity Congress."¹⁷¹ As *Murphy* put it, "conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States."¹⁷² What could be simpler? Why complicate matters?¹⁷³

Besides, that complication is unnecessary. The Constitution does not require a state to have a criminal code. Article I identifies two examples of criminal legislation that states *cannot* enact—an ex post facto law and a bill of attainder¹⁷⁴—but it does not specify any laws that a state *must* pass. *Murphy* ruled that Article I does not vest in Congress the authority to issue commands to states, and the Article VI Supremacy Clause does not change that conclusion.¹⁷⁵ The Supremacy Clause merely establishes "a rule of decision" protecting Congress's legislative authority by making it superior to state law when acting within a delegated power.¹⁷⁶ Because Congress has no Article I power to command that states outlaw cannabis as contraband, states can repeal whatever drug laws they choose.¹⁷⁷

171. *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

172. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018).

173. Yes, in the context of addressing the PASPA as a lawful exercise of the right to regulate gambling the Court in *Murphy* looked to see whether the PASPA granted private parties a right to engage in sports gambling, and found that it did not. *Id.* at 1481. The Court pursued that inquiry, however, only to discern whether there was some non-obvious feature of the PASPA that could save it by regulating private conduct. *Id.* There is no doubt that the CSA regulates private conduct, so there would be no need for that inquiry.

174. See U.S. CONST. art. I, § 10, cl. 1.

175. *Murphy*, 138 S. Ct. at 1478–79.

176. See Larkin, *supra* note 25, at 109–11.

177. *Id.* Atop that, the Supreme Court's Anticommandeering Doctrine is misconceived. The doctrine (assuming that only three decisions can constitute a "doctrine") is a good example of a phenomenon that occasionally bewitches the Supreme Court. From time to time, the Court becomes so captured by one of its own doctrines that it fails to see that the doctrine obscures rather than illuminates legal analysis. (The Supreme Court's capital sentencing precedents are another example.) Indeed, *Murphy* is an example of what happens when judges become hypnotized by a word—here, "commandeering."

The doctrine stems from the Supreme Court's 1992 and 1997 decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). The *New York* case held unconstitutional a provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (codified as amended at 42 U.S.C. § 2021b et seq. (2018)), requiring the states, by legislation, to adopt as state law federally mandated regulations of that subject or else treat as state property their low-level radioactive waste. *New York*, 505 U.S. at 175, 188. *Printz* held the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified as amended at 19 U.S.C. § 922 (2018)), unconstitutional insofar as it directed state law enforcement officers to conduct federal firearms background checks required by federal law. 521 U.S. at 933–34. *Murphy* relied on *New York* and *Printz* to hold unconstitutional an act of Congress, the PASPA, directing state legislatures not to make gambling lawful under state law. *Murphy*, 138 S. Ct. at 1477–78. The doctrine likely gained its moniker because Justice Scalia, the author of *Printz*, used the term “commandeer” to describe what Congress had done by ordering state officials to carry out the responsibilities that federal law had unconstitutionally imposed on them. 521 U.S. at 914 n.7, 917, 929. Justice Stevens also used that term in his dissent. *Id.* at 952, 963 (Stevens, J., dissenting).

There was a simple answer to the allegedly complex issue posed by the constitutional challenges to the PASPA. Put aside any discussion of the express or implied limitations that the Constitution places on Congress's power and return to first principles. They offer an easier path to the same result without the need to create a new doctrine. Those principles reveal that all three statutes sought to do what no one at the Philadelphia Convention of 1787 or State Ratifying Conventions imagined that the newly chartered federal government could do: create *state law*.

Murphy, like *New York*, involved a federal statute that directed a state legislature to pass or not a state law of Congress's liking, while *Printz* involved a statute that imposed a new duty on state law enforcement officers. All three cases involved Congress's attempt to impose new duties on state officials whose authority and responsibilities are defined by state law. *See, e.g.,* *McMillan v. Monroe Cty.*, 520 U.S. 781, 786 (1997); VA. CODE ANN. §§ 15.2-1609 & 15.2-1603 (2020). The statutes in *New York*, *Printz*, and *Murphy* certainly did not purport to grant the relevant state legislative and executive officials' *federal* authority, and, even if they had, it would have been to no effect. The reason is that any party who exercises authority under federal law must be appointed consistent with Article II, and none of those statutes contemplated any such appointment, as Justice Scalia noted in *Printz*, 521 U.S. at 922–23. The only alternative is that, in each case, Congress sought to impose new duties on state officials by creating *state law*.

Yet, Congress lacks the “police power” that states enjoy, so it must find authority to legislate in one or more clauses of Section 8 of Article I. *See, e.g.,* *United States v. Lopez*, 514 U.S. 549, 566 (1995); *id.* at 552 (“The Constitution creates a Federal Government of enumerated powers.”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (“The enumeration presupposes something not enumerated . . .”); THE FEDERALIST No. 45 (James Madison) (Clinton Rossiter ed., 2003) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”). When Congress does so, it

To Professors Young and Baude, the real villain is not *Murphy*, but the Supreme Court's earlier decision in *Gonzales v. Raich*.¹⁷⁸ *Raich* was a challenge to the CSA by two individuals who sought to grow and use marijuana for their own personal medical use, rather than for any commercial purpose, whether interstate or intrastate.¹⁷⁹ They maintained that Congress lacked authority under the Commerce Clause to regulate their conduct because it did not take place in, and could have no effect on, interstate commerce.¹⁸⁰ The California medical cannabis law cordoned that activity off from commerce by limiting the exemption to in-state personal use by residents.¹⁸¹ The Court rejected that argument, holding that Congress

creates a "Law," U.S. CONST. art. I, § 7, cl. 2, that is by definition a *federal* law. Indeed, the Supremacy Clause rests on the premise that federal and state law are categorically different from each other. Because federal legislative authority was seen as being narrowly limited to matters of surpassing national importance, the clause creates an ordinal relationship between them, with federal law trumping state law when they conflict. See, e.g., *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2018) (plurality opinion) ("The Supremacy Clause supplies a rule of priority."); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015) ("It is apparent that this Clause creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land.'"); Larkin, *supra* note 25, at 109–11. Congress can no more create state law for New York, Arizona, or New Jersey than it can create domestic law for England, Canada, or Australia. To be sure, Congress can incorporate state law into federal law. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2018) (making the federal government liable in tort "in accordance with the law of the place where the act or omission occurred"). But any state law so incorporated necessarily becomes a federal law in the process of its application. In sum, since Congress has no power to create state law, none of the statutes in *New York, Printz*, or *Murphy* could have imposed any duty on state legislators or executive officers as a matter of their own state doctrine.

What does that mean for purposes of the Anticommandeering Doctrine? The holdings in *New York, Printz*, and *Murphy* were correct, but for a different reason. The correct rationale should have been that Congress cannot give state officials orders or powers under state law because Congress cannot create state law. So viewed, none of those cases supports the argument that the CSA preempts state legalization efforts because the decisions would not involve the Supremacy Clause at all. They represent only an internal limitation on Congress's power to legislate. State cannabis legalization measures would be safe against preemption by the CSA.

178. 545 U.S. 1 (2006); Young, *supra* note 6, at 96–97; Baude, *supra* note 6, at 171.

179. 545 U.S. at 6–7.

180. *Id.* at 15.

181. *Id.* at 30.

may regulate even “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”¹⁸² The Court also rejected the plaintiffs’ submission that their personal cultivation and use of marijuana could not affect commerce because (as the Court sarcastically described it) “California law ha[d] surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market.”¹⁸³ State law cannot enhance or dilute Congress’s Commerce Clause authority, the Court reasoned, so a state’s efforts to remove a particular local product or activity from the stream of commerce cannot defeat Congress’s power to regulate it to protect interstate commerce or the interests of other states.¹⁸⁴

Pointing to the Supreme Court’s doubt that locally grown marijuana would not find its way across California’s borders, Professor Young suggests that perhaps the Court might be willing to reconsider *Raich* if the states could prove their ability and willingness to quarantine state-grown cannabis within their jurisdictions.¹⁸⁵ Professor Young starts from the premise that the ruling in *Raich* rests on “a hearty dose of skepticism about the efficacy of California’s regulatory regime.”¹⁸⁶ Professor Young surmises that, if state cannabis regulatory programs “prove their efficacy over time” and do not “cause chaos in the states where prohibitions are still enforced,” perhaps the Court would be willing to re-examine that aspect of *Raich*.¹⁸⁷

Professor Baude approaches the decision from a slightly different angle.¹⁸⁸ He argues that Congress’s authority over purely intrastate activity is defensible only insofar as it is necessary to prevent local conduct from affecting people in another state.¹⁸⁹ Accordingly, Con-

182. *Id.* at 17 (quoting *Perez v. United States*, 402 U.S. 146, 151 (1971)).

183. *Id.* at 30.

184. *Id.* at 29–33.

185. Young, *supra* note 6, at 85–102.

186. *Id.* at 97.

187. *Id.*

188. Baude, *supra* note 6, at 171–84.

189. *Id.* at 171–72.

gress's authority should wane as a state minimizes "the risk of spillovers into the interstate black market."¹⁹⁰ To use a different metaphor, the Constitution divides and balances authority over intrastate commerce between the state and federal governments in a manner akin to the operation of a seesaw. The more effort that *State A* makes to prevent its intrastate commerce from spilling over into the jurisdiction of one of its forty-nine neighbors, the less authority Congress enjoys to regulate commerce within that state. That argument, like Professor Young's, is clever, but also ultimately unpersuasive.

Perhaps the Court would be willing to revisit *Raich* if there were proof that no more than a trivial amount of each state's marijuana would end up elsewhere. But I wouldn't bet the ranch on it. The Court wrote in *Raich* that "Congress could have rationally rejected" a system allowing states effectively to opt out of the reach of the CSA by regulating conduct themselves.¹⁹¹ What the Court was politely saying was that the plaintiffs' claim that California's marijuana would never leave home was not credible. The Court just decided to place the blame on Congress for that disbelief instead of taking responsibility itself. In any event, it would be extraordinarily difficult for anyone to prove that marijuana will spend its entire life in its state of birth.

Professors Young and Baude assume that cannabis-legal states are able and willing to prevent homegrown marijuana from crossing their borders headed elsewhere so that the states can escape from the CSA's clutches. That assumption is untenable. There is no reason to presume that what happens in California, stays in California. The evidence certainly doesn't offer much promise in that regard.¹⁹² As for the motivation of law enforcement officers to pre-

190. *Id.* at 172.

191. *Raich*, 545 U.S. at 30.

192. See, e.g., DRUG ENF'T ADMIN., DEA-DCT-DIR-007-20, 2019 NATIONAL DRUG THREAT ASSESSMENT, at 77 (2019) [hereinafter 2019 DEA NATIONAL DRUG THREAT AS-

SESSMENT] (“The popularity of marijuana use, the demand for increasingly potent marijuana and marijuana products, the potential for substantial profit, and the perception of little risk entice diverse traffickers and criminal organizations to cultivate and distribute illegal marijuana throughout the United States.”); *id.* at 80 (“Illicit domestic-produced marijuana is cultivated by various types and sizes of organizations. These range from individuals growing a limited number of plants to organized groups growing large quantities of marijuana intended for distribution across the United States.”); *id.* (“In January 2019, a traffic stop in Texas resulted in the seizure of almost 500 pounds of marijuana from a Colorado resident driving an RV. According to press reports, the driver was the owner and operator of a state-licensed marijuana cultivation facility in Colorado. The marijuana was reportedly en route to Dallas and Newark, New Jersey.”); *id.* at 81 (“[B]lack market marijuana production continues to grow in California, Colorado, Oregon, Washington, and other states that have legalized marijuana, creating an overall decline in prices for illicit marijuana as well. This further incentivizes trafficking organizations operating large-scale grow sites in these states to sell to customers in markets throughout the Midwest and East Coast, where marijuana commands a higher price. Marijuana is also shipped via mail and express consignment shipping services from the United States mainland to the USVI.”); *id.* at 85 (“In May 2019, the Denver FD, along with numerous federal, state, and local partners, arrested 42 people pursuant to a large black market marijuana investigation. During the two-year investigation, over 250 search warrants were executed at large-scale marijuana grow operations and businesses associated with an Asian DTO. Over 65,000 plants and 2,200 pounds of harvested marijuana were also seized. The marijuana produced by this organization was almost entirely destined for drug markets outside of Colorado.”); *id.* (“In March 2019, the New York FD received information regarding multiple suspected drug shipments sent via tractor-trailer from Washington and California to storage facilities in Queens. Follow-up investigation with the New York Police Department (NYPD) and ICE resulted in the identification and arrest of four suspects. Agents seized approximately 425 pounds of marijuana and 8,875 cartridges of THC oil.”); *id.* at 87 (“Marijuana produced in the United States is often trafficked from states where production is legal to or through states where production is not. Domestically produced marijuana is transported in personally owned vehicles (POVs), rented vehicles, semi-trucks, tractor-trailers, vehicle hauler trailers, trains, and buses as well as through personal and commercial planes. The use of commercial parcel services is also common especially for trafficking concentrated forms of marijuana, which are concealed in envelopes, small containers, or flattened parcels.”); Press Release, DEA, Two more plead guilty for roles in interstate marijuana trafficking conspiracy (May 1, 2019), <https://www.dea.gov/press-releases/2019/05/01/two-more-plead-guilty-roles-interstate-marijuana-trafficking-conspiracy> [<https://perma.cc/D7RR-GXXY>]; Press Release, U.S. Att’y’s Off., Dist. of Or., U.S. Dep’t of Just., Houston Man Sentenced to 84 Months in Federal Prison for Leading Interstate Marijuana Trafficking Conspiracy (Jan. 8, 2020), <https://www.justice.gov/usao-or/pr/houston-man-sentenced-84-months-federal-prison-leading-interstate-marijuana-trafficking> [<https://perma.cc/35VR-J9FV>]; CALIFORNIA HIGH INTENSITY DRUG TRAFFICKING AREAS: MARIJUANA’S IMPACT ON CALIFORNIA 46–47 (2018) (noting that marijuana

vent the export of cannabis out of California: Police officers are motivated to make arrests because that is their measure of success.¹⁹³

originating in California was seized in more than 20 other states); OREGON-IDAHO HIGH INTENSITY DRUG TRAFFICKING AREA: AN INITIAL ASSESSMENT OF CANNABIS PRODUCTION, DISTRIBUTION, AND CONSUMPTION IN OREGON 12 (2018) (updated Aug. 6, 2018) (“Between July 2015 and January 2018, 6,602 kg (14,550 lb.) of trafficked Oregon cannabis was seized en route to 37 states—worth more than \$48 million. During that period of time, Oregon cannabis was most frequently illicitly exported to Minnesota, Florida, Wisconsin, Missouri, Virginia, Illinois, Arkansas, Iowa, Maryland, and Texas. . . . Among in-bound monetary seizures, the largest amounts originated from Chicago Illinois, Dallas Fort-Worth Texas, Atlanta Georgia, Phoenix Arizona, and Los Angeles California—over \$718k was seized from Chicago and Dallas alone. As of 2018, Oregon cannabis products were found on multiple public internet markets (Online Classifieds), and clandestine marketplaces online. The most commonly used digital currencies accepted by vendors of Oregon cannabis on clandestine marketplaces were Bitcoin, Bitcoin Cash, Ethereum, Monero, and Litecoin.”); *id.* at 38 (“Because Oregon produces more cannabis than can be consumed by local demand, preventing the exportation of cannabis is a priority and is wholly illegal at both the federal and state level.”) (footnotes omitted); *id.* at 38–40; Trevor Hughes, *Colorado sued by neighboring states over legal pot*, USA TODAY (Dec. 18, 2014), <https://www.usatoday.com/story/news/nation/2014/12/18/colorado-marijuana-lawsuit/20599831/> [<https://perma.cc/H9CF-V5UH>] (“In June, USA TODAY highlighted the flow of marijuana from Colorado into small towns across Nebraska: felony drug arrests in Chappell, Neb., just 7 miles north of the Colorado border have skyrocketed 400% in three years.”); Patrick McGreevy, *As the top pot-producing state in the nation, California could be on thin ice with the federal government*, L.A. TIMES (Oct. 1, 2017), <https://www.latimes.com/politics/la-pol-ca-marijuana-surplus-export-20171001-story.html> [<https://perma.cc/WUU4-GGRK>] (“California produced at least 13.5 million pounds of marijuana last year—five times more than the 2.5 million pounds it consumed. Where did all that extra pot go? The answer, experts say, is that much of it ended up in other states—some, where marijuana is still illegal. . . . The Drug Enforcement Administration already has focused much of its efforts on California. Federal, state and local law enforcement agencies reported seizing 5.3 million marijuana plants throughout the nation last year. Seventy percent were confiscated in California—more than 1 million more plants than were seized in the state a year earlier.”); MARY K. STOHR ET AL., EFFECTS OF MARIJUANA LEGALIZATION ON LAW ENFORCEMENT AND CRIME: FINAL REPORT NO. 255-60 TO THE NAT’L INST. OF JUSTICE, U.S. Dep’t of Justice 6–7 (2020) (noting the belief among law enforcement officers “that there is increased cross border transference of legal marijuana to states that have not legalized,” as well as “the persistence of the complex black market”). Reports indicate that states are not doing a good job of enforcing state regulatory programs. See, e.g., OR. LIQUOR CONTROL COMM’N, OR. HEALTH AUTH., OREGON’S FRAMEWORK FOR REGULATING MARIJUANA SHOULD BE STRENGTHENED TO BETTER MITIGATE DIVERSION RISK AND IMPROVE LABORATORY TESTING (2019).

193. See Larkin, *supra* note 33, at 242–44 (discussing law enforcement metrics).

Almost ninety percent of California's law enforcement officers work for local police departments and sheriff's offices.¹⁹⁴ Based on my experience in law enforcement, those officers are more likely to be concerned with the murders, rapes, robberies, and drug trafficking that take place *within* their discrete regional jurisdictions than with crimes that occur *in other states*. Why?—because residents from Nevada to Maine do not vote in California elections, and residents from Sacramento and San Francisco do not vote in Los Angeles or San Diego elections. To be sure, a bust of outbound marijuana is a “stat,” and officers won't pass up a “cheap” stat (an arrest made without much work). Nonetheless, by and large most local officers probably believe that a crime, including the distribution of cannabis, in their assigned district in California is “my” problem, while the illegal distribution of dope in other states is “theirs.” They will save the heavy lifting for local crimes.

Now, put aside the facts and psychology; turn to the law. Once we do that, it does not take long to realize that any attempt to correlate Congress's authority to the effectiveness of a state regulatory program would generate an unworkable rule of constitutional law.

Start with this question: What do we measure? Professor Young appeals to the Supreme Court's willingness to reconsider its precedents by suggesting that the Court might revisit *Raich* if states with liberalized cannabis programs do not cause “chaos” for states with traditional marijuana laws.¹⁹⁵ Professor Baude's submission is that “the constitutionality of federal law under the Necessary and

194. See, e.g., DUREN BANKS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 14–16 App. Tbls. 1–3 (Oct. 4, 2016); BRANDON MARTIN & MAGNUS LOFSTROM, PUB. POL'Y INST. OF CALIF., LAW ENFORCEMENT STAFFING IN CALIFORNIA 1 (2018), <https://www.ppic.org/wp-content/uploads/jtf-law-enforcement-staffing-in-california.pdf> [<https://perma.cc/8GYU-ASPP>] (“In 2017 there were more than 119,500 full-time law enforcement employees in California; roughly 78,500 were sworn law enforcement officers (with full arrest powers) and 41,000 were civilian staff. Of all sworn officers, about 48% were municipal police officers, 39% were county sheriff officers, and almost 10% were with the California Highway Patrol (CHP). About 3% were employed by other agencies, such as university, port, and transportation districts and the State Department of Parks and Recreation.”).

195. Young, *supra* note 6, at 95.

Proper Clause must be judged under the circumstances,” and those circumstances should include a state’s “success” at preventing the interstate spillover of state-grown cannabis.”¹⁹⁶ Professor Baude even proposes two ways of gauging a state’s success: (1) whether the state’s regulatory scheme is reasonably likely to prevent spillovers, or (2) whether the state’s program in fact prevents spillovers.¹⁹⁷ Sounds easy to evaluate, right? Guess again.

Start by asking whether *State A* has a reasonable cannabis regulatory program, one that engenders trust in the state’s ability to make it work. That might allay any doubts that the state is making a good faith effort to prevent any spillover. Would that approach be sufficient? That is, perhaps we can avoid measuring the effectiveness of a state’s program if we can establish its bona fides.

What must a state regulatory program contain to establish its bona fides? Must there be a licensing requirement to sell marijuana? If so, for how long may a license extend? One year? Two? Five? How much should a license cost? Who can obtain one—in particular are people with felony records (particularly for drug crimes) disqualified? Must growing, processing, and distribution facilities be inspected? If so, how, how often, and by whom?

Rules without penalties for their violation are merely advice, not laws, so there must be a penalty scheme. Must there be criminal

196. Baude, *supra* note 6, at 176.

197. *Id.* at 179 (“There are, no doubt, many ways courts could admit the relevance of state law. One way is to ask the following two questions: First, does the state have a regime that seems likely, on its face, to eliminate whatever spillover problem Congress would otherwise have the power to address? For instance, does the state limit the purchase of marijuana to residents, limit the purchase quantities in a way that makes straw buyers infeasible, and also regulate production and sale in a way that makes diversion unlikely? Second, if the regime seems likely to work on its face, is there also evidence that it works in practice? For example, does the state allocate significant resources to enforcement at the border or other relevant nexus? Do studies or reports demonstrate a large amount of diversion? States that have any interest in the preservation of their regulatory authority could themselves be the ones to amass some of this evidence and provide it to the court, whether as litigants or intervenors or amici.” (footnotes omitted)). Professor Baude also suggests that a court could demand only a “rational basis” for believing that a state’s program would be successful. *Id.* at 180. If that is the standard, however, then there is an equally persuasive “rational basis” for Congress to believe that the state programs won’t work.

liability or are civil and administrative penalties sufficient? If criminal enforcement is necessary, must imprisonment be an available option? If so, for what length? Who will be responsible for enforcement? Must enforcement be done by government officials or can that task be contracted out to the private sector? If the government must be responsible for enforcement for the state's scheme to be credible, who will have that assignment? Must investigators be "rough-and-ready" law enforcement officers (like EPA Special Agent Jack Taggart¹⁹⁸) or may they be ordinary "pencil neck" bureaucrats (like Walter Peck¹⁹⁹)?

May a court examine the intent of the legislators, regulators, inspectors, or enforcement personnel to determine whether they are serious about business compliance?²⁰⁰ If a state the size of Alaska has only one inspector, does that by itself prove that the entire state regulatory program is a sham? If not, how many inspectors must there be? And so forth.

There might be additional questions that need an answer, but you get the point. Courts would be forced into making the type of judgments that we ordinarily leave to Congress during the budgetary and appropriations processes, not because that branch is good at it, but because the courts are worse. If the courts simply make the same type of judgments that Congress would make, we haven't improved the scientific accuracy or political legitimacy of the decision-making process. We've just given it whatever veneer of respectability comes with a judge making a decision rather than an elected official, as well as taking it out of the hands of the public. Governance by Article III judges rather than Article I legislators is not an improvement as far as federalism is concerned.

198. FIRE DOWN BELOW (Warner Bros. Pictures 1997).

199. GHOSTBUSTERS (Columbia Pictures 1984), <https://www.youtube.com/watch?v=j3Uy9wsfkok> [<https://perma.cc/C3NX-RNK3>].

200. The difficulties in doing so are legion. *See, e.g.*, *Edwards v. Aguilar*, 482 U.S. 578, 636–39 (1987) (Scalia, J., dissenting); *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it . . ."). *See generally* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (3d ed. 2012) (developing modern social choice theory).

Now turn to the issue of a state's effectiveness at preventing a spillover. Unfortunately, that approach does not fare much better. It does not eliminate questions that need answering; it just poses different ones. Plus, the problems it would pose, if anything, are even greater.

Start this time with the fact that neither Professor Young nor Professor Baude defines what standard is the correct one to determine whether a state's efforts are effective. What, then, does that concept—"chaos" or "success"—mean? Perhaps more importantly, how does a court, which will evaluate the evidence and arguments pro and con, decide whether a state's program "works in practice"?²⁰¹

The dictionary won't help. No one tried to measure the success of the criminal justice system in the eighteenth century, so that term didn't have a commonly accepted meaning in 1787 when the Framers included the Commerce Clause in Article I. Today's dictionaries also don't solve the problem. Success is ordinarily measured by rates, and there is no one success rate for every enterprise in life.²⁰² In baseball, a batter who hits safely once in every three at-bats will wind up in the Hall of Fame, whereas in football, a quarterback who completes only one pass out of three will wind up on the bench, and a surgeon who has only one-third of his patients survive the procedure won't be practicing medicine for long. What, then, is an acceptable success rate here? Professors Young and Baude do not offer a number, a range, or a parameter for determining

201. Baude, *supra* note 6, at 179.

202. Perhaps "chaos" should be measured by new units known as "Portlands," although other cities are also competing for the title. See, e.g., Erin Ailworth & Julie Wernau, *Wisconsin's Governor Declares State of Emergency Amid Protests*, WALL ST. J. (Aug. 25, 2020), https://www.wsj.com/articles/kenosha-wis-sees-second-night-of-violence-as-unrest-spreads-11598362900?mod=hp_lead_pos7 [https://perma.cc/2GM6-R8FR]; Deanna Paul, *Violence Erupts at Protests in Chicago, Portland*, WALL ST. J. (Aug. 16, 2020), <https://www.wsj.com/articles/violence-erupts-at-protests-in-chicago-portland-11597596900?mod=searchresults&page=1&pos=2> [https://perma.cc/4R64-FNR9]; Deanna Paul & Dan Frosch, *Seattle Police Chief Resigns after Budget Cuts*, WALL ST. J. (Aug. 11, 2020), <https://www.wsj.com/articles/seattle-police-chief-resigns-after-budget-cuts-11597166461> [https://perma.cc/LV2T-RYEE].

whether a state has captured a sufficient quantity of marijuana grown within its borders to escape the reach of the CSA, nor do they identify a relevant source to look for the answer. Creating a constitutionally-based exception to a law without explaining when that exception applies lets each of the 860-plus federal judges pick a number that satisfies him- or herself.²⁰³ That surely would lead to success somewhere (with that many judges, one surely will find that the state's efforts are good enough for government work), but the nationwide disparities that likely will result are likely to lead to chaos or something resembling it (albeit not the type that Professor Young had in mind).

Atop that, neither Professor Young nor Professor Baude argues that a district court should hold the CSA *facially* unconstitutional—that is, unconstitutional across the board, regardless of the facts of a particular case. Accordingly, each federal district court judge would decide only the application of the CSA in the specific case before him or her. The Federal Rules of Criminal Procedure do not permit outsiders to intervene in a criminal prosecution.²⁰⁴ To bring an independent civil action, a party would need to prove that he or she would commit the same conduct as a defendant—that is, traffic in cannabis in violation of the CSA—and be subject to the same government action—that is, a criminal prosecution.²⁰⁵ Few defendants will want to prove that they will violate federal law.²⁰⁶ Moreover, a particular district court judge's ruling binds no other judge; in fact,

203. ADMIN. OFF. OF THE U.S. COURTS, AUTHORIZED JUDGESHIPS, <https://www.uscourts.gov/sites/default/files/allauth.pdf> [<https://perma.cc/V2ZY8U3F>].

204. Compare Fed. R. Civ. P. 24 (allowing nonparties to intervene in a civil action) with Fed. R. Crim. P. 7(c)(1) (the indictment must identify “the defendant”); cf. 28 U.S.C. §§ 509, 510 & 516 (2018) (the authority to bring criminal prosecutions rests with the U.S. Attorney General or his designees).

205. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (ruling that, to obtain prospective relief against police use of a chokehold, the plaintiff would have to prove that he would again be subject to the same practice).

206. Having a marijuana industry organization bring suit on behalf of its members is not an escape from the requirement of proving injury-in-fact because the organization would need to prove that one or more of its members will break the law. See, e.g., *Hunt v. Wash. St. Apple Comm'n*, 432 U.S. 333, 342–43 (1977).

it doesn't even bind the judge who issued the ruling.²⁰⁷ Also, different prosecutions could involve different substantive trafficking crimes—not to mention different conspiracies to traffic cannabis—committed at different times involving different quantities of cannabis, presenting very different factual scenarios. Cases involving the assistance of federal law enforcement officers would have to be eliminated from the tally, or discounted, because the inquiry is whether the *state* has stopped exports. Counting cases where the DEA or FBI assisted would be cheating. Finally, California's "success" at preventing marijuana from spilling over into other states could well vary over time. So, we could have multiple judges deciding materially different cases with conflicting rulings that change over time.

It is also far from obvious how we would measure a state's accomplishments. Is it the amount of cannabis legally grown in *State A* that is not illegally transferred into *State B*, either in gross tonnage or as a percentage of all the cannabis grown in *State A* (assuming that the amount can be reliably measured)? That would require us to know how many crimes have *not* been committed, an answer that law enforcement has never known. Or do we use the amount of money that growers or distributors legally earn in *State A* that they later use to cultivate or sell marijuana illegally in a different jurisdiction, *States B, C, D*, and so on? If so, precisely how much money is enough to justify Congress regulating cannabis in *State A* (and do we adjust that number for inflation over time)? Is there a minimum tonnage or dollar amount that traffickers must exceed before Congress can act, or can Congress intervene earlier on to protect the interests of *States B* through *Z*? And where do those numbers come from, given that they don't have a basis in the text of the Commerce Clause? Picking an arbitrary number is what legislatures do, not courts.

Once we have decided what the correct success rate must be to

207. See *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("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." (quoting 18 J. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 134.02[1][d] (3d ed. 2011))).

stave off congressional regulation, we must determine whether *State A* has achieved it. How do we do that? More specifically, whose evidence counts? The Office of National Drug Control Policy? The Drug Enforcement Administration? Or must the source be closer to home? If *State A* is California, do we rely on the findings of the California Bureau of Investigation, a statewide law enforcement agency? How about the Los Angeles County Sheriff's Department, a massive, regional law enforcement agency?²⁰⁸ What about a sheriff's office with only a handful of deputies?²⁰⁹ What do we do with the opinions of the law enforcement agencies in *State B* (and *C, D*, and so forth)? What about the opinions of a university economist or private consultant? Or do we just let the defendant and Justice Department introduce whatever evidence each party wants and task the appropriate decision-maker with sorting it all out? Any one case will then resolve every case for a state.

If so, who is that decision-maker? That is, who gets to decide whether we are below, at, or above the amount defining *State A's* "success" that would be sufficient to keep the exercise of Congress's Commerce Clause power at bay? Does Congress decide? If so, we have just gone in a complete circle for no apparent reason. If not, is it a subject for the judiciary, particularly federal trial judges? There is no one else left. Consider how that process would work.

Take the Central District of California, which is responsible for Los Angeles and six other counties in adjacent areas. As of April 7, 2020, there were twenty-seven sitting federal district court judges and ten vacancies.²¹⁰ If that court were fully staffed and if each

208. The Los Angeles County Sheriff's Department is the world's largest sheriff's department, with approximately 18,000 employees. *About Us*, LOS ANGELES CTY. SHERIFF'S DEP'T, https://www.lasd.org/about_us.html [https://perma.cc/KG97-QHHF].

209. More than half of the nation's 3,012 sheriff's departments have fewer than 25 full-time sworn officers. Connor Brooks, *Sheriffs' Offices, 2016: Personnel*, NCJ252834, BUREAU OF JUST. STAT., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST. 1 (Oct. 2019), <https://www.bjs.gov/content/pub/pdf/so16p.pdf> [https://perma.cc/T9VK-D3MQ].

210. *Chronological History of Authorized Judgeships in U.S. District Courts*, ADMIN. OFF. OF THE U.S. CTS. 9 <https://www.uscourts.gov/sites/default/files/districtchronol19.pdf> [https://perma.cc/J376-7XP4] [hereinafter ADMIN. OFF.]; *Current Judicial Vacancies*, U.S.

judge had to decide whether the CSA might constitutionally be applied to a particular defendant, there could be as many as thirty-seven different rulings. How is that possible? For two reasons. When the crime occurred (and the amount of marijuana involved) might distinguish each case from all other prosecutions. Different judges might evaluate the same evidence differently, let alone evidence that varies like the quadrants in a Jackson Pollack painting. There are also three other districts in California with dozens of additional judges, bringing the total in California to sixty.²¹¹ Do we really want to have sixty different conclusions about Congress's power to regulate intrastate commerce in just *one* state? Even if we don't wind up with sixty different rulings, how many does it take before we admit that this heavily fact-bound approach just won't work?

Moreover, we also need to know how to define the nature of a district court's ruling on this issue. That is, is it a question of *adjudicative* or *historical* fact, like the name of the person on the deed to Blackacre, or is it a question of *legislative* or *constitutional* fact, like the effect of a 2018 Federal Reserve interest rate reduction on the 2019 Gross Domestic Product? Is the ruling a mixed question of law and fact, like the issue of whether there was probable cause to arrest someone for drug trafficking?²¹² Or is it a pure question of law, like the issue whether there is a "dormant" aspect to the commerce clause?²¹³ The proper classification matters because different appellate standards of review apply to different types of district court findings, even in a criminal case.²¹⁴ The result is that, even after the

CTS. (Apr. 7, 2020), <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> [<https://perma.cc/M8BG-RXDU>].

211. ADMIN. OFF., *supra* note 210, at 9.

212. *See, e.g., Ornelas v. United States*, 517 U.S. 690 (1996) (ruling that *de novo* review is necessary for the ultimate questions of the presence of reasonable suspicion to stop and probable cause to conduct a warrantless search).

213. *See, e.g., Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019) (noting that "[m]embers of the Court have authored vigorous and thoughtful critiques" of the Court's precedents recognizing a "Dormant Commerce Clause").

214. An appellate court reviews a district court's adjudicative factual findings under

appellate process ends, we could wind up with a batch of different conclusions whether the CSA can lawfully be applied to different defendants.

Professors Young and Baude do not discuss this issue, but their arguments lend themselves to treating “chaos” or “success” as a question of fact. Defining those concepts does not require examination of the text or history of the Commerce Clause, as a question of law would. Nor do those terms ask a court to decide whether a state’s evidence satisfies a constitutional standard, like the issue of “reasonableness,” which appears in the Fourth Amendment²¹⁵ or “probable cause,” which the Supreme Court has defined as a component of reasonableness.²¹⁶ The implication of Professor Young’s and Professor Baude’s arguments is that a court should consider “success” or “chaos” by determining whether, and to what extent, the state has halted the export of cannabis. That certainly appears to be a question of adjudicative or historical fact, one that, in part, asks how many crimes were not committed. That inquiry is one that the criminal law has never been able to answer. Perhaps, however, they would want a judge to decide whether the state’s enforcement efforts promoted the legitimate purposes of the criminal law, such as retribution, deterrence, incapacitation, education, respecting victims, rehabilitation, and so forth. That approach essentially asks a district court to gauge the effectiveness of a criminal law. Good luck with that.²¹⁷

the “clearly erroneous” standard, while circuit courts independently review the application of constitutional law to particular facts. *See, e.g., Ornelas*, 517 U.S. at 695–99 (requiring *de novo* review for the application of the Fourth Amendment to particular facts); *Maine v. Taylor*, 477 U.S. 131, 144–45 (1986) (limiting appellate review to the clearly erroneous standard for historical facts).

215. U.S. CONST. amend. IV.

216. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 230–46 (1983) (defining “probable cause”).

217. *See Gore v. United States*, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding the severity of punishment, whether one believes in its efficacy or futility, these are peculiarly questions of legislative policy.” (citation omitted)); *Graham v. Florida*, 560 U.S. 48, 97 (2010) (Thomas, J., dissenting) (“I am unwilling to assume that we, as Members of this Court, are any more capable of making such moral judgments than our fellow citizens. Nothing in our training as judges qualifies us for that

Yet, deciding that issue still does not end our inquiry. We still need to know how long a district court's findings retain their vitality. Why? A state's "success" might not be permanent. Indeed, one needn't be an inveterate cynic to predict that, once a state has proved itself successful, it might transfer its limited enforcement resources elsewhere. If so, the federal government and defendants will be playing this game into extra innings. Can the government or a defendant relitigate the issue a year later? Two? Five? Who knows? Here, too, there is no principled way to answer those questions, which means the Supreme Court is unlikely to try and unlikely to adopt a rule of law asking other courts to do the impossible.

* * *

At the end of the day, Professor Mikos offers an unnecessarily complex (and needless) inquiry. Professors Young and Baude would force courts to answer a host of questions that have no obvious, objective, or permanent answer. Neither the text, history, nor purposes of the Commerce Clause supply us an objective way to decide whether *State A* has successfully prevented the spillover of marijuana beyond its borders. The only answers seem to come from thin air. The Supreme Court, therefore, is not likely to do Congress's job.

task, and nothing in Article III gives us that authority."); Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and Kahler v. Kansas*, 43 HARV. J.L. & PUB. POL'Y 85, 150 (2020) ("Think of the questions that must be answered to do that job properly. Are all justifications of equal importance or do some—say, deterrence—carry more weight than others—say, retribution? How do you measure a punishment's effectiveness? How effective must a punishment be? How do you trade off short-term versus long-term effectiveness? Are some successes—such as uncovering espionage plots or intercepting terrorist attacks—worth more than others are—such as apprehending mass murderers (or serial killers) or convicting senior members of an organized crime family? There are no easy answers to those questions, let alone objective ones. To evaluate the effectiveness of the decisions that legislators and executive officials make, we use the ballot box, not a courtroom." (footnote omitted)).

IV. AN ADDITIONAL RECOMMENDATION

Professor Adler recognizes that most of the debate over federal cannabis policy has focused on the polar options of Congress's reasserting its authority to impose one regulatory approach on the entire nation or completely decentralizing regulatory authority to each state so that fifty different flowers can bloom. There are numerous positions between those two, he notes, and, with the freedom to experiment with different ones without the risk of federal criminal prosecution, the states might be able to devise regulatory schemes that best serve their residents and the nation.²¹⁸

One option, I would suggest, is to divorce the regulation of medical from recreational marijuana use and treat each one separately.²¹⁹ That is particularly important in connection with the former. Federal and state law serve complementary roles in the use of drugs to treat disease.²²⁰ Federal law regulates what drugs may be distributed in interstate commerce,²²¹ while state law governs the practice of treating individual patients.²²² If Congress were to revisit the CSA, it should make clear that the Commissioner of Food and Drugs is responsible for deciding whether cannabis, in any of its

218. Adler, *supra* note 6, at 6–7 (“While much of the policy debate centers on the binary choice between legalizing use and maintaining prohibition, there are multiple margins along which existing laws and policies may be reformed. How a given jurisdiction chooses to legalize or decriminalize marijuana may be as important as whether a state chooses to move in this direction. . . . Allowing different jurisdictions to experiment with different combinations of reforms generates information about the benefits and costs of different measures. Thereby allowing marijuana policy discussions to proceed on a more informed basis. Whatever the end result of this process will be, marijuana policy will be better the more we allow this federalism-based discovery process to operate.”).

219. See Larkin, *supra* note 25, at 115–34; Paul J. Larkin, Jr., *States’ Rights and Federal Wrongs: The Misguided Attempt to Label Marijuana Legalization Efforts as a “States’ Rights” Issue*, 16 GEO. J.L. & PUB. POL’Y 495 (2018).

220. See Patricia J. Zettler, *Pharmaceutical Federalism*, 92 IND. L.J. 845, 849 (2017) (noting the consensus that “state jurisdiction is reserved for medical *practice*—the activities of physicians and other health care professionals—while federal jurisdiction covers “medical *products*, including drugs” (footnote omitted)).

221. See Federal Food Drug and Cosmetic Act of 1938, 21 U.S.C. § 301 *et seq.* (2018).

222. See *Dent v. West Virginia*, 129 U.S. 114, 121–24 (1889).

forms and however it is used,²²³ is a safe and effective treatment for disease. Since Congress enacted the Federal Food, Drug, and Cosmetic Act of 1938,²²⁴ the nation has entrusted the Food and Drug Administration with the responsibility for ensuring the safety of drugs used in medical treatment. There is no good reason to exempt marijuana from that rule.²²⁵ Congress ought to reaffirm that principle in any reconsideration of the CSA.

A consequence of the state liberalization efforts is a change in the practice of medicine in states that authorize marijuana use for medical or recreational purposes. Numerous physicians (some routinely) now recommend that patients use marijuana to treat disabling medical conditions and their unpleasant symptoms or side effects.²²⁶ Apparently, it is not difficult to find a physician who is willing to recommend marijuana as a treatment for some disease or other.²²⁷ In some locales, all it takes is “\$40 and 10 minutes.”²²⁸ This

223. There are many forms and delivery mechanisms. See Larkin, *supra* note 31, at 318–19 (“Food is rarely used as the delivery system for drugs, including controlled substances. Edibles, however, serve in that role. Those foods come in different forms, such as cookies, candies, cakes, popcorn products, lozenges, chocolates, butter, popsicles, and liquids, as well as the Alice B. Toklas brownies made popular in the 1960s. As one observer noted, ‘[e]ssentially, a cannabis culinary professional can infuse just about anything you want to eat with THC.’” (footnotes omitted)).

224. Pub. L. No. 75-717, 52 Stat. 1040 (1938).

225. See, e.g., BRIAN F. THOMAS & MAHMOUD A. ELSOHLY, *THE ANALYTICAL CHEMISTRY OF CANNABIS* xiv (2016) (arguing that the FDA needs to be more closely involved in marijuana regulation than the Drug Enforcement Administration); Larkin, *supra* note 25, at 115–27; Sean M. O’Connor & Erika Lietzan, *The Surprising Reach of FDA Regulation of Cannabis, Even After Rescheduling*, 68 AM. U. L. REV. 823 (2019) (explaining that descheduling cannabis transfers regulatory authority to the FDA).

226. See NAT’L ACAD. OF SCI., ENG’G, & MED., *THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH* 53–54 (2017) (surveying therapeutic effects of marijuana for treating nausea, appetite loss, pain, and anxiety, for which there are varying degrees of support).

227. See, e.g., ED GOGK, *MARIJUANA DEBUNKED* 111 (2015) (“Political campaigns sell marijuana laws to the voting public with ads that feature cancer patients using marijuana for nausea. But it’s a bait and switch. . . . The patients using medical marijuana in real life are disproportionately young and male, and few of them have serious illnesses.”).

228. Chris Roberts, *Anyone Can Get Their Medicine: California has Already Pretty Much*

practice is not a secret. Numerous physicians have published books and articles touting cannabis as a treatment for various ailments and their symptoms.²²⁹

Physicians cannot literally “prescribe” cannabis for treatment. The CSA classifies all “controlled substances” into Schedules I through V according to their perceived risk of addiction and medical utility.²³⁰ Schedule I lists drugs that no physician may prescribe

Legalized Marijuana. And That's Okay, SF WKLY. (Sept. 14, 2014), <http://www.sfweekly.com/sanfrancisco/chem-tales-marijuana-legalization-recreational-use/Content?oid=3154256> [https://perma.cc/4EQH-CTVV] (“Anyone Can Get Their Medicine. Not long ago, a friend of mine visited the doctor. Afterward, I asked him for the diagnosis. ‘Good news,’ he said with a grin. ‘I’m still sick.’ A clean bill of health would have been a setback. That would mean no more marijuana. I am often asked how to legally obtain some weed in San Francisco, what ailment is required to get a medical marijuana recommendation. This fascinates people to this day, out-of-towners as well as locals. When I am honest, I say, ‘About \$40 and 10 minutes.’”).

229. See, e.g., DAVID BEARMAN & MARIA PETTINATO, *CANNABIS MEDICINE: A GUIDE TO THE PRACTICE OF CANNABINOID MEDICINE* (2019); CASARETT, *supra* note 121; PATRICIA C. FRYE & DAVID SMITHERMAN, *THE MEDICAL MARIJUANA GUIDE: CANNABIS AND YOUR HEALTH* (2018); BONNI GOLDSTEIN, *CANNABIS REVEALED* (2016); *THE POT BOOK: A COMPLETE GUIDE TO CANNABIS* (Julie Holland ed., 2010); LESTER GRINSPOON & LESTER B. BAKALAR, *MARIJUANA: THE FORBIDDEN MEDICINE* (1997); MICHAEL H. MOSKOWITZ, *MEDICAL CANNABIS* (2017); J. Michael Bostwick, *Clinical Decisions: Medicinal Use of Marijuana—Recommend the Medical Use of Marijuana*, 368 JAMA 866 (2013); Jerome P. Kassirer, *Federal Foolishness and Marijuana*, 336 NEW ENG. J. MED. 366 (1997). Not every physician, however, believes that marijuana is a legitimate medical treatment. See, e.g., ROBERT L. DUPONT, *THE SELFISH BRAIN: LEARNING FROM ADDICTION* 147–54 (Updated ed. 1997); ED GOGK, *MARIJUANA DEBUNKED* (2015); KEVIN P. HILL, *MARIJUANA: THE UNBIASED TRUTH ABOUT THE WORLD’S MOST POPULAR WEED* (2015).

230. A “controlled substance” is “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of [the] subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.” 21 U.S.C. § 802(6) (2018). The CSA incorporates the definition of a “drug” from the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321(g)(1) (2018).

because of their perceived dangerousness.²³¹ Congress placed marijuana in Schedule I in 1970, and it remains there today.²³² Any physician who prescribes cannabis can suffer a suspension or termination of his license to prescribe controlled substances—which covers every drug for which a prescription is necessary—as well as a criminal prosecution for exceeding the boundaries of legitimate medical practice.²³³ Yet, as if to give content to the aphorism “where there’s a will, there’s a way,” the U.S. Court of Appeals for the Ninth Circuit has ruled that a physician may “recommend” that a patient consider using marijuana as a treatment.²³⁴ Of course, the distinction between “prescribing” a medication easily available in any licensed pharmacy and “recommending” use of a drug openly sold in state-legal marijuana dispensaries (or readily available in every other state²³⁵) is about as precise as the difference between “dusk” and “twilight.”

The federal government seems to have acquiesced in that distinction because it has not been eager to prosecute cases in other circuits to persuade the courts of appeals to forbid physicians from recom-

231. 21 U.S.C. § 812(b)(1)(A)–(C) (2018) (noting that drugs placed in Schedule I have “a high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and a lack of accepted safety for use of the drug or other substance under medical supervision”); *id.* § 829 (setting prescription standards for drugs in Schedules II–V); *id.* § 841(a) (defining prohibited acts).

232. *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 937 n.1 (D.C. Cir. 1991). Marijuana, combined with salts, isomers, and synthetic equivalents, is on that list. *See* 21 C.F.R. § 1308.11(d)(31) (2020).

233. *See United States v. Moore*, 423 U.S. 122 (1975) (holding that a physician can be convicted for distributing methadone, a Schedule II controlled substance, outside the boundaries of professional medical practice).

234. *See Conant v. McCaffrey*, 172 F.R.D. 681, 694–95 (N.D. Cal. 1997) (issuing preliminary injunction), 2000 WL 1281174 (N.D. Cal. Sept. 7, 2002) (issuing permanent injunction), *aff’d*, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (upholding permanent injunction). The courts concluded that the First Amendment Free Speech Clause prohibits the government from adopting a viewpoint-based restriction on the private communications between a physician and a patient of potential medical treatment options. *Conant*, 309 F.3d at 636–39.

235. *See* 2019 DEA NATIONAL DRUG THREAT ASSESSMENT, *supra* note 192, at 77 (“As the most commonly used illicit drug, marijuana is widely available and cultivated in all 50 states.”).

mending marijuana use, or even to clarify where the line falls between permissible and unlawful conduct.²³⁶ That is likely because the advent of state recreational-use marijuana programs renders moot any special restrictions on marijuana distribution or use imposed by state medical marijuana statutes. Why bother to ask the courts to draw a fine distinction between “prescribing” and “recommending” a drug for its potential medical benefits if anyone can buy it simply for its guaranteed euphoric effect?

The birth of state recreational cannabis programs beginning in 2012 has shifted the focus of the debate away from cannabis as therapy to cannabis as euphoric. If nothing else, that shift has improved the honesty of the public debate over cannabis policy. If hypocrisy is the tribute that vice pays to virtue, medical marijuana’s supporters have found the post-1996 debate to be an expensive one.²³⁷ The

236. See *supra* Part I.

237. See Bach, *supra* note 109; Laurie D. Berdahl, *Medical Marijuana: A Dangerous Sham*, MED’L ECON. at 70 (July 10, 2012); Jonathan P. Caulkins, *The Real Dangers of Marijuana*, NAT’L AFFS., Winter 2016, 21, 30 (“Unfortunately, there is very little in the way of intellectually honest marijuana-policy analysis.”); *id.* at 21 (“In the 1990s, several states introduced ‘medical marijuana’ programs. Though marijuana use was made legal only for medical purposes, the regulations were often so loose that essentially anyone could get a physician’s ‘recommendation,’ authorizing that person to purchase marijuana. Suppliers were euphemistically called ‘caregivers’ (even though some never met the ‘patients’ they were caring for), and they sold out of brick-and-mortar retail stores known as ‘dispensaries.’ At one point, there were thousands of dispensaries in California alone.”); Mark Kleiman, *Cannabis Has Medical Value; Medical Marijuana Is a Fraud*, AM. ADDICTION CNTRS., <https://www.rehabs.com/pro-talk/cannabis-has-medical-value-but-medical-marijuana-is-a-fraud/> [<https://perma.cc/3QHV-MT7G>]; Mark A.R. Kleiman, *The Public-Health Case for Legalizing Marijuana*, NAT’L AFFS., Spring 2019, 68, 73 (describing the medical marijuana reform campaign as being “largely fraudulent,” but “worked like a charm”); Charles Krauthammer, *Pot as Medicine*, WASH. POST (Feb. 7, 1997), <https://www.washingtonpost.com/archive/opinions/1997/02/07/pot-as-medicine/84704a96-39b8-485e-96e1-08e798569f05/> [<https://perma.cc/E88D-TZYJ>] (“Take any morally dubious proposition—like assisting a suicide—and pretend it is merely help for the terminally ill, and you are well on your way to legitimacy and a large public following. That is how assisted suicide is sold. That is how the legalization of marijuana is sold. Indeed, that is precisely how Proposition 215, legalizing marijuana for medical use, passed last November in California. . . . Marijuana gives them a buzz, all right. But medical effects? Be serious. The medical effects of marijuana for these conditions are nil. They are, as everyone involved in the enterprise knows—and as many

purpose of the first medical use law—California’s Compassionate Use Act of 1996,²³⁸ also known as Proposition 215—illustrates why that was so. The initiative justified legalizing marijuana use as a treatment for horrific maladies such as terminal cancer, AIDS, and multiple sclerosis-induced “spasticity,” but also included a justification allowing marijuana use for “any other illness for which” a physician believes “marijuana provides relief.”²³⁹ That would include a headache, nervousness, or having a “blue day,” ailments that are light-years away from the maladies used to sell the public on medical marijuana initiatives.²⁴⁰ The proponents of Proposition 215 had that goal in mind,²⁴¹ and the evidence bears it out.²⁴²

behind Prop 215 intended—a fig leaf for legalization.”); Larkin, *supra* note 16, at 511–13 & n.283 (collecting data and authorities supporting the conclusion that medical marijuana initiatives are a sham for recreational cannabis use); *see also, e.g.*, Tom Keane, *The Medical Marijuana Sham*, BOS. GLOBE (Aug. 5, 2012), <https://www.bostonglobe.com/opinion/2012/08/04/medical-marijuana-just-backdoor-way-legalizing-weed/3fLD096MPkfzpg8KHatv9I/story.html> [<https://perma.cc/P2KA-FLHU>]. Even some advocates for medical marijuana use agree. *See* CASARETT, *supra* note 121, at 249 (“A joint is hardly a medicine.”).

238. WEST’S ANN. CAL. HEALTH & SAFETY CODE § 11362.5 (2020).

239. *Id.* § 11362.5(b)(1)(A) (2020).

240. *See* Larkin, *supra* note 16, at 509–12.

241. *Id.* at 511 (“Supporters of the California measure did their cause no good by immediately lighting up marijuana cigarettes after it passed last month and proclaiming that a legitimate medicinal use would include smoking a joint to relieve stress. Dennis Peron, originator of the California initiative, said afterward, ‘I believe all marijuana use is medical—except for kids.’ These actions made it obvious that the goal of at least some supporters is to get marijuana legalized outright, a proposition that opinion polls indicate most Americans reject.” (quoting *Marijuana for the Sick*, N.Y. TIMES (Dec. 30, 1996), <http://www.nytimes.com/1996/12/30/opinion/marijuana-for-the-sick.html> [<https://perma.cc/LDE5-TKMP>])). Whether or not most Americans still reject recreational marijuana use, it is highly likely that most of them do not like being taken for chumps.

242. *Id.* at 511–12 (“There is considerable proof that many state medical marijuana programs are simply a sham for the decriminalization of that substance. Consider the following: according to a 2013 study, in Arizona merely seven of 11,186 applications for medical marijuana had been denied. Only 2,000 patients registered for Colorado’s medical marijuana program before the Justice Department announced in 2009 that it would not enforce the federal marijuana laws against individual patients and caregivers. Colorado residents apparently listened because by March 2011, there were more than 127,000 Colorado registrants. In Colorado, fewer than fifteen physicians wrote

In sum, the futility of pursuing reasoned limitations on the therapeutic uses of cannabis in the face of state recreational use laws highlights a problem that has afflicted marijuana policy since the first medical-use law came on stream in 1996: that is, the argument that smoking marijuana is a legitimate medical treatment is a sham—and a dangerous one at that.²⁴³

more than seventy percent of all medical marijuana recommendations, with the reason being severe or chronic pain in ninety-four percent of the reported conditions. Michigan had fifty-five physicians certify approximately 45,000 patients. California does not require patients to register to receive marijuana for medical use, so the number of patients is a matter of speculation. Estimates, however, are that the number increased from 30,000 in 2002 to more than 300,000 in 2009 and 400,000 in 2010. The California statute permits a patient or caregiver to possess six plants, but it allows counties to amend state guidelines. Humboldt County, which lies in the heart of the Northern California marijuana farming, allows resident [sic] to grow up to ninety-nine plants on behalf of a patient. Not surprisingly, there is also considerable evidence that significant quantities of marijuana grown or sold for medical uses have been diverted for recreational use.” (footnotes omitted)).

243. See Mark Kleiman, *Cannabis Has Medical Value; Medical Marijuana Is a Fraud*, AM. ADDICTION CNTRS. (Nov. 4, 2019), <https://www.rehabs.com/pro-talk/cannabis-has-medical-value-but-medical-marijuana-is-a-fraud/> [<https://perma.cc/4MPK-GET2>]. For a trenchant and recent summary of the public health harms that come from allowing mountebanks to deceive the public into believing that smoking marijuana is a legitimate medical treatment, see Keith Humphreys & Chelsea L. Shover, *Recreational Cannabis Legalization Presents an Opportunity to Reduce the Harms of the US Medical Cannabis Industry*, 19 WORLD PSYCH. 191, 191–92 (2020). As I have explained before:

[M]edical marijuana has become a modern day version of what Stanford Law School Professor Lawrence Friedman has termed the “Victorian Compromise.” . . . The law [in the Victorian Era] would nominally prohibit gambling parlors, saloons, and houses of prostitution from conducting business openly, but law enforcement officials were expected to wink at the existence of private clubs where gambling was conducted and alcohol consumed and to turn a blind eye toward “call girls” and other forms of debauchery that transpired behind closed doors. Professor Friedman described that double standard—the difference between what the law strictly prohibited when defining formal public morality and what the law studiously ignored as being acceptable for purely private conduct—as “the Victorian Compromise.”

That compromise has been reborn today in the form of medical marijuana laws. Unlike straightforward proposals to legalize or decriminalize marijuana, medical marijuana initiatives do not frontally assault the longstanding consensus that, like any other drug, marijuana should not be deemed “safe and effective” just because alcohol can be an even more hazardous inebriant.

Medical marijuana proposals do not directly challenge society's decision to forbid marijuana from being used as an intoxicant while simultaneously permitting beer, wine, or spirits to be freely sold in grocery stores. Nor do they implicitly criticize as hypocritical the social acceptance of alcohol and communal rejection of cannabis. Supporters of medical marijuana measures sold them to the public on the ground that cannabis would be limited to the "personal medical purposes of the patient" acting in consultation with his physician. Supporters highlighted fearsome diseases (cancer, AIDS) and sympathetic parties (the terminally or chronically ill) in order to exploit the voters' humanitarian impulses and thereby generate political support for otherwise controversial ballot initiatives that legislatures might shy away from. Medical marijuana advocates also took advantage of the belief that little harm and possibly some good could result from allowing medically-condemned patients to achieve some respite from their tragic predicaments by whatever means they found useful, means that harmed no one else.

Reform supporters persuaded the public. Beginning in 1996 with the California Compassionate Use Act, numerous states enacted laws ostensibly permitting only a limited exception from the state penal code so that marijuana could be used by a restricted number of severely crippled and dying patients in order to alleviate the symptoms of their disease or the side effects of their treatment. In theory, narrow exceptions to the criminal laws governing "medical marijuana" would benefit the innocent victims of horrible maladies without materially disrupting the purposes served by using the criminal law to prohibit marijuana's widespread use and without materially weakening society's resolve that marijuana should continue to be branded as a dangerous drug.

It turns out, however, that the number of registered medical marijuana "patients" is far too large to believe that only the seriously afflicted are taking advantage of these new laws. The number of users gives strong reason to believe that a massive number of medical marijuana patients are not the poor suffering individuals on whom those laws were supposed to focus—people nearing the end of life or suffering from a debilitating disease or chronic pain. Instead, it is not unreasonable to believe that medical marijuana legislation is a sleight of hand to do indirectly what the new recreational marijuana laws do directly—allow individuals to use marijuana without risking state law criminal liability. It is fair to say that the only difference between medical marijuana laws and recreational marijuana laws are that the latter are honest in their goals.

The result is that a large segment of the nation's population justifiably believes that the medical marijuana movement is merely a Trojan Horse for legalization. To them, the sponsors of those initiatives took advantage of the natural sympathy that people have for others in extremis to achieve dishonestly what could not be done openly: legalize marijuana use. Many people quite reasonably believe that medical marijuana initiatives rest on the deceit

But don't take my word for it. The FDA has consistently affirmed that botanical cannabis is not a safe, effective, and pure drug for purposes of the FDCA.²⁴⁴ The allied federal health care agencies—such as the Department of Health and Human Services, the Office of the U.S. Surgeon General, the National Institute on Drug Abuse, and the Substance Abuse and Mental Health Services Administration—have also concluded that smoking marijuana is not a legitimate treatment and, in fact, carries substantial health risks.²⁴⁵ The

that their purpose and effect would be limited to alleviating the suffering of parties desperate for relief from unrelenting pain or a crippling malady, some of whom have no hope for anything other than to limit their suffering before they die. Many people would have favored decriminalizing or legalizing marijuana—for example, people who may have supported Colorado and Washington's decisions to allow marijuana to be consumed for recreational use—but only if it were done openly, with a public debate followed by a vote of the legislature or, more likely, the state's voters. Now, however, they feel lied to and cheated. Worse still, they feel insulted. In their mind, the supporters of medical marijuana initiatives believe that the average person is so dim-witted that he will never realize what is really going on.

Larkin, *supra* note 16, at 509–12 (footnotes omitted).

244. See, e.g., *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, FDA (Oct. 1, 2020), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd> [https://perma.cc/TF56-2GRQ]; *What You Need to Know (And What We're Working to Find Out) About Products Containing Cannabis or Cannabis-derived Compounds, Including CBD*, FDA (Mar. 5, 2020), <https://www.fda.gov/consumers/consumer-updates/what-you-need-know-and-what-were-working-find-out-about-products-containing-cannabis-or-cannabis> [https://perma.cc/7HGY-KAZ4]; *FDA and Cannabis: Research and Drug Approval Process*, FDA (Oct. 1, 2020), <https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process> [https://perma.cc/L2QP-YETU].

245. See, e.g., Alex M. Azar II, HHS Sec'y, Remarks on Surgeon General's Marijuana Advisory (Aug. 29, 2019), <https://www.hhs.gov/about/leadership/secretary/speeches/2019-speeches/remarks-on-surgeon-general-marijuana-advisory.html> [https://perma.cc/YBQ8-T4HP]; *U.S. Surgeon General's Advisory: Marijuana Use and the Developing Brain*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. OF THE SURGEON GEN'L (Aug. 29, 2019), <https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html> [https://perma.cc/AR4A-5DA8]; U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. OF THE SURGEON GEN'L, *THE SURGEON GENERAL'S WARNING ON MARIJUANA, MORBIDITY AND MORTALITY WEEKLY REPORT* (Aug. 13, 1982), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00001143.htm> [https://perma.cc/9KLB-FZFU]; SUBSTANCE ABUSE &

federal government experts therefore agree that medical marijuana is a stalking horse for recreational use of the drug.²⁴⁶

Medical marijuana is a sham that we have been selling to minors over the last twenty-five years. It is bad enough for adults to lie to serve their own venal purposes. It is worse for adults to teach their

MENTAL HEALTH SERVS. ADM'N (SAMHSA), MARIJUANA RISKS (Sept. 26, 2019), <https://www.samhsa.gov/marijuana> [<https://perma.cc/DCB3-ZQ7Y>]; NAT'L INST. ON DRUG ABUSE, MARIJUANA RESEARCH REPORT (Rev. July 2020), <https://www.drugabuse.gov/download/1380/marijuana-research-report.pdf?v=d9e67cbd412ae5f340206c1a0d9c2bfd> [<https://perma.cc/U5RU-P2HM>] ("Is marijuana safe and effective as medicine? The potential medicinal properties of marijuana and its components have been the subject of research and heated debate for decades. THC itself has proven medical benefits in particular formulations. The U.S. Food and Drug Administration (FDA) has approved THC-based medications, dronabinol (Marinol®) and nabilone (Cesamet®), prescribed in pill form for the treatment of nausea in patients undergoing cancer chemotherapy and to stimulate appetite in patients with wasting syndrome due to AIDS. . . . Researchers generally consider medications like these, which use purified chemicals derived from or based on those in the marijuana plant, to be more promising therapeutically than use of the whole marijuana plant or its crude extracts. Development of drugs from botanicals such as the marijuana plant poses numerous challenges. Botanicals may contain hundreds of unknown, active chemicals, and it can be difficult to develop a product with accurate and consistent doses of these chemicals. Use of marijuana as medicine also poses other problems such as the adverse health effects of smoking and THC-induced cognitive impairment. Nevertheless, a growing number of states have legalized dispensing of marijuana or its extracts to people with a range of medical conditions. An additional concern with 'medical marijuana' is that little is known about the long-term impact of its use by people with health- and/or age-related vulnerabilities—such as older adults or people with cancer, AIDS, cardiovascular disease, multiple sclerosis, or other neurodegenerative diseases. Further research will be needed to determine whether people whose health has been compromised by disease or its treatment (e.g., chemotherapy) are at greater risk for adverse health outcomes from marijuana use."). The cannabis plant contains valuable cannabinoids (namely, biologically active ingredients), some of which the FDA has approved. The plant itself, however, is not, and could not be, classified as an FDA-approved "medicine." Larkin, *supra* note 25, at 117–18 n.76.

246. Does that mean anyone who recommends smoking marijuana to someone who is dying, crippled, or in unyielding pain must be a scoundrel or charlatan? No; that person might be acting out of human kindness. But we shouldn't equate sympathy with medicine. Someone who recommends that the ill or disabled smoke marijuana for symptomatic relief confuses human empathy with scientific legitimacy. "Caring without science is well-intentioned kindness, but not medicine." Gary M. Reisfield & Robert L. DuPont, *Clinical Decisions: Medicinal Use of Marijuana—Recommend against the Medical Use of Marijuana*, 368 NEW ENG. J. MED. 866, 868 (2013) (quoting BERNARD LOWN, *THE LOST ART OF HEALING: PRACTICING COMPASSION IN MEDICINE* (1996)).

children by example that lying is an appropriate way to get what one wants. It is worst of all to incorporate those lies into our law. Yet, that is what we have done throughout the period of state medical marijuana schemes. (Yes, I used the word “scheme” intentionally, with all of the nefarious connotations that it implies). Minors have grown up believing that smoking marijuana is not harmful for two reasons. One explanation is simple: they have parents, relatives, siblings, or friends who smoked marijuana and did not die. Even presidential candidates have used marijuana and not only lived to tell the tale but also won election (and re-election).²⁴⁷ The other reason is more complicated, but unfortunately, more pernicious. Minors know that the states allow it to be sold, that the federal government has two agencies—the FDA and the DEA—whose mission is to protect the public against the use of dangerous drugs, and that the federal government has not shut down state medical marijuana dispensaries on the ground that they are run by unscrupulous charlatans threatening the public health with their product. State legalization efforts have been free riding on the public’s belief that, notwithstanding the oft-repeated statements by numerous federal agencies that the federal government has not approved marijuana for any legitimate therapeutic use,²⁴⁸ the federal government would not stand idly by while millions of people use a drug that could damage their health or well-being. So, minors use marijuana, and some will wind up doing so for a lengthy period, resulting for some in serious damage to their bodies, minds, careers, and lives.²⁴⁹ Dishonesty by adults leads to poor choices by some minors, which leads to poor lives for some soon-to-be adults. That is a serious adverse consequence of empowering the states, under the flag of federalism, to make nationwide scientific decisions about the safety of particular drugs.

247. See Olivia B. Waxman, *Bill Clinton Said He ‘Didn’t Inhale’ 25 Years Ago—But the History of U.S. Presidents and Drugs Is Much Older*, TIME (Mar. 29, 2017), <https://time.com/4711887/bill-clinton-didnt-inhale-marijuana-anniversary/> [<https://perma.cc/GA6G-HLFV>].

248. See *supra* note 244.

249. See, e.g., Larkin, *supra* note 31, at 323–31 & nn. 28–40.

It does not have to end up that way, at least not on a large scale. In 1938, Congress chose a different path, and we have not deviated from it ever since. The FDA is responsible for deciding what substances are “drugs” and which drugs are “safe” and “effective.”²⁵⁰ Why change now? We do not allow states to opt out of the CSA’s classification of heroin, methamphetamine, or cocaine. Why treat marijuana differently? We do not permit companies to distribute drugs like laetrile, viox, or diethylstilbestrol that the FDA has banned. Why place cannabis in a different category? To be sure, questions like those are ones that a democracy should always be free to debate and, if the answers change over time, alter the course of our law. Those questions, however, do not involve disputes over competing social or economic policies, nor do they concern disputed moral controversies whose resolution could change over time. They are scientific issues as to the safety and effectiveness of particular drugs. We might not be able to answer them with the mathematical certainty we would prefer, because risks often extend over a range rather than define themselves as a fixed number, but we do not answer scientific questions by plebiscite; we leave them to scientists. If we want to allow cannabis to be sold for recreational use, do that honestly. State governments should stop ignoring the FDA’s guidance by claiming that marijuana is good for what ails you.

My biggest criticism of *Marijuana Federalism*, therefore, is that none of the contributors discusses the fundamental issue of how we decide precisely what decisions should be left to the states rather than the federal government, whether competence is a legitimate factor for us to consider, and how much weight competence should receive. The Framers made the judgment that our new central government should decide matters that arise in an international or interstate context; the rest they left to the states. The Founders did not separate policy controversies from scientific judgments and assign each one to the federal or state governments based on each polity’s respective skill set. We do that today, however, because science is

250. See, e.g., 21 U.S.C. §§ 321(p) & 352(f)(1) (2018); Larkin, *supra* note 31, at 376–77.

far more advanced than it was in the eighteenth century; because physicians, biochemists, and epidemiologists know far more than the average person does about drugs, medical treatment, and the like; because we are comfortable with allowing experts to make decisions that only someone with their specialized education, training, and experience can make successfully; and because only the federal government has the ability to dedicate the assets required to collect the experts and ensure that they can perform or review the research necessary to maximize the likelihood of reaching the right (or best) result. We did not encourage the states to send an astronaut to the moon and return him safely to Earth; we trusted the federal government to make that possible. The same is true with respect to the safety and efficacy of drugs, even when those drugs come from the cannabis plant. The decision which government—federal or state—should regulate marijuana requires a more nuanced analysis than the contributors to *Marijuana Federalism* acknowledge.

We have largely forgotten those propositions in our debate over the proper allocation of responsibility for making decisions about marijuana. As Professor Adler notes, the debate has generally been a contest between those who want to give all or none of the authority to the federal or state governments. The result is that we have been conducting this debate as if there is no long-term consensus over who is best qualified to decide some of these issues. If federalism is to be our guide, that forgetfulness almost certainly will lead us to reflexively choose the federal government or states based on our views about the pros and cons of federalism writ large. To die-hard Federalists, it is a conceit that only Washington, D.C., can resolve society's problems. For many other people, that attitude might be a conceit, but that doesn't mean the people who hold it are wrong. We would be wise to keep both of those propositions in mind as we debate marijuana policy.

CONCLUSION

Over the last twenty-plus years, a majority of states have concluded that marijuana has legitimate therapeutic and recreational value, and those states allow private parties to cultivate, sell, possess, and use it under a state regulatory régime. Consequently, we have witnessed the development of state cannabis regulatory programs that are inconsistent legally, practically, and theoretically with the approach that our national government has taken for fifty years. How do we resolve that conflict between state and federal law? The Supreme Court has refused to take this issue away from the political branches of the federal government by ruling that it is a matter within the states' bailiwick. The Executive Branch has failed to take a coherent position regarding whether, when, and how it will enforce the existing federal law. And Congress has abdicated its responsibility to clarify what should be federal policy in a field where only Congress can decide. The result is that we have one law for Athens and one for Rome. Not surprisingly, that strategy is not working for anyone other than those members of Congress who wish to avoid casting a vote on the issue.

Marijuana Federalism therefore appears at a most opportune point. The new state cannabis regulatory programs existing from Maine to Hawaii will not disappear any time soon. Some of *Marijuana Federalism's* contributors encourage Congress to "cowboy up" politically and eliminate the disarray in the law, while others try to persuade the Supreme Court to take another whack at the issue. The threads that tie the essays together are the potential benefits we might see from permitting multiple states to devise different regulatory approaches and the affinity for decentralized decision-making built into our Constitution's DNA. All that *Marijuana Federalism* is missing is a treatment of the argument that Congress should leave decisions regarding the recreational use of marijuana to the states, but not whether it has legitimate medical uses. Agree or disagree with the views of one or more of *Marijuana Federalism's* essayists, the book makes an eminently valuable contribution to a much-needed national discussion of an important contemporary public policy issue.

REVIVING *TEAGUE'S* "WATERSHED" EXCEPTION

When the Supreme Court announces a new constitutional rule, that holding applies retroactively to a criminal defendant's case if her conviction is not yet final.¹ Defendants whose cases are on collateral review, however, are not entitled to the same benefit of retroactivity. Instead, under *Teague v. Lane*,² a "new rule" generally does not apply retroactively on collateral review.³ There are two exceptions to the bar on retroactivity in collateral review proceedings: first, for substantive rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;"⁴ and second, for "watershed rules of criminal procedure."⁵ Although the Court has announced rules that fit within *Teague's* substantive exception,⁶ it has "never found a rule that fits [the watershed exception]."⁷

This Note focuses on the Court's evolving habeas retroactivity doctrine and, specifically, the "watershed" exception to the Court's general rule that new rules of constitutional law are not applied retroactively on collateral review. That exception was announced in *Teague*, but it has its origins in Justice Harlan's retroactivity jurisprudence of the late 1960s and early 1970s. As discussed below,

1. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

2. 489 U.S. 288 (1989) (plurality opinion).

3. 489 U.S. 288, 310 (1989) (plurality opinion) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

4. *Id.* at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)).

5. *Id.* at 311.

6. *See, e.g., Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) ("*Johnson* announced a substantive rule that has retroactive effect in cases on collateral review." (citing *Johnson v. United States*, 135 S. Ct. 2551 (2015))).

7. *Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1337 (11th Cir. 2019).

Justice Harlan articulated two different standards for determining whether a new rule is a watershed rule: first, whether it promotes the reliability of convictions by significantly improving the pre-existing fact-finding procedures;⁸ and second, whether it is “implicit in the concept of ordered liberty.”⁹ In Part I, I argue that this latter standard—adopted from the incorporation debates—has been discredited and is ill-suited for retroactivity purposes.

Nevertheless, the *Teague* plurality announced a rule that requires petitioners to satisfy *both* standards.¹⁰ It also noted that only “bedrock” rules of criminal procedure will qualify.¹¹ In Part II, I analyze the Court’s retroactivity jurisprudence since *Teague* and argue that, as a result of *Teague* and its progeny’s emphasis on analogizing to “bedrock” rules like the one announced in *Gideon v. Wainwright*,¹² the watershed exception is all but a dead letter today. Moreover, the Court’s justification for such a difficult standard—finality interests—is insufficient to limit retroactivity to rules as fundamental as *Gideon*’s. Indeed, one can strike a balance slightly different than the *Teague* plurality’s while maintaining respect for finality interests—a balance similar to that embraced by some Founding-era jurists.

In Part III, I discuss why the Court’s recent decision in *Ramos v. Louisiana*¹³ invites the Court to modify the *Teague* standard. The rule announced in *Ramos*—that the Sixth Amendment’s right to a jury trial requires a unanimous verdict—is fundamentally about reliability, and the finality interests at stake are lower than usual. Moreover, Justice Gorsuch’s arguments in *Ramos* suggest that *Teague*

8. See *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) (noting that “constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas”).

9. *Mackey*, 401 U.S. at 693–94 (Harlan, J., concurring in the judgments in part and dissenting in part).

10. See 489 U.S. 288, 312 (1989) (plurality opinion) (combining *Desist*’s reliability element with *Mackey*’s standard).

11. *Id.* at 315.

12. 372 U.S. 335, 344 (1963); see also *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (rejecting retroactivity of Petitioner’s proposed rule in part because “it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception”).

13. 140 S. Ct. 1390 (2020).

may not even be binding precedent. Accordingly, the *Ramos* decision creates a unique opportunity for the Court to minimize the impact of *Gideon* and “bedrock procedural rules” on the watershed inquiry and shift the analysis toward the reliability-enhancing nature of a rule, even if it decides that *Ramos* is not retroactive.

Indeed, not long after delivering the *Ramos* decision, the Court granted certiorari in *Edwards v. Vannoy* to resolve whether the rule announced in *Ramos* applies retroactively on collateral review. In Part IV, I discuss some of the ways in which the oral argument in *Edwards* reveals how the Justices are currently thinking about the watershed exception.

I. THE ORIGINS OF *TEAGUE*: JUSTICE HARLAN’S PUZZLING RETROACTIVITY JURISPRUDENCE

Under *Teague*, a new procedural rule is a “watershed rule” if it satisfies two requirements. First, the rule must “significantly improve the pre-existing factfinding procedures” used before and at trial.¹⁴ The goal is reliability: the Court sought to avoid “an impermissibly large risk that the innocent will be convicted.”¹⁵ Second, the rule must be “implicit in the concept of ordered liberty.”¹⁶

These standards were inspired by Justice Harlan’s opinions in two cases. The first is his dissenting opinion in *Desist v. United States*,¹⁷ in which Justice Harlan explained his views on retroactivity.¹⁸ He argued first that new rules should always be applied retroactively on direct review.¹⁹ Next, he suggested that, on collateral

14. 489 U.S. at 312 (plurality opinion) (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

15. *Id.* (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

16. *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)).

17. 394 U.S. 244 (1969).

18. *Id.* at 257–68 (Harlan, J., dissenting).

19. *Id.* at 258–59. At the time, new rules were not required to be applied retroactively on direct review. Instead, the Court applied a three-pronged test balancing the purpose of the new rule, the extent of reliance on the old rule by law enforcement, and “the

review, the only new rules that should be applied retroactively are those that “significantly improve the pre-existing fact-finding procedures” used before and at trial.²⁰ In doing so, Justice Harlan cited to Professor Paul Mishkin, a then-leading federal courts scholar.²¹ Indeed, it is widely understood that Professor Mishkin’s arguments strongly influenced Justice Harlan’s opinions on retroactivity.²² Accordingly, a brief discussion of Professor Mishkin’s argument is warranted.

Professor Mishkin’s justification for retroactively applying certain new procedural rules can be summed up in one word: reliability. In the portion of Professor Mishkin’s article cited by Justice Harlan, Professor Mishkin notes that “the mere possibility, however real, that a new trial might produce a different result is not a sufficient basis for habeas corpus,” and the “functions of collateral attack must thus be focused on relieving from confinements whose

effect on the administration of justice” of applying the new rule retroactively. *Stovall v. Denno*, 388 U.S. 293, 297 (1967). This led to a hodge-podge of standards for retroactivity in which “certain ‘new’ rules are to be applied to all cases then subject to direct review, certain others are to be applied to all those cases in which trials have not yet commenced, certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, and still others are to be applied only to the party involved in the case in which the new rule is announced and to all future cases in which the proscribed official conduct has not yet occurred.” *Desist*, 394 U.S. at 257 (Harlan, J., dissenting) (citations omitted). The Court eventually adopted Justice Harlan’s position and held that, on direct review, all new rules are applied retroactively. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

20. *Desist*, 394 U.S. at 262 (Harlan, J., dissenting).

21. *Id.* (citing Paul Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 77–101 (1965)).

22. *See, e.g.*, Robert J. Jackson Jr., *Rethinking Retroactivity*, 118 HARV. L. REV. 1642, 1647 (2005) (“Professor Mishkin’s observations significantly influenced Justice Harlan’s thinking about the problem of retroactivity.”); Christopher N. Lasch, *The Future of Teague Retroactivity, or “Redressability,” After Danforth v. Minnesota: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 19 (2009) (noting that Justice Harlan “relied heavily” on Professor Mishkin and “adopted nearly entirely Mishkin’s analysis”); Kermit Roosevelt III, *A Retroactivity Retrospective, With Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What it Might*, 95 CALIF. L. REV. 1677, 1685 (2007) (explaining that Justice Harlan “precisely followed” Professor Mishkin’s analysis).

basis is deficient in more fundamental ways.”²³ For Professor Mishkin, one of those “fundamental” deficiencies relates to the reliability of a guilty verdict. As Professor Mishkin explained, “when a constitutional guarantee is heightened or added to in a manner calculated to improve the reliability of a finding of guilt, the new interpretation essentially establishes a new required level of confidence as the condition for criminal punishment.”²⁴ Building from this premise, Professor Mishkin argues that retroactive application of a new rule on collateral review is warranted where that rule substantially improves the *reliability* of the adjudicative process:

[T]here is certainly substantial justification for the position that no one shall thereafter be kept in prison of whom it has not been established by processes embodying essentially that *new degree of probability that he is in fact guilty*. Valuing the liberty of the innocent as highly as we do, *earlier proceedings whose reliability* does not measure up to current constitutional standards for determining guilt may well be considered inadequate justification for continued detention. For to continue to imprison a person without having first established to the presently *required degree of confidence that he is not in fact innocent* is indeed to hold him, in the words of the habeas corpus statute, “in custody in violation of the Constitution.”²⁵

Justice Harlan adopted this focus on reliability. Although Justice Harlan did not quote Professor Mishkin’s exact language in his *Desist* opinion, he noted that a “principal function” of habeas is to “assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.”²⁶ Moreover, the *Teague* plurality itself described Justice Harlan’s approach in *Desist* as focusing on a similar concept, *i.e.*,

23. Paul Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 80 (1965).

24. *Id.* at 81.

25. *Id.* at 81–82 (emphases added) (quoting 28 U.S.C. § 2241(c)(3) (1965)).

26. 394 U.S. at 262 (Harlan, J., dissenting).

“accuracy.”²⁷ Accordingly, after *Desist*, Justice Harlan’s approach to retroactivity on collateral review—an approach driven primarily by Professor Mishkin’s analysis—can fairly be described as focusing on reliability.

Yet, just two years later, Justice Harlan suddenly shifted course. In his partial dissent in *Mackey v. United States*, Justice Harlan argued that the watershed exception should be reserved for those new rules that are “implicit in the concept of ordered liberty.”²⁸ He adopted this standard from the incorporation debates and, specifically, Justice Cardozo’s opinion in *Palko v. Connecticut*.²⁹

Justice Harlan gave three reasons for departing from a focus on reliability. First, he concluded that “it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged.”³⁰ Second, he noted that new rules of criminal procedure that had been recently announced by the Court were only “marginally effective” at improving the fact-finding process and that the interest in finality outweighs the interest in applying marginal improvements retroactively.³¹ Finally, Justice Harlan found it difficult to distinguish between “those new rules that are designed to improve the factfinding process and those designed principally to further other values.”³²

As noted above, the *Teague* plurality essentially combined the *Desist* and *Mackey* standards when it announced its “watershed” doctrine. In doing so, the Court suggested that the concerns Justice Harlan announced in *Mackey* could be alleviated by combining the

27. *Teague v. Lane*, 489 U.S. 288, 312 (1989) (plurality opinion). Although the *Desist* approach can be fairly described as one focused on “accuracy,” it is more appropriate to use the term “reliability.” This is because the term “reliability” is geared toward the adjudicative *process* (*i.e.*, whether the adjudicative process was reliable enough to comply with the Constitution), whereas “accuracy” improperly focuses on the adjudicative *result*—a focus that Professor Mishkin squarely and correctly rejected in his analysis.

28. 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

29. 302 U.S. 319 (1937).

30. *Mackey*, 401 U.S. at 694 (Harlan, J., concurring in the judgments in part and dissenting in part).

31. *Id.* at 694–95.

32. *Id.* at 695.

Palko standard with a focus on accuracy.³³ However, instead of attempting to reconcile the *Desist* and *Mackey* standards, the Court should have rejected Justice Harlan's *Mackey* analysis entirely. This is so for four reasons.

First, the *Palko* standard is ill-suited for retroactivity purposes. That standard was used to determine whether a particular guarantee in the Bill of Rights was incorporated by the Fourteenth Amendment and therefore applicable to the states.³⁴ However, as Justice Marshall explained elsewhere, *Palko* has been discredited, and a number of constitutional criminal procedure requirements were held inapplicable to the states under the *Palko* standard:

Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected. It was cut of the same cloth as *Betts v. Brady*, the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was "shocking to the universal sense of justice." It relied upon *Twining v. New Jersey*, which held that the right against compulsory self-incrimination was not an element of Fourteenth Amendment due process. *Betts* was overruled by *Gideon v. Wainwright*; *Twining*, by *Malloy v. Hogan*. *Palko*'s roots had thus been cut away years ago.³⁵

Even the *Teague* plurality recognized that *Palko*, in itself, was not the right test for retroactivity: "[w]ere we to employ the *Palko* test without more, we would be doing little more than importing into a very different context the terms of the debate over incorporation. . . . Reviving the *Palko* test now, in this area of law, would be

33. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion) ("We believe it desirable to combine the accuracy element of the *Desist* version of the second exception with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial.").

34. *See Palko*, 302 U.S. at 325 (explaining that rights are valid against the states if they are "implicit in the concept of ordered liberty").

35. *Benton v. Maryland*, 395 U.S. 784, 794–95 (1969) (citations omitted) (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)).

unnecessarily anachronistic.”³⁶ Of course, the *Teague* plurality did not incorporate *Palko* “without more;” instead, it combined *Palko* with the “accuracy element” from Justice Harlan’s *Desist* dissent.³⁷ Yet, that solution does not meaningfully address the Court’s concerns with *Palko* because that “anachronistic” standard remains as a hurdle to retroactivity.

Later jurisprudence further illustrates the inappropriateness of the *Palko* standard for retroactivity purposes. As demonstrated below, the post-*Teague* Court routinely analogizes to *Gideon* and the right to counsel as the quintessential watershed right.³⁸ But that right was not recognized until the Court decided *Gideon* in 1963—over twenty-five years *after* the Court began applying the *Palko* standard.³⁹ Indeed, in the case that *Gideon* overruled, the Court cited the *Palko* standard in its analysis and nevertheless *rejected* the petitioner’s claim that the Fourteenth Amendment incorporated a right to counsel against the states.⁴⁰ In other words, the only watershed right the Court has ever recognized may not actually satisfy the *Palko* standard that the Court embraced for its watershed inquiry.

Second, Justice Harlan’s rejection of reliability as a goal of habeas was misguided. In arguing that habeas is not designed to “inquire whether a criminal convict did in fact commit the deed alleged,”⁴¹ Justice Harlan confused constitutionally required reliability—the goal of Professor Mishkin’s retroactivity analysis—with the accuracy of a conviction (*i.e.*, actual innocence).⁴² Professor Mishkin’s

36. *Teague*, 489 U.S. at 312 (plurality opinion).

37. *Id.*

38. *See infra* Part II.

39. *See Palko*, 302 U.S. at 325.

40. *Betts*, 316 U.S. at 462 nn.10–11, 471–72.

41. *Mackey v. United States*, 401 U.S. 667, 694 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

42. Although reliability is one goal of the habeas procedure, the Court has never recognized a free-standing “actual innocence” claim that would allow a prisoner to be released if she can demonstrate she is actually innocent. *Herrera v. Collins*, 506 U.S. 390, 404–05 (1993). Instead, actual innocence is only relevant to overcoming a procedural default. A petitioner who procedurally defaulted on a constitutional claim can

emphasis on reliability was not intended to allow free-standing actual innocence claims. Indeed, he expressly and correctly rejected that notion: “[H]abeas corpus should only inquire into the reliability of the earlier process of guilt-determination, rather than seek to determine the fact of guilt itself.”⁴³

Instead, Professor Mishkin focused on the ways in which new rules of criminal procedure can promote accuracy in such a way that they render any prior guilty verdict *constitutionally unreliable*. Professor Mishkin noted that rules of criminal procedure collectively express “that degree of confidence that a man has committed a crime which the *Constitution requires* as a condition of the state’s depriving him of liberty or life.”⁴⁴ Noting that reliability must be measured by “current constitutional standards,” he explained why a focus on reliability implicates the Constitution in the habeas context: “[T]o continue to imprison a person without having first established to the presently required degree of confidence that he is not in fact innocent is indeed to hold him, in the words of the habeas corpus statute, ‘in custody in violation of the Constitution.’”⁴⁵ In other words, Professor Mishkin was not arguing that certain rules should be applied retroactively in order to determine whether a petitioner was actually innocent—*i.e.*, to determine whether the *result* at trial was correct. Rather, he was arguing that certain rules should be applied retroactively because, absent the rule, the *process* resulting in the petitioner’s guilty verdict cannot be considered reliable enough to comply with the Constitution.

Justice Harlan should have recognized this distinction. Indeed, he began his retroactivity analysis in *Mackey* by focusing on defective trials, not results: “I start with the proposition that habeas lies to inquire into *every constitutional defect in any criminal trial*, where the petitioner remains ‘in custody’ because of the judgment in that

overcome that default if she demonstrates actual innocence, but she will still have to prevail on her constitutional claim to overturn her conviction. See *House v. Bell*, 547 U.S. 518, 555 (2006).

43. Mishkin, *supra* note 23, at 86.

44. *Id.* at 81 (emphasis added).

45. *Id.* at 82 (quoting 28 U.S.C. § 2241(c)(3) (1965)).

trial.”⁴⁶ Even Justice Harlan’s *Desist* opinion reflected this distinction between process and result: he argued that rules should be held retroactive if they “significantly improve the pre-existing fact-finding *procedures*” or, put another way, “substantially affect the fact-finding *apparatus* of the original trial.”⁴⁷

Third, Justice Harlan’s concern that some new rules of criminal procedure only marginally improve reliability does not justify outright rejecting reliability as a standard for retroactivity. To be fair, his concern is not without merit: in some sense, every rule of criminal procedure promotes reliability.⁴⁸ Accordingly, if *any* improvement in reliability is the standard by which a new procedural rule is deemed retroactive on collateral review, then every new rule should be held retroactive. This would improperly contravene any interest the states have in the finality of convictions.⁴⁹

However, as discussed below,⁵⁰ finality concerns do not warrant a complete rejection of reliability as a standard for retroactivity. Instead, they simply suggest limiting retroactivity to the very rules that Justice Harlan focused on in *Desist*: those without which there is an “impermissibly large risk” that a guilty verdict is unreliable.⁵¹ Indeed, that is precisely how the *Teague* plurality addressed Justice Harlan’s concern: by “limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.”⁵²

46. 401 U.S. at 685 (Harlan, J., concurring in the judgments in part and dissenting in part) (emphasis added).

47. 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) (emphases added).

48. See Mishkin, *supra* note 23, at 80 (“Most constitutional requirements defining due criminal process have as their prime if not sole objective [the] goal of insuring the reliability of the guilt-determining process.” (quoting Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957))).

49. See *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion) (noting that retroactivity exceptions must recognize that “[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system”).

50. See *infra* text accompanying notes 89–109.

51. 394 U.S. at 262 (Harlan, J., dissenting).

52. 489 U.S. at 313 (plurality opinion).

Finally, Justice Harlan's concern that it is often difficult to distinguish between "rules that are designed to improve the factfinding process and those designed principally to further other values"⁵³ is unpersuasive. Professor Robert Jackson Jr. suggested that this rationale revealed "a concern that retroactivity might hinge on the subjective value preferences of a majority of the Justices of the Court."⁵⁴ Yet, there is arguably no standard more at the whim of the Justices' subjective value preferences than "implicit in the concept of ordered liberty."⁵⁵

One is left wondering why, despite these flaws, Justice Harlan abandoned his focus on reliability and embraced the *Palko* standard in *Mackey*. While it is impossible to determine with certainty, one potential motive is that Justice Harlan was dissatisfied with the Court's expansion of the scope of habeas in recent years, and he saw an opportunity to narrow that scope by limiting retroactivity.⁵⁶ Indeed, Justice Harlan had vigorously dissented from the Court's expansion of habeas in *Fay v. Noia*—a landmark case that greatly expanded the scope of federal habeas—and described the Court's holding there as "one of the most disquieting that the Court has rendered in a long time."⁵⁷ And in both *Mackey* and *Desist*, Justice Harlan continued to criticize the Court's expansion of habeas, noting in the latter that he "continue[d] to believe that *Noia* . . . constitutes an indefensible departure both from the historical principles which defined the scope of the 'Great Writ' and from the principles of federalism which have formed the bedrock of our constitutional

53. *Mackey v. United States*, 401 U.S. 667, 695 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

54. Jackson, *supra* note 22, at 1649.

55. See, e.g., Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841, 858 (2013).

56. Lasch, *supra* note 22, at 20–21 (arguing that Justice Harlan was "frustrated" with the Court's expansion of habeas and "sought to achieve a restriction of the writ via the retroactivity problem").

57. 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).

development.”⁵⁸

Regardless of why Justice Harlan suddenly shifted course from the *Desist* standard to the *Mackey* standard, the *Teague* plurality embraced both.⁵⁹ It also included language suggesting that a watershed rule is one that “alter[s] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.”⁶⁰

Professor Jackson suggests that the *Teague* plurality intended for the *Desist* standard to be the primary focus in the watershed inquiry. Specifically, he argues that the Court “resisted a return to an indeterminate jurisprudence of unknown jurists’ substantive values” and made accuracy, instead of the *Mackey* standard, the “touchstone” of the watershed inquiry.⁶¹

However admirable Professor Jackson’s attempt to read *Mackey* out of *Teague* may be, it is not supported by the Court’s opinion. Nowhere in the opinion does the Court suggest that *Desist*’s reliability element deserves primacy in the watershed analysis. In fact, in applying its new standards to the *Teague* petitioner’s proposed rule, the Court’s conclusion suggests that the touchstone is, in fact, the *Mackey* standard: “An examination of our decision in *Taylor* applying the fair cross section requirement to the jury venire leads inexorably to the conclusion that adoption of the rule petitioner urges would be a far cry from the kind of absolute prerequisite to fundamental fairness that is ‘implicit in the concept of ordered liberty.’”⁶²

But one need not look solely at the *Teague* opinion to refute Professor Jackson’s claim. The three decades since *Teague* demonstrate

58. *Desist v. U.S.*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting); see also *Mackey*, 401 U.S. at 685 (Harlan, J., concurring in the judgments in part and dissenting in part) (noting that he “consistently protested a long course of habeas decisions in this Court which, I still believe, constitute an unsound extension of the historic scope of the writ and an unfortunate display of insensitivity to the principles of federalism which underlie the American legal system”).

59. See 489 U.S. 288, 312 (1989) (plurality opinion) (combining *Desist*’s reliability element with *Mackey*’s standard).

60. *Id.* at 311.

61. Jackson, *supra* note 22, at 1651–52.

62. *Teague*, 489 U.S. at 315 (plurality opinion).

that the *Mackey* standard and the Court's emphasis on "bedrock procedural elements" are front and center in the watershed inquiry.

II. A DEAD LETTER: EXPLAINING THE COURT'S "WATERSHED" JURISPRUDENCE SINCE *TEAGUE*.

Today, the watershed exception to *Teague* is all but a dead letter. Since *Teague* was decided, the Court has addressed whether a particular new rule is a watershed procedural rule in thirteen different cases; in each case, "watershed" status was rejected.⁶³ In analyzing these cases, Professor Jackson suggests that the Court's post-*Teague* jurisprudence emphasizes accuracy rather than the *Palko* standard.⁶⁴ He goes so far as to suggest that "the few doctrinal hurdles to discarding *Mackey's* unhelpful reference to the incorporation debate might easily be overcome."⁶⁵ To the contrary, however, *Teague's* progeny routinely apply the *Palko* standard, cite "bedrock procedural elements," and reference *Gideon*. As a result, the Court sets the bar for retroactivity so high that no procedural rule can satisfy it—no matter how much the rule improves the reliability of the

63. See, e.g., *Butler v. McKellar*, 494 U.S. 407, 416 (1990) (rejecting retroactive application of *Arizona v. Roberson*, 486 U.S. 675 (1988)); *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (rejecting retroactive application of Petitioner's proposed new rule); *Sawyer v. Smith*, 497 U.S. 227, 245 (1990) (rejecting retroactive application of *Caldwell v. Mississippi*, 472 U.S. 320 (1985)); *Graham v. Collins*, 506 U.S. 461, 477–78 (1993) (rejecting retroactive application of Petitioner's proposed new rule); *Gilmore v. Taylor*, 508 U.S. 333, 345–46 (1993) (rejecting retroactive application of *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990)); *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994) (rejecting retroactive application of Petitioner's proposed rule); *Goeke v. Branch*, 514 U.S. 115, 120 (1995) (rejecting retroactive application of Petitioner's proposed rule); *Gray v. Netherland*, 518 U.S. 152, 170 (1996) (rejecting retroactive application of Petitioner's proposed rule); *Lambrix v. Singletary*, 520 U.S. 518, 539 (1997) (rejecting retroactive application of *Espinosa v. Florida*, 505 U.S. 1079 (1992)); *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) (rejecting retroactive application of *Simmons v. South Carolina*, 512 U.S. 154 (1994)); *Schriro v. Summerlin*, 542 U.S. 348, 355–58 (2004) (rejecting retroactive application of *Ring v. Arizona*, 536 U.S. 584 (2002)); *Beard v. Banks*, 542 U.S. 406, 420 (2004) (rejecting retroactive application of *Mills v. Maryland*, 486 U.S. 367 (1988)); *Whorton v. Bockting*, 549 U.S. 406, 421 (2007) (rejecting retroactive application of *Crawford v. Washington*, 541 U.S. 36 (2004)).

64. Jackson, *supra* note 22, at 1663 (suggesting that the Court's post-*Teague* jurisprudence is consistent with an approach emphasizing the reliability of the proceedings).

65. *Id.* at 1656.

adjudicative process.

This trend in the Court's post-*Teague* jurisprudence was not inevitable. The year after *Teague* was decided, the Court rejected three claims that a newly announced procedural rule deserved watershed status. However, in doing so, the Court focused on whether the rule promoted reliability. For example, in *Butler v. McKellar*,⁶⁶ the Court held that a rule barring police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation did not satisfy *Teague*'s watershed exception because a violation of that rule "would not seriously diminish the likelihood of obtaining an accurate determination—indeed, it may increase that likelihood."⁶⁷ In *Saffle v. Parks*,⁶⁸ decided the same day as *Butler*, the Court held that the defendant's proposed rule—that the jury be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence—could not be applied retroactively because "fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn . . . on whether the defendant can strike an emotional chord in a juror."⁶⁹ The *Saffle* Court mentioned *Gideon* only briefly, noting that "[w]hatever one may think of the importance of respondent's proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception."⁷⁰ Thus, the impact of the *Palko* standard and the *Gideon* analogy on these cases was, at most, minor.

Just a few months later, that began to change. In *Sawyer v. Smith*, the Court declined to apply retroactively the rule that a sentencer may not be led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.⁷¹ In doing so, the Court explained that "[a] rule that qualifies under this exception must not only improve accuracy, but also 'alter our

66. 494 U.S. 407 (1990).

67. *Id.* at 416.

68. 494 U.S. 484 (1990).

69. *Id.* at 495.

70. *Id.*

71. *Sawyer v. Smith*, 497 U.S. 227, 245 (1990).

understanding of the bedrock procedural elements' essential to the fairness of a proceeding."⁷² The Court noted that it is "unlikely that many such components of basic due process have yet to emerge."⁷³ This stringent two-pronged standard was necessary, the Court explained, because the *Teague* exceptions must be consistent with principles of finality.⁷⁴ The *Sawyer* Court also noted that focusing solely on reliability poses a difficult line-drawing exercise because much of the Court's capital sentencing jurisprudence "is directed toward the enhancement of reliability and accuracy in some sense."⁷⁵ Professor Jackson suggests that *Sawyer* could be read narrowly such that the *Palko* standard and "bedrock" requirement only deny retroactivity on their own force when "the petitioner, by the very nature of his constitutional claim, must *concede* that the new rule is not essential to the fairness of the proceeding."⁷⁶ He points to language in the Court's opinion noting that the petitioner conceded that the constitutional error was harmless.⁷⁷

However, later cases undermine that reading of *Sawyer*. Indeed, *Sawyer* marked the beginning of a string of cases in the Court's watershed jurisprudence—none of which involved a petitioner's concession of harmless error—in which *Desist*'s reliability element was virtually ignored. In *Gilmore v. Taylor*,⁷⁸ the Court declined to apply retroactively a rule that required jury instructions to include clear instructions about an affirmative defense because the rule did not

72. *Id.* at 242 (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion)).

73. *Id.* (quoting *Teague*, 489 U.S. at 313 (plurality opinion)).

74. *See id.* ("The scope of the *Teague* exceptions must be consistent with the recognition that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.' The 'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application.'" (alterations in original) (citations omitted) (quoting *Teague*, 489 U.S. at 309 (plurality opinion); *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (opinion of Powell, J.)).

75. *Id.* at 243.

76. Jackson, *supra* note 22, at 1655.

77. *Id.* (citing *Sawyer v. Smith*, 497 U.S. 227, 243–44 (1990)).

78. 508 U.S. 333 (1993).

satisfy the *Palko* standard.⁷⁹ The Court did not even mention the reliability component of the watershed inquiry. Similarly, in *Gray v. Netherland*,⁸⁰ the Court rejected the argument that the petitioner's proposed rule—that defendants be given more than one day's notice of the state's evidence—was a watershed rule, and it did so based solely on an analogy to *Gideon*: “Whatever one may think of the importance of [Petitioner's] proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception.”⁸¹ The Court applied the same reasoning yet again in *O'Dell v. Netherland*, rejecting retroactive application of a rule because it was not on par with *Gideon*.⁸² Finally, in *Lambrix v. Singletary*,⁸³ the Court noted simply that the reasoning in *Sawyer* foreclosed the possibility that the procedural rule at issue was a watershed.⁸⁴ Although the Court mentioned the reliability element of the watershed inquiry in a handful

79. *Id.* at 345 (“Although the *Falconer* court expressed concern that the jury might have been confused by the instructions in question, we cannot say that its holding falls into that small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.” (alteration in original) (quoting *Graham v. Collins*, 506 U.S. 461, 478 (1993))).

80. 518 U.S. 152 (1996).

81. *Id.* at 170 (second alteration in original) (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)).

82. 521 U.S. 151, 167 (1997) (“Unlike the sweeping rule of *Gideon*, which established an affirmative right to counsel in all felony cases, the narrow right of rebuttal that *Simmons* affords to defendants in a limited class of capital cases has hardly ‘alter[ed] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.’” (alteration in original) (quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990))). Professor Jackson suggests that the *O'Dell* Court “indicat[ed] that the rule's ambiguous effect on accuracy provided an alternative basis for the Court's holding.” Jackson, *supra* note 22, at 1654. Specifically, he points to a footnote in the Court's retroactivity analysis in which the Court states, “[i]t is by no means inevitable that, absent application of the rule of *Simmons*, ‘miscarriages of justice’ will occur.” *Id.* (quoting *O'Dell*, 521 U.S. at 167 n.4). However, that language was a rejection of Petitioner's suggestion that the *Simmons* rule operates to prevent miscarriages of justices in the same way the *Gideon* rule did. See *id.* In other words, that language simply reflects the Court's finding that that *Simmons* rule is unlike *Gideon*—once again demonstrating the substantial weight that the *Gideon* analogy carries in the watershed inquiry.

83. 520 U.S. 518 (1997).

84. *Id.* at 540 (“*Lambrix* does not contend that [the watershed] exception applies to *Espinosa* errors, and our opinion in [*Sawyer*] makes it quite clear that that is so.”).

of cases in the years immediately following *Sawyer*,⁸⁵ it did so in a conclusory manner and only alongside the *Palko* standard or “bedrock”-type language.⁸⁶

The Court’s continued reliance on “bedrock” language and the *Gideon* analogy is problematic because limiting the watershed exception to rules as sweeping as *Gideon*’s right to counsel creates an impossible hurdle—it swallows the watershed exception. Chief Justice Warren described *Gideon* as “the most important criminal procedure case his Court had decided and the third most important case of his tenure overall.”⁸⁷ Legal scholars describe the *Gideon* rule as one of the most important—if not *the* most important—constitutional protections for criminal defendants.⁸⁸ It is no wonder, then, that no other rule has ever achieved watershed status: it is difficult to identify any potential rule that would alter our understanding of procedural fairness the way *Gideon* did.

Yet, that does not mean that *no* new procedural rule should ever be applied retroactively, particularly where the only interest

85. See, e.g., *Graham*, 506 U.S. at 478 (noting that denying Petitioner’s proposed rule would not seriously diminish the likelihood of accurate sentencing); *Caspari v. Bohlen*, 510 U.S. 383, 396 (1994) (noting that denying Petitioner’s proposed rule would actually enhance reliability of proceeding); *Goeke v. Branch*, 514 U.S. 115, 120 (1995) (explaining that Petitioner’s proposed rule “cannot be said to ‘be so central to an accurate determination of innocence or guilt’” such that it qualifies for watershed status (citations omitted) (quoting *Graham*, 506 U.S. at 478)).

86. See, e.g., *Graham*, 506 U.S. at 478 (noting that watershed status only applies to rules “implicit in the concept of ordered liberty” and that “it [is] unlikely that many such components of basic due process have yet to emerge”); *Caspari*, 510 U.S. at 396 (finding Petitioner’s proposed rule is not a “groundbreaking occurrence”); *Goeke*, 514 U.S. at 120 (finding that Petitioner’s proposed rule failed to satisfy the *Palko* standard).

87. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1390 (2004) (quoting Leonard W. Levy, INTRODUCTION TO THE SUPREME COURT UNDER EARL WARREN 3, 20 (1972)).

88. See, e.g., Justin Marceau, *Gideon’s Shadow*, 122 YALE L.J. 2482, 2487 (2013) (“*Gideon* stands as the most important constitutional protection for criminal defendants. *Gideon* is uniquely capable of protecting the innocent and promoting accuracy of result.”); William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1264 (2011) (noting that *Gideon* “has become the central decision in our conception of American justice”).

weighing against retroactivity is finality.⁸⁹ Indeed, even Justice Harlan's *Mackey* opinion acknowledged that other rules besides *Gideon* might warrant retroactivity: "Other possible exceptions to the finality rule I would leave to be worked out in the context of actual cases brought before us that raise the issue."⁹⁰ Although he did not identify any candidates, he never went so far as to claim—as the *Teague* plurality did—that it is "unlikely that many such components of basic due process have yet to emerge."⁹¹ That restrictive language from *Teague* is seemingly driven by the plurality's fidelity to finality interests.⁹²

"[The] Court has never held, however, that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under [28 U.S.C.] § 2254," the federal statute authorizing federal collateral review of state criminal convictions.⁹³ Indeed, Founding-era and other early jurists routinely noted that interests of finality and comity for state courts should not always outweigh the fundamental importance of ensuring that criminal defendants are not wrongfully deprived of liberty or life. Former Eighth Circuit Chief Judge Donald P. Lay persuasively explained those jurists' views:

Arguments of state court finality and comity lose sight of the historical concerns of our constitutional fathers. In 1821, Chief Justice Marshall observed the Constitution did not provide the states with preeminent authority for enforcing the Constitution. He wrote: "There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the

89. See *Sawyer v. Smith*, 497 U.S. 227, 259 (1990) (Marshall, J., dissenting) ("This raw preference for finality is unjustified.").

90. 401 U.S. 667, 694 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

91. *Teague v. Lane*, 489 U.S. 288, 313 (1989) (plurality opinion).

92. See *id.* at 309–10 (discussing finality interests and finding finality-based criticisms of retroactivity "persuasive"); Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1041 (1993) ("The interest of state finality again spurred the change in habeas procedures [announced in *Teague*].").

93. *Reed v. Ross*, 468 U.S. 1, 15 (1984).

times, which would justify the opinion that the confidence reposed in the States was so implicit, as to leave in them and their tribunals the power of resisting or undefeating [sic],⁹⁴ in the form of law, the legitimate measures of the Union." . . . Justice Rutledge [later] stated: "The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available. Beside executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, *considerations of economy of judicial time and procedures, important as they undoubtedly are, become comparatively insignificant.*"⁹⁵

Chief Judge Lay further noted that Congress authorized a federal habeas remedy despite concerns for finality. He explained that federal habeas, "by its very nature, challenges the finality of unconstitutional state court convictions. It inevitably provides 'duplication of judicial effort,' 'delay in setting the criminal proceeding at rest,' 'inconvenience' and 'postponed litigation of fact.' Notwithstanding these obvious concerns, Congress nevertheless created the remedy."⁹⁶

Similarly, Professor Douglas Berman notes that the Constitution itself includes provisions that seemingly undermine the idea that the Framers were primarily concerned about finality. These provisions include the Suspension Clause, the Executive's pardon power, and the Court's appellate jurisdiction.⁹⁷ These elements of

94. The correct word here should be "defeating." See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 388 (1821) ("There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union.").

95. Lay, *supra* note 92, at 1025 (footnote omitted) (quoting *Cohens*, 19 U.S. (6 Wheat.) at 388; *Sunal v. Large*, 332 U.S. 174, 189 (1947) (Rutledge, J., dissenting)).

96. Lay, *supra* note 92, at 1045 (footnote omitted) (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 261 (1973) (Powell, J., concurring)).

97. Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 155 (2014).

the Constitution suggest the Framers sought to ensure that “criminal defendants in a new America would have various means to seek review and reconsideration of the application of governmental power even after an initial criminal conviction and sentencing.”⁹⁸ Indeed, Berman argues that, “given the checks and balances built into our constitutional structure and the significant individual rights and criminal procedure protections enshrined in the Bill of Rights, one might readily conclude that the Framers were likely far more concerned with the fitness and fairness of criminal justice outcomes than with their finality.”⁹⁹

Justice Harlan also believed that finality cannot always outweigh the interest in ensuring that defendants are not wrongfully deprived of liberty or life. As noted above, he did not believe—as the *Teague* plurality did—that it is “unlikely that [any watershed rules] have yet to emerge.”¹⁰⁰ Rather, he acknowledged that “other possible exceptions to the finality rule” may exist.¹⁰¹ The phrasing there is revealing: by characterizing rules that qualify for retroactive application as “exceptions to the *finality* rule,” Justice Harlan implicitly acknowledged that finality should not always outweigh the interest in ensuring a conviction is constitutionally sound. This is consistent with his statements in other cases. In *Sanders v. United States*,¹⁰² for example, he noted that *res judicata* should not be strictly applied in criminal law: “The consequences of injustice—loss of liberty and sometimes loss of life—are far too great to permit the automatic application of an entire body of technical rules whose primary relevance lies in the area of civil litigation.”¹⁰³ And in *Mackey*, while discussing the retroactivity exception for substantive rules of criminal law, he noted that “[t]here is little societal interest in permitting the criminal process to rest at a point where it ought

98. *Id.*

99. *Id.*

100. *Teague v. Lane*, 489 U.S. 288, 313 (1989) (plurality opinion).

101. *Mackey v. United States*, 401 U.S. 667, 694 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

102. 373 U.S. 1 (1963).

103. *Id.* at 24 (Harlan, J., dissenting).

properly never to repose.”¹⁰⁴

This is not to say that finality is irrelevant. Indeed, Justice Harlan also noted in *Sanders* that his views on the proper point of repose “[are] not to suggest[] that finality, as distinguished from the particular rules of res judicata, is without significance in the criminal law.”¹⁰⁵ And as the Court explained in *Teague*:

Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions shows only that conventional notions of finality should not have *as much* place in criminal as in civil litigation, not that they should have *none*.¹⁰⁶

Yet, finality also need not be dispositive in every case that proposes retroactive application of a procedural rule. This is particularly true in cases where the constitutional right at issue substantially improves the reliability of the adjudicative process. Indeed, the Court has expressly acknowledged that finality concerns carry less weight when a constitutional right plays a fundamental role in ensuring reliability. For example, the Court has explained that “finality concerns are somewhat weaker” in cases involving ineffective assistance of counsel claims because that claim “asserts one of the crucial assurances that the result of the proceeding is reliable.”¹⁰⁷

Accordingly, one can respect finality interests and nevertheless acknowledge—as Justice Harlan did—that other possible exceptions to the finality rule besides *Gideon* may in fact exist. Doing so simply requires striking a slightly different balance than that of the *Teague* plurality—one that is more consistent with the balance

104. 401 U.S. at 693 (Harlan, J., concurring in the judgments in part and dissenting in part).

105. 373 U.S. at 24 (Harlan, J., dissenting).

106. *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

107. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

struck by Founding-era jurists.¹⁰⁸ And one can strike that balance by limiting retroactivity to the types of rules that Justice Harlan focused on in *Desist*: those without which there is an “impermissibly large risk” that a guilty verdict is unreliable.¹⁰⁹

Unfortunately, *Teague*'s fidelity to finality and its progeny's emphasis on the *Gideon* analogy and “bedrock” language has made it impossible for the Court to strike that balance today. Indeed, it is fair to say that the Court places so much weight on the non-reliability elements of *Teague*'s watershed test that it ignores reliability outright, even where compelling arguments demonstrate that a particular rule substantially promotes the reliability of a verdict.

On this point, *Gilmore* is illustrative. The new rule in that case came from *Falconer*, in which the Seventh Circuit held that the Illinois model jury instructions were unconstitutional because they allowed a jury to return a murder verdict without considering whether the defendant's mental state would support a voluntary manslaughter verdict instead.¹¹⁰ The defendant in *Gilmore* took the stand at his Illinois trial and admitted killing the victim, but claimed he was acting under a sudden and intense passion and was therefore only guilty of the lesser included offense of voluntary manslaughter.¹¹¹ In other words, he *admitted* to the murder elements in order to present an affirmative defense. Justice Blackmun compellingly argued that the jury instructions in the defendant's case—which were nearly the same as those struck down in *Falconer*—“severely diminished the likelihood of an accurate conviction” because they “prevented the jury from even *considering* the voluntary manslaughter option.”¹¹²

However, Justice Blackmun was in dissent, and the majority did not even engage with his reliability-based arguments. Instead, in

108. See *supra* text accompanying notes 94–99.

109. 394 U.S. 244, 262 (1969) (Harlan, J., dissenting).

110. *Gilmore v. Taylor*, 508 U.S. 333, 345–46 (1993) (citing *Falconer v. Lane*, 905 F.2d 1129, 1136 (7th Cir. 1990)).

111. *Id.* at 336.

112. *Id.* at 360 (Blackmun, J., dissenting); see also *id.* at 363 (“When the judge instructed the jurors, he effectively told them to disregard Taylor's provocation testimony.”).

one sentence, the Court rejected the watershed claim because the *Falconer* rule did not satisfy the *Palko* standard.¹¹³ Thus, the Court seemingly did not care that the *Falconer* rule substantially promoted reliability—perhaps enough to be applied retroactively.¹¹⁴

There is one case in the post-*Teague* era that exemplifies a more appropriate retroactivity analysis. In *Schriro v. Summerlin*,¹¹⁵ the Court addressed whether the rule announced in *Ring v. Arizona*¹¹⁶—*i.e.*, where the law authorizes the death penalty only if an aggravating factor is present, that factor must be proved to a jury rather than to a judge¹¹⁷—applied retroactively on collateral review.¹¹⁸ Writing for the Court, Justice Scalia explained that “the question is whether judicial factfinding so ‘seriously diminishe[s]’ accuracy that there is an ‘impermissibly large risk’ of punishing conduct the law does not reach.”¹¹⁹ The Court concluded that it did not, explaining that “for every argument why juries are more accurate factfinders, there is another why they are less accurate.”¹²⁰ Justice Scalia did not cite to the *Palko* standard or the language in *Teague* about “bedrock procedural elements.”¹²¹

In dissent, Justice Breyer reached the opposite conclusion

113. *See id.* at 345 (majority opinion) (“Although the *Falconer* court expressed concern that the jury might have been confused by the instructions in question, we cannot say that its holding falls into that small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.” (citations omitted)).

114. Indeed, Justice Blackmun believed the rule was as important to reliability as *Gideon*: “The right to an affirmative-defense instruction that jurors can understand when there is evidence to support an affirmative defense is as significant to the fairness and accuracy of a criminal proceeding as is the right to counsel.” *Id.* at 364 (Blackmun, J., dissenting).

115. 542 U.S. 348 (2004).

116. 536 U.S. 584. (2002).

117. *Id.* at 589.

118. *Schriro*, 542 U.S. at 349. *Ring* was an extension of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490.

119. *Schriro*, 542 U.S. at 355–56 (quoting *Teague v. Lane*, 489 U.S. 288, 312–13 (1989) (plurality opinion)).

120. *Id.* at 356.

121. *See id.*

regarding the *Ring* rule's reliability-enhancing role in capital sentencing.¹²² He argued that the applicability of aggravating factors in a death case is ultimately a value judgment turning on "community-based standards"—a value judgment for which a jury is better equipped than a judge.¹²³ He also argued that, in capital sentencing proceedings, finality interests are "unusually weak" and the countervailing interests in "protecting the innocent against erroneous conviction or punishment and assuring fundamentally fair procedures" are "unusually strong."¹²⁴

Whether one agrees with Justice Scalia or Justice Breyer, their robust debate illustrates the proper inquiry regarding retroactivity: a focus on whether a rule substantially promotes the *reliability* of a verdict or sentence. The *Schriro* approach pays respect to finality interests, limiting retroactivity only to those rules that create an "impermissibly large risk" of an unreliable verdict or sentence, as opposed to rules that increase reliability in any way, however small. In that manner, the *Schriro* approach also addresses *Sawyer's* concern that all of the Court's capital sentencing jurisprudence "is directed toward the enhancement of reliability and accuracy in some sense."¹²⁵

However, a reliability-based approach also rightly eliminates the *Palko* standard that, as argued above, is ill-suited for retroactivity.¹²⁶ And it allows petitioners to claim retroactivity without having to make an impossible argument: that the new rule is as "bedrock" as *Gideon*. Indeed, the *Schriro* Court did not tie itself to *Palko* or proclaim that *Ring* is not bedrock—the easy way out. Instead, the

122. Justice Breyer suggested that the majority "does not deny that *Ring*" satisfies the *Palko* standard. *See id.* at 359 (Breyer, J., dissenting). In doing so, he does not cite to the majority opinion but, rather, to opinions in other cases—including Justice Scalia's concurring opinions—suggesting that the *Ring* rule is fundamental. *See id.* He cites to those opinions, rather than the *Schriro* opinion, because the *Schriro* Court never opined on that issue one way or another. It is difficult to know whether the majority accepted Justice Breyer's characterization or if it simply considered the *Palko* standard less relevant to its inquiry.

123. *See id.* at 361–62.

124. *See id.* at 362–64.

125. *Sawyer v. Smith*, 497 U.S. 227, 243 (1990).

126. *See supra* text accompanying notes 34–40.

vigorous debate between Justice Scalia and Justice Breyer exemplifies the *Desist* approach. *Schriro* provided hope for a revived watershed inquiry; indeed, Professor Jackson suggested that *Schriro* might be “indicative of an emerging consensus at the Court to take seriously *Teague’s* admonition that it ‘would be unnecessarily anachronistic’ to import *Palko’s* analysis into retroactivity doctrine.”¹²⁷

Unfortunately, two other cases demonstrate that *Schriro* was just a brief aberration from the Court’s usual post-*Teague* emphasis on analogizing to “bedrock” rules. In *Beard v. Banks*,¹²⁸ decided the same day as *Schriro*, the Court rejected retroactive application of the rule announced in *Mills v. Maryland*,¹²⁹ which prohibited capital sentencing schemes requiring juries to disregard mitigating factors not found unanimously.¹³⁰ The Court only briefly discussed the rule’s impact on reliability¹³¹ and analogized the rule away from *Gideon* and the “bedrock” standard.¹³² Later, in *Whorton v. Bockting*,¹³³ the Court held that its landmark decision in *Crawford v. Washington*¹³⁴ did not satisfy *Teague’s* watershed exception.¹³⁵ The Court addressed both elements of the test— the reliability element and the “bedrock” element.¹³⁶ But even when it addressed the *Crawford* rule’s impact on the reliability of the factfinding process, a substantial portion of the analysis addressed why that impact “is in no

127. Jackson, *supra* note 22, at 1662 (quoting *Teague v. Lane*, 489 U.S. 288, 312 (1989) (plurality opinion)).

128. 542 U.S. 406 (2004).

129. 486 U.S. 367 (1988)

130. *Beard*, 542 U.S. at 408.

131. *See id.* at 419–20 (explaining that “the fact that a new rule removes some remote possibility of arbitrary infliction of the death sentence does not suffice to bring it within *Teague’s* second exception.”).

132. *See id.* at 420 (“However laudable the *Mills* rule might be, ‘it has none of the primacy and centrality of the rule adopted in *Gideon*.’ The *Mills* rule applies fairly narrowly and works no fundamental shift in ‘our understanding of the bedrock procedural elements’ essential to fundamental fairness.” (citations omitted)).

133. 549 U.S. 406 (2007).

134. 541 U.S. 36 (2004).

135. *Whorton*, 549 U.S. at 421.

136. *See id.* at 418–21.

way comparable to the *Gideon* rule.¹³⁷ Thus, the Court continues to frame its inquiry around *Gideon*—an impossible standard.¹³⁸

III. RAMOS V. LOUISIANA AND EDWARDS V. VANNOY: REVIVING THE “WATERSHED” EXCEPTION

On April 20, 2020, the Court held in *Ramos v. Louisiana*¹³⁹ that the Sixth Amendment right to a jury trial requires a unanimous verdict to convict a defendant of a serious offense.¹⁴⁰ Almost immediately, commentators began questioning whether the rule would apply retroactively,¹⁴¹ and just two weeks later, in *Edwards v. Vannoy*,¹⁴² the Court granted certiorari on that very question.¹⁴³

This is not particularly surprising. Discussion about the potential retroactivity of the *Ramos* rule appeared in nearly all of the opinions

137. *Id.* at 419.

138. A collateral consequence of the difficulty in satisfying the watershed standard is that, in order to apply procedural rules retroactively, the Court is forced to rewrite history and recharacterize those rules as “substantive.” *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), is illustrative. There, the Court held that the holding in *Miller v. Alabama*, 567 U.S. 460, 483 (2012)—that a sentencer must consider a juvenile defendant’s youth and attendant characteristics before imposing a sentence of life without parole—was a “substantive” rule that must be applied retroactively. *Montgomery*, 136 S. Ct. at 732. However, the *Miller* Court expressly noted that its decision “does not categorically bar a penalty for a class of offenders or type of crime. . . . Instead, it mandates only that a sentencer follow a certain *process*—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” *Miller*, 567 U.S. at 483 (emphasis added). Indeed, as Justice Scalia persuasively explained in dissent, “[i]t is plain as day that the majority is not applying *Miller*, but rewriting it.” *Montgomery*, 136 S. Ct. at 743 (Scalia, J., dissenting).

139. 140 S. Ct. 1390 (2020).

140. *Id.* at 1397.

141. See, e.g., Leah Litman, *Ten Thoughts on Ramos v. LA*, TAKE CARE BLOG (Apr. 20, 2020), <https://takecareblog.com/blog/ten-thoughts-on-ramos-v-la> [<https://perma.cc/3ZSB-8N5B>] (“One big issue after *Ramos* will be what happens to all of the Louisiana and Oregon convictions that were obtained by non-unanimous juries?”); Josh Blackman, *5 Unanswered Questions from Ramos v. Louisiana*, VOLOKH CONSPIRACY (Apr. 21, 2020, 8:00 AM), <https://reason.com/2020/04/21/5-unanswered-questions-from-ramos-v-louisiana/> [<https://perma.cc/3W2Q-DX6Z>] (identifying whether *Ramos* can be applied retroactively as one of *Ramos*’s unanswered questions).

142. 140 S. Ct. 2737 (2020).

143. *Id.* at 2738.

issued in the case. Justice Alito expressed concern in his dissent that “[p]risoners whose direct appeals have ended will argue that today’s decision allows them to challenge their convictions on collateral review, and if those claims succeed, the courts of Louisiana and Oregon are almost sure to be overwhelmed.”¹⁴⁴ He noted the potential issues with retrying cases, including the unavailability of key witnesses for older cases.¹⁴⁵

Writing for the Court, Justice Gorsuch responded to these concerns by noting that “*Teague’s* test is a demanding one,” and that any future inquiry “will rightly take into account the States’ interest in the finality of their criminal convictions.”¹⁴⁶ Justice Kavanaugh went even further in his concurring opinion and expressly rejected the notion that *Ramos* should be applied retroactively: “[A]ssuming that the Court faithfully applies *Teague*, today’s decision will not apply retroactively on federal habeas corpus review and will not disturb convictions that are final.”¹⁴⁷

As Justice Gorsuch noted, litigation about the retroactivity of *Ramos* “is sure to come.”¹⁴⁸ When that litigation arrives at the Court, the Justices will have a unique opportunity to minimize the impact of *Gideon* and “bedrock procedural rules” on the watershed inquiry and shift the analysis toward the reliability-enhancing nature of a rule. This is so for three reasons.

First, the unanimity requirement is fundamentally about reliability. The petitioners’ brief in *Ramos* illustrates this point. The petitioners identified several purposes of the unanimity requirement, including promoting public confidence in the criminal justice system, checking overzealous prosecutors, and promoting group deliberation.¹⁴⁹ Each of these goals ultimately *promotes* reliability or is accomplished only *by* reliability. For example, group deliberation allows jurors to “evaluate the strength of the evidence, test

144. *Ramos*, 140 S. Ct. at 1438 (Alito, J., dissenting).

145. *Id.*

146. *Id.* at 1407 (majority opinion).

147. *Id.* at 1420 (Kavanaugh, J., concurring in part).

148. *Id.* at 1407 (majority opinion).

149. Brief for Petitioner at 27–28, *Ramos*, 140 S. Ct. 1390 (No. 18-5924).

hypotheses, and challenge latent assumptions—all in service of the search for the truth.”¹⁵⁰ Public confidence in the criminal justice system is promoted by unanimity because “the public considers unanimous juries *more accurate* and fair than the nonunanimous alternative.”¹⁵¹ And when unanimity checks overzealous prosecutors, it makes it harder to achieve a guilty verdict in questionable cases: “If a verdict could be nonunanimous, a ‘zealous prosecutor would carry a *far lighter burden of persuasion*’” in contestable cases.¹⁵² Indeed, the petitioner in *Edwards* made similar arguments to the Court in his briefing.¹⁵³

Whether the absence of unanimity poses an “impermissibly large risk” that the innocent will be convicted is, of course, a separate question. One could argue, quite plausibly, that reliability is not substantially enhanced where the alternative to unanimity in Louisiana and Oregon was not a majority vote (say, 7-5) but a requirement of 10-2 or 11-1. In other words, one might argue that a difference of one or two jurors does not improve reliability enough to qualify for watershed status.¹⁵⁴

Regardless of where one lands in that debate, however, reliability is front and center when it comes to the unanimity requirement, and that allows the Court to engage in a *Schriro*-like debate. That debate, in turn, presents the opportunity to revise the watershed framework and disavow the Court’s emphasis on *Gideon* and “bedrock procedural elements.”¹⁵⁵ The Court could still include some

150. *Id.* at 29 (emphasis added).

151. *Id.* at 33.

152. *Id.* at 28 (emphasis added) (quoting *Hibdon v. United States*, 204 F.2d 834, 839 (6th Cir. 1953)).

153. See Brief for Petitioner at 27–29, *Edwards v. Vannoy*, 140 S. Ct. 2737 (2020) (No. 19-5807).

154. Indeed, the respondent in *Edwards* made this argument in his brief. See Brief for Respondent at 30–38, *Edwards*, 140 S. Ct. 2737 (No. 19-5807).

155. Unfortunately, the petitioner in *Edwards* promotes the reliance on *Gideon* and “bedrock” procedural rules rather than critiquing it. Specifically, he argues that *Ramos* is “uniquely deserving of watershed status” because it is distinct from those rules that the Court found incomparable to *Gideon*. See Brief for Petitioner at 30–32, *Edwards*, 140 S. Ct. 2737 (No. 19-5807) (noting that “a *Gideon*-like rule would qualify for watershed

sort of requirement that a rule be “fundamental” or “essential.” Indeed, the Court in *Ramos* described the unanimity rule in those terms throughout its opinion,¹⁵⁶ and Justice Harlan, too, thought that the unanimity requirement was an “essential feature” of the right to a jury trial.¹⁵⁷ However, any reference to such language should also emphasize that reliability is the touchstone of the inquiry.

Second, the finality interests at stake in retroactively applying *Ramos* are minimal. Although the number of individuals currently incarcerated with final convictions in Louisiana and Oregon is unclear, the fact remains that only two states have allowed non-unanimous jury verdicts since the Court upheld Oregon’s system in 1972.¹⁵⁸ In those states, less than three percent of criminal cases ended in a jury trial, and some of those trials ended in acquittals or mistrials.¹⁵⁹ Thus, the potential for a deluge of reopened cases falling on state courts nationwide is less than usual.¹⁶⁰

Finally—and perhaps most controversially—Justice Gorsuch’s opinion in *Ramos* opened the door to treating *Teague*’s retroactivity analysis as non-binding. Specifically, Justice Gorsuch argued that the case *Ramos* overruled, *Apodaca v. Oregon*,¹⁶¹ is not binding

status” and arguing that *Ramos* “stands apart” from the rule in *Crawford* because it is more comparable to *Gideon* than *Crawford*). At no point does he suggest that the Court alter its framework or dispose of the emphasis on *Gideon* altogether.

156. *Ramos*, 140 S. Ct. at 1395–96 (noting that the unanimity requirement is a “vital right” and an “essential feature of the jury trial”).

157. *Baldwin v. New York*, 399 U.S. 117, 127 (1970) (Harlan, J., dissenting in part and concurring in part) (explaining that one of “three essential features” of a Sixth Amendment jury is that “the verdict should be unanimous”).

158. *Ramos*, 140 S. Ct. at 1398 (majority opinion).

159. See Brief for Petitioner at 36, *Edwards*, 140 S. Ct. 2737 (No. 19-5807).

160. See Litman, *supra* note 141 (“[T]he fallout from holding [*Ramos*] retroactive would be less than in many other cases, given that only Louisiana and Oregon had such a rule.”). Of course, finality interests may be more paramount in future cases where a new rule would apply retroactively to fifty states rather than two. However, *Edwards* nevertheless presents an opportunity for the Court to take a first step—and perhaps not the last—toward striking a new balance in the watershed inquiry.

161. 406 U.S. 404 (1972).

precedent.¹⁶² He explained that only four Justices in *Apodaca* found that the Sixth Amendment did not require unanimity, and the holding in the case relied on the solo opinion of Justice Powell, who believed the Sixth Amendment required unanimity but nevertheless joined the Court's judgment based on a dual-track theory of incorporation that the Court had already rejected.¹⁶³ "[T]o accept [Justice Powell's] reasoning as precedential," explained Justice Gorsuch, "would [require the Court] to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected."¹⁶⁴ And because a single Justice's opinion is not precedent, the case in its entirety does not supply a "governing precedent."¹⁶⁵

For present purposes, this argument is relevant because the watershed inquiry announced in *Teague* only garnered four votes. Indeed, at least one circuit has noted that, under normal principles of determining what constitutes precedent,¹⁶⁶ the *Teague* plurality opinion is non-binding.¹⁶⁷ Although the Court has repeatedly applied *Teague's* watershed inquiry as governing law, that practice would not be dispositive for Justice Gorsuch, who was seemingly unpersuaded by Justice Alito's argument in dissent that the Court

162. *Ramos*, 140 S. Ct. at 1402 (Gorsuch, J., majority opinion) ("[N]ot even Louisiana tries to suggest that *Apodaca* supplies a governing precedent.").

163. *See id.* ("Justice Powell reached a different result only by relying on a dual-track theory of incorporation that a majority of the Court had already rejected . . .").

164. *Id.*

165. *Id.*

166. *Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976))).

167. *See Elortegui v. United States*, 743 F. Supp. 828, 830 n.5 (S.D. Fla. 1990) ("The Eleventh Circuit has twice noted that the plurality opinion by Justice O'Connor in *Teague* is not binding precedent. Indeed, under [*Marks*], the concurrence by Justice Stevens and Justice Blackmun, stating a somewhat different test than the one formulated by the plurality, should be binding precedent." (citing *Hall v. Kelso*, 892 F.2d 1541, 1543 n. 1 (11th Cir. 1990); *Collins v. Zant*, 892 F.2d 1502, 1511 n. 10 (11th Cir. 1990))).

had “reiterated time and again what *Apodaca* had established.”¹⁶⁸ Accordingly, if Justice Gorsuch’s argument were to gain traction,¹⁶⁹ it would provide a third reason for the Court to modify the *Teague* framework in the manner described above.

IV. ORAL ARGUMENT IN *EDWARDS V. VANNOY*:
DECIPHERING THE JUSTICES’ CURRENT THOUGHTS ON THE WATER-
SHED EXCEPTION

On November 30, 2020, the Court heard oral argument in *Edwards*. The parties’ arguments and the Justices’ questions touched on a number of intriguing issues related to the *Teague* analysis, including but not limited to whether *Ramos* announced a new rule,¹⁷⁰ the source of the Court’s authority to impose the *Teague* exceptions on states,¹⁷¹ and whether to consider the racist origins of non-

168. *Ramos*, 140 S. Ct. at 1428 (Alito, J., dissenting) (collecting cases noting that “holding” of *Apodaca* was that the Sixth Amendment does not require unanimity in state court).

169. To be clear, this is a *big* “if.” Only Justice Breyer and Justice Ginsburg joined this portion of Justice Gorsuch’s opinion, and Justice Kavanaugh felt compelled to note in his concurrence that “six Justices treat the result in *Apodaca* as a precedent.” *Ramos*, 140 S. Ct. at 1416 n.86 (Kavanaugh, J., concurring in part).

170. Petitioner’s counsel offered a path to retroactivity for the Justices who were sympathetic to Justice Gorsuch’s argument in *Ramos* that *Apodaca* never held precedential value. See Transcript of Oral Argument at 4, *Edwards v. Vannoy*, 140 S. Ct. 2737 (2020) (No. 19-5807) (Petitioner’s counsel arguing that “[f]or some justices, *Apodaca* was dead on arrival since its deciding votes rationale was foreclosed by precedent. For these justices, *Apodaca* provided no precedential value and *Ramos* is an old rule dictated by precedent.”). Most of the Justices, however, rejected this position at oral argument. See, e.g., *id.* at 10 (Justice Thomas noting that “[w]e’ve had *Apodaca* on the book for—books for quite some time. I think the cases we have actually, if not endorsed it, certainly saw it sitting comfortably if not awkwardly with our case law”); *id.* at 18 (Justice Kagan stating “I thought that *Apodaca* was a precedent, so you would have a very steep climb to get me to think that *Ramos* was anything other than a new rule.”).

171. Justice Thomas and Justice Alito both asked questions regarding the Court’s authority to retroactively impose rules on the states. See *id.* at 64–65 (Justice Thomas asking the federal government “where do you think this—the authority of this Court to apply rules retroactively comes from?”); see also *id.* at 66–67 (Justice Alito asking the federal government “[w]here does the authority to impose the *Teague* rule on the states come from? If it’s an interpretation of the—of the habeas statute, then don’t we have to

unanimous juries when determining retroactivity.¹⁷² Although a thorough analysis of the issues raised at oral argument is beyond the scope of this Note, two aspects of the argument are worth

deal with 2254(d)? If it's not an interpretation of the statute, it would have to come from a provision of the Constitution, such as the Suspension Clause. Is that where you think it comes from?"'). At least one commentator suggested that these comments reflect a belief that the Court lacks the authority to apply *any* rules retroactively. See Amy Howe, *Argument analysis: Complex retroactivity issues divide justices in jury-unanimity case*, SCOTUSBLOG (Dec. 2, 2020, 5:50 PM), <https://www.scotusblog.com/2020/12/argument-analysis-complex-retroactivity-issues-divide-justices-in-jury-unanimity-case/> [<https://perma.cc/GF4C-DHAQ>] ("Both [Justice] Alito and Justice Clarence Thomas seemed doubtful that the court even had the authority to apply rules retroactively."').

172. Much of this questioning related to the issue of how the Court could find *Ramos* retroactive on the basis of its race-discriminatory origins when the Court declined to apply retroactively the rule announced in *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), that peremptory challenges based solely on race are unconstitutional. See *Allen v. Hardy*, 478 U.S. 255, 261 (1986) (holding *Batson* does not apply retroactively on collateral review). Justice Kavanaugh's question to Respondent's counsel noted the relationship between the rules announced in *Batson* and *Ramos*:

In *Ramos*, Justice Gorsuch's opinion and mine as well talked about the history of nonunanimous juries, the linkage to racist origins. . . . I also looked at the—how it was linked to the history of race-based peremptory strikes in *Batson* and how those two things had come from a—from a similar place, a similar unfortunate place in our history, in the Court—in the country's history. And in this case, you know, there's a black defendant. The state uses its peremptory strikes to strike all but one black juror—this is four of its six peremptories against black venire persons—strikes five blacks for cause because several of them—in part, for several of them—had a family history of incarceration. And you're left with one black juror with a black defendant. Then you get a [sic] 11-to-1 verdict on the armed robbery count, the two kidnapping counts—one of the armed robbery counts, two kidnapping counts, and the rape count. And the one juror is the black—black woman, the black juror. This case seems like a classic example of what we were concerned about with the combination of peremptory challenges being used on the basis of race, maybe not to strike every juror but to strike all but one, and then the nonunanimous jury system complementing the—the peremptory challenges.

Transcript of Oral Argument at 54–55, *Edwards v. Vannoy*, 140 S. Ct. 2737 (2020) (No. 19-5807). Other Justices asked how, if at all, the race-discriminatory history of the non-unanimous jury practice should factor into the watershed inquiry. See, e.g., *id.* at 64 (Justice Thomas asking, "what role do you think that the sordid roots of the nonunanimous jury rule in Louisiana should play in our analysis?"); *id.* at 21 (Justice Kagan asking, "[h]ow does [the race-discriminatory origin of non-unanimous juries] play into the *Teague* analysis and how can it play given that we've held *Batson* non—nonretroactive?").

noting because they shed light on the ways that some Justices may be reconsidering the contours of the *Teague* inquiry.

First, the *Edwards* argument revealed competing definitions of “accuracy” as that term is used in the watershed inquiry. As noted above, this Note uses the term “reliability” rather than “accuracy” because “reliability” is geared toward the adjudicative *process* (i.e., whether that process was reliable enough to comply with the Constitution), whereas “accuracy” suggests that the focus is on the adjudicative result—a focus that Professor Mishkin squarely and correctly rejected in his analysis.¹⁷³

The *Edwards* oral argument included discussions about these distinct conceptions of accuracy. For example, when asked by Justice Thomas and Justice Barrett what standard of accuracy he believed was relevant, the federal government’s counsel argued that it is “factual accuracy” that is important rather than the risk of wrongful convictions.¹⁷⁴ The government’s counsel cited the *Butler* example discussed above, where the Court held that a rule barring police-initiated interrogation following a suspect’s request for counsel in the context of a separate investigation did not satisfy *Teague*’s watershed exception because a violation of that rule “would not seriously diminish the likelihood of obtaining an accurate determination—indeed, it may increase that likelihood.”¹⁷⁵

Yet, a focus on “factual accuracy” is arguably too narrow. Consider the right to counsel, the quintessential watershed right. Effective counsel can obtain the exclusion of critical evidence that would otherwise yield a more accurate set of facts for the jury. In this way, the right to counsel often results in *less* factual accuracy, not more. But despite this impact on factual accuracy, the right to counsel is a watershed rule. Accordingly, “accuracy” (as the word is used in the watershed context) cannot mean merely that the rule allows more evidence to be admitted at trial.

Rather, the more appropriate standard is illustrated by an

173. See *supra* note 27 and accompanying text.

174. See Transcript of Oral Argument at 63, *Edwards v. Vannoy*, 140 S. Ct. 2737 (2020) (No. 19-5807); see also *id.* at 78.

175. *Butler v. McKellar*, 494 U.S. 407, 416 (1990).

exchange between Justice Kagan and Petitioner's counsel, who argued that a system "can be inaccurate and unfair even though it may in many instances lead to conceivably the right decision."¹⁷⁶ Justice Kagan later asked Petitioner's counsel if he was referring to the "ordinary meaning of accuracy, which is simply a reduction in the error rate in trials," or if he was "talking about accuracy in some different sense."¹⁷⁷ In answering the question, Petitioner's counsel focused on the *trial*, rather than the result, noting that it is a "systemic approach to say whether or not a trial that[] deprived someone of his liberty without a unanimous verdict is fair."¹⁷⁸ Later, when questioning the federal government's counsel, Justice Kagan noted that, in the *Ramos* opinion, "there's an idea that in . . . founding times, [the *Ramos*] rule was thought of as inherent in what it meant to have a fair trial by jury, and a—and an accurate trial by jury, so that whatever came out of that process, if unanimity wasn't a part of it, there wasn't a true conviction."¹⁷⁹ This idea that the watershed inquiry is not focused on the result but rather the process—*i.e.*, whether "whatever [result] came out of that process" is illegitimate, whether it is a conviction or an acquittal, if the process itself is constitutionally deficient—is precisely the idea that Justice Harlan emphasized in his early jurisprudence influenced by Professor Mishkin.¹⁸⁰

Second, the discussions related to finality during the *Edwards* argument suggest that some Justices are frustrated with the way that the Court has balanced finality interests against retroactive application of constitutional protections. To be sure, much of the discussion regarding finality reflected traditional concerns about the administrative impact on state courts if *Ramos* were held retroactive. Indeed, a majority of the Justices probed different lawyers about

176. Transcript of Oral Argument at 10, *Edwards*, 140 S. Ct. 2737 (No. 19-5807).

177. *See id.* at 18–19.

178. *Id.* at 20. Justice Kagan seemed to endorse this position later, where she noted that if "accuracy" simply meant a reduction of error rates across the board, courts would not require the reasonable doubt standard but instead would require a preponderance standard. *See id.* at 50.

179. *Id.* at 72.

180. *See supra* text accompanying notes 17–27.

the number of cases that would have to be retried if *Ramos* were held retroactive.¹⁸¹

Yet, some of the Justices expressed disappointment with the balance that the Court has struck in applying the watershed exception. For example, Justice Sotomayor noted that, “since *Teague*, we haven’t found anything watershed,” and asked Respondent’s counsel if the Court was “claiming an exception that is—we’re never going to utilize?”¹⁸² Justice Sotomayor pressed counsel for the federal government and the respondent for examples of procedural rules, besides *Gideon*, that would satisfy the watershed exception,¹⁸³ and she also asked whether “the *Teague* exception is an—an ill fit?”¹⁸⁴ Although she did not expressly tie these questions to the role of finality in the watershed inquiry, Justice Sotomayor’s comments reflect disagreement with the Court’s persistent refusal to find a watershed rule.

Justice Gorsuch, however, did suggest that finality plays an outsized role in the watershed inquiry. When questioning Respondent’s counsel about the number of cases that would have to be retried if *Ramos* were held retroactive, Justice Gorsuch raised the point that, once a rule qualifies as a watershed, there will inherently be a considerable burden on states in applying the rule retroactively:

181. See, e.g., Transcript of Oral Argument at 37, *Edwards*, 140 S. Ct. 2737 (No. 19-5807) (Chief Justice Roberts asking Respondent’s counsel, “do you agree with [Petitioner’s] math, I guess, that it’s going to be simply two or three additional cases per prosecutor in the state [if *Ramos* is retroactive]?”); *id.* at 12–13 (Justice Breyer questioning Petitioner’s counsel about the impact on Louisiana state courts of making *Ramos* retroactive); *id.* at 17–18 (Justice Sotomayor questioning Petitioner’s counsel about the impact on Louisiana state courts of making *Ramos* retroactive); *id.* at 40–42 (Justice Breyer asking Respondent’s counsel, “do you know any numbers about new trials required in Puerto Rico or Oregon, as well as [Louisiana]?”); *id.* at 51–52 (Justice Gorsuch questioning Respondent’s counsel about the impact on Louisiana state courts of making *Ramos* retroactive); *id.* at 62 (Chief Justice Roberts asking if federal government’s counsel has “any light to shed on the statistics that we’ve been talking about?”); *id.* at 76 (Justice Kavanaugh asking federal government’s counsel, “do you think the number of cases that would be affected has any bearing on whether something is watershed?”).

182. *Id.* at 46.

183. *Id.* at 46–48, 68–69.

184. *Id.* at 48.

[W]hat relevance does [the number of potentially impacted cases] have anyway? As I understand your argument is that, okay, it's 1,600, but it's really difficult. Wouldn't we expect it to be difficult if, in fact, it were a watershed rule? If this really were a significant change and an important one, wouldn't we expect there to be some burden for the state, and—and where does Teague tell us that matters?"¹⁸⁵

Justice Gorsuch later stated to Respondent's counsel that "I think you'd agree that if it is watershed, *it's retroactive regardless of the burdens on the state.*"¹⁸⁶ Justice Gorsuch may have been telegraphing his belief that the impact of a rule on the reliability of the adjudicative process should have primacy in the watershed inquiry, and the finality interests—*i.e.*, the burdens on states of imposing the rule retroactively—should be a secondary consideration.

CONCLUSION

Respondent's counsel replied to this last comment from Justice Gorsuch by noting that the watershed exception "is calibrated to account for reliance interests."¹⁸⁷ This is true. Yet, as discussed above, the origins of the watershed exception lie in Justice Harlan's *Desist* opinion, which focused on the adjudicative processes' *reliability* rather than states' reliance interests. It was only after Justice Harlan's sudden shift in *Mackey* and the Court's opinion in *Teague* that the watershed exception was calibrated toward finality. Today, after years of being weighed down by the ill-suited *Palko* standard and the impossible-to-satisfy *Gideon* analogy, the watershed exception is all but a dead letter. Indeed, Justice Alito likened the exception to "the Tasmanian tiger, which was thought to have died out in a zoo in 1936, but every once in a while, deep in the forests of Tasmania, somebody sees a footprint in the mud or a howl in the night or some fleeting thing running by, and they say, a-ha, there

185. *Id.* at 52–53.

186. *Id.* at 53.

187. *Id.* at 54.

still is one that exists.”¹⁸⁸

The watershed exception need not be the Tasmanian tiger of the Court’s habeas jurisprudence. The Court can revive the exception by shifting the inquiry more toward reliability while limiting retroactivity—in deference to finality—to those rules whose absence creates an “impermissibly large risk” of an unreliable verdict. That is the balancing act the Court engaged in when it decided *Schriro*. There is no easy answer to which rules will qualify, as demonstrated by the compelling arguments that both Justice Scalia and Justice Breyer advanced in *Schriro*.¹⁸⁹ But some will—perhaps *Ramos* will—and the exception will be alive and well.

The watershed exception does not deserve the early death it seems to be on track for. Concerns for finality understandably drove the inclusion of *Palko* and *Gideon* in the watershed analysis. However, finality need not be the dispositive factor in the inquiry. And, ultimately, finality interests should not always outweigh the justice that must prevail when significant constitutional errors occur. On that point, Justice Gorsuch sums it up best, ending the *Ramos* opinion as follows:

In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.¹⁹⁰

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188. *Id.* at 14.

189. See *supra* text accompanying notes 115–27.

190. *Ramos*, 140 S. Ct. at 1408 (majority opinion).