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PREFACE

Institutions matter. For over forty years, the *Harvard Journal of Law & Public Policy* has been a key institution both in the conservative legal movement and on Harvard Law School's campus. JLPP has published a significant amount of pathbreaking conservative and libertarian legal scholarship, and it has also provided students at HLS with a sense of community. Harvard Law students have formed deep bonds with one another while working together on JLPP. These bonds last a lifetime.

As Volume 45 comes to a close, I am happy to report that the institution that is JLPP is as strong as ever. This Volume, we set the Journal on a great path for the future. Perhaps this Volume's most important legacy will be the launch of *JLPP: Per Curiam*, our Journal's new online component. *Per Curiam* is up and running, and under Alexander Khan and his team's stewardship, its first year was nothing short of a massive success. Recently, *Per Curiam* published a regulatory budget symposium, which included an essay from U.S. Senator James Lankford and contributions from scholars and practitioners. I anticipate even more great things in the years to come.

Issues 1 and 2 of Volume 45 boasted high-quality content from influential authors, and this Issue is no different. We begin Issue 3 with a policy essay from Professor Chris Walker, proposing a Congressional Review Act for the "major questions doctrine"—a doctrine that the Supreme Court formally announced in the recent *West Virginia v. EPA* case. We then have two articles, each of which discuss issues of congressional delegation of government power. In the first article, Professor Aditya Bamzai analyzes a speech that Alexander Hamilton gave during the founding era that may have implications for nondelegation and original meaning. In the second article, Professor Jennifer Mascott excavates the history of delegation to private parties and the federal patent office. In addition, this Issue includes an adapted and expanded version of Professors John Finnis and Robert George's amicus brief in the recently decided Supreme Court case *Dobbs v. Jackson Women's Health Organization*.

Next, we finish off Volume 45 with *yet another* issue in which we publish three pieces of student writing. I am not sure when the last time was that JLPP published at least three pieces of student writing in each issue of a volume. But with this Issue, we finish Volume 45 with a total of nine student-written works. First, a Note from JLPP Managing Editor Catherine Cole explores a growing circuit split about Article III standing. Second, a Note from JLPP Senior Editor Ari Spitzer looks into the removability of inspectors general. Third, a Case Comment from former JLPP Deputy Editor-in-Chief Jason Altabet dives into the Supreme Court's decision in *TransUnion v. Ramirez*.

In my last two prefaces, I thanked a host of editors on JLPP's upper masthead for their hard work. I would be remiss if I did not also thank Jacob Richards, who served as president of the Harvard Federalist Society this last year in addition to his role as an Executive Editor on JLPP. Jacob and I became close during our 1L year and remained best friends throughout law school. He was my first call about anything JLPP related. Jacob played as important a role in the successful completion of this Volume as anyone else on the masthead, to say nothing of his own efforts to build community for right-of-center law students on campus through the Federalist Society. He was a fantastic FedSoc Chapter President and is an even better friend.

Looking ahead to the next Volume, I am elated to hand the reins over to JLPP's next Editor-in-Chief, Mario Fiandeiro. I have every confidence that Mario is going to do an amazing job as Editor-in-Chief—he is extraordinarily conscientious, remarkably thoughtful, and unfailingly kind. Mario has also done an excellent job assembling a team of capable, diligent editors to staff the upper masthead—having worked with nearly all of them, I know they are going to do a fine job. I have long said that when I took over, I wanted Volume 45 of JLPP to be the Journal's best volume to date. History will decide whether we reached that goal. But just as important to me is ensuring that Volume 46 of JLPP is even better than Volume 45, so that JLPP continues on an upward trend. I know Mario has the ability to make that happen.

I also want to thank a few other folks who deserve recognition for helping this Issue of JLPP make it across the finish line. These editors pitched in on special, one-off projects related to getting Issue 3 out the door: John Acton, Kat Barragan, August Bruschini, Catherine Cole, Mario Fiandeiro, Jack Foley, Jacob Harcar, Ross Hildabrand, Hayley Isenberg, Brett Raffish, Jacob Richards, Ben Rolsma, Ari Spitzer, Marisa Sylvester, Cole Timmerwilke, Zach Winn, and Phillip Yan. Without their additional help, we may have had a tough time publishing what proved to be an unusually complicated issue to finalize for a variety of reasons.

Leading JLPP was a wonderful experience and one of the most meaningful things I got to do in law school. I am so grateful to my peers at HLS for entrusting me with the honor of leading this Journal; to the people at the Federalist Society for their constant support and assistance; and to the conservative legal movement for continuing to read, cite, talk about, and tweet at JLPP. Thank you.

Eli Nachmany
Editor-in-Chief

A CONGRESSIONAL REVIEW ACT FOR THE MAJOR QUESTIONS DOCTRINE

CHRISTOPHER J. WALKER*

Last Term, the Supreme Court recognized a new major questions doctrine, which requires Congress to provide clear statutory authorization for an agency to regulate on a question of great economic or political significance. This new substantive canon of statutory interpretation will be invoked in court challenges to federal agency actions across the country, and it will no doubt spark considerable scholarly attention. This Essay does not wade into those doctrinal or theoretical debates. Instead, it suggests one way Congress could respond: by enacting a Congressional Review Act for the major questions doctrine. In other words, Congress could establish a fast-track legislative process that bypasses the Senate filibuster and similar slow-down mechanisms whenever a federal court invalidates an agency rule on major questions doctrine grounds. The successful passage of such a joint resolution would amend the agency's governing statute to authorize expressly the regulatory power the agency had claimed in the invalidated rule. In so doing, Congress would more easily have the opportunity to decide the major policy question itself—tempering the new doctrine's asymmetric deregulatory effects and allowing Congress to reassert its primary role in making the major value judgments in federal lawmaking.

* Professor of Law, University of Michigan Law School. For helpful comments, thanks are due to Anya Bernstein, Aaron-Andrew Bruhl, Scott MacGuidwin, Eli Nachmany, and Ganesh Sitaraman, as well as to participants at the University of Michigan law faculty workshop for sparking this idea.

INTRODUCTION

In a series of Supreme Court decisions this past Term, culminating in *West Virginia v. EPA*,[1] a majority of the Court embraced a new version of the major questions doctrine for interpreting congressional delegations of regulatory authority to federal agencies.[2] Writing for the majority in *West Virginia v. EPA*, Chief Justice Roberts perhaps best captures this new substantive canon of statutory interpretation:

> We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies. Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to clear congressional authorization for the power it claims.[3]

The impact of this new major questions doctrine on the field of administrative law will be profound. To borrow a line from the dissent in another administrative law decision, "[i]t is indeed a wonderful new world that the Court creates, one full of promise for administrative-law professors in need of tenure articles and, of course, for litigators."[4] Application of the doctrine will no doubt be

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1. 142 S. Ct. 2587 (2022).

2. *Id.* at 2615–17 (finding that the Obama Administration EPA's Clean Power Plan exceeded the agency's statutory authority); *see also* Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665–66 (2022) (granting a stay of OSHA's COVID-19 test-or-vaccine mandate for large employers); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489–90 (2021) (vacating the stay of an injunction against the CDC's COVID-19 nationwide eviction moratorium).

3. *West Virginia*, 142 S. Ct. at 2609 (paragraph break deleted; internal quotation marks and citations omitted).

4. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1019 (2005) (Scalia, J., dissenting).

urged in challenges to regulatory actions in federal courts across the nation. And the lower federal courts will have to flesh out the doctrine's contours, especially given that the majority opinion in *West Virginia v. EPA* did little to establish an administrable framework. Indeed, Justice Gorsuch's separate concurrence may well be the more important opinion for the new doctrine, as it provides a roadmap for further development.[5]

Scholarly questions abound. For example, textualists, especially those of us who struggle to situate substantive canons and clear-statement rules in the interpretive toolkit, may find it difficult to square the new major questions doctrine with ordinary statutory interpretation.[6] When it comes to current debates on the constitutional future of the administrative state, this series of cases seems to suggest that the Roberts Court—or at least the ideological middle of the Court, including Chief Justice Roberts—may be embracing what Professor Jeff Pojanowski has dubbed "neoclassical administrative law."[7] In particular, the Court may be retreating, at least for now, from recent calls to revive the nondelegation doctrine as a constitutional constraint on regulation,[8] instead opting

5. *See West Virginia*, 142 S. Ct. at 2616–26 (Gorsuch, J., concurring).

6. *See, e.g.*, Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 480–513 (2021) (critiquing the major questions doctrine on textualist grounds). Jonathan Adler has suggested one potential textualist path forward. *See* Jonathan H. Adler, West Virginia v. EPA*: Some Answers about Major Questions*, 2022 CATO SUP. CT. REV. 37, 39 ("[T]he burden should be on the agency to demonstrate that the power it wishes to exercise has been delegated to it. And when confronted with broad, unprecedented, and unusual assertions of agency power, some degree of judicial skepticism would be warranted."). It would be fascinating, moreover, to see how purposivists or even intentionalists react to this doctrine. *See, e.g.*, Tim Mullins, *Administrative Fidelity—Between Deference and Doubt*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 18, 2022), https://www.yalejreg.com/nc/administrative-fidelity/ [https://perma.cc/UCZ9-Q8KQ].

7. Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 857 (2020).

8. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (arguing that the Court should "not wait" to reconsider the nondelegation doctrine).

to cabin administrative action via non-deferential statutory interpretation.[9]

Here, however, I do not wade into these doctrinal and theoretical debates. Instead, my goal is more modest and practical, focusing on how Congress can respond. I suggest that Congress could enact a Congressional Review Act (CRA) for the major questions doctrine. This fast-track legislative process would bypass the Senate filibuster and similar congressional slow-down mechanisms whenever a federal court invalidates an agency rule on major questions doctrine grounds. The successful passage of a CRA-like joint resolution would amend the agency's governing statute to authorize expressly the regulatory power that the agency had claimed in the judicially invalidated rule. This proposal would encourage Congress to decide the major policy question itself—helping to restore Congress's legislative role in the modern administrative state—and would counteract the new major questions doctrine's asymmetric deregulatory effects.

I. THE MAJOR QUESTIONS DOCTRINE'S POTENTIAL DEREGULATORY EFFECTS

As Professor Jonathan Adler and I have explored elsewhere, there is an often-overlooked temporal problem with congressional delegation, especially when it comes to federal agencies leveraging old statutes to address new problems.[10] Textually broad statutory delegations to federal agencies can become a source of authority for agencies to take action at a later time. This later action could be wholly unanticipated by the enacting Congress and may not

9. *See* Pojanowski, *supra* note 7, at 900, 884 (arguing that the "neoclassical approach . . . turns down the constitutional temperature" and "rejects deference to agency interpretations of substantive law").

10. Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931 (2020); *cf.* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014) ("We argue that agencies are better suited than courts to do that updating work and that the case for deferring to agencies in that task is stronger than ever with Congress largely absent from the policymaking process.").

receive support in the current Congress. One way to address this temporal problem of delegation, we argue, is for Congress to revive the practice of regular reauthorization of statutes that govern federal regulatory action. To do so may require Congress to adopt reauthorization incentives, such as sun-setting provisions, in some statutory contexts.[11]

Some version of the major questions doctrine could be another way to address the temporal problems with congressional delegation.[12] If it is apparent from the statutory text, structure, and context that the enacting Congress would not have anticipated the agency's use of regulatory authority to address a new or different major policy problem, the reviewing court could invoke the major questions doctrine to cabin the agency's regulatory authority. For the agency to be able to regulate in this area, Congress would have to enact legislation to declare more expressly that it has delegated power to the agency to address the major policy question at issue. The doctrine thus forces Congress to make the value judgment when it comes to federal agencies attempting to use old statutes to address new or otherwise unanticipated issues of great economic or political significance.

In *The New Major Questions Doctrine*, Professors Dan Deacon and Leah Litman underscore an important criticism of this vision for administrative governance.[13] The new major questions doctrine seems to operate in only one direction: deregulatory. The reviewing court asks Congress for a clearer statement of delegation on the major question. Yet the "vetogates" in Congress,[14] especially in our

11. *See* Adler & Walker, *supra* note 10, at 1974–82.

12. For the purposes of this Essay, I bracket for another day my concerns with the new major questions doctrine as a matter of interpretive theory and legal doctrine.

13. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4165724. For a defense of the doctrine, see Louis Capozzi, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. (forthcoming 2023), https://ssrn.com/abstract=4234683.

14. *See, e.g.*, William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J. L. ECON. & ORG. 756 (2015).

current era of political polarization, make it near impossible to respond. These deregulatory effects are exacerbated by a clear-statement rule imposed retroactively on statutes enacted prior to the announcement of the new doctrine. That enacting Congress may not have anticipated the need to provide more than broad statutory text to authorize the agency to regulate on a major policy question based on new facts or changed circumstances.

For some supporters of a reinvigorated nondelegation doctrine, this is a feature—not a bug—of the new major questions doctrine. In their view, regulation should be the exception for federal lawmaking, not the rule. For others concerned with congressional over-delegation, however, our normative end is not necessarily deregulation, but rather entrusting Congress—not federal agencies (or courts)—to make the major value and policy judgments when it comes to lawmaking at the federal level. The new major questions doctrine may constrain federal agencies in this area, but it does too little to encourage Congress to play its role in making major policy judgments. And it risks entrenching a potential judicial error concerning congressional intent about an otherwise textually plausible agency statutory interpretation.

II. A POTENTIAL CONGRESSIONAL RESPONSE

For those of us interested in reinvigorating Congress's role in the modern administrative state, there are ways for Congress to fast-track legislative responses to pressing problems. Congress has enacted statutes that bypass the Senate filibuster for various reasons. Budget reconciliation, created by the Congressional Budget Act of 1974,[15] is one prominent example that Congress has used aggressively in recent years.[16] Congress has also enacted various statutes

15. Pub. L. No. 93-344, 88 Stat. 297 (codified at 2 U.S.C. §§ 601–88).

16. *See, e.g.*, Inflation Reduction Act of 2022, Pub. L. No. 117-169 (using budget reconciliation to pass landmark climate change legislation); American Rescue Plan Act of 2021, Pub. L. No. 117-2 (using budget reconciliation to pass a $1.9 trillion economic

to fast-track authority for the president to negotiate international trade agreements.[17] And under the National Emergencies Act and the War Powers Act, Congress has bypassed the Senate filibuster to terminate presidential declarations of emergency[18] and to authorize or terminate the use of force overseas,[19] respectively.

A. The Congressional Review Act

If Congress were interested in responding to the new major questions doctrine, perhaps the most analogous legislative tool is the Congressional Review Act of 1996 (CRA).[20] Motivated by concerns that federal agencies may adopt regulations opposed by current legislative majorities, the CRA creates an expedited process for considering joint resolutions to overturn agency regulations.[21] In effect, the CRA creates a means through which Congress can police an agency's exercise of its delegated authority.[22]

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stimulus package to address the COVID-19 pandemic); Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (using budget reconciliation to pass expansive tax cuts).

17. *See, e.g.*, Michael A. Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L L. & ECON. 687, 696 (1996).

18. 50 U.S.C. § 1622(b) ("Not later than six months after a national emergency is declared . . . each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.").

19. 50 U.S.C. § 1545(b) ("Any joint resolution or bill [authorizing forces pursuant to the War Powers Act] shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays."); *id.* § 1546 (substantially similar language for terminating overseas forces).

20. Congressional Review Act of 1996, Pub. L. No. 104-121, 110 Stat. 868 (codified at 5 U.S.C. §§ 801–808 (2012)). *See generally* MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS (last updated Nov. 12, 2021), https://fas.org/sgp/crs/misc/R43992.pdf.

21. 5 U.S.C. § 801(a)(3)(B).

22. *See, e.g.*, Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 192–93 (2018) (providing extensive overview of the CRA and arguing that "the CRA should be helpful in corralling agency excesses, but new legislation could achieve that result more effectively and efficiently"); *cf.* Squitieri, *supra* note 6, at

Congress can only use the CRA within a relatively short window of time after the promulgation of a major rule.[23] Under the CRA, before any new rule may take effect, the agency must submit a report on the rule to Congress (and the Comptroller General).[24] If the regulation is deemed a "major rule"—defined as any rule the White House's Office of Information and Regulatory Affairs concludes will likely have "an annual effect on the economy of $100 [million] or more," or otherwise have a significant effect on consumer prices or the economy[25]—it shall not take effect for at least 60 days after its submission to Congress.[26] This waiting period provides Congress with an opportunity to review major rules and consider whether to overturn them before the major rules go into effect.

The CRA creates a streamlined process for Congress to overturn a major rule by enacting a "joint resolution of disapproval."[27] If the relevant Senate committee does not act on the disapproval resolution within 20 calendar days from the applicable date, "such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar."[28] The purpose of this mechanism is to streamline the review process by preventing a committee from acting as a bottleneck. Under the CRA, moreover, Senators waive all points of order,[29] cannot

491 (arguing that the major questions doctrine is in tension with the CRA because "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").

23. 5 U.S.C. § 802(a) (providing that the window for the introduction of a joint resolution of disapproval begins when Congress receives the agency's report on the rule "and end[s] 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress)").

24. *Id.* § 801(a)(1)(A).

25. *Id.* § 804(2).

26. *Id.* § 801(a)(3)(A).

27. *Id.* § 801(a)(3)(B).

28. *Id.* § 802(c).

29. *Id.* § 802(d)(1).

propose amendments or delay motions,[30] and are limited to 10 hours for debate.[31] As a result, only a simple majority of Senators must support a CRA resolution for passage.

If Congress passes the CRA disapproval resolution (and the President signs it into law), the substantive effect of the resolution does not just repeal the agency rule at issue. It also prohibits the agency from promulgating "a new rule that is substantially the same" as the rule at issue "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[32]

B. A CRA Approach to the Major Questions Doctrine

Congress could employ a CRA-like approach when federal courts invalidate regulations under the major questions doctrine. Once the regulation is judicially invalidated, Congress could have a window of time during which it could introduce a joint resolution. When it comes to the legislative process, Congress could require the same or similar CRA fast-track procedures. These include a committee discharge mechanism, a limitation on amendments and delay motions, and a simple majority up-down vote in the Senate after a set period of time for debate. If the resolution makes it through the House, the Senate, and the President, the substantive effect would be to amend the relevant statute in two limited ways. First, this amended statute would provide clear authorization for the regulatory power the agency had claimed in the invalidated rule. Second, it would authorize additional regulatory power that is "substantially the same" as the authority the reviewing court had precluded on major questions doctrine grounds.

In so doing, the current Congress would provide the "clear statement" required by the major questions doctrine, along with some regulatory flexibility for the agency to modify its approach as

30. *Id.*
31. *Id.* § 802(d)(2).
32. *Id.* § 801(b)(2).

needed based on changed circumstances. Importantly, the resolution would not codify the agency's prior rule. Nor would it amend the agency's governing statute in any other way. If the rule had been judicially vacated in a universal manner, the agency could reissue the rule "as is" without, where applicable, the need to restart the notice-and-comment process.[33] On further judicial review, such rule would be subject to statutory and, of course, constitutional constraints. For instance, an agency's reissued rule can be substantively permissible under the agency's governing statute (as amended by the joint resolution), but still be set aside on reasoned-decisionmaking grounds as arbitrary and capricious under the Administrative Procedure Act.[34] But the agency also would retain the discretion inherent in the statutory framework, including the option not to reissue the previously invalidated rule at all or to pursue a different regulatory approach through the applicable administrative process.

Admittedly, triggering a CRA-like process through judicial action raises issues not present in the original CRA context. Under the CRA, the clock for congressional action starts when the agency sends the proposed rule to Congress. Judicial review complicates things. A lower federal court invalidating an agency rule on major

33. If the rule had been set aside only as to the parties before the court, the joint resolution would eliminate any major questions doctrine challenges to that part of the existing rule, including in any pending or future litigation. For the purposes of this Essay, I do not wade into the debate on what it means under the APA for a court to "set aside agency action," 5 U.S.C. § 706(2), and, in particular, whether such relief can vacate an agency rule universally or just as to the parties before the court. *Compare* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 439 n.121 (2017) (arguing that "whatever one's view of how much the APA codified or changed existing practice, it never speaks with the clarity required to displace the longstanding practice of plaintiff-protective injunctions"), *with* Mila Sohoni, *The Power to Vacate a Rule*, 88 GEO. WASH. L. REV. 1121, 1129 (2020) (arguing that "the APA should be understood to authorize universal vacatur").

34. *See* Dep't of Commerce v. New York, 139 S. Ct. 2551, 2576 (2019) ("We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.").

questions grounds is not the end of the judicial process. There is always a possibility that an appellate court or the Supreme Court reverses the lower court decision, and even more so in the context of a lower court invalidating an agency rule on major questions doctrine grounds. Allowing the first judicial decision to trigger the CRA-like process would no doubt incentivize litigants to engage in strategic forum-shopping in the lower courts.

On the other hand, waiting for the mandate to issue, or for the Supreme Court to weigh in, would arguably prolong the process too long, especially for major rules that may be signature regulatory policies of a new presidential administration. After all, just like in the original CRA context, successful passage of a joint resolution would require support from a simple majority of both houses of Congress and from the President. Such support is most likely to happen when there is unified government, perhaps shortly after a presidential election when the President's party is more likely to also control Congress.[35] Not allowing for legislative fast-track review of an agency rule invalidated on major questions doctrine grounds until later in the litigation process increases the likelihood that the Congress (and the President) in office when the rule issued are no longer in power. Such delay thus could frustrate the political branches' ability to implement an electoral mandate. As such, that approach, too, would lead to forum-shopping incentives.

Recognizing these concerns, I tentatively suggest that the trigger should be the first federal court decision to invoke the major questions doctrine. In many circumstances, waiting for the Supreme Court to consider the case would be ideal, but the delay and strategic litigation incentives such approach introduces are just too great. The hope is that the prospect of further judicial review may be a potent political consideration that counsels Congress to stay its

35. *See* Adler & Walker, *supra* note 10, at 1952 ("Because the CRA resolutions are subject to presidential veto, Congress' only real opportunity to use the CRA is to rescind 'midnight regulations' adopted at the end of a presidential administration.").

hand until the Supreme Court weighs in. That said, one could imagine a narrower statutory scheme, in which the CRA-like process is triggered only by a Supreme Court decision that invalidates a regulation on major questions doctrine grounds. In all events, the CRA window would then close shortly (perhaps 30 or 60 legislative days) after the formal judicial mandate issues.[36]

III. INTER-BRANCH DYNAMICS

This short Essay does not try to respond to all potential concerns and complications about how to implement a CRA for the major questions doctrine. The goal here is to introduce the idea and hopefully spur congressional and scholarly attention. This Part, however, anticipates some of the concerns about how the dynamics of the proposal would play out in each branch of the federal government.

A. Article III Evasion

One concern is that federal courts might style their opinions to evade this fast-track legislative process. This strategic behavior could manifest in three ways. First, federal courts could fail to invoke the major questions doctrine by name in order to avoid triggering the CRA process. Second, federal courts could strategically find the statute unambiguous or "clear enough"[37] (even when there are multiple plausible interpretations), thus foreclosing the agency rule. Third, federal courts could strike down the statutory delegation as unconstitutional on nondelegation doctrine grounds.

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36. *See* Fed. R. App. Pro. 41 (detailing rules for issuing the mandate).

37. *See* Christopher J. Walker, *Gorsuch's "Clear Enough" & Kennedy's Anti-"Reflexive Deference": Two Potential Limits on* Chevron *Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (June 22, 2018) (discussing *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)), https://www.yalejreg.com/nc/gorsuchs-clear-enough-kennedys-anti-reflexive-deference-two-potential-limits-on-chevron-deference/ [https://perma.cc/6FU6-NL5X].

To address the first concern, it would be important to frame the CRA-like statute to sweep more broadly than an express citation to—or invocation of—the major questions doctrine. This CRA-like statute should include any judicial decision that rejects—as a matter of statutory interpretation—a textually plausible agency statutory interpretation based on the "major-ness" of the policy question at issue. It would encompass decisions framed as resting on a threshold clear-statement rule,[38] a *Chevron* step-one application of a substantive canon to resolve the statutory ambiguity,[39] or a *Chevron* step-two reasonableness check on the agency's interpretation.[40]

Interpreting the grounds of the judicial decision would be left to the congressional process, with the Parliamentarians playing a critical role. As Professors Jesse Cross and Abbe Gluck have detailed, "The Parliamentarians make procedural recommendations on consequential matters," such as committee referrals for introduced bills, "germaneness" determinations for proper bill amendments in the House, and "Byrd rule" determinations in the Senate for legislative provisions that qualify for the filibuster-free budget reconciliation process.[41] Here, the Parliamentarian for each chamber would make a recommendation on whether the proposed resolution addresses an agency rule that has been invalidated by a court on major questions doctrine grounds. To be sure, under each chamber's rules, the presiding officer, subject to override by a chamber majority, would make the final ruling as to whether the joint resolution qualifies for this fast-track process. But as Professors Cross and Gluck explain, "these

38. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

39. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000).

40. *See, e.g.*, Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014). *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (commanding courts to defer to an agency's interpretation of a statute it administers ("step zero") if the statutory provision at issue is ambiguous ("step one") and the agency's interpretation is reasonable ("step two")).

41. Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1585–86 (2020).

[Parliamentarian] recommendations are almost always followed by the presiding officer—and the presiding officer's ruling, in turn, is almost never appealed or overturned by a chamber majority, especially in the House."[42] Basing this decision on internal processes would shield the decision from judicial review; indeed, to avoid confusion, the CRA-like statute should preclude judicial review on this determination.[43]

As for the latter two concerns, this CRA-like legislative response would provide no remedy. Instead, it would leave judicial decisions of statutory clarity and unconstitutionality (such as an overly broad statutory delegation) to the ordinary legislative process and the court of public opinion. As Professor Adler and I explore elsewhere, Congress has other tools, such as the regular reauthorization process, to revisit outdated statutes that govern federal agencies, to update them to address new problems and changed circumstances, and to provide additional statutory instructions to channel regulatory activity.[44]

On the flipside, this legislative innovation would encourage courts to engage more seriously in ordinary statutory interpretation and to invoke the major questions doctrine more carefully and selectively. It would likely have a similar restraining force on vexatious litigation behavior. These constraints on potential abuse of the major questions doctrine would be welcome byproducts of the legislative reform.

B. Article II Overreach

Another concern is that this proposal may encourage the President and federal agencies to overclaim regulatory authority to take advantage of a filibuster-free legislative process. While federal agencies are no doubt influenced by judicial review and potential

42. *Id.* at 1586.

43. *Cf.* 5 U.S.C. § 805 (providing in the CRA that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review").

44. *See* Adler & Walker, *supra* note 10, at 1972–84.

congressional action, priorities and politics should constrain flagrant executive abuse and overreach.

Consider, for instance, a related proposal. Last year, Professors Jody Freeman and Matthew Stephenson proposed a creative use of the CRA: Federal agencies should promulgate major rules that are the opposite of what the agencies and the President actually want and then get Congress to disapprove of those rules under the CRA.[45] Professors Freeman and Stephenson argue that this CRA disapproval resolution would effectively amend the agency's governing statute to authorize the opposite of the proposed rule.

For reasons similar to those offered separately by Professors Jonathan Adler and Adam White,[46] I am skeptical that this is a proper interpretation of the CRA. More importantly for the purposes of this Essay, the Biden Administration has shown no interest in leveraging the CRA in this "good-faith faithless execution"[47] manner. That is perhaps because of the political costs of such tactics and also, no doubt, because of limited resources and higher policy priorities—both in the White House and on Capitol Hill.

I would expect similar political dynamics to limit executive overreach with the proposal set forth in this Essay. That is not to say that a CRA-like approach for the major questions doctrine will have no impact on bureaucratic behavior. The President and federal agencies may well be more aggressive on the margins in their regulatory efforts, especially when judicial review will likely take

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45. Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 281–82 (2022).

46. Jonathan H. Adler, *Could Congress Use the Congressional Review Act to Expand Agency Authority?*, VOLOKH CONSPIRACY (Aug. 19, 2021, 5:09 PM), https://reason.com/volokh/2021/08/19/could-congress-use-the-congressional-review-act-to-expand-agency-authority/ [https://perma.cc/WU24-6Q5V]; Adam White, *The Temptation of "Good-Faith Faithless Execution"*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 15, 2021), https://www.yalejreg.com/nc/the-temptation-of-good-faith-faithless-execution/ [https://perma.cc/SW9C-7ZWT].

47. White, *supra* note 46 (capitalization adapted from title).

place while the President is still in power and the President's party controls Congress. This pro-regulatory shift in behavior may just mitigate the constraining influence the Court's new major questions doctrine no doubt already has had on administrative action.[48] But the political costs, resource constraints, and uncertainties inherent in the legislative process should confine brazen executive overreach. In all events, the ultimate check is that a majority of both chambers in Congress would have to agree.

C. Article I Political Feasibility

The most obvious concern is whether Congress would enact this CRA-like process in the first place. There are substantive reasons why some members of Congress would not, putting aside the political challenges of polarization and congressional gridlock. After all, the new major questions doctrine purports to require Congress to make the major policy judgments in federal lawmaking through the ordinary legislative process. As Justice Gorsuch justifies the doctrine in his concurrence in *West Virginia v. EPA*, "lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident."[49] He further explains:

> The difficulty of the design sought to serve other ends too. By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time. The need for compromise inherent in this design also sought to protect minorities by ensuring that their votes

48. *Cf.* Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 722–24 (2014) (exploring survey responses from agency rule drafters about how their agencies may be more aggressive in rulemaking when they believe *Chevron* deference—as opposed to *Skidmore* deference or no deference—would apply on judicial review).

49. West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring).

> would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority. The difficulty of legislating at the federal level aimed as well to preserve room for lawmaking by governments more local and more accountable than a distant federal authority, and in this way allow States to serve as laboratories for novel social and economic experiments.[50]

Admittedly, this CRA-like fast-track proposal would undercut—to some degree—compromise and consensus building by removing many of the procedures in the Senate that can help advance those goals. Accordingly, it may be difficult to see Republicans (and other members of Congress with an institutionalist or limited-government mindset) providing an avenue for Congress to bypass the filibuster when it comes to rules that address major policy questions. That said, these Senate procedures are not constitutionally required. To the contrary, Congress has already embraced fast-track legislative processes in other contexts, such as for budget reconciliation, the CRA, national emergencies, treaties, and war powers. Here, the fast-track process would not extend to *any* major policy debate or *any* judicial decision constraining agency action—only to those circumstances in which a federal court has found that the agency statutory interpretation is textually plausible yet Congress has not clearly enough authorized the agency to regulate on the major question.

In that sense, this proposal is much narrower than the Supreme Court Review Act[51]—a bill a group of Senate Democrats introduced earlier this summer, which is based on a narrower proposal Professor Ganesh Sitaraman suggested in the pages of *The Atlantic*.[52] That legislation, if enacted, would create a fast-track

50. *Id.* (internal quotation marks and citations omitted).

51. S. 4681, 117th Cong. (2022).

52. Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, THE ATLANTIC (Nov. 16. 2019) ("Congress could pass a Congressional Review Act for the Supreme

legislative process for Congress to pass substantive legislation to respond to any Supreme Court decision that interprets a federal statute in any way or "interprets or reinterprets the Constitution of the United States in a manner that diminishes an individual right or privilege that is or was previously protected by the Constitution of the United States."[53] Although the proposed legislation purports to prohibit "extraneous matters" from being included in a fast-track-eligible bill responding to a Supreme Court decision, the legislation provides that the responsive bill can amend a statutory provision that is "directly implicated" by a Supreme Court decision, or in the constitutional context, allow responsive legislation that is "reasonably relevant" to a Supreme Court decision.[54]

As Professor Aaron-Andrew Bruhl observes in his analysis of the legislation, these provisions are "loose" and "unclear around the edges."[55] That assessment is charitable. Once there is a filibuster-free legislative process for Congress to legislate on anything related to a Supreme Court statutory or constitutional precedent, the incentives for abuse and misuse would be hard to resist. And, as Professor Bruhl notes, outside of the Senate Parliamentarian's recommended rulings that historically receive great deference but can be rejected by the presiding officer and overruled by a Senate majority, there is no judicial review or other non-political check on this process; "[t]he punishment for misapplication or manipulation of the procedures comes from other members or the voters."[56]

By contrast, a CRA-like approach limited to just judicial decisions invoking the major questions doctrine to invalidate an agency rule

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Court, which would enable it to overturn Court decisions on legislative matters with greater speed and ease."), https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/ [https://perma.cc/K6L5-HHPA].

53. S. 4681, § 2.

54. *Id.*

55. Aaron-Andrew P. Bruhl, The Supreme Court Review Act: Fast-Tracking the Interbranch Dialogue at *8 (Sept. 27, 2022, draft), https://ssrn.com/abstract=4227162.

56. *Id.* at *9.

would be much less susceptible to congressional abuse or misuse. Like the CRA itself, a joint resolution would not allow for any other substantive amendments; its passage would just amend the agency's governing statute to provide the clear authorization for the judicially invalidated rule, as well as the authorization for any subsequent agency rules that are substantially the same as the invalidated rule. There would be no fast-track opportunity for any other amendments or substantive legislative changes to the agency's governing statute. That would require the ordinary legislative process.

The purposes of these two legislative proposals, moreover, differ substantially. The Supreme Court Review Act, as its co-sponsor Senator Sheldon Whitehouse puts it, is about "check[ing] the activist Court's rogue decisions . . . ."[57] Or, as co-sponsor Senator Catherine Cortez Masto explains, the bill—if enacted—would create a filibuster-free process for Congress to respond "when the Court misinterprets Congressional intent or strips Americans of fundamental rights."[58] In other words, this legislation is about Congress reviewing and overriding a Supreme Court interpretation of a statute (or the Constitution), pitting the branches against each other.

A CRA-like approach limited to the major questions doctrine, by contrast, should not be viewed as a congressional override of a judicial interpretation of a statute. The new major questions doctrine operates in a unique way. The Court in *West Virginia v. EPA* found that the statute provides "a plausible textual basis for the agency action"; it only invalidated the agency rule because it found no "*clear* congressional authorization" for the agency to

57. U.S. Senator Sheldon Whitehouse, Press Release, Whitehouse, Cortez Masto Propose Congressional Check on Supreme Court Decisions (July 28, 2022), https://www.whitehouse.senate.gov/news/release/whitehouse-cortez-masto-propose-congressional-check-on-supreme-court-decisions [https://perma.cc/EVR5-PNZU].

58. *Id.*

regulate on the major question.[59] In other words, a CRA-like approach to the major questions doctrine is about Congress accepting the reviewing court's invitation to decide the major policy question more definitively in a way that the court had already decided was at least a textually plausible interpretation of the existing statute. For this type of up-down vote on whether an agency has regulatory authority to address a major policy question, the consensus and compromise values the Senate filibuster and related procedures can promote seem to be far less valuable than in the context of the Supreme Court Review Act (or than in the context of ordinary substantive legislation).

Thus, unlike the Supreme Court Review Act, there are reasons to believe that some Republicans in Congress may be willing to consider voting for this CRA-like proposal to get it over the sixty-vote threshold in the Senate. It was not too long ago that Senator Mike Lee and other Senate Republicans founded the Article I Project to restore Congress's role as the "first branch" of government.[60] As Senator Lee explained back in 2017, "Our goal is to develop and advance and hopefully enact an agenda of structural reforms that will strengthen Congress by reclaiming the legislative powers that have been ceded to the executive branch."[61]

To be sure, the new major questions doctrine also combats the ceding of legislative power to the executive branch, but it does so at the risk of judicial error in limiting what Congress had authorized the agency to do. A CRA-like process would be a structural reform to strengthen Congress's ability to make that final decision when it comes to major policy questions. By codifying a CRA for the major questions doctrine, Congress would also be

59. 142 S. Ct. 2587, 2609 (2022) (emphasis added).

60. Michelle Cottle, *Mike Lee's New Crusade*, THE ATLANTIC (Feb. 12, 2016), https://www.theatlantic.com/politics/archive/2016/02/mike-lee-article-one-project/462564/ [https://perma.cc/8GY5-2BZ2].

61. Rachel del Guidice, *3 Bills Sen. Mike Lee Thinks Could Shift Power 'Back to the People'*, DAILY SIGNAL (May 17, 2017), https://www.dailysignal.com/2017/05/17/3-bills-sen-mike-lee-thinks-shift-power-back-people/ [https://perma.cc/SG6J-5GJV].

codifying—either implicitly or explicitly—the existence of the major questions doctrine in the first place. Such legislative recognition of this judicial doctrine may have political and policy value for Republicans in Congress.

CONCLUSION

The new major questions doctrine has arrived, and it is here to stay. Its breadth and impact will likely depend on how it is further developed by litigants and judges in the lower courts. But Congress, if it chooses, can respond. As this Essay details, Congress could enact a Congressional Review Act to respond to the major questions doctrine, allowing for a fast-track, streamlined process for Congress to amend the agency's governing statute to provide clear authorization for an invalidated rule. This legislative innovation would not only mitigate the deregulatory effects of the new major questions doctrine, but it would also allow Congress to reassert its legislative role in making the major value judgments in federal lawmaking.

ALEXANDER HAMILTON, THE NONDELEGATION DOCTRINE, AND THE CREATION OF THE UNITED STATES

ADITYA BAMZAI*

In the period immediately preceding the Constitution's adoption, New Yorkers engaged in a spirited debate over whether a proposed delegation from the State to the federal government authorizing collection of an impost would violate the clause of the New York Constitution that vested "supreme legislative power" in the State Assembly and Senate. Some, like Alexander Hamilton, believed that the clause did not bear on delegations to the federal government, but rather governed the relationship between the branches of the New York government. Others believed that a grant of impost authority impermissibly transferred legislative power away from the state legislature. This Article addresses the debate over delegation that occurred during this controversy—which, in the words of Alexander Hamilton, "begat" the Convention that wrote the U.S. Constitution. The Article also addresses the equally significant debates over delegation that occurred during the consideration of the Constitution itself. As this Article shows, the debates that led to and surrounded the Constitution's adoption were in no small part debates about the legality of delegating sovereign legislative authority.

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INTRODUCTION

One of the most significant criticisms lodged against the Articles of Confederation in the years before the ratification of the Constitution was that the Continental Congress could not directly raise funding for the national government. In 1781, during the American Revolution, the Continental Congress had formally requested that each state "vest a power in Congress, to levy" a tariff of five percent on many foreign imports.[1] In 1787, after years of twists and turns, New York's rejection of Congress's authority to implement an impost effectively sounded the death knell for the proposal.[2] Between those years, the United States won a war and formed a government under the Articles of Confederation.[3] During this period, the impost controversy was central to political debates[4]—so central that, when James Madison spelled out the flaws of the Articles of Confederation in 1787, he placed the inability of the Continental Congress to raise revenue at the very top of the list.[5] New York's rejection was not just the death knell of the impost proposal, but effectively the death knell for the Articles of Confederation and the government

1. 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 112 (Gaillard Hunt ed., 1912).

2. RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 12–15 (2009) (claiming that New York "put so many qualifications on its approval" of a federal impost that it "was effectively killed").

3. *See generally* JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS (1979).

4. *See* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1112–13 (2013) ("Given the horrendous condition of government finances, the impost controversy became a defining issue in American politics."); Letter from Henry Knox to Benjamin Lincoln (June 13, 1788) ("The insurrections of Massachusetts, and the opposition to the impost by New York, have been the corrosive means of rousing america to an attention to her liberties."), *in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 176, 177 (John P. Kaminski et al. eds., 1995).

5. James Madison, Vices of the Political System of the United States (Apr. 1787) (remarking that such failure "may be considered as not less radically and permanently inherent in, than it is fatal to the object of, the present System"), *in* 9 THE PAPERS OF JAMES MADISON 345, 348 (Robert A. Rutland & William M.E. Rachal eds., 1975).

they had created. To borrow Alexander Hamilton's words, "impost begat [the Constitutional] Convention."[6]

The impost controversy was the occasion for a lengthy and substantial debate over the nondelegation doctrine. That is because, in the crucial State of New York,[7] critics of the proposals for federal impost authority invoked the Legislative Vesting Clause of the New York Constitution of 1777 and contended that it prohibited such a conferral of authority. That clause of the New York Constitution declared, in relevant part, that "the supreme legislative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the State of New York, the other to be called the senate of the State of New York."[8]

The critics of the impost proposal argued that delegating impost-collection authority to Congress violated this legislative vesting provision. To take an example, as early as 1783, Abraham Yates—later a prominent antifederalist opponent of the Constitution—claimed that the New York legislature lacked the power "of *delegating* the authority constitutionally vested in them to the federal government."[9] He contended that if the legislature could do so "in this

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6. Alexander Hamilton, Notes for a Speech to the New York Convention (July 17, 1788), *in* 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2197, 2197 (John P. Kaminski et al. eds., 2009); *see also* Calvin Johnson, *"Impost Begat Convention": Albany and New York Confront the Ratification of the Constitution*, 80 ALB. L. REV. 1489, 1500 (2017) ("The New York veto of the national impost was the nearest cause of the abandonment of the confederation mode at the national level and the adoption of the Constitution in its stead . . . .").

7. I describe New York as "crucial" because of its role in the ratification of the Constitution. In the words of the historian Linda De Pauw: "New York was the last state to ratify the federal Constitution before the new government went into operation, and in no state was ratification carried by a narrower margin." LINDA GRANT DE PAUW, THE ELEVENTH PILLAR: NEW YORK AND THE FEDERAL CONSTITUTION ix (1966).

8. N.Y. CONST. of 1777, art. II. In full, the Clause declared as follows: "This convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that the supreme legislative power within this State shall be vested in two separate and distinct bodies of men; the one to be called the assembly of the State of New York, the other to be called the senate of the State of New York; who together shall form the legislature, and meet once at least in every year for the despatch [sic] of business." *Id.*

9. Rough Hewer, No. III, THE NEW-YORK GAZETTEER, Oct. 20, 1783, at 2.

instance, they might in another, and at last surrender *the whole legislative power*."[10] Three years later, in 1786, the Habsburg Monarchy's agent in the United States, Baron de Beelen-Bertholf, reported that critics of the impost claimed that the New York legislature could not give away "an authority that inheres necessarily in the respective legislatures of each state" and that delegating such authority would depart from the "fundamental principles of the American constitutions."[11] And in the crucial debates over the impost in February 1787, a pseudonymous author, "Candidus," claimed that the New York Constitution did "not authorize the legislature to transfer the power of legislation to Congress, in this instance."[12]

Almost six years of debate over the nondelegation doctrine culminated in a speech before the New York Assembly by Alexander Hamilton in February 1787.[13] In his speech, Hamilton directly addressed the nondelegation doctrine at length, noting that some had charged the impost bill with violating a constitutional prohibition on "delegat[ing] legislative power" from the New York legislature "to Congress" and characterizing this objection as the one "supposed to have the greatest force."[14] He acknowledged the critics' premise that the New York Constitution incorporated a nondelegation principle. He said that "[i]n the distribution of the different parts of the sovereignty in the *particular* government of this state the legislative authority shall reside in a senate and assembly, or in other words, the legislative authority of the particular government

10. *Id.*

11. GEORGE BANCROFT, 1 HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 264 (1882) (citing the Report of the Austrian Agent Baron de Beelen-Bertholf (Apr. 1, 1786)). The quoted language is from Bancroft's description of de Beelen-Bertholf's report.

12. Candidus, *To the Printer of the Daily Advertiser*, N.Y. DAILY ADVERTISER, Feb. 6, 1787, at 2.

13. Alexander Hamilton, Remarks on an Act Granting to Congress Certain Imposts and Duties (Feb. 15, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON: 1787–MAY 1788, at 71 (Harold C. Syrett & Jacob E. Cooke eds., 1962) [hereinafter Hamilton Remarks].

14. *Id.* at 73.

of the state of New-York shall be vested in a senate and assembly."[15] But relying on other parts of the New York Constitution, Hamilton contended that the New York Constitution's Legislative Vesting Clause did not go beyond "delineat[ing] the different departments of power in our own state government."[16] Hamilton thus claimed that a delegation *to the federal government* did not violate the prohibition against delegations within "the different departments" of the New York government.[17]

Despite its relevance, the impost debate has received effectively no attention in the voluminous scholarship on the nondelegation doctrine.[18] In this Article, I have uncovered essays and papers written about the legislative vesting provision of the New York Constitution in the critical years and months preceding the Constitution's adoption. There are three basic reasons to care about these new documents.

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15. *Id.* at 74 (internal quotation marks omitted).

16. *Id.*

17. *Id.*

18. I am aware of a few articles that discuss the impost controversy in related, but distinct contexts. First, Professor Jud Campbell discusses the implementation of the impost in the context of the question of commandeering and federalism. *See* Campbell, *supra* note 4; *see, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the Constitution incorporates an "anticommandeering" doctrine that prohibits the federal government from requiring state executive officers to enforce federal law). In doing so, Professor Campbell alludes in passing to the nondelegation question that was raised at the same time. *See* Campbell, *supra* note 4, at 1122 n.72 (observing that Abraham Yates, writing as "Rough Hewer," perceived a "state constitutional bar against 'delegat[ing]' or transfer[ring]' legislative power to Congress"); *see infra* notes 68–71 and accompanying text (discussing Yates and the "Rough Hewer" essays). Separately, Professor David Golove has addressed the impost in the context of delegations to supranational entities. *See* David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1715–17 & nn. 62–63 (2003). And third, Professor Calvin Johnson sets forth the outlines of the impost crisis generally. *See* Johnson, *supra* note 6. These sources demonstrate the link between delegation—especially to parties outside the government, such as private parties or supranational entities—and the concepts of appointment, removal, and control. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015); Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1349 & n.310, 1356–57 (2019) (addressing the question of delegation to the Bank of the United States).

First, the impost controversy precipitated a crisis that led to the Convention that wrote the Constitution of the United States. It is not much exaggeration to say that this was the legal debate that led to the creation of the United States—with the nondelegation doctrine under the New York Constitution playing a starring doctrinal role. The backdrop of Hamilton's speech was the significant financial difficulties (and potential dissolution) of the federal union prompted by the national government's inability to raise national revenue.[19] Thus, "conferring on congress the power of levying a *national impost*, was the great dividing question on which the two parties that existed in America were arrayed."[20] In the words of Alexander Hamilton's son, the historian John Church Hamilton, "[t]he vote of the New-York legislature on the impost decided the fate of the confederation."[21]

Second, the debate over the Constitution prompted a debate over delegation in a second sense: whether state legislatures had the power to transfer their authority to the federal government, either directly or through agents like the delegates to the Constitutional Convention. During the debate over the Constitution, this question came to the fore, with John Jay addressing the topic of delegation in letters and others addressing whether the participants at the Convention had exceeded their delegated authority.[22]

Third, the question whether the U.S. Constitution's vesting of "legislative powers" in Congress implies a nondelegation principle is a matter of significant current debate.[23] The New York debates

19. *See* Johnson, *supra* note 6, at 1490; *infra* Part I.

20. JOHN CHURCH HAMILTON, 3 HISTORY OF THE REPUBLIC OF THE UNITED STATES OF AMERICA 168 (3d ed. 1868).

21. *Id.* at 236.

22. *See infra* Part III.

23. U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). *Compare* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing that the federal Constitution does not incorporate a nondelegation doctrine), *and* Eric A. Posner & Adrian Vermeule, *Interring the*

over the impost provide interesting and potentially significant new and previously overlooked evidence on this question.[24] In a nutshell, they demonstrate that, in one of the highest-profile and consequential debates during the years preceding the Constitution's adoption, editorial writers and legislators within New York repeatedly made arguments based on the premise that the New York Constitution contained a nondelegation doctrine.[25] And in seeking to

Nondelegation Doctrine, 69 U. CHI. L. REV. 1721 (2002) (same), *with* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (arguing that the Constitution does incorporate a nondelegation doctrine), *and* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003) (same).

24. *See, e.g.*, Mortenson & Bagley, *supra* note 23, at 305 (noting that the authors "found only two preratification hints of nondelegation skepticism expressed in a *legal* register"). The new and previously undiscussed sources cited in this Article add to the store of preratification evidence about the nondelegation doctrine.

25. *See infra* Parts I and II. To be sure, I do not claim that the evidence from the impost controversy bears on the question of the scope of the nondelegation doctrine. The Court has used the "intelligible principle" test as the touchstone for implementing the nondelegation doctrine, but several Justices in recent Supreme Court cases have advocated a change to the test. *See* Gundy v. United States, 139 S. Ct. 2116, 2138–42 (2019) (Gorsuch, J., dissenting); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari). Several academics have made important scholarly contributions in recent years on how history might inform the scope of the nondelegation doctrine. *See, e.g.*, Mortenson & Bagley, *supra* note 23; Wurman, *supra* note 23; Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239 (2021); Eli Nachmany, Note, *The Irrelevance of the Northwest Ordinance Example to the Debate About Originalism and the Nondelegation Doctrine*, 17 U. ILL. L. REV. ONLINE 17 (2022). The relevance of historical analysis to the proper scope of the nondelegation doctrine is an important question, but it is one that I cannot answer with the materials surfaced in this Article. Instead, I will address whether the generation of lawyers who adopted the Constitution would have understood the vesting of "legislative power" in a body to prohibit the delegation of such power to other bodies. To my mind, the very fact that the participants in the New York debates—ranging from antifederalists like Abraham Yates to staunch nationalists like Alexander Hamilton—presupposed the existence of such a doctrine under the New York Constitution is strong (albeit rebuttable) evidence that constitution-drafters understood that such vesting incorporated a nondelegation doctrine. For an attempt to sketch an approach to the scope of the nondelegation doctrine, see Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy, Kisor, *and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019).

rebut that argument, Alexander Hamilton, along with his allies, accepted the existence of a nondelegation doctrine under the New York Constitution's Legislative Vesting Clause, but disputed the doctrine's application to a delegation to the federal government.[26]

This Article proceeds in four parts. Part I spells out the history of the impost crisis in the 1780s, starting with its genesis during the American Revolution in 1781 and addressing developments until the critical year of 1787. Part II discusses the New York Assembly's 1787 session, which addressed the impost proposal for a final time in a debate culminating in Alexander Hamilton's speech analyzing the nondelegation doctrine. It includes an extended discussion of that speech, which acknowledged that the New York Constitution's Legislative Vesting Clause incorporated a nondelegation doctrine, but argued that the conferral of revenue-raising authority on the Continental Congress did not violate that doctrine. Part III discusses the aftermath of the speech, which ended in the failure of the impost proposal and the movement toward the Convention that produced the U.S. Constitution. Even there, nondelegation concerns were raised, because critics of the Constitution argued that the delegates to the Convention had violated their mandates by exceeding the authority vested in them by the New York legislature. All of these concerns were specifically raised during the events leading up to the epic Poughkeepsie Convention that ratified the Constitution in New York.[27] Part IV concludes with implications for our understanding of the Constitution's drafting and ratification, the nondelegation doctrine, and the separation of powers more generally.

In broad strokes, the debate in New York over the delegation of an impost to the federal government—which occurred just a few months before the writing of the Constitution—provides new evidence on how Article I's authors might have understood the federal

26. *See infra* Parts II.C and III.

27. *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 327 (2010).

Legislative Vesting Clause. While perhaps not conclusive, it is certainly relevant that, to my knowledge, the principal participants to the New York debate accepted the existence of a nondelegation doctrine under the New York Constitution. The debate over the impost, which "begat"[28] the Constitution, and the debate over the Constitution itself, were in no small part debates over the contours of delegation.

I. THE IMPOST CRISIS OF THE 1780S

The impost crisis was one of the most significant political issues of the period between the end of the American Revolution and the writing of the Constitution. In this Part, I provide a brief timeline of the issue, beginning first with the legal backdrop for the crisis and a description of those who participated in the debate within New York. I then turn to the several impost proposals between 1781 and 1787, highlighting the legal, nondelegation arguments made against such proposals.[29]

A. The Nature of—and Participants in—the Debate

After their ratification in 1781, the Articles of Confederation governed the relationship between the various States. The Articles retained a robust conception of state sovereignty, declaring that "[e]ach State retains its Sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[30] With respect to taxes, in particular, the Articles declared that they "shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the United States, in Congress assembled."[31]

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28. Hamilton, *supra* note 6, at 2197.

29. In this Section, I have been greatly aided by the discussion in the following sources: CLARENCE E. MINER, THE RATIFICATION OF THE FEDERAL CONSTITUTION BY THE STATE OF NEW YORK (1921); Campbell, *supra* note 4, at 1112–26.

30. ARTICLES OF CONFEDERATION of 1781, art. II.

31. ARTICLES OF CONFEDERATION of 1781, art. VIII.

New York's Constitution predated the Articles by four years. Drafted in part by John Jay, the Constitution contained a clause vesting "the supreme legislative power within this State" in an Assembly and Senate.[32] New York had early addressed the question whether this "Legislative Vesting Clause," by conferring "supreme legislative authority" on one body, implicitly forbade its exercise by another. In September of 1780, Egbert Benson reported, and the State Assembly passed, a bill "for the Appointment of a Council to assist in the Administration of Government, during the Recess of the Legislature."[33] On October 9, 1780, the state Council of Revision concluded that the bill was "inconsistent with the spirit of the Constitution," because, pursuant to it, "the person administering the government, with the Council therein provided, must exercise the powers of legislation; which by the Constitution is vested in the Senate and Assembly, and cannot by them be delegated to others."[34] The State Assembly did not enact the bill.[35]

The 1780 episode gave a preview of the constitutional arguments made in the much larger dispute within New York in the decade to

32. N.Y. CONST. of 1777, art. II; *see* WILLIAM JAY, 1 THE LIFE OF JOHN JAY 69 (1833). Another one of the drafters of the New York Constitution of 1777, Gouverneur Morris, would go on to play an important role in the drafting of the U.S. Constitution. *See* William M. Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 11 (2021).

33. *See* THE VOTES AND PROCEEDINGS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR FIRST MEETING OF THE FOURTH SESSION 39, 43 (1780).

34. ALFRED B. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK 234 (1859). The New York Constitution had created the Council of Revision as a power to check the New York legislature, with authority to "revise" or effectively veto legislation. *See id.* at 5–7; N.Y. CONST. of 1777, art. III (providing "that the Governor for the time being, the Chancellor and Judges of the Supreme Court, or any two of them, together with the Governor, shall be and hereby are consisted a Council to revise all bills about to be passed into laws by the Legislature" and "that all bills which have passed the Senate and Assembly shall, before they become laws, be presented to the said Council for their revisal and consideration"). For more on this episode, see CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 42 (1922); Wurman, *supra* note 23, at 1539–40 & n.261.

35. *See* THE VOTES AND PROCEEDINGS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR FIRST MEETING OF THE FOURTH SESSION, *supra* note 33, at 56.

follow. Over the course of that decade, States lapsed on their obligatory payments to Congress, which, in turn, rendered it impossible for the national government to service many of its foreign debts.[36] Within the State of New York, several factions coalesced around different approaches to this problem.[37] Though only 32 at the time of his speech in 1787, Hamilton was one of the leaders of the New York faction that championed federal authority and the need for federal revenues.[38] Hamilton, along with his allies such as the then-Secretary of Foreign Affairs John Jay and Egbert Benson,[39] sought to authorize a delegation by New York to the federal government to administer the impost.[40]

On the other hand, a separate faction led by Governor George Clinton sought to retain the State's taxing authority, arguing against a delegation to the federal government on both policy and legal grounds.[41] At the time 47 years old, Clinton had been repeatedly elected as Governor of New York.[42] Among his allies was Melancton Smith, a prominent businessman, who would author some of the leading Anti-Federalist tracts in the summer of 1787.[43]

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36. E. JAMES FERGUSON, THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790, at 224–28, 234–35 (1961); Letter from James Madison to Thomas Jefferson (Mar. 18, 1786) ("The payments from the States under the calls of Congress have in no year borne any proportion to the public wants."), *in* 8 THE PAPERS OF JAMES MADISON 500, 502 (Robert A. Rutland et al. eds., 1973).

37. *See* Johnson, *supra* note 6, at 1489 ("Ratification was debated in New York with partisan vigor; indeed, participants on either side of the divide were said to detest each other.").

38. RON CHERNOW, ALEXANDER HAMILTON 226–27 (2004).

39. Yes, the same Egbert Benson who would, along with James Madison, convince other members of the House of Representatives to embrace the position that the Constitution conferred on the President a power to remove executive branch subordinates in the "Decision of 1789." *See, e.g.*, Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. ___ (forthcoming 2023).

40. *See infra* Parts I.B, II.

41. JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783–1789, at 219 (1888) (claiming that New York "had her little system of duties all nicely arranged for what seemed to be her own interests, and she would not surrender this system to Congress").

42. *See generally* JOHN P. KAMINSKI, GEORGE CLINTON: YEOMAN POLITICIAN OF THE NEW REPUBLIC (1993).

43. *See generally* THE ANTI-FEDERALIST WRITINGS OF THE MELANCTON SMITH CIRCLE (Michael P. Zuckert & Derek A. Webb eds., 2009).

Also allied with Clinton and Smith were Abraham Yates, a member of the New York Senate; his nephew Robert Yates, a justice of the New York Supreme Court; and John Lansing, the Mayor of Albany and a future member of Congress.[44]

B. From 1781 to 1787

1. The 1781 Impost Proposal

In February of 1781, Congress requested from the States a grant of a five per cent continental tax on imports, characterizing such a tax as an "indispensable necessity."[45] On March 19, 1781, New York granted the federal government an impost to be "collected in such manner and form and under such pains, penalties and regulations, and by such officers as congress shall . . . direct and appoint."[46]

Commenting on the events across the Nation in May of 1781, James Madison remarked in a letter to Edmund Pendleton that Congress's request would prompt a conflict between those members of state legislatures who were naturally jealous and suspicious of national authority and those who saw the necessity of federal revenue-raising capabilities.[47] Madison also noted in his letter that the method of collection would raise its own challenges and that, for this reason, Congress had requested solely the duty, leaving the method to the States.[48]

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44. *See* DE PAUW, *supra* note 7, at 19–31; Campbell, *supra* note 4, at 1128.

45. BANCROFT, *supra* note 11, at 34.

46. An Act Authorizing the United States, in Congress Assembled, to Levy a Duty on Foreign Merchandise Imported into this State (Mar. 19, 1781), *reprinted in* 1 LAWS OF THE STATE OF NEW YORK 347–48 (1886).

47. Letter from James Madison to Edmund Pendleton (May 29, 1781) (noting that (1) Congress had requested that "the duration of the impost was limited" to mollify sentiment within the States, though "limited in so indefinite a manner as not to defeat the object" of the impost, and (2) "if the States will not enable their Representatives to fulfill their engagements, it is not to be expected that individuals either in Europe or America will confide in them"), *in* 1 THE PAPERS OF JAMES MADISON 94–95 (Henry D. Gilpin ed., 1840).

48. *Id.* ("On one side it was contended that the powers incident to the collection of a duty on trade were in their nature so municipal, and in their operation so irritative, that it was improbable that the States could be prevailed on to part with them.").

As Madison predicted, the State of Rhode Island unanimously rejected Congress's recommendation.[49] In a letter to Congress, the Speaker of the Rhode Island House of Representatives, William Bradford, gave three reasons for the rejection. Two of them sounded in policy: Bradford claimed that the impost would work unequally, "bearing hardest on the most commercial states," and that it would be "repugnant to the liberty of the United States."[50] But the other reason Bradford proffered was legal: he claimed that Congress's proposal "introduce[d] into this and the other states, officers unknown and unaccountable to them, and so is against the constitution of this State."[51]

Just four days after Rhode Island's rejection of the 1781 impost, Hamilton—along with fellow Delegates James Madison and Thomas Fitzsimons—produced a report responding to Bradford's letter.[52] The Report set the Continental Congress on a path to a second unsuccessful attempt—an attempt modified to accommodate the objections to the previous proposal—to obtain authorization for a federal impost.

The Report responded to Bradford's constitutional argument[53] by claiming that the various state constitutions did not "define and fix

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49. *See* Letter from William Bradford (Nov. 30, 1782), *in* 23 JOURNALS OF THE CONTINENTAL CONGRESS 788–89 (1914).

50. *Id.* at 788.

51. *Id.* Rhode Island did not have a post-Revolution Constitution at the time, but rather was operating under its Royal Charter. *See* IRWIN H. POLISHOOK, RHODE ISLAND AND THE UNION, 1774–1795 (1969).

52. *See Continental Congress Report on a Letter from the Speaker of the Rhode Island Assembly* (Dec. 16, 1782), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON: 1782–1786, at 213 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

53. The Report also responded to Bradford's policy arguments that the impost unfairly targeted commercial States and was repugnant to the liberty of Americans. As to the former, the Report claimed that merchants would pass on the duty to consumers in the price of the commodity, resulting in each State feeling the "burthen" of the import solely "in a ratio to its consumption, and this will be in a ratio to its population and wealth." *Id.* at 215. As to the latter, the Report sought to play down the implications of the impost grant and to play up the responsiveness of Congress to the citizenry. *See id.* at 219 ("The truth is the security intended to the general liberty in the confederation consists in the frequent election and in the rotation of the members of Congress, by which there is a constant and an effectual check upon them.").

the precise numbers and descriptions of all officers to be permitted in the state," but rather that the "Legislature must always have a discretionary power of appointing officers, not expressly known to the constitution."[54] This discretionary power, the Report continued, "include[d] that of authorising the Fœderal government to make the appointments in cases where the general welfare may require it."[55] In the absence of such a power, the Report argued, the conferral of appointment authority on the federal government for officers within the post office would be unconstitutional.[56] And Rhode Island's argument would "prove also that the Fœderal government ought to have the appointment of no internal officers whatever, a position that would defeat all the provisions of the Confederation and all the purposes of the union."[57] But the Report pointed out that the Articles expressly contemplated that Congress had authority to appoint all such "civil officers as may be necessary for managing the general affairs of The United States under their direction."[58]

Although not couched in nondelegation terms, Rhode Island's objection to the impost opened a constitutional debate over the federal government's power to use its own officers to collect a tax within a State and, in turn, opened a debate on the States' authority to confer such powers on the federal government.

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54. *Id.* at 216.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*; *see generally* 1 GEORGE TICKNOR CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 206–08 (1854). Other supporters of a stronger central government urged that Congress be vested with greater power to pay off the public debt. For example, on February 17, 1783, James Duane wrote Hamilton, urging a "better Establishment of our General Government on a Basis that will secure the permanent Union of the States, and a punctual Payment of the publick Debts." Letter from James Duane to Alexander Hamilton (Feb. 17, 1783), *in* 3 HAMILTON PAPERS, *supra* note 52, at 257.

2. The 1783 Compromise

On March 6, 1783, a report in the Continental Congress commented on the financial situation by declaring that the national government had tried to ascertain and liquidate the public debt and to ensure adequate and regular payment for paying the interest.[59] In doing so, the report renewed the attempt to secure a grant of the proposed impost. But the renewed attempt might have had the opposite effect. On March 15, 1783, New York repealed the grant that the State had made in 1781 and substituted in its place a grant that authorized the collection of the impost by state officials.[60]

The following month, on April 18, 1783, Congress officially reproposed a federal impost.[61] This time around, the proposal was a duty of five percent on "all . . . goods" other than those specified,[62] accompanied with two key accommodations to the objections. First, Congress proposed that the impost expire after twenty-five years.[63] Second, Congress authorized States to appoint tax collectors, though it retained federal authority to remove them.[64] Referring to this proposal in a letter to George Washington, Hamilton described members of Congress as having "been dragged into the measures

59. Report on Restoring Public Credit (Mar. 6, 1783), *reprinted in* 6 THE PAPERS OF JAMES MADISON 311, 311–16 (William T. Hutchinson & William M.E. Rachal eds., 1969); *see id.* at 311 (recommending that the States vest in Congress "a power to levy for the use of the U.S., a duty of 5 [percent] . . .").

60. An Act to Repeal an Act Entitled "An Act Authorizing the United States, in Congress Assembled, to Levy a Duty on Foreign Merchandise Imported into this State" (Mar. 15, 1783), *reprinted in* 1 LAWS OF THE STATE OF NEW YORK 544 (1886) (providing that duties shall be "collected by such officers, under the authority of this State").

61. *See, e.g.*, RICHARD HILDRETH, 3 THE HISTORY OF THE UNITED STATES OF AMERICA 435 (1863); BANCROFT, *supra* note 11, at 104.

62. 24 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 257 (Apr. 18, 1783) (Gaillard Hunt ed., 1922). For the other, listed goods, the proposal levied a specified duty. *See id.* For the committee report on the same subject, see *id.* at 188.

63. *Id.* at 258 (providing that the duties shall not "be continued for a longer term than twenty-five years").

64. *Id.* (providing that "the collectors of the said duties shall be appointed by the states, within which their offices are to be respectively exercised, but when so appointed, shall be amenable to, and removable by, the United States in Congress assembled, alone"). Congress also provided that, if a State did not make such an appointment within a specified time, then Congress could make the appointment. *See id.*

which are now near being adopted by the clamours of the army and other public creditors."[65]

Joined by Madison and Oliver Ellsworth, Hamilton authored a report to defend the proposal that was circulated in the New York press.[66] Hamilton wrote Governor Clinton on May 14, 1783, to advocate for the proposal on the basis of "the obligations of national faith, honor, and reputation."[67]

Others, however, claimed that the proposal violated the New York Constitution of 1777 because the State could not delegate away its sovereignty. Writing as "Rough Hewer," Abraham Yates published a series of elaborate editorials in the New York papers contending that the "Impost, *in the Mode required*, cannot be granted, consistent with the Confederation or [New York] Constitution."[68] Yates argued that, although the New York Constitution conferred on the legislature the authority to appoint the State's officers,[69] it did not by implication grant the legislature the power "of *delegating* the authority constitutionally vested in them to the federal government."[70] If the legislature could do so "in this instance,"

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65. Letter from Alexander Hamilton to George Washington (Apr. 8, 1783), *in* 3 HAMILTON PAPERS, *supra* note 52, at 318.

66. ADDRESS AND RECOMMENDATIONS TO THE STATES, BY THE UNITED STATES IN CONGRESS ASSEMBLED (Apr. 24, 1783); *see* MINER, *supra* note 29, at 19–20.

67. Letter from Alexander Hamilton to George Clinton, *in* 3 HAMILTON PAPERS, *supra* note 52, at 355.

68. Rough Hewer, No. III, *supra* note 9, at 1. For earlier suggestions of the same point, see Rough Hewer, *To Mr. Balentine*, THE NEW-YORK GAZETTEER, Aug. 4, 1783, at 2 (suggesting that the "requisition of Congress" was "against the constitution of the State of New-York"); Rough Hewer, No. II, THE NEW-YORK GAZETTEER, Oct. 6, 1783, at 2–3.

69. *See* N.Y. CONST. of 1777, art. XXIII (specifying how officers would be appointed). In the course of his argument, Yates cited several other provisions of the New York Constitution. *See* Rough Hewer, No. III, *supra* note 9, at 1 (citing N.Y. CONST. of 1777, art. I ("[N]o authority shall, on any pretence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them."); *id.* art. XXVIII (providing that, where "the duration of any office shall not be ascertained, such office shall be construed to be held during the pleasure of the council of appointment"); *id.* art. XXXIII (vesting the Assembly with the power to impeach officers)).

70. Rough Hewer, No. III, *supra* note 9, at 2.

Yates claimed, "they might in another, and at last surrender *the whole legislative power*."[71]

3. The Road to 1787

In 1786, Congress tried again. It began the process on February 8, 1786 by recommending the resolutions of April 18, 1783 "to the serious consideration of the Legislatures of those States which have not fully complied with [them]."[72] A few days later, Congress adopted a resolution as part of a special financial report that noted that New York had yet to comply with the 1783 impost request and that urged immediate action on the matter.[73]

In early 1786, Alexander Hamilton drafted a petition on behalf of the "inhabitants of the City of New York" to the state legislature to support the adoption of the 1783 impost proposal and contended that such a scheme was constitutional.[74] According to the report of Baron de Beelen-Bertholf, the Habsburg Monarchy's agent in the United States, objectors to the impost responded that neither the Congress nor state legislatures possessed the authority to alter state constitutions (or the Articles of Confederation), but rather were required to build on them.[75] Specifically, they argued that surrendering the impost power gave away "an authority that inheres necessarily in the respective legislatures of each state" and that delegating such authority would depart from the "fundamental principles of the American constitutions."[76]

Again, the state legislature adopted the position of the anti-federal-authority faction. On May 4, 1786, the state legislature enacted an impost law that granted Congress certain duties on imports, but

71. *Id.* For a similar point, see Rough Hewer, No. IV, THE NEW-YORK GAZETTEER, Nov. 3, 1783, at 2–3.

72. 30 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 58 (1934).

73. *See id.* at 67.

74. Inhabitants of the City of New York to the Legislature of New York State (Jan.–Mar. 1786), *reprinted in* 3 HAMILTON PAPERS, *supra* note 52, at 647; 1 BANCROFT, *supra* note 11, at 263; 2 HAMILTON, *supra* note 20, at 318.

75. 1 BANCROFT, *supra* note 11, at 264 (citing the Report of the Austrian Agent Baron de Beelen-Bertholf (Apr. 1, 1786)).

76. *Id.*

vested in state officers the power to levy and collect those duties.[77] By implication, the tax collectors were responsible to the State.

Congress recognized this measure as effectively a rejection of its own request and in resolutions issued on August 11 and August 23, 1786, recommended to Clinton that he convene a special session of the legislature to reconsider the bill.[78] Fresh off his election as New York Governor, Clinton had another, albeit by now somewhat-familiar, decision to make.

The stage was set for the final scenes of the drama, for Alexander Hamilton's famous speech on the impost's connection to the New York Constitution, and—precipitated by the entire chain of events—for the Convention that drafted the United States Constitution.

II. HAMILTON'S SPEECH AND THE NONDELEGATION DOCTRINE

In this Part, I will discuss the actions that the New York legislature took during its 1787 session, the nondelegation arguments that were made in the New York press at this time, and Hamilton's speech responding to those arguments.

A. The New York Legislature's January 1787 Session

When the New York legislature met in January 1787, it received a message from Governor Clinton that addressed the congressional

77. An Act for Giving and Granting to the United States in Congress Assembled, Certain Imposts and Duties on Foreign Goods Imported into this State, for the Special Purpose of Paying the Principal and Interest of the Debt Contracted in the Prosecution of the Late War with Great Britain (May 4, 1786), *reprinted in* 2 LAWS OF THE STATE OF NEW YORK 320–22 (1886). The statute provided that "the said duties and imposts shall be levied and collected in the manner directed in and by" state law. *Id.* at 321. For the state law, see An Act Imposing Duties on Certain Goods, Wares, and Merchandize Imported into this State (Nov. 18, 1784), *reprinted in id.* at 11–19.

78. *See* 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 513 (1934) (recommending "the Executive of the State of New York, immediately to convene the legislature of the said state, to take into consideration the recommendation of the 18 of April, 1783, for the purpose of granting the System of impost to the United States, in such conformity with the Acts and grants of the other states . . ."); *id.* at 555–61.

resolutions of the previous August concerning the impost.[79] In his message, Clinton justified his decision not to convene the legislature, in the wake of the congressional resolutions, while it was not in session. He claimed that the impost question had "been so repeatedly submitted to the consideration of the Legislature, and must be well understood," and that he had acted with "regard to our excellent Constitution, and an anxiety to preserve unimpaired the right of free deliberation on matters not stipulated by the Confederation."[80] Clinton's oblique reference to the "excellent Constitution" alluded to the New York Constitution's provision granting the governor "power to convene the assembly and senate on *extraordinary* occasions,"[81] which Clinton interpreted as limiting his discretion in this instance. The State Assembly tasked a committee (which included Hamilton as a member) to prepare an answer to Clinton's address.[82] The initial draft of the answer did not mention the Governor's failure to convene the legislature, but a Clinton ally managed to add a clause in which the assembly "express[ed] our approbation of your Excellency's conduct in not convening the Legislature at an earlier period."[83] In two lengthy speeches, Hamilton unsuccessfully objected that this clause wrongly embraced Clinton's suggestion that the New York Constitution had barred the Governor from calling the legislature in response to the congressional resolutions.[84] Like the Assembly, the Senate responded to the

79. *See* JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION 6 (1787).

80. *Id.*; *see* 1 J.B. MCMASTER, A HISTORY OF THE PEOPLE OF THE UNITED STATES, FROM THE REVOLUTION TO THE CIVIL WAR 370 (1886).

81. N.Y. CONST. of 1777, art. XVIII (emphasis added).

82. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 7.

83. *Id.* at 15, 17. The assembly rejected a proposal by a Hamilton ally, William Malcolm, that would have explained that Clinton's actions were warranted in light of the "short space of time between the passing of the [congressional] Resolution, and the period appointed by law for the meeting of the Legislature." *Id.* at 15. Malcolm's proposal notably omitted any suggestion of approval of Clinton's constitutional argument.

84. Alexander Hamilton, First Speech on the Address of the Legislature to Governor George Clinton's Message (Jan. 19, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 3, 6

Governor's message (in an answer drafted in part by Abraham Yates) by approving Clinton's "conduct in not convening the Legislature, to re-consider a subject which had so lately been decided."[85]

The brief skirmish over the assembly's answer to the Governor's message was a prelude to a larger conflict over the constitutionality of the delegation itself. The assembly ordered a committee led by Hamilton's ally William Malcolm to report on the congressional resolutions,[86] and (a few weeks later) to prepare a bill granting Congress the impost.[87] The bill that the committee ultimately reported contained three notable provisions. The first provision would have given "to the United States in Congress assembled" a set of specified and listed "duties, upon goods imported into [New York] . . . for the special purpose of discharging the debts contracted by the United States, during the late war with Great-Britain."[88] The second provision authorized New York's Council of Appointment to appoint the "Collectors of the said duties," but made those collectors "accountable to, and removable by the United States in Congress

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(arguing that the New York Constitution left Clinton "at liberty to exercise the discretion vested in him" and "[t]here is at least no *constitutional bar* in the way"); Alexander Hamilton, Second Speech on the Address of the Legislature to Governor George Clinton's Message (Jan. 19, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 13, 14 (arguing that, if the legislature gave its "approbation on [Clinton's] conduct, we do clearly decide that the governor was barr'd, that he lay under a constitutional impediment, which prevented him from complying with a request of Congress").

85. *See* JOURNAL OF THE SENATE OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION 8 (1787); *id.* at 6 (noting that Yates was a member of the committee to prepare an answer to the Governor's message). The Senate's answer made specific reference to the Governor's "regard to the Constitution, and the right of free deliberation." *Id.*

86. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 20 (entry of Jan. 23, 1787).

87. *See id.* at 36 (entry of Feb. 6, 1787); *see also id.* at 41, 43, 46 (noting that Malcolm brought a bill entitled "An act for granting to the United States in Congress assembled, certain Imposts and Duties upon foreign Goods imported into this State for the purpose of discharging the Debts contracted by the United States, during the late war with Great-Britain").

88. *Id.* at 51.

assembled."[89] The third provision authorized Congress "to levy and collect within [New York], the Duties and Imposts hereby given and granted" and "to make such Ordinances and Regulations, and to prescribe such Penalties and Forfeitures, as they may judge necessary . . . ."[90] The bill thus set up a potential conflict among those who wished to grant Congress the impost, as well as the authority to control its collectors; those who wished to deny Congress the impost and any control over officers within the State; and those who staked out an uneasy middle ground by seeking to grant Congress the duties, while requiring such collection occur through officers accountable to the State.

B. The Impost War in the Press: "Cimon" and "Candidus"

At the same time, the dispute over the constitutionality of delegating authority to Congress to collect the impost continued in the press. On January 31, 1787, an author using the pseudonym "Cimon" wrote in favor of the impost, albeit without addressing the constitutional issue. He downplayed the policy risks of delegating authority over an impost to the federal government. After all, Cimon claimed, the members of the Continental Congress were "removeable at pleasure, and of short continuance at most," and thus were unlikely to "enter into a combination to destroy the fair fabric of liberty which *themselves* have had so great a share in rearing and establishing."[91] He implored his readers to follow the counsel of Hamilton and Malcolm and to resist the "secret influence of a certain great officer [*i.e.*, Yates] with all his Rough Hewing Myrmidons."[92]

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89. *Id.* at 52.

90. *Id.* The provision further stated that Congress must act with the purpose "to prevent frauds, and to secure the payment and collection thereof as well as to enforce obedience to their ordinances and regulations, respecting the duty of the officers to be employed for that purpose." *Id.* And it provided that "all such penalties and forfeitures may be recovered in the name of Congress, in the same mode as is established by law, for the recovery of fines and forfeitures for the breach of any of the laws of this State, in similar cases." *Id.*

91. Cimon, *To the Honorable Legislature of the State of New-York*, N.Y. DAILY ADVERTISER, Jan. 31, 1787, at 2.

92. *Id.* (capitalization altered).

A week later, another pseudonymous author, "Candidus," responded to Cimon's arguments. He criticized Cimon's rhetoric and, more significantly, his failure to refute the claim that the New York Constitution did "not authorise the legislature to transfer the power of legislation to Congress, in this instance."[93] He challenged Cimon to answer a series of questions.[94] Among those questions was the following: whether the New York legislature had "authority under the constitution, to transfer to Congress such legislative powers, as by their operation will materially abridge the powers committed to the legislature, and change the nature of our government."[95] By its terms, Candidus's question presupposed that the New York Constitution incorporated a principle prohibiting the transfer of "legislative powers" from the state legislature to Congress.

Cimon responded two days later by accepting Candidus's contention that the impost bill would "change the nature of our government."[96] But he said that he welcomed such a change. As he put it, "if *some* of the powers of the [New York] legislature were abridged—and *some* change in the nature of our government was effected (provided no violence was necessary to produce it) it would be a happy circumstance indeed, and devoutly to be wished."[97] Cimon's response thus did not answer, but rather seemed to acknowledge, Candidus's charge that the impost law

93. Candidus, *To the Printer of the Daily Advertiser*, N.Y. DAILY ADVERTISER, Feb. 6, 1787, at 2.

94. In addition to the question highlighted in the text, Candidus posed a set of policy-based questions. He asked whether Cimon agreed that New York had authorized an impost, but merely chosen not to grant Congress the power to make laws to collect it; whether money raised by the States would "go as far in discharging the national debt, as if it were raised under laws made by Congress"; whether it was "absolutely necessary to invest Congress with the power to pass laws to collect the impost"; and whether the grant of collection power to Congress would "affect an essential change both in the federal and state governments." *Id.* These questions indicate that Candidus distinguished between policy-based objections to the impost and the legal nondelegation argument highlighted in the text.

95. *Id.*

96. Cimon, *A Word to Candidus*, N.Y. DAILY ADVERTISER, Feb. 8, 1787, at 2.

97. *Id.*

would violate the New York Constitution's prohibition on transferring "legislative powers."

When he replied to Cimon a few days later, Candidus pointed out just that. He declared that Cimon had failed to address whether the state legislature had the right to confer on Congress the requested power.[98] On February 21, 1787, Cimon answered Candidus by claiming that the New York legislature had the authority to interpret the State Constitution, which it had previously employed to sanction measures that were "not only opposed to the *spirit*, but to the very *letter* of the constitution."[99] Although far from clear, Cimon's response seemed to acknowledge the charge that the impost law might violate the New York Constitution, but justified this violation on the basis of supposed legislative precedents that had also been "opposed to . . . the constitution."

At the same time, illustrating the high stakes of the question, an article advocating a separate New England confederacy was reprinted in the New York press.[100] The author argued that it was

> now time to form a new and stronger union. The five states of New-England, closely confederated, can have nothing to fear. Let then our general assembly immediately recall their delegates from the shadowy meeting which still bears the name of Congress, as being a useless and expensive establishment. Send proposals for

98. *See* Candidus, *Mr. Printer*, N.Y. DAILY ADVERTISER, Feb. 10, 1787, at 2 (reasoning that the state legislature could not "transfer the power of legislating").

99. Cimon, *For the Daily Advertiser*, N.Y. DAILY ADVERTISER, Feb. 21, 1787, at 2 (claiming that the "legislature has on *certain occasions* affirmed discretionary power to *explain the constitution*"). Along with Cimon and Candidus, various other pseudonymous authors weighed in on the impost controversy during this time period. *See* Zenobius, *For the Daily Advertiser*, N.Y. DAILY ADVERTISER, Jan. 22, 1787, at 2; Patrioticus, *Candid Remarks Upon the Republican*, N.Y. DAILY ADVERTISER, Feb. 13, 1787, at 2; Thersites, *To Cimon*, N.Y. DAILY ADVERTISER, Feb. 14, 1787, at 2; An Admirer of Cimon, *To the Printer of the Daily Advertiser*, N.Y. DAILY ADVERTISER, Feb. 17, 1787, at 2; Rough Carver, *Some Considerations on the Impost, Offered to the Citizens of the State of New-York*, N.Y. DAILY ADVERTISER, Feb. 19, 20, & 22, 1787, at 2. For an interesting and nearly contemporaneous treatment of the separation of powers (albeit not in the context of the impost controversy), see Sydney, *Considerations upon the Seven Articles Reported, and Now Lying on the Table of Congress*, THE INDEPENDENT GAZETTEER, Feb. 6, 1787, at 2–3.

100. *See A Serious Paragraph*, N.Y. DAILY ADVERTISER, Feb. 23, 1787, at 2 (reprinting an article "[f]rom a Boston paper of February 15," 1787).

> instituting a new Congress, as the representative of the nation of New-England, . . .[101]

C. Hamilton's Speech on Imposts and Duties

1. Hamilton's Speech

Into this mix stepped Hamilton. Delivered over the course of an hour and twenty minutes, his speech before the New York Assembly responding to the criticisms of the impost has long been viewed as a landmark in American rhetoric.[102]

The order of the day on February 15, 1787, was the bill—drafted in part by Hamilton's ally, William Malcolm—to grant Congress impost authority. The first provision to come to a vote would have authorized Congress to collect "duties, upon goods imported into [New York] . . . for the special purpose of discharging the debts contracted by the United States, during the late war with Great-Britain."[103] By the very slimmest of margins, the Assembly agreed to the inclusion of this language in the bill in a 29–28 vote.[104] But the second relevant provision of the bill—which rendered the collectors of the duties "accountable to, and removable by the United States in Congress assembled"[105]—faced stormier waters. The Assembly voted against that language by a count of 38–19.[106]

That left the third relevant provision of the proposed bill, which would have authorized Congress "to levy and collect within [New

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101. *Id.*

102. Hamilton Remarks, *supra* note 13, at 71 n.1. For contemporaneous sources praising the speech, see CHERNOW, *supra* note 38, at 226 (reporting that Margaret Livingston told her son Chancellor Robert R. Livingston that "after his famous speech in the House in favor of the impost," Hamilton "was called the great man" and "[s]ome say he is talked of for G[overnor]"); Letter from Robert R. Livingston to Alexander Hamilton (Mar. 3, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 103 ("While I condole with you on the loss of the impost I congratulate you on the lawrels [sic] you acquired in fighting *its battles*.").

103. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 51.

104. *Id.*

105. *Id.* at 52.

106. *Id.*

York], the Duties and Imposts hereby given and granted" and to make relevant "Ordinances and Regulations."[107] Before the vote on this provision, Hamilton made his speech.[108]

Hamilton noted that someone or some group of individuals had lodged a nondelegation challenge to the impost bill by contending that "it would be unconstitutional to delegate legislative power" from the New York legislature "to Congress."[109] Hamilton characterized this objection as the one "supposed to have the greatest force" among those who objected to the delegation of impost authority to Congress.[110] Precisely who Hamilton was responding to is unclear, but it seems likely that the views of the pseudonymous polemicist Candidus or the similar views of a member of the Assembly were the target of Hamilton's speech.

Hamilton did not dismiss the nondelegation argument out of hand, but rather parsed the provisions of the New York Constitution of 1777 and acknowledged the viability of a nondelegation challenge in appropriate circumstances. To begin with, Hamilton rejected the objectors' reliance on the provision in the New York Constitution that declared "no power shall be exercised over the people of this state, but such as is granted by or derived from them."[111] Hamilton countered that this provision was merely a "declaration of that fundamental maxim of republican government, that all power, mediately, or immediately, is derived from the consent of the people."[112] Any power, in Hamilton's view, that was

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107. *Id.*

108. *See Colonel Hamilton's Speech in the Assembly, on the 15th. inst when the impost was under consideration*, N.Y. DAILY ADVERTISER, Feb. 26, 1787, at 3 (observing that "Mr. Hamilton addressed the house" with respect to the clause "for granting power to Congress *to levy* the proposed duties").

109. Hamilton Remarks, *supra* note 13, at 71, 73. This version of Hamilton's speech was reproduced from the *N.Y. Daily Advertiser*. *See id.* at 1 n.1, 71.

110. *Id.* at 73.

111. *Id.* (quoting, albeit imprecisely, Article I of the New York Constitution of 1777); *see* N.Y. CONST. of 1777, art. I ("[N]o authority shall, on any presence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them.").

112. Hamilton Remarks, *supra* note 13, at 73.

"conferred by the representatives of the people . . . is a power derived from the people."[113] The clause permitted both "an indirect derivation of power" (*i.e.*, to the U.S. government through the New York legislature) as well as an "immediate grant of it" (*i.e.*, to the New York legislature).[114]

Thus, with respect to this particular clause of the New York Constitution, Hamilton contended that nothing limited the New York legislature from conferring authority on any other entity.[115] Because the power of the New York legislature derived from the people, any power conferred by them on anyone else also derived from the people, albeit "mediately" or "indirect[ly]."[116]

Hamilton's response was different, however, with respect to the New York Constitution's Legislative Vesting Clause. That provision declared that "the supreme legislative power within this State shall be vested in . . . the assembly . . .[and] the senate."[117] Objectors to the impost proposals argued that the clause "exclude[d] the idea of any other legislative power operating within the state."[118] Hamilton did not dispute that the clause incorporated a nondelegation principle. In his view, the clause meant this:

> In the distribution of the different parts of the sovereignty in the *particular* government of this state the legislative authority shall reside in a senate and assembly, or in other words, the legislative authority of the particular government of the state of New-York shall be vested in a senate and assembly.[119]

But that was the extent of the clause's nondelegation implications. The authors of the New York Constitution, Hamilton argued,

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113. *Id.* at 73–74.

114. *Id.* at 74.

115. *Id.*

116. *Id.* at 73–74; *see also id.* at 74 ("The words 'derived from' are added to the words 'granted by,' as if with design to distinguish an indirect derivation of power from an immediate grant of it.").

117. N.Y. CONST. of 1777, art. II.

118. Hamilton Remarks, *supra* note 13, at 74.

119. *Id.* (emphasis in original and quotation marks omitted).

"could have had nothing more in view than to delineate the different departments of power in our own state government."[120] Those authors, Hamilton claimed, "never could have intended to interfere with the formation of such a constitution for the union as the safety of the whole might require."[121]

To put the matter somewhat differently, Hamilton effectively acknowledged that the New York Constitution prohibited delegating legislative authority from the legislature to another body "*within this state*."[122] But he derived from the particular phrasing of the New York Constitution's Legislative Vesting Clause the principle that the legislature could delegate authority *outside of the State* to a federal Congress.

Hamilton rested this conclusion on inferences from several other provisions of the New York Constitution. He noted that the Constitution provided that "the supreme executive authority *of the state* shall be vested in a governor."[123] Hamilton explained that, if the Legislative Vesting Clause "exclude[d] the grant of legislative power," then the Executive Vesting Clause would "equally exclude the grant of executive power," which would necessarily mean that "there would be no federal government at all."[124] "[I]f the constitution prohibits the delegation of legislative power to the union," Hamilton argued, "it equally prohibits the delegation of executive power—and the confederacy must then be at an end: for without legislative or executive power it becomes a nullity."[125]

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120. *Id.*

121. *Id.*

122. *Id.* (emphasis in original).

123. *Id.* (quoting, albeit imprecisely, N.Y. CONST. of 1777, art. XVII) (emphasis in original)). The original text reads "the supreme executive power and authority of this State shall be vested in a governor." N.Y. CONST. of 1777, art. XVII.

124. Hamilton Remarks, *supra* note 13, at 74. Hamilton considered, but rejected, the argument that the clauses were relevantly different because the Legislative Vesting Clause spoke of vesting power "within this State" and the Executive Vesting Clause spoke of such power "of this State." *Id.* at 74–75. He claimed that "[i]n grammar, or good sense the difference in the phrases constitutes no substantial difference in the meaning . . . . In my opinion the legislative power '*within this state*,' or the legislative power 'of this state' amount in substance to the same thing." *Id.*

125. *Id.* at 75.

Contrary to this perspective, however, Hamilton pointed out that various provisions in the Articles of Confederation and in the New York Constitution presupposed the existence of the confederation and the propriety of delegations of "legislative power" to it. For one thing, the federal government "already possessed . . . *legislative* as well as *executive* authority," the latter of which Hamilton defined as "of three kinds, to make treaties with foreign nations, to make war and peace, [and] to execute and interpret the laws."[126] Hamilton defined the "legislative" power, by contrast, as "the power of prescribing rules for the community."[127] He listed a number of the federal government's authorities that he described as "powers of the legislative kind," including the authority "to require [money] from the several states," "to call for such a number of troops as they deem requisite for the common defence in time of war," "to establish rules in all cases of capture," "to regulate the alloy and value of coin; the standard of weights and measures, and to make all laws for the government of the army and navy of the union."[128] Thus, "the [nondelegation] objection, if it prove[d] any thing it prove[d] too much"—by implying "that the powers of the union in their present form are an usurpation on the constitution of this state."[129] But "[t]he degree or nature of the powers of legislation which it might be proper to confer *upon the federal government*" was "a mere question of prudence and expediency—to be determined by general considerations of utility and safety."[130]

For another, Hamilton observed that various provisions of the New York Constitution presupposed the existence of a federal union. For example, the Constitution required the governor "to correspond with the continental Congress,"[131] established "that the judges and chancellor shall hold no other office than delegate to the

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* Or as Hamilton put it elsewhere, "if Congress were to have neither executive nor legislative authority, to what purpose were they to exist?" *Id.* at 76.

130. *Id.* (emphasis added).

131. *Id.* (quoting N.Y. CONST. of 1777, art. XIX).

general Congress,"[132] and directed that "delegates *to represent* this state in the general Congress of the United States of America shall be annually appointed."[133]

These provisions, Hamilton argued, had to be understood by "resort to the co-existing [*i.e.*, contemporaneous] circumstances" to "collect from thence the intention of the framers of the law."[134] He thus traced the historical backdrop of delegations from the states to the federal government. For example, early delegates had been sent to meet in Congress with "full power 'to take care of the republic'" and an understanding that the "whole of this transaction [was] the idea of an *union* of the colonies."[135] Moreover, the Declaration of Independence had been written on behalf of "the representatives of the United States of America in general Congress assembled," which implied "full power of sovereignty" in the federal union.[136]

Turning from the legal argument,[137] Hamilton also confronted the question whether it was sufficient for New York "to grant the *money*

132. *Id.* (citing N.Y. CONST. of 1777, art. XXV).

133. *Id.* (citing N.Y. CONST. of 1777, art. XXX).

134. *Id.* at 77.

135. *Id.*

136. *Id.*; *see also id.* at 78 (reasoning that, taken together, these provisions "in substance amount[ed] to a constitutional recognition of the union with complete sovereignty").

137. Hamilton supplemented the points I have highlighted in the text with rhetorical and policy arguments. For example, he accused his opponents of hypocrisy, contending that they had in the past "by other instances of conduct contradicted their own hypothesis on the constitution which professedly forms the main prop of their opposition." *Id.* at 80 (pointing specifically to a prior bill granting to the United States the power to regulate trade). In addition, he argued that a delegation to Congress posed no threat to the "liberty of the people" because "members of Congress are annually chosen by the several legislatures—they are removable at any moment at the pleasure of those legislatures," *id.* at 81, and because the States themselves would protect the liberties of their citizens, *id.* at 82. The bill, moreover, would "merely . . . grant certain duties on imposts to the United States for the short period of twenty-five years" and the legislature would, under appropriate circumstances, have a "right of repealing its grant." *Id.* at 83. And Hamilton concluded his speech on a theme that he would later repeat in a more famous setting by arguing that, if the States were "not united under a federal government, they will infalliably [sic] have wars with each other; and their divisions will subject them to all the mischiefs of foreign influence and intrigue." *Id.* at 91; *see* FEDERALIST NOS. 6 & 7 (Alexander Hamilton), *in* THE FEDERALIST PAPERS 53–66 (Clinton Rossiter ed., 1961).

but not the *power* required from us"[138]—in other words, to grant the duties to Congress, but not the power to control the collectors. He believed that such a limited grant was insufficient, because other States had accompanied their grants of authority "with a condition, that similar grants be made by the other states."[139] By preserving the ability to collect the duty itself, Hamilton contended, New York's act was "essentially different from" those of the other States.[140] Moreover, unlike the other States, New York had made the duty "receivable in paper money."[141] As a result, "[t]he immediate consequence of accepting [New York's] grant would be a relinquishment of the grants of the other states," who would have to "take the matter up anew, and do the work over again, to accommodate it to [New York's] standard."[142] While some argued that it would be easy to convince other States to enact new delegations that followed New York's model,[143] Hamilton pointed out that it was unclear that "Massachusetts and Virginia, which have no paper money of their own, [would] accede to a plan that permitted other states to pay in paper while they paid in *specie*," especially in light of the depreciated nature of the paper money of most States.[144] This issue would, Hamilton argued, condemn the plan and ensure that "the states which are averse to emitting a paper currency, or have it in their power to support one [against depreciation] when emitted, would never come into it."[145]

2. An Assessment

What should we make of the legal debate and Hamilton's argument in particular? As an initial matter, it seems readily apparent

138. Hamilton Remarks, *supra* note 13, at 86.

139. *Id.* at 87.

140. *Id.*

141. *Id.*

142. *Id.*

143. As Hamilton characterized it, they argued that "the states which have granted *more* [*i.e.*, money with the delegation of authority to collect it] would certainly be willing to grant *less* [*i.e.*, money without the authority to collect it]." *Id.*

144. *Id.*

145. *Id.*

that some group of legislators in New York believed that the New York Constitution's vesting of "the supreme legislative power within this State"[146] implicitly prohibited the delegation or transfer of such power (however defined) to another body—for example, Congress. These legislators also believed that aspects of the proposals conferring impost authority on Congress for twenty-five years violated that prohibition. Hamilton himself characterized this argument as the one "supposed to have the greatest force" with his political opponents.[147]

As for Hamilton himself, it appears he agreed that the New York Constitution of 1777 incorporated some version of a nondelegation doctrine. He could have dismissed the Legislative Vesting Clause argument with a wave of the hand. Indeed, he dismissed the objectors' reliance on the provision in the New York Constitution declaring that only such "authority" may "be exercised over the people or members of this State . . . as shall be derived from and granted by them."[148] With respect to *that* clause, he argued that authority delegated by the legislature to another was still "derived from the consent of the people."[149] Had Hamilton believed that reliance on the Legislative Vesting Clause of the New York Constitution was similarly out of bounds, he had occasion and incentive to say so. But he did not.[150] Instead, he responded that the clause did not mediate between the New York legislature and the federal government, but rather governed "the distribution of the different parts of the sovereignty in the *particular* government of this state."[151] That

146. N.Y. CONST. of 1777, art. II.

147. Hamilton Remarks, *supra* note 13, at 73.

148. N.Y. CONST. of 1777, art. I ("[N]o authority shall, on any presence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them.").

149. Hamilton Remarks, *supra* note 13, at 73.

150. *Cf.* ARTHUR CONAN DOYLE, THE ADVENTURE OF SILVER BLAZE (1892) (deploying the idea of the dog that didn't bark).

151. Hamilton Remarks, *supra* note 13, at 74. Hamilton's allies, moreover, did not find fault in the thrust of his argument, but rather showered him with praise for the speech. *See supra* note 102. In any event, even assuming that Hamilton's argument was made to placate powerful adversaries (rather than sincerely made), it would suggest that Hamilton did not feel that he could dismiss the nondelegation argument altogether.

response converted the argument based on the Legislative Vesting Clause from one that addressed the relationship between state and federal power to one that addressed the relationship between the different branches of state government.

At any rate, no attempt was made to answer Hamilton's speech.[152] Instead, the Assembly immediately voted on the third provision in the bill. That vote resulted in a rejection of Hamilton's position by a tally of 36–21.[153] Hamilton and his allies were defeated. The fight over the impost was over, to be replaced by an equally, if not more, momentous fight over a new legal document—the Constitution.

III. DELEGATION AND THE CONSTITUTIONAL CONVENTION

The impost debate was immediately followed by a significant movement to hold a national convention to revise the Articles of

152. *See* CHERNOW, *supra* note 38, at 226 ("Hamilton's masterly exposition met with stony stares from the Clintonians, who responded in insulting fashion. They demanded a vote on the issue without bothering to rebut Hamilton's speech.").

153. *See* JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 52; Hamilton Remarks, *supra* note 13, at 92 n.7; Leo, *To the Victorious Thirty-Six*, N.Y. DAILY ADVERTISER, Feb. 27, 1787, at 2 (criticizing the majority's vote). Two days later, Hamilton gave a speech in the Assembly touching on, but not embracing, a nondelegation doctrine under the New York Constitution of 1777. *See* Remarks on an Act for Raising Certain Yearly Taxes Within This State (Feb. 17, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 94. Hamilton observed that the then-existing system of taxation in New York was "*arbitrary*," because it left "the amount of the tax to be paid by each person, to the discretion of the officers employed in the management of the revenue." *Id.* Hamilton commented that "*[h]e* would not say that the practice was contrary to the provisions of our constitution; but it was certainly repugnant to the genius of our government." *Id.* at 95 (emphasis added). After all, he asked, "[i]s it proper to transfer so important a trust from the hands of the legislature to the [tax] officers of the particular districts?" *Id.* It is a little unclear whether the "he" in these last two sentences refers to Hamilton's views, or rather to Hamilton's summary of the views of Jacques Necker, a Swiss banker and the French Minister of Finances. *See id.* at 96 n.5. To my mind, it seems more likely that these sentences refer to opinions that Hamilton himself held. At any rate, the point remains the same: Hamilton alluded to the connection between arbitrary government, the transference of authority from the legislature to tax officers, and constitutional law.

Confederation.[154] During this movement, questions about the propriety of delegations from state legislatures to federal authorities were raised once again—both in the form of concerns over state legislatures violating the allocation of powers within state constitutions and in the form of concerns over the mandate granted convention delegates.

A. Doubts About Delegations

In early 1787, almost simultaneously with the impost debate in the New York legislature, John Jay, then the Secretary of Foreign Affairs, exchanged a set of letters expressing delegation concerns that bore a striking resemblance to those articulated in the context of the impost. Jay's concerns, however, arose in the context of a proposed convention to rework the national charter. In this context, too, there emerged a question whether the New York legislature possessed the authority to confer power on a national entity (in this instance, the Convention) when doing so might be understood to depart from the state constitution's vesting of power in the state government itself. In a letter to George Washington dated January 7, 1787, Jay outlined a series of wholesale—rather than retail—changes to the Confederation that he believed were necessary for the federal government's proper functioning.[155] Chief among those changes was a proposal to "divide the sovereignty into its proper

154. To be sure, the first steps in such a direction had begun earlier. *See, e.g.*, Letter from George Washington to John Jay (May 18, 1786), *in* 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY, 1782–1793, at 195 (Henry P. Johnson ed., 1891) (remarking that Washington entertained "*no* doubt" that "it is necessary to revise and amend the articles of confederation," but that he "scarcely kn[e]w what opinion to entertain of a general Convention"); Letter from John Jay to George Washington (Mar. 16, 1786), *in id.* at 186 ("An opinion begins to prevail that a general Convention for revising the Articles of Confederation would be expedient.").

155. *See* Letter from John Jay to George Washington (Jan. 7, 1787), *in id.* at 226–29.

departments."[156] Jay put it this way: "Let Congress legislate—let others execute—let others judge."[157]

Jay, however, highlighted that it was unclear that state legislatures could delegate *binding* authority to the members of a convention in contravention of state constitutions. He doubted, in other words, that a convention composed of delegates with "authority . . . to be derived from acts of the State legislatures" would be able to make the wholesale changes he had recommended.[158] As he asked: "Are the State legislatures authorized, either by themselves or others, to alter constitutions?"[159] He believed they could not, because those "who hold commissions can by virtue of them neither retrench nor extend the powers conveyed to them."[160]

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156. *Id.* at 227 ("The executive business of sovereignty depending on so many wills [in the Continental Congress], and those wills moved by such a variety of contradictory motives and inducements, will in general be but feebly done."). Jay returned to this theme repeatedly in other letters written at the same time. *See* Letter from John Jay to Thomas Jefferson (Feb. 9, 1787), *in id.* at 231–32 (proposing a modification of the national government so "that the legislative, judicial, and executive business of government may be consigned to three proper and distinct departments"); Letter from John Jay to John Adams (Feb. 21, 1787), *in id.* at 233–34 (proposing that the Convention "distribute the federal sovereignty into its three proper departments of executive, legislative, and judicial" and lamenting the fact that "Congress should act in these different capacities" as "a great mistake in our policy" under the Articles of Confederation).

157. *See* Letter from Jay to Washington (Jan. 7, 1787), *supra* note 155, at 227. Some of Jay's suggestions to Washington appear similar to those ultimately adopted at the Constitutional Convention later that very year. *See id.* ("Might we not have a governor-general limited in his prerogatives and duration? Might not Congress be divided into an upper and lower house—the former appointed for life, the latter annually,—and let the governor-general (to preserve the balance), with the advice of a council, formed for that only purpose, of the great judicial officers, have a negative on their acts?"). Other suggestions—perhaps motivated by the then-current impost debate—differed quite dramatically from the approach ultimately adopted in the Constitution. *See id.* at 228 (proposing that "all [the States'] principal officers, civil and military, be[] commissioned and removable by the national government").

158. *Id.* at 248.

159. *Id.*

160. *Id.* When Washington responded to Jay some months later (after the proposal for a Convention had already gathered steam), he remarked that "[i]n strict propriety, a Convention so holden may not be legal." Letter from George Washington to John Jay (Mar. 10, 1787), *in id.* at 238, 239.

Although Jay did not elaborate on his rationale for this conclusion, we can make sense of it in light of the various legal theories articulated during the impost debate. State constitutions—such as the New York Constitution of 1777, which Jay coauthored—had already vested legislative and executive authority in state officials. A new national charter that distributed additional legislative and executive powers among national officials would seemingly seek to vest preexisting state powers elsewhere. Jay's worry that the state legislature's actions would "alter" the state constitution or "retrench . . . the powers conveyed to" state legislators appeared to be based on the premise that the vesting clauses of the New York Constitution implicitly barred such a delegation to a national authority. Much like the earlier concerns of the Rough Hewer and the nearly contemporaneous concerns of Candidus, Jay's letter spoke to the connection between delegation and sovereignty—who or what had the power to govern the people of New York?

While expressing doubts about the authority of a national convention composed of members elected by state legislatures to *bind*, Jay acknowledged that it could *recommend*.[161] But in his view such a recommendation might prompt "endless discussion, perhaps jealousies and party heats."[162] He sought to bypass the state legislatures altogether by proposing that "the people of the States without delay . . . appoint State conventions (in the way they choose their general assemblies)."[163] In turn, those conventions would send delegates to a general convention tasked with revising the Articles of Confederation in a manner that "should appear necessary and proper, and which being by them ordained and published should have the same force and obligation which all or any of the present articles now have."[164] "No alterations in the government," Jay concluded,

161. *See* Letter from Jay to Washington (Jan. 7, 1787), *in id.* at 228 ("Perhaps it is intended that this convention shall not ordain, but only recommend.").

162. *Id.*

163. *Id.*

164. *Id.* at 229.

should "be made, nor if attempted will easily take place, unless deducible from the only source of just authority—*the People*."[165]

Jay's solution to the problem of state legislatures potentially exceeding their constitutional powers, in other words, was to bypass the state legislature in favor of state conventions. But that approach necessarily raised the question whether state conventions themselves abrogated the state constitutions' lodging of legislative and executive powers. To ensure that they did not, Jay needed a theory of state conventions that was absent in his letter to Washington.

B. Delegation and the Convention's Mandate

At any rate, the idea of a constitutional convention to *recommend* revisions to the Articles of Confederation took hold almost immediately after Hamilton's speech on the impost. The controversy that arose in this context was conceptually related to the one that Jay had highlighted in his letter: It concerned the limits that state legislatures placed on the mandate of the Convention delegates and whether those delegates exceeded the mandate in proposing a new national charter. Although only indirectly connected to the proper interpretation of the vesting clauses of the New York Constitution, the debate demonstrated how questions of sovereignty and delegation continued to play a central role in this final stage of the drama.

Two days after Hamilton's speech on the impost, on February 17, 1787, the New York Assembly adopted a resolution to instruct the State's delegates in Congress to recommend the holding of a Convention to revise the Articles "as the representatives met in such Convention, shall judge proper and necessary, to render them adequate to the preservation and support of the Union."[166] By a single

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165. *Id.*

166. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 55; *see* HAMILTON, *supra* note 20, at 239–40 (reporting on amendments to the initial language of the resolution). For a suggestion that Hamilton authored this resolution, see Resolution on the Call of a Convention of the States (Feb. 17, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 93 n.1.

vote, and "after considerable debate," the Senate passed the resolution and transmitted it to Congress,[167] which on February 21, 1787, sanctioned the idea of a Convention "for the sole and express purpose of revising the Articles of Confederation."[168]

After Clinton conveyed Congress's actions to the New York Assembly two days later,[169] Hamilton offered (and the Assembly adopted) a resolution calling for the appointment of five delegates to the proposed Convention.[170] The resolution, however, faced objections in the Senate.[171] Abraham Yates sought to insert a proviso in the mandate for the Convention delegates prohibiting changes to the Articles that were "repugnant to or inconsistent with the constitution of this State."[172] Although the Senate Journal does not reflect Yates' reasons for seeking the proviso, the language seems consistent with his earlier concerns that it would be inconsistent for the New York legislature to delegate away its authority to the federal government. At any rate, after a debate and by the decisive vote of the president of the Senate, the motion to insert the proviso was

167. *See* JOURNAL OF THE SENATE OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 85, at 34–35; HAMILTON, *supra* note 20, at 240 (reporting a debate in the Senate). Remarking on this development, on February 21, 1787, Jay wrote to John Adams that "[t]he convention gains ground" with New York's instruction of "her delegates to move in Congress for a recommendation to the States to form a convention; for this State dislikes the idea of a convention unless countenanced by Congress." Letter from Jay to Adams (Feb. 21, 1787), *supra* note 156, at 233–34.

168. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 74 (1936); *see also id.* at 71–73; HAMILTON, *supra* note 20, at 241.

169. *See* JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 63.

170. *See id.* at 68 (providing, like the congressional resolution, that the Convention occur "for the sole and express purpose of revising the Articles of Confederation"). For Hamilton's introduction of the resolution, see Resolution on the Appointment of Delegates to the Constitutional Convention (Feb. 26, 1787), *in* 4 HAMILTON PAPERS, *supra* note 13, at 101 n.1.

171. *See* JOURNAL OF THE SENATE OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 85, at 42–43.

172. *Id.* at 45.

defeated.[173] But the Senate succeeded in reducing New York's delegates to the Convention from five to three.[174]

Fatefully, on March 6, the New York legislature elected Hamilton, Robert Yates, and John Lansing, Jr. as New York's delegates to the Convention,[175] with the instruction that they attended the Convention

> for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and to the several Legislatures, such alterations and provisions therein, as shall when agreed to in Congress, and confirmed by the several States, render the federal Constitution adequate to the exigencies of government, and the preservation of the Union.[176]

This limitation on the mandate of the Convention delegates played a significant role in the controversies that followed. As an initial matter, in the middle of the Constitutional Convention, two of the three New York delegates—Yates and Lansing—departed.[177] In a letter to Governor Clinton, they claimed that the Convention was violating the delegates' instructions by going beyond a simple

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173. *Id.*

174. *See id.* at 44–45; JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 70–71; BANCROFT, *supra* note 11, at 274.

175. *See* JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 79, at 82–84.

176. *Id.* at 84. Hamilton made one, last-ditch effort to tilt New York's representation at the Convention in favor of his faction, proposing on April 16, 1787, that two additional delegates be named in addition to those already appointed. *See* Motion That Five Delegates Be Appointed to the Constitutional Convention (Apr. 16, 1787) (reporting that the Assembly agreed to Hamilton's resolution), *in* 4 HAMILTON PAPERS, *supra* note 13, at 147. Hamilton suggested as possible names his allies John Jay, Robert R. Livingston, Egbert Benson, or James Duane. *See* Remarks on a Motion That Five Delegates Be Appointed to the Constitutional Convention (Apr. 16, 1787), *in id.* at 148. The New York Senate blocked the proposal. *See* JOURNAL OF THE SENATE OF THE STATE OF NEW-YORK, AT THEIR TENTH SESSION, *supra* note 85, at 93, 95.

177. JONATHAN ELLIOT, 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 479 (1836) (noting that Lansing and Yates left the Convention on July 5, 1787).

revision to the Articles of Confederation.[178] As they put it, "[t]he limited and well-defined powers" conferred on them by the New York legislature "could not, on any possible construction, embrace an idea of such magnitude as to assent to a general Constitution, in subversion of that of the state."[179] The measures contemplated by the Convention, they believed, "tended to deprive the state government of its most essential rights of sovereignty."[180] Yet, they concluded, their mandate could not have included "the subversion of [the New York] Constitution which, being immediately derived from the people, could only be abolished by their express consent, and not by a legislature possessing authority vested in them for its preservation."[181]

The letter penned by Yates and Lansing, thus, echoed the themes of delegation and sovereignty that dominated the impost debate. If the New York Constitution had already vested certain powers in the state government, they reasoned, then neither the state legislature nor they, its agents, could confer that authority on another body.

In addition, just as the Convention concluded and Congress transmitted the proposed Constitution to the States,[182] the *New York Journal* began to publish a series of articles—perhaps written by Governor Clinton—by the pseudonymous author "Cato."[183] Although the first "Cato" essay simply asked the citizens of New York

178. Letter from the Hon. Robert Yates and the Hon. John Lansing, Jun., Esquires, to the Governor of New York, Containing Their Reasons for Not Subscribing to the Federal Constitution, *in* ELLIOT, 1 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* note 177, at 480 ("Our powers were explicit, and confined to the sole and express purpose of revising the Articles of Confederation . . . .").

179. *Id.*

180. *Id.*

181. *Id.* at 480–81.

182. 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 549 (Sept. 28, 1787) (1936).

183. On the identification of Cato with Clinton, see ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 245 (Paul Leicester Ford ed., 1892) [hereinafter ESSAYS ON THE CONSTITUTION]. For speculation that Cato was another individual (either Abraham Yates or

to "[d]eliberate . . . on this new national government with coolness,"[184] the second Cato contended that the Convention had exceeded its mandate, such that the new government would be "founded in usurpation" with its origins in "power not heretofore delegated."[185] Cato was not alone. Critics of the new Constitution repeatedly objected that the delegates to the Convention had exceeded their instructions.[186]

The most consequential rebuttal to the arguments that the delegates to the Convention exceeded their mandates was James Madison's in Federalist 40.[187] There, Madison conceded that "[t]he powers of the convention ought, in strictness, to be determined by an inspection of the commissions given to the members by their respective constituents."[188] But he interpreted the delegates' mandates broadly to authorize the framing of "a *national government*, adequate to the *exigencies of government* and *of the Union*."[189]

The last serious gasp of this delegation-style argument occurred when the New York legislature met in February 1788 to decide whether to ratify the Constitution. Members of the Assembly sought to introduce into the resolution calling for a state convention a preface providing that the delegates to the Constitutional Convention, "instead of revising and reporting alterations and provi-

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John Williams), see Joel A. Johnson, *'Brutus' and 'Cato' Unmasked: General John Williams' Role in the New York Ratification Debate, 1787–88*, 118 AM. ANTIQUARIAN SOC. 297 (2009).

184. Cato I, NEW YORK JOURNAL, Sept. 27, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION, *supra* note 183, at 247, 249.

185. Cato II, NEW YORK JOURNAL, Oct. 11, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION, *supra* note 183, at 250, 254. The Cato essays prompted a set of responses from Alexander Hamilton writing as "Caesar." *See* Cæsar I, N.Y. DAILY ADVERTISER, Oct. 1, 1787, *reprinted in* ESSAYS ON THE CONSTITUTION, *supra* note 183, at 283–85.

186. *See* DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY, APPLICATION, AND CONSTRUCTION 48–57 (1910) (collecting sources arguing that the Convention lacked power).

187. James Madison, FEDERALIST NO. 40, *in* THE FEDERALIST PAPERS 247 (Clinton Rossiter ed., 1961).

188. *Id.*

189. *Id.* at 248.

sions in the Articles of Confederation," had proposed "a new Constitution for the United States" that would "materially alter" New York's Constitution and "greatly affect" the State's rights and privileges.[190] The assembly rejected the proposal, albeit by a close vote of 27–25.[191] Against all odds, at the New York Convention in Poughkeepsie in June and July of 1788, the Federalists led by Hamilton and Jay prevailed in persuading their fellow New Yorkers to ratify the Constitution.[192]

IV. DELEGATION, SOVEREIGNTY, AND THE SEPARATION OF POWERS

What is the source and nature of sovereignty? Both the debate over the Constitution and the impost debate that preceded it turned on the answer to this question. In the case of the impost, the objectors argued that, once vested with sovereign authority through the Constitution, the New York legislature could not delegate that authority to the national government or anywhere else. In the case of the Constitutional Convention, John Jay's concerns were the same—what right did state legislators have to task agents to transfer away their own powers? Although mediated through the issue of the delegates' mandates, the momentous disputes about the propriety of the Constitutional Convention leading up to the ratifying conventions asked the same basic question.

The solution to the question of sovereignty, for better or worse, was the one proposed by Jay in his letter to Washington: an appeal to "the People" through state conventions. Precisely why the state

190. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR ELEVENTH SESSION 47–48 (1788); *see* MAIER, *supra* note 27, at 327.

191. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, AT THEIR ELEVENTH SESSION, *supra* note 190, at 48.

192. *See* MAIER, *supra* note 27, at 327–42. In the words of Professor De Pauw, "[a] substantial majority of the state's voters were Antifederalists, and the delegates that New Yorkers sent to the ratifying convention at Poughkeepsie opposed ratification without previous amendments by a majority of better than two to one." DE PAUW, *supra* note 7, at ix. Hence, "[t]he final vote in favor of ratification at the Poughkeepsie Convention is the most conspicuous example of the Federalists' astonishing ability to succeed even when success appeared impossible." *Id.*

legislature could authorize elections for state conventions that might strip away the vested powers of the state government was never fully explained. Years later, Americans still struggled to explain fully the relationship between ratifying convention and sovereign lawmaking authority.[193]

All of these were, in a sense, questions regarding the delineation of the authority between the sovereign States and the then-quasi-sovereign federal government. Hamilton's response, which echoed the germinal theory expressed in the 1780 Council of Revision opinion, was that the New York Constitution's vesting of "supreme legislative power" within the State created the boundaries between the entities within the State. In his impost speech, he embraced a conception of the nondelegation doctrine that distinguished between the legislature and the Governor. That is the notion of nondelegation that echoes through the centuries down to the present day.

CONCLUSION

During the period immediately before the Constitution's adoption, members of the New York legal community—including Alexander Hamilton—debated whether the New York Constitution's Legislative Vesting Clause prohibited the delegation of impost authority to the federal government. The participants in the debate accepted that New York's Constitution incorporated a nondelegation principle, though they disagreed over the doctrine's scope. The debate over the impost led, almost directly, to a debate over a new federal charter, the Constitution, in which the legality of delegation was again at issue. These debates provide compelling evidence that key members of the generation that wrote the U.S. Constitution believed that the vesting of "legislative power" in one entity implicitly barred delegation of such power to another. The very debates that led to the adoption of the federal Constitution were, in part, debates about nondelegation.

193. *See generally* JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING (4th ed. 1887).

PRIVATE DELEGATION OUTSIDE OF EXECUTIVE SUPERVISION

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ABSTRACT

Over the past decade, the Supreme Court has reworked the landscape of executive branch supervision. The Court has both addressed the scope of executive officials subject to the Constitution's selection constraints in the Appointments Clause and imposed limits on the tenure protections that Congress can bestow on senior agency officials. This refashioning retrenched the functionalist approach that had taken hold in the twentieth century and culminated in the Court's 1989 blessing of independent counsels with authority to investigate the Executive Branch from within.

One less-explored question is the degree to which federally prescribed tasks can be carried out by individuals other than government officials. In other words, to what extent can Congress authorize private actors to perform statutorily required components of governmental operations such as arbitration of disputes, creation of standards tied to governmental requirements, fact-gathering, or the performance of evaluations where the result leads to qualification or disqualification for a government service or benefit? Justice Alito raised this key question in a 2015 dispute involving Amtrak, when he questioned the constitutional basis for Amtrak to set metrics and standards governing passenger railroad services operating as a private actor. The question continues to plague government practice, as

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Congress at times prefers to employ private boards or commissions to set standards such as the quantity and type of routine pediatric services that health insurers must cover under the Affordable Care Act.

From the time of the establishment of the first Congress in 1789, the federal government has employed private actors for numerous tasks. Many of those responsibilities, however, involved the provision of contractual services such as measuring the quantities of imported goods, valuing imported items, constructing government buildings, or providing expertise such as autopsy analysis. In modern practice, private boards or arbitration panels have at times made decisions that ultimately bind the rights or obligations of private parties or that establish the substantive content for government mandates. Is there a meaningful, constitutional distinction between the early versus modern acts? What was the understanding at the time of early practice of the limits, if any, that should govern the types of tasks Congress assigned to private actors? Does the non-officer status of private actors free them from constitutional appointments and oaths constraints? Or is there an irreducible minimum of core governmental authority that cannot be delegated to private actors and that must instead be exercised by governmental actors subject to the Constitution's oath and appointments accountability mechanisms?

This Article will unpack some of those constitutional complexities by examining the early federal practice of delegating adjudicative patent determinations to private experts, which the Supreme Court briefly considered in its most recent review of executive direction of governmental determinations. Specifically, the position of the patent commissioner, first created by Congress in 1836, was bound by fact-findings of private expert panels when denying patent applications. The Court implicitly suggested last year, in United States v. Arthrex, *141 S. Ct. 1970, 1988 (2021), that this practice did not undermine the modern presidential supervisory structure that the Court went on to mandate for the contemporary patent office because the 1836 panels consisted of just private experts, not officers. What implications, if any, does such a view hold for the scope of power or duties that private actors can exercise outside of the control or supervision of the Constitution, the President, and any constitutional accountability mechanisms purportedly constraining power? Just three years after the*

1836 boards' creation, Congress went on to eliminate them and transfer their duties to a federal judge. But evidence suggests that policy considerations rather than constitutional concerns drove this development.

Although Congress and implicitly the Court apparently have concluded that the binding fact-finding authority of the early boards did not disrupt presidential executive supervision, the evidence suggests that this superficially significant power really was not viewed as constituting core sovereign authority. The Executive Branch today has signed off on far broader private delegation of a potentially constitutionally distinct character. This Article will uncover some of those distinctions and explore how the early view of permissible private delegation, implicitly endorsed by the Supreme Court in 2021, differs substantially from some of the private arbitration and other binding private power that Congress and the Executive Branch have normalized today. The constitutional concerns over too much private delegation raised by jurists such as Justice Alito merit further exploration and may call into question several current governmental practices.

INTRODUCTION

Over the past decade, the Supreme Court has reworked the landscape of executive branch supervision. The Court has both addressed the scope of executive officials subject to the Constitution's selection constraints in the Appointments Clause and imposed limits on the tenure protections that Congress can bestow on senior agency officials. This refashioning retrenched the functionalist approach that had taken hold in the twentieth century and culminated in the Court's 1988 blessing of independent counsels with authority to investigate the Executive Branch from within.[1]

The changed course began in the nation's highest court in 2010 when the Supreme Court found the supervisory personnel structure of the Public Company Accounting Oversight Board to be unconstitutional[2] in the form enacted by Congress in the 2002 Sarbanes-Oxley Act.[3] In particular, the Court concluded that Congress had unconstitutionally disrupted the vesting of the executive power in the President by providing significant tenure protections for the Board members who themselves were supervised by tenure–protected Securities and Exchange Commission commissioners.[4] The constitutional reexamination of congressionally crafted personnel structures had first begun several years earlier in the U.S. Court of Appeals for the D.C. Circuit, where newly confirmed then-Judge Brett Kavanaugh first found the Board tenure provisions to be unconstitutional.[5] A majority of the Supreme Court agreed. The Court's opinion, written by the Chief Justice, emphasized the double layer of tenure protections that ensconced powerful governmental positions, making it very challenging for the President to remove or influence the operations of the Board members and

1. *See* Morrison v. Olson, 487 U.S. 654 (1988).

2. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 514 (2010).

3. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

4. *See Free Enter. Fund*, 561 U.S. at 514.

5. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 687 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

interfering with his responsibility to "take Care" that any laws carried out by the Board members were faithfully executed.[6]

Since the recent appointments of Justice Kavanaugh and Justice Neil Gorsuch, the Supreme Court has twice more found certain congressionally enacted tenure provisions to improperly constrain presidential supervision of executive activity via the Article II Vesting Clause.[7] Justice Amy Coney Barrett joined the majority for the second of these two opinions after starting service on the Court in October 2020.

The Court in both *Seila Law v. Consumer Financial Protection Bureau*[8] and *Collins v. Yellen*[9] expounded on the structural constitutional problems with Congress imposing any limitations on presidential removal of the head of the Consumer Financial Protection Bureau ("CFPB")[10] and then the Federal Housing Finance Agency ("FHFA").[11] In both cases, Congress had designed the agencies to exercise significant regulatory power over aspects of the nation's financial systems. And in both cases, there was no easy way for the President to either command agency operations or remove agency directors in the event of policy disagreement. Because one individual exercises more concentrated power at the apex of these agencies than in the multimember commissions like the SEC and the Federal Trade Commission ("FTC"), where multiple commissioners must agree to set direction, the Court found the CFPB and FHFA tenure protections less tenable and more intrusive on the President's vested executive power.

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6. *See Free Enter. Fund*, 561 U.S. at 492.

7. Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020); U.S. CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States . . . .").

8. 140 S. Ct. 2183, 2211 (2020).

9. 141 S. Ct. 1761, 1783 (2021).

10. *Seila Law*, 140 S. Ct. at 2192.

11. *Collins*, 141 S. Ct. at 1770.

In those two cases, the Court arguably moved even further toward a unitary supervisory theory of the Constitution by finding unconstitutional statutory provisions related to agency heads rather than just a department sub-entity like the PCAOB. The Court again based its holdings on the Vesting Clause and the President's Take Care duties, concluding that power cannot be concentrated "in a unilateral actor insulated from Presidential control."[12]

In addition to challenging the removal structures of executive officials, litigants have also challenged the selection procedures for officials, on the front end, under the Appointments Clause within Article II of the Constitution. The Appointments Clause requires "officers of the United States" to be selected in one of only four different ways.[13] The default requirement is that officers be appointed by the President with Senate consent. Congress can provide that "inferior officers" be appointed in that manner or by the President alone, a department head, or a court of law.[14] Over the past several decades, on several occasions litigants have brought challenges on the ground either that an executive employee was not treated as any kind of officer or that an official was appointed as an "inferior officer" when his level of responsibility really amounted to more of a superior, or "principal," role.[15] Principal, non-inferior officers must be appointed by the President with Senate consent ("PAS"). Previously the Court has found that any officer who lacks a direct supervisor other than the President is a "principal," non-inferior officer.[16]

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12. *Id.* at 1773–75 (internal quotation marks omitted); *Seila Law*, 140 S. Ct. at 2191–92.

13. U.S. CONST. art. II, § 2, cl. 2.

14. *See id.* (capitalization adapted).

15. *See, e.g.*, Edmond v. United States, 520 U.S. 651 (1997); Freytag v. Commissioner, 501 U.S. 868 (1991) (inferior officer challenge related to tax adjudicators); Morrison v. Olson, 487 U.S. 654 (1988) (principal officer challenge related to the independent counsel statute). *See also* Gary Lawson, *Appointments and Illegal Adjudication: The America Invents Act Through a Constitutional Lens*, 26 GEO. MASON L. REV. 26 (2018) [hereinafter Lawson, *America Invents*].

16. *See Edmond*, 520 U.S. at 661–63.

The Court generally has treated Appointments Clause challenges as their own separate constitutional claim, noting that the Appointments Clause provided a mechanism for electoral accountability and transparency in the selection of officers because if the President or his top officials must publicly select executive officials, then the President clearly bears blame if the official subsequently poorly exercises her authority.[17] The text of the Appointments Clause does not expressly address presidential direction of the authority exercised by those officers once they are appointed.[18] But the Clause's requirements that the President or other senior officials appoint officers have been thought to implicitly mandate that the President must also have a measure of removal authority over his executive officers, which in turn provides for implicit supervisory authority over an officer's performance of executive tasks.[19] The Court also has repeatedly suggested that Article II, section 1's vesting of executive power in the President similarly requires that the President maintain supervisory authority over his subordinate officers through the ability to fire them.[20] In *Arthrex v. United States*, the Court began to explore whether the Vesting Clause also works in tandem with other Article II provisions like the Appointments Clause to further require that the President or his top lieutenants have the power to *direct* or reverse the actions of subordinates in

17. *See* United States v. Arthrex, 141 S. Ct. 1970 (2021); Buckley v. Valeo, 424 U.S. 1 (1976). *See also* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443 (2018) [hereinafter Mascott, *Officers*].

18. *See* U.S. CONST. art. II, § 2, cl. 2.

19. *See, e.g.*, United States v. Perkins, 116 U.S. 483 (1886). *Cf.* United States v. Arthrex, 141 S. Ct. 1970, 1982 (2021) (discussing the role of the Appointments Clause in preserving "political accountability through direction and supervision of subordinates–in other words, through a chain of command" (internal quotation omitted)).

20. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191 (2020); Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 492 (2010); Myers v. United States, 272 U.S. 52, 137–38 (1926).

addition to having the power to fire them.[21] The Court concluded that in at least a subset of circumstances, the vesting of executive power in the President necessitates that his principal officers have the final say in decisions issued by the executive branch.[22]

If the President must maintain ultimate command over executive branch authority, and if all governmental activity falls under the supervision of one of the three branches, then what kinds of actions can be taken outside of that supervisory control? As administrative agencies exercise increasing authority in the twenty-first century, the Court has begun taking a closer look at this question. The Court's opinions reexamining removal protections, the selection of officials under the Appointments Clause, and the direction of executive branch authority begin to explore the level of decisions that the President and his direct reports must more closely supervise.

In *Arthrex* in particular, the Court concluded that where appellate judges on the Patent Trial and Appeal Board ("PTAB") issue decisions through inter partes review of already-issued patents, the Director of the U.S. Patent and Trademark Office ("USPTO")—who is a presidential appointee subject to Senate consent (PAS)—must have supervisory authority to review those decisions before they are final within the Executive Branch.[23] The idea presumably was that an official one step removed from the President (as his direct appointee) must have the final say over the inter partes decisions

21. *See* United States v. Arthrex, 141 S. Ct. 1970, 1982 (2021) (noting that removal or reassignment of administrative patent judges away from inter partes decision panels is inadequate for executive supervision because it "gives the Director no means of countermanding the final decision already on the books"); Jennifer L. Mascott & John F. Duffy, *Executive Supervision After* Arthrex, 2021 SUP. CT. REV. 225 (2022).

22. *See Arthrex*, 141 S. Ct. at 1985–86 (limiting the holding to the context of adjudication and the proceeding before the Court).

23. *Arthrex*, 141 S. Ct. at 1985 ("Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us.").

for the Executive Branch.[24] But the Court did not deeply theorize its determination that adequate presidential supervision can be effectuated through PAS decision-making without direct presidential involvement but not by presidential appointees serving one more step down the chain. Indeed, under the facts of the case, the USPTO is nestled within the Commerce Department and the USPTO Director serves as an undersecretary subordinate to the U.S. Commerce Secretary.[25] If the Court's theory of supervision was one-step-removed presidential direction for actions, then the undersecretary's position would seem too attenuated for final say-so for the Executive Branch.

If the theory, on the other hand, is that the possibility of direct removal by the President is adequate to satisfy the exclusive vesting of executive power in the President, then final decisions by the USPTO Director with the rank of undersecretary would suffice. But the removal power generally follows the appointing power, so all presidential appointees—even inferior officers—are assumed removable by the President.[26] It is unclear, therefore, why the *Arthrex* opinion highlighted PAS status (or so-called "principal officer" status) as the touchstone for adequately supervised executive action as opposed to either direct presidential sign-off or the absence of any intervening link between the President and the decision-maker.[27]

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24. *See id.* at 1980–81 (discussing the constitutional shortcomings of the lack of review of inter partes decisions by a principal officer); *id.* at 1984 (discussing the "traditional rule that a principal officer, if not the President himself, makes the final decision on how to exercise executive power").

25. *See* 35 U.S.C. §§ 2, 3(a)(1).

26. *See* United States v. Perkins, 116 U.S. 483 (1886); U.S. CONST. art. II, § 2, cl. 2.

27. *See Arthrex*, 141 S. Ct. at 1976 (suggesting that the constitutional requirement is that the work of inferior officers be "directed and supervised" by a PAS appointee); *id.* at 1985 (highlighting again the need for "an officer properly appointed to a principal office" to be the actor issuing final binding decisions on behalf of the Executive Branch). *See also id.* at 2004–05 (Thomas, J., dissenting) (noting that the Appointments Clause makes no distinction between the category of power exercised by principal as opposed to inferior officers).

Although the opinion and the question presented in *Arthrex* referenced the Appointments Clause as the relevant constitutional constraint, the decision more generally suggested that the most acute problem with the patent office's structure was that the PTAB's inter partes authority was inconsistent with the constitutional requirement that sufficiently senior executive officials must direct and supervise executive action.[28] Such a requirement is not directly in the terms of the Appointments Clause, which addresses the selection of officials, but it inheres in the Article II Vesting Clause.[29]

Further, the Court's logic in the case would seem to apply to a vast array of additional executive actions, particularly given the inherent executive character of numerous significant governmental actions far beyond isolated adjudicative determinations within one executive agency.[30] But the Court carved out any non-adjudicative determinations from its decision that day,[31] leaving for the future the question whether all final executive branch actions by government officials, including inferior officers (and even employees), must be subject to presidential command and, if so, via what mechanism.

One less explored question is the degree to which actors entirely outside of the governmental, executive chain of command addressed in *Arthrex* can bear responsibility for federally prescribed tasks. In other words, to what extent can *private* actors perform statutorily required components of governmental operations such as arbitration of disputes, creation of standards tied to governmental

28. *See id.* at 1985–86 (majority opinion) (concluding that a principal officer must issue final inter partes decisions that bind the Executive Branch).

29. *See* U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."). *See also Arthrex*, 141 S. Ct. at 1976 (citing the Vesting Clause and then identifying the Appointments Clause as the source of the authority for the President to obtain assistance in his duties by principal officers).

30. *See* Mascott & Duffy, *supra* note 21, at Part II.

31. *See Arthrex*, 141 S. Ct. at 1985–86 (walling off other categories of adjudication). *See also id.* at 1987 (plurality opinion) (noting that the suit concerned only petitions for inter partes review and not other types of PTAB adjudication).

requirements, fact-gathering, or performance of evaluations where the result leads to qualification or disqualification for a government service or benefit?

This Article will unpack the import of those questions and address the degree to which recent Supreme Court cases on the executive accountability constraints within the Appointments Clause and other Article II provisions may bear on them. Several years prior to the Court's holding in *Arthrex* unpacking the Appointments and Vesting Clauses in relation to "principal" versus inferior executive officers, the Supreme Court had reexamined the scope of the class of governmental actors who must receive appointment as either an "inferior" or non-inferior officer.[32] Applicable to "officers of the United States," the Appointments Clause requires that Congress establish such offices "by Law" and mandates that such officers be appointed using one of only four methods.[33] The Court in *Lucia v. Securities and Exchange Commission* concluded that federal officials exercising "significant authority" on an "ongoing" basis are such "officers."[34] The Court has described such a "continuing" position as one that transcends each unique officeholder, existing separate and apart from any particular person that fills it—in contrast to a contractual arrangement established just for the purpose of a discrete set of tasks and fulfillment by one particular entity.[35]

32. *See* Lucia v. SEC, 138 S. Ct. 2044 (2018).

33. U.S. CONST. art. II, § 2, cl. 2 ("[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

34. *Lucia*, 138 S. Ct. at 2052–53.

35. *See* United States v. Germaine, 99 U.S. 508, 511–12 (1879); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868). *See also* E. Garrett West, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 220–22 (2018) (discussing the nineteenth-century cases).

What is not entirely clear after *Lucia*, or even *Arthrex*, is whether the "officer" elements are two cumulative requirements or essentially redundant: Are only those officials who both serve in ongoing positions and exercise "significant authority" subject to Appointments Clause requirements—and derivatively, the Oaths Clause and impeachment provisions that apply to federal officers? (If cumulative, this would mean that an individual exercising a level of responsibility that might otherwise constitute "significant authority" is exempt from constitutional officer constraints so long as the individual serves only intermittently or temporarily.) Or does the Court's formulation mean that "significant authority" can be appropriately exercised only by those officials who are in the constitutional category of "officers" and, thus, satisfy all of the requirements for that status such as serving in a continuing "office" subject to Article II accountability mechanisms?

It would be odd if the answer were the former. Taken to its logical end, the conclusion that an individual could exercise significant governmental authority free from Article II constraints so long as they served outside of an ongoing position could lead to severe results, potentially freeing from Article II constraint even the most impactful exercises of executive power, like federal prosecutions.[36] This possibility was envisioned by scholars Josh Blackman and Seth Barrett Tillman in relation to Special Counsel Robert Mueller.[37] As special counsel, Mueller served in a temporary role authorized by Justice Department regulations to spring into existence when the Attorney General deems a special counsel necessary to investigate potential criminal activity of a subject that might otherwise create a conflict of interest for the Department such as alleged criminal

36. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985); Buckley v. Valeo, 424 U.S. 1, 138 (1976); United States v. Nixon, 418 U.S. 683, 693 (1974) (designating prosecutions as exercises of executive functions.)

37. Seth Barrett Tillman & Josh Blackman, *Is Robert Mueller an 'Officer of the United States' or an 'Employee of the United States'?*, LAWFARE (July 23, 2018, 2:50 PM), https://www.lawfareblog.com/robert-mueller-officer-united-states-or-employee-united-states [https://perma.cc/L6QV-8Y34].

activity by a high-ranking government official.[38] The regulatory special counsel spot is not permanent. The special counsel spot would continue just as long as it takes to carry out the investigation within the jurisdiction established by the Attorney General ("AG"),[39] subject to potential AG termination for wrongdoing.[40] In writing about this noncontinuous position, Blackman and Tillman suggested that if a role's temporary nature character could free it from constitutional "officer" requirements, then even a powerful, albeit temporary, role like that carried out by a Department of Justice Special Counsel could be exercised free from any appointments requirements.[41]

There did not seem to be any serious question that the special counsel office constituted a governmental position, albeit a temporary one. But if the requirements for accountability under the Appointments Clause apply to exercises of "significant authority" *only when* they are carried out within the context of an ongoing position, then neither the Oaths Clause nor Appointments Clause requirements would limit either the actions of the special counsel or the departmental authority to create such a spot. In that case, the limited special counsel appointment would operate comparably to a private delegation, analogously subject to no independent constitutional constraint so long as the delegation of the duties themselves was appropriate. Such an outcome would seem surprising, at least under modern jurisprudence. Special counsels, although serving temporarily, have substantial power—of a kind considered

38. *See* 28 C.F.R. § 600.1.

39. 28 C.F.R. § 600.4.

40. *See* 28 CFR § 600.7(d) (providing that the Special Counsel may be removed from office "only by the personal action of the Attorney General" for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies").

41. *See* Tillman & Blackman, *supra* note 37.

to be executive at least by the modern Court.[42] By regulation, special counsels have "authority to investigate and prosecute federal crimes committed in the course of, and with intent to interfere with, the Special Counsel's investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses; and to conduct appeals . . . ."[43] This authority is not unlike that of the defunct, statutory independent counsel position that the Supreme Court concluded was an inferior office in *Morrison v. Olson*.[44]

The resolution of this puzzle might very well turn on one's interpretation of the Executive Vesting Clause and its relation to appointments.[45] If the Appointments Clause is the sole constitutional provision applicable to the supervision of government offices—and an individual must occupy an ongoing federal position with "significant authority" to fall under its requirements –- then private actors (or public actors with insufficient authority, or serving in non-ongoing positions) would be free from supervisory constraints under the Constitution. But if the Vesting Clause assigns the President inherent supervisory power of the Executive Branch as part of his exclusive vesting of the executive power, then perhaps no execution of sovereign governmental power is outside of Article II's hierarchical constraints—regardless of how Congress or other actors characterize or label a given position. This is certainly the position toward which the Court began to migrate in 2021 in *Arthrex*, where the Court suggested that both the Article II Vesting Clause and Appointments Clause speak to presidential direction of executive power. In finding that the USPTO Director must have power to review PTAB decisions in inter partes disputes, the Court made clear that the President, through his senior officers, must be able to

42. *See* Mascott & Duffy, *supra* note 21, at 231–32, 261–64 (discussing the Supreme Court's precedent characterizing prosecution as an executive function and exploring independent counsels and executive supervision after *Arthrex*).

43. 28 CFR § 600.4(a).

44. Morrison v. Olson, 487 U.S. 654, 691 (1988).

45. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

review, supervise, and direct their issuance before they stand as final decisions by the Executive Branch.[46] This point is made even more clearly by Justice Thomas in dissent, who succinctly characterized the Vesting Clause as dealing simply with "the vesting of executive power in the President."[47]

Under modern practice, our system has grown accustomed to lower-level functionaries, or employees, occupying governmental positions without Article II appointments.[48] But if the Appointments Clause (and Vesting Clause) do not cover governmental functionaries outside of those holding ongoing positions, then why would those constraints cover private actors exercising those same functions? And would that mean private actors can also serve in positions involving "significant authority" on behalf of the government free from constitutional constraint?[49]

Justice Alito hinted at these questions in his concurring opinion in *Department of Transportation v. Association of American Railroads*,[50] in which he questioned whether it was a violation of the Appointments Clause for arbitrators to develop binding standards that applied to train operations and challenged Amtrak's contention that it could promulgate codes without operating as a governmental actor. The arbitrators were private actors and, thus, had not taken an oath to support the Constitution or received government appointments in line with the constitutional Oaths and Appointments Clause requirements, which Justice Alito raised as a serious accountability concern.[51] Amtrak's role in jointly establishing minimum metrics for the quality of passenger train operations that

46. *See* United States v. Arthrex, 141 S. Ct. 1970, 1985 (2021).

47. *Id.* at 2005–06 (Thomas, J., dissenting).

48. See Mascott, *Officers*, *supra* note 17, at 464.

49. *Cf.* Constitutional Limitations on Federal Government Participation in Binding Arbitration, 19 Op. O.L.C. 208, at **9–10 (1995) (1995 WL 917140) (suggesting that private actors are outside the constraints of the Appointments Clause even if their duties would amount to an exercise of "significant authority) [hereinafter *Binding Arbitration*].

50. 575 U.S. 43 (2015).

51. *Id.* at 57 (Alito, J., concurring).

could subject entities to enforcement actions constituted a coercive exercise of authority that was essentially governmental in his view and should be subject to constitutional requirements for officers.[52]

Over the years the Court has not given much definitive consideration to precise limitations on delegations of authority to private actors—so-called private delegations. And the Court's recent decision in *Arthrex* has the potential to impact or inform any potential future analysis of the question in any event. The Court in *Arthrex*, more clearly perhaps than in past decisions,[53] relied on both the Vesting Clause and the Appointments Clause to reach its conclusion that administrative patent judges ("APJs") could not be the final word on a binding decision for the Executive Branch because as non-principal officers they could not exercise binding executive authority.

This more crystallized focus in *Arthrex* on the character of the authority itself rather than the precise identity of the actor exercising it is perhaps a game-changer on all manner of questions related to the force of electoral accountability via supervision over exercises of functions related to the Executive Branch. These questions include the proper role of private actors who carry out functions integral to executive action for the Executive Branch. Because if any final binding decision carrying out executive authority must be issued by a principal actor, then a mere technicality like the intermittent nature of an official's role or position cannot excuse the exercise of the authority by one not appointed as a principal officer. In other words, if an individual were to exercise final prosecutorial authority on behalf of the Executive Branch, the character of the authority would make it unconstitutional for the final action to be vested in someone other than a principal officer. It would not become constitutional simply because the prosecutor, or special or independent counsel, simply held a periodic or temporary position and therefore did not require a principal officer appointment. Further, the *Arthrex*

52. *See id.* at 57–60.

53. *See* Mascott & Duffy, *supra* note 21.

opinion more clearly connected appointments constraints with the Executive Vesting Clause than did other recent opinions addressing appointments challenges. The precise relationship between the Vesting Clause and the constitutional requirement of executive supervision over binding governmental acts also could inform the proper scope of any role for private actors in carrying out tasks for the government.

In *Arthrex*, the Court suggests that the role of a nineteenth-century board of examiners in reaching determinations that then bound the Senate-confirmed head of the Patent Office was consistent with the constitutional vision of executive authority that the Court sets forth in its opinion.[54] From 1836 to 1839, those constituted boards could issue determinations finding that an invention was patentable, on appeal from denials of patentability by the newly constituted office of Patent Commissioner. Those determinations then bound the Commissioner's future actions with respect to the patent application under review.[55]

After surveying the landscape of Appointments Clause doctrine in Part I, Part II of this article will delve into the history of the precise character of those examiners—whether they were hired private actors or some other kind of non-officer. Part III of the article then will explore just exactly what kind of decision, or action, the board was empowered to take with respect to patentability. Interpreted in its broadest, most surface-level form, the 1836 board arrangement appears to authorize the boards to make final patent decisions for the Executive Branch, despite the examiners' non-appointment by the President, which would have been required had they been exercising power with the character of principal officer authority under the *Arthrex* opinion. Although the relatively isolated, short-lived example of three years of practice under the new Patent Office

54. United States v. Arthrex, 141 S. Ct. 1970, 1984–86 (2021) (majority, then plurality, opinion).

55. *See infra* Part II.

fifty years after constitutional ratification is certainly not dispositive for constitutional meaning, the recently issued *Arthrex* opinion intimates that the arrangement was permissible—and, indeed, compatible with the Court's recent decision.[56] It is thus informative to examine the character of the boards' authority to identify an example from historical practice of exactly what kind of final determination issued by someone other than a principal executive officer is permissible under the current Court's view.

To explore the stakes of any potential Vesting Clause or Appointments Clause implications for the delegation of responsibilities to private actors, the Article will then briefly survey a few examples of the types of power that private actors have wielded as a matter of contemporary government practice.[57] Congress has authorized quite a few tasks for hired private actors, or contractors. What is the nature of some of the tasks? What is the theory behind the sense that these private roles are constitutional? And what, if anything, do the implications stemming from the *Arthrex* opinion have to do with it? The answer, notably, might differ based on one's theory of the interrelationship between the Appointments and the Vesting Clauses and the constitutional purposes of accountability underlying each clause.

The twenty-first century Court has emphasized the importance of all executive power reporting back up to the President in both its Appointments Clause and removal cases involving tenure protections for executive officers. The Court has also begun excavating the executive supervision and direction requirements embedded in the Executive Vesting Clause. How does the performance of functions, decision-making, or standard setting by private actors fit within the scope of those constraints, if at all? Electoral

56. *See Arthrex*, 141 S. Ct. at 1984–86 (majority, then plurality, opinion); see also *id.* at 2005–06 (Thomas, J., dissenting) (citing *Arthrex*, 141 S. Ct. 1984–85 (majority opinion)).

57. *See, e.g.*, *Binding Arbitration*, *supra* note 49, at **8–9 (discussing examples of private actors used for arbitration, regulatory functions, and adjudicative determinations along with earlier examples like the use of private actors to conduct appraisals of customs goods).

accountability is an important purpose of the Appointments Clause, and the scope of actions related to governmental authority that can be wielded by private actors outside of that accountability is a critical question on the horizon of the twenty-first century administrative state.

I. APPOINTMENTS CLAUSE DOCTRINAL LANDSCAPE

In June 2021 the Court issued a potentially seismic opinion finding the structure of supervision within the USPTO to be constitutionally inadequate.[58] The particular constitutional challenge before the Court was the claim that APJs function as "principal," or superior, non-inferior officers, and thus must be appointed by the President with Senate consent.[59]

The Court agreed, ultimately, that APJs have been exercising too much power in light of their inferior officer appointments by the Commerce Secretary, a mere department head. Yet in distinction to the Court's other contemporary, post-*Myers* opinions on removal, appointment and executive accountability, the Court declined to remedy the APJ structure by meddling with the tenure protections insulating APJs from disciplinary supervision.[60] Rather, the Court concluded that the head of the USPTO, the Director—a Senate-confirmed official—must be able to direct or oversee all APJ decisions for there to be adequate accountability and executive supervision.

For the first time in contemporary jurisprudence the Court relied on the Vesting Clause in combination with the Appointments Clause to conclude that executive accountability necessitates direction on the front end, rather than focusing heavily on the backend

58. *See Arthrex*, 141 S. Ct. 1970.

59. *See* U.S. CONST. art. II, § 2, cl. 2.

60. *Compare, e.g.*, *Arthrex*, 141 S. Ct. 1970, *with* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020), *and* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010). *See also* Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012).

ability to fire wayward executive officials.[61] In other words, presidential supervision over the Executive Branch requires that the President have the ability, through his top officers, to direct executive branch action, not just remove or suspend those who fail to comply.

Curiously, although the *Arthrex* majority relied on historical practice to buttress this executive power vision, the history it cites contains a glaring inconsistency that the majority opinion obscures. More surprising, perhaps, than the notion that inferior officers could have the final say in executive branch determinations, Congress in 1836 authorized *private* actors to issue final factual determinations with legal consequence on appeal that bound the Commissioner of Patents.[62] This arrangement lasted until 1839, when Congress instead made patent denials immediately appealable, instead, to the chief judge in the District of Columbia acting in his district court capacity, after the Patent Commissioner objected that the private board appeals process was too time-consuming.[63]

This Article will explore the contours of the allocation of final executive branch determinations to intermittent private boards outside the formal governmental apparatus, and analyze the implications for the proper scope of private delegation. The existence of the 1836 boards of private experts suggests that Congress may have concluded that private actors could appropriately have charge over certain technical, mixed fact-law determinations regarding threshold patentability findings on obviousness and interference. That said, such exercises of private authority occurred only in the

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61. *See* Mascott & Duffy, *supra* note 21. *See also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (suggesting that the ability to instruct and direct is a necessary component of the Article II-vested executive power).

62. *See* 5 Stat. 117, 120 (1836).

63. *See* 5 Stat. 353 (1839); Act of Feb. 27, 1801, Section 3, ch. 15, 2 Stat. 103, 105–06 (circuit court); Act of Apr. 29, 1801, Section 24, ch. 31, 2 Stat. 156, 166 (district court functions). *See also* Theodore Voorhees, *The District of Columbia Courts: A Judicial Anomaly*, 29 CATH. U. L. REV. 917, 919–20 (1980) (describing the creation of a circuit court in the District of Columbia in 1801 and the subsequent congressional authorization for the chief judge to preside over a federal district court as well).

context of appeals of patent *denials*—they did not disrupt definitive *grants* of patents by the Patent Commissioner.

Decisions issued by the chief justice post-1839 suggest that his role simply descended from the 1836 boards and that he was not understood to have jurisdiction to review patents in a *judicial* capacity, but rather provided just a more efficient vehicle for review of the kind that the 1836 boards had provided.[64] In both cases, the 1839 chief justice and the 1836 review boards before him provided a more ministerial, or expert-driven, set of threshold findings that were not viewed as settling judicial rights regarding the award of the patent. The law at the time essentially permitted these decisionmakers just to conclude that certain threshold fact-bound mandatory qualifications for acquiring a patent had not been satisfied. The 1836 boards and chief justice acting in his specialized statutory limited review capacity did not have the power to strip away patents even in cases of interference, nor reverse a commissioner finding *in favor of* patentability. Congress had provided separately for judicial review of patent grants and denials.[65]

The 1836 boards of examiners made a cameo appearance in the briefing for the Court's renewed consideration of constitutional Appointments Clause requirements this year in *Arthrex*. The Court also acknowledged and opined briefly on the boards' existence in its opinion, albeit without a full acknowledgment of the board's nature and character. Private counsel for respondents had contended that the 1836 boards' ability to reverse certain patent commissioner findings provided historical precedent for contemporary APJs to issue final decisions without reversal despite their appointment

64. *See id.* at 354–55 (tying the chief justice's jurisdiction to the responsibilities that the 1836 boards had previously held).

65. *See, e.g.*, Section 11, 5 Stat. 353, 354–55 (1839) (providing for potential adjudication of certain contested issues by the chief justice of the U.S. District Court for the District of Columbia and then specifying "[t]hat no opinion or decision of the judge in any such case, shall preclude any person interested in favor or against the validity of any patent which has been or may hereafter, be granted, from the right to contest the same in any judicial court, in any action in which its validity may come in question").

status as non-principal officers. The Secretary of Commerce appoints APJs, a method of appointment that Article II of the Constitution permits only for "officers of the United States" other than "principal officers," whom the President must appoint subject to Senate consent.[66] Similarly, Congress had authorized the selection of members of the 1836 boards subject only to approval by the Secretary of State, the relevant department head at the time.[67]

But as this Article details further below, contextual statutory evidence suggests that the 1836 board participants were not governmental officers of any kind.[68] Rather, Congress had authorized the hiring of private experts to review certain factual commissioner determinations.

The conclusion that the board members held no governmental position despite their performance of paid services for the government not only derives from the statutory text but also reflects the stated understanding at the time of officials such as the patent commissioner. Therefore, the board provides no historical precedent for discerning the line between principal and inferior officer status. The existence of the board, however, does offer an historical example providing a glimpse of the understanding of the scope of tasks that Congress may constitutionally delegate to private actors, at least as of the mid-nineteenth century.

The use of private boards to resolve certain issues connected to the patent process was not a new phenomenon in 1836. In 1793 Congress had authorized the use of arbitrators to resolve certain threshold determinations necessary for acquisition of a patent. And in numerous other areas of the law, Congress had authorized the hiring of private actors and experts to perform services or reach factual legal determinations bearing on legal consequence as early as the eighteenth century. For example, as far back as 1789 Congress had authorized the selection of private actors to conduct services related

66. *See* U.S. CONST. art. II, § 2, cl. 2.
67. *See* 5 Stat. 117, 120 (1836).
68. *See infra* Part II.

to governmental determinations such as the weighing and measuring of goods on ships for purposes of assessing customs duties and the dissection of the corpses of convicted criminals by surgeons.[69]

In *Hartwell*, the Supreme Court provided a foundational definition for constitutional "officers of the United States," describing them as officials whose positions entail "tenure, duration, emolument, and duties."[70] These positions are in contrast to those of contractors who are hired only to perform particular services or whose positions are determined by the terms of the specific contract rather than based on the terms and scope of some kind of office or position that exists outside of that particular contractual agreement.

Then, in addition, starting from the first Congress, non-federal officers had involvement in carrying out tasks related to the implementation or enforcement of federal law. These were not necessarily private actors, but sometimes state law enforcement officers whose services the federal government incorporated into implementation of federal law. For example, section 33 of the Judiciary Act of 1789 had provided that state judges could arrest, imprison, or hold subject to bail individuals accused of a federal offense and subject to possible trial.[71] The Clinton Administration's Office of Legal Counsel ("OLC") opinion on arbitration and the Appointments Clause suggested that this was a delegation of power to state actors,[72] but it is unclear there was much of a delegation. The detention was to be at the expense of the federal government.[73] And federal district attorneys who were each to be "a meet person learned in the law" were to prosecute "all delinquents for crimes and

69. *See* Act of Aug. 4, 1790, ch. 35, 1 Stat. 145 (customs); Act of Apr. 30, 1790, ch. 9, 1 Stat. 112, 113 (section 4, surgeons). *See also* Mascott, *Officers*, *supra* note 17, at 523–27 (discussing examples).

70. United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868). *See also* Auffmordt v. Hedden, 137 U.S. 310, 327 (1890); United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823) (Marshall, C.J., sitting circuit).

71. Judiciary Act of 1789, Section 33, 1 Stat. 73, 91 (1789).

72. *See Binding Arbitration*, *supra* note 49, at 212–14 & nn.7–8.

73. *See* Judiciary Act of 1789, Section 33, 1 Stat. 73, 91 (1789).

offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden."[74] In addition to the state officials having power to hold alleged federal offenders at federal expense, qui tam arrangements existed as early as the eighteenth century.[75]

Part of the motivation for this structure may have been the Founding-era skepticism about establishing large cadres of federal officers.[76] In the time leading up to ratification of the Constitution, Madison expressed his understanding that states could supply their own revenue payments to the federal government by use of state officers who would collect the revenue under state rules.[77] Sometimes these types of arrangements have been analyzed under the Appointments Clause, as if the relevant problem is that the state officer or other actor engaged in a task related to federal law should have simply been selected by one of the four appointments methods specified for officers in Article II. But that challenge is somewhat odd in form, particularly if it regards the exercise of authority by state actors. State actors already must take an oath to defend the federal Constitution,[78] but they do so in their capacity as state officials. So long as they are state officers, selected according to state procedures, it would be an impossibility for them to be appointed via a federal appointing authority such as the President or an executive department head. They are picked under state law and by an

74. *See* Judiciary Act of 1789, Section 35, 1 Stat. 73, 92 (1789).

75. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 29 & n.89 (1994); NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013).

76. *See, e.g.*, The Federal Farmer, Anti-Federalist No. 76–77: An Anti-Federalist View of the Appointing Power Under the Constitution (Federal Farmer XIII) (1788), *in* THE ANTI-FEDERALIST PAPERS 293–94 (Bill Bailey ed., n.d.) (describing "the vast number of officers necessary to execute a national system in this extensive country" in an analysis of opposition to the draft Constitution).

77. *See* THE FEDERALIST No. 45, at 240 (James Madison) (George W. Carey & James McClellan eds., 2001). *See also* Mascott, *Officers*, *supra* note 17, at 502–03.

78. *See* U.S. CONST. art. VI, cl. 3.

official vested with state government appointing authority. More appropriately, the question in such cases is how much power to enforce or carry out federal law can be vested in a nonfederal actor—i.e., one who is not directly and exclusively accountable back to the supervision of the President of the United States, in whom is vested the entirety of *the* executive power of the United States.[79]

That same question arises in the delegation of power to private actors. If the President lacks command of individuals who do not directly report to him or—in the case of private actors—the individuals carrying out a task do not have to take a constitutional oath as part of their job, then what tasks related to governmental services and sovereign acts can such individuals perform? The issues might be somewhat distinct in that state officers at least take an oath to carry out the Constitution in their state officer role, whereas private actors lack a constitutional obligation to take any oath. But in both cases, the question is the extent to which power can be delegated to any actor whom the executive does not fully supervise.

Under the statutes enacted during the First Federal Congress, Congress authorized services to be performed by private actors in a variety of formats. A common pattern was the authorization of hired experts or contractors to perform tasks related to governmental acts. For example, boatmen were employed for transportation related to measuring and assessing customs duties.[80] And customs "inspectors, weighers, measurers and gaugers" could be employed by customs collectors to measure the quantity of goods on which the customs duties were to be assessed.[81] These individuals had very little discretion in the tasks they performed,[82] in part because

79. U.S. CONST. art. II, § 1.

80. Alexander Hamilton, U.S. Sec'y of the Treasury, List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the Year Ending October 1, 1792 (1793), *in* 1 AMERICAN STATE PAPERS: MISCELLANEOUS 57 (Walter Lowrie & Walker S. Franklin eds., Washington, Gales & Seaton 1834).

81. Section 6, 1 Stat. 145, 154 (Act of Aug. 4, 1790); Section 53, 1 Stat. at 172.

82. Mascott, *Officers*, *supra* note 17, at 523.

of the detailed nature of the customs rates per unit of many distinct subcategories of goods that Congress had developed and imposed.[83] Mariners and boys were hired to work on revenue cutters—the First Federal Congress authorized revenue cutters involved in customs collection to utilize one master, several mates, several mariners, and two boys to collect the customs revenue.[84] This collection of officials was described within the authorizing statute as consisting of "officers, mariners and boys,"[85] suggesting that the mariners and boys were non-officers. Congress also authorized the President in 1791 to appoint at least three bank superintendents for the oversight of bank stock subscriptions.[86] It is noteworthy that even preconstitutional practice involved fairly generous use of hired-for-services individuals. For example, the preconstitutional Mint of the United States permitted the master coiner to "procure proper workmen" for coinage purposes.[87] Early American reports also indicate the use of revenue to pay for services such as the operation of printing presses and the construction of government buildings.[88] Surgeons were also used to perform autopsies.

That said, none of the acts carried out by these individuals seemed to rise to the level of an independent exercise of "delegated sovereign authority," a standard that the Executive Branch has previously used to describe governmental power.[89] This range of tasks performed by private actors in the eighteenth century, however, provides a comparison point for evaluating the breadth of tasks performed by private actors under modern practice such as the

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83. Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019) [hereinafter Mascott, *Customs Laws*].

84. Section 63, 1 Stat. at 175.

85. 1 Stat. 145, 175.

86. Act of Feb. 25, 1791, ch. 10, section 1, 1 Stat. 191, 191–92 (amended 1791).

87. *See* An Ordinance for the Establishment of the Mint of the United States of America, and for Regulating the Value and Alloy of Coin (1786), *in* 31 JOURNALS OF THE CONTINENTAL CONGRESS 876 (John C. Fitzpatrick ed., 1934) (emphasis omitted).

88. *See* 1 AMERICAN STATE PAPERS: FINANCE, 36, 86–87.

89. *See* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 78 (2007) [hereinafter *Officers of the U.S.*].

Amtrak standards-setters and arbitrators analyzed by Justice Alito in 2015.[90]

Were the late-1830s board assessments similar in kind? At a minimum the legal status of the board determinations—effectuating binding reversal of prior Patent Commissioner assessments—was of a somewhat different nature than the fact-bound customs measurements or private surgeon assessments. But these determinations arguably all had significant legal significance—constituting fact-bound determinations by experts on which Congress had determined by statute that certain administrative procedures would rely. In other words, by statute in each instance Congress had made the assessment that certain administrative assessments must incorporate objective determinations or findings by outside experts.[91] Such determinations ranged from technocratic assessments like measuring the quantity of a particular imported good—an objectively verifiable rote assessment—to more standards-based or moderately discretionary findings such as whether a particular invention was new. Nonetheless, even the 1836 patent board determinations on novelty were relatively technocratic—constituting a fact-based evaluation of the delta of novelty of a new invention against the backdrop of previously discovered patented inventions.[92] Moreover, the understanding of the legal import of the board decision was simply that the board could conclude the commissioner must reach a finding entitling an inventor to a prima facie

90. *See infra* Part IV.

91. *Cf. generally* JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012) (discussing early administrative practice including adjudicative determinations by federal actors); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1279–80, 1293 (2006) (discussing the role of customs officials in assessing the value of goods and the consistency between the goods measured on the ship versus listed on the invoice as well as the discretion inherently present in the collection system).

92. *Cf.* Section 12, 5 Stat. 353, 355 (1839) (authorizing the *patent commissioner* to promulgate regulations governing the taking of evidence in contested patent proceedings).

patent. The questions of patentability then were ripe for further judicial determination, and challenge, in the courts.[93]

In contrast to the Court's quick dismissal of the historical practice of mid-nineteenth century extra-executive use of private experts for patent findings, contemporary executive branch officials have overread the import of historical examples of these types of expert determinations such as in the customs context. For example, in 1995, then-Assistant Attorney General of the Office Legal Counsel Walter Dellinger relied in part on early customs practice to reverse a longstanding executive branch position that the federal government could not subject executive power to the binding assessments of private arbitrators.[94] He contended, for example, that the historical practice of using outside appraisers to measure the value and quantity of goods for purposes of imposing customs duties meant that significant authority could be delegated to non-governmental actors outside of Appointments Clause requirements so long as the responsibility for those duties was intermittent and non-continuing.[95]

But even if one accepts that historical practice is relevant for contemporary constitutional meaning, does a past governmental practice of reliance on appraisers and scientific experts to make generally verifiable, objective determinations mean that Congress could authorize the delegation to private actors of any governmental duty so long as the duty is not continuous and ongoing? Even if delegation to private actors of arbitration determinations binding on the government or private parties is permissible, would that mean any decision with impact on the government or citizenry can be vested

93. *See* Section 12, 5 Stat. 117, 122 (1836).

94. *See Binding Arbitration*, *supra* note 49, at *1.

95. *See id.* at **5–6. *See also* United States v. Maurice, 26 F. Cas. 1211 (C.C. D. Va. 1823); United States v. Hartwell, 73 U.S. 385 (1868); United States v. Germaine, 99 U.S. 508 (1879); Auffmordt v. Hedden, 137 U.S. 310 (1890) (Supreme Court opinions and an opinion by Chief Justice Marshall riding circuit establishing that Article II offices subject to Appointments Clause requirements necessarily "embrace[] the ideas of tenure, duration, emolument, and duties").

in a private person so long as they are not in an ongoing governmental role? Surely there must be a line at which private delegation ceases to be permissible.[96] For example, constitutional functions vested exclusively in a certain governmental actor (such as the pardon power[97]) cannot be delegated.[98] What about regulatory findings or discretionary policy determinations? Or congressional or executive investigative tasks? This Article will explore these questions. Further, it will explore whether the standard for the constitutional exercise of power as a permanent governmental official outside of Appointments and Oaths Clause requirements differs from the line dividing exercises of sovereign authority necessarily performed by government officials from intermittent non-sovereign acts performable by private experts.

The Article ultimately posits that although as an original matter, any federal official with ongoing statutory duties was an "officer of the United States" subject to Appointments and Oaths Clause constraints,[99] individuals retaining their private capacity could be hired to perform services—even relatively substantial tasks—so long as

96. *Cf. Binding Arbitration*, *supra* note 49, at **7–12 (suggesting that there are limits on the kind of power the government can delegate to private actors but suggesting that those limits have nothing to do with the Appointments Clause constraints applicable to federal actors).

97. *See* U.S. CONST. art. II, § 2, cl. 1.

98. *See Binding Arbitration*, *supra* note 49, at *11 ("One important principle is that Congress may not vest itself, its members, or its agents with either executive power or judicial power . . . ." (internal quotation marks omitted)).

99. Mascott, *Officers*, *supra* note 17, at 546 (finding that the original meaning of Article II "Officers of the United States" encompassed even recordkeeping clerks who merely recorded certificates granted for the unloading of ships in the United States, among other records, so long as the clerk duties were authorized by statute and performed by a federal official in an ongoing position). *See also id.* at 454 (concluding that "the most likely original public meaning of 'officer' is one whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance").

the performance of those tasks did not constitute a portion of the delegated sovereign authority of the United States.[100]

In the wake of the *Arthrex* decision, the USPTO Director now has direct review authority over thousands of patent determinations before the Office each year.[101] Under the Court's opinion, the Director has *discretion* whether to actively review each decision, so the detailed practical implications of *Arthrex* are not yet fully known. But in the event that this new structure proves to be unworkable or Congress concludes it is improperly distinct from the adjudicative structure it intended through enactment of the America Invents Act, Congress might find it worthwhile to evaluate whether any of the highly technical work of scientific patentability review could be delegated to experts outside the formal bounds of the patent office. The 1836 boards may provide precedent informing both the permissible extent, and confines, of such delegation as a constitutional matter.[102]

Reevaluation of the scope of permissible governmental delegation to hired private boards could also inform numerous additional administrative arrangements involving arbitration, standard-setting, and governmental certifications. The more constrained understanding of private delegation from that time period might further

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100. *Cf. Officers of the U.S.*, *supra* note 89, (concluding that Article II offices are "continuing" positions "to which is delegated by legal authority a portion of the sovereign powers of the federal government" and using this line to divide Article II officers from employees, in contrast to the line proposed in this Article between governmental and permissible non-governmental acts).

101. *See* United States v. Arthrex, 141 S. Ct. 1970, 1986 (2021) (empowering the Director of the USPTO to have the discretion to review any decision by the PTAB) (opinion of Roberts, C.J., joined by Alito, Kavanaugh, & Barrett, JJ., and Breyer, J., in the remedy). PATENT TRIAL & APP. BD., STANDARD OPERATING PROCEDURE 1 (REVISION 15), ASSIGNMENT OF JUDGES TO PANELS (noting the thousands of cases that the Director assigns each year to APJs, *available at* https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf [https://perma.cc/UQ5U-6JJ3].

102. *Cf.* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 58–62 (2015) (Alito, J., concurring) (discussing the constitutional difficulties with delegation of governmental authority to private actors and clearly walling off regulatory authority as not permissibly delegated).

reveal ways in which Congress and the contemporary Executive Branch have countenanced too much delegation of binding authority to actors outside of the presidential executive supervisory structure. The Court has spent significant time in recent years revisiting the hierarchy of executive department heads and their subordinate officers and staff, but might also need to reevaluate the optimal, and constitutional, contours of the numerous governmental-private power-sharing arrangements within the modern administrative state.

This Article is primarily descriptive. It takes a deep dive into aspects of the historical structure of one government office to provide a snapshot of early practice in relation to contemporary consideration of officer appointments, supervision, and delegation. It does not intend to provide a comprehensive originalist proof text of the definition of inferior or non-inferior officer or of the precise scope of duties considered to be inherently governmental or permissible for delegation or assignment to non-governmental actors. But reevaluation of the boundaries of sovereign authority that must be exercised consistent with the Constitution is a critical pursuit. The Article will explore what light the 1836 boards—and their elimination in 1839—shed on the understanding of that line and how the courts and the Executive Branch have demarcated sovereign authority since that time.

In particular, Part II details the structure of the 1836-authorized examination boards and the role that Congress authorized for these panels in relation to the Patent Commissioner's determinations. It will also describe the genesis of this type of three-member adjudicative body in the predecessor patent act of 1793 and proposals that were rejected prior to the enactment of the first federal patent law in 1790. This Part will excavate statutory structure, contemporaneous history, and case law to examine the understanding of actors at the time of the role of the 1836 review panels. The bodies were viewed as carrying out non-governmental duties. And judicial review of executive branch patent-related determinations was seen as

critical for finality in the grant of patents and resolution of priority determinations for multiple claims to patent rights for the same invention.

Part III addresses the historical understanding of the role of the 1836 boards of examiners and their 1839 replacement—review by a single judge in the D.C. federal court. Part IV briefly explores how the non-governmental actor determinations of empirical patent questions in the eighteenth and early nineteenth centuries might relate to questions still very alive today: the constitutionality, and propriety, of non-governmental actors reaching determinations that assist in, or inform, the performance of governmental functions. Perhaps it would be more accurate to think of the use of private actors in the hiring of contractors to perform certain supporting tasks, rather than the delegation of sovereign authority of any kind. Reexamination of the understanding of the proper use of non-governmental actors in government services from the founding of the patent office to today in this Article, and follow-up scholarship and consideration by the Supreme Court, would help to shed light on these critical questions.

II. *ARTHREX*'S HOLDING AND THE USE OF PRIVATE EXPERTS IN EARLY PATENT ADJUDICATIONS

The Supreme Court's June 2021 decision concluded that APJs have been unconstitutionally exercising power when they issue decisions stripping inventors of their patents without adequate executive branch supervision and review. As inferior officers, the Court found that APJs cannot issue final patent adjudication decisions without the possibility of reversal by a "principal" executive officer in an office subject to presidential appointment with Senate consent. Consequently, the Court held that the USPTO Director must have the ability to reverse decisions by APJ panels before they are subject to judicial review. APJs cannot have the final say for the Executive Branch.

The Court reasoned in part that this holding was consistent with uniform historical executive branch patent practice, suggesting that until 2011, when Congress expanded the power of the patent office through inter partes review by APJ panels,[103] the head of the patent office had always maintained ultimate control over its decisions. The Court found this meaningful because the USPTO Director is a Senate-confirmed presidential appointee and thus operates as a "principal" officer. The Constitution's vesting of executive power in the President through Article II necessitates that officials closely accountable to him, such as principal (or non-inferior) officers, must have the final say in exercises of executive power. The Appointments Clause within Article II, further, requires that officials qualifying as "officers of the United States" must be appointed by the President with Senate consent, unless those officers carry out just "inferior" roles, in which case Congress can authorize their appointment by the president alone, an executive department head, or a court of law.[104]

But the Court's discussion of the relevant historical practice quickly glossed over an apparently significant aberration in past practice of patent office supervisory review. From 1836 to 1839, Congress had authorized three-member boards of examiners to consider appeals of decisions by the Commissioner of Patents. Findings of these boards were determinative, and binding, on the Commissioner in his subsequent evaluation of the covered patent disputes. For example, the boards could reverse the 1836 Patent Commissioner's conclusions that an invention was insufficiently novel to warrant a patent or that an invention duplicated, or interfered with, an invention already submitted to the patent office. These board members were selected for their roles with the approval of the Secretary of State, a department head, not by the President. How could the *Arthrex* majority conclude, then, that the

103. *See* America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).
104. U.S. CONST. art. II, § 2, cl. 2.

issuance of binding determinations by these non-Senate-confirmed officials was consistent with its holding that only principal officers[105] may have the final, determinative executive branch say in adjudication of patent disputes?

This historical practice is notable because the very first statute creating a formal standalone patent office established the arrangement. But the Court glosses over it by characterizing the board members as non-officers and, thus, irrelevant to its principal versus inferior officer analysis. Specifically, the Court noted that the Board members had just intermittent, non-continuing, roles so they failed to check one of the boxes of Article II officer status under the Court's jurisprudence.[106] Therefore, the board members were not occupying either principal or inferior offices and the *Arthrex* majority assessed their existence as irrelevant to its analysis of the role of modern APJs who, in contrast, serve in ongoing roles.

This general discussion by the *Arthrex* majority did not meaningfully assess the significance of the 1836 board determinations. Instead it generally stated that prior to 2011, the head of the patent office had always had supervision over final patent adjudicative determinations. This omitted any deep analysis of where the members of the 1836 examination boards in fact were situated within the constitutional structure even if they were intermittent entities or private actors. And the general statement that prior to 2011, the head of the patent office always had the final say over patent determinations appears to be objectively false, particularly in light of a patent review structure that the Court's *Arthrex* opinion fails to

105. The act of appointment by the President with Senate consent ("PAS appointment") does not necessarily make an official a principal officer. The Constitution prescribes this procedure as the default requisite method of appointment for both non-inferior and inferior officers of the United States. *See* U.S. CONST. art. II, § 2, cl. 2. But PAS appointment is constitutionally required for non-inferior officers. In other words, PAS appointment is a necessary, but not sufficient, condition for any officer exercising power that rises to the level of principal, or non-inferior, officer status.

106. *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044 (2018) (concluding that an individual is an "officer of the United States" only if he both occupies an ongoing position and exercises "significant authority").

reference in any way. In 1839, just three years after the creation of the three-member hired boards, Congress replaced the review by the boards with review by the Chief Justice of the district court in the District of Columbia. Opinions issued by the Chief Justice sitting in that capacity, discussed in detail in Part III of this Article, demonstrate that the judge thought of himself as an appendage of the executive branch's review of patent applications. The judge issued factual determinations that subsequently bound the Commissioner. So while a patent did not issue without the Commissioner taking action, the 1839 judge (and perhaps, even to a degree, the 1836 boards) could issue determinations that essentially necessitated the grant of a patent by the Commissioner.

It is hard to see the daylight between the absence of commissioner reversal authority over the judge and board decisions and the lack of Director review authority over PTAB decisions prior to *Arthrex*, at least in form. The Commissioner could not reverse the 1836 and 1839 appellate determinations. So it seems incomplete at best for the *Arthrex* majority to have described the patent office head as the complete, final authority for patent decisions pre-2011 without at least acknowledging the place of the 1839 single-judge review structure. Unless the nature of those 1839 appellate review determinations was significantly different in kind than the inter partes decisions issued by the PTAB pre-2021, then there may be a constitutional discrepancy between the *Arthrex* ruling and mid-nineteenth century patent office practice as instituted by Congress. It would not be the first time that Congress had made a constitutional mistake in the patent review structure that it authorized.[107] But close examination of the role played by the 1836 and 1839 board and judge review of Commissioner determinations suggest that the review was limited in meaningful ways. And this analysis might in turn be instructive for identifying the distinction between

107. *See* John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 2007 PATENTLY-O PATENT L.J. 21, http://www.patentlyo.com/lawjournal/2007/07/areadministrat.html [https://perma.cc/KD76-HEXA].

permissible exercises of authority by private actors and unconstitutional delegations that stray into the territory of an exercise of sovereign authority.[108]

Under the modern statutory scheme, the PTAB within the USPTO issues decisions on appeal via multi-member panels consisting of the USPTO Director and a group of APJs, subject to no further higher-level review within the agency. Even where an initial board decision is subject to reevaluation, the mechanism for reconsideration is adjudicative review by a second panel consisting of the Director and multiple APJs (a rehearing panel).[109] The decision is not reviewed by the Director, the functional agency head. Distinct from most other administrative agency adjudicative systems,[110] there is no mechanism for plenary agency head review of final board determinations; the statutory scheme as originally interpreted and applied left no room for potential reversal of a final PTAB decision, at least not outside of challenge in an Article III court.[111]

In 2011, Congress significantly expanded the power of the patent office—authorizing it to reach executive branch determinations not only on whether an invention merits a patent or improperly infringes on an already-granted patent, but also on whether a patent has been improperly granted in the first place.[112] This inter partes review authority essentially enables the patent office to strip an individual of a patent he owns—a determination that then receives deference when challenged in an Article III court. In 2018, a split Supreme Court found this to be a proper exercise of executive

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108. *Cf. Officers of the U.S.*, *supra* note 89 (discussing delegated sovereign authority and the constitutional requirement that it be exercised only by Article II-appointed "officers of the United States").

109. *See* 35 U.S.C. § 6(c).

110. *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141 (2019) (analyzing agency adjudicative structures and identifying the PTAB as sui generis).

111. *See* Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 LOYOLA J. REGUL. COMPLIANCE 22 (2017) [hereinafter Mascott, *Constitutionally Conforming Agency Adjudication*].

112. *See* America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

authority, rather than a private rights determination on a property interest that must first be heard in Article III court.[113] Litigants in *Arthrex* then challenged inter partes review, instead, on the ground that APJs exercise so much final authority without executive branch review that it constitutes an Appointments Clause violation.

The USPTO Director is appointed by the President with Senate consent,[114] thus in the default constitutional mode appropriate for any officer, even those who oversee inferior officers.[115] The Secretary (or head) of the Commerce Department appoints APJs. The challenger in *Arthrex* had contended this arrangement was unconstitutional, as APJs participate as majority members on PTAB panels issuing reconsideration decisions subject to no further possibility of executive branch review and such decisions are not "inferior." In the challenger's view, given the absence of review of collective APJ determinations and the USPTO Director's inability to fire wayward APJs at will, APJs lack meaningful supervision and therefore cannot be "inferior officers" within constitutional terms.

The U.S. Court of Appeals for the Federal Circuit, surprisingly to many, agreed. In October 2019, the Federal Circuit held that APJs constitutionally function as "principal officers"[116] under their

113. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018).

114. 35 U.S.C. § 3(a)(1).

115. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring the President to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for . . . but the Congress may by Law vest the Appointment of . . . inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

116. The term "principal officer" is the moniker that the Supreme Court has designated for officers who fall outside of the subordinate "inferior officer" class in Article II. *See* Edmond v. United States, 520 U.S. 651, 659–60 (1997); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483–84 (2010); Morrison v. Olson, 487 U.S. 654, 670 (1988). All non-inferior "officers" must be appointed by the President with Senate consent. But the Appointments Clause never labels such officers as "principal." It does not expressly name the class of non-*inferior* officers at all, other than to generally

current statutory structure because they are not subject to constitutionally adequate supervision.[117] Rather than suggest that the Director must receive additional authority to unilaterally review, and reverse, APJ panel decisions, thereby serving as the exclusive last word within the executive entity of the USPTO, the Federal Circuit severed APJ tenure protections from the statutory scheme as unconstitutional. The Federal Circuit concluded that at-will removal authority would give the Director direct control over APJ decisions through the threat of firing—thereby making the APJs truly "inferior" actors within the USPTO.

This decision did not stand without a fight. In 2020, the private parties and the government filed petitions for en banc review. The government believed that the executive should be able to have close supervisory authority to direct APJs in their duties, but believed such direction is possible through the statutory tenure provision permitting discipline for "cause." Several Federal Circuit judges debated among themselves in warring opinions on the en banc decision about whether the current structure of APJs' inter partes review is optimal as a legislative policy matter or unconstitutional.[118] The stakes for APJ accountability have only intensified over recent years, as APJs have received jurisdiction to review more patent

describe "Officers of the United States" and clarify the default rule that all appointees must be subject to presidential appointment and Senate consent. The 1788 Constitution uses the phrase "principal officer" in only one instance—to describe the presidential power to require written opinions from his own team. *See* U.S. CONST. art. II, § 2, cl. 1. Some scholars—such as Gary Lawson, who has analyzed the proper dividing line between non-inferior and inferior officers as a matter of first principles—suggest instead that non-inferior officers be labeled "superior officers," which is more accurately descriptive of their role within the constitutional structure. *See* Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 98 n.51 (2019); Lawson, *America Invents*, *supra* note 15.

117. Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320, 1335 (Fed. Cir. 2019).

118. *See generally* Arthrex, Inc. v. Smith & Nephew, Inc., 953 F.3d 760 (Fed. Cir. 2020) (denial of rehearing en banc).

determinations—including the authority to strip a previously granted patent.[119] But the court denied en banc review.

The June 2021 decision by the Supreme Court aligned with the Federal Circuit's determination that APJs had been exercising power without adequate supervision. But rather than revisit APJ tenure protections, a majority of the Justices concluded the best way to remedy the constitutional violation was to address the ability of the USPTO Director to reverse APJ decisions. In the Court's view, if the Director can reverse or affirm patent office decisions, then inferior officer APJs no longer improperly exercise final decision-making authority for the Executive Branch.

APJs are nested within three layers of executive officials. The President appoints and supervises the Commerce Secretary, who in turn appoints the USPTO Director, who in turn at least nominally heads the office within which APJs serve.[120] If each step in this chain involves supervision, the APJs would be comfortably three rungs in. The APJs themselves are appointed by the Commerce Secretary,[121] which would be constitutionally inadequate if they indeed operate as inferior officers.[122] The core conclusion of the majority in *Arthrex* is that operation as an inferior officer precludes APJs from having the final say for the Executive Branch. Therefore, the Director must have the authority to step in and reverse any decision issued by the PTAB that he concludes is inappropriate. To bring about this arrangement, the Court concluded that the statutory provisions permitting review of APJ panel decisions only through panel reconsideration are unenforceable. In the Court's

119. *Cf.* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365 (2018) (holding that the patent office can review determinations stripping patent rights); Mascott, *Constitutionally Conforming Agency Adjudication*, *supra* note 111 (discussing the potentially intractable due process problem of giving more elected presidential control to adjudicators outside of the Article III context when the deprivation of private property is at stake).

120. *See* 35 U.S.C. § 3(a)(1).

121. *See* 35 U.S.C. § 6(a).

122. *See* U.S. CONST. art. II, § 2, cl. 2.

determination, the USPTO Director must have the authority to reconsider and reverse those decisions. Rather than sever any provisions in the statute like the Court sometimes does to remedy constitutional violations, the Court in *Arthrex* found that 35 U.S.C. § 3(a)(1) already vests plenary authority for all patent office responsibilities in the Director.[123] Therefore, so long as the explicit limitations on Director review authority of inter partes decisions are considered unenforceable, the Director already has all of the power necessary for constitutional review within the enacted statutory scheme. The Court concluded that so long as the Director functionally can operate with the power to review and revise or reissue APJ decisions, then a sufficiently senior executive official, closely accountable to the President, is able to oversee executive action on the President's behalf.[124]

123. Cf. 35 U.S.C. § 3(a)(1) ("The powers and duties of the United States Patent and Trademark Office shall be vested in an Under Secretary of Commerce for Intellectual Property . . . .").

124. The Court did not explicitly address the constitutional status of the USPTO Director. The Director himself is appointed by the President with Senate consent, so the method of his appointment would be constitutional whether he has authority to exercise the power of an inferior or principal officer. The Court suggested that the Director, thus, is sufficiently high-level in the Executive Branch that he can properly oversee all final patent decisions. But the Court did not theorize that conclusion. Although the Director is directly appointed by the President, he is under the Commerce Secretary in the chain of command. So if presidential executive accountability comes through the President's ability to direct, the Director is in a better position than the APJs who have tenure protections and are three layers down. But the Director still is two layers within the executive branch hierarchy, and it is unclear what kind of say, if any, the Commerce Secretary has over the Director's decisions or whether the President directly oversees the Director's activity. Therefore, it is not immediately clear just how direct the President's control is over even the Director's actions. And it would be strange to think that the new hierarchy post-*Arthrex* is better, simply because the Director is a PAS appointee. Presidential appointment with Senate consent does not itself bring any additional presidential supervisory control to the appointee's actions once confirmed, at least not any more than would be present if the appointee were an inferior officer selected by the president alone or one of his department heads. Indeed, PAS appointment diminishes executive branch control, in a sense, by giving the Senate a role in the officer selection.

If the modern USPTO Director must have power to revisit APJ decisions, how could the 1836 boards issue determinations that bound the then-head of the office, the Commissioner of Patents? Here is what is at stake relevant to the executive branch hierarchy, whether the power is one exercised by today's APJs or power exercised outside the formal governmental staffing structure by hired experts. The Appointments Clause is a safeguard ensuring that actors exercising the governmental power of officers of the United States are appointed in certain ways to maintain transparency and accountability in the selection of those carrying out executive power. Although the majority in *Arthrex* dismissed any Appointments Clause concern with the 1836 board after determining its members held only intermittent roles and thus were more like hired contractors than officers, the question remains whether the particular tasks conducted by those board members—or indeed by any private actors—are tasks that only constitutionally accountable officers may perform. In other words, even if an actor does not hold a continuing office and, thus, definitionally does not occupy an office, are there any additional constraints—either embedded within the Appointments Clause protections or the general vesting of executive power in the President alone—that forbid those private non-officers from carrying out certain duties involving sovereign tasks? Perhaps the performance of only intermittent tasks for the government not only robs the actor of the status of an Article II officer, but also fixes a constitutional ceiling on the kinds of tasks the actor may perform on the government's behalf.[125]

In the mid-nineteenth century, the Court on multiple occasions concluded that hired contractors performing non-governmental technical services, like medical exams, landscaping, and the measurement and evaluation of imported goods for customs purposes,

125. *See* Lucia v. SEC, 138 S. Ct. 2044, 2051–52 (2018).

performed non-officer tasks.[126] But was that simply because those individuals were hired on an intermittent basis to fulfill a contract and thus did not check all the boxes for officer status?[127] Or was there also something fundamentally different about the character of the tasks they performed?

Parts III and IV of this Article explore that question, based in part on the 1836 practice in the patent office and the analysis by courts and the Executive Branch of the proper contours of delegation of tasks to private actors starting from the early nineteenth century. In evaluating whether certain tasks involve uniquely sovereign acts such that they cannot be tasked to private actors, the Article will also address whether the Appointments Clause or, more fundamentally, the Article II Vesting Clause, necessitates restricting the performance of certain tasks just to properly appointed governmental actors. The Constitution includes an Oaths Clause requiring all officers to swear fidelity to constitutional principles. And the first statute enacted by the First Congress instated an oath requirement for federal officers. Implicitly those requirements suggest that actors performing governmental tasks must swear allegiance to constitutional principles and be subject to accountability.[128] Can such accountability apply to private actors hired merely for occasional services?

The Court's opinion in *Arthrex* is consistent with this inquiry and refocuses constitutional analysis about proper executive branch supervision on the extent to which senior executive officers, and ultimately the President, have control over the exercise of executive power on the front end. In contemporary cases evaluating

126. *See, e.g.*, Burnap v. United States, 252 U.S. 512, 519–20 (1920) (landscape architect not an officer); United States v. Germaine, 99 U.S. 508, 511 (1879) (surgeon); United States v. Hartwell, 73 U.S. 385 (1868); United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823).

127. *See, e.g.*, *Lucia*, 138 S. Ct. 2044, 2052 (discussing the ongoing nature of officer positions); *see also Officers of the U.S.*, *supra* note 89.

128. *Cf.* U.S. Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 57–58 (2015) (Alito, J., concurring).

executive supervision post-*Myers v. United States*, the Court up until Arthrex had underscored the power of the threat of *removal* as a mechanism for supervision. For example, in evaluating whether inferior officers are adequately supervised, the Court suggested in cases like *Free Enterprise Fund v. Public Company Accounting Oversight Board* that a surplus of authority in lower-level officials could be addressed by the severance of tenure protections for those officials, transforming them into removable-at-will officials.[129]

In 1836, Congress enacted legislation creating the first formal patent office.[130] Evidence indicates that the 1836 boards operated as nongovernmental boards of experts,[131] thus performing no instructive work for the precise question on which the Court had granted certiorari in *Arthrex*—whether the APJs needed to be appointed as principal (rather than inferior) officers. But the 1836 precedent provides an intriguing window into an even more fraught and unsettled debate within constitutional jurisprudence—the extent of

129. 561 U.S. 477 (2010). The statutory removal limitations that the Court found incompatible with "inferior officer" status were the stipulation that Board members could be fired for only "willful violations" of securities laws, "willful abuse of authority," or unreasonable failure to enforce compliance." *Id.* at 503. Only after concluding that those removal limitations were unconstitutionally constraining on the President's ultimate executive supervisory authority did the Court determine that the Board members were subject to sufficient supervision to constitute "inferior officers" susceptible to appointment by an executive branch department head.

130. Previously the Secretary of State had overseen significant portions of the patent-granting process. This was inefficient, and the 1836 Act created a separate patent office hierarchically within the State Department along with the formal position of Commissioner of Patents. The Secretary of State still had a role in providing sign-off on aspects of patent practice such as the selection of individuals to serve on the 1836 boards. But the authority to reach determinations on patentability was allocated by statute to the patent commissioner, with no explicit lingering role for the Secretary of State.

131. Significant evidence from the history of predecessor patent statutes, the practice of selection of the three-adjudicator 1836 panel members, and judicial opinions and other statements around the time suggests that the panel members operated as hired experts rather than as governmental actors. They did not serve in the ongoing, continuous positions that historically constituted "offices" or other governmental positions of any kind. *See infra* Part II.

governmental power, if any, that can be delegated to private boards, arbitrators, self-regulators, and external commissions.

For those who turn to historical practice as relevant evidence of the longstanding understanding of constitutionally permissible practices,[132] the structure and functions of the 1836 office along with its progenitors in 1789 – 90 and 1793 provide rich insight. Surprisingly, and in apparent tension with the *Arthrex* Court's assertion that the head of the patent office had charge over final patent determinations until 2011, the 1793 Congress authorized arbitration panels to reach final patent adjudicative determinations for the Executive Branch, and the 1836 Congress authorized boards of private, hired experts to issue determinations—irreversible within the Executive Branch—capable of reversing initial findings by the Commissioner of Patents. Those cases are distinct from the inter partes power given to the APJ panels under review in *Arthrex*, in the sense that those private expert determinations were pre-patent. They addressed patent denials; they did not have the power to issue determinations stripping inventors of previously granted patent property rights, unlike the modern APJs. But they call into question the *Arthrex* Court's general statement that the head of the patent office has always overseen all final adjudicative patent determinations. And analysis of the distinctions between the historic use of private actors to reach final determinations binding on executive officials, versus the inter partes decisions found unconstitutional by the Arthrex Court, provides valuable insight about the constitutional contours of the use of private actors to conduct tasks for the government.

This analysis is not necessarily intended to apply a pure originalist methodology or ordinary meaning interpretive approach and offers just a partial explanation of relevant constitutional principles governing exercises of authority in the issuance of patents. But it

132. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570 (2008) (relying on history to interpret the Second Amendment); NLRB v. Noel Canning, 570 U.S. 513 (2014) (recess appointments).

sheds light on the historical moors of contemporary patent practice and offers an intriguing comparative point from which to assess the breadth of executive authority claimed in twenty-first century patent practice. It also provides insight into historical understanding of the permissibility of using private actors to carry out tasks related to governmental functions and whether there were limitations on such use.

In 1836, as now, multi-member panels reached relevant adjudicative determinations as part of the process of evaluating patent applications. But the content, and significance, of those determinations differed significantly from contemporary patent practice under the expansive America Invents Act of 2011.[133] And the early nineteenth-century adjudications did not encompass the specific categories of patent determinations that have prompted the key patent-related constitutional challenges over the past decade. For example, both *Oil States* and *Arthrex* involved appeals from inter partes review proceedings, in which third parties challenge the validity of previously granted patent rights.

What might be surprising, and is apparently little-examined from a constitutional theory perspective, is the congressional delegation of aspects of those determinations to outside actors starting as early as 1793.[134] Non-governmental experts reached fact-based

133. Pub. L. No. 112-29 (codified at 35 U.S.C. § 1 et seq.), 125 Stat. 284 (2011).

134. Yale Law Professor Jerry Mashaw has descriptively discussed the three-member patent board under the 1790 Act as an example from the First Federal Congress of an "independent commission" and has written magisterial compilations of the variety and breadth of early administrative agency practice. *See, e.g.*, *supra* note 91. He acknowledges that the patent-granting commission of 1790, however, operated very differently from twentieth-century commissions in that it consisted of governmental actors already holding preexisting offices and, thus, already subject to a preexisting accountability structure for the performance of their duties. *See* 1 Stat. 109 (constituting a board composed of the Secretary of State, the Secretary of War, and the Attorney General). His early work focuses on identifying the range of administrative agency activity during historical practice rather than focusing on either potential Appointments Clause implications or providing in-depth assessment of constitutional delegation implications for

determinations relevant to patent validity, sometimes issuing determinations that were nonreviewable within the Executive Branch. Many of these determinations constituted just empirical assessments of whether an invention measured up to a patentable standard or ministerial assessments of whether patent applicants had satisfied statutory procedural requirements. But in certain instances, outside actors were authorized to resolve disputes between two competing patent applicants or even reverse determinations issued by the head of the office with no mechanism for further review outside of the Article III court system. Here are their stories.

A. 1790 Patent Act

The 1790 Act authorized the Secretary of State, the Secretary of the War Department, and the Attorney General to grant patents in response to petitions of persons asserting they had invented or discovered a useful and new art, device, or improvement.[135] Any two of the three officials were to issue a "letter[] patent" in the name of the United States if they "deem[ed] the invention or discovery sufficiently useful and important."[136] The issuance of the letter patent granted to the petitioner and his heirs the exclusive right of making, using, and selling the invention for a term of up to 14 years.[137] The letters of patent subsequently were to be delivered for examination to the Attorney General who was to certify them within 15 days of

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the role of private actors. Professor Edward Walterscheid has published extensive historical work detailing the role and structure of patent decisionmakers under the 1790, 1793, and 1836 acts—focusing on the development of substantive standards for issuing patents such as the origins of the first-to-invent rule in the United States. *See, e.g.*, Edward C. Walterscheid, *The Early Evolution of the U.S. Patent Law: Antecedents (5, Part II)*, 78 J. PAT. & TRADEMARK OFF. SOC'Y 665 (1996); Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953 (2007) (critiquing the work of Walterscheid and discussing the early evolution article among others). The collective law review literature, however, does not appear to include assessment of the officer status of the participants on the multi-member review boards or a constitutionally grounded assessment of the permissibility of delegation of responsibility to such private actors.

135. Section 1, 1 Stat. 109, 109–10 (section 1).

136. *Id.* at 110.

137. *Id.*

receipt if he found them adequate under the statute.[138] The Attorney General then was to present the letter to the President who affixed the seal of the United States to the letter. The Secretary of State's office maintained the records of granted patents and recorded their delivery to the patent grantee.[139] In addition to this letter patent process, Congress also enacted legislation to grant individual patents throughout the first few decades after constitutional ratification.

Prior to the 1790 act, inventors had petitioned individual state governments for patent recognition. Standardization, and availability, of patent rights across the country as a federal matter was a significant objective of the constitutional drafters and ratifiers.[140] There was no national mechanism for patent issuance under the Articles of Confederation.

The 1790 statute enacted by the First Federal Congress required the grantee of each patent to submit a written specification describing and explaining the invention that would enable the public to have the full benefit of the use and existence of the discovery after expiration of the patent term. The Act did not explicitly specify federal court jurisdiction over patent-related claims, but the existence of jurisdiction was implicit in the Act's provision that the patent specification would serve as admissible evidence regarding the patent in all courts and jurisdictions in which the patent right was questioned.[141] Along with the statutory provision for patent specifications to serve as "competent evidence" in patent disputes, the statute required a jury assessment of damages for infringements of patent rights.[142]

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138. *Id.*

139. *See id.*

140. *See* U.S. CONST. art. I, § 8, cl. 8 (listing among Congress's legislative powers, such as the authority to regulate interstate commerce, the authority "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (capitalization adapted)).

141. *See* 1 Stat. at 110–11 (section 2).

142. *See id.* at 111 (section 4).

In addition, the statute gave federal judges jurisdiction to evaluate motions made within one year of the issuance of a patent claiming that a patent was obtained under false pretenses.[143] The judge then had authority to require the patentee to "show cause why process should not issue against him . . . to repeal" an unlawfully obtained patent.[144] If the patentee could not rebut the charge, the judge was to "order process" against him.[145] The district court judgment that a patentee was not the first or true inventor also could result in the repeal of the patent.[146]

Inventors quickly grew frustrated with this process. By 1793, only 57 patents had been issued.[147] The three-member panel of two cabinet secretaries and the Attorney General could not keep up with the timely issuance of patent determinations in areas in which they did not have particular expertise.

Members of Congress therefore developed and evaluated several proposals to create a more efficient structure for evaluation of patent applications. For example, H.R. 41, introduced but not enacted, would have created a mechanism for "three indifferent persons" called "referees" to determine whether to stay the issuance of a patent. Each of two opposing parties to a patent application would have selected one of the referees and the Secretary of State would have selected the third. A version of this format appeared in the enacted 1793 Act. During a 1790 House debate on the patent system, there was discussion about whether parties instead were entitled to a patent priority determination by a jury, in part because of concerns that the Secretary of State's appointee would have disproportionate influence on the referee process. But the plea for a jury requirement was rejected. The consensus was that lay juries would

143. *Id.* (section 5).

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* P.J. Federico, *Operation of the Patent Act of 1790*, 85 J. PATENT & TRADEMARK OFF. SOC'Y 33, 39 (2003).

not be competent to decide technical issues associated with that kind of determination.[148]

B. 1793 Act

Then in 1793, Congress successfully enacted a patent process reform proposal.[149] This system swung in a wildly different direction, incorporating lower-level officials and even private actors into the patent determination process.

The lawmakers solved the problem of inefficiency and time constraints within the Executive Branch by limiting executive decisionmakers to making no truly substantive determination on the patent-worthiness or merit of a particular invention. Rather, executive officers had authority just to assess whether patent petitioners had satisfied all the statutory procedural requirements connected to the patent process. If patent petitioners had, initial paperwork was issued and executive branch consideration was complete. These executive officer roles were viewed as merely ministerial.[150] In particular, the 1793 act provided for presentation of a patent petition to the Secretary of State alone.[151] The Secretary of War and Attorney General no longer played a role in the initial determination of patent-worthiness.

As under the 1790 Act, the Secretary of State was to cause a letter patent to be "made out in the name of the United States, bearing teste by the President."[152] Thereupon the petitioner acquired the full and exclusive right to use that invention. Identical to the process under the 1790 Act, the Attorney General then certified that the letter complied with legal requirements, the President received the

148. *See* P.J. Federico, *The First Patent Act*, 14 J. PAT. OFF. SOC'Y 237, 247–48 (1932) (reprinting a record of the House Committee on the Whole debate on March 4, 1790).

149. *See* An Act to promote the progress of useful Arts; and to repeal the act heretofore made for that purpose, 1 Stat. 318 (1793).

150. *See, e.g.*, Grant v. Raymond, 31 U.S. (6 Pet.) 218 (1832).

151. *See* 1 Stat. at 319–21 (section 1).

152. *See id.* at 320–21.

letter for certification, and the patent bearing the seal of the United States was to be recorded.[153]

But distinct from the 1790 Act, the Secretary of State no longer had charge to substantively assess whether the patent application described an invention that met the statutory requirements for new and useful inventions. Instead, the patent applicant swore an oath testifying that he believed the invention was new.[154] The oath did not need to be made before a government official but could be sworn "before any person authorized to administer oaths."[155] Also, before receiving a patent, the inventor had to deliver a written description of the invention in terms sufficiently clear to distinguish it from all prior works. This particular requirement diverged from the 1790 provisions, which imposed no oath requirement for the inventor nor an oath requirement of any kind to accompany the written specification.[156] In addition, the 1790 act had authorized the granting of the patent contemporaneously with the prospective patentee's submission of a written specification rather than requiring a preliminary submission, as the determinations of the Attorney General and Secretaries resolved patent-worthiness at the time. At the time an applicant's paperwork attestations were not dispositive.[157]

Therefore, the 1793 requirements essentially left the process up to the prospective patentee's efforts to certify and verify his own invention. The applicant's description was to be signed by himself and two witnesses and would constitute "competent evidence" in any court where the subject matter of the invention came into question.[158]

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153. *See id.*

154. *See id.* at 321 (section 3).

155. *Id.*

156. *Compare id.*, *with* section 2, 1790 Act, 1 Stat. 109, 110–11.

157. *Compare* section 1, 1790 Act, 1 Stat. at 110, *with* section 3, 1793 Act, 1 Stat. at 321–22.

158. *See* 1 Stat. at 322 (section 3).

The 1793 act provided for federal circuit court jurisdiction of claims that a person had infringed on a patent right, subjecting the wrongdoer to a penalty of at least three times the cost to license the invention.[159] Allegedly infringing parties could raise as a defense the improper grant of the patent; judgment for the defendant in that case would result in a declaration that the patent was void.[160]

Where more than one applicant had a patent pending for the same invention, section 9 of the 1793 Act provided for arbitration of the interfering claims. This provision established a process to resolve the conflict generated where multiple parties had satisfied the threshold requirement of completing the paperwork to receive a patent.[161] The panel in charge of resolution of interfering applications was to consist of "three persons"—one selected by each of the two applicants and the third "appointed by the Secretary of State." Section 9 of the Act specified that "the decision or award of such arbitrators, delivered to the Secretary of State, in writing and subscribed by them, or any two of them, *shall be final*, as far as respects the *granting of the patent*."[162] Where either applicant should refuse to choose an arbitrator, the patent would issue to the opposing party. And where there were more than two interfering applications and the parties were unable to collectively agree upon "appointing three arbitrators," the Secretary of State had the power to appoint them.

The arbitrators were not selected in a fashion permissible under the Appointments Clause for either principal or inferior officers.[163]

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159. *See id.* (section 5).

160. *Id.* (section 6).

161. *See id.* at 322–23 (section 9); *see also id.* at 318–20 (section 1) (keying the issuance of the patent to an applicant's assertions and filings rather than to a substantive determination on the merits by the Secretary of State like the cabinet-level determinations for which the 1790 Act had provided).

162. 1 Stat. at 323 (section 9) (emphases added).

163. *See* U.S. CONST. art. II, § 2, cl. 2 (providing for only four modes of appointment: by the President alone, the President with Senate consent, a court of law, or an executive department head).

Although in cases with multiple applicants who could not agree on which examiners to appoint, the board members were selected by the Secretary of State—a department head capable of appointing inferior officers—the run-of-the-mill examination board was to have two members selected by the disputing parties themselves. Moreover, there was no requirement in the Act that the arbitrators take an oath prior to engaging in their duties, further indicating that Congress did not consider the arbitrators to be serving as governmental actors.[164]

Despite the arbitrators' role in the initial "granting" of a patent, the 1793 Act provided for Article III judicial determination of claims that a patent "was obtained surreptitiously," within three years of the patent's issuance.[165] District court rulings against the defendant were to result in the judgment of the repeal of the patent.[166]

C. 1836 Act

Although the 1793 system remained in place for more than forty years, it, too, led to dissatisfaction. The problem of untimely determinations by the three-member early 1790s panel of high-level governmental officials was in the past. But the 1793 system led to the opposite problem of patents that were too readily awarded.

In response, in 1836 Congress established a separate entity labeled the "Patent Office" that was "attached to the Department of State."[167] The "chief officer" was to be a Commissioner of Patents appointed by the President with Senate consent.[168] The act

164. *See* 1 Stat. at 322–23 (section 9) (excluding any reference to an oath, in contrast to the oath instructions in section 10). The existence of an oath requirement, however, was not uniformly tied to the governmental status of the oath-taker; on occasion Congress required private actors to provide sworn statements in verification of their assertions or actions as private citizens.

165. 1 Stat. at 323 (section 10).

166. *Id.*

167. 5 Stat. 117, 117 (section 1) (1836).

168. *Id.* at 117–18 (section 1).

subsequently described the commissioner as the "principal officer."[169] The commissioner, with the approval of the Secretary of State, was to appoint an inferior officer titled the "Chief Clerk of the Patent Office."[170]

Both officials and "every other person to be appointed" in the office were to "make oath or affirmation, truly and faithfully to execute the trust committed to him" prior to "enter[ing] upon the duties of his office or appointment."[171] Because the chief clerk and commissioner were to collect patent-related fees on behalf of the office, they also had to comply with another standard accountability mechanism for federal officers of the late eighteenth and early nineteenth century—they were to "give bonds with sureties to the Treasurer of the United States" in the amounts of $5,000 and $10,000, respectively.[172] The bonds were to guarantee that these two officers would render an accurate account on a quarterly basis of the payments they received for duties on patents and copies of patent records and invention drawings.[173] The act also included a conflict-of-interest provision, establishing that every person "appointed and employed in the office" was prohibited from acquiring, except through inheritance, any patent right granted after the enactment of the legislation during the period of their appointment.[174]

169. *Id.* at 118 (sections 2 and 3).

170. *Id.* (section 2).

171. *Id.* (sections 2 & 3).

172. *Id.* (section 3); *see also* An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, 1 Stat. 29, 44 (section 28) (1789) (requiring customs officers to give a bond payable to the United States "conditioned for the true and faithful discharge of the duties of his office according to law"); An Act to establish the Treasury Department, 1 Stat. 65, 66 (section 4) (1789) (requiring the Treasurer of the United States to give a bond "with condition for the faithful performance of the duties of his office, and for the fidelity of the persons to be by him employed").

173. 5 Stat. at 118 (section 3).

174. *See id.* (section 2).

The Commissioner had plenary supervision of the office, albeit "under the direction of the Secretary of State." He was "to superintend, execute, and perform, all such acts and things touching and respecting the granting and issuing of patents" and would "have the charge and custody of all the books, records, papers, models, machines, and all other things belonging to said office."[175] Patents from the office were to be issued in the name of the United States, signed by the Secretary of State, and countersigned by the Commissioner.[176]

Petitioners desiring patents were to submit a written application to the Commissioner who, "on due proceedings," had authority to grant a patent. The applicant had to make an oath asserting that he believed he was the original inventor of the submitted art and had to provide a specification of the invention that he had signed and to which two witnesses had attested.[177]

Under this Act, rather than the inventor's submissions resulting in the automatic grant of a patent, the filing of a patent application first triggered an examination by the Commissioner as to whether the invention was new. If the Commissioner concluded that the subject matter was indeed novel, then the Commissioner had the "duty to issue a patent" for it so long as he "deem[ed] it to be sufficiently useful and important."[178]

But when the Commissioner determined that the applicant was not the original inventor or an aspect of the claimed invention was not a new discovery, the Commissioner was to notify the applicant and provide him the opportunity to alter his written specification of the purported invention to attempt to justify the patent. The applicant could withdraw his application at that time and relinquish his claim. Or he could persist in his application.

175. *Id.* (section 1).
176. *Id.* at 118–19 (section 5).
177. *Id.* at 119 (section 6).
178. *Id.* at 119–20 (section 7).

If the Commissioner still concluded that the applicant was not entitled to a patent, then the applicant could appeal and submit a written request for a "board of examiners" to review the Commissioner's denial. The statute specified that the Secretary of State had to appoint "three disinterested persons" to constitute the board "for that purpose."[179] At least one of the examiners was "to be selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture, or branch of science to which the alleged invention appertains."[180] And board members were to take an oath to impartially perform "the duty imposed upon them by said appointment."[181]

D. Legal Status of the 1836 Boards of Examiners

The 1836 statutory language itself is highly suggestive of the discrete, nongovernmental status of the examiners to be hired. First, the statutory text intimated that the examiners were to be hired on a case-by-case basis. Otherwise, it would not be possible to select a panel examiner for knowledge of the specific skill relevant to the particular invention up for review by the board. Second, Congress required the examiners to take an oath to impartially fulfill just the duty imposed by their "said appointment" to reach resolution in a specific patent dispute.[182] Also, the statute referred to the examiners as "persons" rather than officers or employees of the government. And the examiners received remuneration on a fee-for-service basis rather than a salary.[183]

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179. *See id.* at 120 (section 7).

180. *Id.*

181. *Id.*

182. *See id.* ("[O]ne of whom at least, to be selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture, or branch of science *to which the alleged invention appertains*; who shall be under oath or affirmation for the faithful and impartial performance of the duty imposed upon them *by said appointment*." (emphases added)).

183. *Id.* Neither of these final two factors is dispositive. Other statutory provisions use the phrase "persons" at time to refer to officers. But often, in such a case, the

This understanding is apparently confirmed by the Patent Commissioner's 1839 annual report on patent officer operations to Congress in which he explained the roles of the boards and their inefficiencies.[184] The commissioner described the board as "occasionally appointed in cases of appeals" and mentioned that it was challenging to find adequately qualified individuals to serve on each appeal. He further described the delay in constituting a board whenever there is an appeal, indicating that the board did not consist of one set group reconvened repeatedly albeit intermittently to consider each appeal. After the submission of this report on the inefficiency of the 1836 board, Congress transferred the board's appellate review duties to the chief justice of the district court of the United States for the District of Columbia.[185] There is no recorded congressional debate over this particular feature of the 1839 act or the chief justice's special statutory review role.[186] And the 1836 boards were so short-lived that there are apparently no federal court reporter records of appeals from board actions. There are, however, several post-1839 chief justice decisions in the early federal reporters that provide insight into the character and scope of the review authority

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statutory scheme uses both the general term "persons" and the more particular term "officer." Here the examiners are never described as holding an office. Similarly, with payment on a fee-for-service basis, at times government officers also received compensation in this fashion—*e.g.*, customs officials in the First Congress received payment by fees connected to the imported goods that they processed. *See* 1 Stat. 29, 44 (section 29) (1789). But at least here, in this statutory scheme, other more ongoing positions are funded via salary rather than payment for services rendered "in each case."

184. H. Rep. Doc. No. 80, 25th Cong., 3rd Session (Jan. 14, 1839).

185. *See* 5 Stat. 353, 354 (section 11) (1839) ("[I]n all cases where an appeal is now allowed by law from the decision of the Commissioner of Patents to a board of examiners . . . the party, instead thereof, shall have a right to appeal to the chief justice of the district court of the United States for the District of Columbia, by giving notice thereof to the Commission, and filing in the Patent Office . . . .").

186. *See* Vol. 8, Congressional Globe, 26th Cong.; section 11, 1 Stat. 354, 354–55 (1839) (discussing the role of the chief justice under the new scheme, which replaces the 1836 board role).

that the 1836 boards and chief justice exercised.[187] The jurisdiction of the single-judge review starting in 1839 was similar to that of the 1836 boards. And because the ministerial nature of the grant of a patent did not substantially change under the 1839 Act, the legal significance of issuance of a patent under both the 1836 and 1839 acts, prior to judicial review via a bill in equity, remained essentially the same.

The board's adjudication of a patent applicant's appeal essentially pitted the Commissioner and the applicant against each other as two adverse parties. The board was to give "reasonable notice" to the Commissioner and the applicant of the time and place of a board hearing at which the two parties could provide the board with the "facts and evidence" they deemed "necessary to a just decision."[188] The Commissioner had the duty to provide the board with any relevant information he possessed.[189] Upon its "examination and consideration of the matter," the board—or a majority of its members—had the power to reverse the Commissioner's decision in whole or in part. Once the board's opinion was certified to the Commissioner, he was to be governed by it in any future proceedings he conducted on that patent application.[190] Traditional judicial review of past determinations was addressed separately, in section 12 of the 1836 act and section 11 of the 1839 act.

In addition to reversing the Commissioner's denial of an initial patent application, the board had the authority to reverse a Commissioner's denial of a challenge brought through an interference proceeding.[191] (The 1836 board and chief justice, in contrast, lacked authority to reverse a Commissioner's decision resulting in a patent

187. *See, e.g.*, Matthews v. Wade, 16 F. Cas. 1136 (C.C.D.C. 1850); Bain v. Morse, 2 F. Cas. 394 (C.C.D.C. 1849); In re Janney, 13 F. Cas. 349 (C.C.D.C. 1847); Pomeroy v. Connison, 19 F. Cas. 957 (C.C.D.C. 1842); In re Kemper, 14 F. Cas. 286 (C.C.D.C. 1841).

188. 5 Stat. 117, 120 (section 7).

189. *Id.*

190. *See id.*

191. *Id.* at 120 (section 7).

grant.) The board's jurisdiction included appeals from commissioner determinations on which of two pending applications had priority and whether a new application would interfere with any already-granted unexpired patent. If either the new applicant or the previous applicant was dissatisfied with the Commissioner's resolution "on the question of priority of right of invention," then the applicant could appeal from the decision to the board. This might occur in instances simply where the Commissioner had decided a new applicant had not demonstrated eligibility for a patent. But the terms of the statute also covered appeals where the Commissioner reached a decision against a patentee holding an unexpired patent that had been previously granted.[192]

Section 16 of the 1836 Act provided that whenever a patent application was denied through an adverse decision by "a board of examiners" on the ground of interference, the applicant or other person interested in the patent could have a "remedy by bill in equity." The court, after granting "notice to adverse parties and other due proceedings," had the power to declare the patents void or inoperative and invalid. The court could also issue a judgment that an applicant was entitled to receive a patent based on "the fact of priority of right or invention" in the case. If that adjudication favored the right of a patent applicant, then the adjudication authorized the Commissioner to issue the patent.[193] There was no available judicial review under the 1836 Act for commissioner decisions *granting* a patent or for ex parte denials of patent applications.[194]

Although by this account the 1836 boards of examiners sound like bodies with quite significant authority at least with respect to patents, they were reviewing what was essentially a ministerial

192. *See id.* at 120–21 (section 8). It is unclear from the rest of the context of this statutory provision, however, whether the board truly had charge over disputes challenging an already-existing patent because the provision continues on to provide that board proceedings were to resolve disputes "determin[ing] which or whether either of the *applicants* is entitled to receive a patent as prayed for." *Id.* (emphasis added).

193. *Id.* at 123–24 (section 16).

194. *See id.*

determination about whether patent applications had satisfied technical requirements.[195] There is little to no readily available evidence suggesting that the boards issued decisions in many instances. By 1839, Congress had eliminated the provision for this board of examiners.[196] In all cases where appeals to a board of examiners had previously been permitted, the 1839 Act instead gave the party the right to petition to the chief justice of the district court of the United States for the District of Columbia. Congress expanded the availability of judicial review under the 1839 Act, authorizing appeal for review to the Chief Justice under his special statutory review authority for patent denials on any ground.[197]

There does not appear to be a record of congressional debate in 1836 over the role of the boards and whether the use of outside boards to reach final findings related to patent determinations raised any constitutional concerns. The boards lasted only until 1839 when Congress eliminated them in favor of immediate appeals to the chief justice of the federal district court in Washington, D.C. Patent scholar P.J. Federico's examination of relevant records reported fewer than 10 board of examiner determinations prior to the change in the procedure in 1839.[198]

The 1839 commissioner's report suggests that the motivation for the 1839 elimination of the 1836 boards was practical rather than constitutional. The 1839 commissioner report describes the board review procedure as inefficient and ineffective because the federal government did not pay enough for their services to draw skilled examiners. The boards were revisiting so many complicated issues related to patents that the board reconsideration process had

195. *See* Mascott & Duffy, *supra* note 21, at 27.

196. *See* 5 Stat. 353.

197. *See id.* at 353–54 (sections 10 and 11).

198. P.J. Federico, *Evolution of Patent Office Appeals*, 22 J. PATENT OFF. SOC'Y 838, 841–42 (1940).

become unwieldy.[199] The 1836 Act had authorized only up to $10 compensation per matter.[200] Because the boards were reviewing evidence and taking on the factual review of the entire record, the board of examiner appeal process was quite lengthy. The compensation for each proceeding was inadequate to motivate qualified individuals to take on the assignment.[201]

E. 1839 Act

The 1839 Act provided that the chief justice of the D.C. district court would have authority to review any type of Commissioner determination that had previously been subject to board of examiner review. In cases lacking two private parties, the Commissioner was to be served by the challenging party. The chief justice was to decide issues on a summary basis and had jurisdiction over all issues that the 1836 Act had authorized for consideration by the intermittent boards of examiners. The 1839 Act also authorized the Commissioner of Patents to promulgate regulations for taking evidence in contested cases.[202] In that way, the 1839 Act tried to standardize the process for evaluating contested patent determinations.[203]

III. OFFICERS UNDER THE CONSTITUTION? THE ROLE OF THE 1836 AND 1839 PATENT REVIEW STRUCTURES

Starting as early as the mid-nineteenth century, Supreme Court case law and other contemporary legal sources, such as Floyd Mechem's 1890 treatise on officers, observed that to hold an office

199. Letter from Henry L. Ellsworth, Comm'r, U.S. Patent Off., to Senator John Ruggles, Jan. 29, 1836 [hereinafter Ellsworth letter].

200. 5 Stat. 117, 120 (section 7) (1836).

201. *See* Ellsworth letter, *supra* note 199.

202. *See* 5 Stat. 353, 354–55 (1839) (sections 10, 11, and 12); *see also* Arnold v. Bishop, 1 F. Cas. 1165, 1166 (C.C.D.C. 1841).

203. *Cf. Arnold*, 1 F. Cas. at 1166 (noting that the Commissioner had not made any provision in the procedural rules he promulgated for the adjudication of patent applications to make exceptions from those rules, suggesting that the same procedures should be in place for each proceeding).

subject to constitutional constraints like the Appointments Clause, one must hold a position with "tenure, duration, emolument, and duties."[204] For example, the Mechem treatise specified that the key indicator of governmental officer status was whether one had been delegated some of the "sovereign functions of government."[205] It further refers to public office as a "permanent trust" beyond the performance of "transient and occasional duties" and cites authority noting that an "office is a special trust or charge created by competent authority." Such a trust involves action that "in its effects . . . will bind the rights of others."[206]

Principles from nineteenth-century cases and a treatise on officers suggest that where governmental actors such as Congress reach a policy-based assessment that governmental findings should incorporate expert determinations, the sovereign act has occurred at the point that Congress authorized and assigned weight to the expert assessment.[207] The actual expert assessment itself is not a separate sovereign act, but just a factbound determination or finding that the government can contract out to a private actor. Even where two parties disagree on the factual determination, the adjudication of that dispute also is not necessarily a sovereign act so long as an act of government is what finally gives the binding impact to the expert resolution.[208] In other words, as a historical matter, the use of an adjudicative actor to break a tie between two disagreeing

204. *See, e.g.*, United States v. Hartwell, 73 U.S. 385, 393 (1868) ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."). *See also* West, *supra* note 35.

205. FLOYD RUSSELL MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICERS AND OFFICERS 5 (1890) (explaining that delegation of "some of the sovereign functions of government" is the key indication of governmental officer status).

206. *Id.* at 3 n.2, 4.

207. *See, e.g.*, Auffmordt v. Hedden, 137 U.S. 310, 329 (1890).

208. *Cf. Mandatory Statutes—Appointing Power*, 8 Op. Att'y Gen. 41 (1856) (noting that the President needed to have the authority to reject a contractual agreement or the actor executing the contract would be exercising the power of an Article II officer subject to Appointments Clause constraints).

appraisers or patent examiners did not necessarily transform the resolution of the factual dispute into an inherently sovereign act.[209]

Further, government officials at the time recognized the ministerial nature of some of the relevant private actors' duties. For example, the Supreme Court explicitly recognized that under the 1793 act, executive officials conducted purely ministerial responsibilities in evaluating patents.[210] The Executive Branch recognized this ministerial nature of its authority. For example, an early nineteenth-century letter to the Secretary of State concluded that the Secretary had lacked discretion to decline to issue a patent once the prospective patentee had complied with the congressionally mandated application process.[211] And in 1831 the Attorney General opined that the State Department "acts ministerially rather than judicially in granting patents" and that patents issue from the Patent Office "upon the representation of the party, without entering into an examination of the question of right."[212] The Attorney General further concluded that where a question extended beyond procedural compliance and included the determination whether a patent will "confer any right on the patentee," the question was necessarily subject to "the decision of the court."[213]

Nineteenth-century decisions by the judges authorized in 1839 to review patent commissioner determinations also shed light on the understanding of the significance of the role of the post-commissioner review authorized under the 1836 and 1839 acts. There were relatively few appeals from commissioner denials during the

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209. *Cf.* MECHEM, *supra* note 205, at 3 n.2 (describing case law that indicates that court-appointed receivers and land commissioners establishing damages awards are not "public officers" within the constitutional meaning because their actions are "related especially to particular individuals and specific litigation").

210. *See, e.g.*, Grant v. Raymond, 31 U.S. 218, 241 (1832) (opinion of Marshall, C.J.) ("[T]he secretary of state may be considered, in issuing patents, as a ministerial officer. If the prerequisites of the law be complied with, he can exercise no judgment on the question whether the patent shall be issued.").

211. Patents for Inventions, 1 Op. Att'y Gen. 170, 171 (1812).

212. Patents, Patent Office, and Clerks, 2 Op. Att'y Gen. 454, 454–55 (1831).

213. *Id.* at 455–56.

period that the private three-member boards of examiners were in place, but scholars have identified fulsome records of nine appeals to boards of examiners in 1838.[214] Members of the board did not receive significant remuneration, being paid minimally for their work on each matter. The Patent Commissioner's 1838 report indicated that this sum was far too small to induce willingness to serve on the boards in light of the often extensive factual record that the board had to review to resolve a patent dispute.[215] In total, historians and records indicate that fifteen individuals served on the nine 1838 boards.[216]

The 1836 Patent Act required the members to take an oath to faithfully serve.[217] In practice the members then also set their own procedures for their proceedings—adopting rules governing testimony, depositions, and hearing schedules.[218] The board would sometimes grant continuances and hold proceedings over the course of multiple days.[219] The nine boards issued decisions in eight interference proceedings and one ex parte matter, affirming the Commissioner on five occasions and reversing him on three with one appeal being withdrawn.[220] According to a patent commissioner report, the board interpreted its role to include reexamination of the evidence, which could lead to lengthy service. According to Professor Federico, the rules that the boards established differed from case to case,[221] suggesting that the boards did not have binding sovereign authority to set the terms for future proceedings.

The chief judge had neither the responsibility nor the authority to rehear the evidence and was required by statute to evaluate the

214. *See* Federico, *supra* note 198, at 842.

215. Annual Report, Commissioner of the Patent Office (Jan. 1, 1839) (describing the need for reform).

216. *See* Federico, *supra* note 198, at 841.

217. *See id.* at 841–42.

218. *Id.* at 841–42.

219. *Id.*

220. *Id.* at 842.

221. *Id.*

appeal based on the evidence before the Commissioner.[222] Further, Attorney General Hoar in 1870 advised the Secretary of the Interior that he viewed the chief justice's role in patent review as ministerial and not "strictly judicial."[223]

The 1839 Act also provided for judicial review via a bill in equity of every refusal of a patent.[224] The 1836 Act, in contrast, had not provided for any judicial review of denials of ex parte applications—just of patent denials due to interference disputes between two competing applicants or between a new application and an unexpired patent.[225]

The first appeal under the 1839 Act reached Judge William Cranch in 1841.[226] Judge Cranch was the only judge hearing patent appeals from the Commissioner for 13 years.[227] Congress created the Circuit Court of the District of Columbia in 1801 and Cranch was appointed as chief judge in 1805.[228] According to Federico, Judge Cranch handed down opinions in only nineteen Patent Office appeals from 1841 to 1850.[229]

Several of these decisions contain characterizations of Judge Cranch's view of his role in the review of executive branch patent determinations. They suggest that he was acting in an executive capacity rather than as a source for Article III judicial review.

One interesting case involved a claim for a patent on improved Morse code technology. Although the challenge was brought as an interference proceeding, Judge Cranch concluded that both parties had developed a separate patentable contribution. After Judge Cranch attempted to retire in the early 1850s, Congress passed a bill

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222. *See* 5 Stat. 353, 354–55 (section 11–12) (1839).

223. Judge's Certificate in Patent Appeal, 13 Op. Att'y Gen. 265, 266 (1870).

224. *Id.* at 354 (section 10).

225. 5 Stat. 117; *see* Federico, *supra* note 198, at 840.

226. *See* Federico, *supra* note 198, at 845–46. *See also* In re Kemper, 14 F. Cas. 286 (C.C.D.C. 1841).

227. *See* Federico, *supra* note 198, at 848.

228. *Id.*

229. *Id.* at 848–49.

permitting appeal to assistant judges of the D.C. Circuit Court in addition to the chief judge of that court.[230] At first some applicants refused to appeal to anyone other than Judge Cranch who was no longer hearing cases, which Federico indicates was a means for the prevailing party below to indefinitely delay appeal.[231] The Patent Commissioner at the time tried to intervene by issuing an order to compel transfer of appeals to the assistant judge from the docket of Judge Cranch, threatening to immediately grant a patent to the party who prevailed below if the parties did not transfer the appeal.[232] Attorney General Caleb Cushing put a stop to this approach in 1853, however, by opining that such an order violated the 1839 Act, which gave applicants a legal entitlement to appeal to a chief judge.[233] The fact that the Attorney General, a senior executive branch official, believed he could issue such an order and require the parties to proceed a particular way suggests that he believed the Commissioner had supervision over the mechanics of this review process and that it was internal to the executive branch.

Intriguingly, in 1861, Congress created a new board of three examiners-in chief who served as an intermediate review body between the frontline examiner and the Commissioner of Patents.[234] These examiners were subject to presidential appointment with Senate consent and earned a statutorily prescribed annual salary.[235] These distinct, more formal arrangements underscore through contrast the more intermittent, service-for-hire nature of the 1836 boards who stood in review of Commissioner determinations. Over a span of just twenty-five years, the appellate, privately hired boards had been replaced by permanent intermediate appellate boards of examiners whose decisions were subject to higher-level

230. *See id.* at 850–51.
231. *See id.* at 851.
232. *Id.*
233. 6 Op. Att'y Gen. 38 (1853).
234. 12 Stat. 246, 246–47 (section 2) (1861).
235. *Id.*

review by the Commissioner, rather than the hired-by-case intermittent examiners whose determinations could supersede Commissioner patent denials. Professor Federico, however, indicates that the intermediate appellate review of these boards likely had already been part of informal practice within the Patent Office, in some form, before Congress formally provided for the appointment of the intermediate board by statute.[236] The 1857 annual report provided to Congress regarding the patent office also referenced the existence of some kind of intermediate board review in light of the Commissioner's inability to singlehandedly hear and fully consider all appeals from the initial examiner decisions.[237]

If these observations accurately reflect the practice, an intermediate appeals board that Congress eventually established in 1861 subject to presidential appointment with Senate consent initially existed in some form without statutory authorization of any kind. In his description and analysis of this practice, Professor Federico notes, however, the distinct nature of the role of the board review prior to its statutory authorization as a distinct entity in 1861 –- "the board in effect acted *for the Commissioner* in an appeal to him directly from the initial examination and a separate appeal from the board to the Commissioner did not exist."[238] Federico's description is consistent with Chief Judge Cranch's description of patent practice in one of his decisions affirming a commissioner patent denial in 1850. In the opinion reviewing the denial of a patent for improvements to steamboat propellers, Judge Cranch disputed the commissioner's oblique reference to board of examiner review in 1850 that could have been read to suggest the board had power over the commissioner. Judge Cranch explained that he had "no knowledge of any legal board of examiners in the patent office having power or authority to affirm or reverse the decisions of the commissioner of

236. *See* Federico, *supra* note 198, at 854–55; In re Aiken, 1 F. Cas. 226 (C.C.D.C. 1850).

237. Federico, *supra* note 198, at 855–56 (quoting REPORT OF THE COMMISSIONER OF PATENTS FOR THE YEAR 1857 (1858)).

238. *Id.* at 856 (emphasis added).

patents."[239] The 1839 Act transferred the power of the 1836 boards to the district judge. And without statutory authority for board review, Judge Cranch said, review within the patent office must be either by the commissioner himself or "with the aid of such examiners as [the commissioner] may assign for that business."[240] In a clear nondelegation statement, Judge Cranch declared that the commissioner "cannot transfer to [the examiners], or any of them, his own power to decide." Further, the commission "cannot constitute them a board of examiners, known in law as such," as any nonstatutory examiners would be "but the assistants of the commissioner in the discharge of his duties."[241]

This distinction could have had significant relevance for the constitutional import of the board's role, in that the intermediate trio of actors would have been serving merely as adjuncts to the Commissioner, or in his shadow, prior to the genesis of their own statutory role providing separate review as a function of their separately created office in 1861.

Professor Federico does not identify any analysis of the constitutional nature of the informal board in the mid-nineteenth century. But the construct of actors performing adjunct roles in the shadow of a constitutional officeholder, rather than holding their own independent position, extends as far back as the First Federal Congress in 1789.[242]

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239. *In re Aiken*, 1 F. Cas. at 227.

240. *Id.*

241. *Id.*

242. *See* Mascott, *Officers*, *supra* note 17, at 515–23; Aditya Bamzai, *The Attorney General and Early Appointments Clause Practice*, 93 NOTRE DAME L. REV. 1501, 1507–08 (2018); *see also* United States v. Eaton, 169 U.S. 331, 343–44 (1898) (concluding that vice consuls temporarily carrying out the duties of a consul when that office is vacant serve only as "de facto" officers in the consul seat, without actually taking on the "character" of consuls: "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official . . . [t]o so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer . . . ").

At the time that the chief judge of the D.C. district court was authorized to hear patent appeals in 1839, the District of Columbia did not yet have its own separate local court system.[243] Underscoring the nonjudicial nature of the appeal to the judge during that timeframe, remarks by a congressman in 1870 explicitly noted the nonjudicial nature of the appeal from commissioner decisions.[244] He referred to the review as that of "the action of a single judge" that did not necessarily align with the decisions of other judges sitting in review at that stage or decisions by the commissioner,[245] suggesting that the determination was not that of a member of a cohesive court or judicial review body. The congressman further, more pointedly, described the appeal to the sole D.C. judge authorized by the 1839 Act as "to an officer who is neither an executive officer nor a judicial officer in the act he is required to perform, but only judicial in name."[246]

The role of this not-quite-judicial officer does not technically raise the *Arthrex* concern derived directly from the Court's Appointments Clause doctrine, in that the D.C. judges were each appointed by the President with Senate consent. So even if the D.C. judge hearing the patent appeal was deemed to be issuing a final decision that was still within the Executive Branch, the judge nonetheless still would have been appointed properly under the *Arthrex* rule that only principal officers can reach final executive branch determinations regarding patent adjudications.[247] That said, the Court in *Arthrex* also suggested that Director review was required of PTAB inter partes decisions because the Vesting Clause requires certain supervisory review of decisions before they become final for the Executive Branch.[248] If the D.C. judges empowered to hear appeals under the 1839 statute indeed were still engaged in executive

243. *See* Voorhees, *supra* note 63, at 919–20.
244. *See* Federico, *supra* note 198, at 859.
245. *Id.* at 859 (quoting CONG. GLOBE, 41st Cong. at 2679–83 (Apr. 14, 1870)).
246. *See id*.
247. *See* United States v. Arthrex, 141 S. Ct. 1970, 1985 (2021).
248. *Id.* at 1976.

decisions when reviewing Commissioner appeals, then *Arthrex* would suggest a potential problem. That is, so long as the judge was not somehow subordinate to executive branch supervisory control when issuing the patent review. Or perhaps the patent issuance role at the time was so pro forma and ministerial, with little legal consequence other than registering a patent request, in which case the review of the Commissioner determinations was not necessarily a binding *sovereign* act.

To that point, in the same set of remarks, Congressman Jenckes described the 1836 board of examiner appeals as originally involving only a narrow review of facts that over the course of the next several decades had expanded to covering questions of law.[249] That characterization of the 1836 examiner board review as addressing only factual determinations is consistent with the description of the review function in the 1830s decisions themselves that reviewed Commissioner patent denials. If the examiner boards sat simply as expert evaluators of the technical nature of an invention to objectively measure its patentworthiness, then the implications of those boards for the significance of the exercise of authority outside Article II constraints is relatively limited. Rather than asserting authority to develop the law or gap-fill, make final determinations about an individual's affirmative entitlement to a patent, or even create new regulatory procedures for adjudications, the boards would have looked much more analogous to the fee-for-service weighers, gaugers, and measurers of the 1789-era customs operations than to a standard-creating body or a prosecutor acting without direct executive supervision.

Congressman Jenckes's primary concern about the subsequent role of the post-Commissioner review, once it was taken over by D.C. judges per the 1839 statute, was that it had expanded to cover too many significant questions such as legal issues core to patent

249. Federico, *supra* note 198, at 859–60 (quoting CONG. GLOBE, 41st Cong. at 2679–83 (Apr. 14, 1870)).

determinations.[250] There was no uniformity of decision because the review of Commissioner denials was relatively ad hoc.[251] And Congressman Jenckes goes so far as to describe the reviewers as "assum[ing]" to themselves "some of the executive powers of the Commissioner" as well as "quasi judicial powers." The review determination apparently was not viewed as a true judicial determination, and this aspect of it seemed to be motivating some of the concern of Congressman Jenckes, who lamented that "[t]he vice" of the system and what Congress wanted to amend was that the officer reviewing Commissioner determinations was "neither an executive officer nor a judicial officer in the act he is required to perform, but only judicial in name."[252] Consequently, it would have made no difference as a constitutional matter whether the individual hearing the appeal was "one out of four" or "one out of two hundred and forty" or a judge of the D.C. supreme court or a member of the U.S. House of Representatives, in Congressman Jenckes's view.[253]

In 1869, the patent commissioner at that time more explicitly opposed the process of appeal to a single judge in its entirety.[254] He noted that there was no mechanism for en banc review, so that there was no consistency in the administration of the patent system resulting from that system of review.[255] This 1869 annual patent commissioner report also described the appeal to a single judge as an encroachment on the executive duties of the Commissioner—constituting yet another source suggesting that this unique review of Commissioner determinations was an addendum to the executive

250. *See id.*

251. *Cf. id.* at 860 (describing the analysis at the time that a judge's actions had been "so irregular with respect to procedure and his conception of the law of reissues so peculiarly incorrect" that the Commissioner at one point "refused to issue the patents" required by one of the judges' determinations and orders).

252. *Id.* at 859.

253. *See id.*

254. *See* Federico, *supra* note 198, at 862–63 (quoting 1 ANNUAL REPORT OF THE COMMISSIONER OF PATENTS FOR THE YEAR 1869 (1871) [hereinafter 1869 ANNUAL REPORT]).

255. 1869 ANNUAL REPORT, *supra* note 254, at 11.

process of evaluating patents rather than an exercise of judicial review.[256] The commissioner of course had reason to contest the role of a non-patent office official in reviewing his determinations. But it is noteworthy that his specific objection was that it was being "asserted that the judge, and not the Commissioner, is the head of the Patent Office."[257] The commissioner urged Congress to alter this state of affairs on the ground that by 1869, the single judges were being "authorized to interfere and to overrule the Commissioner in any order or rule which the latter may make or attempt to execute."[258] These single judges were forcing the issuance of patents that the Commissioner, in his role as titular head of the patent office, had determined should be denied. And the mechanism for the review was described as a "summary appeal,"[259] suggesting it was less like judicial review and more like a decision by a supra-executive. The 1869 report also highlighted that the patent commissioner believed that the single-judge appeal mechanism precluded final "determination of the rights of the parties" because it precluded the office from enforcing prompt decisions[260]—further underscoring that the review process seemed to operate as an extension of the patent office's own executive operations. Nonetheless, it seemed to still be primarily factual in nature, as the commissioner reported that ninety percent of the appeal cases "involve[d] mere questions of fact."[261]

Finally, this appeal existed separate and apart from the authority that Congress had granted to applicants to file bills in equity in any circuit court in the 1839 patent act replacing the 1836 examiner boards with the single-judge executive review process.[262] In contrast to the more limited judicial review available under the 1836

256. *See id.* at 11–12.
257. *Id.* at 12.
258. *Id.*
259. *See id.* at 11–12.
260. *Id.* at 13.
261. *Id.*
262. *See id.*; 5 Stat. 353, 354 (section 10) (1839).

Act, the 1839 Act permitted the filing of a bill of equity to judicially challenge the denial of a patent on any ground.[263]

In 1841, in *Arnold v. Bishop*, Chief Judge Cranch affirmed one of the patent commissioner's application denials in an interference proceeding. Arnold had challenged the commissioner's factual determinations and alleged that they were based on testimony inadmissible under the rules of the patent office. In this opinion, Judge Cranch sets forth the facts of the case and the evidence presented to the patent office. For example, he relies on depositions to establish the story of the sequence of the discovery of the alleged invention. He also assesses which technology was part of the invention and finds that "[t]he man who reduces to practice the theory of another who assists in the reduction of it to practice cannot be considered as the sole inventor of the machine."[264] With this conclusion, Judge Cranch was not interpreting the scope of the patent statutes but simply evaluating the criteria that justify patentability. He further found that the relevant invention at issue "consisted both of the discovery of the principle and the reduction of it to practice."[265] That said, subsequent reports by patent commissioners suggest that the decisions by Chief Judge Cranch and other judges sitting as lone adjudicators did not have precedential value. Therefore, no uniform new body of law was established by the decisions reviewing the initial Commissioner patent *denials*. Judge Cranch also reached determinations resolving inconsistencies in the facts within depositions relevant to the patent application and evaluated witness credibility. He ultimately rejected the admission of additional evidence and affirmed the patent denial. And he applied statutory provisions in the 1836 and 1839 Acts indicating that one loses their right to a patent by failing to object to the public use of their invention over a two-year period.[266]

263. *Compare id.*, *with* 5 Stat. 117, 123–24 (section 16) (1836).
264. *See* Arnold v. Bishop, 1 F. Cas. 1165, 1167 (C.C.D.C. 1841).
265. *See id.*
266. *See id.* at 1168.

Separate and apart from this particular review process, the 1836 and 1839 acts also authorized the pursuit of judicial review through a bill of equity. If an Article III court determined upon review that the Commissioner or D.C. chief judge had improperly denied a patent, that Article III determination would effectively authorize the statutory grant of the patent so long as the applicant followed the pro forma steps of filing a copy of the adjudicative determination and complying with the Act's remaining procedural requirements.[267]

One month after his initial October 1841 decision in *Arnold v. Bishop*, Judge Cranch reconsidered the matter.[268] That second time, the judge indicated that he had heard additional arguments on the admissibility of a certain deposition.[269]

Judge Cranch's opinions generally relied fairly heavily on statutory interpretation, and he extensively discussed relevant detailed provisions from the 1836 and 1839 patent acts. For example, in the November 1841 reconsideration of the patent denial in *Arnold v. Bishop*, Judge Cranch noted that the statutory provisions requiring the patent applicant to be the inventor and prohibiting three parties from jointly being deemed inventors required the commissioner here to deny the patent request.[270]

In the November 1841 rehearing, Judge Cranch also described the mechanics of the review process in significant detail. He described his role as the chief justice reevaluating the petition as one who was to revise commissioner determinations in a "summary way on the evidence produced before the commissioner at such early and convenient time as he may appoint." The commissioner had to have notice of the proceeding and then was supposed to submit all of the "original papers and evidence in the case," the grounds of his

267. *Id.*
268. *See* November 1841 rehearing, Arnold v. Bishop, 1 F. Cas. 1168, 1168 (1841).
269. *See id.*
270. *Id.*

decisions in writing.[271] The judge was permitted to review only those issues related to reasons for the appeal. As a practical matter, this might mean affirming the commissioner even if the judge uncovered an error unrelated to the precise issues raised on appeal.[272]

Not only could the judge consider only those issues raised on appeal, but the judge's proceedings governed further commissioner decisions only with respect to the grounds for patent denial actually raised on appeal. If the judge sustained the commissioner denial, the commissioner could not subsequently revisit his earlier denial on those same grounds. At the same time, a commissioner could reject a patent even after a justice had reversed an initial denial so long as the commissioner identified a new basis for denial upon further review. The judge's reversal of the original denial was binding only with respect to the grounds actually considered on appeal.[273]

Intriguingly, in another indication that the judge's review of Commissioner patent details did not operate like typical judicial review, Judge Cranch's patent-related determinations include a fair degree of unsettling of his own earlier determinations. Also, Cranch was relatively candid about his perceptions of the limitation on his patent dispute resolution authority. For example, upon review of his earlier *Arnold* decision, Cranch suggested that he had correctly concluded he held the authority to determine whether Mr. Arnold qualified for a public-use exception. Cranch opined that he should not have reached the issue about whether a patent can issue for an invention that has been in the public use for two years. Judge Cranch indicated that portions of his old opinions to the contrary should be debated and destroyed. He also indicated that he thought part of his former opinion was extra-judicial and should be withdrawn.[274]

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271. *Id.* at 1169.
272. *See id.* at 1170.
273. *See id.*
274. *See id.*

Another of the few opinions decided under the 1830s system of appellate review of the Commissioner patent denials—*Bain v. Morse*—involved Judge Cranch's review of a development related to Morse code technology.[275] In challenging the patentability of Morse's invention, Bain's attorney argued evidentiary procedure, characterizing the limits of the evidence of the relevant technology presented to the commissioner and to the D.C. federal judge.[276] Bain's counsel contended that parties could call both the patent commissioner and the examiners to testify under oath explaining the principles of the machine for which a patent is requested but that the commissioner and examiners could not give opinions or describe facts on other aspects of the matter.[277] Morse's attorney helpfully summarized aspects of the commissioner's decision in the matter, and described the decision as concluding that the new Morse development "was new, original, useful, and therefore patentable."[278] One key aspect to the determination was the assessment whether the specification describing the patent had been adequate for people skilled in the relevant art to understand and use the invention.[279] The adequacy of the specification was a critical component of an invention's patentability, particularly at the time, because the legal system placed value on patentability and awarded this legal protection due to the benefit it would bring to the public through access to the new technology.[280] In addition to assessing the technology, the excerpts from the commissioner determination also discussed relevant procedure, observing that the evidence before the commissioner was the model of the relevant technology and drawings and specifications and that the law had not provided for testimony to show the insufficiency of the models

275. *See* Bain v. Morse, 2 F. Cas. 394 (C.C.D.C. 1849).

276. *Id.* at 396.

277. *See id.*

278. *Id.* at 398.

279. *See id.* at 397–98; *see also* Arnold v. Bishop, 1 F. Cas. 1165 (C.C.D.C. 1841) (discussing the requirements for the specification).

280. *See generally* Mossoff, *supra* note 134.

of a patent application.[281] The commissioner saw the question of the adequacy of the models for entitlement to a patent as up to his discretion, explaining that "[t]he sufficiency of the models, drawings, and specifications is a question, so far as it affects the issue of a patent, which is reserved alone for the commissioner" and which the commissioner "determines . . . upon the evidence submitted by the party making the application."[282] Morse's attorney then contended that only questions considered by the commissioner could be brought to the D.C. judge during the single-judge appeal procedure.[283]

At least as of this 1849 decision, both parties briefed the case before the single judge and made arguments regarding specific grounds of appeal on which the review was requested.[284] Morse's attorney also described his view of the entirety of the American system of patent law. Morse contended that an inventor's title to an invention was "absolute the moment his patent is sealed and signed by the proper officers" and that U.S. law "knows no such thing as a conditional patent."[285] In contrast, according to Morse, English law permitted a patent to be granted but made it conditional and ultimately at risk of becoming void if a specification were not turned in within four to six months.[286]

The Attorney General had been called in during the case to offer an interpretation of provisions within the 1836 Act allocating priority between American and foreign inventions.[287] The Attorney General's opinion referred to the Act as containing a "clear rule of adjudication, by which the rights of parties are ascertained."[288] He indicated that a contrary interpretation, submitting a U.S. invention

281. *See Bain*, F. Cas. at 398.
282. *See id.*
283. *See id.* (referencing 5 Stat. 353, 354 (section 11) (1839)).
284. *See id.* at 396–98.
285. *Id.* at 399.
286. *See id.*
287. *See id.* at 402–03.
288. *Id.* at 403.

to come behind a foreign invention in priority, was "directly opposed to the intent, the policy, and express words of the act of Congress" and "without any legal foundation."[289]

In his opinion, Judge Cranch described the role of the court's review and the review of the 1836 boards. He first noted that the commissioner's decision could not have been conclusive under the 1836 Act because parties were permitted to object to the decision in certain instances.[290] Judge Cranch also spoke to his jurisdiction and concluded that he had jurisdiction to determine questions of priority of inventions and interference. During the course of issuing his ruling on the telegraph-related claim, Judge Cranch also opined on legal questions such as concluding that an inventor is not obligated to request separate patents on each new patentable matter but instead could ask for a patent for a combination of materials.[291] Although on this point, rather than contending that he was pronouncing new law, Judge Cranch cited a patent law treatise, suggesting that he was simply reaching his decision by applying previously established patent practice principles.[292] Even if the invention was a combination of multiple materials, none of which would be independently patentable, the combination itself might nonetheless be a patentable invention.[293] Judge Cranch later in the opinion also relied on the patent law notion that an abstract principle cannot be patented.[294] He needed to reach his own conclusions of statutory interpretation, however, by opining on which sections of the 1836 Act were most applicable and under which statutory subsections the dispute in the case arose.[295]

289. *See id.*
290. *See id.* at 403–04.
291. *See id.* at 405–07.
292. *See id.* at 407.
293. *See id.*
294. *Id.*
295. *See id.*

The current executive branch test for officer status, at least by its terms, maintains consistency with this standard.[296] And Congress has for more than one hundred years authorized the performance of significant tasks by entities considered to be private rather than governmental. For example, as Professor Aditya Bamzai points out in his analysis of the character of the role and functions of the early national banks, the prevailing view at the time of the creation of the Bank of the United States was that it "was a private entity that performed non-sovereign functions for the benefit of the public."[297] This was so even though it performed currency-making functions, which were not necessarily considered to be inherently sovereign tasks at the time.[298] In the context of analyzing entities such as the first two banks, Professor Bamzai concludes that the national bank provided "good evidence that the delegation of certain functions by the federal government to nominally private—though heavily regulated—entities does not necessarily violate the separation of powers." He then asks the natural follow-on question, however, "whether there are any limits" to the nature of the delegated power.[299] He notes that the Court has indicated that an entity operates as governmental if it exists to further governmental objectives

296. *See, e.g.*, *Officers of the United States*, *supra* note 89, at 98, 103, 106, 122 (determining that federal officers are those who have been "delegated by legal authority a portion of the sovereign powers of the federal government" and thus are in a continuing office; non-officers include those who have "an occasional and transitory appointment", or serve in positions that were "summoned into existence only for *specific temporary purposes*," or who work in a position where the rules of that position were defined by contract or the position involves "a subject matter . . . of a temporary and limited character" (quoting *Contract With Architect of Public Buildings*, 5 Op. Att'y Gen. 754, 754–55 (1867)), and noting that contractors do not hold a government office because even where they "assist the Government in carrying out its sovereign functions, their actions . . . have no legal effect on third parties or the government absent subsequent sanction").

297. Aditya Bamzai, *Tenure of Office and the Treasury*, 87 GEO. WASH. L. REV. 1299, 1346 (2019).

298. *See id.* at 1354–55.

299. *See id.* at 1384–85 (discussing the Supreme Court's conclusion in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), that just deeming an entity private does not necessarily pass muster under the separation of powers if the entity in fact operates in a governmental capacity).

and the government functionally controls the entities through its appointees.[300] Those questions do not seem to come into play with the hired boards of examiners of 1836, as those experts were hired just for one-time services.

So long as the actors like the 1836 board members were not conducting tasks of the kind that cannot be delegated to completely private actors, then their lack of tenure and even their lack of meaningful government supervision would be irrelevant. Private actors not improperly engaged in tasks inherently involving the exercise of sovereign authority would be outside the constitutional scope of the typical accountability requirements applicable to government officers such as the oath requirement and the Appointments Clause.

As noted above in Part I, determinations related to the patentability of inventions were one of just several categories of early practice in which Congress involved private actors in governmental tasks. In 1790, Congress established a system in which the equivalent of private contractors would be hired to assess the weight and size of imported goods for purposes of determining the customs due on imported items.[301] In addition, Congress provided for the hiring of surgeons to conduct autopsies on the corpses of the deceased. And Congress employed private prosecutors by authorizing relators to bring actions on behalf of the government to enforce certain legal requirements. Evidence suggests that Congress used private actors to perform intermittent services to constrain the size

300. *See id.* at 1385.

301. *See* 1 Stat. 145, 154 (1790); *see also, e.g.*, Auffmordt v. Hedden, 137 U.S. 310, 312 (1890) (discussing the nongovernmental role of general appraisers who could reverse a collector's import duty determination; the appraisers, "wherever practicable," were to be two experienced merchants who would separately appraise the item; any difference of opinion on the value of the item would be resolved by the collector whose determination of true value would be final); *id.* at 326–27 (observing that Appointments Clause constraints do not apply to the selection or hiring of such individuals).

of the federal government and avoid creation of multiple new, unnecessary federal offices.[302]

At least with respect to the customs evaluations and the autopsies, non-governmental actors were being hired for expert services in which they completed measurements or other types of empirical assessments—actions that are not inherently exercises of sovereign authority. Therefore, the delegation of those tasks to private actors would not implicate constitutional concerns. It is possible that the Executive Branch's position that officers exercise delegated sovereign authority to bind third parties or the government in fact explains the distinction between an inherently governmental act and a non-governmental act—not the line between Article II officers versus low-level employee status under the Appointments Clause. The historical standard for qualifying as an "officer" under the Appointments Clause, rather, seems to be any actor employed by the government on a continuing basis to perform any type of statutory duty, regardless of the level of significance or exercise of discretion inherent in that duty.[303]

IV. PUBLIC-PRIVATE ARRANGEMENTS & MODERN PRACTICE

This section briefly explores ways in which the non-governmental determinations of empirical patent questions in the eighteenth and early nineteenth centuries might relate to questions still very alive today regarding the constitutionality, and propriety, of non-governmental actors reaching determinations that assist in, or inform, the performance of governmental functions. Issues related to the incorporation of private actors into governmental tasks arise in the context of, *e.g.*, arbitration panels, self-regulation and self-

302. *See, e.g.*, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627 (Max Farrand ed., 1911) (Madison's comments during constitutional drafting/ratification suggesting that the federal government should use state officials for even governmental functions like tax collection to alleviate the need to hire a massive force of federal officers; *see also Officers of the U.S.*, *supra* note 89, at 78.

303. *See* Mascott, *Officers*, *supra* note 17, at 454; *see also Officers of the U.S.*, *supra* note 89, at 122.

certification procedures,[304] and recommendations by advisory entities adjudicating government-regulated disputes.[305]

A refocus on the modest role played by outside experts in nineteenth-century patent adjudication through the application of relatively straightforward legal or technical standards to facts might provide a model for more reliance on non-governmental experts in contemporary patent law practice, rather than a system of complete reliance on patent officers within a system that is plagued with few supervisors who can meaningfully oversee work inside the office.[306] Revisiting the contours of executive branch decisionmaking in the early nineteenth century might also shed additional light on the proper dividing line between *judicial* resolution of private patent property rights and *executive* ministerial determination of the satisfaction of requisite requirements to attain eligibility for a patent.[307]

The Supreme Court's blessing of the executive branch revocation of already-issued patents in *Oil States* resolved the Court's view of

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304. *See, e.g.*, Lu Junhong v. Boeing Co., 792 F.3d 805, 808–10 (7th Cir. 2015) (interpreting the federal removal statute for cases involving federal officers—codified at 28 U.S.C. § 1442(a)(1)—not to apply to Boeing, which had contended that it was "acting under the Federal Aviation Administration because the FAA ha[d] granted Boeing authority to use FAA-approved procedures to conduct analysis and testing required for the issuance of type, production, and airworthiness certifications for aircraft under Federal Aviation Regulations" (internal quotation marks omitted)).

305. To take one example, the Affordable Care Act mandates adoption of certain board and commission-issued recommended best medical practices. *See* 42 U.S.C. § 300gg-13(a)(1)–(4). A recent lawsuit challenged the permissibility of this arrangement under the Appointments Clause. *See* Complaint –- Class Action, No. 4:20-cv-00283, Kelley v. Azar (N.D. Tex. Mar. 29, 2020) [hereinafter *ACA Challenge*].

306. *Cf.* Mascott & Duffy, *supra* note 21, at 242–44, 254–61 (discussing the challenges of the shortage of principal officers with supervisory authority in the current patent office).

307. *See generally* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) (analyzing the line between permissible executive adjudication and matters that must be resolved by the Article III judiciary as a matter of first principles); Mascott, *Constitutionally Conforming Agency Adjudication*, *supra* note 111 (discussing the constitutional due process distinctions between adjudicative matters involving traditional private property interests and punitive penalties versus those involving public rights or government-managed resources).

the constitutionality of that executive role.[308] But Congress, as a policy matter, could reexamine whether the 2011 Leahy-Smith America Invents Act correctly marked the boundary line between the branches and whether the potential for greater political executive patent determinations through more robust Appointments Clause constraints counsels for revising that line.

Under current practice, there are numerous means by which private actors support or assist with governmental functions. This Part will close by unpacking and discussing contemporary skepticism about the constitutionality of delegating to private actors any authority that is truly governmental[309] as well as contemporary executive branch positions on the delegation of authority to non-governmental actors. Finally, the section will assess the distinctions between the functions delegated to the 1793 and 1836 experts and the functions performed by APJs in contemporary PTAB inter partes proceedings and other contemporary public-private arrangements.

Public-private arrangements appear in a number of contemporary forms. The existence of these arrangements merits taking a closer look at the constitutional issues of executive supervision and direction—where private actors are reaching final or binding determinations—that might be in play in light of *Arthrex*. To the extent such determinations are occurring within processes involving the exercise of sovereign authority, there may be new constitutional issues in play in light of *Arthrex*. There might need to be consideration of whether the application of the *Arthrex* principles to patent appeals adjudication also suggests that the exclusive vesting of "executive" power in the President means that private actors cannot actually have final say in acts in which sovereign authority inheres.

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308. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365 (2018); *see also generally* Mossoff, *supra* note 134; Michael S. Greve, *Exceptional, After All and After* Oil States*: Judicial Review and the Patent System*, 26 B.U. J. SCI. & TECH. L. 1 (2020).

309. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 56–58 (2015) (Alito, J., concurring).

The development of non-binding standards or recommendations, on the other hand, could be permissible.

Several examples with potentially broad reach may merit evaluation. For example, within the Affordable Care Act ("ACA"), Congress authorized boards to assess what types of medical services are critical for children to receive at certain ages. Congress made the decision to require adoption of these expert guidelines for certain determinations authorized by the ACA. The role of these boards and task forces is now subject to ongoing legal challenge in federal Texas court for alleged Appointments Clause and delegation violations. Attorney Jonathan Mitchell, who helped to develop the conception of Texas's "S.B. 8" before the Supreme Court in 2021, is the architect of this current legal challenge against the ACA.[310] Congress had authorized the U.S. Preventive Services Task Force and other entities such as the Advisory Committee on Immunization Practices to identify necessary preventive services, keying certain health insurance coverage requirements to the list of services that these groups deem necessary for categories of covered individuals.[311]

In addition, Congress has at times even authorized private actors to self-regulate and determine for themselves, as administered through self-reporting, whether they are complying with certain federal standards.[312] And although these officials are often not viewed as purely private actors, either Congress or executive actors through regulation have authorized temporary counsels to wield prosecutorial authority outside of the typical presidential appointment and Senate confirmation process for principal executive

310. *See ACA Challenge*, *supra* note 305. The Court considered a pre-enforcement challenge to the Mitchell-designed S.B. 8 in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021).

311. *See* 42 U.S.C. § 300gg-13(a)(1)–(4).

312. *See, e.g.*, Lu Junhong v. Boeing Co., 792 F.3d 805, 808–10 (7th Cir. 2015) (opinion of Easterbrook, J.) (federal regulatory requirement that Boeing must "assess and certify the airworthiness of its planes" does not make it a federal actor for purposes of the federal removal statute, 28 U.S.C. § 1442(a)(1)).

officers. Special Counsel Mueller was authorized to investigate former President Trump under DOJ regulations establishing the terms for certain special counsel investigations. Most recently, the Second Circuit just beat back an Appointments Clause challenge to special prosecutors selected by district judges, over a strongly worded dissent.[313]

About these types of arrangements, however, Justice Breyer—writing for the Court in 2007—said that although a formal delegation of power from the federal government to a contractor might transform the actor into a federal entity for purposes of the federal removal statute, the mere requirement that the company self-regulate or monitor/certify compliance with federal law is inadequate to do so.[314] According to the Court, "neither Congress nor federal agencies normally delegate legal authority to private entities without saying that they are doing so."[315]

In 2015, however, Justice Alito raised significant constitutional questions in a concurring opinion regarding the accountability mechanisms that must be in place when arbitrators formulate standards that themselves bind other regulated parties.[316] Justice Alito agreed with the Court in an appeal from a D.C. Circuit decision involving governmental power exercised by Amtrak[317] that Amtrak was a federal actor for constitutional purposes because the Government specifies a number of its day-to-day operations and oversees significant aspects of its annual budget. He highlighted the principle that "[l]iberty requires accountability" because the electorate must be able to "readily identify the source of legislation

313. *See* Donziger v. United States, 38 F.4th 290 (2d Cir. 2022); *id.* at 306 (Menashi, J., dissenting); *see also* Petition for a Writ of Certiorari, Donziger v. United States (No. 22-274) (Sept. 20, 2022).

314. *See* Watson v. Philip Morris Cos., 551 U.S. 142, 145 (2007) (opinion of Breyer, J.).

315. *Id.* at 157.

316. *See Ass'n of Am. R.R.*, 575 U.S. at 58–62 (Alito, J., concurring) (raising concern about the delegation to arbitrators of the development of "metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations").

317. Ass'n of Am. R.R. v. Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013).

or regulation that affects their lives" or Government officials will "wield power without owning up to the consequences."[318] For example, if a governmental operation can be passed off "as an independent private concern," then government might be able "to regulate without saying so."[319] In his view, the requirement that federal officers take an oath to support the Constitution and receive a commission is critical for accountability, not an empty formality, because it marks those who exercise governmental power as "set apart from ordinary citizens" and subject to "special restraints."[320] Therefore, the absence of a requirement that Amtrak board members take a constitutional oath raised grave questions about the propriety of Amtrak exercising rulemaking authority, in Justice Alito's view. He also questioned the propriety of private actors exercising arbitration authority.[321]

Section 207(a) of the Passenger Rail Investment and Improvement Act requires Amtrak and the Federal Railroad Administration (FRA) to jointly establish minimum standards and metrics for measuring the quality of intercity passenger train operations.[322] These standards and metrics have tangible effect because Amtrak and private rail carriers must incorporate them into service and access agreements whenever practicable.[323] Noncompliance can prompt investigations and subsequent enforcement actions.[324]

According to Justice Alito, "[t]he fact that private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts by itself makes this a regulatory

318. *Ass'n of Am. R.R.*, 575 U.S. at 57 (Alito, J., concurring).

319. *See id.*

320. *Id.* at 57–58.

321. *See id.* at 58–62.

322. Section 207(a), Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4907, 4925–27 (codified at 49 U.S.C. § 24101).

323. *Ass'n of Am. R.R.*, 575 U.S. at 58–59 (Alito, J., concurring).

324. Section 213(a), Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4907, 4925–27 (codified at 49 U.S.C. § 24308(f)).

scheme."[325] Obedience to the standards would materially reduce liability risk, and that "powerful incentive[] to obey" creates an inherent potential coercive effect. Therefore, by helping develop those standards Amtrak was operating in a governmental capacity, Justice Alito reasoned.[326] Justice Alito maintained concerns about such power being exercised by a private actor, as Amtrak at the time was operating as a private entity without following any of the typical constitutional mechanisms for accountability in the exercise of sovereign power such as officials having to take an oath to act consistently with the Constitution.[327]

Justice Alito concluded that Amtrak was operating in a governmental fashion even though the entity did not have final supervisory authority over its determinations. The Amtrak board members were to issue final regulatory standards and metrics decisions in conjunction with the FRA, similar to the PTAB members' need to coordinate at least on some level with the USPTO Director.

Section 207(d) then provided authorization for more private actor decisions—in addition to empowering Amtrak to participate in establishing potentially binding regulatory standards, the Act permitted parties to request appointment of an arbitrator if the FRA and Amtrak failed to reach agreement on the regulatory standards.[328] The Act described the potential arbitration as binding.[329]

The private actor in this case challenged the potential role of the arbitrator as potentially an unconstitutional delegation of governmental power to a private actor.[330] The government in the case did not dispute that the arbitrator would engage in binding power; rather the government urged the Court to consider the arbitrator a

325. *Ass'n of Am. R.R.*, 575 U.S. at 59 (Alito, J., concurring).

326. *See id.* at 57–60; *see also id.* at 46 (majority opinion) (finding that Amtrak is governmental for constitutional purposes despite any statutory pronouncements to the contrary).

327. *See id.* at 58–59 (Alito, J., concurring).

328. *Id.* at 59–60.

329. *See id.* at 60.

330. *See id.*

public actor. The role of the arbitrator was to force compromise between the FRA and Amtrak.[331] So the statute thereby at a minimum stacked the deck for compromise. Justice Alito concluded in no uncertain terms that if such authority were to be held by a private actor, then it would be an unconstitutional exercise of will.[332]

Twenty years earlier, in 1995, the Office of Legal Counsel ("OLC") within the Justice Department had evaluated the appropriate role of private actors within governmental operations through the mechanism of binding arbitration.[333] This opinions is the most recent significant executive branch analysis of the proper role of arbitration under constitutional constraints like the Appointments Clause and provides a sort of bookend to the use of private actors for services that the First Federal Congress employed.

The 1995 OLC opinion reexamined past executive branch positions and concluded that neither the Appointments Clause nor any other constitutional doctrine or provision generally prohibits the federal government from entering into binding arbitration.[334] The opinion found the Appointments Clause entirely irrelevant to the question of the proper scope of authority delegable to private actors. Without opining on a precise standard, the opinion noted, however, that the Constitution nonetheless imposes "substantial limits on the authority of the federal government to enter into binding arbitration in specific cases," possibly through delegation constraints.[335] Still, the opinion suggested that quite a bit of responsibility had been, and could be, lawfully delegated to private actors, including the authority to resolve disputes through arbitration and a degree of regulatory or adjudicative authority.

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331. *See id.*

332. *See id.* at 60–61.

333. *Binding Arbitration*, *supra* note 49 (opinion by former Assistant Attorney General Walter Dellinger).

334. *Id.* at *1.

335. *Id.* at *19.

These conclusions shifted position from the President George H.W. Bush-era view that the Appointments Clause bars the United States from entering binding arbitration. The shift was first signaled in a 1994 OLC advice memorandum and then formalized and further explained in the 1995 opinion.[336] In an early 1990s Department of Justice litigation manual the Department had indicated that arbitrators needed to be selected under the Appointments Clause to enter into binding arbitration on behalf of the government.[337] The constitutional provisions other than the Appointments Clause that OLC had evaluated for constitutional constraints on arbitration included "the non-delegation doctrine and general separation of powers principles."[338] The memorandum noted, however, that the phrase "binding arbitration" is susceptible of a range of meanings and the constitutional analysis for whether it is appropriate can thus differ from case to case.[339]

This 1995 opinion makes clear that private, or temporarily serving, actors are still widely used by the government today. For example, there are citizen suit provisions within the Clean Water Act, there have been governmental mechanisms providing for independent or special counsels to exercise prosecutorial authority without holding a permanent position, private industry groups have at times been authorized to formulate particular standards, Indian tribes have some authority to enforce laws, and private industry groups have at times been allocated adjudicative authority by Congress.[340] Assessing the proper scope of their role will be critical as the Supreme Court continues to try to figure out the degree to which executive power vested in the President must be more fully and directly supervised by him and his direct reports as a constitutional matter.

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336. *See id.* at *1 & n.2.

337. *See* U.S. DEP'T OF JUST., GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION FOR LITIGATION IN THE FEDERAL COURTS 4 (1992).

338. *Binding Arbitration*, *supra* note 49, at *3 & n.7.

339. *See id.* at **17–18.

340. *See id.* at *3, *8.

CONCLUSION

The patent boards of examiners authorized by Congress in 1836 were discrete panels of non-governmental actors selected to conduct expert examination of patent claims. The board members therefore were neither inferior or non-inferior officers or even government "employees" as they held no ongoing position and were to be hired case by case. Early practice focuses primarily on using non-governmental actors as contractors to perform outside empirical services, such as weighing imported goods, evaluating the technical similarity of patent claims, or completing expert medical exams. Discussions of the definition of governmental officers as opposed to outside experts leading up through the early nineteenth century support the use of outside actors to conduct ministerial tasks, not necessarily to engage in the exercise of delegated authority to bind third parties or the government regardless of the narrow scope of the authority.

EQUAL PROTECTION AND THE UNBORN CHILD: A *DOBBS* BRIEF*

JOHN FINNIS** & ROBERT P. GEORGE***

* This Article brings together the authors' Amicus Brief filed in *Dobbs* on July 29, 2021, their subsequent Enhanced Amicus Brief in *Dobbs*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3955231, and their Supplement to an Enhanced Amicus Brief in *Dobbs*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3973183. It retains the broad outline and (with minor corrections) the whole content of the filed Brief, while expanding it fourfold with historical material and analysis.

EDITOR'S NOTE: Due to the nature of this piece as an adapted amicus brief, the authors have elected to retain some in-text citations as opposed to footnotes in the ordinary Bluebook style.

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INTRODUCTION

Roe conceded that if, as Texas there argued, "the fetus is a 'person' within the language and meaning of the Fourteenth Amendment," the case for a constitutional right to abortion "collapses."[1] But then the Court hurdled over text and history to an error-strewn denial that unborn human beings are persons under the Amendment.

Scholarship exposing those errors has cleared the ground for a reexamination of Texas's position in *Roe*. While recalling that scholarship, this brief sheds fresh light on the Amendment's original public meaning, focusing on common-law and pre-Civil War history (including primary material) that previous scholarship has not adequately noted or explored. That history proves that prohibitions of elective abortions are constitutionally obligatory because unborn children are persons within the original public meaning of the Fourteenth Amendment's Due Process and Equal Protection Clauses.

SUMMARY OF ARGUMENT

The originalist case for holding that unborn children are persons is *at least* as richly substantiated as the case for the Court's recent landmark originalist rulings.[2] The sources marshalled in such decisions—text, treatises, common-law and statutory backdrop, and early judicial interpretations—here point in a single direction.

First, the Fourteenth Amendment, sustaining and going beyond the Civil Rights Act of 1866, guaranteed equality in the fundamental rights of persons—including life and personal security—as these were expounded in Blackstone's *Commentaries* and leading American treatises. The *Commentaries*' exposition *began* with a discussion

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1. Roe v. Wade, 410 U.S. 113, 156–57 (1973); *see also* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 779 (1986) (Stevens, J., concurring). Both *Roe* and Texas overlooked a three-judge district court majority's cogent defense of fetal constitutional personhood in Steinberg v. Brown, 321 F. Supp. 741, 746–47 (N.D. Ohio 1970).

2. These rulings include *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); and *Crawford v. Washington*, 541 U.S. 36 (2004).

(citing jurists like Coke and Bracton) of unborn children's rights as persons across many bodies of law. Based on these authorities and on landmark English cases, state high courts in the years before 1868 declared that the unborn human being throughout pregnancy "is a person" and hence, under "civil and common law, . . . to all intents and purposes a child, as much as if born."[3]

From the earliest centuries at common law, (1) elective abortion at any stage was to "no lawful purpose" and functioned as an inchoate felony for not just one but two felony-murder purposes, and (2) elective abortion was an *indictable* offense at least when the woman was "quick with child"—a phrase with shifting meanings identified below.[4] (And contrary to *Roe*'s potted history, the sources show that the common law's concern was to protect the child's life, not simply to outlaw procedures dangerous to the mother.[5]) By 1860, the "quick-with-child" prerequisite for indictments had been abandoned in a majority of states, because science had shown that a distinct human being begins at conception. Such obsolete limits to the common law's criminal-law protection of the unborn had been swept away in this cascade of statutes, in almost three-quarters of the states, leading up to the Amendment's ratification.

In the 1880s, the Supreme Court held that corporations are "person[s]" under the Equal Protection and Due Process Clauses.[6] The rationale—combining the Blackstonian understanding of persons (as natural or artificial) with a canon of interpretation first expounded by Chief Justice Marshall and central to originalism today—itself blocks any analytic path to excluding the unborn. Indeed, the originalist case for including the unborn is much stronger than for corporations.

These textual and historical points show that among the legally informed public of the time, the meaning of "any person"—in a

3. Hall v. Hancock, 32 Mass. (15 Pick.) 255, 257–58 (1834).

4. *See* discussion *infra* Section I.A.4.aa.

5. *See infra* note 87.

6. *See* Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394 (1886).

provision constitutionalizing the equal basic rights of persons—plainly encompassed unborn human beings.

Second, the only counterarguments by any Justice—and by the sole, widely discredited legal-historical writer cited in *Roe*—rest on groundless extrapolations and plain historical falsehoods subsequently exposed in scholarship that has never been answered, to which this Brief adds some new evidence.

Finally, acknowledging unborn personhood would be consistent with preserving the nation's long tradition of deference toward state policies treating feticide less severely than other homicides and guarding women's rights to pressing medical interventions that may cause fetal death. Nor would recognizing the unborn require unusual judicial remedies. It would restore protections deeply planted in law until their uprooting in *Roe*.

ARGUMENT

I. UNBORN CHILDREN ARE CONSTITUTIONAL PERSONS ENTITLED TO EQUAL PROTECTION OF THE LAWS.

The Fourteenth Amendment bars States from depriving "*any person* of life . . . without due process of law" or denying "to *any person* . . . the equal protection of the laws."[7] It was adopted against a backdrop of established common-law principles, legal treatises, and statutes recognizing unborn children as persons possessing fundamental rights.[8]

7. U.S. CONST. amend. XIV, § 1 (emphasis added).

8. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 605–16 (2008) (interpreting original public meaning based on Ratification Era treatises, antebellum case law, and Civil War Era legislation).

A. The Common Law Considered Unborn Children to Be Persons.

Authoritative treatises—including those deployed specifically to support the Civil Rights Act of 1866, which the Fourteenth Amendment aimed to sustain and enhance[9]—prominently acknowledged the unborn as persons. Leading eighteenth-century English cases, later embraced in authoritative American precedents decades before ratification, declared the general principle that unborn humans are rights-bearing persons from conception. And even before a nationwide wave of statutory prohibitions of abortion in the mid-nineteenth century, the common law firmly regarded abortion as gravely unlawful from the moment—supposed to have been established by science—when there emerged a new individual member of the human species, a human being. The treatises, cases and statutes are identified and analyzed below, but it is not too early to state the three common-law criminal prohibitions that protected the unborn child's life, prohibitory rules that recur constantly in the exposition below. For at common law, century after century, any elective abortion engaged three indictable offences, three types of homicide:

[I] [*pre-natal* quasi-*felony-murder of the woman*] all attempts at elective abortion are so gravely unlawful when done that if they result in the death of the mother within a year and a day, they are murder;

[II] [*pre-natal* quasi-*felony-murder of the child*] all attempts at elective abortion are so gravely unlawful when done that if they demonstrably result in the child's death after being born alive, they are murder;

[III] every elective abortion is a serious misprision (near-felony) or very grave misdemeanor, *at least* when it results in the aborting of the pregnancy of a woman "quick with child."

9. Congress, though not limiting itself to this purpose, drafted the Fourteenth Amendment to sustain the Act of 1866. *See* Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1391 (2018).

Protections [I] (quasi-felony murder of the mother) and [II] (murder by abortifacient of the child born alive) were generally left in place by the reforming statutes of the Ratification Era—the two decades before and after ratification of the Fourteenth Amendment. Those statutes focused on rule [III] (the crime of elective abortion as such). More or less unanimously, though with many differences of detail, they retained the position settled at common law by 1601: elective abortion as such, though a very serious crime, is not punished as murder or manslaughter, and the drawing of this distinction among kinds of unlawful killings is judged fully compatible with protecting the child in the womb as a person.

The distinction thus drawn between persons in the womb and persons partly or wholly outside the womb is in all our jurisdictions judged to be a distinction rationally and justly recognizing the unique situation of these two interdependent persons, the mother and her unborn child.

The common law and those reforming statutes agree that if the pregnant mother's life is threatened either by the presence of the unborn child or by a medical condition that cannot be relieved without termination of the pregnancy, such termination is fully lawful even though it foreseeably results in the death of the unborn child (just as, analogously, necessary measures of self-defense are fully lawful, and compatible with equal protection of the law, even when lethal). This Brief uses the term "elective abortion" to distinguish each of the three common-law rules, and their statutory successors, from such medical emergency cases.

Another relevant category of non-elective abortion—destruction of the child in the womb without the mother's consent—is given adequately distinct but also adequately balanced legal treatment only later than the Ratification Era. For although almost all the reforming statutes of that Era amend the common law by implicitly exempting the mother who consents to or requests abortion, it is, broadly speaking, only in the 20th century that closer reflection on just (equal) protection of the unborn impels many state legislatures to treat this other type of non-elective abortion as murder.

A final introductory note. Both the common-law cases and treatises, and then the countless statutes of the Ratification Era, speak almost without exception of "the (unborn) child," and almost never of "the fetus." This Brief accordingly speaks likewise. To follow the "fetus/fetal" usage common in legal circles today would to some extent, even if only subliminally, impede getting a clear view of the original public meaning of "deny to any person the equal protection of the laws" in the Equal Protection Clause ratified in 1868.

1. The Foundational Treatise

Blackstone's *Commentaries*, expressly teaching that unborn human beings are rights-bearing "persons," contributed enormously to the term's shared legal meaning in 1776–91 and 1865–68. Little wonder that when House Judiciary Committee Chairman James F. Wilson introduced the Civil Rights Act of 1866, he said:

> [T]hese rights . . . [c]ertainly . . . must be as comprehensive as those which belong to Englishmen . . . . Blackstone classifies them . . . as follows: 1. The right of personal security . . . great fundamental rights . . . the inalienable possession of both Englishmen and Americans . . . .[10]

Wilson was quoting Blackstone's *Commentaries*' first Book, "Of the Rights of Persons," and its first Chapter, "Of the Absolute Rights of Individuals." Wilson observed approvingly that the leading American treatise on common law—Kent's *Commentaries*—explicitly adopted Blackstone's categorization of these rights and description of them as "absolute"—natural to human beings.[11]

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10. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (March 1st, 1866).

11. *Id.* at 1118 (col. iii); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *123 (stating that "absolute *rights*" are those that "would belong to their persons merely in a state of nature, and which every man is entitled to enjoy"). (Blackstone uses "man" synonymously with "human being.") In this usage, rights are called *absolute* because they are *not conditional* either upon recognition and specification by positive law (whether common law or statute, or Civil or other laws), or upon relationships entered into with other individuals. *Id.* The Amicus Brief of the United States

Blackstone's analysis, presented as uncontroverted and familiar to Wilson's listeners in Congress, begins with the "right of personal security"—"*a person's* legal and uninterrupted enjoyment of his life, his limbs, his body, his health . . . ." And Blackstone's unfolding of this right of persons opens, *immediately* after Wilson's quotation, with *two paragraphs* about the rights of the unborn:

> 1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb.[12] For if a woman is

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rightly acknowledges the unequalled primacy of these pages of Blackstone as demonstrating the rights recognized "[a]t the Founding," precisely as "absolute rights" vested in persons "by the immutable laws of nature." Brief of the United States as Amicus Curiae Supporting Respondents at 22, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (citing pages *120, *125 and *130, but significantly omitting *129).

Present in the background is the fact rightly recorded in the Amicus Brief of the American Historical Association and the Organization of American Historians at 7, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392):

> Blackstone's "works constituted the preeminent authority on English law for the founding generation." Alden v. Maine, 527 U.S. 706, 715 (1999). James Wilson, who crafted the preamble to the U.S. Constitution, quoted and endorsed Blackstone's words in his seminal lectures of 1790: "In the contemplation of law, life begins when the infant is first able to stir in the womb." James Wilson, *Natural Rights of Individuals* (1790), *reprinted in* 2 THE WORKS OF JAMES WILSON 316 (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896).

The cited passage from Justice Wilson's 1790 lecture reads, more fully:

> With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.
>
> 2 THE WORKS OF JAMES WILSON 596–97 (Robert G. McCloskey ed., 1896).

12. BLACKSTONE, *supra* note 11, at *129–30 (footnote omitted). Nothing in Blackstone or Coke, Hawkins and other classic writers on the common law suggests that the phrase "able to stir" meant "felt by the mother to stir," as the Amicus Brief of the American Historical Association and the Organization of American Historians, *supra* note 11, asserts at 5 (opening paragraph of its Argument) and *passim*, erroneously stating: "At

> quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter.(*o*)[13] But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor.(*p*)

The penultimate sentence's footnote "(*o*)" quotes a line from Bracton in Latin about abortion as homicide; the final sentence's footnote (*p*) cites a passage in Coke's *Institutes* that ends by quoting the same line from Bracton.[14] (These two sentences about one ele-

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common law, as explained by authorities such as Coke and Blackstone, life was deemed legally to begin only when a pregnant woman sensed the fetus stirring in her womb." Nothing would have been easier to say, but Coke, Blackstone, and the others neither say nor imply it. From Bracton through the American founding era, common-law criminal law fixed its attention almost entirely on the unborn child's formation and animation—that is, its life as a distinct individual, and its consequent *ability* to move or stir—not on the mother's usually much later experiences of the child's making its presence felt by its stirring and kicking. *See infra* at notes 64, 66, 78.

13. American editions of 1 COMMENTARIES, based on Edward Christian's 1793 edition, here insert a note stating that if the child is born alive and dies from the abortion it will be murder, and those who administered the potion or advised the woman to take it will be liable as accessories before the fact to the same punishment. See for example the 1822 and 1860 editions mentioned *infra* note 14, or the 1818 edition by publishers in Boston, Philadelphia, Baltimore, Washington City, and Georgetown, D.C.

14. For the passage from Coke (3 INST. 50) and the sentence that both Coke and Blackstone quote from Bracton, see text *infra* after note 66. Note that the quotation above is from 1 COMMENTARIES's first edition, Oxford 1765, pp. 125–26; in its second edition, 1768, and thereafter the editions in Blackstone's lifetime—including the first American edition, Boston 1774—these paragraphs are at pp. 129–30 and the first paragraph's last sentence reads: "But *Sir Edward Coke doth not look upon this Offence* in quite so atrocious a light, but merely as a heinous misdemesnor" (emphasis added). (In later American editions such as the second American edition, Boston 1799, the 1822 New York edition, or George Sharswood's many editions, *e.g.*, Philadelphia 1860, it reads: "But the modern law doth not look on this offence in quite so atrocious a light, but merely as a heinous misdemeanor.") The change makes it evident that by 1768 Blackstone had decided that he would not articulate the "present" position in his own voice until his full treatment of homicide in vol. 4, the first edition of which was in 1769. There he deals with type [III] protection of unborn life not as a misdemeanor but, more serious, "a great

ment—type [III]—in the criminal law's protection of unborn children's right to life are closely analyzed below, along with the fuller, contextualized treatment that students using 1 *Commentaries* knew they would find in Blackstone's treatise on criminal law, 4 *Commentaries*.[15]) The second of Blackstone's two paragraphs on unborn children's rights follows immediately, on a canvas much wider than criminal law protections:

> An infant *in ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It[16] is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.[17]

These two paragraphs received intense and merited attention from American courts and lawyers. The *first* paragraph's first sentence concerns the natural right of a living individual possessing human nature.[18] Blackstone here points to *natural realities* calling for legal embodiment, and to a *doctrine of common-law* criminal law that constitutes such an embodiment. The doctrine he mentions here is not the only or even the most important doctrine recalled in these paragraphs to illustrate the rights of the unborn, but it is mentioned immediately, in view both of the section's topic (the right to *life*)

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misprision," and—as with types [I] and [II]—makes (unlike Coke) no reference to the quickness or otherwise of the unborn child. *See infra* note 31.

15. *See infra* section I.A.3.a, and notes 34, 85, 100.

16. Blackstone uses "it" of born children as well as unborn. *See* BLACKSTONE, *supra* note 11, at *300 ("[T]he child, by reason of its want of discretion . . . .").

17. *Id.* at *129–30 (some footnotes omitted). Footnote 11(s) reads, translated: "Those who are *in utero* are understood in Civil law to be 'in the real world' [*in rerum natura esse*], when it is a matter/question of their benefit" (citing Justinian's *Digest* 1.5.26, save the last five words, which in fact give the gist of 1.5.7). Blackstone has cut two words to universalize the principle, which had read: "in *almost* the whole [*toto paene*] of the Civil law."

18. *See id.* at *133 ("This natural life . . . cannot legally be disposed of or destroyed by any individual . . . merely upon their own authority.").

and of what may be inferred from the treatment of natural realities "in contemplation of law."

This last phrase, in Blackstone, signals legal fictions:[19] here, a legal doctrine's treatment of the infant's ability "to stir in the womb"[20] as the start of life for some purpose. Blackstone follows this first paragraph—about the criminal law's narrow, defendant-protective conception of homicide (requiring a "stir[ring]," perhaps partly for evidentiary reasons)—with a paragraph sketching laws that, *free* from artificial constraints, benefit all unborn humans. Thus he hints that the law bearing on rights of persons accommodates more than one "contemplation of law," more than one conception of the person, and may be refined.

For, quite generally and in all eras of our civilization, "person" can mean (1) a natural reality signified in our civilization by Boethius's definition ("an individual substance of a rational nature"), closely corresponding to the sense used in this foundational *Commentaries* text,[21] or (2) a social role signified by the term's root meaning *mask* or *assumed identity*—in which sense the law can deem anything a person (rights-bearing unit).

The Fourteenth Amendment uses "any person" (without qualifiers) paradigmatically in the first sense. Yet the Court, since the 1880s,[22] has also included corporations within "any person" because the meaning of "person"—in the then-prevailing linguistic-conceptual framework of a legally educated public brought up on Blackstone's *Commentaries*—linked under "the Law of Persons" (*the*

19. *See, e.g.*, *id.* at *270 ("[I]n contemplation of law [the King] is always present in court."). Legal fictions are found on a spectrum ranging from legally stipulated definitions close to ordinary-language conceptions of natural or other realities, through more or less technical and artificial terms of art, to outright contra-factual (fictive) propositions of law such as the one just quoted. See further *infra* section III.C.1 and notes 76, 129, 209, 213.

20. For the phrase, not then a legal term of art, see *infra* note 59.

21. *See* BLACKSTONE, *supra* note 11, at *130 (citing Coke for "reasonable creature"); *id.* at *300 (using that phrase for human being or person).

22. *See infra* section I.B.2.

topic of the whole of 1 *Commentaries*) both natural and artificial persons.[23]

Blackstone's *second* paragraph on unborn persons' rights states an even more pervasive common-law doctrine (construing common law broadly to include established equitable principles). Also essential to the legal context and meaning of "any person" in the 1868 Clauses, this doctrine treats the unborn as rights-bearing persons *from conception*, in many fields besides criminal law. It was developed and expounded in notable English cases adopted by leading state courts in the antebellum generation.

2. Status of Children in utero in American Civil Law

The leading case of *Hall v. Hancock*,[24] which cited many English cases, formulated this doctrine thirty-two years before the debates on the Civil Rights Act of 1866. The Massachusetts Supreme Judicial Court ruled unanimously, per Chief Justice Shaw:

> [A] child is to be considered *in esse* [in being] at a period commencing nine months previously to its birth . . . . [T]he distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases [and] does not apply to cases of descents, devises and other gifts; and . . . a child will be considered in being, from conception to the time of its birth in all cases where it will be for the benefit of such child to be so considered. . . .
>
> Lord *Hardwicke* says, in *Wallis v. Hodson*,[25] . . . that a child *en ventre sa mere* is a person *in rerum naturâ*, so that, both by the . . . civil and common law, he is to all intents and purposes a child, as much as if born in the [testator's] lifetime. . . .

23. *See, e.g.*, *id.* at *123, *467. 1 COMMENTARIES concludes with a chapter on the rights of "artificial persons," corporations.

24. 32 Mass. (15 Pick.) 255 (1834).

25. (1740) 26 Eng. Rep. 472, 2 Atk. 114, 116.

> *Doe v. Clarke*[26] is directly in point[,] . . . stat[ing] as a fixed principle, that wherever [it] would be for his benefit, a child *en ventre sa mere* shall be considered as absolutely born.[27]

This doctrine about the real and legal personhood of the unborn *from conception* was enunciated by an esteemed state chief justice not as a technical rule for one purpose but as a "fixed principle" "to all intents and purposes": the unborn is "a child, as much as if born" and "is a person *in rerum naturâ*."[28] The Georgia Supreme Court, too, in 1849, expressly applied that principle, paraphrasing Hardwicke and Shaw.[29]

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26. (1795) 126 Eng. Rep. 617; 2 H. Bl. 399.

27. *Hall*, 32 Mass. at 257–58.

28. *Id. See also in rerum natura*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("In the nature of things; in the realm of actuality; in existence."). The idiomatic sense in these contexts often approximates to "in the ordinary world," for instance, the "world" outside the darkness and anonymity of the womb, where the child is in "a world of its own," even its sex unknown to all, and unable to communicate or be communicated with even in a rudimentary fashion. For more on this routine phrase, always kept, elusively, in a foreign language, see *infra* notes 69, 76, and especially 218.

Lord Hardwicke's parallel decision in *Millar v. Turner* (1748) 27 Eng. Rep. 971, 1 Vesey Sr 85, shows how these cases correct the inference, adverse to the unborn, that might be drawn from Coke's statement, at 3 *Inst.* 50, that children are accounted *in rerum natura* when born alive. Hardwicke cites 3 *Inst.* 50 to support his statement that an unborn child "is considered as *in esse*," "the destruction of him is murder; which shews the laws [*sic*] considers such an infant as a living creature." *Millar*, 1 Vesey Sr at 86. The deliberate doing of the destructive act, though completed while the child in *in utero*, is murder, subject only to a condition subsequent: that the child be living, however temporarily and unviably, when delivered.

29. *See* Morrow v. Scott, 7 Ga. 535, 537 (1849) (posthumous child's share in estate on intestacy). Following 1 COMMENTARIES *130, Kent and Hardwicke in *Wallis* and *Clarke*, and Shaw in *Hall v. Hancock*, the Georgia Supreme Court quotes from the latter the rule that "in general, a child is to be considered as *in being*, from the time of its conception, where it will be for the benefit of such child to be so considered," and adds: "This rule is in accordance with the principles of justice, and we have no disposition to innovate upon it, or create exceptions to it. Let the judgment of the Court below be reversed." *Id.*

Given this general but pointed principle,[30] and the doctrinal architecture of Blackstone's *Commentaries* and thus of American legal education for the century preceding 1868, the original public meaning of "any person" in the fundamental-rights-regarding Equal Protection Clause included living preborn humans.

3. The Three Main Criminal Law Protections of the Unborn Child in American Common Law

a. In the Treatises

Blackstone's two sentences at 1 *Commentaries* *129–30 select just one of the three criminal law protections of the child *in utero* that he will expound at 4 *Commentaries* 198–201. There, in one sentence tracking the sentences from Coke that his first volume had cited at *130, Blackstone will affirm[31] that both [III] and [II] are grave offenses:

> [III] To kill a child in its mother's womb, is now no murder, but a great misprision : but [II] but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb it seems, by the better opinion, to be murder in such as administered or

30. *See* Botsford v. O'Conner, 57 Ill. 72, 76 (1870) (holding that a child *in ventre sa mere* is a "person" who "must have an opportunity of being heard, before a court can deprive such person of his rights"); *see also Wallis*, 26 Eng. Rep. at 473; Beale v. Beale (1713) 24 Eng. Rep. 373; 1 P. Wms. 244.

31. The context is Chapter 14, "Of Homicide," in BLACKSTONE, 4 COMMENTARIES (beginning at page *176). At page *188, sec. III., Blackstone explains that "[f]elonious homicide" is "the killing of a human creature, of any age or sex, without justification or excuse." Later, at page *194 and following, Blackstone discusses "deliberate and wilful *murder*.":

> In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first. [fn. 1 Hawk. P. C. 79.] Further; the person killed must be "*a reasonable creature in being, and under the king's peace,*" at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman; except he be an alien enemy in time of war. [fn. 3 Inst. 50. 1 Hal. P. C. 433.] To kill a child in its mother's womb, ...
>
> BLACKSTONE, 4 COMMENTARIES *197–98.

> gave them [fn. 3 Inst. 50. 1 Hawk. P. C. 80. *But see* 1 Hal. P. C. 433.].[32]

The passage treats the opinion of Coke (before Hale) and Hawkins (after Hale) as sounder, in this instance, than Hale's[33]—all three treatises being staple authorities in Blackstone's exposition of common-law criminal law. But Blackstone promptly goes on to affirm that [I] accidentally causing the death of the pregnant woman by consensual abortion is murder, and here a judicial ruling by Hale is his primary authority. Expounding homicide with implied or transferred malice, Blackstone says, about felony murder:

> And if one intends to do another felony and undesignedly kills a man, this is also murder.[fn. i 1 Hal. P. C. 465] Thus, if one shoots at A and misses *him*, but kills B, this is murder . . . The same is the case where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder.[fn. j Ibid. 466] So also, [I] if one gives a woman with

32. 4 COMMENTARIES (8th ed. 1778) 198. For the key passage here cited, 3 INST. 50, see *infra* p. 956.

33. SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 432–33 (1743) [hereinafter HALE, H.P.C.]:

> [T]he second consideration, that is common both to murder and manslaughter, is, who shall be said a person, the killing of whom shall be said murder or manslaughter. If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is *killed*, it is not murder or manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be [III] a great crime, and by the judicial law of Moses(*g*) was punishable with death, nor can it legally be known, whether it were kil[led] or not, [citation to Yearbook of Edward III] so it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this [II] is not homicide [citation to an earlier Yearbook]. (emphasis added).

Hale's first two sentences do not deny that the child *in utero* is a person. They deny only that it is a person *of the kind* whose killing is homicide as distinct from [III] "a great crime" (Coke's great misprision). *See infra* text accompanying note 224. But the last sentence does deny that killing the child after abortion is a type [II] indictable homicide, and in this view Hale is virtually alone and will be explicitly rejected by all the subsequent authoritative eighteenth and nineteenth century treatises circulating in America. *See infra* at notes 70–73.

> child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it.[fn. k Ibid., 429][34]

Notice: "a woman with child," that is, a pregnant woman—no reference to quickening. In this, Blackstone is following Hale, who—at the end of a vigorous argument concluding that physicians, even if unlicensed, are not guilty of homicide if the potion they give *intending to heal* in fact kills[35]—contrasts that position with the administration of abortifacients:

> But [I] if a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly, that it kills her, this is murder, for it was not given to cure her of a disease, but *unlawfully to destroy the child within her*, and therefore he that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder . . . [36]

"[M]ust take the hazard:" the real or pretended medical practitioner who engages in abortion does so at risk of being guilty of murder if his patient's death ensues, however skilfully he acted. For, as Hale's "unlawfully" only implies but Blackstone's exposition at 4 *Commentaries* *198 makes clear, this is a case both of felony murder—because destruction of the unborn child is *incipiently* felonious—and of transferred murderous malice ("malice aforethought")—because intent to destroy the unborn child is *incipiently* homicidal: if the aborted child is born alive and then perishes from the effects of the abortifacient, that is [II] murder.

The three types of criminal law protection of the unborn that are expounded by Blackstone were expounded both earlier and later in the criminal law treatises in use in America. The three offenses are set out economically in *Burn's Justice of the Peace*,[37] both the 1764

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34. 4 COMMENTARIES *200–01.

35. HALE, H.P.C., *supra* note 33, at 429.

36. *Id.* at 429–30 (emphasis added) (adding that he had given this ruling "at the assizes at *Bury* in the year 1670").

37. RICHARD BURN, JUSTICE OF THE PEACE, AND PARISH OFFICER (1764), 228–29.

English edition, and the 1792 American edition, *Burn's Abridgment, or The American Justice; containing the whole practice, authority and duty of justices of the peace; with correct forms of precedents relating thereto, and adapted to the present situation of the United States*,[38] addressed to justices in New Hampshire, Massachusetts, and Vermont and published in Dover, New Hampshire. The chapter on homicide, in its section on murder, treats the three offenses as a single unit: having set out Hale's ruling (H.P.C. 429) about lethal but not criminal medical mistakes, the section continues with Hale's ruling (H.P.C. 429) that [I] giving a potion "to destroy the child within her" is murder if it kills her; this is followed immediately by Coke's ruling (3 *Inst.* 50) that [III] "if a woman be quick with child, and by a poison or otherwise killeth it in her womb" this is "a great misprision but no murder;" and that is followed immediately by Coke's ruling that [II] it is murder if the child is born alive and dies from the abortifacient measure. A sub-paragraph reports Hale's opinion (1 H.P.C. 433) that it cannot "legally be known" whether the abortifacient killed the child or not, but gives the final word to Hawkins' (1 Hawk. 80) view that "it is clearly murder."

East's Pleas of the Crown. First published in London in 1803, Edward East's *Treatise of the Pleas of the Crown* was promptly published in Philadelphia in 1804 and 1806.[39] In the chapter on Homicide, after a terse but thoughtful presentation, in passing, of rules [II] and [III], there is an extensive discussion of *transferred* malice aforethought, including homicidal malice transferred from the unborn child to the pregnant mother, a discussion brought to bear on rule [I]:

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38. RICHARD BURN, BURN'S ABRIDGMENT, OR THE AMERICAN JUSTICE; CONTAINING THE WHOLE PRACTICE, AUTHORITY AND DUTY OF JUSTICES OF THE PEACE; WITH CORRECT FORMS OF PRECEDENTS RELATING THERETO, AND ADAPTED TO THE PRESENT SITUATION OF THE UNITED STATES (1792), 226 [misprinted 216]. An edition published in Boston in 1773 had referred only to Hale's opinion on types [II] and [III].

39. 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN (Philadelphia 1806).

> [ch. V, sec. 17, margin note: *Malice to one which falls on another*] In these cases the act done follows the nature of the act intended to be done. Therefore *if the latter were founded in malice*, and the stroke from whence death ensued fell . . . upon a person for whom it was not intended, yet *the motive being malicious*, the act amounts to murder; . . .
>
> . . . .
>
> . . . [margin note: 1 Hale, 429] Hither also may be referred the case of one who gave medicine to a woman; and that of another who put skewers in her womb, with a view in each case to procure an abortion; whereby the women were killed. Such acts are clearly murder; though the original intent, had it succeeded, would not have been so, but only a great misdemeanor; for *the acts were in their nature malicious* and deliberate, and necessarily attended with great danger to the person on whom they were practised.[40]

The skewers case (but not the potion case) is cited in the margin: "Marg[aret] Tinckler's case, 6th Nov. 1781 by all the judges [of England]", and East summarizes it from judges' notes.[41] The abortifacient acts of the accused abortionist (insertion of skewers and tossing up and down of the pregnant woman), though all consensual, were all criminal, and so constituted murder on [the fulfilling of the condition subsequent,][42] the death of the pregnant woman—which in this case happened to be after the birth of her child (alive, but dying instantly).

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40. *Id.* at 230 (emphases added).

41. *Id.* at 230, 354–56 (ch. V, sec. 124). Notice that though this case was tried before one of the King's judges on assize and was later considered by "all the judges," it is entirely unreported and would be unknown but for the (extensive) account of it in East's treatise.

42. For this analysis, see *infra* notes 28, 69, 73–74, 102, and pp. 989, 992.

East's discussion of the transferred malice in a consensual elective abortion is deployed in the affirmation of rule [I] by Russell's *Treatise On Crimes*,[43] perhaps the most important of the early 19th century English-American treatises.[44] Attempts to evade East and Russell and the major judicial ruling in *Tinckler's Case* will in 1971 play a large part in the desperate efforts of Means II (accepted uncritically by the majority in *Roe*) to avoid and efface the common law's many-faceted criminalization of elective abortion.[45]

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43. 1 SIR WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS (Lincoln's Inn, 1819). Its first American Edition was by Daniel Davis in his third decade as Solicitor-General of Massachusetts and published by Wells and Lilly of Court Street, Boston, in 1824. By 1841 it was in its fourth American edition, incorporating the notes, supplementations and excisions made by Davis, by Theron Metcalf (later a judge of the Supreme Court of Judicature), and by George Sharswood, and published in Philadelphia. 1 SIR WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS (Philadelphia 4th ed. 1841). The American editions use Russell's text and supplement or comment on it in footnotes.

44. Russell deals with [I] in Book III, ch. 1 (Murder), sec. IX, which begins on p. 759 with the general proposition that the rest of the section will particularize:

> If an action, *unlawful in itself*, be done deliberately, and with *intention of mischief or great bodily harm to particulars*, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder.

Id. at 759 (emphasis added) (capitalization adapted).

Thus Russell moves abortion "felony-murder" into the context of transferred malice: the abortion was intended to do (lethal) mischief to one individual, the actual or supposed unborn child, but resulted in (lethal) mischief to another, the (actual or supposed) mother: result, murder. He continues on p. 760:

> [margin note: *Murder in attempting to procure an abortion*] So, where a person gave medicine to a woman to procure an abortion [fn. 1 Hale, 429], and where a person put skewers into the womb of a woman for the same purpose [fn. Tinckler's case, 1 East. P. C. c. 5, s. 17, p. 230, and s. 124, p. 354], by which in both cases the women were killed, these acts were held clearly to be murder; for, though the death of the women was not intended, the acts were of a nature deliberate and malicious, and necessarily attended with great danger to the persons on whom they were practised.
>
> *Id.* at 760.

"The persons on whom they were practised" included, it seems, both the women and the unborn children they were or were believed to be carrying.

45. *See infra* text near note 170.

b. In State Court Cases

The Brief of the United States, intervening in *Dobbs*, rightly identifies Chief Justice Shaw's judgment for the Supreme Judicial Court of Massachusetts in *Commonwealth v. Parker*[46] as the appropriate representation of what *Roe* called the "received common law in this country."[47] Relying on Bracton-Coke-Blackstone, Shaw wrote that indictments for abortion must aver that the woman "was quick with child."[48] That is the dispositive ruling in the case, a ruling superseded by statute less than six weeks before it was given.[49] It was a conservative, defendant-favorable judicial ruling,[50] but it *explicitly*

46. 50 Mass. (9 Met.) 263, 267 (1845). The judgment, at 267, alludes in passing to *Hall v. Hancock*, in which the common-law rule reaffirmed in *Parker* was foundational in the unsuccessful argument (of Metcalf) for the appellant defendant, and was dealt with by Chief Justice Shaw thus: "We are also of opinion, that the distinction between a woman being pregnant, and being quick with child, is applicable mainly if not exclusively to criminal cases; and that it does not apply to cases of descents, devises and other gifts; and that, generally, a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered." Hall v. Hancock, 32 Mass. (15 Pick.) 255, 257–58 (1834).

47. Roe v. Wade, 410 U.S. 113, 134 (1973).

48. *Parker*, 50 Mass. (9 Met.) at 265.

49. Massachusetts had made the question moot (for future litigation) on January 31, 1845, by a statute prohibiting any attempt to "procure the miscarriage of a woman." *An Act to Punish Unlawful Attempts to Cause Abortion*, ch. 27, Mass. Acts 406 (1845).

50. The Massachusetts Penal Code Commissioners who reported in February 1844, REPORT OF THE PENAL CODE OF MASSACHUSETTS (Boston 1844), had made it clear that, *in the common law* as they understood it, indictability or criminal liability for abortion did not depend on whether the woman was or was not "quick" with child. Their proposal retained the term "quick" only in relation to severity of punishment. Nothing related to maternal *perceptions* of the life and motion of the child made any appearance in their discussion, *id.*, ch. VII, at 19–20, of the common law, and even the word "quicken" appeared in that discussion only in relation to Bracton, where they twice use "quickened" to translate his word *animatum*. Nor is "quick[en]" part of their proposed definition of the offence of abortion, which prohibits the action of any one who:

> maliciously, without lawful justification, *with intent to cause the miscarriage* of *a woman then with child*, administers to her, or causes or procures to be administered to or taken by her, or knowingly aids or assists in administering to her, or causing or procuring to be administered to or taken by her, any poison or noxious thing, or shall maliciously use any instrument or other

declined to rule on the question "what degree of advancement in a state of gestation would justify the application of that description [quick with child] to a pregnant woman"—Shaw declined to hold that at common law a woman's "being quick with child" meant that she has "felt the child alive and quick within her."[51] He quoted with implied approval Bracton's ruling—in which *formatum et animatum* certainly did not allude to maternal sensations of fetal movement/kicking—and summarised it: until the fetus had "advanced

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means with like intent . . .

Id., ch. XIII at 1 (emphasis added).

The commissioners then go out of their way to re-emphasize that their provision states what they believe to be the existing common law: both in criminalizing elective abortion at all stages of pregnancy and in respecting the mother's need to terminate a pregnancy that threatens her life. For footnote (a) says:

> *This is a crime by the common law*. (Deac[on] Cr. Law [London 1831], 9; 1 Russ[ell *On Crime*,] 796, 8th Ed.[by Daniel Davis, S-G Mass., 1841]; 3 Chit[ty], Cr. Law, 798 [Mass. 1841]; [Daniel] Davis's Justice[s of the Peace, Boston 1828] 262; Bang's C[ase] 9 Mass, R. 387 [181]) . . . Where the potion is given, or other means of causing abortion are used, by a surgeon, *for the purpose of saving the life of the woman*, the case is free of malice and has a lawful justification, and so does not come within the above provision.

Id. n.(a) (emphases added).

Thus, at the time of Chief Justice Shaw's opinion in *Parker*, a significant section of legal opinion considered that the common law's type [III] rule was not tied to "quick with child" (let alone "quickening") but was concerned only with the existence of a child capable of being killed in the womb. The commissioners in effect sided with those—notably Daniel Davis, for more than 30 years Solicitor General of Massachusetts, who came to think that the *Bangs* ruling, *Commonwealth v. Bangs*, 9 Mass. 387 (1812), erred in requiring that indictments for abortion allege that the woman was quick with child. *See* DANIEL DAVIS, PRECEDENTS OF INDICTMENTS: TO WHICH IS PREFIXED A CONCISE TREATISE UPON THE OFFICE AND DUTY OF GRAND JURORS 34 n.3 (Boston, 1831) ("There is no authority referred to in [*Bangs*] . . ."); *id.* at 36 n.1 (form of indictment for administering savin-based drug to a woman "with child but not quick with child" with intent to procure miscarriage, taken from 3 Chitty, *Criminal Law* *798 "upon the presumption that the facts therein stated would amount to a misdemeanour at common law.").

51. *Parker*, 50 Mass. (9 Met.) at 267. The only authority that Shaw finds identifying "quick with child" with "quickened" in the maternal-perceptions sense is *Phillips* (*infra* note 62), interpreting "quick with child" "in the construction of this [English] statute."

to that degree of maturity" that it could be "regarded in law" as having a "separate and independent existence," rule [III] abortion was not indictable.[52] Moreover, Shaw reaffirmed the common law rule [II] that if the child dies from abortion after being born alive, the abortifacient acts, however early in the pregnancy they were done, were murder.

A few weeks earlier the state's legislature had definitively swept away the whole debate about "quick with child," by making abortion at any stage punishable (variously but with at least one year's imprisonment).[53] It adopted the thrust of the Penal Code Commissioners' 1844 proposal, but rejected their suggestion that being "quick with child" be relevant to penalty, and instead made the severity of penalty depend upon whether or not the mother died (thus folding a mitigated rule [I] into the newly articulated rule [III]).

Parker's limitation of the common law rules [II] and [III] to attempts and abortions on a woman "quick with child" was rejected by the courts in Pennsylvania and Iowa.[54] It was accepted by the courts in New Jersey[55] and Maine,[56] but New Jersey's legislature instantly rejected the limitation.[57] Maine's legislature had criminalized abortion at all stages of gestation much earlier, in 1840, and so its court's 1851 ruling on the common law had little practical significance.[58]

4. The Unimportance of Quickening

The conclusion that the original public meaning of "any person" in the Equal Protection Clause included living preborn humans is not undermined by the (limited, shifting, under-determinate, and

52. *Parker*, 50 Mass. (9 Met.) at 266, 268.

53. *See supra* at note 49; *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85 (1858).

54. Mills v. Commonwealth, 13 Pa. 631, 632–33 (1850); State v. Moore, 25 Iowa 128, 135 (1868).

55. State v. Cooper, 22 N.J.L. (2 Zab.) 52, 54 (1849).

56. Smith v. State, 33 Me. 48, 51 (1851).

57. *Infra* note 87 (quoting State v. Murphy, 27 N.J.L. 112 (N.J. 1858)).

58. *Infra* note 200.

ultimately transient) relevance at common law of a child's or woman's being "quick" or "quickened."

a. Before the 1850s

Though crumbling by Blackstone's time, archaic views of human generation had some credence as late as the early nineteenth century. Such views, unchallenged from the 13th through the mid-17th centuries, mostly supposed that generation involved an unformed mass, first milky then fleshy, undergoing successive "formations" (receptions of new forms—vegetable, animal, etc.) until it was differentiated enough, at around six weeks, to acquire a distinctly human form, and substance, the *animation* of which by a rational soul (*anima*[59]) was considered to make it a *human* organism. Despite scientific advances, this widespread misunderstanding of gestation as marked by a discontinuity—by the emergence of a *human individual* at about six weeks from conception—was exacerbated in public discourse by linguistic instability and consequent further misunderstandings making the words "quick," "quicken," and their cognates unstable and ambiguous right down to the mid-nineteenth century. Although these uncertainties led some courts to leave reform of common law abortion offenses to legislatures,[60] they did not affect the *legal* question whether prenatal humans—*whenever* science showed they existed—were "person[s]" entitled to life and security. *All along, they have been*, as is demonstrated by near universal talk of unborn children (rather than fetuses) and by the shape of the

59. Scientists into the seventeenth century relied on ARISTOTLE, HISTORIA ANIMALIUM 7.3.583b (cited by *Roe* at 133 in its muddled footnote 22) for the view that, at approximately 40 days (at least for males) this mass becomes articulated and the first fetal movement occurs. (So too Blackstone's "able to stir in the womb.") Bracton probably held the view Aquinas contemporaneously articulated in SUMMA CONTRA GENTILES II c. 89, summarized in JOHN FINNIS, AQUINAS: MORAL, POLITICAL AND LEGAL THEORY 186 (1998): it takes about six weeks for generation to yield a body sufficiently elaborated (*complexionatum*) and organized (*organizatum*) for animation (receiving the rational, human soul). For the most widely read treatment contemporaneous with both Bracton and Aquinas, see *infra* note 64.

60. *Infra* note 86.

common law, in which *at least* type [I] homicide protection was entirely independent of quickening in any sense, and—as general opinion about gestation caught up with the science—courts and lawmakers fairly swiftly extended the long-standing type [II] and the even longer-standing type [III] protections by freeing them from any limiting notions of "quick," "quickened," etc.[61] The confusion was perhaps at its height during the half-century when one two-millennial paradigm was in the last phase of being definitively replaced by the new paradigm of continuous self-directed growth from conception.[62]

aa. THREE SENSES OF "QUICK[EN]"

To make sense of the legal history, three distinct senses of "quick[en]" must be kept in view:

61. *Infra* section I.A.3.b.

62. Crucial in fomenting if not initiating the final-phase confusion was *Rex v. Phillips* (1811) 3 Camp. 73, 77, 170 Eng. Rep. 1310. This seems to have been the first reported case of an indictment under that section of the 1803 English statute 43 Geo. III c. 58 which made abortion of a woman quick with child a capital offense. The medical witnesses, significantly, "differed as to the time when the foetus may be stated to be quick, and to have a distinct existence," and the woman swore "that she had not felt the child move within her before taking the [abortifacient] medicine, and that she was not then quick with child." The medical witnesses, despite their own (differing) medical views, "all agreed that in common understanding, a woman is not considered to be quick with child till she has herself felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although most usually about the fifteenth or sixteenth week after conception." The trial judge, Lawrence J., said that this was the interpretation that must be put on the words *quick with child* IN THE STATUTE; and as the woman in this case had not felt the child alive within her before taking the medicine –- he directed an acquittal." The full account of the case in JOHN. A. PARIS & JOHN FONBLANQUE, 3 MEDICAL JURISPRUDENCE 86–90 (1823) (a treatise cited by counsel for the appellant in *Hall v. Hancock*) is followed immediately by the comment (90): "It cannot be necessary here to repeat that the popular idea of quick or not quick with child is founded in error." An edition of Campbell's Nisi Prius reports including *Phillips* was published in New York and Charleston, South Carolina, in 1821.

i. "quick with child" meant *pregnant*[63]—from pregnancy's start, conception—but was also sometimes used interchangeably with having
ii. "a quick child" (a *live child*), understood to emerge when embryonic development had yielded an individual sufficiently formed and differentiated and articulated to receive a *rational animating* principle (soul) and so from that moment be a truly human individual, "an infant" and one "*able to* stir in the womb";
iii. "quicken*ing*" (a "quickened child", etc.), from the pregnant woman's perception of a shift in the uterus's position or her child's movements, sometime between the twelfth and the twentieth week (or not at all), but normally about the fifteenth or sixteenth week.

It is essential to distinguish sense iii from sense ii (and from sense i so far as it matches sense ii). As stated in the previous paragraphs,

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63. *See* R v. Wycherley (1838) 173 Eng. Rep. 486, 8 C. & P. 263 (approved in FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 457 (2d ed. 1852)). Even *Wycherley*, however, having emphasized the primacy of sense i (as to a capitally-condemned pregnant woman's right to reprieve during pregnancy), confuses sense ii with iii. Bracton had stated the reprieve principle in terms of pregnancy: "If a woman has been condemned for a crime and is pregnant, execution of sentence is sometimes deferred after judgment rendered until she has given birth." 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 429 (Thorne trans., 1968) (emphasis added). On such a "plea of pregnancy," the charge to the jury of matrons came to be expressed as determining whether the condemned was "quick with child," and in Blackstone's view the question evidently was not whether the mother or child had quickened in sense 3, but whether the child was quick in sense 2 such that, without reliance upon the mother's testimony or the use of ultra-sound or even a stethoscope, they could determine that there was present a *living* (not dead) child. *See* BLACKSTONE, 4 COMMENTARIES, *supra* note 32, at 395: "if they bring in their verdict *quick with child* (for barely, with child, *unless it be alive in the womb*, is not sufficient) execution shall be stayed . . ." (emphasis added). Hale, perhaps an outlier on this matter, had stated that the jury of matrons must find the condemned woman "with child of a quick child," and at the very end of the discussion of the peculiar case where she is mistakenly found to be in that condition but later becomes pregnant Hale indicates, in Latin, that the *foetus* is *vitalis* usually about 16–18 weeks though as medical opinions indicate it may be significantly earlier. *See* HALE, H.P.C., *supra* note 33, at 368–69.

"quick" in sense ii applied—in Bracton's mid-13th century,[64] Coke's late-16th to early-17th,[65] and the educated opinion of Blackstone's time[66]—from the sixth week of pregnancy.

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64. What Bracton meant by "formed and animated/ensouled" is made clear by the extremely influential encyclopedic work composed in the same decades as his own treatise on English law: *On the Properties of Things* [*De Proprietatibus Rerum*] by Bracton's contemporary Bartholomaeus Anglicus (between 1230 and 1250); the English translation made by John Trevisa in 1398/99 was first printed in 1497 and again in 1582 (thus linking Bracton's time and culture with Coke's): we can read the 1398/99 translation in modernized spelling in 1 ON THE PROPERTIES OF THINGS: JOHN TREVISA'S TRANSLATION OF "BARTHOLOMAEUS ANGLICUS DE PROPRIETATIBUS RERUM": A CRITICAL TEXT 296–97 (Oxford, 1975) (bk. 6, on the creation of the infant [*creatione Infantis*]):

> The child is bred forth . . . in four degrees. The first is when the seed has a milk-like appearance. The second is when the seed is worked into a lump of blood (with the liver, heart and brain as yet having no distinct shape). The third is when the heart, brain and liver are shaped [*formatis*], and the other or external members [head, face, arms, hands, fingers, legs, feet and toes] are yet to be shaped and distinguished. The last degree is when all the external members are completely shaped [*formantur*]. And *when the body is thus made and shaped* [*organizato*] with members and limbs, and disposed to receive the soul [*ad susceptionem animae*], *then it receives soul and life* [*vivificat*], *and begins to move itself* [*incipit se movere*] and sprawl with its feet and hands [better: kick with its feet: *peditu calcitrare*. . . .]
>
> In the degree of milk it remains seven (7) days; in the degree of blood it remains nine (9) days; in the degree of a lump of blood or unformed flesh it remains twelve (12) days; and *in the fourth degree, when all its members are fully formed, it remains eighteen (18) days*. . . .
>
> So from the day of conception to the day of complete disposition or formation [completionis] and first life of the child [vivificationis fetus] is forty-six (46) days. (emphases added).

At this point, the work refers to the biblical-theological significance that St. Augustine of Hippo, over eight centuries earlier, had found in the fact that the period of human formation consummated by animation was thus of 46 days (six-and-a half weeks) duration.

65. *See* Coke's contemporary WILLIAM SHAKESPEARE, LOVE'S LABORS LOST (c. 1593), V.ii.669-70, 673-74: "Fellow Hector, she is gone! She is *two months* on her way!. . . She's *quick*; the child brags in her belly already. 'Tis yours." (emphasis added). CRYSTAL & CRYSTAL, SHAKESPEARE'S WORDS: A GLOSSARY & LANGUAGE COMPANION 358 (2002) (*quick*: pregnant, with child; 490: *on one's way*: pregnant).

66. *See, e.g.*, *Embryo*, *in* EPHRAIM CHAMBERS, CYCLOPAEDIA (1728) (defining "embryo" as the beginning of an "animal" before it has "received all the Dispositions of Parts

necessary to become animated: which is supposed to happen to a Man on the 42nd day"); *see also id.*, *Animation*:

> *Animation*, signifies the informing of an animal Body with a Soul. Thus, the Foetus in the Womb is said to come to its *Animation* when it begins to act as a true Animal; or after the Female that bears it is quick, as the common way of Expression is. See FOETUS. The Common opinion is that this happens about 40 days after conception. But *Jer. Florentinus*, in a Latin treatise, *Homo Dubius, Sive de Baptismo Abortivorum*, shows this to be very precarious.

Since Florentinus's cited treatise argued embryologically that children are fully human persons as from conception, Chambers is warning readers that the "common opinion" presupposed by Bracton and Coke may move, under pressure of evidence, toward recognizing animation/personhood from conception.

Tracking Bartholomaeus Anglicus's treatise, and probably the most available source of *popular* information (and misinformation) about the child's ante-natal formation, in the period 1684 to c. 1840, was the pseudonymous work misleadingly entitled *Aristotle's Masterpiece*, first published in London in 1684 and going into hundreds of editions on both sides of the Atlantic. Early American editions usually resemble ARISTOTLE'S COMPLETE MASTERPIECE . . . DISPLAYING THE SECRETS OF NATURE IN THE GENERATION OF MAN, 44–46 (Worcester [Mass.] 1795), near-identical to pp. 43–44 of the same title printed in London in 1702:

> *How the Child . . . groweth up in the Womb of the Mother, after Conception.* . . . As to the formation of the child, it is to be noted, that after coition the seed lies warm in the womb for SIX DAYS without any visible alteration . . . In THREE DAYS after it is altered from the quality of thick milk or butter, and it becomes blood, or at least resembles it in colour, nature having now begun to work upon it. In the NEXT SIX DAYS following, that blood begins to be united into one body, grows hard, and becomes a little quantity, and to appear a round lump. And as the first creation of the earth was void, and without form, so in this creating work of divine power in the womb, THIS SHAPELESS EMBRIO lies like the first mass [*scil.* of the universe]. But IN TWO DAYS AFTER, the principal members are formed by the plastic power of nature . . . THREE DAYS AFTER the other members are formed . . . FOUR DAYS AFTER THAT, the several members of the whole body appear, and as nature requires, they conjunctly and separately do receive their perfection. And so in the appointed time, the whole creation hath that essence which it ought to have in the perfection of it, receiving from God A LIVING SOUL, therewith putting into his nostrils THE BREATH OF LIFE. Thus have I shown the whole operations of nature in the formation of the child in the womb, . . . By some others more briefly, but to the same purpose, the forming of the child in the womb of its mother is thus described; THREE DAYS in the milk, THREE DAYS in the blood, TWELVE DAYS FROM THE FLESH, and EIGHTEEN THE MEMBERS, and FORTY DAYS AFTERWARDS the child is inspired with life, being endued with an immortal living soul.

The importance of these meanings and of the distinctions between them derives largely from the passage of Coke that Blackstone cited to illustrate the unborn child's right to life. It is from the *Institutes*' chapter on murder, in the section about who can be murdered (answer: "*a reasonable creature, in rerum natura*"):

> [III] If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but [II] if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive. . . . And so horrible an offense should not go unpunished. And so was the law holden in Bracton's time, *Si aliquis qui mulierem praegnantem percusserit, vel ei venenum dederit, per quod fecerit abortivum, si puerperium jam formatum fuerit; et maxime si fuerit animatum, facit homicidium.* [trans.: Anyone who strikes a pregnant woman, or gives her a poison by which he induces abortion, commits [III] homicide if the infant/fetus was already formed, and especially if it was animated [ensouled].] And herewith agreeth Fleta . . .

Thus Coke at 3 *Inst.* 50 summed up his statement of rule [III] and [II] by arching back to the Bracton passage later quoted by Blackstone. And by appealing to Bracton's proposition, Coke emphasizes that when he says that "it"—the "child" with which the woman was "quick"/pregnant—is, when born alive, "accounted a reasonable creature, *in rerum natura*," he means that it is counted/treated as having been alive and capable of being murdered *at the time when the lethal act was done to it*, that is, when it was unborn (at any stage of pregnancy when it was sufficiently formed to be capable of being injured in a manner reliably detectable after its live birth).

Roe uncritically reported Cyril Means's view that "Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law."[67] That "abortion case", *R v.*

67. *Roe*, 410 U.S. at 135 n. 26 (citing "Means II", where the passages relied on by *Roe* are at 345–48).

Sims, actually goes far to disproving the charge. For there it was not Coke as prosecuting or intervening Attorney General but the King's Bench itself that authoritatively stated the unborn-child-protective principles at issue and the corresponding rule [II] in a form ("born alive") shaped by evidential considerations:[68]

> for if it be dead born, it is no murder, for *non constat* [it is not provable] whether the child were living at the time of the battery or not, or if the battery were the cause of the death.

Coke, in the passage (3 *Inst.* 50) recalled by Blackstone (and depreciated by Means and *Roe*), did no more than unpack and restate the two rules. Rule [II] was stated in *Sims* but rule [III] was implicit in—or assumed by—the King's Bench's decision, because the act that would be murder if the child was born alive (and died as a result of the act) must have been felonious or quasi-felonious (misprision *as distinct from misdemeanor*) when it was done. That act occurred in all cases of attempted elective abortion, whether done by the mother or by someone else—any act done so as to kill the unborn child (whether quickened in sense iii or not). Provided the child survived to be born alive, however briefly alive, the sequence of events—beginning with that act and ending with the born child's death because of that act—counted as murder. Once born, the child was in the public realm ("*in rerum natura*"), but it had been "a reasonable creature" at the time when the lethal act was done (perhaps soon after conception) or at any rate as soon as it was formed and animated ("quick" in sense ii). In other words, the lethal act when done was murder subject to a condition subsequent: that the child

68. (1601) Gouldsb. 176, 75 Eng. Rep. 1075, 1076. Chief Justice Popham and Justice Fenner authoritatively stated the rule that it is [II] murder to strike a woman "great with child" (pregnant) if the child is born living but succumbs from injuries that can "be proved" to have been caused by the battery with a view to causing a miscarriage. The Court of King's Bench went on to emphasize the evidential rationale of the rule, by observing that "when it is born living, and the wounds appear in his body, and then he die, the Batteror may be arraigned of murder, *for now it may be proved whether these wounds were the cause of the death or not*, and for that if it be found, he shall be condemned" [of [II] murder].

be born alive.[69] To repeat: the foundation for imposing this condition subsequent was, *Sims* had ruled, an evidential one. And quickening in sense iii is nowhere alluded to.

Moreover, rule-[III] indictable abortion was not merely implicit in *Sims*, awaiting Coke's articulation of it at 3 *Inst.* 50. It was part of the working common law throughout his lifetime, increasingly as the ecclesiastical courts declined. The Means-*Roe* allegation or insinuation that he invented it is baseless.[70]

Hale became an outlier in relation to rule [II] (and perhaps also rule [III]), by taking the *Webb* evidential concerns to an extreme, as if they were a definitional part of the common law:

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69. Mark S. Scott, *Quickening in the Common Law: The Legal Precedent* Roe *Attempted and Failed to Use*, 1 MICH. L. & POL'Y REV. 199 (1996) makes telling criticisms of *Roe* but errs (a) in accepting with little or no nuance that "quick" always referred to "quickening" in the sense deployed in *Roe*; (b) in interpreting [I] murder of the mother by abortion and [II] murder by abortion of the child-born-alive as deploying a "retroactive attribution of humanness" (p. 235) (back to the point of quickening, Scott says; but neither [I] nor [II] treats "quick with child" as a necessary condition of indictability). In truth, Coke and Hale were clear that the unborn child is human all the way through, or at least from completed formation c. day 40; a fiction such as retroactive attribution is foreign to their line of thought, and in no way compelled by Coke's phrase "accounted a reasonable creature, *in rerum natura*, when it is born alive;" that phrase conveys, rather, that from that point on any intentionally death-dealing act will be murder without having to fulfill any condition subsequent (other than the normal year-and-a-day rule)—so from birth the child will be treated (accounted) like everyone else, viz., as being not only a reasonable creature (as it was all along, at least from formation and animation) but also *in rerum natura*, in the ordinary social world.

70. Means II more or less expressly (at 344) and *Roe* by innuendo (at 135 n.26) claim that *Sims* either opposes or does not imply/assume rule [III], and that Coke invented it (sometime in the 33 years between 1601 and his death in 1634) in 3 *Inst.* 50 (first published 1644). Means and *Roe* ignore all the evidence that [III] abortion was an indictable offense fairly often prosecuted at common law: JOHN KEOWN, ABORTION, DOCTORS AND THE LAW, 6–9 (1988), points to *R. v. Lichefeld* (1505), *R. v. Webb* (1602), *R. v. Beare* (1732); JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 193 (2006) gives a corrected translation of *Webb*; at 202 cites further 16th century [III] abortion convictions from 1530/31 and 1581 (twice); and at 194 gives evidence that "English courts prosecuted abortions fairly routinely under the early Stuarts" (before Coke's death), citing abortion [III] convictions in 1615, 1616 (twice), 1617, and 1622, and indictments recorded without indication of outcome in 1615, 1618 and 1629.

> The second consideration, that is common both to murder and manslaughter, is, who shall be said a person, the killing of whom shall be said murder or manslaughter. If a woman be quick or great with child, if she take, or another give any potion to make an abortion, or if a man strike her, whereby the child within her is kil[led], it is not murder or manslaughter by the law of England, because it is not yet *in rerum natura*, tho' it be [III] a great crime, and by the judicial law of Moses was punishable by death, NOR CAN IT LEGALLY BE KNOWN, WHETHER IT WERE KIL[LED] OR NOT [citation to Yearbook of Edward III]. So it is, if after that child were born alive, and baptized, and after die of the stroke given to the mother, this [II] is not homicide [citation to an earlier Yearbook]. (emphasis added)[71]

The argument proves too much and was rejected, perhaps even by Hale himself,[72] certainly by Blackstone and all the American editions of criminal law treatises before and after him.[73]

Hale's robust rule [I], on the other hand, was universally followed: causing death by elective, consensual abortion, even when

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71. HALE, H.P.C, *supra* note 33, at 429–30.

72. MATTHEW HALE, PLEAS OF THE CROWN, OR A METHODICAL SUMMARY OF THE PRINCIPAL MATTERS RELATING TO THAT SUBJECT, 53 (1678):

> If a Woman quick with Child take a potion to kill it, and accordingly [III] it is destroyed without being born alive, a great misprision but no Felony; but [II] if born alive and after dies of that potion, it is Murder.

Both this work and the better known *History* were published posthumously (this work in 1678, the *History* in 1736), and it cannot now be determined which gave Hale's final view of [II] and [III].

73. Hawkins had led the way: WILLIAM HAWKINS, 1 PLEAS OF THE CROWN 80 (1716), where abortion is treated in the chapter on Murder:

> *Sect.* 15. As to the third Point, *viz.,* Who are SUCH PERSONS BY KILLING OF WHOM A MAN MAY COMMIT MURDER; it is agreed, that the malicious Killing of any Person, whatsoever Nation or Religion he be of, or of whatsoever Crime attainted, is Murder. *Sect.* 16. And it was anciently holden, that [III] the causing of an Abortion by giving a Potion to, or striking, a Woman big with Child, was Murder: but at this Day, it is said to be a great Misprision only, and not Murder, unless [II] the Child be born alive, and die thereof, in which Case it seems clearly to be Murder, notwithstanding some Opinions [*scil.* Hale] to the contrary.

skillfully performed by a registered physician, is always murder. The rule made no reference at all to quickness. Moreover, the rule implicitly deployed a condition-subsequent doctrine of murder, analogous to Coke's rule [II]: attempting abortion, at any stage of gestation, is—by transfer of homicidal malice from unborn child to mother—murder subject to the condition subsequent that the mother die from its effects. And, contrary to Means II's wild claim[74] that Hale invented it in a fit of "Restoration gallantry" towards women endangered by unskilful abortionists, rule [I] had been established and applied for centuries—as far back as Bracton's time—when Hale articulated it.[75]

What was the significance of Coke's and Blackstone's quotation of Bracton, as witness to the "ancient law"?[76] Bracton's sentence

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74. Means II at 363.

75. DELLAPENNA, *supra* note 70, at 206 n.184, cites convictions in 1281, 1288, 1589, 1591 and 1600, besides the case Hale himself tried at assize in 1670, and acquittals in 1249, 1292, 1313, 1330 and 1652.

76. As to the shift from the "ancient law" (stated in Bracton) to Blackstone's "present" law (stated by Coke): C'Zar Bernstein, *Fetal Personhood and the Original Meanings of "Person"*, 26 TEX. REV. L. & POL. __ (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3870441, asserts at 69 that by this shift "the unborn were removed from the category of persons in being, and were therefore outside the protection of the law against homicide." But there is no trace of shift from "the unborn are persons" to "the unborn are not existing persons;" rather, the shift is in legal opinion about the degree of safely cognizable injustice involved in acts lethally impacting on the child *in ventre sa mere*, whether acts of strangers to whom the child was invisible, or of the mother involved intimately with it. Bernstein's claim about the shift is refuted also by a leading work intermediate between Coke and Blackstone, HAWKINS, 1 PLEAS OF THE CROWN 80, where abortion is treated in the chapter on Murder:

> *Sect.* 15. As to the third Point, *viz.*, Who are SUCH PERSONS BY KILLING OF WHOM A MAN MAY COMMIT MURDER; it is agreed, that the malicious Killing of any Person, whatsoever Nation or Religion he be of, or of whatsoever Crime attainted, is Murder. *Sect.* 16. And it was anciently holden, that the causing of an Abortion by giving a Potion to, or striking, a Woman big with Child was Murder: but at this Day, it is said to be [III] a great Misprision only, and not Murder, unless [II] the Child be born alive, and die thereof, in which Case it seems clearly to be Murder, notwithstanding some Opinions to the contrary.

plainly addresses "quick"-ness in the *second* sense—a supposedly not-yet-human entity's change (by formation) into an organism and (by animation) into a human organism, "an individual" as Blackstone would say.[77] By quoting Bracton, both Coke and Blackstone were effectively teaching that abortions were common-law heinous misdemeanors (as *sui generis* homicides, neither murder nor manslaughter) from the sixth week of pregnancy.[78]

There is in Hawkins (like the other classical common-law authorities) not the slightest suggestion that unborn children were shifted from being—as "anciently holden"—"Persons by killing of whom a Man may commit Murder" to being non-persons. Rather, with the changed liability-rule, they were persons in a new liability-category: persons by killing of whom a man commits murder if—however long after his malicious actions—they succumb from his actions after living outside the womb for however short a time, while if they do not live outside the womb the doer of those same actions is guilty of a lesser but still near-capital "great misprision" (less than capital felony but more than misdemeanor).

In other classic common-law authorities, this sub-category of persons, a sub-category forged in tandem with the newly nuanced liability rule, is marked by saying that they are not persons *in rerum natura* (literally, "in the nature of things," idiomatically more like "in 'reality'," meaning the visibly shared world, the ordinary world) or *in esse* (same meaning idiomatically; literally, "in being/existence"). Keeping these phrases in the foreign tongue signalled the presence of a fiction deployed in service of the moral and/or pragmatic judgment that justice would be better served by introducing the acknowledgement of appropriate difference in the severity of the crime and its fitting scale of punishment, and the matching sub-category of persons: rational creatures like the rest of us, but not yet sharing our public world, publicly distinct from and partly inter-dependent with their mothers, who are persons whom one can point to and name.

77. *See supra* pp. 935–39.

78. Further compelling evidence that the standard pre-1800 common legal understanding of "quick with child" was not dependent on a mid-pregnancy, maternally-felt "quickening" is Blackstone's treatment of the plea of pregnancy in stay of execution: "the judge must direct a jury of twelve matrons or discreet women to inquire the fact: and if they bring in their verdict *quick with child* (for barely, *with child,* UNLESS IT BE ALIVE IN THE WOMB, is not sufficient) execution shall be stayed generally till the next session . . ." 4 COMMENTARIES, *supra* note 32, at 395. So she is quick with child if the special jury can detect fetal *life*. (The problem of the dead fetus, not to mention that of the mole or tumor, has a large part in the evidentiary caution that made successful prosecution for elective abortion difficult whatever the stage of gestation at which the unlawful acts charged were done.) *See also* HAWKINS, 2 PLEAS OF THE CROWN 464 (1721), where the final sentence of the discussion of the plea is: "Also it is said both by *Staundforde* and

Roe contradicts this, launching its discussion of the common law (and of quickening in sense iii) by citing Coke and Blackstone for its claim that

> [I]t is undisputed that at common law, abortion performed *before* 'quickening'—the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy—was not an indictable offense.

False. Again, Coke and Blackstone cited only Bracton, who was referring to a living child, quick in sense ii, animated by a human form or soul, months before the mother would feel "recognizable movement" around the "16th to the 18th week."[79]

Roe, later in the Court's opinion, returned to Bracton and, by relying on an English translation while ignoring the Latin, made one of its worst and most damaging errors. Having correctly observed (410 U.S. at 133–34) that early common law focused on formation and animation as defining the time from which abortion would be homicide, and that there were uncertainties about when the completion of formation by animation occurred, the Court (at 134) lurched into stark error:

> Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of

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Coke, that a Woman can have no Advantage from being found with Child unless she be found quick with Child." The footnote to this sentence cites ten authorities (treatises and abridgements), but the only two quotations are: "it is expressly said, that the Inquiry was whether the Woman were *enseint* [pregnant] with A LIVE CHILD or not" and "'tis said only, That the Woman was found *enseint* or pregnant." Likewise, American criminal law treatises: see for example, CONDUCTOR GENERALIS, 214 (New York, 1749) ("Jury of Matrons. You the Fore-woman of this jury shall swear, That you shall search the Prisoner at the Bar, whether she be quick with Child OF A LIVING CHILD. . ."); 371 ("You as Fore-Matron of this Jury, shall swear, that you shall search and try the Prisoner at the Bar, whether she be quick with Child of a QUICK CHILD. . . ."); 372 ("[B]ut if they find that she is not quick with Child of a quick Child, she shall be hanged presently, for it will not avail her to be young with Child.") (emphases added).

79. Roe v. Wade, 410 U.S. 113, 132 (1973).

> the two first principles of life, Bracton focused upon quickening as the critical point.

But Bracton, writing in Latin, spoke only of the fetus being formed and animated. "Quick[ened]" is just the term unhappily chosen by Samuel Thorne, a few years before *Roe*, to translate Bracton's *animatum*.[80] So *Roe*'s claim that Bracton was providing a resolution to uncertainties about "animation" by opting to focus on something else (or on some other term), "quickening," is simply absurd. And the absurdity gives *Roe* an illegitimately easy way to ignore sense ii of "quick" entirely, and giving sense iii and the 15–16-week stage an illegitimate primacy or monopoly in its picture of the common law.

Roe's generalization that the common-law offense [III] required perceptible movement is not well defended by citing *State v. Cooper*.[81] It is true that New Jersey's high court, after holding that abortion involves a woman "quick with child," appeared to take sides (though it was not in issue) on when this occurs, answering: "when the embryo gives the first physical proof of life, no matter when it first received it."[82]

Yet *Cooper*'s framing of the question about "offense against the person"—as concerning when a human child is "*in esse*" (in being)—itself tells in favor of the principle that a prenatal human individual warrants protection from its first moment of existence (a principle *Cooper* acknowledges the evidence for, and does not rebut).[83] And *Cooper* made clear that it neither contested that a new

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80. The absurdity of the argument *Roe* is developing here is only compounded by the fact that its footnote 23 quotes, besides Thorne, the Twiss translation, "if . . . formed and animated, and particularly if it be animated."

81. 22 N.J.L. (2 Zab.) 52, 54 (1849) (cited in *Roe*, 410 U.S. at 135 n.27).

82. *Id.* at 53–54.

83. *Cooper*, 22 N.J.L. at 54. The court, quoting Bracton's line, rightly admitted that it "at first view might seem to favor a different conclusion." *Id.* at 55. Then, assuming precisely what is here in dispute (the sense of "quick with child"), the court appealed

human life begins before the mother perceives movement,[84] nor questioned the other legal protections for children at those early developmental stages.[85] It also explicitly chose to leave reform to the legislature,[86] and New Jersey lawmakers promptly abolished the distinction between pre- and post-"quickening" and extended prohibition of this "offense against life" to begin when a woman is "pregnant with child"—*i.e.*, conception.[87]

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to "the unanimous concurrence of all authorities, that that offence could not be committed unless the child had quickened." *Id.* The court relies on *Commonwealth v. Parker* while failing to note that on the very point for which the New Jersey court is arguing, the Massachusetts court declined to state an opinion. *See id.* at 57. Thus throughout its argumentation the New Jersey court begs the very question left open by *Parker* and *assumed* precisely what needed to be demonstrated, *viz.* that "quick with child" at common law meant "with sense (3) quickened child" rather than "with live child" or perhaps even "with child".

84. *See id.* at 54 ("It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception . . . . *In contemplation of law* life commences at the moment of quickening.").

85. *See id.* at 56–57. But it entirely fails to acknowledge the authoritative statements of principle, collected in *Hall v. Hancock*, undergirding those protections. The handling of authorities is uncertain throughout; for example, Blackstone, 4 COMMENTARIES 395 is cited at 57 to support the claims that "quick with child" and "with quick child" are synonymous, that both phrases "import that the child had quickened in the womb," and that that was when "the life of the infant, in contemplation of law, had commenced." In fact, though Blackstone there treats "quick with child" and "the child was quick" as equivalent, he does use "quickened" or "quickening," and seems most concerned with the question whether the child is or alive ("quick") rather than dead: see *supra* notes 63, 78.

86. *Id.* at 58 (finding "legislative enactments" "far better" on "this . . . debatable" matter, when courts must give "the accused" the benefit of "reasonable doubt").

87. Act for the Punishment of Crimes (1846, s. 103 Supp., enacted March 1st 1849 (Session Laws 1849, po.199)); State v. Murphy, 27 N.J.L. 112, 114 (1858) ("The statute. . . was cotemporaneous [sic] with that decision [*Cooper*]. An examination of its provisions will show clearly that the mischief designed to be remedied by the statute was the supposed defect in the common law developed in the case of The State v. Cooper."). Against *Roe*'s faulty history, *Cooper* itself clearly confirmed that common law protected the child's right long before "viability," *no later* than the perception of movement four or five months before birth, during which time any "act tending to its destruction" was an indictable offense, a homicide. *See Cooper*, 22 N.J.L. at 56, 58, 55. Note that the Chief Justice, stating the opinion of the court in *Murphy*, says—with some roughness of phrasing—that the common law was defective in that it was concerned entirely with the life

b. Antebellum and Ratification Eras

The high-water mark of treating quick*ening* (felt movement) as relevant was the early nineteenth century[88]; by the last third, that line was virtually gone as it was always destined to be—denounced by the medico-legal treatises as groundless because formation and animation occur at conception.[89] The same treatises also regarded the old Bracton-Coke-Blackstone version of "quick with child"

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of the unborn child, *not the health of the mother*; so the statute, by contrast, treats the acts of the abortionist as having the same degree of culpability whether or not they harm or kill the child, whether or not "it has quickened," and so also whether or not the mother had actually ingested the abortifacient supplied by the appellant defendant abortionist, the degree of culpability and applicable scale of punishment under the statute is affected only if the mother dies. *See Murphy*, 27 N.J.L. at 114. (In fact, of course, the 1849 legislation was very much concerned with the life of the child, too: as noted in the text above, offenses under it were committed only if the woman was in fact "then pregnant with child.")

88. PHILIP A. RAFFERTY, *ROE V WADE*: THE BIRTH OF A CONSTITUTIONAL RIGHT 179–180 (1992) argues that it is at best unproven that the common law ever made proof of quickening a criterion of criminal liability, and that the thesis that it did "originally was articulated in the nineteenth century in certain American appellate opinions . . . ." Be that as it may, it was understandable, though not logically ineluctable, that the fact that the introduction — beginning with Lord Ellenborough's Act, 43 Geo. 3 c. 58 (1803) — of statutory type-[III] prohibitions of abortion from conception was accompanied in some jurisdictions (such as England under that Act) of different punishments depending on whether or not the woman was "quick with child" or "with quick child" had the side-effect that in the abortion context the word "quick" came quite generally to be assimilated to "quickened, "quickening," and cognates. For the American jurisdictions with such differentiation of penalties, see James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 34–36 (1985).

89. *See, e.g.*, THEODRIC ROMEYN BECK & JOHN B. BECK, 1 ELEMENTS OF MEDICAL JURISPRUDENCE 464–66, 468 (12th ed. Philadelphia, 1863) ("[N]o other doctrine appears to be consonant with reason or physiology, but that which admits the embryo to possess vitality from the very moment of conception. . . . [W]e must consider those laws which exempt from punishment the crime of producing abortion at an early period of gestation, as immoral and unjust."); WILLIAM GUY, PRINCIPLES OF MEDICAL JURISPRUDENCE 133–34 (1st Am. ed. 1845) ("[T]he absurd distinction formerly made between women quick and *not* quick is done away with . . .").

(around six weeks) as equally ridiculous.[90] With modern scientific embryology, that Bracton test was compelled, by its own rationale, to recognize personhood from conception even in the cramped, defendant-solicitous criminal law.[91] Thus, the influential and widely circulated 1803 textbook *Medical Ethics* explained that "to extinguish the first spark of life is a crime of the same nature, both against our maker and society, as to destroy an infant, a child, or a man."[92]

What these treatises taught about the unborn—many describing their destruction as murder or indistinguishable from infanticide[93]—was vigorously promoted and re-asserted in professional medical associations, legal education, and state legislatures. The American Medical Association in 1859 dismissed the fiction "that the foetus is not alive till after the period of quickening" and urged correction of any "defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth as a living being."[94]

The leading American treatise on criminal law mocked the pegging of legal protection to felt quickening and effectively buried the

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90. BECK & BECK, *supra* note 89, at 466–68 (calling the six-week criterion "absurd," "injurious," and "wholly unsupported either by argument or evidence," and going on to denounce as "no less absurd" the "popular belief" and laws, including English and, implicitly, American law, "denying to the foetus any vitality until after the time of quickening" by "consider[ing] life not to commence before the infant is able to stir in its mother's womb," and declaring (against *both* understandings of "quick/quickening") that non-perception of "motions" is "no proof whatever that such motions do not exist.").

91. *Cf.* FINNIS, *supra* note 59, at 186 (explaining why, had Aquinas "known of the extremely elaborate and specifically organized structure of the sperm and the ovum . . . and the [embryo's] typical, wholly continuous self-directed growth and development . . . from the moment of insemination of the ovum," he would have located "personhood {*personalitas*: ScG IV c. 44 n.3}" at conception).

92. THOMAS PERCIVAL, MEDICAL ETHICS 135–36 (Chauncey D. Leake ed., 1975) (1803), *quoted in* Ohio's 1867 S. Comm., *infra* note 112.

93. *See* BECK & BECK, *supra* note 89; JOHN KEOWN, ABORTION, DOCTORS, AND THE LAW 23–24, 38–39, 179–80 (1988) (citing treatises).

94. *Roe*, 410 U.S. at 141 (citing 12 TRANSACTIONS OF THE AMERICAN MEDICAL ASSOCIATION 73–78 (1859)).

Bracton-Coke quickening-as-animation criterion. *Wharton's Criminal Law*, from its first edition in 1846, argued that the criminal law of offenses against unborn persons should be aligned with the law of property, guardianship, and equity[95] as expounded in cases such as *Hall v. Hancock*, adopting authoritative English equity precedents, which recognized unborn rights at *all* stages of development.

Thus, by 1866 Chief Justice Tenney of the Maine Supreme Court could accurately report that "the [quickening] distinction . . . has been abandoned by jurists in all countries where an enlightened jurisprudence exists in practice."[96]

c. Constants

Whatever the confusions about "quick" and "quickening," the common law indisputably, always and everywhere, made any attempted abortion a serious indictable offense from *at least* 15 weeks (give or take three). The Ratification Era's virtually unanimous legislative,[97] professional, and public support for this part of the nation's tradition of ordered liberty, *and* for following the science and removing any temporal limit in the criminal law's protection, has been extensively documented by scholars since *Roe* and *Casey*.[98]

95. WHARTON, *supra* note 63, at 308 (1846); 2 WHARTON at 653 (6th ed. 1868) ("It has been said that [abortion] is not an indictable offence . . . unless the mother is *quick* with child, though such a distinction, it is submitted, is neither in accordance with medical experience, nor with the principles of the common law. The civil rights of an infant in *ventre sa mere* are equally respected at every period of gestation."); *see also* J.P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 386 (2d ed. 1858) (reviewing cases and preferring the view that abortion is indictable at common law without allegation that the mother was quick with child).

96. 5 TRANSACTIONS OF THE MAINE MEDICAL ASSOCIATION 38 (1869).

97. *See infra* section I.B.1.

98. *See* DELLAPENNA, *supra* note 70, at 213–28 (2006) (concluding "that English law regarding abortion was fully received in the [American] colonies, and that the purported 'common law liberty to abort' is a myth"); *see also id.* at 263–451 (for all aspects from Independence down to c. 1900).

This confirms that "any person" in the fundamental-rights-regarding Equal Protection and Due Process Clauses includes all unborn human beings.

So does the fact that, while prevailing (though not universal[99]) nineteenth-century common law made only post-"quickening" abortion indictable, the common law *always* regarded pre-quickening abortion as "an act done without lawful purpose," as Chief Justice Shaw mildly put it in 1849,[100] such that abortions (however skillfully performed) that accidentally cause the consenting mothers' death constituted murders. As has been shown above, even pre-quickening abortion was always a kind of inchoate felony for [I] felony-murder purposes,[101] as well as always constituting the *actus reus* with *mens rea* for the crime of [II] murder subject to a condition subsequent: that the child die, however soon, after being born alive.[102]

And all along, every involvement in elective abortion was unlawful in the broader sense that was signaled by its liability to other legal penalties. Contracts for elective abortion services were void for illegality; any place used for elective abortion or for "offering medicines to destroy a child"[103] was liable to summary closure as a

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99. Limitation to post-"quickening" attempts and abortions was rejected by the courts in Pennsylvania and Iowa. *See* Mills v. Commonwealth, 13 Pa. 631, 632–33 (1850); State v. Moore, 25 Iowa 128, 135 (1868).

100. *Parker*, 50 Mass. (9 Met.) at 265. Hale puts it more straightforwardly: the abortifacient is given "*unlawfully to destroy her child within her*, and therefore he that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder." *R v. Anonymous* (1670), *reported and endorsed in* HALE, H.P.C., *supra* note 33, at 429–30 (emphasis added); the passage is cited by Blackstone to verify his own statement, in which abortion is his third example of felony-murder: "And if one intends to do another felony, and undesignedly kills a man, this is murder. . . . And so, if one gives A WOMAN WITH CHILD a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it." 4 COMMENTARIES, *supra* note 32, at *200–01.

101. That is clearly stated by Blackstone: see the previous footnote.

102. That too is clearly stated by Blackstone. *See* 4 COMMENTARIES 198, quoted *supra* text at note 32. Like [I] (the abortion quasi-felony murder of the mother), [II] was not questioned by any American authority.

103. HAWKINS, 1 PLEAS OF THE CROWN 262 (6th ed. 1788).

disorderly house, on pain of criminal penalty for non-compliance; advertising or publicly offering abortion services so described was criminal per se or a conspiracy *contra bonos mores*. The "openness" with which abortions were available in some places throughout the relevant era, an openness vaunted by pro-choice modern scholars, was analogous to the openness with which other criminal or unlawful practices were available and even respectable among some classes in some areas: to take an extreme case, of the open visitations by the Ku Klux Klan at some times and places, or at the other end of the spectrum, the availability in many places of pornography or forbidden drugs, or of alcohol under local or national prohibition.

B. Antebellum Statutes and Post-Ratification Precedents Confirm This Status.

1. State Abortion Statutes

The Union in 1868 comprised 37 States, of which 30 had statutory abortion prohibitions.[104] Most were classified as defining "offenses against the *person*,"[105] with 28 applying before *and* after quickening in senses ii and iii—protecting, in other words, the child from conception.[106] And Congress, legislating for Alaska and the District of

104. *See* Witherspoon, *supra* note 88, at 33.

105. *See id.* at 48.

106. *See id.* at 34 (finding, however, that in Nebraska, and possibly Louisiana, the statutory prohibition did not at that time extend to abortion by use of instruments). The various shifting arguments made by Aaron Tang, *The Originalist Case for an Abortion Middle Ground*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3921358, to the effect that "28" [or 27] here should read "16" [or 15] are refuted in all their strongly different versions from September 13 to September 30, 2021 by the authors of this article in *Indictability of Early Abortion c. 1868*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940378. The latter identifies over 50 serious historical errors in the relevant 40 pages of Tang's many-times revised article; the replies he incorporated in his latest revisions, on October 11 and December 15, 2021 contest none of the 50+ identified errors directly, accept many of our charges silently, indefensibly ignore many, confess to a couple, and replace some abandoned errors with new ones the answer to which will easily be supplied by readers of the debate. (These counts of states do not include the

Columbia shortly after ratification of the Fourteenth Amendment, referred to unborn children as "person[s]."[107]

Many such statutes were adopted or strengthened within a year or two of the Amendment's ratification, as in New York,[108] Alabama,[109] and Vermont.[110] In Florida, Ohio, and Illinois, the very legislatures ratifying the Amendment also banned abortion at all stages.[111] About a month after ratifying the Amendment, Ohio's senate committee concluded that given the "now . . . unanimous opinion that the foetus in utero is alive from the very moment of conception," "no opinion could be more erroneous" than "that the life of the foetus commences only with quickening, that to destroy the embryo before that period is not child murder."[112]

Thus, state legislators not only viewed these laws as consistent with the Fourteenth Amendment, but also—like any legally informed reader—would have understood equality of fundamental rights for "any person" to include the unborn. In relation to none of the state legislative proceedings to reform the common law of abortion, beginning at latest in New York's 1829 statute and running through to 1883 (when the 43rd of the states to do so prohibited abortion at all stages), has any suggestion been recorded that

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territories of Washington (1854), Colorado (1861), Montana (1864), Idaho (1864) and Wyoming (probably 1864, alternatively 1869), which from the dates just mentioned had statutes criminalizing abortion at all stages of gestation.)

107. Act of Jan. 19, 1872, 1872 D.C. ACTS 26–29; Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253–54 (1899).

108. *See* Act of Apr. 28, 1868, ch. 430, 1868 N.Y. LAWS 856–68; Act of May 6, 1869, ch. 631 1869 N.Y. LAWS 1502–03.

109. *See* Act of Feb. 23, 1866, 1866 ALA. PEN. CODE, tit. 1, ch. 5, § 64, at 31 (*codified* ALA. CODE § 3605 (1867)).

110. *See* Act of Nov. 21, 1867, no 57, 1867 VT. ACTS 64–66.

111. *See* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3 §§ 10–11, ch. 8, §§ 9–11, 1868 FLA. LAWS 64, 97; Act of Feb. 28, 1867, 1867 ILL. LAWS 89; Act of Apr. 13, 1867, 1867 OHIO LAWS 135–36.

112. 1867 OHIO SEN. J. APP'X 233. Yet the law proposed by the committee and enacted by the legislature aligned with none of the three elements in *Roe*'s notion (at 157 n.54) that acknowledging and acting on the personhood of the unborn requires that the woman be treated as a principal or accomplice, that abortion be punished as murder, and that it be prohibited even when medically necessary to save the life of the mother.

any legislator considered that these statutes were abolishing a common-law right or liberty possessed by women since colonial times. The allegation by Cyril Means and *Roe*, now made even more recklessly by Professor Aaron Tang,[113] is that that was precisely—and momentously—what the legislatures were doing. It is an allegation so devoid of evidence and historical plausibility that it appears in only a carefully muted, somewhat chastened form in the present Historians' brief for the respondents in this case (retreating, tacitly, from the utterly discredited[114] Historians' briefs in *Webster* and *Casey*).

2. Precedent Interpreting the Fourteenth Amendment: The Case of Corporations

The original public legal meaning of "persons" encompassed *all* human beings. On this, the legal meaning fixed by treatises and cases was confirmed by rapid early-to-mid-1800s expansions of prenatal protections. And—even apart from the latter evidence—under the *Dartmouth College* principle giving legal meaning primacy over drafters' motivating concerns, the inclusion of children *in utero* could not have been blocked except by wording (easily available, but neither proposed nor adopted) such as "any person wherever born."

The plain legal meaning and sweep of a constitutional provision "is not to be restricted" by the "existing" problem it was "designed originally to prevent."[115] So declared Justice Field, on circuit in *Santa Clara County v. Southern Pacific Railroad Co.*, soon affirmed by the Supreme Court itself in its holding (in the headnote) that corporations are persons under the Due Process and Equal Protection Clauses. Field quoted Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward*:

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113. *See supra* note 106.

114. *See* John Keown, *Back to the Future of Abortion Law:* Roe*'s Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3 (2006).

115. Santa Clara County v. S. Pac. R.R. Co., 18 F. 385, 397 (C.C.D. Cal. 1883) (opinion of Field, J.), *aff'd*, 118 U.S. 394 (1886).

> It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to . . . say that, had this particular case been suggested, the language would have been so varied as to exclude it . . . . The case being within the words of the rule, must be within its operation . . . .[116]

As Marshall had explained in *Dartmouth College*, it may be:

> more than possible, that the preservation of rights of this description was not particularly in the view of the framers . . . . But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, [absent] plain and strong reason for excluding it . . . .[117]

The plain and original meaning of the constitutional text extended to the case, though its application had not been envisaged.[118] (Nor was there any "sentiment delivered by its contemporaneous expounders, which would justify us in making" any exception.[119]) This principle remains an axiom of constitutional (especially originalist) interpretation today.[120]

Here it controls. As a matter of plain original meaning to educated lawyers, just as the college charter considered by Marshall fell under the Contract Clause, and the railroad considered by Field was a "person" under the Equal Protection Clause, so too, but *more*

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116. *Id.* (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 644–45 (1819) (opinion of Marshall, C.J.)). In applying this by assessing what falls "within the words of the rule" (the Equal Protection Clause), recall that the ratification in 1868 was not by "the American people" but by legislatures, that these included many lawyers whose basic instruction in legal language was through studying Blackstone, and that legislative reforms to remove common-law criminal law's reference to "quick with child" or "quickening" were in full swing, had prevailed in more than two-thirds of the states and all the territories, and would within 15 years be virtually universal.

117. *Dartmouth College*, 17 U.S. (4 Wheat.) at 644.

118. *See id.* at 645.

119. *Id.*

120. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 787 (2010) (rejecting argument that "the scope of the Second Amendment right is defined by the immediate threat that led to the inclusion of that right in the Bill of Rights").

certainly, prenatal humans are "persons" under the Clause, whether or not its drafters and ratifiers specifically had that in mind.[121]

Inclusion of the unborn is *more* certain because of their foregrounding in the discussion of fundamental rights to life and security in Blackstone's *Commentaries*, the formative text for educated lawyers of 1776–89 and 1866–68 (in Congress and nationwide), invoked in the introduction of a civil rights bill prefiguring or supported by the Amendment.[122]

Given the evil they aimed to cure, the Amendment's ratifiers may not have subjectively had in mind that the Equal Protection Clause would affect established antebellum Union rules and institutions at all.[123] But if a state in, say, 1870 had legislated to permit all elective

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121. *See* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 23 n.34 (2013) (explaining the argument that the unborn should be held to enjoy constitutional protection "for the same interpretive methodological reason that corporations properly can be understood as legal persons—that that was conventional term-of-art legal usage, and thus bears heavily on what the legal meaning of the term 'person' was at the time") (emphases omitted).

122. *See supra* section I.A.

123. That reasoning synthesizes the judicial rationale of several restrictive assumptions about the Equal Protection Clause between 1871 and 1888. *See, e.g.*, Insurance Co. v. New Orleans, 13 F. Cas. 67, 68 (C.C.D. La. 1870) (holding that corporations are not Fourteenth Amendment persons); Bradwell v. State, 83 U.S. 130, 139 (1872) (females and the practice of law); Bartemeyer v. Iowa, 85 U.S. 129, 133 (1873); The Slaughter-House Cases, 83 U.S. 36, 81 (1872) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Equal Protection Clause]."); Strauder v. West Virginia, 100 U.S. 303, 304 (1879); The Civil Rights Cases, 109 U.S. 3 (1883); Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 188–89 (1888) (finding that Fourteenth Amendment equal protection is concerned with protecting any class "singled out as a special subject for discriminating and hostile legislation").

For example, the litigants in *Bradwell*, fighting discrimination against women practicing law, appealed to the Amendment's first sentence but never its Equal Protection Clause. That is inexplicable except based on early assumptions about that Clause's application that would also have blocked early appeals to the Clause by those seeking to bolster fetal protections. These blocking assumptions, when articulated by courts,

abortions, the reasonable ratifier would have agreed that the Amendment's terms entitled guardians ad litem to obtain equitable relief for unborn children.[124] This could have been denied only on some Fourteenth-Amendment-limiting theory[125]—*e.g.*, of the Amendment's race-specific motivating goals[126]—long and rightly

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proved to concern not the meaning of "any person" but the import of "deny . . . the equal protection of the laws." Some of these restrictions were soon rejected; others lingered more or less unchallenged for over a century. *See* John Finnis, *Unborn Persons: Why Equal Protection Slept 102 Years*, FIRST THINGS (Mar. 30, 2021), www.firstthings.com/web-exclusives/2021/03/unborn-persons-why-equal-protection-slept-102-years [https://perma.cc/YLJ9-WYKG]. Under the corrected understanding of "equal protection," plus the public meaning that the Clause's "any person" phrase always had, the Clause protects the unborn against state laws permissive of elective abortion.

124. On guardians of the unborn, *see* 1 BLACKSTONE, quoted in text *supra* at note 17; *see also* WHARTON, quoted *supra* note 95. Ratifiers, in this counterfactual 1870 scenario, would find their willingness to understand the Equal Protection Clause as protecting the unborn against novel and lethal discrimination enhanced by the robust feminists of the day, whose near unanimous condemnation of elective abortion as murder is painstakingly documented in DELLAPENNA, *supra* note 70, at 267–68 ("[T]he leading feminists of the time were virtually unanimous in *demanding* the criminalization of abortion."); *id.* at 324 ("The leading feminists of the time were, if anything, more emphatic [than the medical men] in demanding harsh punishment for abortion, and on precisely the same grounds as the male dominated organized medical profession"); *id.* at 345 ("Women—particularly the founding mothers of feminism—also took the lead in these nineteenth century legislative battles. [footnote omitted]. And women physicians in the nineteenth century took a particularly strong leading role in the 'crusade' against abortion." [footnote omitted]); *id.* at 372, 374 ("[P]erhaps the most impressive demonstration of the new consensus on the nature of human generation [footnote omitted] was its emphatic embrace by all leading feminists of the period when the abortion statutes were being enacted. Feminist leaders, as a result, were explicit and uncompromising, and virtually unanimous, in condemning abortion as 'ante-natal murder,' 'child-murder,' or 'ante-natal infanticide.'"). *See also id.* at 375, 380, 381–82, 384–85, 387, 392, 404.

125. The Civil Rights Cases of 1883 had stressed that the amendment bears only on "State legislation" or "State action" that impairs privileges or immunities or injures persons in life, liberty, or property or denies to any one of them the equal protection of the law. The implicit baseline for identifying a singling-out, an impairment, an injury, or a denial was the common law and the long-established legal institutions accepted in 1866 in the states that had been loyal to the Union. That baseline, and the strong limitation it imposed on the equal protection clause, was not definitively left behind (repudiated) until *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954).

126. Such as prevailed from 1871 until 1886: *see supra* note 123.

rejected by the Supreme Court as inconsistent with the original and plain public meaning of the words of the Equal Protection Clause.

II. *ROE*'S AND *CASEY*'S ARGUMENTS AGAINST FETAL PERSONHOOD ARE UNSOUND.

A. Justice Stevens' Defense in Casey *has Absurd Implications.*

Since *Roe*, the only Justice to defend *Roe*'s denial of constitutional personhood—Justice Stevens—clung to a single plank: *Roe*'s claim that unborn children's right to guardians *ad litem* to protect their property interests is no recognition of personhood because those interests are not perfected until birth.[127]

This plank is no affirmative case, merely a response to one counterargument, and still it fails—attempting to drum up a constitutional principle from one narrowly stated[128] sub-constitutional technical rule[129] while ignoring others that reflect the principle declared

127. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 912–13 (1992) (Stevens, J., concurring in part and dissenting in part).

128. Too narrowly, because the *vesting* of rights often counts at least as much as their "perfecting." The present procedural rights of unborn children to have guardians *ad litem*, like their substantive right to receive income or other property by inheritance or intestate succession, get an injunction against waste, or to *parens patriae* or other protection against their mothers (or the mother's representatives) (*see infra* note 132), are rights each sufficiently vested ("perfected") to serve the child's interests appropriately and in seamless continuity with the substantive rights as he or she enjoys them after birth and eventually after infancy.

129. Also unavailing is *Roe*'s reliance on a defunct tort doctrine rejecting liability for prenatal injuries. Justice Holmes invented that doctrine well after the Amendment's ratification, in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 16–17 (1884), based on the fictions that the unborn child is "not yet in being" and so is merely "part of the mother." (State and federal courts gradually exposed those fictions until 1953, when New York's appellate court followed the "clear[]" "biological" reality "that separability begins at conception." Kelly v. Gregory, 125 N.Y.S.2d 696, 697 (App. Div. 1953). By 1971 Prosser could write that almost all jurisdictions have allowed recovery for pre-viability injuries. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 337 (4th ed. 1971). He had approvingly called rejection of Holmes's fictions "the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts." *Id.* § 56, at 354 (3d

by Blackstone and Shaw, and by the Lord Chancellors whose rulings they cited: the unborn child "is a person *in rerum naturâ*" under "the civil and common law" and "to all intents and purposes[.]"[130]

Thus, the child *in utero* has had substantive rights to receive income or other property by inheritance or intestate succession, and to get an injunction against waste, rights sufficiently vested to serve her seamlessly through birth and infancy.[131] Then there are the vested rights of the unborn, enforced by courts against their parents' competing rights-claims, in *parens patriae* cases ordering blood transfusions, etc.[132] The latter civil rights to life—which could hardly override parental rights unless the unborn were themselves persons—had to be ignored by *Roe* and verbally denied[133] by Justice Stevens. Similarly ignored were the ongoing prosecutions and convictions, now as then, for violations of unborn children's right to life as enforced in state feticide laws.[134]

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ed. 1964). A.A. White, *The Right of Recovery for Prenatal Injuries*, 12 LA. L.REV. 383, 394–400 (1952) (written just before the Holmes doctrine sank beneath the waves), surveys various insufficient policy or precedential reasons for the doctrine's denial of liability (denial that the unborn infant was a person in the eyes of the law), and shows (399) that "the courts denying recovery for prenatal injuries have not effectively escaped the implications for tort law of the recognition by the criminal law and other fields of the civil law of the infant's prenatal existence." This recognition was induced by physical/physiological facts.

130. Hall v. Hancock, 32 Mass. (15 Pick.) 255, 258 (1834).

131. *See id.*, where Chief Justice Shaw adopts "the principal reason" of Lord Hardwicke's opinion in Wallis v. Hodson, 2 Atk. 117 (Ch. 1740), a reason that Lord Hardwicke promptly exemplified: "on Behalf of such an Infant [*en ventre sa mere*], a Bill might be brought, and an Injunction granted to stay Waste."

132. *See* Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 201 A.2d 537, 538 (N.J. 1964), *cert. denied* 377 U.S. 985 (1964); *see also* Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 844–48 (1973) (collecting cases); Ex parte Phillips, 287 So.3d 1179, 1251-1253 (Ala. 2018) (Parker, J., concurring specifically) (collecting cases).

133. "Thus, as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.'" Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

134. *See generally* Gerard V. Bradley, *The Future of Abortion Law in the United States*, 16 NAT'L CATH. BIOETHICS Q. 633 (2016).

B. Roe*'s Grounds for Denying That "any person" Included Unborn Children Are Utterly Untenable.*

Roe's counterarguments merit no deference, *Roe* having disqualified itself from constitutional-settlement status by refusing to appoint a guardian *ad litem* or hear the contemporaneous Illinois appeal involving an unborn child so represented[135]—and its points fail anyway.

Roe produced three reasons not to recognize unborn humans as persons. Its textual reason, that "person" as used elsewhere in the Constitution gave no "assurance" of "pre-natal application," was concededly inconclusive, and in fact subverts itself by proving too much.[136] Its pragmatic reason was so implausible that it was framed in questions, not propositions.[137] And its historical reason was a cluster of gross errors drawn solely from two articles by Cyril Means. His first article (called by the Court "Means I") was written while he was general counsel of National Abortion Rights Action League, and had already been refuted.[138] The second ("Means II") was so recent that no scholar had yet examined its sources, was so

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135. Doe v. Scott, 321 F. Supp. 1385, 1387 (N.D. Ill. 1971); *see also* John D. Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment "Personhood," and the Supreme Court's Birth Requirement*, 4 S. ILL. U. L.J. 1, 8–9 (1979).

136. Roe v. Wade, 410 U.S. 113, 157 (1973). For none of the Constitution's uses of "person" gives any indication of *when* one becomes a person, or entails that one becomes a person only at birth. *See* Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 550–52 (2017). And any reading that excludes the unborn from the Equal Protection Clause's "any person" because most uses of "person" elsewhere in the Constitution cannot apply to them (voting, becoming President, and so forth) applies *a fortiori* to corporations, yet the Court from 1886 has unflinchingly included them within equal protection and due process guarantees for "any person."

137. It asked how to square unborn personhood with (i) not penalizing the mother who consents to elective abortion, (ii) not penalizing operations that save the life of the mother but terminate her pregnancy, or (iii) penalizing abortion less severely "than the maximum penalty for murder." *Roe*, 410 U.S. at 157 n.54. *But see* Craddock, *supra* note 136, at 562–66.

138. *See* GERMAIN GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 382–92, 395, 434 (1970).

flawed that it was known to "fudge" the history even by counsel for Jane Roe who cited it,[139] and abandoned key theses of the first. Once scrutinized, its sources crumbled, as did *Roe*'s consequent assertion of a historic common-law "right to terminate a pregnancy."[140] Two key elements in Means I and II are selected for examination below, exemplifying the articles' gross errors and manipulations.

History "disposes of any claim that abortion was a 'common law liberty;'"[141] the common law and statutory history above already shows the claim to be preposterous, and will be supplemented in the next section. And *Roe*'s astonishing "doubt[]" that post-quickening abortion was "ever firmly established as a common law crime"[142] contradicts the precedents and authorities since before Bracton in the 1200s. Means's attempt to explain away those precedents, an attempt repeated by *Roe*,[143] was soon refuted, not least by original records underlying the inaccurate printed accounts used by Means.[144]

C. *By Following Means I and II,* Roe *Caricatured the Common Law and the Reforming Statutes.*

In this section we make only two of the many points that could be made about the analyses (sharply differing but overlapping in

139. A 1971 memorandum circulated among Roe's legal team said Means's "conclusions sometimes strain credibility" and "fudge" the history but "preserve the guise of impartial scholarship while advancing the proper ideological goals." DELLAPENNA, *supra* note 70, at 143–44, 683–84.

140. *Roe*, 410 U.S. at 140–41.

141. DELLAPENNA, *supra* note 70, at 1056; *see also id.* at 336, 351–54, 374–75, 409–10 n.175.

142. *Roe*, 410 U.S. at 136.

143. *See id.* at 134–36.

144. DELLAPENNA, *supra* note 70, at 146–50; *see also id.* at 134–43.

error) in Means I[145] and Means II.[146] One point concerns the putative common law liberty of—or right to—re-quickening abortion (the version in Means I) or abortion up to birth (the version in Means II). The other concerns the misuse, in both articles, of *State v. Murphy*[147] as principal, indeed almost sole evidence for the articles' fantastic proposition that the mid-19th century reforming statutes had *no purpose* of rejecting that imagined liberty (in either of its versions) to destroy the unborn ("fetuses"), but instead the *exclusive* purpose—now obsolete, needless and therefore unconstitutional—of protecting women against procedures dangerous to their health or life.

1. The Invented "common law liberty to abort"

To make even the semblance of a case that there was a common law liberty to abort—whether at all stages or only at pre-quickening stages—Cyril Means had to surmount the settled doctrine of all the treatises used by America's front-line criminal courts, the justices of the peace. That doctrine, to repeat (see *supra* Sections I(A)(1)–(3)), had three stable and unchallenged elements:

(i) causing the death of the mother by consensual elective abortion measures at any stage of pregnancy is murder (*see* Hale, Hawkins, Blackstone, *Conductor generalis*, the *American Justice*, East, Russell, the draft Massachusetts Penal Code, Chief Justice Shaw in *Parker* . . .);

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145. Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y. L. F. 411, 418–28 (1968) [hereinafter Means I]. Pages 418–28 were cited by *Roe* at 132 n.21 (quickening, etc.), and pages 411-12 were cited by *Roe* at 134 n.22 (canon law). The whole was cited by *Roe* at 151 n.47 (purpose of state statutes).

146. Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty*, 17 N.Y. L. F. 335 (1971) [hereinafter Means II]. The whole was cited by *Roe* at 135 n.26 (no established common law prohibition) and 151 n.47 (statutory purpose(s)). Pages 375–76 were cited by *Roe* at 139 n. 33 (state statutes) and pages 381–82 at 148 n.42 (purpose of state statutes).

147. 27 N.J.L. 112 (Sup. Ct. 1858).

(ii) causing the death of the child after its birth by elective abortion measures at any stage of pregnancy is murder (*see* Coke, Hawkins, *Conductor generalis*, the *American Justice*, the draft Massachusetts Penal Code, Chief Justice Shaw in *Parker*. . .);

(iii) any elective consensual abortion measure is a serious misdemeanor at least if it is taken while the mother was "quick with child" and causes the death of the child in the womb; many authorities (including probably Hale himself and certainly the Massachusetts Penal Code commissioners and American treatises such as Wharton and Bishop) treat it as a serious misdemeanor at *all* stages of pregnancy, at least if it causes the death of the child in the womb.

Means I: Falsified by Hale

Means's 1968 article (Means I) focused[148] on Coke's 3 *Inst*. 50 statement of [III] and [II]. Here Means was concerned to assert, without argument, that Coke's opening words, "If a woman be quick with child. . ." "witnessed" that

> [a]t some point between the thirteenth and seventeenth centuries, English common law developed along the line suggested by Bracton's distinction between formation and animation. In so doing, it postulated the latter event as occurring at the time of quickening (*i.e.*, toward the end of the fourth or the beginning of the fifth month of pregnancy), as witnessed by the statement of Sir Edward Coke[]. . .[149]

Means never gave any argument or evidence for the highly improbable claim that Coke was referring to "quickening," in the sense of an event of maternal perceptions "towards the end of the fourth or the beginning of the fifth month."[150] (Nor consequently did *Roe*, which simply changed the just-quoted assertion in Means I into the even more egregiously implausible claim that the common law's adoption of maternally perceived quickening occurred

148. Means I, *supra* note 145, at 418–28 (cited by *Roe*, 410 at 132 n.21).
149. *Id.* at 420.
150. *See id.*

in the famous sentence of Bracton itself.[151]) It is highly probable that Coke like everyone else between 1250 and 1650 regarded the woman as *quick with child*, if not from the beginning of her pregnancy, then at the time when the c. six-week formation of the conceptus into a child was completed and followed, distinctly but presumptively immediately, by the distinct though secret event of animation, generally accepted as occurring at about the 40th, 42nd or 46th day after conception.[152]

On this almost universally accepted schema, Bracton's distinction between *formatum* and *animatum* would be read as disambiguating *formatum*, "formed," which on its own could refer to any point in an 18-day period between the 28th and 46th day. "Quickening" in the sense that interested some nineteenth-century judges, Means, and the Historians' Brief in *Dobbs*, was irrelevant to those for whom, like Bracton and Coke, the key question always was and is: From when are we dealing with *a distinct human being* in the womb?

Means I's grand division of theories into "immediate animation," "mediate animation" and "birth," and the declaration of Means I at 418 (where *Roe* begins to cite Means) that "the only one of the three theories that explains absolutely nothing in our legal system is immediate animationism,"[153] totally overlooks the two different ideas of "mediate": ensoulment at c. 40 days, and maternally perceptible movement at c. 105 days. Means I proceeds, at 420, to derive from the quoted passage of Coke the proposition "an abortion *before* quickening, with the woman's consent, whether killing the foetus while still within the womb, or causing its death after birth alive, was . . . not a crime at all." This is what Means I (by contrast with Means II) will mean by "ancient common-law liberty."[154]

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151. *See supra* text accompanying note 52, text after note 76, and text after note 80; for the Bracton sentence, *see supra* text after note 66. *See also* notes 59, 64, and 66.

152. *See supra* notes 64–66.

153. Means I, *supra* note 145, at 418 (cited by *Roe* at 132 n.21).

154. *See id.* at 452, 453, 462; *cf. id.* at 438 ("[T]he common law *tolerated* abortion on request *before* quickening." (his emphasis)).

But that passage in Coke (and Blackstone and the rest) dealt only with rules [III] and [II], not at all with [I], the liability of the provider of an elective abortion for murder if the mother dies from it. *Means I admits that this liability is incurred even though the abortion was done or attempted before quickening*.[155] The article does not raise the rule [I] issue at all until it has purportedly completed its demonstration that pre-quickening consensual abortion was no crime either in the woman or in her provider, and has passed on to a consideration of the subordinate question whether the consent of the husband was needed if the not-yet-quickened pregnant woman was married. (Answer: there is no evidence that it was, and the article does not for even a moment consider how improbable its liberty thesis is in relation to a "patriarchal" society—or indeed any society with a serious conception of marriage—insofar as it proposes that the common law made no objection to the married woman's secret or defiant destruction of her husband's son and heir.)

This sequencing allows Means I to argue in a vicious circle: the provider of a pre-quickening abortion was acting lawfully because

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> So fond was [the common law] of liberty, that it allowed the pregnant woman to run the risk of death on the operating table, at a time when this risk was real and substantial, if she chose to rid herself of the foetus *before quickening*; yet so fond was it also of life that, if she did not survive the operation or its aftermath, he who performed it was hanged.

Id. at 437 (emphasis added).

The same page explained that if the purpose of the operation was to save the life of the woman, then the operation would be *with* lawful purpose, in which case, even if the patient died, the physician would not be guilty of any offense, let alone murder. The therapeutic exception was thus already present in the common law, not in the domain of pre-quickening abortion—for all such abortions were noncriminal, provided the patient consented, *and survived*[!]—but rather in the domain of murder as imputed to the abortionist whose patient died.

In this confused passage, Means I admits *at least* that the lawfulness of the pre-quickening elective abortion cannot be determined until the patient has "survived" the abortion and its aftermath. Incidentally, we have not observed in Means I and II anything as mistaken as Professor Aaron Tang's notion that rule [I] merely penalized "botched abortion." *See* John M. Finnis & Robert George, *Indictability of Early Abortion c. 1868*, at 23–24 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3940378.

the passage quoted from Coke shows that "[a]bortion before quickening was not an offense at common law at all (unless the patient died)."[156] But that passage from Coke dealt only with rules (ii) and (iii), and it neither stated nor implied that *abortion was lawful* if the mother was not yet quick with child: it merely said that if she *was* quick with child, abortion was a great misprision and was murder if the child born alive died from it.[157] Means took care to evade the implications of holding the abortionist guilty of murder if "the patient [mother] died," by avoiding—navigating around—Hale's statement of the rule, which *describes the abortion as unlawful*—"unlawfully to destroy the child within her, and therefore, he that gives a potion to this end must take the hazard . . . ."[158] It is because *the procedure is unlawful* that the abortionist, however skilful, "must take the hazard" of being liable for murder if the mother dies.[159]

Hale is here making clear that there is no common law liberty of abortion. For if the abortionists are guilty of murdering the consenting woman if she dies from the abortion, the murderous acts were none other than their abortifacient conduct perhaps many months before her death. The common law knew nothing of an act that is lawful when and as done—involves neither *actus reus* nor *mens rea*—but becomes criminal on the happening of some subsequent event. What it does recognize is *unlawful* acts that constitute criminal homicide if and only if some subsequent harm happens to result from that act.

So Means I deals with the issue by quoting two American judgments (*Parker* in 1845 and *Smith* in 1851) in which the judges do not quote Hale, and instead of his term "unlawfully to destroy the child" use the softer phrase "without lawful purpose" (a phrase that Means I proceeds to treat as concerned only with the common

156. Means I, *supra* note 145, at 440 n.64.

157. *See id.*

158. Means I, *supra note* 145, at 446; Means II, *supra* note 146, at 362, quoting the passage from Hale.

159. *Id.*

law's implied permission of therapeutic life-saving abortion).[160] The fact that one of the judgments cites Hale is buried in a footnote, without identifying the citation beyond "a posthumously published (1736) treatise by Sir Matthew Hale (1609-1670)."[161]

Means II: Extremist Escape from its Author's Dilemma

So Means was obliged to take seriously, and tackle, the problem concealed by Means I. He did so in Means II, with new boldness but a familiar technique.

The new boldness is part of the radical shift in stance between Means I and Means II. Quickening, the heart of Means I, has been moved almost off-stage: the liberty proclaimed is not of pre-quickening elective abortion; it is "English and American women's common-law liberty of abortion at will," that is, to "terminate at will an unwanted pregnancy" "at every stage of gestation."[162] Correspondingly, the rule [I] issue is contained within the question with which Means II, on its second page, frames its whole discussion: "Did an expectant mother *and her abortionist* have a common-law liberty of abortion *at every stage of gestation*?"[163]

The familiar technique, already deployed in Means I, is to postpone all mention of rule [I] until after the discussion has reached the essential conclusion that—in the Means II version—the woman did indeed have (in England until the statute of 1803, in America "until 1830") a common-law liberty of elective abortion just as much after as before quickening. Only then is the question about "her abortionist" raised and rule [I] reconsidered.[164] The answer that Means II will give to its framing question from p. 336 is delayed until p. 373, and it is an answer dividing the position of "the expectant mother" from the position of "her abortionist:"

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160. *See* Means I, *supra* note 145, at 435.
161. *Id.* at 435 n.56.
162. Means II, *supra* note 146, at 335-36, 375.
163. *Id.* at 336 (emphasis added) (capitalization adapted).
164. *Id.* at 373.

> During the late seventeenth, the whole of the eighteenth, and early nineteenth centuries, English and American women were totally free from all restraints, ecclesiastical as well as secular, in regard to the termination of unwanted pregnancies, at any time during gestation. During virtually the same period (*i.e.*, starting with Hale's decision in 1670), however, the common law had imposed a new risk on the woman's abortionist: he became the insurer of her survival. . . . [T]he common law said[:] . . . if your patient die, you will hang for her murder. If she survive [sic], you will have committed no offense.[165]

On the preceding page, 372, Means II states that last proposition more radically: "In Massachusetts when Shaw wrote [in *Parker*], therefore [since there was no ecclesiastical jurisdiction, only secular common law], *it would have been false to say that an abortifacient act was done 'unlawfully'*; it merely lacked 'lawful purpose.'"[166]

But in the very same sentence, Shaw had said: "the consent of the woman cannot take away the imputation of malice, any more than in the case of a duel, where, in like manner, there is the consent of the parties."[167] What is the "malice" of the provider of a consensual abortion? Means II ignores the question at this critical point (just as Means I had ignored it entirely). But earlier Means II had tried to tackle it, by casting doubt (unwarranted, as we shall soon see) on what East says about transferred malice in the justly influential passage (1 East 230) discussed above.[168] Means I and II needed to deny or evade, and did deny or evade, the fact that for Hale, East, and Chief Justice Shaw, *the malice of the consensual abortion was against the unborn child*.

Shaw's comparison with dueling[169] helps make sense of the whole question whether the abortionist was acting unlawfully even before

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165. *Id.*

166. *Id.* at 372 (emphasis added).

167. Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 265 (1845).

168. Means II, *supra* note 146, at 363–72. East is discussed *supra* pp. 945–47; *infra* pp. 986–89.

169. *Parker*, 50 Mass. (9 Met.) at 265.

any mother died from his elective procedures. It helps to bear in mind that the common law did *not* operate with a principle or general doctrine that an attempt to commit a crime (felony, misprision, misdemeanor) is itself an indictable crime.[170] But it did operate with a principle or general doctrine that there had to be an *actus reus*, the doing of which with *mens rea* defined the time and place of the committing of the offense, even if the offense's indictability depended upon a subsequent event such as a death.[171] What was done before the fulfilling (if ever) of that condition subsequent was, of course, unlawful and in a broad, important sense, criminal.[172]

How did Means II evade and disguise the implications of East's discussion? First by pretending that 1 East 230 was not a general statement of principle and law, but a commentary on *Tinckler's Case*, in which both the mother and the baby (born living for a few moments) died—allowing Means to claim that, since the defendant abortionist was not prosecuted for murdering the baby, and East did not allude to the murder of the baby, he and the Crown prosecutors and the trial judge and all the "Twelve Judges of England" must have rejected the doctrine in Coke (3 *Inst.* 50) that [II] the abortion-caused death of the aborted baby born alive is murder.[173] The whole argument is absurd (and entirely characteristic of the argumentation of Means I and II), for the following three reasons.

(1) As is reported on 1 East 355, a page which Means II quotes in its entirety, the baby when born was proved by the surgeons to be "perfect."[174] So there was no ground for prosecuting Tinckler for murder under rule [II], and all Means's inferences from that nonprosecution, and all his rhetorical flourishes in stating them, are entirely worthless. Means simply ignores what he has transcribed about the fact ("was perfect") that would have made it impossible

170. *See* 2 JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 222–23 (London, MacMillan & Co. 1883).

171. *Id.*

172. *Id.*

173. Means II, *supra* note 146, at 367–71.

174. *Id.* at 364.

to establish the causal link between abortive measures and death that is one of the two requirements of rule [II].

(2) 1 East 230 is not, as Means II claims,[175] a commentary on *Tinckler*.[176] It is a general exposition of a legal rule, of which *Tinckler* is one appropriate illustration. But, as the page makes unambiguously clear, *Tinckler* is only the second of two different illustrations, two precedents explicitly identified as different, the first being an unidentified case of giving an abortifacient potion causing the death of the mother (with no suggestion of a born-alive baby or a possible rule [II] murder).

(3) Means II's insistent claim that East probably disapproved of Coke's rule [III] because he certainly (says Means) disapproved of Coke's rule [II][177] is disproved not only by its illogic as a fallacious *and* groundless argument from silence (about Tinckler's baby's unprosecuted death), but above all by the plain fact, unaccountably ignored by Means, that only two pages earlier in the same discussion of homicidal malice, 1 East 227 explicitly approved and adopted precisely both of Coke's rules![178] Indeed, for good measure,

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175. *Id.* at 366–67.

176. Means II even claims that the marginal note citing 1 Hale 429 expresses East's preference for Hale over Coke and for Hale's denial of Coke's rule [II] and non-affirmation of rule [III]. Means II, *supra* note 146, at 367. But neither of those rules was relevant to 1 East 230, which concerns only rule [I], never expounded by Coke—and places the citation to 1 Hale 429 not alongside the skewers case but at the very beginning of the paragraph expounding the transferred malice principle's application to abortion as illustrated by two cases. Presumably that is why Means II, when using East's marginal note to 1 Hale 429 as its first ground for inferring that East disapproved of Coke, takes care to cite not the marginal citation of "1 Hale 429" at 1 East 230—where East is actually discussing rules—but only the marginal note "(1 Hale, 429)" in the quasi-report of *Tinckler* at 1 East 353, at the point where the trial judge's ruling is given: "[Nares J.] was clearly of opinion it was murder [of the mother], on the authority of Lord Hale." Rule (i) in action in 1781. (The divided opinions of "all the judges" concerned only the question of admitting dying declarations of an accessory without corroboration. *See* 1 East 356.)

177. Means II, *supra* note 146, at 368.

178. EAST, 1 PLEAS OF THE CROWN 227 (London 1803, Philadelphia 1806) (citing in the margin Coke (3 *Inst.* 50) and his supporters Hawkins and Blackstone).

1 East 228 pointed out that *both* Hale *and* Staundford (Means II's hero in the article's struggle to discredit rule [III]) *agreed with rule [III]* even though they rejected rule [II] for reasons that East, like almost everyone else, goes out of his way to say were unsound.[179]

After and seemingly because of these blunders or misfeasances, Means II simply ignores the references to malice that appear prominently in the authorities he approves: *Russell On Crimes*,[180] Shaw in *Parker*,[181] and the Maine court in *Smith* (1851).[182] Notably, Means II's commentary on *Parker* focuses entirely on Shaw's low-key phrase "without lawful purpose," ignoring what Means I had said about the same passage, and instead implausibly taking it as a sign that Shaw thought Hale treated abortion as only an ecclesiastical offense.[183] The whole commentary functions to diverting readers' attention away from the real premises and logic of Shaw's argument: the consensual abortion is a malicious act, the "imputation of malice" is no more cancelled by the woman's consent than it is in the case of a duel, and the upshot is that the procedure however skillful is not just a homicide but a murder.

The failure of Means II's extended discussion of rule [I] further illustrates the extravagant baselessness of the article's rejection of rules [II] and [III], with its accompanying attempt to remove from the common law of abortion everything that was affirmed by Coke

179. *Id.* at 277–81 ("But to kill a child in its mother's womb is no murder, *but a great misprision*: and Staundford and Lord Hale are of the same opinion, even where the child is born alive and afterwards dies by reason of the potion or bruises it received in the womb: which opinion they seem to ground on the difficulty of ascertaining the fact: certainly not a satisfactory reason, where the fact is clearly established: and according to all other opinions the latter is murder."). "[T]he latter" is the case of the [II] aborted child born alive and dying from the abortifacient measures; the implicit "former" is the [III] aborted child who dies in the womb. Note in passing the absence of any reference to quickening; the governing phrase "kill a child" necessarily implied that the child was quick in the sense of formed, ensouled and alive (which is long before "quickening").

180. Means II, *supra* note 146, at 371.

181. *Id.* at 372.

182. *Id.*

183. *See id.*

and by all who followed him, including Blackstone and all the treatises recalled above.

2. The Reforming Statutes' Rationale: *Murphy* Mishandled

To recall: both Means I and Means II ascribed extraordinary, indeed unique importance to *State v. Murphy*.[184] They treated a single sentence in the New Jersey Supreme Court's opinion as their principal, indeed almost their sole evidence for their proposition that mid-19th century reforming statutes in dozens of states had *no purpose* of rejecting the (imaginary) common-law liberty (in either of its versions) to destroy the unborn ("fetuses"), but instead the *exclusive* purpose of protecting women against procedures dangerous to their health or life. The articles were entirely unconcerned with the *decision* in *Murphy*. It was only ever one single, oracular sentence that these articles quoted; they made not the slightest reference to the facts or the issue in the case, or to the context of the sentence in the New Jersey Supreme Court's opinion. Here is the sentence:

> The design of the [New Jersey] statute [of 1849] was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts.[185]

About this sentence, Means I and Means II made the same incredible claim:

> Until now [1968!], this observation, in *State v. Murphy*, had been the sole piece of contemporary evidence as to why the legislatures enacted these statutes abridging the liberty to abort before quickening, a right which women enjoyed at common law for centuries. It remains the sole *judicial* exposition of such a statute contemporary with its enactment.[186]

Towards the end of Means I, the author doubles down:

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184. *See supra* text accompanying note 147.

185. State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858).

186. Means I, *supra* note 145, at 452 (emphasis in original).

> The New York Revisers' Report of 1828 and the New Jersey decision of 1858 in *State v. Murphy* are literally the only known contemporary authoritative texts explaining the reason for the enactment of any of these novel prohibitions of abortion before quickening. Both point to the life and health of the pregnant woman as the *sole* objective in legislative view.[187]

And Means II repeats all this:

> The only contemporaneous judicial explanation for the enactment of any of the pre-Lister [scil. 1867 or 1884][188] abortion statutes—a decision of 1858 construing New Jersey's first such statute passed in 1849—contains the [sentence above quoted].[189]

Despite the effrontery of these false claims, they had the desired effect. They were swallowed whole by *Roe*.[190] The Court makes a show of saying that it is merely describing what "parties challenging state abortion laws" "claim" and "argue."[191] But the argument and the evidence for it is simply what Means I and Means II says about *Murphy*, and by the end of this key passage the Court is simply embracing it:

> Pointing to the absence of legislative history to support the contention [that a purpose of these laws, when enacted, was to protect prenatal life], [parties challenging state laws] claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose.[fn. See discussions in Means I and Means II.] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the

187. *Id.* at 507 (emphasis in original).

188. *See* Means II, *supra* note 146, at 391. "Lister" is shorthand for the use of antiseptics in surgery.

189. Means II, *supra* note 146, at 389–90. Means adds a couple of sentences emphasizing how distinguished and well-informed the *Murphy* court was.

190. Roe v. Wade, 410 U.S. 113, 151 (1973).

191. *Id.*

> woman's health rather than in preserving the embryo and fetus. [fn. See, *e.g.*, *State v Murphy*, 27 N.J.L. 112, 114 (1858).][192]

These claims by Means I and II—that *Murphy* was the only judicial decision before 1867/1884 (Lister) or 1968 ("now" in Means I) that identified the legislative purpose of a state abortion statute—were untenable, to put it mildly. Within a year of *Murphy*, the Massachusetts Supreme Court authoritatively—and not as mere dictum—identified the purpose of that state's 1845 statute,[193] and the Vermont Supreme Court identified the purpose of that state's 1846 statute.[194] And, tellingly though unsurprisingly, neither court saw

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192. *Id.*

193. See *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85 (1858), which upheld the trial judge's direction

> that *although at the common law*, as held in this commonwealth, it was no offence to procure an abortion, unless it was alleged and proved that the mother was "quick with child"—that being the stage of pregnancy which, by the common law, was considered to be the commencement of the child's life—yet that under the statute of 1845, c. 27, it was not necessary to allege in the indictment or to offer affirmative proof that the child had life. (emphasis added).

The appellate court added:

> The [trial] court was also requested to instruct the jury that a lawful justification "would exist if the child with which Sarah Chaffee was pregnant was not a live child." If by this was meant that the mother had not reached the stage of pregnancy in which she would be "quick with child," and when to procure an abortion would be an offence at common law, the prayer in our opinion misconceives the purpose of *the statute*, which *was intended to supply the defects of the common law, and to apply to all cases of pregnancy*.

Id. at 93 (emphasis added).

194. See *State v. Howard*, 32 Vt. 380 (1859), where the primary question was whether the prosecution need prove that the child was alive in the womb at the time of the unlawful inducing of miscarriage. After comparing the state's 1846 statute with the English criminal abortion statutes of 1803, 1837 and 1851, the State Supreme Court held:

> [U]nder our statute it is expressly required, to constitute the offence, that the attempt be to procure the miscarriage of a woman "then pregnant with child."
>
> . . .
>
> . . . So that the only new question arising under our statute is, whether it is essential to the pregnancy or "being pregnant with child," that the child

any reason to mention maternal health. Each court, independently of the other, identified the legislative purpose as filling in the gap in the common law's protection of the unborn child—the "quick with child" requirement of rule (iii).

Equally untenable was the other main claim made by Means I and II about *Murphy*: that it held or declared that protection of unborn life was not even *one* purpose of New Jersey's 1849 statute. Even read in isolation, the key words of the quoted sentence are "not to prevent the procuring of abortions, *so much as to* guard the health. . . ."; the words here italicized imply, unquestionably, that preventing the procuring of abortions was *a purpose*, though not the primary one. But context is a primary determinant of meaning, and the sentence's context, totally ignored by Means and *Roe*, shows that "not to prevent the procuring of abortions" meant far less than appears in isolation. It was not intended to contrast preventing destruction of unborn life with preventing damage to maternal health, but rather to contrast what the court took to be the common law's *exclusive* focus on the fate of the unborn with the legislature's *additional* concern to protect women from the dangers presented by the activities and solicitations of abortionists and suppliers of abortifacients.

For the sole issue in *Murphy* was whether it was a defense to a charge of supplying abortifacient drugs that the woman had not

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should be still alive. IT IS NOT CLAIMED THAT IT IS NECESSARY THE EMBRYO SHOULD HAVE QUICKENED. THE GENERAL FORM OF EXPRESSION "PREGNANT WITH CHILD," SEEMS TO HAVE BEEN USED TO ESCAPE ALL QUESTION OF THIS KIND AND HAVE IT CLEARLY APPLY TO EVERY STAGE OF PREGNANCY, FROM THE EARLIEST CONCEPTION; and if so, we see no reason why it should not extend through its entire term, until the expulsion of the *foetus*.

Id. at 400 (emphasis added).

If the legislative purpose in Vermont or Massachusetts had been protection of women's health *rather than* the child's life, the statutes would have abolished the requirement of proving pregnancy, and would have penalized abortifacient measures on women only believed or feared to be pregnant. For all that is said by the New Jersey supreme court in *Murphy*, the same should be said about the New Jersey statute in that case (see *infra* pp. 992–97).

swallowed them. The court's answer is No. That answer was obvious from the words of the statute, but the court launched itself into a redundant and convoluted justification. The mischief tackled by the statute is supply of means of inducing abortion or, more generally, is *the activities of abortionists*. Those activities endanger maternal health, *whether or not* a particular woman supplied with an abortifacient (and/or solicited to use it) did in fact incur the danger to herself [not to mention to "the embryo and fetus"!] by actually using it.

So the emphasis in the sentence selected and quoted by Means I and II was really on *procuring*, here meaning: actually bringing about an abortion. Procuring is being contrasted with *attempting* to procure, and/or with *facilitating* abortion:

> [T]he mischief designed to be remedied by the statute was the supposed defect in the common law developed in the case of The State v. Cooper, viz., that the procuring of an abortion, *or an attempt* to procure an abortion, with the assent of the woman, was not an indictable offence, as it affected her, but only as it affected the life of the *fœtus*. The design of the statute was not to prevent the *procuring* of abortions, *so much as to* guard the health and life of the mother against the consequences of such *attempts*. *The guilt of the defendant is not graduated by the success or failure of the attempt.* It is immaterial whether the *fœtus* is destroyed, or whether it has quickened or not. *In either case* the degree of the defendant's guilt [under the statute] is the same.[195]

For reasons best known to itself, the court further complicates its opinion with another concern: to make clear that the statute, in saying "if any person . . . shall administer . . . or prescribe . . . or direct . . . ," was criminalizing only the activities of abortionists, not of their clients. The court contrasts all this with the common law, focused as it was and is on the life of the unborn child: Unless the child was quickened and then destroyed, the actions of both mother

195. State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858) (emphases added).

and abortionist are unindictable at common law, however damaging they are to the woman. (The court neglects rule [I].)

Some of these defects of the common law would have been remedied had the common law incorporated a functioning general principle that it is an indictable offense to attempt or incite an offense. But not only did it lack such a principle,[196] but by its exclusive focus on the formed or quickened child, it also failed (leaving aside the mother's death and rule (I)) to penalize either successful or attempted abortions early in pregnancy, even though such acts and attempts were just as dangerous, at least to the mother, from conception onwards, and even if there had in fact been no conception. As the court put it:

> At the common law, the procuring of an abortion, or the attempt to procure an abortion, by the mother herself, or by another with her consent, was not indictable, *unless the woman were quick with child*.[197]

Thus, the legislature's remedy had two aspects: The statute criminalized, regardless of quickening,[198] (1) all elective abortifacient facilitations and incitements, regardless of their outcome (including

196. This is not contradicted by the court's remark that—where the common law does recognize a crime of attempt—"[m]ere words do, at the common law, constitute such overt act as amounts to an attempt to commit a crime." *Id.* at 115.

197. *Id.* at 114 (emphasis added).

198. But, *nota bene*, only if there is an unborn child in existence! The statute said:

> If any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman *then pregnant with child,* shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing; and if any person or persons maliciously, and without lawful justification, shall use any instrument, or means whatever, with the like intent; and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall, on conviction thereof, be adjudged guilty of a high misdemeanor; and if the woman die in consequence thereof, shall be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labour for any term not exceeding fifteen years, or both; and if the woman doth not die in consequence thereof, such offender shall, on conviction thereof, be adjudged

actual consumption of abortifacients), and (2) unlike the common law,

> the statute [does not] make it criminal for the woman to swallow the potion, or to consent to the operation or other means used to procure an abortion. No act of hers is made criminal by the statute. Her guilt or innocence remains as at common law. Her offence at the common law is against the life of the child. The offence of third persons, under the statute, is *mainly* against her life and health. The statute regards her as the victim of crime, not as the criminal; as the object of protection, rather than of punishment.[199]

None of this in any way suggests that the statute had cancelled either the common law abortion offenses or the common law's concern for the child.[200] The "mainly" here, like the "so much as" in the sentence quoted by Means I and II, suggests instead that the statute's reforming priority was that such protective concern for the child be *extended* so as to protect the life and health of women *more adequately than before*.[201]

> guilty of a misdemeanor, and be punished by fine, not exceeding five hundred dollars, or imprisonment at hard labour, for any term not exceeding seven years, or both.

A further supplement to an act entitled "An act for the punishment of crimes": Penalty for causing or procuring miscarriage (approved Mar. 1, 1849), *in* ACTS OF THE SEVENTY-THIRD LEGISLATURE OF THE STATE OF NEW JERSEY (Phillips & Boswell, 1849).

199. *Murphy*, 27 N.J.L. at 114–15 (emphasis added).

200. It is certain that in states that retained common-law criminal law at all, abortion statutes could be, and were, regarded as supplementing the common law. *See, e.g.*, Smith v. State, 33 Me. 48, 51 (1851).

201. The New Jersey Supreme Court revisited the 1849 statute and *Murphy* in 1881, in *State v. Gedicke*, 43 N.J.L. 86, 89–90 (Sup. Ct. 1881):

> [T]he act of March 1st, 1849 . . . was passed to remedy an adjudged defect in our law, that to cause or procure abortion before the child is quick was not a criminal offence at common law or by any statute of our state. *State v. Cooper, 2 Zab. 52*. As soon as the question was raised and the doubt suggested, this act was passed to punish the offence. The design of the statute was not so much to prevent the procuring of abortions, however offensive these may be to morals and decency, as to guard the health and life of the female against

But, absurd though it was, the Means I and II thesis that the legislative purpose of dozens of state statutes could be demonstrated by pointing to one decontextualized sentence in a single, convoluted, debatable court opinion was, as shown above, essentially adopted in *Roe*. Before long, but too late, the thesis was demolished by James Witherspoon's exhaustive survey of those statutes' actual features, and his unfolding, as exemplar, of the legislative history of Ohio's reforming statute of 1868.[202] The lively concern for the child in the womb so amply displayed in the Ohio statute's particular legislative history was present and manifested in numerous features of the design and enacting of overwhelmingly many other reforming statutes in other states (not least in the New Jersey statute under discussion in *Murphy*)—Witherspoon listed and exemplified in detail no fewer than twelve such features, and identified all the statutes that embodied them.[203] In doing so, he also showed that the legislators' pervasive concern for children *in utero* was always

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> the consequences of such attempts. The guilt of the defendant is not determined by the success or failure of the attempt; but the measure of his punishment is graduated by the fact whether the woman lives or dies. *State v. Murphy, 3 Dutcher 112*. This law was further extended March 26th, 1872 . . . to *protect the life of the child also*, and inflict the *same* punishment, in case of its death, as if the mother should die. (emphasis added).

This final sentence (though still inexplicably minimizing the 1849 statute's in fact gapless protection of the life of the unborn child) shows—even without going further afield than New Jersey—how erroneous was *Roe*'s claim, in the opinion's above-quoted sentence citing (only) *Murphy*, that "[t]he few state courts called upon to interpret their laws *in the late 19th and early 20th centuries* did focus on the State's interest in protecting the woman's health *rather than* in preserving the embryo and fetus." Roe v. Wade, 410 U.S. 113, 151 (1973). Means II had quoted and celebrated *Gedicke*'s sentence repeating *Murphy* (in decontextualized and over-simplified form) but had—shamelessly—withheld the following sentence, about the 1872 statute's putting the child's death on a par with the mother's. *See* Means II, *supra* note 146, at 381–82. Relying on Means rather than reading the cases on which he purported to rely, *Roe* fell headlong into this advocate-activist's snare.

202. Witherspoon, *supra* note 88, at 61–69 (1985).

203. *Id.* at 70.

entirely compatible with, indeed reinforcing, and reinforced by, an equivalent lively concern for the health of women.

III. IN FOUNDING AND RATIFICATION ERA LEGAL THOUGHT, CONSTITUTIONAL STATUS AS A PERSON TRANSCENDED NARROW DOCTRINES AND LEGAL FICTIONS.

A. A Preliminary Warning Example: Roscoe Pound

The attempt by Justice Stevens to narrow the constitutional-level understanding of "any person" by appeal to technical rules or doctrines inverts the logic of constitutional thought. It does so by neglecting the meanings that were public (shared) among Founding and Ratification Era constitution-makers and ratifiers, meanings conveying (and taken by those makers and ratifiers to convey) the very framework of legal thought and of the legal system. That framework they took to be articulated, in broad and solid terms, by Blackstone's *Commentaries*, deeply based as these were not only on case law, statutory developments and classic treatises, but also on prior attempts such as Matthew Hale's[204] to grasp the system of

204. *See* MATTHEW HALE, ANALYSIS OF THE LAW 1–4 (1st ed. 1713). Hale died in 1676: "*The Analysis of the Law*. Sect. 1. Of the Civil Part of the Law (in general). The Civil Part of the Law concerns, 1. Civil Rights or Interests . . . Now all Civil Rights or Interests are of Two Sorts: 1. *Jura Personarum,* or Rights of Persons . . . The Civil Rights of Persons are such as do either, 1. Immediately concern the Persons themselves: . . . As to the Persons themselves, they are either, 1. Persons Natural; Or 2. Persons Civil or Politick, *i.e.* Bodies Corporate. Persons Natural are consider'd Two Ways: 1. Absolutely and simply in themselves . . . In Persons Natural, simply and absolutely considered, we have these several Considerations, *viz.* 1. The Interest which every Person has in himself . . . 1st, The Interest which every Person has in himself, principally consists in three Things, *viz.* 1. The Interest he has in the Safety of his own Person. And the Wrongs that reflect upon that, are, 1. Assaults . . . And all Persons are (presum'd) able in either . . . Taking or Disposing. . .which [persons] by Law are not disabled: and those that are so disabled come under the Title of *Non-ability*, though that Non-ability is various in its Extent, *viz*., To some more, to some less (as in the several instances following): . . . 4. Infants: here of the Non-ability of Infants. . . ." The *Oxford Dictionary of National Biog-*

English law as a whole. Legal thought and language so framed took as foundational natural realities such as those that in 1 *Commentaries* *129–30 Blackstone takes as a starting point for that seminal passage's exposition of the natural person's right to life.

An analogous inversion is exemplified by Roscoe Pound's ambitious legal-theoretical treatment of Persons and legal personality in his final magnum opus, *Jurisprudence*.[205] Pound's discussion is full enough to make clear the doctrinal or analytical incoherence that results from giving doctrines and fictions priority over realities such as the continuous identity of an individual person both before and after birth, notwithstanding birth's reasonable social and legal importance.

In Section 127, "BEGINNING AND TERMINATION OF LEGAL PERSONALITY," Pound commences with the seemingly authoritative proposition: "Beginning of natural legal personality is conditioned by birth. The Romans held, and this has been adhered to ever since, that this means complete separation of a living being from the mother." There follows a page of references to various relevant points of difference between classical Roman law and later German, French, Spanish and other doctrines or enactments. After two dozen lines of this we read: "At common law the requirement is that the child be born alive." But the only authority cited to verify this is "Coke, Third Inst. (1644) 50."[206]

At this point it is obvious that Pound's discussion of "persons" in law has come adrift. A technical rule of criminal law *about murder*, established in 1601 and related by Coke in a paragraph about murder without the slightest theoretical pretension, is being treated as

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raphy entry for Hale (2004) says: "[Hale's] *Analysis* . . . was borrowed by William Blackstone with minimal modification and therefore provides the structure of Blackstone's *Commentaries*." On Blackstone's own *Analysis* as derivative from Hale's and forerunner of the *Commentaries*, see J. M. Finnis, *Blackstone's Theoretical Intentions*, 12 NATURAL L. F. 63, 64–67 (1967).

205. ROSCOE POUND, 4 JURISPRUDENCE ch. 25 (1959).

206. For the text of 3 INST. 50, *see supra* note 32. Pound's footnote cites seven other English precedents on related points of detail and further cases illustrative of a dispute or difference between Kentucky and older and newer English views.

if it were (or made manifest) a general principle of law and building-block of juristic thought. Pound's misuse of Coke is refuted by Blackstone's treatment of the unborn across the whole sweep of the law in 1 *Commentaries* *129–30, examined above throughout Section I.A.1.

One page further on, he suddenly admits that Roman law had a rival principle, opposite to the *not-a-person-until-birth* principle he had canonised. Now he says: "[U]nborn children are in almost every branch of the civil law regarded as clearly existing"! Pound discusses technical exemplifications of this, but makes no effort to reconcile it with the position (principle? rule? doctrine? definition?) announced without qualification at the beginning.

Pound gets to the truth of the matter when he broadens his discussion of persons and personhood, to engage with human realities, benefits and harms, not mere jigsaw pieces of old (and mostly foreign) legal rules and maxims:

> In the United States down to the Civil War, the free negroes in many of the states were free human beings with no legal rights. They were not property. But they could scarcely be called legal persons. . . . At common law there was civil death—loss of legal personality in one naturally alive.
>
> . . .
>
> But there came to be a steady expansion of legal personality, a recognition of the human being as a moral and so a legal unit and extension of legal capacity, so that in the era of natural law legal personality was thought of as an attribute of the individual human being. The human being had certain qualities whereby he was naturally entitled to have certain things and do certain things and so was the subject of natural and therefore legal rights.

Pound does not pause to note that this "natural law" thinking—subordinating legal doctrines and fictions to *truths* about the "attributes" and "qualities" that belong to "the human being" *prior* to a society's laws—is integral to the thinking we find crystallized in the Constitution and again in the Due Process and Equal Protection

Clauses. Instead Pound goes straight on, taking for granted that academic progress has "eliminated" all that attention to natural realities and consequent moral, pre-legal responsibilities:

> With the natural-law basis eliminated, there remained for analytical jurisprudence the definition [of person]: "A subject of legal rights and duties."[207]

But though you expel nature with a pitchfork it comes back in by the rear door, and so we find him soon admitting, indeed on the following page, that:

> [A]nalytical jurisprudence has had to take account of idiots, *unborn children*, babes in arms, in Roman law children under seven years, and those lunatics whose mental disease inhibits exercise of will. *All these are commonly accounted natural persons and certainly would today be legal persons*.

In short: The part of Pound's work on persons that is of constitutional relevance is the part where natural realities are acknowledged as informing the law's most fundamental (constitutional) building blocks and prescriptions, not the part where axioms articulating legal fictions adopted in former legal systems or former doctrines of our own system are taken—too quickly, without sufficient reason—to be truths of legal ("analytical") philosophy.

B. Constitutional Terms: Neither "common sense" nor "common law" but Meanings Shared by Drafters/Ratifiers

C'Zar Bernstein's forthcoming article "Fetal Personhood and the Original Meanings of 'Person'"[208] argues that an originalist interpreter, considering the original meaning of "person" in the Constitution, must choose between the original "ordinary meaning" and the original "common-law meaning." The former provides a route to acknowledging that the unborn are within the meaning of "any person" in the Fourteenth Amendment (which would, as Bernstein himself quite reasonably thinks, be the better solution in terms of

207. *Id.* at 193–94.

208. Bernstein, *supra* note 76.

policy or justice). But that route is blocked if the appropriate original meaning is the common-law meaning, which Bernstein seeks to identify across about 40 pages, mostly concerning "the Born-Alive Rule" in criminal law, law of torts, and succession: In all three areas (though not with certainty in the law of succession), the born-alive rule (Bernstein argues) excludes fetuses from the scope of "person." Investigating his article's treatment of the material can shed light on our Brief's argument, and the failure of his article's good-faith critique of fetal personhood provides reassurance of the solidity of our Brief's position.

The case for holding that unborn children are persons within the original meaning of the Fourteenth Amendment *does not look to either of Bernstein's alternatives*. On the one hand, it does not inquire after an unfocused "ordinary meaning" or "ordinary understanding," or "ordinary-language public meaning," though it agrees with Bernstein about what his inquiry yields: that *person* in the Equal Protection Clause refers to any "'member of the human species,' a category that includes the unborn." The better focus of inquiry is into the *meaning of "person" that was shared or "ordinary" among legally informed members of the drafting and ratifying legislatures*, when they were considering documents intended for legal deployment, including constitutional text, sub-constitutional legislation, and related judicial and administrative usage. In that context they neither excluded nor gave priority to how their electorates understood the term. The legally informed members of the relevant drafting and ratifying bodies were thoroughly familiar with the highly prominent use of the word "person" to structure the treatises foundational to their entire formation first as students and then as, in many instances, practitioners of law.

On the other hand, however, that foundational usage of "persons" as a primary building block in the thought and discourse of the *Commentaries* cannot be rightly understood as "the common-law meaning of 'person'." For:

1. *There is and was no single common-law meaning of "person," no common-law definition of "person*," but rather a variety of rules and stated principles identifying the categories of persons that are the subjects or objects of specific rules and doctrines, rules and doctrines that were shaped and adopted to do *justice*-according-to-law as conceived by judges, practitioners and treatise-writers (with constant reference to corrective legislation) at particular periods. These justice-seeking rules and principles have drawn major (but not unchanging) distinctions between the born and the unborn. And that line drawing was appropriate in principle, for two reasons. One reason was the uncertainty that used to prevail, more or less insuperably until birth, about whether a particular unborn human entity was one, two or many, alive or dead, a creature of a rational nature or a hydatidiform mole, or male or female. Another reason was and is the social significance of attitudes and customs that have their root in the change that birth made and still to some extent makes: from darkness and uncertainty to the daylight of the visible, ordinary world. Some of the law's justice-seeking rules do not count the unborn among their objects or subjects, but other rules—notably, those *essential to preserving the basic interests of the unborn* at least prior to birth – *do*, or (on the rights-theory of our Constitution), *should* count the unborn the same as or very much like other persons.

2. Members of the drafting and ratifying community did not consider themselves bound to particular common-law judgments, rules, and doctrines, where these collided with their own judgments about justice and practicality. As was outlined in Section B.1 above, the generation that drafted and ratified the Equal Protection Clause was the generation that most profoundly and extensively reformed and replaced the common law's forms of criminal-law protection of the unborn—always increasing the level of protection. For that generation of state legislators, by and large, regarded that historic set of rules and doctrines as in some respects profoundly unsatisfactory—that is, inadequate to the truth about human beings precisely as objects of the law's protection.

1. Common-law Succession Rules

Bernstein forces the common-law rules and doctrines onto a Procrustean bed (what he calls "the Born-Alive rule"), in which personhood is never attributed to the unborn until they are born alive, at which point it is attributed to them *by a fiction* as having been enjoyed prior to birth. So, for example, Bernstein says:

> In the succession context, there are two legal fictions. First, the legal fiction that the unborn do not exist. Second, the legal fiction that persons already born were born before they were in fact born. This second fiction—the relation of birth back to conception—was necessary only because the first fiction existed and so is evidence of the lack of legal personality of the unborn at common law.

This way of formulating the common law's rules is starkly opposed to the language and thought of 1 *Commentaries* *129–30 and of *Hall v. Hancock*. Bernstein's article never mentions *Hall v. Hancock*, though he labors on some of the cases and dicta collected in Shaw's judgment there.[209] The opposition between Bernstein's im-

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209. On Bernstein's understanding of the "common-law meaning" of "person, and the related common-law rules," the following six indented and enumerated propositions (the whole set of relevant propositions) in Shaw's judgment (*supra* at nn. 24–28; where not quoted in the text there, the propositions are stated on pp. 257–58 of the report there cited) should all have been phrased differently:

> [1] We are also of opinion, that . . . generally, a child will be considered in being, from conception to the time of its birth, in all cases where it will be for the benefit of such child to be so considered . . . .

On Bernstein's fictionalist view, Shaw should have said "a child, if born alive, will be treated as if it had been in being from conception . . . ."

> [2] . . . the Court are of the opinion, that a child *en ventre sa mere* is to be considered a child living, so as to take a beneficial interest in a bequest, where the description is "children living."

Shaw should, on Bernstein's view, have said "a child born alive is to be considered as if it had been living when the testator died while it was *en ventre sa mere*."

> [3] A child *en ventre sa mere* is *taken to be a person in being, for many purposes*. He may take by descent; by devise . . . or under the statute of distributions, . . .

agined common law discourse and the real discourse of the common law is illustrated in note 209 above. To repeat: The real common law goes with the grain of reality, tracking the common-sense and scientific truth that birth, while momentous as entry into a public social world, is not at all the beginning of the child's life as a person, a life which began many months earlier. The common law's fictions, where they are adopted, run in the direction of *enhancing protection* of the unborn *in utero*—by treating them for many purposes *as if* they were born—while simplifying the disposition of the affairs and interests of the born by treating those unborn who

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> and generally for all purposes where it is for his benefit.

Shaw should on this view have said "a child born alive is for many purposes taken, by fiction, to have been in being while *en ventre sa mere*."

> [4] Lord *Hardwicke* says, in *Wallis v. Hodson,* the principal reason I go upon is, that [4] *a child en ventre sa mere is a person in rerum naturâ,* so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's lifetime.

The correct common-law way of speaking would, on Bernstein's view, have been "a child *en ventre sa mere* is NOT a person *in rerum natura,* but if born alive is treated as if he had been, and is NOT a person for any purposes at all, unless he is born alive."

> [5] And *Buller* J., in delivering his opinion, in *Thellusson v. Woodford,* 4 Ves. 324, after citing various cases, says, the effect is, that [5] *there is no difference between a child actually born and a child en ventre sa mere*.

Buller and Shaw should have said "there is all the difference in the world between a child actually born and a child *en ventre sa mere* unless the child is actually born, in which event it will by fiction of law be treated, for some purposes (but not others), as having had some existence before birth."

> [6] [I]t was stated [in *Doe v. Clarke,* 2 H. Bl. 399] as [6] *a fixed principle*, that wherever such consideration would be for his benefit, *a child en ventre sa mere shall be considered as absolutely born*.

No, Hardwicke and Shaw should have said that "the fixed principle is that a child *en ventre sa mere* is not a person and has no being or existence unless born alive, in which case it will then be treated as if it had been born at the time of its conception, if so treating it will be for the benefit of the born child."

These inversions are, each and all, absurdly unnecessary, and out of line with the common law's willingness to acknowledge human beings in their reality and be ready to adjust the degree, forms and limits of the protection it affords the life and property interests of the unborn, for the sake not least of avoiding needless complexity and uncertainty in complex family and other property interrelationships.

emerge from the womb *dead* (and thus incapable of being benefited) *as if* they had never existed.

Bernstein can point to a couple of decisions in which judicial dicta speak of the unborn as if they were only fictitiously existent, or fictitiously persons. Thus the Chancellor of the Chancery Court of New York in *Marsellis v. Thalhimer* said:

> [T]he existence of the infant as a real person before birth is a fiction of law, for the purpose of providing for and protecting the child, in the hope and expectation that it will be born alive, and be capable of enjoying those rights which are thus preserved for it in anticipation.[210]

But though the case is not reported to have been cited to the court in *Hall v. Hancock*, Shaw's piling up of statements of principle looks as if it was aimed against this talk of fiction, and was concerned to emphasise that *the existence of the infant as a real person from conception to birth is acknowledged by the law, with two qualifications: (1) the protection afforded to the unborn infant's interests in life and property is afforded for its benefit only and cannot be deployed in defining the property interests of others unless and until the child is born; and (2) these protections terminate if it is born dead (or otherwise dies before birth)*, and for the future the law's rules apply to those concerned (who might have benefited had it been born alive) *as if the child had never lived*.

The dicta about fiction in *Marsellis* were entirely unnecessary to the decision,[211] which itself and in its essential reasoning and treatment of authority is fully in line with the cases deployed four years

210. 2 Paige Ch. 35, 40 (N.Y. 1830).

211. The ruling in *Marsellis* is that a still-born child does not count as having been born alive for the purposes of the rule that *if a child is born of a marriage*, the surviving spouse has a life estate ("in curtesy") in property in respect of which the deceased spouse was seised of an inheritable estate (whether or not the child had predeceased the deceased spouse). That was a conventional and proper application of doctrine, even though the doctrine of estates in curtesy would not have been subverted had the ruling gone the other way; the ruling in the case is the neater solution, avoiding difficult potential problems of defining whether and when, for the purposes of the curtesy rule, a

later in *Hall v. Hancock*. All that needed to be said was said elsewhere in the judgment and in all the authorities including *Hall v. Hancock*: The law's acknowledgement of the reality and existence of the unborn human being/person is, pending birth, *for the benefit of that infant only*. It is not for the benefit of others, and so does not count for purposes of defining those others' property/succession entitlements.

Similarly with Bernstein's other succession authorities, first *Gillespie v. Nabors*,[212] which states:

> From the citations above,[213] it results that although an unborn child is treated as having an existence for certain purposes beneficial to it, yet, this existence is conditional and imperfect, and confers no rights of property, until it is born alive. When that event happens, to preserve successions, and to prevent forfeitures, it becomes, by relation and legal fiction, a separate, individual person having personal and property rights, dating back to the time of conception, when such backward step is necessary to protect a descent or devise. If, however, the fœtus is never born alive, then it is treated as if it never had an existence.[214]

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child miscarried or born dead had indeed been present and living in the womb as a fruit of the marriage.

212. 59 Ala. 441, 442–44 (1877).

213. The first of these citations is the above-discussed passage in *Marsellis*, with the sentences following that: "The rule has been derived from the civil law; . . . . although by the civil law of successions, a posthumous child was entitled to the same rights as those born in the life-time of the decedent, it was only on the condition that they were born alive, and under such circumstances that the law presumed they would survive. . . . Children in the mother's womb are considered, in whatever relates to themselves, as if already born; but children born dead, or in such an early stage of pregnancy as to be incapable of living, although they be not actually dead at the time of birth, are considered as if they had never been born or conceived." *Marsellis*, 2 Paige Ch. at 40–41 (cited at *Gillespie*, 59 Ala. at 443–44). Notice that the latter fiction is deployed only *after* the death of the unborn, when all need for protecting *that child's* interests (benefit) has ceased.

214. *Gillespie*, 59 Ala. at 444–45.

This is an outlier, not a convincing or representative analysis or explanation. The claim that the *existence* of the unborn is "conditional and imperfect" and that on birth the "unborn child"/"foetus" "becomes, by relation and legal fiction, a separate, individual person" is *one way* of expressing the conditionality of, and limitations upon, the law's acknowledgement and protection of the unborn person's rights and interests. But it is neither the only way, nor the best way, which is the way adopted by the weightier line of authority and exposition, exemplified by *Hall v. Hancock* and the cases it relied upon: The child *in utero* is to be considered a person entitled to legal protections, while, *in utero*, as a distinct individual with rights—subject, however, to a condition subsequent, *viz.* that if he or she is stillborn, those prenatal rights (or many of them) are treated *as if* they had never been.

Bernstein's remaining relevant authority is Justice Field's dictum for the Supreme Court in *Knotts v. Stearns* (decided in 1875):

> The posthumous child did not possess, until born, any estate in the real property of which his father died seized which could affect the power of the court to convey the property into a personal fund, if the interest of the children then in being, or the enjoyment of the dower right of the widow, required such conversion.[215]

But Bernstein does not mention what the Court's opinion also says, later on the same page: a statement (quoted below) that supports the directly contrary premise (for reaching the same conclusion). This statement cancels every possible implication that the Court has set its face against acknowledging either the existence of the unborn child or that child's capacity while unborn to possess an estate or interest in land (even if that possession or interest could not be counterposed to the power of conversion):

> But there is another answer to the objection. Assuming that the child, before its birth, whilst still en ventre sa mere, possessed

215. Knotts v. Stearns, 91 U.S. 638, 640 (1875) (cited in Bernstein, *supra* note 76, at 65 n.323).

> such a contingent interest in the property as required his representation in the suit for its sale, he was thus represented, according to the law which obtains in Virginia, by the children in being at the time who were then entitled to the possession of the estate. Parties in being possessing an estate of inheritance are there regarded as so far representing all persons, who, being afterwards born, may have interests in the same, that a decree binding them will also bind the after-born parties.[216]

In short, the Court here showed itself to be quite free of the dogmatic fictions of fetal non-existence that Bernstein asserts were "the common-law."

In sum: rather than awaiting birth and then *backdating* to conception the personhood and existence of the child born alive, the common law ascribes to the unborn child—from its actual conception and all the way along its gestation *in utero*—the status and legal protections that the child will possess once born, making just two adjustments in view of birth's significance.

The common law ascribes to the unborn child the status and protections the child will have from birth (a) to the full extent (and only to the extent) that this status and those protections are for *that child's* benefit and (b) subject to a condition subsequent: that if the child is never born alive, that status will—for many purposes *but not all*—be treated as if it had never been in place. Not all, because electively aborting the unborn child, at least once it had attained the definite individuality connoted by "quick" in sense ii, remained a serious offense, just below *capital* felony, even when the child is never born alive; and in cases where the aborted child, *even though not "quick,"* died after birth or where the mother died from the elective abortion (however skilfully and carefully performed), the inchoate felony status of the abortive acts *when done* entailed that the abortion provider was guilty of murder.

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216. *Id.* at 640–41.

2. Common-law Criminal Law

Bernstein's extended treatment of the common-law criminal law is less adequate than his treatment of succession (where he commendably acknowledges that some of the decisions of the great Lord Chancellors can be read as opposed to his fictions). He misunderstands the classic treatises by under-estimating their subtlety, he truncates and consequently distorts their key formulations, and he misreads *Sims*. We have already, in note 76 *supra*, addressed the central, strategic claim Bernstein makes in this discussion; what follows is supplementation.

(i) Not unreasonably, Bernstein focusses on Coke's treatment of homicide and abortion. Bernstein quotes the passage from 3 *Inst.* 50 quoted above at page 29 but he omits Coke's affirmation that what has just been said agrees with the Bracton sentence (which Coke then quotes in full) and comments:

> [1] The important point from that passage is . . . that abortion COULD NOT COUNT AS MURDER precisely because the law did not regard the unborn AS PERSONS YET IN EXISTENCE [citation to a 1674 Chancery case citing this page of Coke] unlike all other natural persons (those listed [by Coke] above).
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> The evidence of this is as follows. [2] First, Coke addresses each element of murder in turn, including the element that the entity killed BE A PERSON IN EXISTENCE. [3] Second, both the list of natural persons within that concept's extension and his statement of the Born Alive Rule are included under his exposition of THIS ELEMENT. Third, the discussion about abortion and the Born Alive Rule follows immediately after his list of examples of NATURAL PERSONS IN EXISTENCE. [4] Fourth, the obvious reason to include feticide here is to distinguish fetuses from the other natural persons listed and to clarify that FETICIDE, unlike killing more generally, COULD NOT count as murder at common law, because it could not satisfy this element. [5] Putting all this together, Coke AFFIRMS THAT ABORTION is wrong and for that reason is criminalized, but it COULD BE NO MURDER—and this is the crucial point—BECAUSE

> "in law" the fetus IS NOT "accounted a reasonable creature, in [EXISTENCE], [UNTIL] it is born alive."[217]

Each of the sentences we have enumerated miscarries.

[1] Nothing in Coke's passage says abortion *cannot* or *could not* be murder, and indeed the whole or a large part of the point of the passage is to affirm that abortion (or what Bernstein also calls feticide) *is* murder when the aborted child's death follows, however closely, its live birth. The reason why Bernstein has things so back-to-front emerges in point [5].

[2] Again Bernstein uses the phrase "a person in existence," and he will continue to do so. But the element in the definition of murder that Coke is expounding in this passage is neither "person" nor "in existence," but rather "reasonable creature" and "*in rerum naturae*." "Reasonable creature" is close in its reference (denotation) to "(human) person," but like Blackstone a century and a half later it keeps in view both (a) all creaturely (*i.e.*, created) life's dependence on a Creator and (b) the distinction between human nature and the nature of other animals. Both "person" and "rational animal/reasonable creature" smoothly include the unborn human child, but the latter perhaps a shade more obviously. As for "in existence," if it were a fully safe translation of *in rerum natura* it would surely have been used by Coke, Hale, Blackstone, and all; but it is not, so they didn't. Literally "in-the nature-of things," it is obviously used here in an idiomatic sense, as a term of art, signifying being in a condition to participate in the *ordinary world*, in the palpable social world as a distinct individual of known sex, appearance, ability to communicate even if inarticulately, and so forth.[218]

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217. Bernstein, *supra* note 76, at 39 (emphases added and omitted).

218. Lord Hardwicke uses this phrase deliberately differently, to mean simply in reality. *See supra* notes 28, 209. Aquinas, writing in the era of Bracton but still read in the age of Coke, uses the phrase 185 times. Reading through these sequentially, in context, with the aid of an electronic contextualized concordance, it is clear that though the phrase can often be safely translated "actually" or "in actuality" or "really", it is rarely if ever used to contrast with "potentially" (as distinct from "actually"), and its central

By substituting "person in existence" for Coke's actual terms, Bernstein makes it seem as if Coke and the common law use "person" as a building block in the law's definitions or trains of reasoning. Instead, "person" functions in Coke's discourse (when it is used at all) in much the same untheorized way as "child" (as in "child in the womb").

[3] and [4] use the same problematic verbal substitutions as [1] and [2]; and [4] makes the same entirely mistaken claim as [1]—that abortions cannot be murder.

[5] Here the verbal substitutions are within the framework of a syntactic inversion which helps obscure Coke's point from Bernstein. Coke is telling us that abortifacient blows or ingestions *are* murder whenever they result in the child's death after being

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sense is something very like our rather informal phrase "in reality" in the sense of "in the real world." In the context of Coke and his antecedents such as Staundford and his successors like *Russell On Crimes*, the phrase has a narrower but related sense, for none of these writers thought that the unborn child (say a week or a month or six months before birth) was not real or part of the real world, so what they (as distinct from, later, Lord Hardwicke) meant by "not yet *in rerum natura*" was "not yet part of that human, 'social' world of interpersonal communication that everyone enters by birth and (whether or not we are immortal and headed for heaven or hell) leaves by death."

To illustrate Aquinas' usage with one example: in his *Commentary on the Sentences of Peter Lombard* lib. 3 d. 20 q. 1 a. 5 qc. 2c, speaking about judgments in the ordinary sense of historical or scientific or common-sense ["This email is a genuine email from my boss"] affirmations or denials, Aquinas says:

> [A] judgment about something is unconditional [*absolutum*] when that something is considered precisely as actually [*actu*] existing [*existens*] in the real world [*in rerum natura*]; and it is considered in that way when it is considered with all the circumstances pertaining to it [*cum omnibus circumstantiis quae sunt in ipsa*].
>
> [Super Sent., lib. 3 d. 20 q. 1 a. 5 qc. 2 co. Ad secundam quaestionem dicendum, quod judicium absolutum est de re, quando consideratur ipsa secundum quod est actu in rerum natura existens; et hoc est quando consideratur cum omnibus circumstantiis quae sunt in ipsa. Sed quando consideratur res secundum aliquid quod in re est sine 1010onsideration aliorum, illud judicium non est de re simpliciter, sed secundum quid.]

born alive, and he gives us the reason why this is conceptually possible: "for in law it is accounted a reasonable creature *in rerum natura*"—that is, it falls within *that* element in his definition of murder—"when it is born alive." For of course, *every* child *is* a reasonable creature *in rerum natura* when the child is born alive, but the law *counts* the child who is murdered by abortion—the child who was born briefly alive despite the abortion—as *having been* a reasonable creature when the lethal deed was done to it while it was still in the womb.

The problem that confronts Coke, and all his readers who are following the legal argument he develops across his entire exposition of the law of murder, is that *actus reus* and *mens rea* must coincide (he articulates the related classic axiom *actus non facit reum nisi mens sit rea* only four pages later). *When* the death occurs is not a problem, provided it is within a year and a day of the lethal act done with "malice aforethought;" and *when the death occurs* we can say that the murder victim *was murdered* at the time when that act—the murder!—was done, perhaps many months before the victim's death. And this holds good also in the special case of the unborn child murdered by abortion, whose death occurred after his or her live birth but who must have satisfied—and in contemplation of law did satisfy—the relevant element of the definition of murder *at the time of the lethal act—the murder*—a time when that child was in the womb. And that relevant element is, in Bernstein's phrasing: being an existing person; and in Coke's: being a reasonable creature *in rerum natura*—in the ordinary world.

So Coke owes his readers an explanation of why murder by abortion is subject to a limiting condition subsequent—that the child be born alive—since that state of affairs does not relate, whether chronologically nor causally, to either the lethal abortifacient act or the death. He was well placed to provide the explanation that Hale provides, at precisely this point in *his* exposition of why abortion though a great and lethal crime is not murder:

> The second consideration, that is common both to murder and manslaughter, is, who shall be said a person, the killing of whom

> shall be said murder or manslaughter. If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is *killed*, it is not murder or manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be a great crime . . . NOR CAN IT LEGALLY BE KNOWN, WHETHER IT WERE KILLED OR NOT [citation to Yearbook of Edward III]. so it is, if after that child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide [citation to an earlier Yearbook].[219]

As we have said, in that last sentence Hale speaks as an outlier whose opinion his successors Hawkins and Blackstone (see 4 *Commentaries* 198), and everyone subsequently, decline to follow.[220] Hale, if not blindly following the two highly questionable[221] Yearbook authorities he cites, is following the logic of his general explanation of why abortion is not homicide: not that the unborn child is not a person, or not a reasonable creature, or is non-existent, but that he or she is not yet *in rerum natura*, and that "it cannot legally be known, whether it were kil[led] or not." And that was the explanation that Coke himself, so it seems, elicited (as prosecuting or intervening Attorney-General) from Chief Justice Popham and Justice Fenner in King's Bench in *Sims*—the evidential considerations[222] quoted above at note 68. It is perhaps surprising that Coke neglects to give the explanation here, in its appropriate place, 3 *Inst.* 50. Perhaps he harbored (but did not act upon) the doubt that Hale did act upon (but perhaps in the wrong direction): the evidential argument seems to "prove too much," for if causality

219. HALE, H.P.C., *supra* note 33, at 433 (some emphases added).

220. *See supra* notes 71–73.

221. *See* DELLAPENNA, *supra* note 70, at 143–50, 189, giving full translations of the court documents underlying (and changing the sense of) the brief YB reports.

222. Similarly framed evidential concerns, similarly crystallized into a rule of law, underlie the year-and-a-day rule for murder: "for if he die after that time, it cannot be discerned, as the law presumes, whether he died of the stroke or poison, etc., or if a natural death; and in case of life the rule of law ought to be certain." 1 *Inst.* 53.

can be proved in the case of the victim of abortion born alive, why not in the case of the victim of abortion born dead?

Bernstein mishandles this passage of Hale in more ways than one. Immediately after point [5] in his passage about Coke, above, he goes on (p.40):

> Sir Matthew Hale was as explicit and clear on this point. [fn. omitted] [1] Here is how he describes the essential element in the law of homicide that the victim be an entity the law considers as a person: "The second consideration, that is common both to murder and manslaughter, is, *who shall be said a person*, the killing of whom shall be said murder or manslaughter." [fn. omitted] [2] Immediately after Hale describes this essential element of homicide, he says that abortion "is not murder nor manslaughter by the law of England, *because* [the fetus] is not yet *in rerum natura*." [fn. omitted] [3] According to Hale, then, the unborn fetus is not an entity "who shall be said a person" in the law against homicide. [fn. omitted] [4] It follows that the criminal law counted a natural person (in the ordinary sense) as in existence only if it is born alive, and the lesser offense of which one might be guilty for killing a fetus involved an offense against an entity lacking the legal personality that inhered in other natural persons. [fn. omitted]

Again, the propositions we have enumerated all misfire.

[1]. Here Bernstein takes Hale to be working with a theorem or premise of the form "Only persons can be murdered," as if he were setting up the syllogism that continues: "But fetuses are not persons. Therefore fetuses cannot be murdered." But once Hale's now obsolete system of punctuation is allowed for, we can see that his thought is not that the unborn are *not persons* (as Bernstein wrongly truncates his thought in paraphrase) but that they are *not persons the killing of whom is murder*[223]—a thought for which Hale

223. Bernstein not rarely abbreviates sentences with the result that their meaning is substantially or even radically changed (as here). Another incidental example occurs when he quotes the second of Blackstone's paragraphs on *129 quoted and discussed above at note 17—the one beginning "An infant . . . in the mother's womb, is supposed

gives two reasons, neither of them in any way suggesting that the unborn are not persons or are non-existent persons: they are (a) human beings not yet *in rerum natura* and (b) human beings the cause of whose death is hidden in the profound darkness of the womb (was this dead child alive when the blow or potion went to work?).

[2]. Bernstein helps his misinterpretation on its way by inserting "the fetus" where Hale had an "it" that looked back to the beginning of the very same sentence: "the child within her." It is harder to deny that human beings are persons with (as Blackstone will say) a right to life if you are calling them children, sometimes located here, sometimes there, rather than using the term "fetus" (shared with sub-rational animals; depersonalised). Hale's English does not include "fetus" in any of its spellings.

[3]. Again Bernstein mistakenly assumes that Hale or his readers are in search of the class each of whose members is an "entity 'who shall be said a person.'" Hale's concern is with the class of *persons whose killing is criminal homicide at common law,* and identifies the class: those persons who are in *rerum natura*: persons born alive.[224] Persons not yet born are protected by other rules of criminal law, one or more rule(s) punishing their killing as such, one or more punishing their killing or attempted killing whenever it results in their mother's death, and so on.

[4]. Though Bernstein does not formally deny this, Hale neither says nor implies that the unborn lack legal personality. He is concerned to delineate murder or homicide, and in this context he does not use "person" as his categorising tool. *The term is here used*

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in law to be born for many purposes . . .", and says: "Professor Finnis says of this passage that it establishes that 'the law treats [unborn children], even at [conception], *as equal to a born child*.'[fn. omitted] This is mistaken." Bernstein, *supra* note 76, at 55. But what Finnis in fact says at the place cited is quite different: "For some purposes (guardianship, for example) the law treats such an individual, even at that beginning stage, as equal to a born child." John Finnis, *Abortion is Unconstitutional*, FIRST THINGS (Apr. 2021), https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional [https://perma.cc/VN2Z-GYWZ].

224. *See also supra* note 33.

not as a term of art deployed in legal rules, but as a scarcely theorised way denoting human beings including infants or children both before and after birth, a legally significant line but not one bearing upon personhood as he conceives it.

Much more could be said about Bernstein's efforts to construct a common-law doctrinal denial of fetal personhood. But there is little need, since they err in the same sorts of ways as are on display in the two passages we have discussed. We note only, in parting, that he entirely misses the evidential concerns at the core of *Sims* (*supra* note 68) (and of Hale's passage quoted *supra* note 33).

In sum: common-law rules rarely use "person," and dictionaries of the common law that Bernstein cites to define other terms include no definition of person(s). The term is used in high-level analytical syntheses such as Hale's or Blackstone's *Analysis of the Law* (*supra* note 204). Though it is there extended to corporations conceptualized as artificial persons, its use in relation to natural persons is all but identical to common-language use. In these uses, which display law's most general purpose or rationale, to serve the wellbeing of natural persons (human beings in all their similarities and dissimilarities), the term "person" is used by the great scholarly and judicial exponents of the common law (and makers or ratifiers of constitutions in its mould) in a manner that approximates closely to the common-sense and common-speech use that other parts of Bernstein's article successfully affirm and show *includes unborn human children*.

IV. *DOBBS* AMICUS BRIEFS OF THE UNITED STATES AND ASSOCIATIONS OF HISTORIANS FAIL AT ALL RELEVANT POINTS.

The *amicus curiae* Brief of the United States makes a number of submissions that contradict or cut across the positions proposed in the present Brief. In reviewing and rebutting those submissions, we will also respond shortly to relevant assertions in the Historians' Brief in this case.

A. The United States Brief never confronts the thesis of this article, that Roe *could and should be overruled on the ground that the object and victim of an elective abortion is entitled, precisely as a person within the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, to constitutional protection against such a procedure (accepted by* Roe *itself as a ground that—if sound—"collapses" its entire holding and rationale).*

For on the basis of that ground, the "absolute" or natural rights to life, limbs, and bodily integrity (and consequent rights of self-determination) that are urged by the United States at 23-26 (mainly on the sound basis of Blackstone's representative recital of them) cease to be decisive or even weighty in favor of *Roe* and its progeny. Those rights then instead entail a position essentially like that of Texas in *Roe*: elective abortions violate the corresponding absolute and constitutional rights of the child who is their object and victim, while non-elective terminations of pregnancy vindicate the absolute and constitutional rights of the pregnant woman even when they unavoidably cause the child's death.

Similarly, the position advanced by the United States at 24 that *Roe* and *Casey* simply cannot be *grievously* wrong stands and falls with its hidden premise: that *Roe* succeeded in rebutting Texas's assertion of the Fourteenth Amendment rights of the unborn child. In accepting, unequivocally, that if that assertion was sound, the case for the rule established in *Roe* collapses, the Court in *Roe* was accepting, inevitably and rightly, that if it was going wrong in rejecting Texas's assertion, it was going *grievously* wrong and licensing a substantial and ongoing violation of the absolute and constitutional right always acknowledged *first*, to life.

Nor does the position change when the United States' denial of *grievous* error is given its full formulation: a woman's liberty "to have some freedom to terminate her pregnancy . . . . is so closely related to bodily integrity, familial autonomy, and women's equal

citizenship" that "*Roe*'s and *Casey*'s core holding that the Constitution protects some freedom to terminate a pregnancy cannot be *grievously* incorrect."[225] For, rhetoric and emphases aside, those interests in bodily integrity, familial autonomy and equal citizenship were amply present to the mind of the *Roe* Court when it acknowledged that if the unborn are Fourteenth Amendment persons, its position collapses. And as soon as the destruction of *another person's* bodily integrity is acknowledged as implicated in a woman's decision to terminate her pregnancy, the ambiguity in the phrase twice used by the United States, "some freedom to terminate," becomes vividly evident and clarification becomes an inescapable responsibility. The phrase "elective abortion" is a compressed summary of the needed disambiguation: The pregnant woman unquestionably has an "absolute" (natural) and constitutional freedom—closely connected with bodily integrity—akin to the legitimate freedom of self-defense in situations in which exercise of that liberty-right does not become illegitimate even when foreseeably lethal. So she would indeed retain, unimpaired but measured (like ordinary self-defense) by inter-personal fairness, a real "freedom to terminate" if *Roe* and *Casey* were overturned on account of the legitimate constitutional right of her child. But just as the Equal Protection Clause prevents her interest in familial autonomy and/or equal citizenship being the constitutionally legitimate basis of a right to infanticide, so too, analogously, the Clause prevents those interests from being the constitutionally legitimate basis or measure of a right to *elective* abortion.

It scarcely needs saying that in the perspective developed in our Brief, the phrase "state interests" (deployed in a customary way by the United States on 24–25), though of course retaining the relevance it has to the state's upholding of other individuals' rights to life, ceases to be an adequate articulation of the interests and the "absolute" and *federal constitutional* rights of the person whose life is at stake in her mother's choice of elective abortion.

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225. Brief of the United States as Amicus Curiae, *supra* note 11, at 24.

Similarly, the argument advanced by the United States at 25–26, that overruling *Roe* would threaten the Court's decisions in *Griswold*, *Loving*, *Lawrence*, and *Obergefell*, has no force if the ground for overruling *Roe* is recognition of the neglected countervailing rights of constitutional persons erroneously denied that status. For no such denial of personal status or countervailing rights was involved in any of the cases just mentioned.

B. At 26–27 the United States makes a number of historical and legal-historical claims that this Brief shows to be mistaken, along with constitutional claims that a more accurate history rebuts.

At 26, going immediately to the critical issue, the United States asserts on the authority of *Roe*, 410 U.S. at 134, that at common law "there was agreement" that the fetus in the early stages of pregnancy was to be regarded as "part of the woman." But in its very next sentence, *Roe* bases both the meaning and the truth of its assertion on perhaps the most absurd of the errors in its error-strewn opinion: it says that "[d]ue to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40–80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point"—and thus quickening, "appearing usually from the 16th to the 18th week of pregnancy" (132), "found its way into the received common law in this country" (134). But, as noted above (at notes 76–80 *supra*), this asserted clarification of the law by Bracton is fantasy. For Bracton, writing in Latin, said nothing whatsoever about quickening, let alone quickening in the sense naively taken for granted by *Roe*: he spoke only of the unborn infant becoming "formed and *animatum*," where *animatum* means nothing either more or less specific than ensouled, animated in the sense of endowed with *anima*, a human soul. Nor do Bracton, Coke, Hale, Hawkins, or Blackstone speak of the pre-"quick" fetus or embryo as "part of the mother," or concede that she is entitled to treat

it as simply a part. The very occasional uses of the term "part" (usually as *pars viscerum matris*) are by outlier authorities.[226]

But the United States, in its next sentence on 26, rightly identifies Chief Justice Shaw's judgment in *Parker* (*supra* at notes 46–58) as the appropriate representation of what *Roe* called the "received common law in this country," and summarizes it:

> Until the fetus had "advanced to that degree of maturity" that it could be "regarded in law" as having a "separate and independent existence," abortion was not prohibited. *Commonwealth v Parker*, 50 Mass. (9 Met.) 263, 266, 268 (1845).

But at 50 Mass. 268 the court said only that the acts set forth in the indictment, without averment that the woman had been "quick with child," "are not punishable at common law." At 265, having defined the issue before the court, Shaw recalls one of what our Brief has shown was many ways which "abortion" was "prohibited" in the sense of unlawful even when not itself per se indictable/punishable at common law: he reaffirms the rule that if the child dies from abortion after being born alive, the abortifacient acts, however early in the pregnancy they were done, were murder.

And at 50 Mass. 266 itself, Shaw illustrates what "separate and independent existence" means by not merely citing but quoting Bracton saying that abortion is homicide if the unborn infant is formed and *animatum*. The only authority that Shaw finds identifying "quick with child" with "quickened" in the *Roe* sense is *Phillips* (*supra* note 62), interpreting "quick with child" "in the construction of this [English] statute." And Shaw immediately (267) declines to rule on ("decide") the question "what degree of advancement in a state of gestation would justify the application of that description," *scil.* "quick with child," "to a pregnant woman," at common law. Nor did he ever have to, since a few weeks earlier the state's legislature had definitively swept away the whole debate about "quick

226. Notably *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884), a case now discredited and abandoned, *see supra* note 129, and cases following it such as *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 367 (1900).

with child," by making abortion at any stage punishable (variously but with at least one year's imprisonment).[227]

It follows that the next sentence of the United States Brief is mistaken in citing *Parker* at 267 to verify its claim that "at common law, the fetus was generally considered to have a legally 'separate existence' [only] after quickening—when the woman could feel its movement in utero."[228] More pointedly: the only common-law authority advanced by the United States to support *Roe*'s entire "quickening" doctrine is, if anything, an authority against it.

And even if that were not so, the definitive evolution or rectification of Massachusetts law in the same early months of 1845 is a sign of the constitutional irrelevance of quickness in any but its central sense, the child's being alive. That evolution in Massachusetts, subsequent to New York, Ohio, Maine, Alabama, and Iowa (and on one view Illinois), manifested a reform (accomplished completely by the end of 1868 in 27 states and substantially in 28) that is of more immediate constitutional significance than the common law, whose entrapment in unresolved uncertainties concerning ambiguous sources and physiologically explored concepts obscured its basic and enduring recognition of the unborn child's status as a person with a right to life—the status implicit in Bracton's word *homicidium*, killing of a human being, so carefully and otherwise needlessly *quoted* by Coke, Blackstone, and Shaw along with the same Bracton sentence's focus not on maternal perceptions but on the fetus/child's reality as *formatum et animatum.*

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227. *See supra* note 46; Commonwealth v. Wood, 77 Mass. (11 Gray) 85, 86 (Mass. 1858).

228. At 27 n.4, the Brief of the United States again cites *Parker* at 267 mistakenly for the proposition that abortion was "often legal at least before a fetus could be considered legally separate from the pregnant woman." *See* Brief of the United States as Amicus Curiae, *supra* note 11, at 27 n.4. What is said at 267 subtracts nothing from what *Parker* said at 235 to remind readers that even when it is not indictable, elective abortion early or late is always "done without lawful purpose"—was never "legal"—and is murder whenever, however skillfully performed, it happens to result in the death of the woman who while pregnant had consented to it.

In retailing, in its Brief's next sentence on 26, *Roe*'s preposterous claim that it is doubtful whether abortion of a quick child "was ever firmly established at common law" and *Roe*'s associated assertion of the "paucity of common-law prosecutions for post-quickening abortion," the United States overlooks the probable relative rarity of abortions until the early 19th century (a rarity established with some clarity in the affirmations made and sources quoted and cited not only by Joseph Dellapenna's Amicus Brief in *Dobbs* at 13–16)[229] but also by *Parker* itself, an appeal from just such a prosecution and conviction and referring to a Massachusetts conviction (similarly overturned on appeal for reasons found obscure by Shaw) in 1810.

Conspicuously, the United States does not repeat *Roe*'s central claim that at common law there was a legal "liberty" or "right" to early abortion; it makes the already-noted assertions, refuted by its chosen authority *Parker*, that such abortion was "legal," and for the rest limits itself to the vague and dubious social-historical claims that "women generally could terminate an abortion" (27) or "abortion was generally available" (27n.4).

C. Similarly, the Historians' Brief in this case marks a notable retreat from some of the most confidently advanced legal errors in its predecessor Amicus Briefs—signed by individual historians, unlike the present one (signed by counsel)—errors made by those predecessors in endorsing Roe*'s invented common-law "liberty" and "right."*

As to the historic law relating to abortion, the present Historians' Brief rightly abstains even from the word "free," let alone "liberty" or "right." The most it will venture are the hazy formulations "opportunity to make this choice" (3, quoting *Roe*) and "under the common law, a woman could terminate a pregnancy at her discretion prior to physically feeling the fetus move." (7) (This is the same

229. Brief of Joseph W. Dellapenna as Amicus Curiae in Support of Petitioners, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392).

"could" as the United States ventured while scrupling to add the equivocal and misleading "at her discretion.")

Instead, the Historians offer a new, romanticized version of the common law as focused upon an alleged "female-centric principle" (5), a "subjective standard decided by the pregnant woman alone," and a legal standard "not considered accurately ascertainable by other means" (2). The evidence offered for this last proposition proves on inspection to be no evidence at all: a sentence quoted (6) from Taylor's *Medical Jurisprudence* (1866) with the innuendo that it concerns evidence for ascertaining and determining the fact of quickening for legal purposes turns out on inspection to be in a section of the book entirely concerned with informing clinicians for clinical purposes. The sentence relied upon has nothing whatever to do with law or legal proceedings, actual or potential. The Brief undeniably misuses it.

The footnote on the same page (6) misuses *Russell On Crimes* (1841) almost as severely, quoting a proposition that asserts that "quick with child" means "the woman has felt the child within her" as if it were the author's affirmation of a common-law principle—the Historians come up with no other affirmation comparably clear—when in fact it is no more than a marginal note summarising (as a kind of running index for rapid readers) the content of the adjacent paragraph, which is transcribing the reported trial direction in *Phillips* (*supra* note 62). Simply for brevity (as throughout the volume), the marginal note (in no case offered to make an authorial affirmation) omits the essential qualification made by the trial judge: that his interpretation of "quick with child" is for the purposes of applying the English statute (Lord Ellenborough's Act) of 1803. About the common law neither the judge nor the author/editor of the marginal note said anything.

The Historians' Brief, at 9, offers an inept formulation of "the common law principle" said to be "consistently enunciated" by "legal treatises:"

> Like Blackstone, these sources explained that the reason for this principle was the legal belief that a fetus was not considered a cognizable life for purposes of the law until quickening. *See, e.g*, [*Roscoe on Evidence*, 3rd ed 1846 p. 652 [in fact 694]]. ("A child in the womb is considered *pars viscerum matris* . . . and not possessing an individual existence, and cannot therefore be the subject of murder.")

The proposition in *Roscoe on Evidence*, being about "a child in the womb," manifestly does nothing to verify "until quickening" in the previous sentence. Nor does it manifest a "legal belief," but only a legal fiction. Nor does it say anything about "a cognizable life for purposes of the law." The fiction is merely to account—in the non-explanatory way that fictions do—for the legal rule that abortion, even when a serious criminal offense,[230] is not murder or manslaughter. And this fiction is particularly inept, because it leaves the criminality of abortions, at least when done to a woman "quick with child," entirely unexplained.

Seeking to discredit Wharton, whose treatises on criminal law, like those of Joel Bishop, were of greater weight than those cited with approval by the Brief, the Brief alleges (10) that he "opposed allowing any abortion." But in fact Wharton writes, in his chapter on abortion at common law: "Of course it is a defence that the destruction of the child's life was necessary to save that of the mother."[231]

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230. The Historians' Brief, misspelling misprision, erroneously equates it to misdemeanor. *See* Amicus Brief of the American Historical Association and the Organization of American Historians, *supra* note 11, at 5–6.

231. FRANCIS WHARTON, 2 A TREATISE OF THE CRIMINAL LAW OF THE UNITED STATES sec. 1230 (7th ed. 1874). The footnote to the sentence quoted cross-refers to section 90 *b*, actually 90 *c*, a short section on killing "by necessity" as acknowledged by natural law, canon law, and French and German jurists, and promising a fuller discussion in sections 1013 and 1028. Section 1013 is irrelevant, and the reference is evidently to section 1019, the first of several sections on "Homicide from necessity in defence of a man's own person or property, or of the persons or property of others." Section 1028 discusses self-defence in situations of necessity where both parties are innocent, such as two persons on a plank in the shipwreck. Section 1029 discusses "Sacrifice of life in childbed

The later parts of the Historians' Brief continue at the same low level of accuracy, balance and coherence.

V. RECOGNIZING UNBORN CHILDREN AS PERSONS ENTITLED TO EQUAL PROTECTION COHERES WITH THEIR MOTHERS' SIMILAR ENTITLEMENT, AND REQUIRES NO IRREGULAR REMEDIES OR UNJUST PENALTIES.

Recognizing unborn personhood would be a natural exercise of courts' power to bind parties to a case by applying the law to the facts, disregarding unconstitutional laws, directing lower courts, and enjoining unlawful executive actions.[232] Such a holding would bar lower courts from enjoining prosecutions or vacating convictions of abortionists. Injunctions would lie against officials asked to facilitate elective abortions, as in cases like *Garza v. Hargan*,[233] where guardians *ad litem* could be appointed for the unborn with a view to protecting them against elective abortion, as before *Roe*.[234]

While state homicide laws would need to forbid elective abortion,[235] here too courts would be limited to customary remedies. Most States have laws tailor-made for "feticide;"[236] any carve-outs

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[*scil.* in obstetric emergency], where either the mother or the child must die, because (he writes) 19 out of 20 Caesarean operations to save the child result in the death of the mother. "The dictates of humanity, and, in consequence, those of the law, call for the sacrifice of the child." (cross-citation to secs. 942 and 1230). Section 942 is the general treatment of the born-alive rule for murder under the doctrine articulated in *Sims*, *supra* note 68, and by Coke, 3 *Inst*. 50, *supra* note 32.

232. *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2351 n.8 (2020).

233. 874 F.3d 735, 736 (D.C. Cir. 2017) (en banc), *cert. granted, judgment vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018).

234. *See, e.g.*, David W. Louisell & John T. Noonan, Jr., *Constitutional Balance*, *in* THE MORALITY OF ABORTION 220–260 at 244–45, 255 (John T. Noonan ed., 1970); and *supr*a note 132.

235. *Cf.* People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984) (reinstating rape charges against a husband despite a statutory marital-rape exception after holding that the exception violated equal protection and failed rational basis review).

236. *See* Bradley, *supra* note 134.

for elective abortion would be disregarded by courts as invalid.[237] New laws, or prosecutorial practice, that reduced criminal-law protection of the unborn below the constitutionally mandated minimum would face legal challenge like any statute *today* that decriminalized homicides of some class—say, the cognitively disabled.[238]

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237. *See* John Finnis, *Born and Unborn*: *Answering Objections to Constitutional Personhood*, FIRST THINGS (Apr. 9, 2021), https://www.firstthings.com/web-exclusives/2021/04/born-and-unborn-answering-objections-to-constitutional-personhood [https://perma.cc/ZE2K-ZLS8]. For example (sec. III) (emphasis added below):

> NY Penal Law, as amended in 2018 to strip out remaining references in section 125.00 to "abortion" and to the "unborn child," says in that section: "Homicide means conduct which causes the death of a person under circumstances constituting murder or. . . . " Section 125.05 says that "'person,' when referring to the victim of a homicide, means a human being who has been born and is alive." Then section 125.25 defines second-degree murder as causing the "death of a person" with "intent to cause the death of" that person or "another person." Abortion is now dealt with exclusively in the state's Public Health Law [which is fully compliant with *Roe* and *Casey*].
>
> Equal protection entails (as *Roe* conceded) that these NY Public Health Law provisions would fall, just like California's, and therefore that Penal Law section 125.05—since it operates quite bluntly to deny to unborn persons the protections they would have as born persons, say ten seconds later—would expressly or by implication be declared inoperative. *Thus the default position would be that most abortions would be murder.* New York, if dissatisfied with the applicability here of the defenses of excuse and justification available to anyone charged with murder, would thus be strongly incentivized to enact new legislation making a fair accommodation between the rights of mother and child, recognizing both their basic and constitutional recognized equality as persons and their significantly differing situations and legitimate interests.

238. Unlike suicide and consensual euthanasia, elective abortion is a zero-sum affair, in which one person's choice extinguishes another person's life without the latter's consent. The courts cannot stand idly by when either state law or state or local prosecutorial policy systematically neglects to protect one class of persons against denial of the right to life at the hands of other persons. The courts are reluctant to interfere with prosecutorial discretion, and their rule against improper selective prosecution is usually invoked as (or for purposes of) a defense against prosecution, rather than to require prosecution. But the general rules articulated by the Supreme Court since *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), certainly extend in principle to judicial action against nonprosecution. Thus *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996):

> [A] prosecutor's discretion is "subject to constitutional constraints." *United States* v. *Batchelder,* 442 U.S. 114, 125 (1979). One of these constraints, imposed

State regimes invalidated for denying minimal prenatal protection would, absent amendment, revert to the default, general homicide law; states would thus have strong incentives to establish a just balance—a balance consistent with the constitutional command of equal protection of the laws.

Equal protection allows States to treat different cases differently, for legitimate ends.[239] States may consider degrees of culpability as mitigating factors or altogether immunize from prosecution certain participants in wrongful killings. Here such policy choices serve legitimate purposes by taking fairly into account ("balancing") the child's humanity and her unique physical dependence and impact on her mother, another person entitled to equal protection. By analogy with the right of self-defense, the mother's constitutional rights could require States to allow urgent or life-saving medical interventions even when these would unavoidably result in the child's death.[240]

If States failed in their duties of protection or enforcement, a responsibility would also fall to Congress, which could follow a personhood holding with proportional legislation under Section 5 of the Amendment to protect the unborn.[241]

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by the equal protection component of the Due Process Clause of the Fifth Amendment, *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954), is that the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). A defendant may demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system of prosecution amounts to "a practical denial" of equal protection of the law. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373 (1886).

239. *See* Vacco v. Quill, 521 U.S. 793, 799 (1997).

240. *See Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).

241. *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

CONCLUDING POSTSCRIPT

The Amicus Brief that this Article expands and supplements is cited in footnote 24 of the Opinion of the Court in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), in relation to the "debate[d]" question that the Opinion frames as one about "the exact meaning of 'quickening'." As we demonstrated in the Brief and have shown again here, the debate is really about whether the common-law term "quick," as in "quick with child" or (less commonly) "with quick child," should be taken to have referred at all to quickening in the sense intended by the Opinion. But in any event, the Court in *Dobbs* judged that it had no need to "wade into this debate."

More important was the prominence that the Opinion—on the way to its fundamental ruling that "a right to abortion is not deeply rooted in the Nation's history and traditions"—gives to what the Brief (at pp.

3, 22) called "a kind of inchoate felony for felony-murder purposes" (rule [I]), and the Opinion at page 2250 suitably refers to as "a proto-felony-murder rule:"

> That the common law did not condone even prequickening abortions is confirmed by what one might call a proto-felony-murder rule.

This finding, like the associated findings about the common law in parts 2a, 2b and 2c of the Opinion, is supported by the many authorities cited in the Brief, including the main authorities we cited for rule [I]. It is a very significant finding, disposing decisively of the myths of "abortional freedom" that were so assiduously cultivated in Means I and Means II, in *Roe,* and in the Historians' Brief and the Brief for the United States in *Dobbs*. It is a finding not challenged in the *Dobbs* dissent.

Our Brief's main thesis, about the constitutionally proper and original public meaning of "any person" in the Equal Protection Clause, was dismissed in footnote 7 of the dissent ("a revolutionary proposition: that the fetus is itself a constitutionally protected 'person,' such that an abortion ban is constitutionally *mandated*") and

rejected in the concurring opinion of Justice Kavanaugh ("Some *amicus* briefs argue that the Court today should . . . hold that the Constitution *outlaws* abortion throughout the United States. No Justice of this Court has ever advanced that position. . . . But [the position is] wrong as a constitutional matter, in my view.").

What about the Opinion of the Court? Between the two actual parties in *Dobbs*, it was common ground that the Constitution does not require states (or Congress) to prohibit even elective abortions.[242] That common ground allowed the Court to remain silent about the question, and it did, neither affirming nor questioning that common ground. Even the Court's declaration that it is "return[ing] the power to weigh those [policy] arguments to the people and their elected representatives" does not strictly entail that it is affirming Justice Kavanaugh's position (in a concurrence joined by no other Justice) that the Constitution is neutral about abortion. "Our opinion is not based on *any* view about if and when prenatal life is entitled to any of the rights enjoyed after birth" (emphasis added).[243]

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242. Transcript of Oral Argument at 43, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392):

> JUSTICE KAVANAUGH: And to be clear, you're not arguing that the Court somehow has the authority to itself prohibit abortion or that this Court has the authority to order the states to prohibit abortion as I understand it, correct?
>
> MR. STEWART [Solicitor General of Mississippi]: Correct, Your Honor.
>
> JUSTICE KAVANAUGH: And as I understand it, you're arguing that the Constitution is silent and, therefore, neutral on the question of abortion? In other words, that the Constitution is neither pro-life nor pro-choice on the question of abortion but leaves the issue for the people of the states or perhaps Congress to resolve in the democratic process? Is that accurate?
>
> MR. STEWART: Right. We're -- we're saying it's left to the people, Your Honor.

243. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2261 (2022) That statement is affirmed in the Opinion twice, *verbatim,* and represents the settled position of the Opinion, counter-balancing two incautious declarations. The first is the approving quotation of Justice Scalia's phrase "permissibility of abortion:"

> It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade

The Court's verbally unqualified rhetoric of return to the people is silently subject to qualifications it articulates elsewhere in the Opinion: for example, the people's legislature must have a rational basis for thinking its enactments serve legitimate state interests.[244] Nowhere, however, does the Opinion articulate anything to qualify the appearance it gives of mistakenly assuming that prenatal children are not persons protected by the Equal Protection Clause. Nevertheless, the judgment of the Court, in which the Chief Justice too concurred, makes no finding or ruling on the matter, *and neither depends nor could depend on the mistaken assumption*. For the decision in Dobbs was to reverse the Fifth Circuit and require courts to uphold Mississippi's prohibition of abortion after 15 weeks' gestation. The Court's position that that prohibition is constitutionally valid is not, and could not conceivably be, supported by the proposition that unborn children are not entitled to Equal Protection.

Without departing from the strict rules of *stare decisis*, therefore, a future Court could (as it should) hold that prenatal children are constitutional persons, protected by the Equal Protection Clause, without challenge to anything in *Dobbs* save the breadth of the logically superfluous, constitutionally overbroad rhetoric of entirely returning abortion's permissibility to the people. A future decision of the Supreme Court could adopt everything that, on the arguments of our Brief and this Article, is required by fidelity to constitutional text and history in order to do justice to the rights

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> one another and then voting." That is what the Constitution and the rule of law demand.

Id. at 2243 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in judgment in part and dissenting in part)). The second is the equally sweeping declaration that "the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people." *Id.* at 2265.

244. Note, incidentally, that in articulating this qualification, the Court heads up its non-exhaustive list of "legitimate interests" with: "respect for and preservation of prenatal life at all stages of development [and] the protection of maternal health and safety . . . ." *Id.* at 2284 (citing *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007)).

given constitutional status in 1868, rights (as we have argued) both of persons prior to their birth and of their mothers.

A STANDOFF: *HAVENS REALTY V. COLEMAN* TESTER STANDING AND *TRANSUNION V. RAMIREZ* IN THE CIRCUIT COURTS

CATHERINE COLE*

INTRODUCTION

Two lines of Article III standing law are at odds with each other. Forty years ago, in *Havens Realty Corp. v Coleman*,[1] the Supreme Court held that a tester had standing for a stigmatic injury due to the violation of a statutory right.[2] Scores of testers have since gotten into federal court for claims of discrimination under laws like the Civil Rights Act, the Americans with Disabilities Act (ADA), and the Fair Housing Act (FHA). This type of tester standing seemed like settled law. But in last term's decision in *TransUnion v. Ramirez*,[3] the Court reframed Article III standing. Under *TransUnion*, violations of statutory law are justiciable in federal court only if the violated rights have "a close historical or common-law analogue."[4] Additionally, plaintiffs must have suffered a real, not just

* JD, Harvard Law School, Class of 2022. I am indebted to Professor Jack Goldsmith, Kat Barragan, Jacob Harcar, and Eli Nachmany for their contributions to the development of this Note and to my family for everything else. Any errors are my own.

1. 455 U.S. 363 (1982).

2. *Id.* at 374. A tester is someone who pretends to be interested in a good or service to investigate whether a protected class's legal rights are being upheld. For instance, in *Havens Realty*, a black tester and a white tester separately solicited information about an apartment building, with no intent to purchase or rent, to determine whether they would receive the same truthful information. *Id.* at 368, 373.

3. 141 S. Ct. 2190 (2021).

4. *Id.* at 2204.

legal, harm.[5] *Havens Realty*'s tester standing seems irreconcilable with *TransUnion*'s standing redefinition, yet both remain good law. Now what?

The courts of appeal have begun to venture their guesses. In four near-identical cases in the year following *TransUnion*, all involving a tester plaintiff suing for online disability accommodations required by the ADA, the circuit courts reached different conclusions.[6] The Second, Fifth, and Tenth Circuits denied standing to their tester plaintiffs, though for different reasons. The Eleventh Circuit concluded the tester plaintiff had standing. While these cases strained to follow both *Havens Realty* and *TransUnion* (along with *TransUnion*'s predecessor case, *Spokeo v. Robins*[7]), none presented a satisfactory theory of standing doctrine that accommodates them both.

This Note analyzes the circuit court split on tester stigmatic injury standing and concludes that the conflict between *Havens Realty* and *TransUnion* is untenable. One must bend to the other, if standing law is to be coherent. Part I looks at the circuit court cases that have taken on this conflict, summarizing their decisions and evaluating each court's rationale on its own terms. Part II argues that this collective body of decisions, in failing to harmonize *Havens Realty* and *TransUnion*, presents a meaningful problem for standing law. Part III considers options for resolution. Until this conflict is resolved, it will remain unclear what is left standing of tester stigmatic injury claims.

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5. *Id.* at 2205.

6. Harty v. West Point Realty, 28 F.4th 435 (2d Cir. 2022); Laufer v. Mann Hospitality, L.L.C., 996 F.3d 269 (5th Cir. 2021); Laufer v. Looper, 22 F.4th 871 (10th Cir. 2022); Laufer v. Arpan LLC, 29 F.4th 1268 (11th Cir. 2022). As an exception, the Fifth Circuit decision was handed down two months before *TransUnion*. Nonetheless, this Note includes it in the discussion because (a) it is factually identical to the Tenth and Eleventh Circuit cases and (b) the Fifth Circuit's holding derives from an understanding of Article III standing law based on *Spokeo* that mirrors *TransUnion*'s understanding in all ways relevant. In other words, this Note's selection of cases errs on the side of inclusivity rather than exclusivity.

7. 578 U.S. 330 (2016).

I. TESTER STIGMATIC INJURY STANDING IN THE SECOND, FIFTH, TENTH, AND ELEVENTH CIRCUITS

Four cases decided on the grounds of standing for tester stigmatic injuries represent circuit courts' different interpretations of *TransUnion*. The facts of the cases are remarkably alike. In the Fifth, Tenth, and Eleventh Circuits, serial plaintiff Deborah Laufer, a woman with vision, dexterity, and ambulation problems, alleged that various hotels failed to provide online information about accessible rooms and features for disabled people in violation of the ADA and its regulations.[8] In the Second Circuit, plaintiff Owen Harty, a wheelchair-bound man, alleged the same thing of a hotel in New York.[9] While the plaintiffs hinted at possible plans to book rooms for themselves,[10] both self-identified as testers whose primary aim was to verify the hotels' ADA compliance. Both plaintiffs were also represented by the same lawyers.[11] Such are the similarities among these cases that, for the purposes of this Note, they can be considered factually indistinct, which throws the rationales of the four circuit courts into relief. This Part describes and evaluates the reasoning used by each circuit court in turn, beginning with the three circuit courts that did not award standing to their tester plaintiffs.

All three of the circuits that denied standing for tester stigmatic injury grappled with the tension between *Havens Realty* and *TransUnion*, though they split roughly into two camps in terms of

8. *See, e.g.*, *Arpan*, 29 F.4th at 1270.

9. *Harty*, 28 F.4th at 439.

10. These plans were decidedly vague. In her complaint in the Western District of Texas, Ms. Laufer said that despite never having stepped foot in Texas before, she "intend[ed] to travel all throughout the State" after the pandemic and would "need to stay in hotels when [she goes]." *Mann Hospitality*, 996 F.3d at 272. And in contrast to her other cases, in her Northern District of Florida complaint, Ms. Laufer did not even go that far, declaring no intention whatsoever of visiting the defendant's hotel in Marianna, Florida. *Arpan,* 29 F.4th at 1290 (Newsom, J., concurring).

11. *Arpan,* 29 F.4th at 1295 (Newsom, J., concurring).

how they resolved it. The Tenth Circuit confronted the conflict head-on. It framed *TransUnion*'s main innovation as the repudiation of statutory rights-based standing and thereby concluded that "a violation of a legal entitlement alone is insufficient under *Spokeo* and *TransUnion* to establish that Ms. Laufer suffered a concrete injury."[12] Per the Tenth Circuit, Ms. Laufer's complaint alleged only that she was unable to enjoy ADA-created entitlements—that is, that she suffered exactly the sort of mere statutory violation contemplated and rejected by *TransUnion*.[13] Without more, this deprivation was inadequate to get her into federal court, and Ms. Laufer's case was rightly dismissed.

The Tenth Circuit then engaged the *Havens Realty* problem, concluding that *Havens Realty* was still good law but that it did not apply in Ms. Laufer's case. It stated that the *Havens Realty* plaintiff was given false information due to her race—a concrete and particularized harm sufficient for Article III standing—whereas Ms. Laufer was simply denied information.[14] As such, the Tenth Circuit concluded that although a *Havens Realty*-style injury, narrowly defined, would merit standing even after *TransUnion* because that injury constitutes something more than a statutory violation, the *Havens Realty* and Laufer cases were distinguishable due to the relative offensiveness of the injuries experienced. On these bases, the Tenth Circuit affirmed the dismissal of Ms. Laufer's claims.

As a matter of law, this is mystifying. There is no perceptible *legal* difference between the harms suffered by the *Havens Realty* plaintiff and Ms. Laufer. The *Havens Realty* plaintiff was guaranteed "truthful information concerning the availability of housing" by the Fair Housing Act—and was denied it.[15] Ms. Laufer was guaranteed information "[i]dentify[ing] and describ[ing] accessible features in . . . hotels and guest rooms" by ADA regulations—and was denied

12. *Looper*, 22 F.4th at 878.

13. *Id*.

14. *Id.* at 879 ("Ms. Laufer has not alleged that the Loopers gave her false information. Nor has she alleged they denied her information because of her disability.")

15. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

it.[16] Both denials are straightforward statutory violations. To avoid the parallel, the Tenth Circuit invented a distinction. It reported that the *Havens Realty* injury "was grounded in misrepresentation and racial animus," which was somehow worse than Ms. Laufer's injury in a way that gave rise to Article III standing.[17] It is not evident why this distinction mattered. Is the reason that the offenses of "misrepresentation and racial animus" parallel a historical or common-law harm, which is the plus factor demanded by *TransUnion*? Probably not, as the purpose of much of the 20th Century's civil rights legislation was to penalize racial animus where historical causes of action had not.[18] Is it that discriminatory or racist intent creates a real, not just legal, injury? No, because the injury inquiry focuses on effect, not intent.[19] Statutory law makes intent relevant,[20] but considerations of statutory law without more are verboten under the Tenth Circuit's interpretation of *TransUnion*. Is it something else? If so, the Tenth Circuit did not say. It declared that the injury in *Havens Realty* was worse and moved on, without any clear legal foundation.

The Second and Fifth Circuits arrived at the same destination as did the Tenth Circuit by a different route. Both circuits denied standing due to features of the plaintiffs that were intrinsic to their identities as testers and thus seemed to invalidate post-*TransUnion* tester standing altogether. In contrast to the Tenth Circuit with its

16. *Looper*, 22 F.4th at 874.

17. *Id.* at 879.

18. *See* 88 Cong. Rec. 22839 (1963) (address of President Johnson to joint session of Congress about the proposed Civil Rights Act) ("We have talked long enough in this country about equal rights. We have talked for 100 years or more. It is time now to write the next chapter—and to write it in the books of law.").

19. *See* TransUnion LLC v. Ramirez, 141 S.Ct. 2190, 2214 (2021).

20. *See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–02 (1973) (noting the importance of intent for discrimination under statute by observing that because "Title VII [of the Civil Rights Act] tolerates no racial discrimination," a Title VII complaint requires an inquiry into an employer's motives).

focus on *TransUnion*'s overall standing redefinition, the Second Circuit emphasized that *TransUnion* rejected speculative harm as a possible standing basis. In the Second Circuit's view, the key to the case was that "*TransUnion* now makes clear that . . . *mere risk of future harm*, standing alone, cannot qualify" as an injury in a suit over a statutory right.[21] The tester plaintiff's lack of plans to visit the hotel himself, a subject which seemed to preoccupy the Second Circuit, thus foreclosed his pathway to standing.[22] Rather than entangle itself with *Havens Realty*, the Second Circuit relegated *Havens Realty* to a footnote and ignored the consequences of its *TransUnion* interpretation for testers as a class.

The Fifth Circuit similarly jumped on the idea that Ms. Laufer's injury, due to characteristics inherent to tester injuries, was insufficient to get Ms. Laufer into federal court.[23] The court listed Ms. Laufer's fatal flaw as having "visited the [Online Reservation System website] to see if the motel complied with the law, and nothing more."[24] This, of course, is exactly what a tester does. No matter, to the Fifth Circuit. Because Ms. Laufer, like the Second Circuit plaintiff, could not demonstrate that she "even intended to [book a room]," the Fifth Circuit concluded that she had suffered no real injury and that her case was rightly dismissed for lack of standing. In this way, both the Second and Fifth Circuits denied plaintiffs standing due to their natures as testers who court injury for purposes of legal monitoring rather than for their own purposes.

Mirroring the Second Circuit, the Fifth Circuit dispensed of *Havens Realty* quickly. It answered the question of whether *Havens Re-*

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21. *Harty*, 28 F.4th at 443 (emphasis added) (internal quotation marks omitted).

22. *Id.* ("Because Harty asserted no plans to visit West Point or the surrounding area, he cannot allege that his ability to travel was hampered by West Point Realty's website in a way that caused him concrete harm.").

23. *Mann Hospitality*, 996 F.3d at 272 ("'Article III standing requires a concrete injury even in the context of a statutory violation.' . . . Laufer fails to show how the alleged violation affects her in a concrete way." (quoting Spokeo v. Robins, 578 U.S. 330, 332 (2016))).

24. *Id*.

alty controlled in the case at issue in a short paragraph with an unsurprising "no." From the Fifth Circuit's perspective, the *Havens Realty* plaintiff had standing because "the [FHA] forbade misrepresenting [information] to 'any person,' quite apart from whether the tester needed it for some other purpose."[25] In this view, *Havens Realty* did not recognize standing for testers generally. It recognized standing for the specific *Havens Realty* plaintiff because she demonstrated the concrete harm of an FHA violation, with her tester status merely incidental to the analysis.

The Fifth Circuit's reasoning here was erroneous for at least two reasons. For starters, the *Havens Realty* plaintiff's injury, the misrepresentation, was a statutory violation. If violation of the FHA alone gave rise to Article III standing in *Havens Realty*, then the hotels' violation of the ADA by withholding accessibility information should have given rise to Ms. Laufer's standing under the same theory. Furthermore, *Havens Realty* does stand for the general principle of tester standing, or at least the courts have long thought it does.[26] So too have legal scholars.[27] The Fifth Circuit's attempt at reconciling *Havens Realty* and Ms. Laufer's case distorted logic and the law alike, further demonstrating the challenges of applying *Havens Realty* in the post-*TransUnion* era.

Although neither the Second nor the Fifth Circuit rejected *Havens Realty* explicitly, the upshot of both decisions is that the path

25. *Id.* at 273 (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982)).

26. *See, e.g.*, Kyles v. J.K. Guardian Sec. Services, Inc., 222 F.3d 289, 297 (7th Cir. 2000) ("Although we thought the standing of the testers, as an original matter, to be dubious, we acknowledged *Havens*' holding that testers have standing . . . ." (internal quotation marks and citation omitted)); Houston v. Marod Supermarkets, 733 F.3d 1323, 1332 (11th Cir. 2013) ("Thus, the tester motive . . . does not preclude [the plaintiff's] having standing . . . ." (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–75 (1982))).

27. *See, e.g.*, Shannon E. Brown, *Tester Standing Under Title VII*, 49 WASH. & LEE L. REV. 1117, 1127 (1992) ("*Havens* establishes a strong precedent for federal courts to hold that employment testers have standing under Title VII."); Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547, 576 (1995) ("As interpreted in *Havens Realty*, [the Fair Housing Act] eliminates that requirement [of factual injury].").

to standing used by the *Havens Realty* tester plaintiff is now foreclosed in both circuits. To be sure, the circuits paid lip service to tester stigmatic injury standing. In a footnote, the Second Circuit stated that "[t]he law is clear that testers can have standing,"[28] while the Fifth Circuit hyped up *Havens Realty* as "the Supreme Court's seminal tester case."[29] But it is a mystery how the *Havens Realty* plaintiff—or, indeed, any tester—could survive the standing gauntlet that the Second and Fifth Circuits imposed on their plaintiffs here, which they considered compulsory because of *Spokeo* and *TransUnion*. Both denials of standing turned on the fact that, in the context of a statutory violation, neither plaintiff demonstrated a personal plan to go to the tested hotels. If that is enough to bar a plaintiff from having standing under the Second and Fifth Circuit's interpretations of *Spokeo* and *TransUnion*, then these circuits have quietly shut down any avenue for a tester to get into federal court. The difference between the Tenth Circuit, on the one hand, and the Second and Fifth Circuits, on the other hand, is that the former circuit's theory at least contemplates that the *Havens Realty* door to tester standing remains open after *TransUnion*.

That leaves the Eleventh Circuit. It departed from its peers by awarding Ms. Laufer standing. In an opinion by Judge Newsom, the Eleventh Circuit posed the central issue as whether a tester's injury can qualify as a "concrete *intangible* injury" after *TransUnion*. Concluding that it can, the Eleventh Circuit vacated the dismissal of Ms. Laufer's case for lack of standing in the absence of physical, property, monetary, or similar harms.[30] The inquiry took several steps. The Eleventh Circuit acknowledged that *TransUnion* had rearticulated standing law in a way that diminished the materiality of legal injury. Next, the circuit determined that, without consideration of legal injury alone, what remains after *TransUnion* is a test

28. *Harty*, 28 F.4th at 444 n.3.

29. *Mann Hospitality*, 996 F.3d at 273 (internal quotation marks omitted).

30. *Arpan*, 29 F.4th at 1272.

in which a concrete intangible injury derives from (1) a close relationship to a traditional common-law cause of action and (2) a free-standing concrete injury—in which satisfying only the second part of the test is enough for standing.[31] Then, the court concluded that Ms. Laufer's claim satisfied this second part, because Ms. Laufer suffered real emotional pain after she tested the hotel. The Eleventh Circuit stated, "Even if it's clear after *TransUnion* that a violation of an antidiscrimination law is not alone sufficient to constitute a concrete injury, we think that the emotional injury that results from illegal discrimination is."[32] Ms. Laufer experienced "frustration and humiliation and a sense of isolation and segregation" when she learned that the hotel did not make accessibility information available.[33] This turmoil was real, so the Eleventh Circuit held that Ms. Laufer had alleged standing sufficient to pursue her claims of an ADA entitlement violation.

Though it came out the opposite way of the Second, Fifth, and Tenth Circuit opinions, the Eleventh Circuit opinion suffered from its own defects. In developing a theory of standing based on stigmatic injury due to emotional harms, the Eleventh Circuit identified a pathway to standing for Ms. Laufer that had nothing to do with her status as a tester. It sidestepped, rather than reconciled, *Havens Realty*. The Eleventh Circuit's majority opinion did not mention *Havens Realty*; there was no need, because the emotional pain that gave rise to standing was tangential to Ms. Laufer's tester role. Further, the Eleventh Circuit's workaround may not work so well in practice. The appellate court concluded that Ms. Laufer's emotional suffering was facially adequate for Article III standing, but it remains to be seen whether district courts will find that testers experience sufficient turmoil as a question of fact.[34] Concededly,

31. *See id.* at 1272–73.
32. *Id.* at 1274.
33. *Id.* (internal quotation marks omitted).
34. *Id.* at 1298–99 (Carnes, J., concurring).

TransUnion kept open the possibility that a plaintiff might feel sufficient emotional pain at the prospect of her own exposure to future harms.[35] However, testers worry not about their own future injury but about the generalized prospect of future injury (or perhaps about the imperfect rule of law itself). Will district courts find that testers suffer sufficient personal pain due to speculative, and impersonal, harm? Maybe, or maybe not. And it is not obvious that the emotional pain that arises from a stigmatic injury due to discrimination is even a permissible ground for tester standing at all.[36] The Eleventh Circuit's pathway to standing does not reliably provide for tester standing under *TransUnion* and therefore, like the other circuits' opinions, does not fully harmonize *TransUnion* with *Havens Realty*.

Ultimately, all four opinions suffer from the same weakness, which is that *Havens Realty* tester stigmatic injury standing is a square peg that does not want to fit into the round hole of modern standing doctrine. *Havens Realty* provided for standing based on a statutory violation alone in the absence of real harm. This is precisely what *TransUnion* forbids. Thus, the cases seem incompatible. To overcome this incompatibility presumption, the law would need to accommodate a nuanced legal theory that incorporates *Havens Realty* and *TransUnion*. Over the course of four paradigmatic tester cases, four circuit courts tried and failed to do this. The shortcomings of their resolutions lend strong support to the notion that the tension cannot be resolved satisfactorily right now.

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35. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2211 n.7 (2021).

36. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 755 (1984) ("There can be no doubt that this sort of [stigmatizing] noneconomic injury is one of the most serious consequences of discriminatory government action . . . . Our cases make clear, however, that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." (quoting *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984)).

II. SIGNIFICANCE OF THE CIRCUIT COURT SPLIT OVER *HAVENS REALTY* AND *TRANSUNION*

As illustrated by the circuit court split, there is little consensus about whether tester standing survives *Spokeo* and *TransUnion*. To be sure, a circuit court split does not always pose a serious problem for the law. As Judge Wilkinson put it, "Circuit splits are often more apparent than real, and at any rate, the world will not end because a few circuit splits are left unresolved."[37] For example, when the legal issues giving rise to the split are minor,[38] or when uniformity can be attained via legislative instead of judicial action,[39] the Supreme Court may prudently decline to intervene. In some splits, the lower courts can work through their inconsistencies themselves, making meaningful contributions to the country's legal discourse along the way. This is not such a split. As this Part argues, the *Havens Realty* and *TransUnion* circuit court split is an important problem that the Supreme Court should resolve soon for at least three reasons.

First, this circuit court split creates real-world problems because it acutely affects a discrete circle of actors involved in civil rights testing whose work is jeopardized by the legal status quo. Chief among these actors is Congress, which has heretofore passed civil rights (and similar) legislation under the assumption that the rights introduced would be broadly enforceable in federal court.[40] Now,

37. J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L.J. ONLINE 67, 69 (2010).

38. *See* U.S. Sup. Ct. R. 10(a) (stating the Supreme Court's internal rule that, when granting review on certiorari, priority should be given to court of appeal splits on "important federal question[s]" and "important matter[s]"). *See, e.g.*, Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569 (2008) (suggesting "whether a signature on a notice of appeal could be typed" and "whether a complaint delivered by facsimile had been properly served" as examples of trivial issues in circuit court splits that did not demand resolution).

39. Frost, *Overvaluing Uniformity*, *supra* note 38, at 1607–08.

40. *E.g.*, Senator Bob Dole, Address on the Passage of Americans with Disabilities Act (July 12, 1990) ("The tough but fair enforcement remedies of ADA, which parallel

TransUnion establishes that this is true only when those rights have a common-law analogue.[41] The rights protected by testing—freedom from discrimination, freedom from emotional suffering, guaranteed statutory compliance, and so on—do not boast obvious historical analogues.[42] Such is *TransUnion*'s catch-22: because historical laws did not protect parties from discrimination, Congress created laws; because Congress created the laws, the Court will not allow parties alleging discrimination to enforce their protections. Yet *Havens Realty* suggests that the Court still must allow it. This stalemate handicaps Congress, along with the agencies that develop nationwide regulations under congressional mandate, because the extent to which its created rights will carry weight is now unclear. More directly, the circuit court split also impacts testers themselves. This includes not only litigious lone wolves, like Ms. Laufer, but also a multitude of civil rights organizations that have sprung up across the country to train and employ professional testers.[43] This cottage industry's existence turns on the circuit court split's resolution.[44] Last but not least, disabled people, members of other protected classes, and the companies they patronize enjoy less certainty about

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the Civil Rights Act of 1964, are time-tested incentives for compliance and disincentives for discrimination."). At the time of the ADA's passage, testing had been legitimized by the Supreme Court for eight years.

41. Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 283 (2021).

42. *But see* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2211 n.7 (2021) (observing, though explicitly not taking a position on, the idea that litigants could make analogies to tort law).

43. As a sampling, organizations include the University of Illinois Chicago Law Fair Housing Legal Support Center; the Equal Rights Center in Washington, DC; the Disability Law Center in Salt Lake City; the Equal Housing & Opportunity Council in St. Louis; the Boston Fair Housing Initiative; the Housing Rights Center in Los Angeles; the Seattle Office for Civil Rights Testing; the U.S. Department of Justice's Fair Housing Testing Program; and more.

44. Additionally, in the meantime, the status quo encourages testers to forum shop, bringing their claims in the more hospitable Eleventh Circuit until the circuit court split is resolved. This comes with its own drawbacks; courts tend to view forum shopping as inefficient and deleterious to the rule of law. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73–75 (1938).

their legal rights and obligations due to the split. In circuits where testers have standing, testers will operate, and companies may adhere to a higher standard of legal compliance.[45] Where there is no standing, they may not. This turns the country into a patchwork quilt of discrimination protection standards, leaving protected classes unable to predict where their rights can best be enjoyed. The circuit court split, while still new, already puts these actors in an uncertain position.

Second, unlike with splits that make circuit court judges choose among many credible resolutions, the uncertainty about *TransUnion* and *Havens Realty* leaves judges with no good options at all. This forces even the most faithful judges to improvise. For instance, Judge Newsom opened the Eleventh Circuit opinion by declaring that the court's grant of standing was "require[d]" by the Eleventh Circuit's "recent decision in *Sierra v. City of Hallandale Beach*."[46] In that case, handed down one month before *TransUnion* last year, Judge Newsom laid out a comprehensive theory of what he believed standing law should be[47]—a theory that stands in opposition to *TransUnion*.[48] For one thing, he proposed that statutory causes of

45. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 3 (6th ed. 2011) ("[P]eople also respond to more severe legal sanctions by doing less of the sanctioned activity.").

46. *Arpan*, 29 F.4th at 1270 (citing 996 F.3d 1110 (11th Cir. 2021)); *see also Arpan*, 29 F.4th at 1283 (Newsom, J., concurring) ("This is a sequel of sorts to my concurring opinion in *Sierra*.").

47. Judge Newsom has delved deeply into the issue of standing. In *Arpan*, he used the facts of Ms. Laufer's case to defend his alternative standing theory from *Sierra*, which would award standing whenever a plaintiff has a legal cause of action, except when that action stems from a congressionally created public right that a private plaintiff seeks to vindicate. He also keenly observed that *TransUnion*'s "'history-and-judgment-of-Congress' standard . . . can't comfortably accommodate the sort of 'stigmatic' injury that this case involves and that the Court has consistently acknowledged." *Arpan*, 29 F.4th at 1284 (Newsom, J., concurring).

48. *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115–40 (11th Cir. 2021) (Newsom, J., concurring). The *Sierra* opinion was favorably cited in Justice Thomas's dissent in *TransUnion*, *see* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2219 (2021)

action should be enough for standing, "regardless of whether [a plaintiff] can show a separate, stand-alone factual injury."[49] Had *TransUnion* definitively closed the door to tester standing, the Eleventh Circuit's mandate would have been clear. Instead, because *TransUnion* left a gap, the Eleventh Circuit had the leeway to hew more closely to the inclusive theory of standing it had already espoused. Is this what the Supreme Court ordered in *TransUnion*? As Judge Newsom said in his *Arpan* concurrence, "The majority opinion in this case reflects our best effort to apply *Sierra*'s binding precedent in light of *TransUnion*, . . . but I suspect that the law concerning 'stigmatic injury' will remain deeply unsettled until the Supreme Court steps in to provide additional guidance."[50] Quite. The stigmatic injury confusion has made it hard, if not impossible, for faithful judges to interpret the law with exactitude.

Third, this circuit court split demands resolution because it concerns an important matter of constitutional law. Article III standing is not a trivial issue; it impacts every single case in every federal court. Moreover, Article III standing is a judge-made doctrine.[51] The Supreme Court is the only body that can clarify its meaning. To put a finer point on it, if *TransUnion* standing was meant to override *Havens Realty*, the Supreme Court is the only actor that can say so. All the circuit court majority opinions discussed in this Note started from that premise—that *TransUnion* is binding law and *Havens Realty* must conform to its new order.[52] It is a reasonable premise. But while *Havens Realty* remains on the books, it is not an obviously

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(Thomas, J., dissenting), demonstrating the chasm between the *TransUnion* majority holding and Judge Newsom's standing theory.

49. *Arpan*, 29 F.4th at 1283 (Newsom, J., concurring) (quoting *Sierra*, 996 F.3d at 1115 (Newsom, J., concurring)).

50. *Id.* at 1287.

51. *See* Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and The Federal System 49 (7th ed. 2015).

52. Even the Eleventh Circuit, which awarded standing, did not do so because of *Havens Realty*. The holding relied wholly on *TransUnion* and its vague definition of a "factual" injury, bringing the tester's emotional suffering under that definition. *Arpan*, 29 F.4th at 1274.

correct premise. Without resolution of the split, this field of constitutional law will remain unsupported, forcing the lower courts to barrel ahead blindly.

One judge departed from this premise. In the Eleventh Circuit, Judge Jordan wrote a concurrence that discussed the importance of *Havens Realty* as precedent.[53] He recognized the threat posed by *TransUnion* to tester stigmatic injury standing but wrote that until the Supreme Court disposed of it formally, "lower courts must continue to recognize and apply the old with the new."[54] He then put forward a straightforward rationale for Ms. Laufer's tester standing. It demonstrates how this case might have been decided in a pre-*Spokeo* and -*TransUnion* world:

> For standing purposes, then, Ms. Laufer is not different than [*Havens Realty* plaintiff] Ms. Coleman. Indeed, in cases after *Havens Realty* the Supreme Court has held that the deprivation of information to which one is legally entitled constitutes cognizable injury under Article III. . . . If resulting stigmatic harm is the necessary adverse (and downstream) consequence of informational injury, Ms. Laufer's "frustration and humiliation"—which was caused by the hotel's failure to provide accessibility information— suffices. . . . I also think Ms. Laufer has standing as a tester for her Title III ADA claim based on the informational injury she suffered, [as in *Havens Realty*].[55]

While Judge Jordan agreed with the majority opinion that the emotional consequences suffered by Ms. Laufer were probably enough for standing under *TransUnion*, he also believed that Ms. Laufer independently had standing due to an informational injury under *Havens Realty*. Not just that, Judge Jordan also seemed to propose that *Havens Realty*'s controlling effect took priority: "*Havens Realty* may be endangered, but . . . it governs here."[56] Judge Jordan

53. *Id.* at 1275 (Jordan, J., concurring).
54. *Id*.
55. *Id.* at 1280, 1283.
56. *Id.* at 1283.

eyed the conflict between the equally binding *Havens Realty* and *TransUnion* decisions and declined to endorse the idea that *TransUnion* necessarily took precedence.

The Supreme Court left confusion in *TransUnion*'s wake. Whether Judge Jordan was correct that *Havens Realty* still prevails after *TransUnion* is difficult to say, because the Supreme Court has not articulated what "correct" looks like in this dispute. This is a problem for an area of the law as integral to federal court operations as justiciability. Due to the real-world implications, the judicial leeway afforded, and the importance of the *Havens Realty* and *TransUnion* problem, the Supreme Court should clarify the doctrine of tester stigmatic injury standing in explicit terms, freeing judges from guesswork.

III. POSSIBLE RESOLUTIONS

The Supreme Court should act, but how? The conflict between *Havens Realty* and *TransUnion* is multifaceted, implicating questions of informational injury, stigmatic injury, civil rights, statutory rights-based standing, tester status, and more. In that sense, there are numerous ways for the Court to approach the conflict. However, the central issue confronted by the Second, Fifth, Tenth, and Eleventh Circuits can be distilled to this question: *Do testers have Article III standing, when their claims allege stigmatic injury because of a statutory violation and nothing more?*

This Part proposes five ways that the Supreme Court could justifiably answer that question. Any of these answers would help resolve the circuit court split discussed in this Note. The options are ranked in order from least to most disruptive to current standing law.

1. Yes, because the injury experienced by testers is factual, not just legal, under *TransUnion*.

The Eleventh Circuit's majority opinion is a species of this option. This choice addresses one of the main theoretical obstacles to

tester standing under *TransUnion*, which is that "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court"[57] and that testers incur only abstract harm, for the purpose of preventing (someone else's) concrete harm. But the force of this obstacle depends on what constitutes concrete harm. The Eleventh Circuit concluded that Ms. Laufer's specific "frustration and humiliation" after her failed test qualified. A court could go broader, determing that testers are so inherently invested in the outcome of their tests that they presumptively experience suffering when a tested statutory right is not upheld. The concrete harm could be something other than emotional pain; it could be the affront to the dignity of a tester member of a marginalized class whose rights were violated. To make this option work, the Court would also need to endorse the Eleventh Circuit's interpretation of the *TransUnion* test, which allows for injury where there is a legal violation plus a concrete harm, even without a common-law analogue[58]—an endorsement that may be unlikely.

By and large, though, this option relies on *TransUnion* without overturning *Havens Realty*'s core holding, making it relatively harmonious with existing precedent. *TransUnion*'s definition of concrete harm imagined two lawsuits over the illegal pollution of land in Maine and distinguished a Maine neighbor plaintiff's harm as concrete where a Hawaiian observer's harm would not be.[59] Under this option, a tester would be more like the Maine neighbor, because he personally would experience the bad result of the illegal tested behavior—through the test itself. This would hold true even if the plaintiff never contracted for a good or service with the tested company. However, this option is still imperfect, not least because

57. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021) (majority opinion).

58. *Arpan*, 29 F.4th at 1273 ("Despite the absence of a close common-law comparator, we conclude that under existing precedent—both our own and the Supreme Court's—Laufer has alleged a concrete intangible injury.").

59. *TransUnion*, 141 S. Ct. at 2205.

it is something of a pretense. A tester sues because a statutory law was violated, not because the violation made him sad. Adopting this standard would incentivize tester plaintiffs to play up, even seek out, a negative emotional response. It would bring standing law further from, not closer to, the truth. This theory works, but, like the tester plaintiffs it would encourage, it does not feel great.

2. Yes, because the harm experienced by testers is analogous to a common-law harm under *TransUnion*.

This option avoids the other major obstacle to standing under *TransUnion*, which is that intangible statutory harms may be considered concrete if they are "injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts."[60] The Court nodded to an array of permissible historical or common-law harms, including "reputational harms" and "harms specified by the Constitution."[61] The question is how close the relationship between one of these harms and the statutory violation must be. For instance, the Eleventh Circuit shrugged off the idea that depriving a tester of a statutorily guaranteed right was akin to the torts of intentional infliction of emotional distress (IIED), which requires extreme or reckless conduct, or the negligent infliction of emotional distress, which usually requires that the inflicted party be near physical danger.[62] But perhaps the Eleventh Circuit was too hasty. As *TransUnion* observed, "*Spokeo* does not require an exact duplicate in American history and tradition."[63] Under this option, even if the hotels' behavior did not reach the level of recklessness, the courts could still determine that it irresponsible enough as to have a relationship to the common-law IIED claim—something that the Court openly contemplated in a *TransUnion* footnote.[64] In

60. *Id.* at 2204.

61. *Id.*

62. *Arpan*, 29 F.4th at 1272–73 ("But neither intentional nor negligent infliction of emotional distress is a sufficiently close analogue.")

63. *TransUnion*, 141 S. Ct. at 2204.

64. *See id.* at 2211 n.7.

the alternative, perhaps injury resulting from discrimination is sufficiently analogous to the harms barred by the Fourteenth Amendment's Equal Protection Clause.[65] Although this option might require the Court to define the "traditional harms" test more expansively than it currently does, this accommodation would work with post-*TransUnion* standing law's overall framework instead of against it. Unfortunately, it would still depart from the most obvious interpretation of a "close relationship" from *TransUnion*. This option fits, depending on the Court's willingness to accept attenuated relationships to common-law harms.

3. Yes, because *Havens Realty*'s theory of standing represents an exception to the broad *TransUnion* rule.

Arguably, Judge Jordan hinted at something like this option in his concurrence in the Eleventh Circuit. *TransUnion* laid out a rule for standing. In his concurrence, Judge Jordan considered that "*Havens Realty* may be inconsistent (in whole or in part) with current standing jurisprudence" but conducted its standing analysis anyway, proceeding as though *Havens Realty* existed independently, and fell outside, of the *TransUnion* umbrella rule. The Court could adopt this approach in a future case by holding that when a plaintiff self-identifies as a tester, her suit automatically slots into a *Havens Realty* analysis instead of a *TransUnion* analysis. This would sustain both rules, by making the former an exception to the latter.

This option has its own advantages and weaknesses. On the one hand, it is supported by Supreme Court practice. There is a rich tradition of the Court carving out exceptions to a general constitutional rule when confronted with scenarios that render the rule senseless.[66] This option is also attractive because it would allow

65. U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

66. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968) (recognizing an exception to the Fourth Amendment's warrant and probable cause requirement when a seizure is minimally

TransUnion to control in its unadulterated form except in the very narrow category of tester cases, thereby allowing the core holdings of both *TransUnion* and *Havens Realty* to live on. On the other hand, narrow exceptions have a way of becoming broad exceptions. The Court may justifiably worry that chopping up its standing doctrine, especially so soon after the Court comprehensively articulated it, would undermine the doctrine's legitimacy, leading to an even less intelligible rule governing the federal court gateways.

4. No, because *TransUnion* overrules *Havens Realty*.

The Second and Fifth (and to an extent, the Tenth) Circuits selected this option, though they did not put it in such blunt terms. This option has the distinct advantage of allowing the Court to double down on *TransUnion*'s theory of standing, in which Congress's creation of a cause of action is "instructive" but not dispositive to the injury inquiry.[67] Given the Court's persistence with this theory from *Spokeo* through to *TransUnion*, this is perhaps the likeliest option in a near-future Supreme Court case. Yet the principle of *stare decisis* would generally counsel against throwing *Havens Realty* overboard and taking tester standing along with it. And sticking to *TransUnion*'s narrow standing doctrine would likely impede Congress's ability to create rights that can be reliably and broadly enforced in federal court, which conceivably transgresses against the constitutional design.[68] Even so, in support of this option from a policy perspective, the absence of standing would not leave testers without redress entirely. Testers could pursue their claims in state courts,[69] bring employment complaints to the Equal Employment

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intrusive and a police officer has reasonable suspicion of criminal activity); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (recognizing an exception to the First Amendment's Free Exercise Clause analysis under *Smith* for the hiring and firing of church ministers).

67. *TransUnion*, 141 S. Ct. at 2204.

68. *E.g.*, Article I's Vesting Clause exclusively gives Congress all legislative powers therein granted, which *TransUnion* arguably impairs. U.S. CONST. art. I, § 1. A fuller discussion of *TransUnion*'s constitutional footing is outside the scope of this Note.

69. *See TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting).

Opportunity Commission,[70] and print studies publicizing their findings. Many tester organizations already do all three of these things and more. If the Supreme Court overruled *Havens Realty*, those testers would lack a remedy only in federal courts. Thus, while this option would represent a formal shift in the law by requiring the Court to overturn *Havens Realty*, it might not significantly impact testing on the ground.

5. Yes, because *Havens Realty* endures, and *TransUnion* does not.

Far and away, this option would be the most disruptive to standing law and is the most unlikely to be adopted. It would require the Court to turn its back on *TransUnion* and articulate a new conception of the standing doctrine altogether. Per this option, *Havens Realty* would continue to exist as it has since 1982. *TransUnion*'s requirements of an injury in fact, not "an injury in law," and of a common-law analogue would give way to an as-yet-unknown version of standing law, which would presumably be more encompassing of legal injuries. While it would represent a break, this option has plenty of supporters. Since *TransUnion* was handed down, many scholars have objected on legal and practical grounds. For example, Erwin Chemerinsky expressed concern that *TransUnion* has placed "a potentially drastic limit on the ability of Congress to create rights," which "undermines separation of powers by greatly constraining congressional power."[71] In addition to echoing these concerns, Cass Sunstein lamented that "the new understanding of standing (and of Articles III and II) has no roots in the Constitution, and it is disconnected from standard sources of constitutional

70. *See* Steven G. Anderson, Comment, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217 (1992).

71. Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, *supra* note 41, at 270, 272.

law."[72] The appeal of this option probably depends the level of one's agreement with such scholars. Regardless, the inability of the circuit courts to parse out *TransUnion*'s meaning with consistency means that the Supreme Court will likely have to clarify it further at some point. This option proposes that the Court does so in a way that lends itself to standing based on a statutory violation alone.

The best choice among these five options turns on legal and historical questions outside the scope of this Note (though this is a subject undoubtedly worthy of further scholarly discussion). This Note's conclusion is more limited: as a matter of law, the endurance of both *Havens Realty* and *TransUnion* in their present form, without clarification, is untenable, as evidenced by the circuit courts' inability to reconcile them consistently and comfortably. These five options represent ways in which the Supreme Court could engage the conflict presented by this precedential dissonance. Regardless of the option chosen, Supreme Court clarification would be a victory for the rule of law in that it would prevent further contradictory readings like those seen in the Second, Fifth, Tenth, and Eleventh Circuits.

CONCLUSION

Havens Realty and *TransUnion* are in a standoff, each case representing a theory of Article III standing incompatible with the other. *Havens Realty* permitted the finding that a tester could have standing due to her stigmatic injury under the FHA. *TransUnion* rejected the notion that a statutory violation could be a foundation for standing where the plaintiff's injury was not analogous to an injury at common law and where the plaintiff suffered merely legal harm. Since *TransUnion* was decided last year, the circuit courts have been straining to harmonize the two precedents in cases with a tester plaintiff. The unsatisfactory and contradictory resolutions of the

72. Cass Sunstein, *Injury In Fact, Transformed* (Mar. 11, 2022), at 1, available at https://ssrn.com/abstract=4055414.

Second, Fifth, Tenth, and Eleventh Circuits show that the two precedents probably cannot be harmonized well without further Supreme Court intervention. The courts heard near-identical cases involving a plaintiff alleging stigmatic injury due to hotels not providing online information about their disability accessibility features. That their resolutions diverged so widely reveals the depths of the Supreme Court's error in not resolving this conflict in *TransUnion* or elsewhere already. The Supreme Court should take up this problem, resolve the standoff, and decide one way or another whether tester standing endures in American law.

THE CONSTITUTIONALITY OF FOR-CAUSE REMOVAL PROTECTIONS FOR INSPECTORS GENERAL

ARI SPITZER*

ABSTRACT

Questions surrounding the constitutionality of for-cause removal protections for executive officials have been at the forefront of recent major Supreme Court cases. Over the past several years, the Court has struck down such protections for members of the Public Company Accounting Oversight Board, the director of the Consumer Financial Protection Bureau, and the director of the Federal Housing Finance Agency. The next development in this area of doctrine may arise soon. Recently introduced bills in the U.S. House of Representatives have sought to amend the Inspector General Act to grant for-cause removal protection to inspectors general in the executive branch. If one of those bills, or a similar one, is enacted into law, the Supreme Court may face questions about the constitutionality of such provisions.

This Note considers whether for-cause removal protections for inspectors general would unconstitutionally restrict the president's removal power. Nearly a century ago, the Supreme Court held in its landmark Myers v. United States *decision that the power to remove executive officials*

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is part of the president's executive power under Article II of the U.S. Constitution. In the decades since, the Court strayed from this approach. Since 2010, however, the Court has inched back towards its embrace of Myers*, favoring presidential removal power. Most prominently, in 2020, the Supreme Court in* Seila Law v. Consumer Financial Protection Bureau *clarified its presidential removal doctrine, holding that there exists a presumption against removal restrictions for executive officers outside of two narrow exceptions: members of multi-head agencies and "inferior officers" with limited duties.*

This Note concludes that inspectors general fall outside of the Seila Law *exceptions, and are therefore subject to the baseline* Myers *rule against for-cause removal restrictions. The Supreme Court has construed the exceptions narrowly, holding that even slight variations from the paradigmatic outliers referenced in* Seila Law *can place an official outside the scope of the relevant exception. Because inspectors general fall outside the* Seila Law *exceptions, for-cause protections for inspectors general are likely unconstitutional.*

INTRODUCTION

Inspector General ("IG"/"IGs") independence from presidential control has been the subject of heightened attention since former President Donald Trump removed the Intelligence Community's and State Department's IGs in the spring of 2020.[1] Since then, the House of Representatives has passed the Inspector General Protection Act[2] and proposed the Protecting Our Democracy Act ("PODA"),[3] both of which aim to protect IGs from presidential control by amending the Inspector General Act ("IG Act") to add for-cause removal protection for IGs. This Note analyzes the constitutionality of provisions providing IGs for-cause removal protection.

This Note argues that such provisions are unconstitutional. Under the Supreme Court's presidential removal power doctrine, whether Congress may restrict the president from firing a class of executive branch officials depends on whether those officials are best classified as "employees," "inferior officers," or "principal officers" of the United States. It also depends on the scope of the officials' authority and character of their office. This Note concludes that IGs are officers of the United States and not mere employees, IGs are inferior officers and not principal officers, and that IGs' duties are sufficiently broad such that Congress cannot constitutionally insulate them from the President's removal power.

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[1] TODD GARVEY, CONG. RSCH. SERV., R46762, CONGRESS'S AUTHORITY TO LIMIT THE REMOVAL OF INSPECTORS GENERAL 1 (2021); Letter from Pat A. Cipollone, Counsel to Pres. Donald J. Trump, to Hon. Charles E. Grassley (May 26, 2020), *available at* https://foreignaffairs.house.gov/_cache/files/a/b/aba462f3-09e5-4757-9228-21b2d46730e8/D86F423895BAEA1DC3FFE06E6600F962.bbresponse-engel-060120.pdf [https://perma.cc/7C67-EHKR] (hereinafter "Letter from Pat Cipollone"). Garvey's piece contains a thorough and excellent analysis of this topic, which comes to a different conclusion than does this Note. I recommend that anyone interested in this topic consult Garvey's article as well.

[2] H.R. 23, 117th Cong. (2021) (as passed by House, Jan. 5, 2021).

[3] H.R. 5314, 117th Cong. (2021) (hereinafter "PODA").

Part I provides historical context surrounding the IG Act and the executive branch's longstanding constitutional concerns. Part II provides an overview of Supreme Court jurisprudence covering for-cause removal provisions and lays out the modern framework. Finally, Part III analyzes the office of the IG under the modern framework. A conclusion follows.

I. THE IG ACT

A. IG Act and Proposed Amendments

The Inspector General Act of 1978[4] reorganized the executive branch by creating IG offices within several agencies. The Act was intended to create "independent and objective units" to conduct investigations and audits; provide leadership, coordination, and policy recommendations; and keep agency heads and Congress "fully and currently informed about problems and deficiencies" within the agencies.[5]

The IG Act created two types of IGs.[6] The first is an "establishment"[7] IG who operates from within most executive agencies.[8] The second is a "designated federal entity"[9] IG ("DFE IG"), operating within certain other federal entities, such as the Securities and Exchange Commission, and appointed by the head of the DFE.[10]

The President appoints establishment IGs with the advice and consent of the Senate.[11] In terms of agency hierarchy, IGs "report to and . . . [are] under the general supervision" of their respective agency heads.[12] However, agency heads do not have the power to

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[4] 5 U.S.C. app. §§ 1–13 (hereinafter "IG Act").

[5] IG Act § 2.

[6] GARVEY, *supra* note 1, at 2. A third type of IG, "Special" IGs, was created outside of the IG Act and therefore is not part of this analysis. *Id.* at 2–3.

[7] IG Act § 3.

[8] GARVEY, *supra* note 1, at 2 (citing IG Act §§ 3, 12).

[9] IG Act § 8G(a)(2).

[10] GARVEY, *supra* note 1, at 2 (citing IG Act §§ 8G(a)(2), 8G(g)(1)).

[11] IG Act § 3(a).

[12] *Id.*

"prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation."[13] As for the President's power to remove an IG, § 3(b) of the IG Act stipulates that: "[a]n Inspector General may be removed from office by the President. The President shall communicate the reasons for any such removal to both Houses of Congress[.]"[14] Agency heads can remove DFE IGs pursuant to § 8G(e)(2), which uses similar language as § 3(b) regarding communication to Congress.[15]

Congress has proposed amendments to both aforementioned sections of the IG Act. PODA §§ 702–703 seek to limit the President's power to remove an IG and, similarly, protect DFE IGs from being removed by agency heads. The bill would restrict the grounds under which the president may remove IGs. Those specific grounds include criminal activity, neglect of duty, inefficiency, or permanent incapacity. PODA also requires the president to "communicate the substantive rationale, including detailed and case-specific reasons" for removal, backed up by documentation of the grounds cited.[16] PODA's for-cause removal restrictions apply to both establishment IGs and DFE IGs. This Note seeks to resolve whether the aforementioned for-cause protections are constitutional.[17]

B. History of Executive Branch Opposition

Since the passage of the 1978 IG Act, both Democratic and Republican presidential administrations have objected to the Act's constraints on the president's power to remove IGs. For example,

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[13] *Id.*

[14] *Id.* § 3(b).

[15] *See id.* § 8G(e)(2).

[16] PODA §§ 702–703.

[17] Note that for-cause protections already exist for the Postal Service IG under 39 U.S.C. § 202(e). The constitutionality of that statutory provision might nevertheless be in question after *Free Enterprise Fund v. Public Company Oversight Board*, 561 U.S. 477 (2010). *See* GARVEY, *supra* note 1, at 9 n.75.

during President Jimmy Carter's administration, an opinion by the Office of Legal Counsel[18] objected to the requirement that the president notify the House and Senate of the reasons for removal, referring to such a requirement as "an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers."[19] When signing a different bill that included a similar requirement, President George H.W. Bush wrote that "its obvious effect is to burden" the exercise of a president's constitutional removal authority.[20] President Barack Obama, when removing an IG, communicated to Congress merely that he "'no longer' had 'the fullest confidence' in" the IG, and argued that a requirement that he provide any more "reason" would be unconstitutional.[21] The D.C. Circuit accepted President Obama's position.[22] President Donald Trump referenced all these precedents when he removed two IGs in 2020, citing a lack of confidence.[23] The foregoing suggests that the executive branch has held a decades-long position that the IG Act, even in its current form, unconstitutionally restricts or conditions the president's removal power.

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[18] The Office of Legal Counsel, part of the U.S. Department of Justice, "provides legal advice to the President and all executive branch agencies . . . . The Office is also responsible for reviewing and commenting on the constitutionality of pending legislation." *Office of Legal Counsel*, U.S. DEP'T OF JUST., https://www.justice.gov/olc [https://perma.cc/Z2GZ-AH9U] (last visited Aug. 8, 2022).

[19] Inspector General Legislation, 1 Op. O.L.C. 16, 18 (1977) (citing Myers v. United States, 272 U.S. 52 (1926)).

[20] George H.W. Bush, Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990 (Nov. 30, 1989), *in* 25 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1851–53 (1989).

[21] Walpin v. Corp. for Nat'l & Cmty. Servs., 630 F.3d 184, 187 (D.C. Cir. 2011) (quoting Letter from Barack Obama, Pres., U.S., to Joseph R. Biden, Pres., U.S. Senate (June 11, 2009), *available at* https://abcnews.go.com/images/Politics/Biden_letter_to_Obama.pdf [https://perma.cc/PJS2-9NFL]).

[22] *Id*. ("This explanation satisfies the minimal statutory mandate that the President communicate to the Congress his 'reasons' for removal.").

[23] Letter from Pat Cipollone, *supra* note 1.

II. HISTORY OF FOR-CAUSE REMOVAL RESTRICTIONS FROM *MYERS* TO TODAY

Nearly a century ago, the Supreme Court held in *Myers v. United States*[24] that the president's executive power under Article II of the Constitution included "the power of appointment and removal of executive officers."[25] As a result, President Woodrow Wilson was empowered, without further Senate approval, to direct the Postmaster General to remove a Senate-confirmed postmaster.[26]

The Supreme Court subsequently narrowed *Myers*' broad holding in *Humphrey's Executor v. United States*.[27] After President Franklin Roosevelt tried to remove a member of the Federal Trade Commission, the Court held that the president's removal power was not unlimited and that Congress could include for-cause removal protection for executive officers in "quasi-legislative or quasi-judicial agencies[.]"[28] The Court distinguished the office of postmaster in *Myers*, which included "no duty at all related to either the legislative or judicial power," with an "administrative body," such as the FTC, "created by Congress to carry into effect legislative policies[.]"[29]

In *Wiener v. United States*,[30] the Court continued to apply the restrictive view of presidential removal power articulated in *Humphrey's Executor*. In *Wiener*, President Dwight Eisenhower sought to replace members of a commission that adjudicated war claims from World War II. Even though there was no statutory removal re-

[24] 272 U.S. 52 (1926).
[25] *See id.* at 164.
[26] *Id.* at 60.
[27] 295 U.S. 602 (1935).
[28] *Id.* at 629.
[29] *Id.* at 627–28.
[30] 357 U.S. 349 (1958).

striction, the Court held that a president did not have the constitutional power to remove members of a quasi-judicial body "merely because he wanted his own appointees . . . ."[31]

Decades later, in *Morrison v. Olson*,[32] the Supreme Court upheld statutory for-cause protections for the position of Independent Counsel ("IC")—an inferior officer charged with conducting investigations of and legal proceedings against government officials.[33] The Court discarded the *Humphrey's Executor* analysis of executive functions versus quasi-judicial or quasi-legislative functions.[34] Instead, the Court considered a balance of the importance of protecting the "necessary independence of the office" in question[35] with the importance of protecting "the President's ability to perform his constitutional duty[.]"[36] Looking to the details of the IC's characterization as an "inferior officer," and its function, such as its "limited jurisdiction and tenure and lacking policymaking or significant administrative authority[,]"[37] the Court concluded that for-cause protection struck an appropriate balance.[38]

The Supreme Court has drifted back towards the *Myers* standard of unrestricted presidential removal authority in recent years.

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[31] *Id.* at 356.

[32] 487 U.S. 654 (1988).

[33] *See id.* at 662.

[34] *Id.* at 689 ("We undoubtedly did rely on the terms 'quasi-legislative' and 'quasi-judicial' to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'"). Notably, the Court did admit "*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." *Id.* at 690.

[35] *Id.* at 693.

[36] *Id.* at 691.

[37] *Id.*

[38] *Id.* at 691–92 ("[W]e simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.").

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[39] the Court invalidated a statute whereby members of the Public Company Accounting Oversight Board ("PCAOB") were removable by Securities and Exchange Commission ("SEC") commissioners—and only for cause. The majority assumed without deciding that the SEC members themselves had for-cause removal protection.[40] The Supreme Court invalidated the PCAOB members' for-cause removal provision on the grounds that two layers of executive officials with for-cause removal protection in an agency hierarchy unconstitutionally restricted the president's ability to control the executive branch.[41] However, the Court did not directly rule on the constitutionality of the SEC commissioners' for-cause removal protection, perhaps implicitly affirming the constitutionality of such provisions.[42]

A decade later, in *Seila Law v. Consumer Financial Protection Bureau*,[43] the Supreme Court once again held unconstitutional a for-cause removal protection, this time for the director of the Consumer Financial Protection Bureau ("CFPB"). The Court determined that the director was vested with "significant executive power,"[44] such as "the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court."[45] In reviewing its prior decisions, the Court asserted that the President's broad removal power was "settled by the First Congress" and "confirmed in the

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[39] 561 U.S. 477 (2010).

[40] *See id.* at 487; *see also id.* at 545 (Breyer, J., dissenting) (criticizing the majority opinion for assuming without deciding that SEC commissioners themselves are removable only for cause).

[41] *Id.* at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

[42] GARVEY, *supra* note 1, at 19.

[43] 140 S. Ct. 2183 (2020).

[44] *Id.* at 2192.

[45] *Id.* at 2193 (citing 12 U.S.C. §§ 5562, 5564(a), (f)).

landmark [*Myers*] decision," and that *Humphrey's Executor* and *Morrison* represent the only two recognized exceptions.[46] As the *Seila Law* majority put it, *Humphrey's Executor* allowed for-cause removal protections for "expert agencies led by a *group* of principal officers" and *Morrison* held the same for "certain *inferior* officers with narrowly defined duties."[47] However, the Court declined to extend the limits on the president's removal power to "principal officers who, acting alone, wield significant executive power," such as the CFPB director.[48]

Finally, in *Collins v. Yellen*,[49] the Supreme Court applied its holding in *Seila Law* to invalidate for-cause removal protections for the director of the Federal Housing Finance Agency ("FHFA"). The Court characterized this as a "straightforward application of [its] reasoning in *Seila Law*" noting the similar structures of the FHFA and CFPB.[50] Arguably, though, the Court's opinion in *Collins* went further. Whereas Chief Justice Roberts' opinion in *Seila Law* highlighted the CFPB director's "significant executive power,"[51] Justice Alito's majority opinion in *Collins* discarded the need to measure the scope of an agency's power and authority precisely.[52] Indeed, Justice Kagan, concurring in judgement on *stare decisis* grounds, criticized the Court for "careen[ing] right past that boundary line" in holding that "[a]ny 'agency led by a single Director,' no matter how much executive power it wields, now becomes subject to the requirement of at-will removal."[53] *Collins* thus represents the latest

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[46] *Id.* at 2191–92.

[47] *Id.* (emphasis in original).

[48] *Id.* at 2211.

[49] 141 S. Ct. 1761 (2021).

[50] *Id.* at 1784.

[51] *Selia Law*, 140 S. Ct. at 2211.

[52] *Collins*, 141 S. Ct. at 1785 ("Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies, and we do not think that the constitutionality of removal restrictions hinges on such an inquiry.") (internal citations omitted).

[53] *Id.* at 1801 (Kagan, J., concurring in part and concurring in the judgment) (quoting *id.* at 1783–84 (majority opinion)).

step in the Court's return to a presumption against for-cause removal restrictions while viewing earlier decisions to the contrary as narrowly-defined exceptions.

III. CONSTITUTIONAL ANALYSIS OF FOR-CAUSE REMOVAL RESTRICTIONS

Seila Law provided the most authoritative explanation of the doctrine of presidential removal power—it stands as the most recent, comprehensive formulation of the relevant tests. The Court appeared to hold that there is a general presumption of presidential removal power, as the Court held in *Myers*.[54] That presumption holds for all executive officers outside of two narrow exceptions—the multi-head agency as in *Humphrey's Executor*[55] and inferior officers with limited duties and powers as in *Morrison*.[56] IGs do not fall within the multi-head agency exception, but they might be comparable to the inferior officer with limited duties like the IC in *Morrison*. A separate factor to consider is whether layers of hierarchy separate the president from an officer when the officer in question enjoys for-cause removal protection, which *Free Enterprise Fund* held is unconstitutional when that officer's superior also enjoys such protection.[57]

Part III will analyze whether IGs qualify for one of the two exceptions that allow them to receive for-cause removal protection under the modern removal doctrine. First, this Part considers whether IGs are officers or mere employees. Next, this Part examines whether IGs are principal or inferior officers. If IGs are principal officers, then it would be unconstitutional under *Myers* for IGs to enjoy for-cause removal protection. After considering what type of officer IGs are, this Part analyzes the type and degree of the IGs'

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[54] *See Selia Law*, 140 S. Ct. at 2192.

[55] *Collins* probably eliminates the inquiry into the scope of an agency's powers. *See supra* note 52.

[56] *See Selia Law*, 140 S. Ct. at 2192.

[57] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010).

authority, which can make for-cause removal protection unconstitutional even for inferior officers. Finally, Part III concludes by discussing how and whether the dual layers analysis from *Free Enterprise Fund* applies to IGs.

It is important to note that:

> [T]he precise scope of these exceptions remains unresolved . . . . The two approved uses of removal restrictions are not necessarily the *only* scenarios in which Congress can use for cause removal restrictions. Instead, the multimember commission and inferior officer "exceptions" represent the "*outermost* constitutional limits of permissible congressional restrictions on the President's removal power."[58]

Therefore, even if IGs do not perfectly fit into the *Morrison* exception, they may still warrant for-cause protection.

A. Are IGs Officers or Employees?

Unlike officers, "mere employees" are "not subject to the Appointments Clause."[59] The Supreme Court declined in *Free Enterprise Fund* to rule whether employees are "subject to the same sort of control" as officers.[60] Given the strong link between the Appointments Clause and the removal power, employees not subject to the former will likely not be subject to the latter.[61]

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[58] GARVEY, *supra* note 1, at 22 (emphasis in original) (quoting *Seila Law*, 140 S. Ct. at 2200 (citing PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F. 3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting))).

[59] Lucia v. SEC, 138 S. Ct. 2044, 2062 (2018) (Breyer, J., concurring in the judgment in part and dissenting in part). *See also* Buckley v. Valeo, 424 U.S. 1, 126 n.162 (1976) (per curiam) ("Employees are lesser functionaries subordinate to officers of the United States.").

[60] *Free Enter. Fund*, 561 U.S. at 506.

[61] GARVEY, *supra* note 1, at 13–14 ("The constitutional principles applying to appointments and removals are intimately related . . . . [But while a]n executive branch official's classification as employee, inferior officer, or principal officer . . . has a role in determining Congress' freedom to impose removal restrictions, . . . it is not necessarily a dispositive one.").

The key distinction between officers and mere employees is whether the appointee possesses "significant authority pursuant to the laws of the United States."[62] What exactly "significant authority" *is* remains unclear, and the Court recently declined to clarify the uncertainty.[63] But other precedents can provide clues. In *Buckley v. Valeo*, the Court held that "administration and enforcement of public law" are "administrative functions [which] may . . . be exercised only by persons who are 'Officers of the United States.'"[64] However, "functions relating to the flow of necessary information—receipt, dissemination, and investigation" were not required to be performed by executive officers.[65] Additionally, the Court has suggested that "purely recommendatory powers" do not rise to the level of authority sufficient to establish officer status.[66]

On the other hand, officials in adjudicatory roles are more likely to be considered officers. *Lucia v. SEC* held that administrative law judges at the SEC were officers because they exercised "significant discretion" when carrying out "important functions" such as "the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges."[67] The Court's *Lucia* holding followed its earlier opinion in *Freytag v. Commissioner of Internal Revenue*,[68] which held that special trial judges in tax courts

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[62] *Buckley*, 424 U.S. at 126.

[63] *Lucia*, 138 S. Ct. at 2051 ("Both the *amicus* and the Government urge us to elaborate on *Buckley*'s 'significant authority' test, but another of our precedents makes that project unnecessary. The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments.").

[64] *Buckley*, 424 U.S. at 141.

[65] *Id.* at 137.

[66] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 507 n.10 (2010) (emphasizing that the Court's holding does not necessarily mean that administrative law judges are "officers" in part because they possess "purely recommendatory powers"); *see also id.* at 509 (suggesting that restricting the CFPB's enforcement powers "so that it would be a purely recommendatory panel" would be one way to eliminate the officer status of the CFPB's board members).

[67] *Lucia*, 138 S. Ct. at 2053 (citing Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 882 (1991)).

[68] 501 U.S. 868 (1991).

were officers because they "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders."[69] Taken together, these special trial judges enjoyed "'significant discretion' when carrying out . . . 'important functions.'"[70] The Court in *Lucia* went further to say that "[e]ven if the duties . . . were not as significant as we . . . have found them . . . our conclusion would be unchanged"[71] because the officials had "independent authority"[72] in even "minor matters."[73] The independence and discretion enjoyed by the special trial judges were thus the critical factors making them officers instead of employees.

Taking all these factors together, IGs would seem to be officers, not mere employees. Though much of their role is "recommendatory," which *Free Enterprise Fund* suggested is not enough to be an officer, "[t]he fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution."[74] Rather, IGs have "independent authority"[75] and "significant discretion"[76] in conducting investigations, given the fact that agency heads do not have the power to "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation."[77] As such, IGs are likely officers, subject to constitutional rules regarding appointment and removal.

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[69] *Id.* at 881–82.
[70] *Lucia*, 138 S. Ct. at 2053 (quoting *Freytag*, 501 U.S. at 882).
[71] *Id.* at 2052 n.4 (quoting *Freytag*, 501 U.S. at 882).
[72] *Id.* (quoting *Freytag*, 501 U.S. at 882).
[73] *Id.* (quoting *Freytag*, 501 U.S. at 873).
[74] *Freytag*, 501 U.S. at 882.
[75] *Id.*
[76] *Id.*
[77] IG Act § 3(a).

B. Are IGs Principal or Inferior Officers?

IGs are most likely inferior officers. *Seila Law* noted the distinction between principal and inferior officers in interpreting the two historical exceptions to the *Myers* rule against removal restrictions. "In [*Humphrey's Executor*], we held that Congress could create expert agencies led by a group of *principal* officers removable by the president only for good cause. And in . . . [*Morrison*], we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties."[78] Whether IGs are principal or inferior officers determines which type of exception they must satisfy to qualify for for-cause removal protection. If IGs are principal officers, restrictions on the president's removal power would likely be unconstitutional as IGs are not members of multi-head expert agencies as in *Humphrey's Executor*. But if IGs are inferior officers, the constitutionality of for-cause removal protection would depend on an analysis of the IGs' "narrowly defined duties" compared to the IC in *Morrison*. This will be discussed in Part III.C.

In *Edmond v. United States*,[79] the Supreme Court crafted a test to help courts determine whether an official is a principal or inferior officer.

> Generally speaking, the term "inferior officer" connotes a relationship with some higher ranking officer or officers below the President: Whether one is an "inferior" officer depends on whether he has a superior. . . . "[I]nferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.[80]

The Court held that Coast Guard Court of Criminal Appeals judges were inferior officers "by reason of the supervision over

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[78] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) (emphasis in original).

[79] 520 U.S. 651 (1997).

[80] *Id.* at 662–63.

their work exercised by the General Counsel of the Department of Transportation in his capacity as Judge Advocate General and the Court of Appeals for the Armed Forces."[81] More recently, the Court in *Seila Law* rubber-stamped the approach detailed above.[82]

Whether IGs are principal or inferior officers under the *Edmond* test is complicated. On the one hand, the IG Act designed the office as "independent and objective units"[83] with layers of protection from interference in their work.[84] On the other hand, the IG Act is explicit that the IG "shall report to and be under the general supervision of the head of the establishment involved."[85] Perhaps the Supreme Court's opinion in *NASA v. Federal Labor Relations Authority*[86] can break the tie. *NASA* held that IGs are considered agency representatives under the Federal Service Labor-Management Relations Statute,[87] because "each Inspector General has no supervising authority—except the head of the agency of which the [Office of the Inspector General] is a part."[88] Although *NASA* dealt with an entirely different context (unfair labor practices), the Court's description of an agency head as being a "supervising authority" over the IG most likely tips the balance of the *Edmond* test in favor of viewing IGs as an inferior officers.

C. Scope and Degree of IGs' Authority

Because IGs are most likely inferior officers, *Seila Law* points to the *Morrison* exception of "limited duties and no policymaking or administrative authority" to determine whether for-cause removal

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[81] *Id.* at 666.

[82] *Seila Law*, 140 S. Ct. at 2199 n.3.

[83] IG Act § 2.

[84] *Id.* at § 3(a) ("Neither the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.").

[85] *Id.*

[86] 527 U.S. 229 (1999).

[87] 5 U.S.C. § 7101 *et seq*.

[88] *NASA*, 527 U.S. at 240.

protection is constitutional.[89] *Morrison* held that for-cause protection was appropriate for ICs under that theory.[90] Arguably, ICs have an even broader set of powers than do IGs, including "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice."[91] "Whereas IGs are generally limited to investigating and auditing agency operations and programs, the IC was authorized to both investigate and prosecute criminal acts of a broad swath of high-level government officials."[92] However precise the analogy between IGs and ICs, the relationship is certainly closer than that between IGs and the CFPB Director, whose for-cause removal protection the Supreme Court ruled unconstitutional in *Seila Law*.[93]

This analysis, however, is complicated by *Seila Law*'s articulation of the Court's removal doctrine, which largely discarded the analytical framework of *Morrison* and the other earlier opinions. Instead, the majority in *Seila Law* stressed that *Myers* was the default rule while *Humphrey's Executor* and *Morrison* represented the "*outermost* constitutional limits of permissible congressional restrictions on the President's removal power."[94] This holding may indicate that an official with *any* power beyond those of the IC is outside of the *Morrison* exception.

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[89] Seila Law v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2200 (2020).

[90] Specifically, the Court held that the IC's "limited jurisdiction and tenure and lacking policymaking or significant administrative authority" was sufficient evidence that for-cause removal protection did not "unduly trammel[] on executive authority." Morrison v. Olson, 487 U.S. 654, 691 (1988).

[91] *Id.* at 671 (quoting 28 U.S.C. § 594(a)).

[92] GARVEY, *supra* note 1, at 34.

[93] *Seila Law*, 140 S. Ct. at 2200–01 ("By contrast [to the IC], the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.").

[94] *Id.* at 2200 (emphasis added) (quoting *PHH*, 881 F.3d at 196 (Kavanaugh, J., dissenting) (internal quotation marks omitted)).

The Court in *Collins* conducted just this type of inquiry, comparing the scope of power of one agency to that of another. Rejecting an argument that the FHFA was less powerful than the CFPB in *Seila Law* and thus entitled to *Humphrey's Executor*-like insulation from presidential power, the Court commented that "the CFPB might be thought to wield more power than the FHFA in some respects. But the FHFA might in other respects be considered more powerful than the CFPB."[95] Justice Alito's majority opinion declined to weigh the net difference in authority between the CFPB and the FHFA with precision.[96] Rather, the critical determination was that there were some areas in which the FHFA's authority surpassed the CFPB's authority.[97]

Analogously, whether IGs receive the same insulation from presidential power as ICs may depend on a comparison of their respective scopes of power and authority. As the Court held in *Collins*, it is unnecessary to conclude that the IGs' authority sweeps more broadly than does that of the ICs *on net*. Rather, if IGs wield more power than ICs in particular respects, that alone may necessitate the conclusion that IGs are not entitled to *Morrison*-like insulation from presidential removal power.

IGs' permanent position, as opposed to the "temporary" nature of ICs, is one such feature of IGs' power that eclipses that of ICs. Far from being just an example of *any* factor which grants IGs more power than ICs, the "temporary" nature of the IC position was one of the *key* factors the Court considered when deciding that ICs were inferior officers with permissible for-cause removal protections.[98]

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[95] Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021).

[96] *See supra* note 52 (quoting *Collins*, 141 S. Ct. at 1768 ("[T]he nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head.")).

[97] *See Collins*, 141 S. Ct. at 1784–85.

[98] Morrison v. Olson, 487 U.S. 654, 672 ("[T]he office of independent counsel is 'temporary' in the sense that an independent counsel is appointed essentially to accomplish a single task, and when that task is over the office is terminated . . . ."); *id.* at 679

This element very well may place IGs outside of the "outermost limits" of the *Morrison* exception. Notably, "the only IG who currently possesses for cause protections (the U.S. Postal Service IG) serves a seven-year term."[99] The unlimited tenure of IGs (in general), therefore, might be a dispositive factor in concluding that IGs' "duties" and "authority" sweep more broadly than those of ICs. Overall, while it is a close question, under *Seila Law*'s gloss of *Morrison*, and under *Collins*' application of *Seila Law*, IGs are likely inferior officers that nevertheless retain too much authority for Congress to insulate them from the president's constitutional removal power under applicable Supreme Court precedent.

D. Multiple Layers Analysis

Provided the close questions presented above, it is worth considering whether the "multiple layers" consideration from *Free Enterprise Fund* affects the analysis. Recall that *Free Enterprise Fund* held that "multilevel protection from removal" violates the Constitution because it "contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'"[100] This doctrinal point may be relevant for DFE IGs within independent agencies. *Free Enterprise Fund* applied to "Officers of the United States" who "exercis[e] significant authority."[101] As discussed in

("Particularly when, as here, Congress creates a temporary 'office' the nature and duties of which will by necessity vary with the factual circumstances giving rise to the need for an appointment in the first place, it may vest the power to define the scope of the office in the court as an incident to the appointment of the officer pursuant to the Appointments Clause.").

[99] GARVEY, *supra* note 1, at 36 (citing 39 U.S.C. § 202).

[100] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010) (quoting *Morrison*, 487 U.S. at 693).

[101] *Id.* at 506.

Part III.A, IGs are most likely officers under *Lucia* and *Freytag* because of their "independent authority"[102] and "significant discretion[.]"[103] Therefore, it would probably be unconstitutional for DFE IGs to be removable only by officers who themselves receive for-cause removal protection, whether those higher level officers obtain of the *Humphrey's Executor* multi-head agency exception or the *Morrison* limited duties exception.

CONCLUSION

For the foregoing reasons, for-cause removal protections for IGs are likely unconstitutional. However, this analysis presents close questions, specifically whether IGs are principal or inferior officers, and whether the scope of the IGs' authority goes beyond that of the ICs. The trajectory of the Supreme Court's decisions on this issue over the past decade-plus is informative, and it suggests that the Court will err toward a return to the *Myers* standard, which is protective of presidential removal power.

[102] Lucia v. SEC, 138 S. Ct. 2044, 2052 n.4 (2018) (quoting Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 882 (1991)).

[103] *Id.* at 2053 (quoting *Freytag*, 501 U.S. at 882).

TRANSUNION V. RAMIREZ: LEVELS OF GENERALITY AND ORIGINALIST ANALOGIES

JASON ALTABET*

ABSTRACT

In TransUnion v. Ramirez, *the Court entrenched a "close relationship" test for defining concrete injuries under Article III's injury-in-fact requirement. In order to assess concreteness, courts must attempt to analogize a plaintiff's harm to a harm traditionally recognized by English or American courts. Without a close relationship to a traditional harm, plaintiffs may not maintain their action in federal court.*

This test necessarily raises an important question: how analogous is analogous enough? By varying the level of generality, a possibly analogous traditional harm might be sufficiently, or insufficiently, close to a plaintiff's current harm. The more generally one is willing to view a traditional harm, the more likely the close relationship test will be satisfied. The more specifically one views a traditional harm, the less likely the plaintiff's harm will suffice. In TransUnion *itself, Justice Kavanaugh's majority opinion simultaneously used a rather specific level of generality for certain questions of similarity, leading to a rejection of various claims under the close relationship test, and a general, more forgiving, level for another question, allowing certain claims to continue. Justice Thomas, in dissent, uniformly used a highly general level and accordingly concluded that all of plaintiffs' claims were sufficiently analogous.*

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The uneven application of levels of generality in TransUnion *helpfully illustrates the problem of unsystematic application of levels of generality in legal analogies. The issue is present in many parts of legal reasoning, from the definition of rights to whether prior precedent is binding or merely persuasive. But varying levels of generality are particularly problematic when present in originalist analysis. Originalism purports to be a formalist, discretion-limiting, method of constitutional interpretation. But the ability to switch between levels of generality when describing and applying historical cases and practices inserts significant discretion. By recognizing and better systematizing the levels of generality used for originalist analogies, judges, practitioners, and scholars can better and more faithfully apply originalism.*

INTRODUCTION

Is a hot dog a sandwich?[1] That age-old question has dogged many an undergraduate dorm room. The debate can take many forms, ranging from raw intuitions about how surprised one would be to show up at a sandwich shop that only sells hot dogs[2] to empirical evaluation of linguistic usage.[3]

In many respects, the question boils down to one of generality. Certainly, defining a sandwich as only bacon, lettuce, and tomato on two pieces of rye bread would be too specific. But what about two separate pieces of bread with a filling?[4] That level of specificity eliminates the hot dog. How about merely bread and a filling?[5] Under that level of generality, the hot dog qualifies as a sandwich. Or what about just an edible outside and a filling (allowing for the newly popular lettuce wrap sandwiches alongside the traditional hot dog)?[6]

In *TransUnion v. Ramirez*,[7] the Court wrestled with a more legal, less humorous, question of generality. There, the Justices examined whether failure to maintain reasonable procedures before labeling a class of plaintiffs potential terrorists in a credit report database

1. *Cf.* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960) ("The issue is, what is chicken?").

2. Alternatively, would you ever ask your friend to get you "whatever sandwich looks good" and be happy with a hot dog?

3. *Cf.* Lawrence M. Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311 (2018).

4. *See Sandwich*, MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/sandwich [https://perma.cc/YHX7-HKEF] (last visited Mar. 19, 2022).

5. *See id.* (including as one definition "one slice of bread covered with food" or including a "split roll"). Consider as well whether that means pizza is a kind of sandwich.

6. *See* Lexi, *How to Make a Lettuce Wrap Sandwich (Low Carb!)*, LEXI'S CLEAN KITCHEN (Apr. 4, 2018), https://lexiscleankitchen.com/lettuce-wrap-sandwich/ [https://perma.cc/TLR3-W269].

7. 141 S. Ct. 2190 (2021).

was *similar enough* to the traditional harm of defamation to be an injury-in-fact.

The Court, splitting 5–4, rejected the claims of most class plaintiffs because their harms were not similar enough to that traditional injury. The Court explained that, to have a concrete injury-in-fact for standing purposes, a plaintiff's injury must have a "close relationship" to traditionally recognized harms in English or American courts.[8] Without such a relationship, federal courts have no jurisdiction over the action.[9] The majority dismissed most plaintiffs' claims because their harms failed this close relationship test, that is, they were not analogous enough to traditional harms.[10]

The Court's close relationship requirement provides a helpful lens for evaluating the important issue of levels of generality for legal analogies. This Comment first reviews the basic facts and implications of *TransUnion*. It then explores the various, conflicting levels of generality used in Justice Kavanaugh's majority opinion as well as the level of generality in Justice Thomas's dissenting opinion. Finally, this Comment reviews how levels of generality are a lurking presence in various parts of legal reasoning and—importantly—in current originalist reasoning.

This Comment argues that unsystematic analysis of levels of generality gives judges significant discretion to arrive at favored outcomes even in the confines of purportedly formalist and nondiscretionary doctrines like originalism. Accordingly, faithfully originalist jurists must be careful to apply rules of generality systematically when looking to historical analogies.

I. THE *TRANSUNION* DECISION

In *TransUnion*, a class of plaintiffs sued the credit reporting company TransUnion under the theory that the firm had "failed to

8. *Id.* at 2200.
9. *See id.*
10. *Id.*

use reasonable procedures to ensure the accuracy of their credit files."[11] Specifically, plaintiffs were incorrectly listed in TransUnion's files as "potential[ly]" being on "a [government-made] list of 'specially designated nationals' who threaten America's national security,"[12] sometimes known as the "OFAC list."[13] TransUnion erroneously listed the plaintiffs because the company failed to perform any due diligence when linking credit files to the OFAC list.[14] Any person with the same first and last name as an individual on the OFAC list would be labeled by TransUnion as "a potential match" to the terrorist database.[15] And "TransUnion did not compare any data other than first and last names. . . . [This] generated many false positives."[16]

For lead plaintiff Sergio Ramirez, TransUnion's practices led to a whole lot of hassle and humiliation.[17] At a car dealership, the salesman rejected Mr. Ramirez's attempt to purchase a vehicle, informing Ramirez that he appeared on a "terrorist list."[18] Mr. Ramirez immediately contacted TransUnion and demanded a copy of his credit file.[19] Shortly thereafter, Mr. Ramirez received a mailing from TransUnion with his report, sans any mention of the OFAC list, alongside a "statutorily required summary of rights."[20] He then separately received a second mailing, this time telling him that he was a match for the OFAC list, but without the summary of rights.[21] After cancelling a planned trip out of the country, and with

11. *Id.*
12. *Id.* at 2201.
13. *Id.* The list was created by the Treasury Department's Office of Foreign Assets Control ("OFAC"). *Id.*
14. *See id.*
15. *Id.* (internal quotation marks omitted).
16. *Id.*
17. *See id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 2201–02.

the help of a lawyer, Mr. Ramirez's efforts led TransUnion to remove the link between him and the OFAC list.[22]

Not content with that result alone, Mr. Ramirez filed a class action lawsuit in the U.S. District Court for the Northern District of California.[23] He and his class members solely pursued theories under the federal Fair Credit Reporting Act.[24] Specifically, the suit claimed that TransUnion failed to: (1) "follow reasonable procedures to ensure the accuracy of information in his credit file[;]" (2) provide an OFAC list alert in its mailing; and (3) provide the statutorily required summary of rights.[25]

The district court held a jury trial that ended with victory on all three claims for Mr. Ramirez and his class.[26] The jury awarded each class member $984.22 in statutory damages and then punitive damages of $6,353.08.[27] The Ninth Circuit affirmed, save for reducing the punitive damages for each class member to $3,936.88.[28]

The Supreme Court reversed in a five-Justice majority opinion written by Justice Kavanaugh. In his opinion, Justice Kavanaugh cited *Spokeo, Inc. v. Robins*,[29] a recent opinion that also considered the circumstances under which plaintiffs with intangible injuries have standing to sue for damages.[30]

In *Spokeo*, the Court explained that a statutory cause of action alone is insufficient to establish a concrete injury-in-fact for an interested plaintiff.[31] Rather, federal courts must independently consider whether the harm protected by the statute is constitutionally

22. *Id.* at 2202.
23. *Id.*
24. 15 U.S.C. § 1681 *et seq*.
25. *TransUnion*, 141 S. Ct. at 2202.
26. *Id.*
27. *Id.*
28. *Id.* (citing 951 F.3d 1008 (9th Cir. 2020)).
29. 578 U.S. 330 (2016).
30. *Id.* at 339.
31. *Id.*

cognizable under Article III—with deference to Congress's choice.[32] The Court stated that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts," although it tempered that position with the observation that "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important."[33]

In *TransUnion*, *Spokeo*'s "instructive" suggestion became a firm constitutional requirement. The *TransUnion* Court explained that "[c]entral to assessing concreteness is whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts."[34] As Justice Thomas explained in his dissent, the majority's reasoning ensures that Congress has much less of an "instructive and important" role than originally recognized for determining whether a harm is *concrete*.[35] Instead, the Court held that Congress may merely "elevate harms that exist in the real world" to legally cognizable status, while courts "independently decide whether a plaintiff has suffered a concrete harm."[36]

Thus, to determine whether there was a sufficiently concrete harm for the various *TransUnion* plaintiffs, the Court was required to consider whether any traditionally recognized harm had a close relationship to a harm asserted by the plaintiffs.[37] The majority and dissenters split on all three of the plaintiffs' claims.

The majority held that only class members who had their credit reports disseminated could bring suit on the reasonable procedures

32. *Id.* at 340–41.

33. *Id.* at 341.

34. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2200, 2213 (2021) (citing *Spokeo*, 578 U.S. at 340–41).

35. *See id.* at 2220–21 (Thomas, J., dissenting).

36. *Id.* at 2205 (majority opinion) (internal quotation marks omitted).

37. *Id.* at 2208.

claim, because publication had been a historically required element for defamation actions.[38] At the same time, the majority rejected TransUnion's argument that all the claims should have been dismissed given that TransUnion's statements calling plaintiffs "potential" terrorists was not false.[39] Despite falsity being historically required for defamation actions, the Court explained that the new cause of action need not be an "exact duplicate" of the traditional one.[40] Finally, the majority held that no one other than the lead plaintiff had standing on the other two claims.[41] In dissent, Justice Thomas first argued that the majority's "close relationship" test has no basis in history or the Constitution and then asserted that, even under the majority's test, all plaintiffs had a sufficiently concrete harm for all three claims.[42]

II. LEVELS OF GENERALITY IN JUSTICE KAVANAUGH'S MAJORITY OPINION AND JUSTICE THOMAS'S DISSENT

The opinions by Justice Kavanaugh and Justice Thomas offer helpful illustrations of levels of generality in legal analogies—particularly, their evaluations of whether the harm from TransUnion's failure to take "reasonable procedures in internally maintaining the credit files" has a sufficiently close relationship to a traditional harm.[43] Justices Kavanaugh and Thomas both reasoned that the "close relationship" at issue for the reasonable procedures claim

38. *Id.* at 2209–10.

39. *Id.* at 2209.

40. *Id.*

41. *Id.* at 2213–14.

42. *Id.* at 2214–26 (Thomas, J., dissenting). Justice Kagan, joined by Justices Sotomayor and Breyer, wrote an additional dissenting opinion expanding on their concerns regarding the close relationship test and separating from Justice Thomas in regards to public versus private rights. *Id.* at 2225–26 (Kagan, J., dissenting).

43. *Id.* at 2208 & n.5 (majority opinion).

could be to the harm "associated with the tort of defamation."[44] To evaluate closeness, the Justices needed to compare and contrast historical harms with plaintiffs' stated injury: were the plaintiffs' harms sufficiently analogous to the traditional harm from defamation?

On appeal, both parties agreed that only 1,853 of the 8,185 class members had their credit reports disseminated outside of TransUnion.[45] This was a crucial concession for Justice Kavanaugh's majority. The Court noted that "[p]ublication is 'essential to liability' in a suit for defamation."[46] Accordingly, the majority held that plaintiffs who never had their information published could not establish a close enough relationship to the traditional harm associated with defamation.[47] No dissemination meant no traditional liability, and thus no concrete injury.

Consider the level of generality required for this conclusion. Since the close relationship test is an "analog[y]" requirement,[48] a plaintiff must provide the Court with a traditionally recognized harm similar enough to the plaintiff's own harm. The level of generality used by the Court determines how close the comparison need be. The more specific the level of generality, the harder it will be to analogize between the traditional harm and your harm. The more general the level, the easier it will be to analogize.

Given that the Court relied on defamation, it would be helpful to look to the First Restatement of Torts—cited by both majority and dissent in *TransUnion*. It states that defamation traditionally

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44. *Id.* at 2208 (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)); *see id.* at 2222 (Thomas, J., dissenting). Justice Kavanaugh's analysis strictly focused on comparing the plaintiffs' harms to the harm associated with traditional defamation. Justice Thomas, while citing to defamation, was much more willing to describe the concreteness of plaintiffs' harm in terms disconnected from strict reference to defamation.

45. *Id.* at 2208–09 (majority opinion).

46. *See id.* at 2209–10 (citation omitted).

47. *See id.*

48. *See id.* at 2204 ("[I]dentif[y] a close historical or common-law analogue.").

consisted of "an [(1)] unprivileged [(2)] publication of [(3)] false and defamatory matter [(4)] of another" that includes (5) special harm or is actionable per se.[49] Justice Kavanaugh posited that for traditional defamation, "the basis of the action . . . was the loss of credit or fame, and not the insult." Thus the historically required element of "publication of words" is also required for statutory causes of action relying on defamation for the close relationship test.[50]

Looking at just that conclusion, one would reasonably think that the majority established the close relationship test at quite a specific level of generality: if an element historically required for recovery is missing, then the new statutory harm is insufficiently similar to the traditional harm. Whether or not it is correct as a constitutional matter, such an analysis would have the virtue of clear consistency.

Yet, in the very same opinion, the Court *rejected* the contention that the disseminated material must also be false, which was also a traditionally required element of defamation.[51] Explaining this conclusion, the Court stated:

> [W]e do not require an exact duplicate. The harm from being labeled a "potential terrorist" bears a close relationship to the harm from being labeled a "terrorist." In other words, the harm from a misleading statement of this kind bears a sufficiently close relationship to the harm from a false and defamatory statement.[52]

It is justified to feel a bit of whiplash looking back and forth between that passage and the conclusion regarding dissemination. If one were merely to read the falsity portion of the opinion, it would seem clear that the close relationship test is set at a fairly

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49. RESTATEMENT (FIRST) OF TORTS § 558 (Am. L. Inst. 1938); *see TransUnion*, 141 S. Ct. at 2222 (Thomas, J. dissenting) (citing RESTATEMENT (FIRST) OF TORTS § 569 (Am. L. Inst. 1938)).

50. *TransUnion*, 141 S. Ct. at 2209 (majority opinion) (quoting JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 474 (5th ed. 2019)).

51. *Id.* at 2208–09 (citing RESTATEMENT (FIRST) OF TORTS § 559 (Am. L. Inst. 1938)).

52. *Id.* at 2209.

high level of generality. If something is similar enough to the traditional harm, then it is good enough for a concrete injury. You need not establish every traditionally required element. After all, being misleading is not all that dissimilar from falsity, if viewed generally enough.

Consider what the result would have been if the high level of generality used for the falsity element were applied to the publication element. It is true that TransUnion had not actually published its report to the employers, banks, and car dealers of some class members. But TransUnion is an important and readily accessible credit reporting database. It had labeled each plaintiff in its database as a potential terrorist. Historically, having defamatory information placed even in an unknown publication satisfied the publication requirement.[53] Using a high level of generality, the harm from placement in an unknown publication seems similar to the harm from placement in a major credit reporting database, even if not an "exact duplicate."[54] If "potential terrorist" is similar enough to "terrorist," why is "readily accessible to over 65,000 businesses"[55] not similar enough to "published, but in an unknown magazine"?[56]

The generality inquiry is even further muddled by footnote six of the opinion, in which the Court waved away an alternative publication argument. The plaintiffs claimed that when the potential

53. *See* RESTATEMENT (FIRST) OF TORTS § 577 (Am. L. Inst. 1938); Ostrowe v. Lee, 256 N.Y. 36, 38 (1931) (Cardozo, C.J.) (explaining that, under New York law, even if a defamatory statement is only read by a single individual, like a "compositor in a printing house" or a "copyist" it has been "published"); *cf.* Hellar v. Bianco, 244 P.2d 757, 759 (Cal. Dist. Ct. App. 1952) (holding that a statement on the wall of a men's bathroom had been published for defamation purposes).

54. *See TransUnion*, 141 S.Ct. at 2209.

55. *See A Powerful, Global Presence*, TRANSUNION, https://www.transunion.com/global-presence (last visited Mar. 28, 2022) [https://perma.cc/YJ2B-YH66].

56. One way of conceptualizing the similarity: in both, the plaintiff merely awaits the danger of having someone important to them read the defamatory material. In traditional defamation, an action is triggered the moment one person reads the statement, no matter how unrelated to the plaintiff, *see supra* note 53; for the TransUnion plaintiffs, it is any of TransUnion's many customers ordering up a credit report.

terrorist alert was placed in TransUnion's internal files, the information was "published" internally.[57] The Court rejected the argument, stating "[m]any American courts did not traditionally recognize intra-company disclosures as actionable publications" and thus there was an insufficiently close relationship.[58] Accordingly, the Court acknowledged that *some* courts traditionally *did* recognize intra-company disclosures as enough.[59] This raises the crucial question of how many courts need to have accepted or rejected a traditional element.[60] Furthermore, it is important to remember that the close relationship test is ostensibly about whether the harm experienced is sufficiently similar to a traditional harm. The very fact that some courts did not require "public" disclosure chips away at the Court's conclusion that harm is not close enough if it does not involve an immediate loss of public credit and reputation.[61] To reach its conclusion, the Court necessarily employed an unexplained, specific level of generality.

Justice Thomas picked up on this theme in dissent, mostly eliding the element-by-element inquiry. In the first instance, Justice Thomas would set the level of generality at a very high level—although Justice Thomas did not phrase his analysis in precisely that

57. *TransUnion*, 141 S. Ct. at 2210 n.6. The Court held that the argument was waived, but reached the merits of it regardless.

58. *Id. But see Ostrowe*, 256 N.Y. at 38. The Court similarly rejected a risk of future harm argument because there was no evidence either of dissemination or of the likelihood of dissemination. *See TransUnion*, 141 S. Ct. at 2210–13.

59. *See, e.g.*, *Ostrowe*, 256 N.Y. at 38.

60. *Cf.* Michael Ramsey, *James Cleith Phillips & Jesse Egbert: A Corpus Linguistic Analysis of 'Foreign Tribunal'*, THE ORIGINALISM BLOG (Mar. 21, 2022, 6:13 AM), https://originalismblog.typepad.com/the-originalism-blog/2022/03/james-cleith-phillips-jesse-egbert-a-corpus-linguistic-analysis-of-foreign-tribunalmichael-ramsey.html [https://perma.cc/8E28-W7UR] (questioning, in the context of a textualist analysis, whether "seldom" contemporaneous use of the term "foreign tribunal" to mean a private arbitration body and usual use to refer to a government tribunal is simply "another way of saying that 'foreign tribunal' could include both a court and a [sic] [private] entity conducting arbitration" since even occasional use suggests linguistic coverage of the infrequently invoked concept).

61. *See TransUnion*, 141 S. Ct. at 2209.

way. Instead, Justice Thomas simply explained that the harm from defamation did not require a "loss of reputation" at all.[62] He appealed to "common sense" to understand that the plaintiffs' harms appear to be rather like traditionally recognized harms.[63] He noted that having the information sit in TransUnion's database entailed a degree of risk that alone is like the harm from defamation.[64] And, when Justice Thomas did move to focus on the element of publication, he noted that TransUnion had submitted the information to a third party data storage firm, which would historically suffice for publication.[65]

Furthermore, Justice Thomas explained that the class's other two claims (based on TransUnion's failure to provide an OFAC list alert or the statutorily required summary of rights) were similar enough to the traditional harm of "unlawful withholding of requested information."[66] The majority, on the other hand, held that without "'downstream consequences' from failing to receive the required information," there was no close relationship to a traditional harm.[67] Neither Justice Thomas, nor the majority, ever provided an element-by-element inquiry like the one used for the reasonable procedures question.

In sum, Justice Kavanaugh's majority gave little explanation for sometimes requiring deep specificity (publication required) and other times accepting a general fit (harm like that of false information). The Court also failed to explain the similarity required for specific elements within a traditional cause of action, as illustrated

62. *Id.* at 2222 (Thomas, J., dissenting) (quoting RESTATEMENT (FIRST) OF TORTS § 569 (Am. L. Inst. 1938)).

63. *Id.* at 2223–24.

64. *Id.* at 2222–23.

65. *Id.* (explaining that submitting a defamatory statement to telegraph companies or even stenographers would be enough for publication).

66. *Id.* at 2221.

67. *Id.* at 2213–14 (majority opinion).

by its rejection of the internal publication theory. Meanwhile, Justice Thomas consistently invoked a general level of analysis, but without detailing why a uniformly general, rather than specific, level was most appropriate. Under Justice Thomas's general fit standard, all of the plaintiffs would have had standing. Under Justice Kavanaugh's differing levels of generality, only a plaintiff whose information was disseminated had standing.

III. THE PROBLEM OF UNSYSTEMATIC LEVELS OF GENERALITY IN LEGAL REASONING AND ORIGINALIST ANALOGIES

The unexplained and unchallenged variations in levels of generality in the *TransUnion* opinion, and Justice Thomas's unexplained choice to keep his analysis uniformly general, is illustrative of the danger presented by unsystematic application of levels of generality. Yet, this problem is even more damaging when inserted into purportedly formalist methods of legal reasoning, like originalism. There, unexplained changes in level of generality can introduce relatively unseen, and even unconscious, discretion.

Of course, the idea that lawyers and judges need to grapple with levels of generality for analogies is not novel. The topic has been most thoroughly explored in the context of substantive due process.[68] There, legal academics have discussed the important role that levels of generality play for the scope of judicially defined

68. *See, e.g.*, Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); Girardeau A. Spann, *Constitutionalization*, 49 ST. LOUIS U. L.J. 709 (2005); Thomas A. Bird, *Challenging the Levels of Generality Problem: How* Obergefell v. Hodges *Created a New Methodology for Defining Rights*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 579 (2016); *cf.* Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937, 1938 (2018) (discussing the conceptual challenge of identifying "the appropriate level of generality at which 'clearly established constitutional rights' are articulated"). Levels of abstraction in original intentions originalism were also discussed by Professor Ronald Dworkin and Judge Robert Bork in the early days of originalism's rise. *Compare* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (Macmillan, 1990), *with* Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 633, 660–67 (1990); *see also* Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 485 (2017).

rights. "For instance, did the Court in *Griswold v. Connecticut* recognize the narrow right to use contraception or the broader right to make a variety of procreative decisions?"[69] Such a distinction is relevant because, in the next case, a judge must determine whether *Griswold* reaches a state regulation that, perhaps, bans gene editing for fetuses. If *Griswold* is about contraception, the precedent is at most persuasive, but if *Griswold* is about procreative decisions, it may be binding.

While this generality problem was most meaningfully explored in the rights context, it necessarily arises *whenever* judges or lawyers are called upon to use analogical reasoning for precedent. This is, as Justice Scalia once said, "the technique—or the art, or the game—of 'distinguishing' earlier cases. It is an art or a game, rather than a science, because what constitutes the 'holding' of an earlier case is not well defined and can be adjusted to suit the occasion."[70] This discretion allows the clever judge to reach "the desirable result for the case at hand," by "distinguish[ing] precedents, or narrow[ing] them" to reach the desired result.[71] Alternatively, a judge can construe a precedent broadly so that she is purportedly "bound" by the prior precedent.

Yet, even though the problem has long since been identified in various contexts, there is surprisingly little rigor in judicial opinions on the question of *why* a particular level of generality is proper. In fact, despite receiving occasional attention, rules of generality are

69. Tribe & Dorf, *supra* note 68, at 1058 (footnote omitted).

70. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the U.S. Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 7 (Amy Gutmann ed., 1997).

71. *Id.* at 39. For example, in the very context of *TransUnion*, at least one prominent law professor has suggested taking an extremely specific view of the case's applicability to "narrow the *TransUnion* ruling" and avoid having it dramatically reshape standing law. *See* Cass Sunstein, *Injury In Fact, Transformed* (Mar. 12, 2022) (unpublished manuscript), at 18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4055414.

not systematically applied. Justice Kavanagh can plausibly construe the element of publication specifically and the element of falsity more generally, only a few pages apart, without much or any explanation. Furthermore, Justice Thomas can plausibly construe the entire enterprise at a high level of generality. And both Justices talk past each other because neither is prepared with a clear reason for why *their* level of generality is *systematically* correct.[72]

Perhaps, to a reader of this piece, one or the other Justice's argument intuitively seems right. "Of course defamation hinged on disclosure to the entire public, where is the harm otherwise?" Alternatively, "of course calling someone a potential terrorist in a major credit reporting database is sufficiently like historic defamation." But without systematic rules, levels of generality are merely governed by intuitions regarding why one thing "seems" like or dislike the other. Yet, this appeal to raw intuition is exactly the type of discretion that advocates of originalism and textualism reject in other contexts.

This Comment will conclude by mentioning two common ways originalists use analogies for which levels of generality can cause issues. These practices are associated with an originalism that at least considers historic practices and expectations as evidence of original meaning.[73] If one looks to "using framing-era understandings and practices as a means of fleshing out the meaning of constitutional text," then that person would likely use the following two types of originalist analogies.[74]

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72. *Cf. Stanford Encyclopedia of Philosophy*, JOHN RAWLS: 2.4 REFLECTIVE EQUILIBRIUM, https://plato.stanford.edu/entries/rawls/ [https://perma.cc/P8UR-YTVL]. Consider philosopher John Rawls' theory that a proper philosophical theory would seek to encompass as much of one's varied philosophical beliefs as possible. Similarly, to argue that one's level of generality is systematically correct, one could try to encompass as many intuitive conclusions about the "right" answers as possible for different comparative questions.

73. Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1190 (2012).

74. *Id.* at 1191; *see* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) (looking to "longstanding" practice and analysis to determine that felons, the mentally ill, and

The first set of originalist analogies involves relying on old opinions to help better understand the meaning of various constitutional provisions. This use of cases implicates the same problems inherent in any precedent-based constitutional interpretation.[75] The difference here, however, is that originalist analysis will often look to state and federal cases, not for precedent, but rather to understand the meaning of a constitutional provision.

In *District of Columbia v. Heller*,[76] for example, the Court relied on state cases written after the ratification of the Constitution to understand whether the Second Amendment protects an individual right to own and carry firearms for self-defense.[77] The Court's analysis demonstrates the dangers of unsystematic application of levels of generality.

In trying to understand the Second Amendment, the majority ended up taking a consistently general view of cases emphasizing an expansive right—embracing not just specific facts and stated conclusions, but also general principles (even when the case relied

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"sensitive places" regulations are unprotected by the Second Amendment). Even amongst originalists, there is significant disagreement regarding whether and how to use original practices. *See, e.g.*, Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 580–82 (2006); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998). Generally, even those who use original practices only purport to use them to uncover semantic meaning. *See* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, at 123 (Amy Gutmann ed., 1997). The theoretical contours of the debate continue to evolve, however. For example, in recent years, Professors Will Baude and Stephen Sachs have argued that originalists must uncover and apply Founding-era interpretive legal norms. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

Whatever the exact details, if one's originalist methodology relies on historical evidence, it will invariably implicate the levels of generality problem discussed in this Comment.

75. *See supra* note 68.

76. 554 U.S. 570 (2008).

77. *Id.* at 610–15.

on a state, rather than the federal, constitution).[78] By contrast, the Court often took a specific view of cases that would have indicated a narrower reading of the Second Amendment, by cabining them to specific facts, taking a strict view of stated conclusions, and even looking to other cases from the same court that were decided differently.[79] Furthermore, cases whose general principles and statements were relied on earlier in the opinion were viewed more narrowly when the Court came to the question of whether some "presumptively lawful regulatory measures" would be available.[80] For his part, Justice Breyer's dissent read cases indicating a lesser right to bear arms as having principles of general application, while reading disfavored cases to have narrow applicability (for example, by waving them off as cases involving state constitutions).[81]

To combat this problem, originalists must be careful to ensure that they are not reading certain cases more generally than other cases, at least not without good reason. Furthermore, they should be wary of the unique problems associated with using these kinds of cases. Even beyond the usual problems with levels of generality in constitutional reasoning,[82] these cases are often centuries old. Accordingly, facts may be so outdated that the context-differences alone offer a facially compelling rationale to distinguish disfavored cases—but one must be careful to apply that reasoning categorically, not just to cases that are counter to one's priors. And, given that the cases are not binding, it is easy to skip over opinions unhelpful to the position that one is most sympathetic to. Thus, one must take care to avoid the ease of generalizing favorable cases and

78. *See, e.g.*, *id.* at 612–13 (relying on a Georgia Supreme Court case that struck down an open carry ban on pistols) (citing Nunn v. State, 1 Ga. 243, 251 (1846)).

79. *See, e.g.*, *id.* at 613 (distinguishing a Tennessee Supreme Court case that upheld a concealed carry ban) (citing Aymette v. State, 21 Tenn. 154 (1840)).

80. *See id.* at 626–27 & n.26. *Compare id.* (listing lawful curtailments of the right to bear arms), *with id.* at 612–13 (relying on the statement that "the right of the whole people . . . to keep and bear *arms* of every description . . . shall not be *infringed*, curtailed, or broken in upon, in the smallest degree") (quoting *Nunn*, 1 Ga. at 251).

81. *See, e.g.*, *id.* at 687–89 (Breyer, J., dissenting).

82. *See supra* note 68.

narrowing contrary ones when seeking to understand the scope of constitutional provisions.

The second type of originalist analogy involves the use of historical state and federal practices. Justice Scalia in *Heller*, for example, invoked "longstanding prohibitions" when defending the constitutionality of firearm prohibitions for the mentally ill and felons, as well as "sensitive places" regulations.[83] More broadly, originalists may find themselves turning to traditional practices to make sense of indeterminate constitutional text and supplement semantic analyses.

To provide an easy example, consider the widespread regulation of gunpowder at the time of the Founding.[84] These laws restricted everything from how one could buy gunpowder to the manner by which one could store their gunpowder, to how gunpowder could be transported, and even to whether gunpowder could be loaded into a firearm in a public place.[85] If original practices are relevant, then one must consider how applicable gunpowder regulation is to other forms of firearm regulation. The *Heller* majority, concerned with the direct regulation of firearms, construed the importance of gunpowder regulations narrowly, describing them merely as "fire-safety laws" with little relevance at all.[86] Meanwhile, Justice Breyer's *Heller* dissent construed the laws at a higher level of generality, considering them to be important evidence that the ability to bear arms was unquestionably burdened by public safety concerns around the time of the Founding.[87] Once again, the two opinions exhibit differing levels of generality with little explanation as to why.

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83. *Heller*, 554 U.S. at 626–27 (majority opinion).

84. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 510–11 (2004).

85. *Id.* at 510–12 (collecting state laws).

86. *Heller*, 554 U.S. at 632.

87. *Id.* at 684–87 (Breyer, J., dissenting).

To put a finer point on it, consider a hypothetical law regulating ammunition storage and sale. What would be the import of historic gunpowder regulations on such a case? In the 1700s and 1800s, one of the "things" that made a gun work was gunpowder. Today, guns generally use "nitrocellulose," a kind of "smokeless gun powder" that is part of the average bullet.[88] An originalist who puts value in traditional practices might look at gunpowder regulations and determine whether they provide insight into ammunition regulations.

If construed at a high level of generality, old gunpowder laws and new bullet regulations are similar. If the relevant comparison is what propelled the bullet then and now, then modern ammunition essentially contains replacement gunpowder. If that level of generality is accepted, prior regulation of gunpowder could help to define the contours of the Second Amendment in favor of ammunition regulation. On the other hand, a more specific view would say that gunpowder was special, because, when concentrated, gunpowder would raise significant fire-safety concerns.[89] Therefore, regulation of gunpowder has little bearing on the question of ammunition (so long as the ammunition does not create the same extreme risk of explosion and fire).

The purpose of the gunpowder regulations could also be subject to these levels of generality. Are the regulations generalizable as "public safety" measures,[90] defining traditional limitations on the Second Amendment for compelling public safety needs? Or, alternatively, are these regulations once again narrowed to addressing specific existential concerns about fire-safety, thus having little import for regulation of modern ammunition?

These questions are important because they should be answered consistently, across originalist inquiries. "[W]hat's good for

88. Mike V., *Do Guns Still Use Gunpowder?*, EVERYDAY CONCEALED CARRY, https://everydaycarryconcealed.com/do-guns-still-use-gunpowder/ [https://perma.cc/D7C7-36G2] (last visited Mar. 29, 2022).

89. *See Heller*, 554 U.S. at 632 (majority opinion).

90. Cornell & DeDino, *supra* note 84, at 512.

the goose is good for the gander."[91] To the extent that originalism aspires to be a formalist, less discretion-laden response to alternative constitutional interpretative methods, its practitioners must be careful to identify and remedy practices that inject new discretion. This is particularly true for issues like levels of generality, which might not be readily apparent without thoughtful reflection.

CONCLUSION

The opinions in *TransUnion* demonstrate the problems inherent in unsystematic application of levels of generality in legal analogies. Due to the importance of analogies in the law, issues associated with levels of generality are definitionally present throughout legal work. However, given originalism's role as a formalist and discretion-limiting method of constitutional interpretation, it is particularly important that practices enabling discretion are identified and then limited, standardized, or at least made transparent. By identifying and thoughtfully approaching the selection of levels of generality, judges, practitioners, and scholars can better and more faithfully apply originalism.

91. E.E.O.C. v. Waffle House, 534 U.S. 279, 314 (2002) (Thomas, J., dissenting).