HARVARD JOURNAL
of
LAW & PUBLIC POLICY

VOLUME 31, NUMBER 2 SPRING 2008

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Federalist Society Conference on the Contributions of Judge Robert H. Bork

I.

COMPETITION LAW AND THE FREE MARKET

The Antitrust Paradox: A Policy at War with Itself

ESSAYISTS

FRANK H. EASTERBROOK
DOUGLAS H. GINSBURG
GEORGE L. PRIEST

THE CHICAGO SCHOOL AND EXCLUSIONARY CONDUCT

FRANK H. EASTERBROOK*

One panel is not remotely enough to discuss Robert Bork's contributions to antitrust, or even a small portion of his magnum opus, *The Antitrust Paradox*.[1] The essayists on this panel have carved off just a few slices. Mine is exclusionary practices—predatory pricing, refusals to deal, tying, and many related practices that are said to make entry difficult and thus reduce the number of rivals. This is a subject on which much of what was deemed outré when Bork wrote is now settled doctrine at the Supreme Court and the normal way of thinking at the Antitrust Division and FTC. When Bob Bork was a nominee for Solicitor General, Senators insisted that he promise not to impose his views on the Antitrust Division. He represented the Division's views faithfully during his time. Today a nominee to the Antitrust Division is apt to be asked for assurances that he will implement Bork's views.

Bob Bork is a product of the Chicago School (particularly of Aaron Director) and was its leading exemplar during the 1960s and 1970s, even though living in exile at Yale. (When the three essayists on this panel were students at Chicago, our teacher was Phil Neal, who is *not* a member of the Chicago School!) What are the intellectual tools that Bork used, and how did they lead to his diagnoses?

- Antitrust is about the promotion of social wealth. Usually this means consumers' welfare. It is never, ever about the

* Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The Law School, The University of Chicago. This brief Essay, originally prepared as a talk for a panel of the Federalist Society's Conference on the Contributions of Judge Robert H. Bork on June 26, 2007, is It incorporates portions of earlier work, though original material has been added for the occasion.

1. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (The Free Press 1993) (1978).

promotion of producers' welfare. What is good for small dealers and worthy men, in Justice Peckham's phrase,[2] usually is bad for everyone else. Competition is a gale of creative destruction (this is Joseph Schumpeter's memorable line),[3] and it is by weeding out the weakest firms that the economy as a whole receives the greatest boost. Antitrust law and bankruptcy law go hand in hand.

- The goal of antitrust, to be more precise, is preventing the allocative loss that comes about when firms raise price over long run marginal cost, and thus deprive consumers of goods for which they are willing to pay more than the cost of production. Bork also stressed productive efficiency, joining Yale Brozen among Chicago comrades in arms. An emphasis on efficiency implies a program for antitrust law: look for situations in which firms can increase their long-run profits by reducing output.[4] It also implies accepting another of Schumpeter's prescripts: that sometimes one large firm is best, when that firm can produce most cheaply (and, as Schumpeter noted, internalize the benefits of research and other ideas, which have free rider problems and will be underproduced in Adam Smith's world of pin-makers).[5] To put it otherwise, atomistic competition may not be as efficient as other market structures.
- When looking for situations in which self-interested producers can do consumers dirt, assume rationality. When will a rational, self-interested producer find that money can be made by restricting output? This is not to say that everyone *is* rational. Instead the point is that the law's sanctions are directed to such people. Those who figure out how to *lose* money by restricting output need not be penalized. Their conduct is self deterring. For example, antitrust law does not impose penalties on people who make bad

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2. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 323 (1897).

3. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (3d ed. 1950).

4. *Schor v. Abbott Labs.*, 457 F.3d 608, 612 (7th Cir. 2006), is among many decisions making this point.

5. SCHUMPETER, *supra* note 3; *see also* Edward S. Mason, *Schumpeter on Monopoly and the Large Firm*, 2 REV. ECON. & STAT. 139, 139 (1951) (characterizing Schumpeter as arguing "that market power is necessary to innovation and that innovation is the core of effective competition").

product-design decisions, even though they drive consumers away and reduce output. This has a big effect on the understanding of exclusionary practices, because many of them (predatory pricing, for example) can succeed only if someone, or lots of someones, behaves irrationally. Mistaken attempts to predate confer benefits on consumers, who enjoy lower prices. That's self deterring, so the law should ignore it. The other possibility is that low prices stem from productive efficiency, and then we should welcome the producers' behavior.

- Be exceedingly suspicious of claims that new products or low prices or novel means of distribution injure consumers. Innovation is one thing that we seek to promote. Assertions that the long run will depart from the short run are easy to make but hard to prove. As Yogi Berra put it, "It is always hard to make predictions, especially about the future." Instead of making predictions that are impossible to test—and will injure consumers if wrong—wait to see what happens. If monopolistic prices happen later, prosecute then.[6] This, too, has become the norm in the Supreme Court's jurisprudence.

In days gone by people talked about using "leverage" to extend market power to new products.[7] When Bob Bork exploded the leverage myth so completely that even Don Turner came to agree with him,[8] and the Supreme Court abandoned the doctrine,[9] new claims arose based on physical bottlenecks (such as the "last mile" of wire in telecommunications) or complementarities (such as the relation between software and computer operating systems). These arguments demand that holders of

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6. *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690 (7th Cir. 2006).

7. *See* Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 515 (1985); *see also* Alex P. Jacquemin, *Market Structure and the Firm's Market Power*, 2 J. INDUS. ECON. 122, 124 (1972).

8. *See* Daniel A. Crane, *Hovenkamp: The Antitrust Enterprise: Principle and Execution*, 105 MICH. L. REV. 1193, 1194 (2007) (book review).

9. *See* Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45 (2005) ("[T]he lesson to be learned from *International Salt* [*Co. v. United States*, 332 U.S. 392 (1947)] and the academic commentary is the same: Many tying arrangements . . . are fully consistent with a free, competitive market.").

market power cooperate with rivals, a la the joint ticket in *Aspen Skiing*.[10] That was 1985—the last gasp of the old school of antitrust.

Many of these themes bit the dust in *Verizon v. Trinko*,[11] when the Supreme Court held that even a monopolist has no general duty to cooperate with rivals. After all, as Bork stressed, the main goal of antitrust is to compel firms to be rivals; cooperation is to be feared rather than welcomed. Anyone who thinks that judges would be good at detecting the few situations in which cooperation would do more good than harm has not studied the history of antitrust.[12] The *Journal of Law and Economics*, which I used to edit, devotes a couple of articles every year to examining old antitrust cases and asking how the judges did. The answer is that they did miserably. Markets are much better than judges at sifting efficient from anticompetitive practices. An anticompetitive practice that produces a monopoly overcharge attracts entry from rivals; a practice that does not attract such entry most likely is efficient and could be called "anticompetitive" only because judges and litigants have misunderstood its effects.

The big problem with the law of exclusionary practices is that all competitors seek to undercut and exclude rivals. Efficient production and lower price is the best exclusionary tactic, but hardly to be condemned on that account. Other tactics, such as supposedly predatory prices and clever changes in product compatibility could in principle exclude without being efficient. But how can we tell which is which? If a rival asserts that a given tactic is exclusionary, there are three hypotheses: it is exclusionary but also beneficial for consumers because the defendant has made a better mousetrap; it is exclusionary and will in the long run lead to higher prices as more-efficient rivals founder; or it is not exclusionary at all, and the complainant is just Chicken Little.

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10. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

11. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

12. I explore this subject in *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984), and *Ignorance and Antitrust*, *in* ANTITRUST, INNOVATION, AND COMPETITIVENESS 119 (Thomas M. Jorde & David J. Teece eds., 1992).

How can courts tell the difference? They can't. *Every* indicator of exclusion also is present with efficient competition. Both predators and efficient producers undercut rivals and gain market share. What distinguishes exclusion from efficiency is what happens in the *future*: exclusion leads to monopoly overcharges later, and efficiency does not.[13] Judges are no better than the rest of us at predicting the future. My colleagues and I spend most of our time on cocaine prosecutions, employment discrimination, and the myriad other subjects within federal jurisdiction. We cannot hope to emulate students of industrial organization, and my friends who study that subject are themselves no great shakes at prediction.

Consider for a moment the claim made by the Antitrust Division that Microsoft's provision of Internet Explorer at zero marginal price would drive other browsers out of the market.[14] (Now I know that Bob Bork sided with some of Microsoft's rivals, but I want to praise the work of Bork the academic rather than Bork the consultant.) What happens in the browser wars is not interesting unless accompanied by a claim that after extinguishing its rivals Microsoft would raise price and decrease output. So what has happened? Certainly Internet Explorer's market share went up. Internet Explorer today enjoys the large market share that once belonged to Netscape. But did Microsoft raise price and curtail output? Of this there is no evidence. Indeed, Franklin Fisher, who provided the principal expert testimony on this subject in the *Microsoft* case,[15] said as much. He called the provision of Internet Explorer a tie-in but conceded that there was no discernable price consequence.[16] He might as well have called the provision of a disk directory system with an operating system a tie-in, or the doors on a car a tie-in. Automobiles used to be sold without doors, as operating systems used to be sold without browsers, but I don't think that consumers would be better off today if antitrust had been used to enforce a no-door condition indefinitely to protect potential

13. I elaborate in *When is it Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, and *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972 (1986).

14. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 37, 39 (D.D.C. 2000).

15. United States v. Microsoft Corp., 253 F.3d 34, 88 (D.C. Cir. 2001).

16. *Id.* at 88, 97.

rivals in the car-door market. This, too, is a core proposition from *The Antitrust Paradox* and one reason why Bob Bork was so critical of the Supreme Court's tying cases.

The Antitrust Division effectively made a prediction in the Microsoft suit: if Microsoft is allowed to bundle Internet Explorer and undermine Netscape, it will obtain a monopoly and be able to raise prices in the future. That prediction has been falsified. Today and for the foreseeable future many other distinctive browsers are available to consumers. I have Firefox, Opera, OmniWeb, and Safari installed on my computers. OmniWeb and Safari are the most interesting: they run only on Mac OS X, which represents less than 10 percent of the operating system market. Yet a chance to compete for a share of this small segment has been enough to induce the development and distribution of two new browsers. And now Apple has begun to distribute Safari for Windows. Competition is hardy.

This says all we need to know about the prediction that, as soon as one browser gets the lion's share, competition will cease. In this market output continues to rise and price stays low. Claims that prices will rise later can't be refuted—the future lies ahead—but why should the future differ from the past? Anyway, a return very long delayed can never repay the gains foregone. This is why the Supreme Court held in *Matsushita*,[17] the TV case, that a low-price-now strategy by Japanese producers could not be condemned as exclusionary. From today's perspective the argument of the 1980s that Japan would use below-cost sales to monopolize consumer electronics seems absurd. Prices of consumer electronic gizmos remain low, and, just as economists said, any attempt by the Japanese producers to raise price works to the advantage of makers in Korea and China.[18]

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17. *Matsushita*, 475 U.S. 574.

18. Like other supposed "victims" of predatory or exclusionary conduct, they did not have any trouble raising capital. Money markets are large, competitive, and liquid; no more is required. No one supposes that capital markets are "perfect" in the sense that all profitable ventures are funded, and no others are. Life is full of chances, and errors can be caused by fraud, costly information, or the stochastic quality of competition. But these errors are not systematic: it is no more likely that a good project will fail to find suppliers of capital than that a bad project will do so. (In competition, if errors *were* biased, the lenders making such errors would go out of business.)

I think it likely that the future will be like the past: the ability of judges and other regulators to second-guess markets has not improved. Economic models may have improved, but it is real-world performance that matters. If "choose better regulators" or "educate the judges" has not been a successful prescription for the last 116 years, it will not become a good prescription tomorrow. This is not a matter of "faith in markets" or some other quasi-religious creed but of evidence. We want to look for suits actually filed that nailed bad practices (successes) or banned good ones (false positives), plus suits *not* filed where it turned out that exclusion occurred (false negatives). Only if the gains from the successful suits exceed the losses from the false positives can we say that litigation about exclusionary practices has been a success. And aside from pointing to the AT&T divestiture in 1982[19]—something that likely was inevitable because of technological change, independent of antitrust—few people claim to identify even one success in this line of work.

In other words, judges and enforcers must be wary of claims that take the form: "Here is a model in which bad results *can* happen; let's use the legal system to find out *whether* they happen." That approach assumes away the costs of false positives. Because these costs are high (that's what errors over the last century tell us), we should not seek to test theory in the halls of government, where mistakes may be inflicted on the populace. Test models the professional way, by gathering data, running regressions, and publishing in professional journals. Before predicting that the future will be unlike the past—that is, before predicting that judges and juries will acquire a comparative advantage at identifying practices that are bound to reduce welfare in the future—one must do empirical testing. Government fared poorly between 1890 and 2006, even when the rules were simple. Why should we think that regulators (including judges) will do well when the rules become complex, when strategies are designed to conceal relevant costs, and so on? If the strategies conceal matters from competitors, then they conceal from judges and other regulators too.

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19. *See, e.g.*, Clement G. Krouse et al., *The Bell System Divestiture/Deregulation and the Efficiency of the Operating Companies*, 42 J.L. & ECON. 61 (1999).

Just as we all insist today on proof that a given practice is bad for consumers,[20] so we must insist on proof that a given legal regimen implied by an economic model does better than the unregulated market. To point to a competitive failure is not to show that regulation is better. That's the Nirvana Fallacy.[21] Government has its own costs and errors, which may be worse (and harder to correct) than the problems of markets. Don't invoke a theory of market failure unless you also have a theory of regulatory failure—and a way to show that the costs of the former exceed the costs of the latter.

Today's Supreme Court has seen things Bob's way on most exclusionary practices. I've mentioned *Trinko* (no compulsory cooperation) and *Matsushita*, which all but abolishes predatory-pricing doctrine. Last Term *Weyerhaeuser*[22] extended that view to claims of predatory buying. The non-economic claim that one firm bought "too much" is defunct. *Hyde*[23] made market power a precondition to any claim of tying, and *Independent Ink*[24] extended that rule to patented products, abolishing the doctrine—which Bob Bork and Ward Bowman spent much ink undermining—that patents automatically show market power. *Spectrum Sports* holds that only a dangerous probability of success in producing a monopoly justifies any exclusionary-practices claim.[25] The list could go on and on.

In only one respect has Bork's position failed. His worry about exclusionary practices was the use of the government as an agent of exclusion. Entry barriers created by the government itself can't be undermined in the market. The Court has shown some cognizance of this when the part of "government" at issue is the courts; it may be possible to make out an antitrust claim based on predatory use of litigation to raise rivals' costs. That's the holding of *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*[26] But the Court has not overruled

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20. *See, e.g.*, Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).

21. *See* Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1711–12 (1986).

22. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007).

23. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 11 (1984).

24. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2005).

25. *Spectrum Sports*, 506 U.S. 447.

26. 508 U.S. 49 (1993).

Parker v. Brown,[27] which held that private groups may use government to squelch competition, and it isn't likely to; the antitrust laws are not a warrant to undermine other statutes or to set up an inquest along the lines of *Lochner*[28] in which states must prove their statutes' value to pass muster.

So only 90 percent of the Bork program is in force today. That's an astounding success for an approach that was branded as kooky in the 1960s, the time of *Brown Shoe*[29] and *Von's Grocery*.[30] So three cheers for Bork. If only he had achieved this much success in constitutional law!

27. 317 U.S. 341 (1943).
28. Lochner v. New York, 198 U.S. 45 (1905).
29. FTC v. Brown Shoe Co., 384 U.S. 316 (1966).
30. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

JUDGE BORK, CONSUMER WELFARE, AND ANTITRUST LAW

DOUGLAS H. GINSBURG*

The Sherman Antitrust Act of 1890 broadly prohibits contracts, combinations, and conspiracies in "restraint of trade" and makes it unlawful "to monopolize" any line of commerce.[1] The open-textured nature of the Act vests the judiciary with considerable responsibility for interpretation. In a 1966 article published in the *Journal of Law and Economics*, then-Professor Robert H. Bork examined the legislative history of the Act.[2] Bork was candid about the "difficulties inherent in the very concept" of legislative intent.[3] Nevertheless, Bork thought the undertaking was justified by the need to counter the judiciary's repeated invocation of values that were unrelated to the debate that had informed congressional enactment of the Sherman Act and, lacking any legitimate economic rationale, were likely to produce real economic harm.

For example, in *Fashion Originators' Guild of America v. FTC*,[4] the Supreme Court had counted among the policies underlying the Sherman Act protection of "the freedom of action of [Guild] members [not] to reveal to the Guild the intimate details of their individual affairs."[5] No lesser light than Judge Learned Hand had asserted that the Congress intended the Sherman

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* Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. These remarks were excerpted from the Author's introduction to Judge Bork's 1966 article, *Legislative Intent and the Policy of the Sherman Act*, as republished in the Spring 2006 issue of *Competition Policy International*. *See* Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L 225 (2006).

1. *See* 15 U.S.C. §§ 1–2 (2000).

2. *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

3. *Id.* at 7 n.2. Bork's caveat is an important one. After all, "[i]t is the *law* that governs, not the intent of the lawgiver." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997).

4. 312 U.S. 457 (1941).

5. *Id.* at 465.

Act to achieve certain sociopolitical aims, such as minimizing the "helplessness of the individual"[6] and ensuring the "organization of industry in small units."[7] Obviously, such policies are highly malleable; they can be invoked (or not) to justify almost any result in any situation. Indeed, as Bork pointed out, Judge Hand went so far as to state that in enacting the Sherman Act, the Congress had "delegated to the courts the duty of fixing the standard for each case."[8]

Bork's examination of the text and structure of the Sherman Act against the background of preliminary proposals and draft legislation, statements by Senators and Representatives, and contemporaneous understandings of constitutional and common law led him to conclude: "The legislative history . . . contains no colorable support for application by courts of any value premise or policy other than the maximization of consumer welfare."[9] By "consumer welfare," Bork meant "the maximization of wealth or consumer want satisfaction,"[10] known today as allocative efficiency—a concept he thought the framers of the Sherman Act clearly grasped even though they did not "speak . . . with the precision of a modern economist."[11] Bork also explained that maximization of consumer welfare is the common denominator underlying the central prohibitions of the Act, that is, the condemnation of cartel agreements, monopolistic mergers, and predatory business practices.[12] He explained that legislators used the term "monopolize" to refer only to those three prohibited activities, as opposed to a "monopoly," which might arise from superior efficiency.[13] According to Bork, "[o]nly a consumer-welfare value which, in cases of conflict, sweeps all other values before it can account for Congress' willingness to permit efficiency-based monopoly."[14]

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6. United States v. Aluminum Co. of Am., 148 F.2d 416, 428 (2d Cir. 1945).

7. *Id.* at 429.

8. United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

9. Bork, *supra* note 2, at 10.

10. *Id.* at 7.

11. *Id.* at 10.

12. *Id.* at 11–12, 21–26.

13. *See id.* at 12, 26–31.

14. *Id.* at 12.

When Bork's article was first published in 1966, his thesis was novel; by 1977, it had become the conventional wisdom of the federal courts. That year, the Supreme Court, in *Continental T. V., Inc. v. GTE Sylvania Inc.*,[15] repudiated the position it had taken only 10 years before in *United States v. Arnold, Schwinn & Co.*[16] In the earlier case, the Court had held that a nonprice vertical restraint imposed by a manufacturer on a distributor after "title, dominion, or risk" had passed was a *per se* violation of the Sherman Act,[17] that is, regardless of its actual—and possibly efficient—economic effect.

In *GTE Sylvania Inc. v. Continental T. V., Inc.*,[18] a retailer of televisions claimed that a manufacturer's limitation upon the locations at which the retailer could sell its televisions was a *per se* violation of the Sherman Act.[19] The Ninth Circuit expressly adopted Bork's thesis and rejected the multiplicity of "values" the Supreme Court had been reading into the Sherman Act for decades.[20]

The Supreme Court affirmed, holding that "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive,"[21] and stating, "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."[22] In emphasizing allocative efficiency over other values, the Supreme Court implicitly endorsed Bork's thesis. Indeed, in his concurring opinion, Justice White attributed to the Court the view that the Sherman Act is "directed solely to economic efficiency," citing Bork's article as the source of that proposition.[23]

The significance of the Court's new, Borkean position should not be underestimated. As Professor Timothy Muris has said,

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15. 433 U.S. 36 (1977).
16. 388 U.S. 365 (1967).
17. *Id.* at 379.
18. 537 F.2d 980 (9th Cir. 1976) (en banc).
19. *Id.* at 1000.
20. *See id.* at 1003 (citing Bork, *supra* note 2, at 7, 11).
21. *GTE Sylvania Inc.*, 433 U.S. at 49–50.
22. *Id.* at 54.
23. *Id.* at 69 (White, J., concurring) (citing Bork, *supra* note 2, at 7).

"the opinion was a ringing endorsement of the economic approach to antitrust."[24]

Two years later, in *Reiter v. Sonotone Corp.*,[25] the Supreme Court considered a class action brought under the Clayton Antitrust Act of 1914 by plaintiffs who had purchased hearing aids from a manufacturer that they alleged had fixed prices with its rivals and its retailers.[26] Relying this time expressly upon Bork's appraisal of the legislative history of the Sherman Act as the "predecessor" of the Clayton Act, the Court concluded that the latter Act, in providing a remedy to anyone injured in his "business or property," covered "pecuniary injuries suffered by those who purchase goods and services at retail for personal use."[27] Quoting Bork's 1978 book, *The Antitrust Paradox*, of which his 1966 thesis was a small but important part, the Court declared that the legislative history "suggest[s] that Congress designed the Sherman Act as a 'consumer welfare prescription.'"[28]

In *NCAA v. Board of Regents of the University of Oklahoma*,[29] the Court had further occasion to embrace the consumer welfare thesis when it determined that the NCAA's limitation upon the number of televised intercollegiate football games and its fixed-price, exclusive agreements with certain broadcasters violated the Sherman Act.[30] Although the Court noted that the arrangement adversely affected competitors' "freedom to compete," it ultimately based its decision squarely upon allocative efficiency.[31] Thus, by the mid-1980s, Bork's thesis had undeniably changed the Supreme Court's most fundamental understanding of the Sherman Act.

Other academics began seriously to challenge Bork only after the Supreme Court had adopted his reading of the legislative history in *Reiter*. Two distinct theories of congressional intent

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24. Timothy J. Muris, GTE Sylvania *and the Empirical Foundations of Antitrust*, 68 ANTITRUST L.J. 899, 900 (2001).

25. 442 U.S. 330 (1979).

26. *Id.* at 330.

27. *Id.* at 343.

28. *Id.* (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978)).

29. 468 U.S. 85 (1984).

30. *Id.* at 88, 91–94.

31. *See NCAA*, 468 U.S. at 106–07.

emerged. One, advanced by Professor Robert H. Lande, is that Congress's chief objective in the Sherman Act was the prevention of "wealth transfers" from consumers to business trusts, the forerunners of the large corporations of today.[32] Because the Sherman Act is an anti-*trust* measure, and some legislators believed large trusts were generally more efficient than small and medium-sized businesses, Professor Lande concludes that allocative efficiency could not have been the sole value underlying the statute.[33] Instead, he argues that the Act was intended to curb the market power of large producers to prevent their "extract[ing] wealth from consumers."[34]

Alternatively, Professor Herbert Hovenkamp contends, based upon the Act's legislative history and attendant political circumstances, that the primary purpose of the Sherman Act was the protection of small business, not of consumers.[35] Professor Hovenkamp concludes that the Congress acted primarily to avert "various kinds of injury to competitors . . . flow[ing] mainly from the lower costs of more efficient rivals."[36]

The challenges to Bork's thesis lodged by Professors Lande and Hovenkamp are representative of the academy as a whole. One commentator goes so far as to allege that Bork's interpretation "has been almost universally rejected by antitrust scholars."[37] Yet the academy has failed to persuade the judiciary, and Bork's consumer welfare thesis has become one of his many enduring contributions to U.S. antitrust law.

Regardless whether Bork's assessment is correct, the Supreme Court's endorsement of allocative efficiency as the fundamental value underlying the antitrust laws has had important consequences. First, as a matter of administrability, the consumer welfare thesis has substantially ameliorated the practical problem of

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32. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

33. *Id.* at 91–93.

34. *Id.* at 93.

35. *See* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 23–24 (1989).

36. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 101, at 10–11 (3d ed. 2006).

37. Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 905 n.150 (2000).

having courts choose among multiple, incommensurable, and often conflicting values. Even one of Bork's sharpest critics, Professor Christopher Grandy, acknowledges that Bork's thesis "provides a clear and cogent set of rules that courts can apply in antitrust cases, and no other view of antitrust accomplishes that task as well."[38]

Second, judicial adoption of Bork's thesis has nearly put an end to the efforts of counsel and the propensity of lower courts to manipulate outcomes by invoking highly plastic, subjective values of the sort instanced by Judge Hand.

Third, by applying a single standard rooted in economic analysis, court decisions have become less arbitrary and more predictable; no longer must businesses make decisions without knowing the standard by which their actions will later be judged if challenged in the courts.

Finally, judicial endorsement of the consumer welfare thesis has no doubt led to a more efficient allocation of scarce resources, thereby increasing the wealth of the Nation. Had Bork not written his landmark article, these salutary developments might still be in the offing.

38. Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 373 (1993).

THE ABIDING INFLUENCE OF *THE ANTITRUST PARADOX*

GEORGE L. PRIEST*

It is an honor to be invited to write about Judge Robert H. Bork's contributions to antitrust law. It is also a pleasure to join in paying tribute to Judge Bork's work. When I joined the faculty at Yale, Judge Bork was a colleague, though I did not get to know him then. But when Judge Bork left Yale, I inherited his antitrust course. At Yale Law School at least (and only so far as the classroom), I am Judge Bork's successor.

Despite all of the horrible things that Judge Bork continues to say about the Yale Law School (he has recently added the Yale Club to the list), he remains an important and dominant presence there today. Intellectually, I would like to think that my antitrust class closely resembles the course that he taught or would be teaching if he had stayed. But Judge Bork has a continuing presence in a different sense. Antitrust remains a popular course, drawing 60 to 80 students per year, which is a very large class by Yale Law School standards. Indeed, the Law School possesses only two or three classrooms that can accommodate that number. In the room in which I typically teach the class, on the back wall directly facing the instructor, and looking over the shoulders of every student, is a large portrait of Judge Bork. It is an excellent portrait, though perhaps emphasizing Judge Bork's sternness and seriousness more than his wonderful sense of humor. The presence of the portrait, however, has two effects on the class. First, it keeps the instructor on track. If I were even to entertain the suggestion that something in an antitrust opinion, say, of Justice William O. Douglas, made any sense, a quick glance at the portrait would immediately disabuse me of the thought. The second effect is

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on the students. Many students, at least at the beginning of the course, will present arguments based on concepts of the existence of barriers to entry, of the ability of a firm with market power to leverage that power from one market to another, or of harms related to foreclosure. To deal with arguments of this nature, all the instructor needs to do is to ask students making such contentions to look over their shoulders at Judge Bork's portrait. What, in any other light, is a serious portrait becomes a scowling portrait, and has a wonderful effect on performance and understanding in the class. Judge Bork's influence on the understanding of antitrust law will be sustained at Yale Law School for many generations into the future.

This brief Essay seeks to place Judge Bork's important book, *The Antitrust Paradox*,[1] into the context of the Chicago School's contribution to the modern direction of antitrust law. Virtually all would agree that the Supreme Court, in its change of direction of antitrust law beginning in the late 1970s, drew principally from Judge Bork's book both for guidance and support of its new consumer welfare basis for antitrust doctrine.[2] Many outside the Chicago School, however, and some within, have regarded Judge Bork's contribution in the book as chiefly derivative of ideas of Aaron Director that had been developed by Director's students and research associates, such as Lester Telser, John McGee, Judge Bork, and others.[3] Judge Bork has not dissented from the point: in *The Antitrust Paradox*, he generously attributes his learning from Director and from the associates that Director brought to Chicago.[4] But Judge Bork's contribution to the success of the Chicago approach should not be understated.

To view Judge Bork's work as derivative seriously undervalues his contribution to the development of modern antitrust

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1. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

2. *See, e.g.*, Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB POL'Y 439 (2008); Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where it has Been, Where it is Now, Where it Will be in its Third Century*, 9 CORNELL J.L. & PUB. POL'Y 239, 248 (1999).

3. *See, e.g.*, Douglas G. Baird, *The Future of Law and Economics: Looking Forward*, 64 U. CHI. L. REV. 1129, 1129 (1997); Spencer W. Waller, *Antitrust: New Economy, New Regime: Second Annual Symposium of the American Antitrust Institute: The Language of Law and the Language of Business*, 52 CASE W. RES. L. REV. 283, 300–01 (2001).

4. BORK, *supra* note 1, at ix–xi.

law. To be sure, Aaron Director had many important and seminal ideas, in particular with respect to the economic effects of vertical practices.[5] Without question, *The Antitrust Paradox* builds on those ideas. As I shall explain, however, the book extends far beyond those basic ideas by translating them persuasively for members of a Court neither trained in nor sympathetic to economic analysis and, furthermore, by convincing the Court that consumer welfare is the only coherent standard on which to base modern antitrust law.[6]

That portion of Chicago School thought that addresses industrial organization derives from a single basic principle: Markets in the real world are generally highly competitive, constrained only by real costs of operation. It follows from this proposition that markets operate at a position very near to that which might be called "efficient"—efficient given the costs that firms must face. It further follows from the proposition, again given the presumption of general competitiveness, that actions taken in the market by a single firm generally represent a means for advancing the interests of the firm by providing value to consumers. Put conversely, if a firm's practices did not provide value to consumers, the firm would fail in the competitive battle. Thus, there is a presumption in Chicago School analysis that individual firm practices generally benefit competition and consumers, rather than the reverse. This is the basis that led the Chicago School to be critical of, if not scathing toward, the expansion of antitrust law condemning industrial practices from the earliest years—such as *Standard Oil*[7]—and most especially in the years following the second New Deal.[8]

The basic assumption of high levels of competition, and of the necessity of a single firm to provide value to consumers in all of its practices, formed the foundation of the many seminal ideas concerning vertical practices that are associated with the work of Aaron Director and his associates, including Judge

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5. *See, e.g.*, Sam Peltzman, *Aaron Director's Influence on Antitrust Policy*, 48 J. LAW & ECON. 313 (2005).

6. *See* BORK, *supra* note 1, at 81–89.

7. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

8. The Chicago School approach to these issues is discussed in George L. Priest, *The rise of law and economics: a memoir of the early years*, *in* THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS 350 (Francesco Parisi & Charles K. Rowley eds., 2005).

Bork. Thus, Director intuited that a firm can only exploit market power to the extent of that power, and can only gain a single monopoly profit. Similarly, a firm generally will be unable to leverage market power possessed in one market into another competitive market. Further, foreclosure of competition in a market represents market success, not anticompetitive victory. These ideas are the foundation of Director's work.[9] These ideas are also a foundation of *The Antitrust Paradox*, but the book extends the analysis of antitrust law substantially beyond ideas relating to vertical practices.

The Antitrust Paradox changed the direction of antitrust law by systematically applying economic analysis to the legal issues that face courts in antitrust litigation. Although the book analyzes economics issues, it is at heart—and this accounts for its success in the courts—a legal book. Its brilliance comes from its translation of counterintuitive economic analysis into legal analysis persuasive to the courts.

First, the book made economic analysis—difficult even for many economists to understand—intelligible and persuasive to judges possessing no economic background. The repeated citations to the book by the diverse Justices of the U.S. Supreme Court in the many post-*GTE Sylvania*[10] cases are illustrative.[11]

Second, the book expanded Chicago School economic analysis to horizontal practices. Aaron Director had little to say about horizontal practices. Judge Bork's antitrust work, as exemplified in *The Antitrust Paradox*, builds on the centrality of the prohibition of horizontal restraints—cartel agreements—to the understanding of appropriate antitrust prohibitions. Judge Bork's seminal emphasis on the significance of *Addyston Pipe*[12] as a formulative antitrust decision is an example.[13] It was Judge Bork, not Director or any other Director associate, who focused on the centrality of *Addyston Pipe*, a case involving the horizontal allocation of markets among competitors.

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9. *See, e.g.*, Peltzman, *supra* note 5.

10. Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

11. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602–05, 608–09 (1985); NCAA v. Board of Regents, 468 U.S. 85, 101 (1984).

12. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

13. *See* BORK, *supra* note 1, at 26–30.

Third, both in the *Legislative Intent and the Policy of the Sherman Act*[14] and in *The Antitrust Paradox*, Judge Bork distilled the economic learning of the Chicago School into a single, workable standard for antitrust analysis: the consumer welfare standard.[15] Neither Director nor his associates discussed "consumer welfare" as a standard. The maximization of consumer welfare, of course, is implicit in their work. Judge Bork made the standard explicit and, as I shall explain below, convincing to the courts.

Fourth, *The Antitrust Paradox* successfully attacked those aspects of the antitrust canon that were inconsistent with the consumer welfare standard and with Chicago School analysis. Thus, *The Antitrust Paradox*

(1) exposed the lack of content of the concept of preventing competitive harms "in their incipiency," which had been an important, but standardless, Clayton Act proposition;[16]

(2) criticized virtually the entirety of FTC antitrust jurisprudence developed during the 1950s and 1960s based upon an asserted populist approach to antitrust law;[17]

(3) criticized and deflated the value of protecting small business against large business—a principal hallmark of Supreme Court antitrust jurisprudence during the 1960s and 1970s (and championed by Justice Douglas)—on the grounds that the policy harmed consumers at large;[18]

(4) exposed the fallacy of antitrust policy based on concerns about so-called "barriers to entry";[19]

(5) criticized the Court's approach to merger analysis, in particular, in the now notorious, though then mainstream, *Brown Shoe*[20] and *Von's Grocery*[21] decisions;[22] and

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14. Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

15. *See* BORK, *supra* note 1, at 81–89.

16. *Id.* at 303.

17. *Id.* at 198–216.

18. *Id.* at 205, 256–57.

19. *Id.* at 310–29.

20. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

21. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

22. BORK, *supra* note 1, at 198–218.

(6) demonstrated the general irrelevance of the Robinson-Patman Act[23] amendments in attempting to control retail distribution practices.[24]

These are tremendous accomplishments for a single book, and, indeed, for a career of antitrust scholarship. At the time this Essay was first drafted, there was one area of antitrust law in which Judge Bork's contributions had been only partially successful: resale price maintenance. *The Antitrust Paradox* demonstrated, following Director, Telser, and others, that resale price maintenance was most likely to benefit consumers, not to harm them.[25] Although the Supreme Court had moved largely in the direction suggested by the book—in *Monsanto v. Spray-Rite*[26] and *State Oil v. Khan*,[27] for example—to dismantle the widespread prohibitions of resale price maintenance, a single precedent survived: *Dr. Miles*.[28] Judge Bork had criticized *Dr. Miles* extensively[29] but, at the time this Essay was presented to the Federalist Society's Conference,[30] it remained the single outstanding anti-Chicago School precedent surviving into the twenty-first century, something of the order of the baseball exemption,[31] which neither Judge Bork nor the Chicago School has ever bothered to criticize on grounds of relevance. Roughly one week after the conference, however, the Supreme Court reversed *Dr. Miles*, making the Bork revolution of antitrust law complete.[32]

There is a further and important feature of *The Antitrust Paradox* that has been neglected—especially among economic

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23. Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936).

24. BORK, *supra* note 1, at 382–94. Following *The Antitrust Paradox*, the Robinson-Patman Act has shriveled as law. *See, e.g.*, Robert J. Aalberts & L. Lynn Judd, *Slotting in the Retail Grocery Business: Does it Violate the Public Policy Goal of Protecting Businesses Against Price Discrimination?*, 40 DEPAUL L. REV. 397, 414–15 (1991); Harry Ballan, Note, *The Courts' Assault on the Robinson-Patman Act*, 92 COLUM. L. REV. 634 (1992).

25. *See, e.g.*, BORK, *supra* note 1, at 280–98.

26. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

27. State Oil Co. v. Khan, 522 U.S. 3 (1997).

28. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

29. *See* BORK, *supra* note 1, at 32–33, 298.

30. *See supra* note *.

31. *See* Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

32. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

types like me—but needs to be emphasized. Because the book contained and distilled so many new and interesting economic ideas, many readers focused on the economic analysis of industrial practices, a consistent subject of the book.

But the book goes further. It discusses the institutional competence—and limitations—of courts in the context of antitrust litigation.[33] It also examines the virtue of law as law versus law as political decision making by judges.[34] Most importantly, the book explains why the consumer welfare standard for antitrust law provides a consistent, normatively defensible, and politically removed standard for decision by courts.[35] In this light, Judge Bork's contributions in *The Antitrust Paradox* are related to his work in *The Tempting of America*[36] and his other constitutional writings.[37] In addition to the book's economic analysis, its institutional analysis of the competence of courts substantially advanced its success and its persuasiveness with the courts. In the revolution of antitrust law associated with the Chicago School, I know of no references by the Supreme Court to Aaron Director, Lester Telser, or John McGee, all friends that Judge Bork acknowledges. The Supreme Court references Judge Bork.[38]

Finally, although somewhat less directly related to *The Antitrust Paradox*, I wish to discuss Judge Bork's unsuccessful nomination to the Supreme Court. Here, I gained an honor denied to my distinguished classmates on this panel, who both were sitting judges at the time. I was not a sitting judge, and thus had the opportunity to testify in favor of Judge Bork's confirmation to the Supreme Court.[39] In the twenty years since those hearings, the controversy remains. It is important to address this historical episode, because many readers were not even born at

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33. BORK, *supra* note 1, at 82–83, 86–89.

34. *See id.* at 419–20.

35. *Id.* at 405.

36. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

37. *See, e.g.*, Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L.J. 21 (1985).

38. *See supra* note 11.

39. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 2411–90 (testimony of witness panel 12, including testimony of the Author).

the time; those in primary or later schools may have incomplete recollections.

I had expected to testify about the importance of *The Antitrust Paradox*. By the time of my appearance, the principal focus of the hearings was not Judge Bork's twenty-year contribution to antitrust law, but a talk that Judge Bork had given at the University of Indiana Law School that was later published in the *Indiana Law Journal*.[40]

The focus on the *Indiana Law Journal* piece, however, was a pretext for a political undercutting of Judge Bork's nomination. The Senate Judiciary Committee asked me not a single question with respect to *The Antitrust Paradox*. Though I have not examined the entire record for this purpose, I am quite certain that the Committee devoted little time to Judge Bork's most important scholarly contribution. Why? Because it was untouchable, surely by the members of the Judiciary Committee and their staffs. By 1987, the time of the hearings on Judge Bork's confirmation, the Supreme Court was on the verge of changing its approach to antitrust law in the direction recommended by Judge Bork. There was no gain to the Committee from an emphasis on the person whose ideas would prove seminal and would dominate Supreme Court antitrust jurisprudence into the future.

The Committee's focus on the *Indiana Law Journal* piece, in contrast, was pretextual. Judge Bork's nomination to the Court foundered not because of Judge Bork, but because of the President. Judge Bork's nomination to the Court followed very shortly after the revelation of President Reagan's involvement in the Iran-Contra affair.[41] The Senate could not effectively reduce the power of the Commander in Chief with respect to dealings with Iran or with Nicaragua (the leftist government of which was opposed by the Contras). Instead, the opposition to the President's foreign policy concentrated on presidential appointments: in this instance, on Judge Bork's appointment to the Supreme Court. President Reagan, not Judge Bork, lost Judge Bork's nomination to the Supreme Court.

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40. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

41. The Iran-Contra affair first became known to the public in November and December of 1986. Judge Bork was nominated in 1987.

I stated at the time and I still believe that the failure of Judge Bork's nomination to the Supreme Court was a loss for the country. Putting aside other areas of law, it was not a terrible loss in terms of antitrust law. The Supreme Court has continued in its antitrust jurisprudence to follow the direction of *The Antitrust Paradox*. It has sometimes misinterpreted Judge Bork's direction.[42] And there are many cases that might have been decided more coherently if Judge Bork had authored the opinions. But the great and sustained influence of *The Antitrust Paradox* cannot be denied, and its originality within the Chicago School tradition remains preeminent.

42. *See* George L. Priest & Jonathan Lewinsohn, *Aspen Skiing: Product Differentiation and Thwarting Free Riding as Monopolization*, *in* ANTITRUST STORIES 229 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

Federalist Society Conference on the Contributions of Judge Robert H. Bork

II.

JUDICIAL PHILOSOPHY AND ORIGINALISM

The Tempting of America: The Political Seduction of the Law

ESSAYISTS

KURT T. LASH
JOHN HARRISON
SAIKRISHNA B. PRAKASH

OF INKBLOTS AND ORIGINALISM: HISTORICAL AMBIGUITY AND THE CASE OF THE NINTH AMENDMENT

KURT T. LASH*

Ever since Justice Goldberg's concurring opinion in *Griswold v. Connecticut*,[1] the Ninth Amendment has been a flashpoint in debates over the merits of originalism as an interpretive theory. Judge Bork's comparison of interpreting the Ninth Amendment to reading a text obscured by an inkblot[2] has been particularly subjected to intense criticism.[3] The metaphor has been attacked as erasing the Ninth Amendment from the Constitution, and as representing the inevitably selective and inconsistent use of text and history by so-called originalists.[4]

It turns out, however, that not only was Judge Bork right to reject Justice Goldberg's reading of the Ninth Amendment, his inkblot metaphor illustrates precisely the approach that a principled originalist must take in the face of historical silence or ambiguity. The more historical evidence that comes to light regarding the Ninth Amendment, the more Judge Bork's original instincts have been vindicated.

I. A BRIEF INTRODUCTION TO THE MODERN PRACTICE OF ORIGINALISM

Originalism has evolved during the last several decades. Although past formulations sometimes looked for the Founders'

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1. 381 U.S. 479 (1965).

2. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 224 (1987) (statement of Judge Robert H. Bork).

3. *See, e.g.*, Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 10–11, 80 (2006).

4. *See, e.g.*, Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. BALT. L. REV. 169, 192–93 (2003).

intent, today the more sophisticated forms of originalism seek the meaning of the text as it was likely understood by those who added the provision to the Constitution.[5]

This emphasis on the original understanding of the ratifiers can be traced back to the Founding generation itself. James Madison, for example, expressly embraced the idea that the meaning of the Constitution should reflect the understanding of the state ratifying conventions.[6] According to Madison, the Constitution as proposed by its framers "was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions."[7]

Madison's emphasis on the ratifiers' understanding reflects the Founders' belief in popular sovereignty. A political theory in ascendancy at the time of the Founding, popular sovereignty distinguishes the government from the governed, with only the latter having the sovereign right to establish (or amend) fundamental law.[8] The governed speak as "the People" when they meet in convention and debate, vote, and reduce to writing the People's fundamental law. Because these conventions of the People are responsible for "breathing life" into the document, it is their understanding of the words that controls.

II. THE NINTH AMENDMENT

When it comes to the Ninth Amendment, the modern practice of originalism might seem problematic because, for many years, we had little information about its original meaning. The text of the Ninth Amendment states: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[9] When Justice Goldberg relied on this text in his *Griswold* concurrence, the consensus

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5. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

6. James Madison, Speech on the Jay Treaty in the Fourth Congress (Apr. 6, 1796), *in* 6 THE WRITINGS OF JAMES MADISON 263, 272 (Gaillard Hunt ed., 1906).

7. *Id.*

8. For an elegant presentation of the development of popular sovereignty theory in the early Republic, see GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1998).

9. U.S. CONST. amend. IX.

among scholars and jurists was that the Ninth Amendment lacked any kind of identifiable and relevant history.[10] Despite the lack of historical evidence regarding its original understanding and application, Justice Goldberg nevertheless concluded that the "other rights" referred to by the Ninth Amendment included libertarian rights, such as the right to privacy—and that these rights were enforceable against the states.[11]

Although neither the majority opinion in *Griswold* nor the majority opinions in later privacy cases like *Roe v. Wade*[12] was actually premised on the Ninth Amendment, the Clause was widely viewed as providing critical textual and rhetorical support for the right to privacy.[13] It was perhaps inevitable, therefore, that the Ninth Amendment would become a subject of intense examination when nominees to the Supreme Court appeared before the Senate Judiciary Committee.

When the Committee asked Judge Bork about the Ninth Amendment, he replied:

> I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an inkblot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the inkblot if you cannot read it.[14]

Notice that Judge Bork did not equate the Ninth Amendment with an inkblot. He equated a judge confronting an ambiguous text with an ambiguous history with a judge confronting an inkblot. Throughout his testimony, Judge Bork spoke of being open to new historical evidence.[15] Absent evidence of the original understanding of the text, however, a principled originalist judge has no authority to interfere with the political process. Judicial authority is derived from and limited by the meaning of the text as understood by those with the sovereign authority

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10. *See* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 598–99 (2005).

11. Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

12. 410 U.S. 113 (1973).

13. *Id.* at 120–22, 129, 152; *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring)

14. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 224 (1987) (statement of Judge Robert H. Bork).

15. *Id.*

to entrench fundamental law. Absent an understanding of the people's sovereign will, courts lack authority to interfere with the political process.

Nonetheless, when applied to the Ninth Amendment, Judge Bork's approach seems to present a bit of a problem. Until very recently, the consensus view was that the Ninth Amendment was born in obscurity and drifted at sea for two hundred years until washing up on Justice Goldberg's shore in 1965.[16] If this were true, then the Clause could never be applied—at least not by a judge committed to the original understanding of the text. Judge Bork's position thus appears to erase the Ninth Amendment from the Constitution altogether—at least as an enforceable text.

The beauty of historical inquiry, however, is that the endeavor is cumulative—and the door is never closed on additional discovery. In the case of the Ninth Amendment, a growing body of evidence uncovered in the last few years reveals that the "historical obscurity" model of the Ninth Amendment is almost embarrassingly incorrect.[17] There are literally hundreds of citations to, and discussions of, the Ninth Amendment in federal and state court decisions throughout the nineteenth and early twentieth centuries.[18] All of these cases link the Ninth Amendment with the Tenth as together establishing a zone of state autonomy.

This view goes all the way back to the Founding. The original draftsman of the Ninth Amendment, James Madison, viewed the Ninth as working alongside the Tenth Amendment in a manner preserving the right to local self-government. In a speech delivered to the House of Representatives while the Bill of Rights remained pending in the States, Madison declared that the Ninth Amendment represented a rule of strict construction of federal power—one which preserved the people's retained right to regulate local matters free from federal inter-

16. *See* Lash, *supra* note 10, at 598.

17. *See* Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 101 (2007); Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. (forthcoming 2007); Lash, *The Lost Jurisprudence*, *supra* note 10; Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004).

18. *See* Lash, *supra* note 10.

ference.[19] As Madison put it, the Tenth Amendment restricts the federal government to the powers enumerated in the Constitution, and the Ninth Amendment guards "against a latitude of interpretation" when it comes to interpreting the scope of those powers.[20]

Finally, there has been renewed scholarly interest in the first Supreme Court opinion discussing the Ninth Amendment, written by no less a judicial luminary than Justice Joseph Story. In an opinion that remained influential for over a century, Justice Story described the Ninth Amendment as calling for the preservation of concurrent state power whenever possible.[21]

All of this historical evidence reflects an original understanding of the Ninth Amendment as a federalism provision protecting the people's retained right to local self-government. It turns out that the Founders were indeed committed to the protection of natural rights—but they were even more committed to leaving the protection of such retained rights to the people of the several States.

None of this history was known at the time of Judge Bork's confirmation hearings before the Senate Judiciary Committee, or when Judge Bork repeated the same general view of the Ninth Amendment in *The Tempting of America*.[22] Even there, however, Judge Bork tentatively suggested that the Ninth Amendment might well be viewed as a companion to the Tenth in preserving rights placed in state constitutions.[23] In general Judge Bork concluded that the evidence simply did not then allow for any definite conclusions—and certainly did not support Justice Goldberg's reading of the Ninth Amendment in *Griswold*.[24]

In this, Judge Bork's instincts and approach have been vindicated. Indeed, his position stands as an example of how an originalist judge should approach a text whose history is either ambiguous or missing altogether. When faced with such a

19. *See* James Madison, Speech on the Constitutionality of the Bank of the United States (Feb. 2, 1791), *in* JAMES MADISON: WRITINGS 480, 489 (Jack Rakove ed., 1999).

20. *Id.*

21. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 48–50 (1820) (Story, J., dissenting).

22. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 185 (1990).

23. *Id.*

24. *Id.*

situation, the temptation is to associate the text with a higher principle of some kind and proceed to enforce the principle. But without history as a guide, a judge can only assume what those principles might be—and the choice will almost certainly reflect more personal predilection than historical accuracy.

The proper stance of an originalist judge in the face of historical ambiguity, then, is one of humility. If the original meaning of the text remains obscured, then courts lack authority to use the text to interfere with the political process. Put another way, in a case of historical ambiguity, the very legitimacy of judicial review is obscured—as if by an inkblot.

In such a case, originalism calls for a judge to stay his hand pending further investigation and analysis. Such an approach does not ignore the text, much less erase it from the Constitution. It simply ensures that judicial action will be grounded upon the identified sovereign will of the people themselves.

ON THE HYPOTHESES THAT LIE AT THE FOUNDATIONS OF ORIGINALISM

JOHN HARRISON*

Constitutional law, as taught in American law schools today, is primarily a course in religious indoctrination. Stories are told about the gods and heroes that in part convey information, but mainly shape the character of the students, teaching them appropriate emotional reactions so that they can be good members of the community.

My constitutional law teacher did not do it that way. He rejected the gods of the city. He brought in new gods. And he corrupted the young. Thirty years later, still corrupt but no longer young, I will do as my constitutional law teacher taught me, and disagree with him.

One of the questions considered by the essays collected in this volume is: "Is Originalism an effective bulwark against judicial activism? Or, is the approach just as susceptible to indeterminacy and abuse as any other judicial philosophy?" On that score, Robert Bork, my constitutional law teacher, says:

> The interpretation of the Constitution according to the original understanding . . . is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people. Only that approach can lead to what Felix Frankfurter called the "fulfillment of one of the greatest duties of a judge, the duty not to enlarge his authority."[1]

I do not think that is true. I am deeply skeptical of the capacity of any methodology to constrain any interpreter and thereby to keep Americans from doing what they love to do, which is to find that their Constitution is good, and, therefore, contains what it needs to contain. I also have a second-order disagreement with that claim: I do not think it is very impor-

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1. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 159–60 (1990).

tant. I will mainly discuss my grounds for skepticism about the substance of Bork's claim concerning originalism, and then briefly consider whether originalism's capacity to constrain interpreters is an important question.

Can originalism, or any methodology, keep interpreters from interpreting the Constitution along the lines that they think good? I will give three grounds for thinking that it cannot, each of which relates to one of three slightly different ideas of what originalism is.

Originalism is often understood as giving special place to the views of people at the point of origin in time of a legal text. Originalism means following the views of those people. If that is what originalism means, and if originalism is constraining, then people who had to be originalists because of their location in time, for example because they were located right after the Constitution was ratified, would have been more constrained than subsequent interpreters. That is unlikely, so it is unlikely that originalism in this sense is constraining.

One way to see how unlikely is to read the first volume of David Currie's wonderful books about the Constitution in Congress.[2] In that book, Currie recounts and analyzes in brilliant detail the arguments about the Constitution that took place when it was still new, at a time when every interpreter's methodology, whatever it was, *had* to be "originalist," because the origin had been so recent. One lesson of Currie's books, including that first volume about the time of the Constitution's origin, is that interpreters' positions on constitutional questions overwhelmingly lined up with what they thought were good ideas.[3]

Another example comes, not from the early history of the primary document, but from the early history of the first of the three Reconstruction Amendments, the Thirteenth Amendment. That Amendment was proposed by Congress in the late

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2. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1997).

3. One example involves an issue that is still with us today: whether Congress may designate its own officers, including the Speaker of the House and President Pro Tempore of the Senate, to act as President when both the President and Vice President are unavailable. As Currie explains, views on that question were strongly influenced by the Senators' and Representatives' views on Secretary of State Thomas Jefferson, who likely would have been first in line if the congressional officers were excluded. *Id.* at 139–44.

winter of 1865 and ratified in December of that year.[4] Within a year of its proposal, and within less than a year of its adoption, there was a major fight over what it meant. The primary question left unclear by the Amendment's text was whether it went beyond eliminating the forced labor relationship of master and slave, and also affected legal rights other than pure self-ownership.[5] An especially important aspect of that issue was whether the Amendment entitled freed slaves to all the civil rights of other free people.[6]

There was a major debate about that last question immediately after the ratification of the Thirteenth Amendment, one that started within weeks of the Amendment's adoption. Soon after its ratification, Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee and a leading proponent of the Amendment, introduced legislation that would become the Civil Rights Act of 1866.[7] That legislation forbade race discrimination with respect to civil rights, ensuring that freed slaves would have the same civil rights as white people. Senator Trumbull and most of the supporters of the legislation argued that Congress had power to enact it under Section 2 of the Thirteenth Amendment, because of the connection between slavery and race discrimination with respect to civil rights.[8] There was a hard struggle over the Civil Rights Act's constitutionality, in Congress and with President Johnson, over whose veto it was eventually adopted.[9] In all the debates over the Civil Rights Act, the participants' views on the constitutional question lined up significantly (not exclusively, but mainly) with their views as to what was sound policy. Those participants were *all* originalists; they had to be, because there had been no time in which to become anything else. They were still

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4. On January 31, 1865, the House joined the Senate in voting, with a two-thirds majority, to propose the Amendment to the States for ratification. MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 205–07 (2001). Ratification followed promptly, and on December 18th, the Secretary of State issued a proclamation that the necessary three-fourths had ratified and the Amendment had become part of the Constitution. *Id.* at 233.

5. *Id.* at 234.

6. *Id.* at 234–36.

7. *Id.* at 234.

8. *Id.*

9. *Id.* at 233–39.

at the origin point. They do not seem to have been much constrained by their status as originalists.

The second understanding of originalism that I will address is more specific. It takes seriously the point that "original" in this context is an adjective, as in "original intent," and that an adjective is less fundamental than the noun it modifies. The first and most important question is to identify the phenomenon one is seeking to understand, be it meaning or intention. Locating that phenomenon in time, as by wanting to understand the original version, is of secondary importance. I believe that the binding content of a legal text is found in its semantic meaning. As to the secondary question of the proper location in time of that semantic meaning, I think that the governing content is the original semantic meaning.

I am originalist in that sense, but being one gives me pause, because my second ground for doubting the constraining power of originalism is a cautionary tale about a fellow seeker for the original semantic meaning. I have mentioned my constitutional law teacher. The cautionary tale is about *his* constitutional law teacher, William Winslow Crosskey of the University of Chicago. Professor Crosskey had a legal mind of immense power. He conducted prodigious research into the history and original understanding of the Constitution, and into legal and terminological conventions at the time of its adoption. He adopted an interpretive canon that for its textualist and originalist rigor I find inspiring, though as I say, I also find the ultimate story disturbing. Crosskey used as the epigraph for the first two volumes of his astonishing work, *Politics and the Constitution in the History of the United States*, this quotation from Justice Holmes: "We ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English using them in the circumstances in which they were used."[10] That was Crosskey's interpretive principle, and he applied it with tremendous ability and massive research.

In applying his interpretive principle, Crosskey discovered that the original meaning of the Constitution was that Congress was not subject to the principle of enumerated powers. It had general authority to legislate.[11] The States, however, were sub-

10. 1 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, at ii (1953).

11. *See, e.g., id.* at 391.

ject to very strong limitations, for example by a Contracts Clause that forbade both prospective and retrospective changes in the law of contracts,[12] and by a Fourteenth Amendment that imposed the Bill of Rights on them.[13] Crosskey also discovered that, although the States were subject to judicial review, there was no judicial review, or hardly any judicial review, of acts of Congress.[14]

Crosskey discovered, that is to say, that the Framers had drafted the New Deal Constitution. He discovered Franklin Roosevelt's constitution, which was the one that Crosskey himself believed in. As far as I know no one has questioned Crosskey's intellectual integrity, and certainly no one who reads the work should question his ability or the volume of his research. And I do not question his originalist, textualist interpretive canon. But apparently it did not constrain him enough to keep him from finding in the Constitution what he was looking for.

A third way of thinking about originalism assumes that originalism is the practice of originalists, as history may be thought to be the practice of historians. Originalism, on this understanding, is what a certain group of interpreters, including some judges, do. In that case, originalism should include what Robert Bork does, and what he did when he was a judge.

The example that casts doubt on the constraining capacity of originalism I will discuss here is Judge Bork's opinion in *Ollman v. Evans*.[15] That case involved a defamation action by Professor Bertell Ollman against Rowland Evans and Robert Novak, two newspaper columnists.[16] Evans and Novak had published a column in which they asserted that Professor Ollman was regarded by his peers as a political activist (he was a Marxist) and quoted an anonymous academic as saying that "Ollman has no status within the profession."[17] Ollman sued for defamation, claiming that Evans and Novak had defamed his professional reputation as a scholar.[18] The question before the D.C. Circuit was whether what Evans and Novak had written quali-

12. *Id.* at 352–57
13. 2 CROSSKEY, *supra* note 10, at 1089–95.
14. *See, e.g., id.* at 1007.
15. 750 F.2d 970 (D.C. Cir. 1984) (en banc).
16. *Id.* at 971, 973.
17. *Id.* at 987, 993.
18. *Id.* at 973.

fied as opinion rather than as an assertion of fact.[19] If it did, it came within the privilege for opinion under the First Amendment.[20] If not, it was a false assertion of fact that defamed Ollman, and he was entitled to recover damages. The majority of the court of appeals, speaking through Judge Kenneth Starr, concluded that Evans and Novak had been expressing their low opinion of Professor Ollman's conduct as an academic, not making untrue factual claims, and that there was no issue for a jury to consider.[21]

Judge Bork wrote an intellectually powerful concurring opinion, arguing that the opinion privilege was not the proper analytical category.[22] Instead of asking narrow and wooden questions about the difference between fact and opinion,[23] Judge Bork contended that the First Amendment required courts to employ a more nuanced, totality-of-the-circumstances balancing test that would determine whether the speech in question was the kind of expression that should be protected.[24]

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19. *Id.* at 971.

20. *Id.* at 975 n.8.

21. *Id.* at 987–92.

22. *Id.* at 993 (Bork, J., concurring).

23. *Id.* ("Any such rigid doctrinal framework is inadequate to resolve the sometimes contradictory claims of the libel laws and the freedom of the press.").

24. *Id.* at 997 ("The only solution to the problem libel actions pose would appear to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury. This requires a consideration of the totality of the circumstances that provide the context in which the statement occurs and which determine both its meaning and the extent to which making it actionable would burden freedom of speech or press. That, it must be confessed, is a balancing test and risks admitting into the law an element of judicial subjectivity. To that objection there are various answers. A balancing test is better than no protection at all." (citation and footnote omitted)).

It is hard to miss Judge Bork's ironic glee in rejecting "old categories which, applied woodenly, do not address modern problems," *id.* at 995, and especially in clashing with then-Judge Scalia, who dissented. According to Judge Bork,

> Judge Scalia's dissent implies that the idea of evolving constitutional doctrine should be anathema to judges who adhere to a philosophy of judicial restraint. But most doctrine is merely the judge-made superstructure that implements basic constitutional principles. There is not at issue here the question of creating new constitutional rights or principles, a question which would divide members of this court along other lines than that of the division in this case. When there is a known principle to be explicated the evolution of doctrine is inevitable. Judges given stewardship of a constitutional provision—such as the first amendment—whose core is known but whose outer reach and contours are ill-defined, face the never-ending task of discerning the meaning of the provision from one case to the next.

Id.

Judge Bork's argument was that changes in the practical effects of defamation law, in particular the possibility of large jury awards against people who spoke their minds, were a threat to the freedom of speech as the framers of the First Amendment understood it, and that they intended the Amendment to vindicate.[25] Because of those changed circumstances, it was necessary to adjust the doctrine so that it would continue to produce the result the framers wanted, adapting the ground-level legal rules to changes in their practical consequences.

One can agree with Judge Bork's argument or not, but methodologically it is perfectly good originalism. Formulated more specifically, it is purposivism, taking as normative the original

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25. As Judge Bork explained:

> We know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the first amendment. But we do know that they gave into our keeping the value of preserving free expression and, in particular, the preservation of political expression, which is commonly conceded to be the value at the core of those clauses. Perhaps the framers did not envision libel actions as a major threat to that freedom. I may grant that, for the sake of the point to be made. But if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should not judges adapt their doctrines? Why is it different to refine and evolve doctrine here, so long as one is faithful to the basic meaning of the amendment, than it is to adapt the fourth amendment to take account of electronic surveillance, the commerce clause to adjust to interstate motor carriage, or the first amendment to encompass the electronic media? I do not believe there is a difference.

Id. at 996. The relevant change in circumstances was an increased threat to freedom of the press from large defamation awards:

> Instead, in the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose a self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the first amendment most certainly would not permit. *See* [Anthony] Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 Colum.L.Rev. 603 (1983). It is not merely the size of damage awards but an entire shift in the application of libel laws that raises problems for press freedom. *See* [Rodney A.] Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel,* 132 U.Pa.L.Rev. 1 (1983). Taking such matters into account is not, as one dissent suggests, to engage in sociological jurisprudence, at least not in any improper sense. Doing what I suggest here does not require courts to take account of social conditions or practical considerations to any greater extent than the Supreme Court has routinely done in such cases as *Sullivan*. Nor does analysis here even approach the degree to which the Supreme Court quite properly took such matters into account in *Brown*, 347 U.S. at 492–95."

Id. at 996–97 (footnotes omitted).

purpose. It attributes to the creators of a legal norm, here a text, a particular goal that they were trying to accomplish and says that those who are applying the norm must apply it so as to achieve the creators' goal.[26]

That is entirely unexceptionable reasoning, but consider how it works. The Judge began with the text of the First Amendment, which stands for a value. Judge Bork then attempted to discern that value by understanding the political theory and preferences of the people who created it. He understood the value so derived as an outcome state with respect to the practical availability of free speech.[27] Then he assessed the practical effects of different legal doctrines concerning defamation, and concluded that the practical effect of the existing doctrine, the one his court was applying, was insufficiently protective of speech. In order to achieve the practical effect that the First Amendment's framers adopted as their goal or value, it was necessary to devise a different doctrine.

As I indicated, that argument is, in form, perfectly legitimate purposivist originalism (or originalist purposivism, if you prefer nouns to adjectives). The methodology it employs is not very constraining, however, because of the moves that it licenses. Consider how one could reason in this fashion about the Fourteenth Amendment. One can reasonably say, first, that the goal or value that its framers were trying to achieve, or at least one of their main goals or values, was fully to integrate black Americans into the free market economy. That was the outcome state they were trying to achieve. Much evidence supports that formulation of the framers' goal,[28] just as much evidence supports Judge Bork's view concerning the goal of the First Amendment's framers.

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26. *Id.* at 996 ("A judge who refuses to see new threats to an established constitutional value, and hence provides a crabbed interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty. That duty, I repeat, is to ensure that the powers and freedoms the framers specified are made effective in today's circumstances. The evolution of doctrine to accomplish that end contravenes no postulate of judicial restraint.").

27. It is not clear whether Bork understands the outcome state as a set of incentives concerning expression or as the actual production of expression. More likely it is the former.

28. *See* James W. Ely, Jr., *"To Pursue Any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 U. PA. J. CONST. L. 917, 932 (2006) (describing the importance of economic rights to the framers of the Fourteenth Amendment).

One might also conclude, as an empirical matter, that in order to fully integrate black Americans into the free market economy it is necessary, or at least permissible, to employ racial preferences in higher education. That is a judgment about the practical effects of possible legal rules, just like Judge Bork's judgment about the practical effects of possible legal rules governing defamation. Justice O'Connor almost certainly believed it when the Court decided the Michigan affirmative action cases.[29] That practical judgment is controversial, and many conservatives strongly disagree with it, but it is one that reasonable people can and do embrace. The mode of reasoning that Judge Bork adopted in *Ollman* can thus quite legitimately lead to Justice O'Connor's position in the Michigan cases.[30] Others will formulate the goal of the Fourteenth Amendment differently, and come to different conclusions about the effects of legal rules, or both. Purposivist originalism will lead them to quite different conclusions, conclusions also consistent with that methodology.

Methodologies are not strongly constraining. That is in large measure the burden of American constitutional history. Having said that, and having disagreed with Judge Bork on the first-order question, I will also disagree with him on a second-order question, and say that I do not think that the constraining capacity of methodologies is an important question, at least when one is deciding whether originalism or any other interpretive approach is the correct interpretive approach. That is because the reasoning according to which originalism is correct because it constrains judges is itself wrong in principle. That reasoning is wrong in principle because it commits one of the characteristic errors of American constitutional theory. That error is to develop a theory of judicial review rather than a theory of the Constitution.

Theories of judicial review routinely begin by assuming that there will be extensive judicial power, and then ask how that power should be exercised. If you think that judicial subjectivity is bad, as many do, and if you assume that there will be judicial review, you may well ask if there is a methodology that

29. *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

30. *See Grutter*, 539 U.S. at 306 (approving use of racial considerations in law school admissions); *Gratz*, 539 at 276–80 (O'Connor, J., concurring).

can constrain judicial subjectivity. If you believe that originalism is such a methodology, you may favor originalism.

The problem with this line of reasoning is that it is not a theory of the Constitution at all; it is a theory of judicial review. The right way to conduct constitutional theory is to begin with more fundamental questions. On this point I have the authority of Robert Bork, in *Neutral Principles and Some First Amendment Problems*,[31] a short piece that was, for a brief time in 1987, the most famous law review article ever written.

Bork's mode of reasoning in *Neutral Principles* does not take judicial review for granted. Instead, it goes to the foundations of the American constitutional system, seeking the basic premises that ground the written Constitution itself. From those premises Bork derives principles about judicial review, among other features of the system.[32] In particular, he derives from foundational premises conclusions about the conditions under which judicial review can be legitimate.[33] That is a genuine constitutional theory, not just a theory of judicial review. It is, in my view, the sound mode of reasoning.

It is astonishing that Bork was able to write that article, especially given the intellectual circumstances of the time. A scholar primarily of antitrust law, without the benefit of the relatively more sophisticated conceptual tools that are available to us, many years later, in thinking about the Constitution, Bork came to the field and, largely on his own, reasoned in the right way when so many were reasoning in the wrong way. While others were taking judicial review for granted, Bork started with more fundamental considerations and came to conclusions that remain powerful and persuasive today.[34] It is a remarkable achievement.

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31. 47 IND. L.J. 1 (1971). In the first paragraph of that article, Professor Bork foreshadowed the importance of the decision the Senate would make in 1987, and offered an explanation: Because of a lack of a theory of constitutional law, "courts are without effective criteria and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes." *Id.* at 1.

32. *Id.* at 2–4.

33. *Id.* at 4. ("If it does not have and rigorously adhere to a valid and consistent theory of majority and minority freedoms based upon the Constitution, judicial supremacy, given the axioms of our system, is, precisely to that extent, illegitimate.").

34. This is on display in the subtitle of a work published at the end of the decade in which Bork wrote and that remains profoundly influential today: JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

There is a parallel for that achievement with which I will conclude. When he was an old man, Sir Isaac Newton had a number of conversations with his niece's husband, a fellow named John Conduit.[35] Conduit later wrote a biography of Newton, based in part on those conversations with the great scientist.[36] One of the notes he made from his talks with Newton concerned Newton's invention of the reflecting telescope, and the construction of the first such instrument. Conduit's note reads,

> I asked him where he had it made, he said he made it himself, & when I asked him where he got his tools said he made them himself & laughing added if I had staid for other people to make my tools & things for me, I had never made anything.[37]

Fortunately for us, and for America, Robert Bork did not wait for anyone else. He just did it himself.

35. JAMES GLEICK, ISAAC NEWTON, at vi, 193 (2003).
36. *Id.*
37. *Id.*

THE MISUNDERSTOOD RELATIONSHIP BETWEEN ORIGINALISM AND POPULAR SOVEREIGNTY

SAIKRISHNA B. PRAKASH*

Since *The Tempting of America* was published,[1] many originalists, seeking to justify their preference for adhering to the original meaning of the Constitution, have taken up the banner of popular sovereignty.[2] The Constitution, we are told, was ratified by "We the People."[3] According to many, the popular ratification of the Constitution and its many amendments grants the Constitution an enduring legitimacy.[4] Because popular sovereignty is said to be the principal basis of the Constitution's legitimacy, one ought to follow the meaning ascribed to the Constitution by "They the People"—namely, those who ratified the Constitution and its amendments over the course of 200 years. In other words, if the American people gave the Constitution a continuing legitimacy, they also should be the ones to give it an enduring (and somewhat stable) meaning. Recently, Professor Kurt Lash asserted that popular sovereignty is the "most common and most influential justification for originalism."[5] Whether or not Professor Lash is correct, his assertion seems plausible.

This Essay does not take issue with those who celebrate popular sovereignty. Nor does it deny that the Constitution's

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1. ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

2. *See, e.g.*, PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 63–64 (1992).

3. *Id.*

4. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999). For a discussion of the relationship between originalism and popular sovereignty, see JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 190–91 (2005).

5. Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007).

legitimacy arises by virtue of numerous acts of ratification, most of which took place several generations ago. Those are debates for another day. Instead, this Essay contests the interpretive assertion that proponents of popular sovereignty often make: that originalism is a legitimate means of making sense of the Constitution merely or primarily because of the manner in which the Constitution was ratified and amended.[6] This position unduly narrows the strength and appeal of originalism, which, properly understood, has nothing to do with how the legal document in question came into being. Legal documents generally ought to be understood through the originalist lens, whether those documents are the products of petty dictators or the united voice of the people. Indeed, *any* text or utterance, legal or not, should be understood through the originalist lens.

Originalists interested in discerning the meaning of a legal text usually ask some variant of the question: What did these provisions mean when they were enacted? Some originalists look to the lawmakers' subjective meaning: What did the actual lawmakers mean by the text that they purported to make law? Other originalists try to identify a semantic meaning, which is a sort of generic public meaning that might sometimes be distinct from what the actual lawmakers intended: What would this language mean to most ordinary people at the time?[7]

Originalists of all stripes eventually have to examine evidence that sheds light on their preferred version of original meaning. No one can properly say what a text written over two centuries ago meant at the time without examining far more than the text alone. Hence, originalists typically examine materials like Samuel Johnson's *A Dictionary of the English Language*,[8] debates from the time of the Constitution's framing and ratification, and post-ratification history (including material from Congresses, Presidents, and courts).[9] More resourceful original-

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6. *See* KAHN, *supra* note 2, at 63.

7. For a discussion of these differences, see Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

8. *See, e.g.*, Altman v. City of High Point, N.C., 330 F.3d 194, 201 (4th Cir. 2003) (opinion of Luttig, J.).

9. *See, e.g.*, Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 346–47 (1999) (Scalia, J., concurring) (citing dictionaries "roughly contemporaneous with the ratification of the Constitution" to determine the original meaning of "enumeration" in Article I of the Constitution); United States v. Lopez, 514 U.S.

ists may examine letters from the era, newspaper articles, books, and any other available document to determine original meaning.[10] After all, common usage not only establishes a public, semantic meaning; it also provides evidence of legislative intent, for lawmakers often intend the common meaning of the words they use.

But an obvious question arises once one examines something besides the text: How are we to make sense of these other sources that are being used to unearth a constitutional provision's original meaning? If one does not apply originalism to these documents but instead applies the theory of a living dictionary, a living letter, or a living *Federalist Paper*—the obvious counterparts to the living Constitution theory—then one will not really be discerning and recovering the Constitution's *original* meaning. In using modern or post-modern understandings of words and phrases in dictionaries, letters, and debates, we will have abandoned any chance of discerning the original meaning of words and phrases in the Constitution.

For good reason, therefore, originalists use originalism not only as a means of understanding the Constitution, but also as a means of understanding the documents that are used as the building blocks for discerning the Constitution's original meaning. But if originalism is justified only because of the manner in which the Constitution became law, what is the justification for using originalism to understand letters or newspaper articles? None of these were the products of popular sovereignty. They were typically written by one or a handful of persons. Dictionaries, letters, debates, and other materials were not written by "We the People." Nor were they "ratified" or given any popular legitimacy or authority.

549, 585–87 (1995) (Thomas, J., concurring) (citing dictionaries from the Founding era, Madison's notes from the Constitutional Convention, *The Federalist*, and the ratification debates to define the meaning of "commerce" in the Commerce Clause); *see also* Van Orden v. Perry, 545 U.S. 677, 686–87 (2005) (plurality opinion) (discussing the meaning of the Establishment Clause by referencing President Washington's Thanksgiving Day Proclamation).

10. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 590–91 (1995) (Thomas, J., concurring); Steven G. Calabresi, *The Originalist and Normative Case against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1084 (2005); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 16 (1999).

Some might argue that if one assumes originalism is appropriate for documents with a popular-sovereignty basis, it somehow follows that all documents useful for discerning the meaning of texts with a popular-sovereignty basis should likewise be discerned using originalism.

Such arguments, however, raise further questions. If one adopts an originalist stance towards the Philadelphia Convention records, *The Federalist*, or the Pacificus-Helvidius debates when used to shed light on the Constitution's original meaning, what method of interpretation should one use when reading these documents, not as a means for understanding the Constitution, but instead for purely historical interest? If a student of history or political science wishes to understand the meaning of *Federalist No. 10*, without regard to the light it might shed on the Constitution, is she free to adopt a non-originalist approach because she is not using the source to understand the Constitution?

Most ordinary people would conclude that one should read *The Federalist* by trying to recapture its original meaning. What was Madison trying to communicate when he talked about how a large republic might better counteract the influence of faction?[11] Once one knows what he was trying to communicate, one will have a better understanding of *Federalist No. 10*.

This contention is hardly revolutionary. How do historians, students, and ordinary citizens make sense of documents like the Gettysburg Address, Washington's Farewell Address, and the Magna Carta? Like good originalists, they try to discern original meanings. Few advocate reading such sources as if they were "living documents," capable of different meanings that reflect changing times and preferences. These documents mean something irrespective of whether their readers are socialists or libertarians, statists or free-marketers. No doubt there are great and important debates about what these documents really mean, but there seems to be no debate about whether originalism or some other interpretive method ought to be used to make sense of them. Such arguments are only made in the context of the Constitution and laws that purport to have continuing legal validity.

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11. THE FEDERALIST NO. 10 (James Madison).

Indeed, when discussing the Articles of Confederation, the Constitution's predecessor, does anyone claim that its meaning has changed over time and now means something quite different than it meant in 1950? Or that it meant something different in 1850 than it did in 1788? Most people, even the most fervent non-originalists, understand that archaic legal documents have a static meaning arising out of their original context.

If this Essay's argument about how people typically make sense of documents and utterances is true, originalism has no special claim to legitimacy merely because the Constitution was the product of an act of popular sovereignty. Legal documents produced by a tyrant, ruling without any popular mandate and acting directly contrary to popular will, should likewise be understood as they were originally understood. Old dictionaries, speeches, and letters ought to be understood the same way.

This is not to suggest that popular sovereignty is irrelevant to society's willingness to treat the Constitution as law. As noted at the outset, many might choose to adhere to a legal document because of the manner in which it was made law. Documents adopted by democratic means will strike many as having some unique entitlement to legitimacy, even when they were democratically adopted generations ago, and even though many people at the time were excluded from participating in the adoption of those documents.[12] Indeed, for many, the Constitution has a special claim to legitimacy because of the manner of its adoption, however imperfect that process may seem to modern eyes. It is also true that many regard laws made by tyrants as illegitimate precisely because of their source.

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12. In colonial America and during the early history of the United States, the franchise was restricted to white adult males. At one time or another, all of the colonies also restricted voting to Protestant Christians, and property restrictions further limited the size of the potential electorate. Scholars estimate that anywhere from 50 to 80 percent of adult white males were eligible to vote in the colonial period. Because adult white males made up 20 percent of the population as a whole, only 10 to 16 percent of the whole population might have been eligible to vote on the eve of the Revolution. Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America, in* VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 19, 20–25 (Donald W. Rogers ed., 1992).

These sorts of arguments address the normative question of whether one ought to follow some document—to treat it as binding law—because of the procedures used to adopt it. These arguments, however, have little to do with how to decipher the meaning of an ancient document. If one understands the Articles of Confederation and the ordinances and treaties enacted by the Continental Congress through the lens of originalism, even though none of those documents were the products of a process reflecting popular sovereignty, then originalism is not the proper means of understanding the Constitution merely because the latter resulted from acts of popular sovereignty. The popular foundations of the Constitution give reasons (good and bad) for accepting the Constitution as the continuing "supreme Law of the Land," but they supply no sound reason for believing that originalism is the proper method for discerning the Constitution's meaning.

Indeed, originalism, properly understood as an interpretational methodology, can never hope to provide an argument for a document's authority or legitimacy. It can no more provide such an argument than a key used to decipher a coded message can command the decoder to follow the coded message's instructions. Meaning tells us what somebody was trying to convey. But the meaning of a communication, by itself, does not necessarily provide a compelling reason to do anything.

The claims made here against the use of popular sovereignty as a justification for originalism can be generalized. *Any* theory that supposes that originalism is uniquely qualified or fit to determine the meaning of the Constitution has the same sets of problems as the prevalent popular sovereignty justification. Suppose that one thinks that the Constitution should be understood in light of its original meaning because of the supermajoritarian ratification process,[13] the excellence of the Constitution's provisions,[14] or the supposed legitimacy conferred by the many acts of informed and extraordinary higher law making that generated the Constitution,[15] to take but three other

13. *See* WHITTINGTON, *supra* note 4, at 130.

14. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 3–5 (2004) (arguing that the Constitution is legitimate because it contains adequate procedures to protect "natural rights").

15. *See* WHITTINGTON, *supra* note 4, at 111.

theories. Adherents of these theories must explain how we ought to understand the documents that help us discern the original meanings, almost none of which will enjoy the features that supposedly favor originalism as applied to the Constitution. Once one posits a unique justification for originalist methodology as applied to the Constitution, one has to explain how one derives meaning from all other documents relevant to unearthing the Constitution's original meaning.

It is doubtful that narrow justifications for originalism—popular sovereignty, super-majoritarian ratification process, and so on—provide sound and unique reasons for using originalism to determine the Constitution's meaning. Originalism is not a narrow, specialized technique that has unique (or even extra) purchase in the context of documents meeting some exacting procedural or substantive criteria. It has a broader appeal as a theory of interpretation, and it should not be tied to controversial normative arguments that have more to do with whether we ought to adhere to the rules found in the original Constitution.

But perhaps I am woefully mistaken in all this. Those originalists who disagree might choose to edify me. Such originalists might try to explain the methods by which we are to decipher the meaning of writings advancing their more narrow originalist theory, as well as ordinary texts like statutes, old letters, and so on. If popular sovereignty uniquely justifies originalism as applied to the Constitution, then we need other interpretive theories to help us make sense of all the other documents and utterances we encounter in the law and in ordinary life.

Federalist Society Conference on the Contributions of Judge Robert H. Bork

III.

LAW AND CULTURE

Slouching Towards Gomorrah: Modern Liberalism and American Decline

ESSAYISTS

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RENDER UNTO CAESAR THAT WHICH IS CAESAR'S, AND UNTO GOD THAT WHICH IS GOD'S

STEVEN G. CALABRESI*

It is a great pleasure to contribute to this Symposium with such distinguished scholars as Professors Robert George and Ilya Somin, and to comment on Judge Bork's thought-provoking book, *Slouching Towards Gomorrah*.[1] Many of the contributors to this Symposium disagree sharply on the issue of governmental efforts to enforce morality. This Essay explores that topic by seeking to shed additional light on two fundamental questions raised by Judge Bork's book. First, what is the proper relationship between law, religion, and morality? Second, is it appropriate for the government to punish adult consensual conduct that does not directly harm other individuals, such as drug dealing and possession, prostitution, suicide, and for that matter professional boxing or dueling? I will address these two topics in turn.

I. THE RELATIONSHIP BETWEEN LAW, RELIGION, AND MORALITY

There is a 2000 year old rule of law tradition in the West that dates back to ancient Roman times. Under that tradition, the Civil Law and Common Law Western Legal Traditions differ from other non-Western Legal Traditions such as the Islamic Legal Tradition in a key way. One of the Western Legal Tradition's most prominent and distinguishing characteristics is its commitment to the idea that there is and there ought to be a sharp separation between law and religion.[2] We in the West think that the law is influenced by—but is distinguishable and autonomous from—religion. We think that religious bodies ought to be free of governmental control and that the government ought to be free of control by ecclesiastical authorities. Our judges are not priests and our courts are not ecclesiastical bodies. The heads of our churches are not monarchs or heads of state. And our heads of state are not religious officials or Ayatollahs. Our lawyers study and train separately from priests. Our priests in turn study and

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1. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996).

2. *See* HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION, *reprinted in* COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW 44 (Mary Ann Glendon et al. eds., 3d ed. 2007).

train separately from our lawyers. We think that the law is independent, not only of the church, but also of the government.

This independence is key to the supremacy of the law over the government and the church. We think of the law as being a body of rules with a history of its own that grows and changes over time. It is not simply a set of rules that was divinely revealed for all time two thousand years ago. Precisely because the law is not divinely inspired, we believe, it can change over time, rather than remaining frozen in, say, the third or the ninth century A.D. as is the Islamic Sharia. For this reason, even our constitutions and bills of rights can be amended and, of course, all of our statutes can be changed. Change and belief in progress is an essential part of Western law.

Even in the Middle Ages, continental Europe had a multitude of political jurisdictions, and each of those jurisdictions was governed by private Roman law rather than by Canon law. The Pope during this period was the spiritual leader of Europe, but governmental power rested with the Holy Roman Emperor, or in various kings and dukes, rather than the church. We in the West think and have always thought that the historical continuity of the law going back to Justinian's *Corpus Juris Civilis* is linked to its supremacy over religious and governmental institutions.[3] Ancient Roman law applied to government and to ecclesiastical officials in their private law transactions. Neither the government nor the church was in this sense above the law.

These familiar points about Western legal history are important because other legal traditions around the world, both historically and in contemporary times, deny the idea that there is and ought to be a separation between law and religion. For example, many fundamentalist Muslims disagree with the Western idea that law and religion ought to be separate.[4] Some ultra-orthodox Jews in Israel disagree as well. Historically, we know that ancient Mesopotamia and Egypt combined religious and legal power in one supreme autocratic ruler. Although Western law has its roots in Judeo-Christian religious traditions,[5] it has evolved in its own distinct direction for two thousand years. This evolution did not begin with the Reformation but was evident as early as the twelfth century, when Roman law and canon law were taught as separate disciplines and when the common law in England first took hold independent of the church. Ironically, this very Western separation of law and religion may itself have Chris-

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3. *Id.* at 45.

4. *See, e.g.*, Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 381 (2006).

5. *See, e.g.*, Charles J. Reid, Jr., *The Three Antinomies of Modern Legal Positivism and Their Resolution in Christian Legal Thought*, 18 REGENT U. L. REV. 53, 53 (2005).

tian religious underpinnings. One of the cardinal teachings of the New Testament, after all, is that we ought to render unto Caesar what is Caesar's and unto God what is God's.[6]

Some Western Europeans and many traditionalist American Protestants, Catholics, Mormons, and Jews share the concern of the fundamentalist Muslims, wondering if we in the West have gone too far in separating not only law and religion but also law and morality.[7] Although the Western tradition embraces a sharp separation between law and organized religion, it most emphatically has not embraced a strict separation between law and morality. For two thousand years, most of our laws have grown out of moral ideas and intuitions. We should be grateful for this. A body of law that was not rooted in morality would be hateful and unjust. Not everything that is immoral ought to be illegal, but most of our criminal and regulatory laws must be rooted in moral intuitions, and those laws ought not themselves to be immoral. Indeed, this is why even the most extreme secularists in American society today rarely separate law from morality in practice. They rightly favor legislating morality through civil rights laws, environmental laws, hate speech laws, and bans on smoking. Their purported opposition to legislating morality is in reality opposition only to legislating certain religious moral ideas; the morality of St. Thomas Aquinas is off-limits but the morality of John Stuart Mill is perfectly acceptable. Exactly why, they fail to explain.

Whence, then, comes the misleading American shibboleth, "You cannot legislate morality"? I suspect it comes from the failure of the great social experiment that was Prohibition.[8] What people mean when they say you cannot legislate morality is that such efforts will fail if they are widely at variance with public attitudes about right and wrong. You cannot justly and successfully regulate consumption of alcohol, or, for that matter, sexual behavior that huge supermajorities of the population engage in. It is, however, a categorical error to conclude from this basic fact the further point that all efforts to govern morality must invariably fail. Government legislates morality all the time. Indeed it is moral ideas that are and must remain the basis of most of our laws.

Less clear, however, is exactly how comprehensively government can and ought to regulate morality. Should government criminalize all violations of Judeo-Christian moral teachings, including failing to give ten percent of your income to the church, failing to help the poor, failing to love your neighbor as yourself, or committing blasphemy? The Puritans of the Massachusetts Bay Colony famously

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6. *Matthew* 22:21.

7. *See* BORK, *supra* note 1, at 142.

8. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

tried comprehensively to legislate Judeo-Christian moral teachings, just as the Communists more recently tried to legislate their own twisted, Marxist version of morality. Is this kind of comprehensive religious-moral regulation by government through law a good idea?

The answer depends on one's view of human nature. If one believes that human beings are inherently good and are perfectable on earth, as did Jean-Jacques Rousseau[9] and Karl Marx,[10] all that may be necessary to achieve Utopia is to free men from the shackles of law and from centuries of conditioning in a world of private property. Rousseau and Marx taught that man is a noble savage and that all that is required to perfect him is to cast off property and tradition and give the leading role in government to committed Utopians. Some Christians have also accepted the blasphemous idea that Godly Utopias of a new chosen people can be created here on earth.

James Madison and the Framers of the American Constitution were much more cautious and realistic about human nature. Because *Slouching Towards Gomorrah* takes issue with certain aspects of the Framers' project, it is worth examining for a moment Madison's views on the nature of man and on the implications of that nature for the proper role of government. In *Federalist No. 10*, Madison noted:

> The latent causes of faction are . . . sown in the nature of man . . . . A zeal for different opinions concerning religion, concerning government, and many other points . . . ; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for the common good.[11]

Madison believed that human nature is sufficiently fallen that it is impossible to eliminate the causes of faction. The law can only regulate its effects. This is done by constructing a government in which "[a]mbition must be made to counteract ambition."[12] Madison famously argued:

> The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of

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9. Jean-Jacques Rousseau, *A Discourse on the Origin of Inequality: Appendix*, *in* THE SOCIAL CONTRACT AND DISCOURSES 118 (J.H. Brumfitt & John C. Hall eds., G.D.H. Cole trans., J.M. Dent & Sons Ltd., new ed. 1973).

10. *See generally* KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (Samuel Moore trans., Penguin Books 2002) (1888).

11. THE FEDERALIST NO. 10, at 73 (James Madison) (Clinton Rossiter ed., 2003).

12. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

> all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[13]

History has clearly proven Madison right about the fallenness of human nature, and Christian Utopians, Rousseau, and Marx tragically wrong. Human beings are not inherently good, nor are they plastic and malleable. Efforts to alter and improve human nature by squeezing round pegs into square holes leave a lot of dead and severely injured human beings. Radical attempts to remake human nature—such as the efforts of the Communists, the radical Islamists, and the Massachusetts Bay Puritans—can only lead to tragedy. There is no escaping the Fall. Government cannot produce Utopia in this world, and it ought not to try. The problem with unbounded government efforts to reform humanity is that power corrupts, and government leaders are fallen, corruptible individuals. If given total power, they will abuse that power and millions of lives will be lost or ruined along the way. It is appropriate, therefore, to be very cautious and modest about supporting ambitious, untraditional governmental efforts to legislate morality or to impose Puritan or Islamic or Marxist religious ideas as to what is the good. There is a very good chance such efforts will cause more harm than they will prevent.

Traditional regulations of morality, however, may well improve human behavior, even if they cannot make it perfect. Fanatical secularist efforts, therefore, to drive morality entirely out of the law are thus just as mistaken as are efforts to produce Utopia on earth. This is one important point made by *Slouching Towards Gomorrah.* The great problem facing America today, Judge Bork argues, is not excessive entanglement of government with religion, but excessive hesitation on the part of government to enforce moral ideas with religious underpinnings. Judge Bork's complaint is thus that since James Madison wrote *The Federalist,* each generation of Americans has become less and less shaped by religion. Today, he argues we have arrived at a state of near barbarism in some respects. This is a serious critique of the entire American project.

In analyzing this complaint, we must begin by remembering that all of our legal rules—including the basic prohibitions against murder, assault, and robbery—have religious and moral underpinnings. Applied cautiously, the way they have been applied for centuries, there is absolutely no question that religiously-inspired laws of this kind can nudge individuals into behaving substantially

13. *Id.*

better than they otherwise would. Law can thus be used modestly to nudge us in the direction of the good. This point applies not only to laws that forbid us from harming one another but also to some laws that forbid some consensual adult conduct. Law and morality are inevitably intertwined. This is good, so long as we realize that man cannot be perfected on earth, that Utopia in this world is unattainable, and that at some fundamental level we must all render unto Caesar only the things that are Caesar's, while rendering unto God the things that are God's.[14]

The content of our law is rooted in the moral precepts of our Judeo-Christian religious tradition and in the classical philosophy of ancient Greece and Rome as refined during the Renaissance, the Reformation, and the Enlightenment. It is this content that helps to make our law just and worthy of being obeyed. I doubt that anyone contributing to this Symposium—even Professor Somin—would argue that positive law that is morally rudderless and violative of all fundamental precepts of human dignity, such as the law of Nazi Germany or of Stalin's Soviet Union, ought to be obeyed. Certainly, Thomas Jefferson, the author of our Declaration of Independence, did not believe that a government that repeatedly and over a long period of time denied us God-given rights to life, liberty, and the pursuit of happiness was worthy of our loyalty. Jefferson did recognize, however, that the case for revolution was not to be lightly or casually made, and that only great violations of human freedom could justify a revolution. Such violations of human freedom are occurring now in a few countries like Iran, and it ought to be the task of the West to rectify those violations.

II. GOVERNMENT PUNISHMENT OF "VICTIMLESS" CRIMES

At some level, then, government and law ought to promote morality for the laws to be just and to command our support. This is most obviously true of those laws preventing one person from directly harming another person by depriving that person of life, liberty, or property.[15] There is widespread consensus in the West today that laws preventing one person from directly harming another person are desirable ways for government to promote morality.

A harder question over the last 150 years concerns laws seeking to promote morality when an individual has not directly harmed another.[16] This includes government efforts to promote morality by

14. *Matthew* 22:21.

15. *See* JOHN STUART MILL, ON LIBERTY 73 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

16. *See, e.g.*, BORK, *supra* note 1, at 56–65 (discussing deficiencies associated with limiting laws to those prohibiting an individual from directly harming another individual).

preventing people from harming themselves by, for example, drinking alcohol, smoking cigarettes, cigars, and pipes, using other dangerous drugs like heroin, opium, or cocaine, gambling, engaging in prostitution, committing suicide, consuming obscene pornography, driving cars without seatbelts on, or engaging in consensual dueling, professional boxing, gladiatorial matches to the death, or for that matter playing professional football. Should these "victimless" but dangerous and self-destructive activities be legalized where they are now outlawed, or ought we to decline to criminalize them where they are not currently illegal? In most of Western Europe, so-called victimless crimes substantially have been legalized,[17] but in the United States the picture is more mixed. Some activities—alcohol and tobacco consumption, professional boxing, and gambling—are mostly legal. Other activities—assisted suicide and dealing in and possessing drugs—are still illegal, although the laws are imperfectly enforced. Is this situation good? Ought government to promote morality by outlawing these supposedly victimless behaviors?

To begin, the behaviors in question are not, in fact, totally victimless. The most common victims of so-called victimless behavior are the children and other family of the perpetrator. When people abuse alcohol, tobacco, or drugs, commit suicide, or behave in other self-destructive ways, they hurt their children, spouse, parents, siblings, and friends. The victimless crime is to some extent a fiction. Self-destructive behavior often harms others.

People who engage in these activities also damage themselves, another moral and religious wrong, albeit not one that ought always to be legally policed. Our religious obligations to love God and to love our neighbors as ourselves[18] require that we not abuse our bodies or our souls. Actively harming oneself is morally problematic, although there are admittedly gray areas where risky behavior may be warranted. That is, after all, why we outlaw dueling but allow professional boxing and football, or why we outlaw obscenity but protect the artistic depiction of nude bodies. Can the law police risky, self-destructive behavior to allow what is valuable and prohibit what is

17. *See, e.g.*, Nora V. Demleitner, *Is There a Future For Leniency in the U.S. Criminal Justice System?*, 103 MICH. L. REV. 1231 (2005) (book review) (noting that European countries have decriminalized many moral offenses, including prostitution and drug offenses); Martti Lehti & Kauko Aromma, *Trafficking for Sexual Exploitation*, 34 CRIME & JUST. 133, 141 (2006) (noting that many European countries, led by the Netherlands and Germany, have decriminalized prostitution); *Portugal legalizes drug use*, BBC NEWS, July 7, 2000, http://news.bbc.co.uk/hi/english/world/europe/newsid_823000/823257.stm (noting that Portugal has decriminalized consumption of marijuana and heroin and that Spain and Italy also have decriminalized possession of small quantities of illicit drugs); Derek Humphry, *Assisted Suicide Laws Around the World*, EUTHANASIA RESEARCH & GUIDANCE ORGANIZATION, Mar. 1, 2005, http://www.assistedsuicide.org/suicide_laws.html.

18. *Mark* 12:31.

not without bringing on the suffocation of a totalitarian state? The answer is a qualified yes—provided that we recognize several major limitations of the law when it comes to paternalistic regulation.

The first important limitation is that government efforts to outlaw so-called victimless crimes may give prosecutors enormous discretion in enforcement—discretion that can and will be abused to the detriment of unpopular individuals and minorities. For example, the problem with a law against buying alcohol is that a lot of people will violate it at some point, but not everyone will be prosecuted and jailed. The people who are prosecuted and jailed may be selected for reasons that turn out to be fairly arbitrary, and when that happens they may deserve to be released.[19]

Second, some paternalistic laws are widely disobeyed, causing many people to hold the legal system in low regard. Widely disobeyed laws foster disrespect for the entire legal system, leading some people at the margins to disobey other laws. It is not costless to put laws on the books that nobody follows.[20] This argues against paternalistic laws as ambitious as was Prohibition.

Third, rare enforcement of laws may not provide the individuals against whom they are enforced with actual notice that what they did was prosecutable. A due process question arises when the government prosecutes people for laws not usually enforced.[21] This suggests that we need a doctrine of desuetude to deal with laws that have become nullities as a result of decades of non-enforcement.

The conclusion usually drawn from the reservations just mentioned is that "victimless" offenses ought to be made legal. Thus, many libertarians argue for legalizing drugs, prostitution, and assisted suicide, just as the repeal of Prohibition legalized the sale of alcohol.

I oppose this solution. Too many people look to the law for guidance regarding what is right and moral for outright, blanket legalization of morals offenses to be desirable. There was an explosion in gambling when it was legalized in the 1970s. Many people concluded that because gambling was legal, it was also morally unproblematic.[22] Even state governments became confused about the issue. Indeed, many state governments now sponsor gambling in the form of lotteries and encourage their citizens to gamble through

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19. *See* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1875–76 (2000).

20. *See id.* at 1877–78, 1891.

21. *See* Steven G. Calabresi, Lawrence, *the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1115–18 (2004).

22. *Cf.* Stuntz, *supra* note 19, at 1878–79 (noting the correlation between public norms with respect to gambling and its decriminalization).

lottery advertising.[23] In my humble opinion, the legalization of gambling was a mistake. We should learn from that mistake and not repeat it with other victimless behaviors.

Legalizing drugs, prostitution, and assisted suicide could and probably would produce an explosion of such self-destructive behavior. After legalization, the government could itself encourage immoral behavior: (1) by selling drugs in state-owned, for-profit stores (the way some states continue to sell alcohol), (2) by running state-owned brothels to raise tax revenue, or (3) by encouraging elderly Medicare patients to consider assisted suicide to keep welfare costs down. Like it or not, the law teaches moral lessons, and people, especially in America, are quite prone to believe that what is legal is also moral.[24]

One solution is to keep legal prohibitions on traditionally proscribed self-destructive adult consensual behavior in place but to make the penalties better proportioned to the offenses than we in the United States have done up until now. I agree with that course of action.

Thus, while I oppose legalization of heroin, opium, or cocaine, I also adamantly oppose the draconian sentences that we impose for narcotics offenses. I oppose legalization of prostitution, but I also oppose jail sentences, as opposed to fines, for prostitutes or their customers. I oppose government efforts to teach that society ought to be indifferent to the choice of homosexuality over heterosexuality, but I also oppose laws criminalizing homosexual sodomy. There are many ways in which the law can send a moral message without imposing punishments that are disproportionate to the offenses committed.

The government has another important tool, in addition to the law, that it ought to use more often: advertising. One of the most successful moral campaigns of all time has surely been the federal government's anti-smoking advertising. Smoking and lung cancer rates have decreased dramatically as a result, and social disapproval of smoking is much higher now than it ever was in the 1960s. Although part of the reason for the decline is that consumers are much better informed today about the health hazards of tobacco than they used to be,[25] advertising against tobacco has

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23. *See* Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 60–63 (1992).

24. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 269 (1994).

25. *See* Matthew C. Farrelly et al., *Getting to the Truth: Evaluating National Tobacco Countermarketing Campaigns*, 92 AM. J. PUB. HEALTH 901 (2002) (showing that the American Legacy Foundation's "truth" campaign regarding the health effects of smoking has led to an increase in anti-tobacco attitudes); John P. Pierce & Elizabeth A. Gilpin, *News Media Coverage of Smoking and Health Is Associated With Changes In Population Rates of Smoking Cessation But Not Initiation*, 10 TOBACCO CONTROL 145 (2001)

also changed the climate of social opinion about the morality of smoking. Advertising about the evils of other victimless behaviors, such as drug abuse, could be equally successful. Indeed, imagine the effects on gambling if government advertising warned people that buying lottery tickets was an immoral waste of money instead of encouraging them to buy those tickets.

III. A PARTING SUGGESTION

I conclude this Essay with a suggestion regarding the most important law, morality, and religion issue of our day: we should again criminalize first- and second-trimester abortions, with punishment in the form of steep and ruinous fines falling on abortion providers and not on women seeking abortions. Even more than drug abuse, abortion is far from a victimless crime. There is, after all, a victim in the form of an unborn child, as Judge Bork observed.[26] Even assuming that advocates of a constitutional right to abortion are sincere when they insist, in former President Bill Clinton's words, that abortion ought to be safe, legal, and rare,[27] the government should provide educational advertisements about the procedure. What better way to start making legal abortions rare than for the government to educate its citizens about fetal development and to encourage women to consider adoption rather than abortion? How many women decide to have abortions without knowing how early fetal hearts beat and brainwaves develop, or how early unborn children acquire the capacity to feel pain? Should not these facts be as widely disseminated as facts about the harms caused by smoking? Is not a society that witnesses a million abortions each year,[28] when many couples are yearning to adopt,[29] at least as morally uninformed as a society that widely tolerated smoking?

If our government is going to regulate morality, it should get out of the business of advertising lottery tickets and into the business of advertising the evils—or even the objective facts—of abortion.

(showing that increased coverage regarding the health effects of smoking beginning in the 1960s led people to stop smoking).

26. BORK, *supra* note 1, at 175–77 (1996).

27. President William J. Clinton, Remarks Accepting the Presidential Nomination at the Democratic National Convention in Chicago (Aug. 26, 1996), http://www.presidency.ucsb.edu/ws/index.php?pid=53253.

28. LAWRENCE B. FINER & STANLEY K. HENSHAW, ESTIMATES OF U.S. ABORTION INCIDENCE, 2001-2003, at tbl.1, (2006), *available at* http://www.guttmacher.org/pubs/2006/08/03/ab_incidence.pdf.

29. *See* Mary Ann Davis Moriarty, *Addressing In Vitro Fertilization and the Problem of Multiple Gestations*, 18 ST. LOUIS U. PUB. L. REV. 504, 507 n.33 (1999).

SLOUCHING TOWARDS GOMORRAH REVISITED

ROBERT P. GEORGE*

When *Slouching Towards Gomorrah*[1] first appeared, it bore on its dust jacket the following words of mine praising the book and its distinguished author:

> The ideological triumph of liberalism among American elites, far from bringing the individual and social enlightenment it promised, has produced unprecedented decay. The principal victims of this decay are the poorest and most vulnerable among us, those most in need of a healthy culture. Bork courageously and boldly states these truths. A judge as wise as Solomon has become a prophet as powerful as Isaiah.[2]

That is what I thought then, and I believe it even more firmly now. It was not that I agreed with everything that Judge Bork said in the book. I strongly dissented, for example, from Judge Bork's suspicious attitude toward the natural rights teaching and equality doctrine of the Declaration of Independence,[3] though it must be said that, even in the chapters in which he articulates the grounds of his skepticism about the Declaration, I found characteristically Borkean flashes of insight and many important truths. Rather, what seemed to me prophetic about the book was its profound appreciation of the character-shaping, or soul-crafting, role of culture. Particularly, the book was deadly accurate in describing and warning about the ways in which the triumph of liberal ideology among American elites is corroding public morality and damaging the interests of all of us, especially the interests of the poorest and most vulnerable. Judge Bork recognized our common interest in maintaining a social environment—a "moral ecology," as I have elsewhere

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1. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996).

2. *Id.*

3. *See id.* at 56–82.

described it[4]—that is conducive to virtue and at least minimally inhospitable to what the great British jurist Patrick Devlin referred to as "the grosser forms of vice."[5]

I have in my own writings, both before the publication of *Slouching Towards Gomorrah* and after, offered philosophical criticisms of what I regard as the illusion of moral neutrality,[6] which is the centerpiece of much liberal and libertarian legal and political theory, and has been championed by the late John Rawls,[7] Ronald Dworkin,[8] and the late Robert Nozick.[9] I have tried to illustrate the many ways in which beliefs, attitudes, and choices are shaped in any society—not just in ours—by the framework of understandings and expectations that to a considerable extent constitute a society's public morality and would do so even in the strict libertarian's utopia.[10] I have previously sought to show that the acts of private parties, even the apparently private acts of private parties, can and often do have public consequences; indeed, such private acts sometimes have extensive and profound public consequences.[11] It will come as no surprise, then, that I found Judge Bork's refocusing of our attention on public morality to be valuable and even prophetic. Of course, the next question, for those of us who see things as

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4. ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1994).

5. Lord Patrick Devlin, *Mill on Liberty in Morals*, 32 U. CHI. L. REV. 215, 223 (1965).

6. *See, e.g.*, GEORGE, *supra* note 4, at 159 (explaining that an argument for a morally "neutral" law must fail because such a law would still "embody a distinctive and highly controversial view of human personality and the moral life"); ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 75–89 (2001) (arguing that moral neutrality cannot exist in a discussion of homosexual marriage); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2474, 2501 (1997) (arguing that marriage is an area "in which moral neutrality strikes me as not only undesirable, but unattainable").

7. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

8. *See* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000).

9. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

10. *See, e.g.*, GEORGE, *supra* note 4, at 45 ("Any social environment will be constituted, in part, by a framework of understandings and expectations which will tend, sometimes profoundly, to influence the choices people actually make.").

11. *See, e.g.*, Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 17–18 (2000) (citing as an example the flourishing of pornography, which "erodes important shared public understandings of sexuality and sexual morality on which the health of the institutions of marriage and family life in any culture vitally depend").

Judge Bork and I see them, is the hard one: What should we do about it?

Truth be told, in the period from roughly the mid-1960s to the publication of *Slouching Towards Gomorrah* in 1996, scholars had given very little serious attention to public morality and its decline. Concern about public morality seemed to disappear, at least from the scholarly literature, except as an item of ridicule. Even as public morality was quickly eroding, scholars paid virtually no attention to the question of what might be done to rebuild a decent moral ecology.

So the question is: What are the legitimate and illegitimate means of upholding, or restoring, public morality? What is likely to work, and what is likely to prove futile, or even to do more harm than good? We can all think of ways in which the effort to rebuild public morality could go awry. There are even some people who believe that any effort to rebuild public morality, or at least any use of the law toward that end, would do more harm than good.[12]

But that brings us, of course, to the next question: What is the role and what are the limits of law in the establishment and maintenance of a public morality, or a moral ecology, that assists us in living our own lives and in bringing up our children to be decent and honorable people? At this point, Judge Bork and I break from our strict libertarian friends. We think that law and public policy can play a constructive, albeit limited, role in protecting not only public health and safety, but public morals as well.

Judge Bork, in *Slouching Towards Gomorrah,* was even willing to cause scandal and outrage by putting in a good word for censorship.[13] Now, I myself would never support the censoring of ideas and arguments, however evil and revolting the causes in which they are advanced. I would defend, for example, Larry Flynt's right to advocate for a free market in hard-core pornography, and even his right to encourage pornography as a tool of personal and social liberation,[14] as vile as I think such ideas are. At the same time, I would have no objection in prin-

12. *See, e.g.*, Ilya Somin, *The Borkean Case Against Robert Bork's Case for Censorship*, 31 HARV. J.L. & PUB. POL'Y 511 (2008).

13. *See* BORK, *supra* note 1, at 140 ("Sooner or later censorship is going to have to be considered as popular culture continues plunging to ever more sickening lows.").

14. *See, e.g.*, Hustler v. Falwell, 485 U.S. 46 (1988).

ciple, and can easily think of circumstances under which I would be willing to support, forbidding Flynt from producing and distributing his smut. But if there is a case against shutting down operations like *Hustler*, it is merely a prudential case, not a case based on natural rights, liberty, equality, or justice.

In my own criticisms of John Stuart Mill's "harm principle,"[15] for example, or of contemporary and modern defenses of that principle and its application to some of the issues about which people who think about public morality are concerned, I have argued that there is no moral principle on which Mill's position can be successfully defended.[16] But in the case of any proposal to use the mechanism of the law, especially the law's coercive aspects, to forbid wrongdoing, there are always a range of prudential questions that have to be asked and answered. Sometimes the weight of argument, as a matter of prudence, will militate against using the force of law; other times, perhaps, for using it.

Take, for example, the drug prohibition debate.[17] It seems to me that there is no compelling moral argument for a right to use hallucinogens and other mind-impairing drugs on a recreational basis. Many critics of drug prohibition have, however, made the case for their view on prudential, as opposed to moral, grounds. I do not myself find it in the end to be a persuasive case, but I can understand why many people do. They have been persuaded that the social costs imposed by drug prohibition are so high that we would be better off decriminalizing at least some commonly used drugs.[18] In any event, that is where the argument has to be made. It is not a question of whether people have a right to do immoral things, like use cocaine or LSD, but rather a question of whether the effort to use the coercive force of the law will be futile or even counterproductive. More specifically, the question is whether it would do more harm than good by encouraging police corruption or the development of black markets, or by leading to the prohibition of legitimate activities that might fall under too sweeping a ban.

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15. JOHN STUART MILL, ON LIBERTY 80 (Yale Univ. Press 2003) (1859).

16. *See, e.g.*, GEORGE, *supra* note 4, at 130.

17. *See, e.g.*, Debate, *The War on Drugs: Fighting Crime or Wasting Time*, 38 AM. CRIM. L. REV. 1537 (2001) (debate between former Congressman Bob Barr and Eric Sterling).

18. *See id.* at 1542.

This concern about consequences also exists in the area of censorship. There are arguments about whether efforts to ban pornographic material that really does deserve to be banned will lead to the banning of material that has artistic and literary merit. That is not necessarily to say that the prudential argument always comes down against prohibition. It is only to say that someone considering what his position ought to be on the question, whether as a policy maker or a citizen of a democratic society, needs to consider carefully the weight of prudential arguments on the opposing side. It is not obvious, for example, that if we prohibit *Hustler,* there will consequently be prohibitions of literature that actually should not be prohibited because such literature is not truly obscene. The question of what the default position should be is itself a matter for argument and prudential judgment. It requires us to consider what damage is being done, especially to our young people, in a culture in which pornography flows and flourishes as freely as it does in America today.

Let me conclude with a comment about the role of law and government in upholding public morality in circumstances where they do have a legitimate role—that is, where what is being prohibited is not only something wicked, but where prohibiting it passes all the tests of prudence. The role of law and government is always *secondary* and *subsidiary.* The primary role in this area is played by the institutions of civil society, such as families, churches and other religious bodies, and organizations like the Boy Scouts, which are all concerned fundamentally with character formation. By working closely with individuals, these organizations can do a good job of inculcating a sound understanding of morality and promoting virtue. Although public morality is indeed a *public good,* its maintenance depends far more on contributions from private institutions, beginning with the family, than on the institutions of law and government. We go wrong if we invert those positions and ascribe to government and law the primary role.

Where families, churches, and other institutions of civil society fail, or where, perhaps because of legal impediments, they are unable to play their roles properly, laws will hardly suffice to preserve public morals. Ordinarily, at least, law's role is supportive. That is what I mean by secondary and subsidiary. The law's role is to *support* families, churches, and the like in

the task of forming honorable and decent people as well as good citizens.

And of course, finally, the point that cannot be repeated often enough: Law goes wrong when it displaces those institutions of civil society—when it undermines or pushes aside the church, the family, and other character-shaping institutions, and substitutes itself for them, forcing them in a sense to abdicate their own responsibilities. At the same time, although we must be vigilant to prevent usurpations of familial or religious authority by government, it is also important to note that the role of law in upholding public morality, even though subsidiary, is itself undermined by families, religious communities, churches, and other religious institutions that abdicate their primary responsibility of instilling morality, or, even worse, that promote false and morally destructive practices.

THE BORKEAN CASE AGAINST ROBERT BORK'S CASE FOR CENSORSHIP

ILYA SOMIN*

The primary purpose of this Essay is to criticize Robert Bork's advocacy of government censorship of American culture. However, I come as much to praise Judge Bork as to criticize him. To my mind, the principles advanced in his book, *The Antitrust Paradox*,[1] are just as much applicable to government regulation of culture as they are to government regulation of the economy—to some extent even more so. In his essay on *The Antitrust Paradox* in this volume, Judge Frank Easterbrook noted that Bork's conclusion in that book was that regulators should not "second-guess" the results of markets.[2] This principle applies just as much to cultural markets as to product markets. The Robert Bork who wrote *The Antitrust Paradox* is the best antidote to the later Bork who wrote *Slouching Towards Gomorrah*.[3]

Indeed, one of Bork's mentors at the University of Chicago was the economist Aaron Director. In 1964, Director wrote a famous article on the very subject of this Essay, entitled "The Parity of the Economic Marketplace."[4] In that work, Director pointed out that government regulation of cultural markets and of speech has many of the same weaknesses as government regulation of "economic" activity. Director's main purpose was to criticize political liberals who wanted to abolish government regulation of speech and cultural activities, yet

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1. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (The Free Press 1993) (1978).

2. Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 HARV. J.L. & PUB. POL'Y 439, 445 (2008).

3. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996).

4. Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964).

supported heavy government regulation of the economy. But of course the argument also works in reverse against conservatives such as Judge Bork, who oppose most economic regulation but advocate government intervention in the cultural market.

This Essay explains why government censorship of culture is not "prudent," to use Professor George's terminology,[5] because it cannot be contained within the bounds that George and Bork would like to confine it. I also discuss why such regulation is in fact unnecessary. Private institutions can do a much better job of promoting desirable cultural values than government can.

At the outset, it is important to appreciate the radical sweep of Judge Bork's vision in *Slouching Towards Gomorrah*. Although Bork is usually viewed, quite correctly, as a conservative, there are some radical implications to this book. Judge Bork not only criticizes modern liberals and libertarians,[6] he also goes all the way back to the source, so to speak, and attacks the Enlightenment, the Declaration of Independence, and John Stuart Mill.[7] Judge Bork harshly criticizes the principles of the Declaration, arguing that they are "pernicious" if "taken . . . as a guide to action, governmental or private."[8] He denounces John Stuart Mill's liberty-protecting "harm principle" as "both impossible and empty."[9]

There is, therefore, a great deal at stake in considering Judge Bork's argument in *Slouching Towards Gomorrah*. If we accept it, we would have to reject a very large part of the American tradition of individual freedom and perhaps even the broader Western tradition of liberalism. I hope to convince you that we don't need to do that. We should instead embrace the less radical option of rejecting Judge Bork's call for government censorship of the culture.

First, it is essential to recognize a major conceptual problem with government regulation of the culture: that the state has a fundamental conflict of interest in this field. The people who control the government have a strong incentive to use state

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5. Robert P. George, Slouching Towards Gomorrah *Revisited*, 31 HARV. J.L. & PUB. POL'Y 505 (2008).

6. BORK, *supra* note 3, at 4, 150.

7. *Id.* at 56–65.

8. *Id.* at 57.

9. *Id.* at 59.

power to suppress their political opponents and indoctrinate the people to promote their own favored ideologies and to maintain their own grip on power.

Historically, the desire to indoctrinate has been a major motive for censorship and even, to some extent, for the creation of public education in the nineteenth century.[10] This would not have come as a surprise to the Robert Bork who wrote *The Antitrust Paradox*. After all, he pointed out that antitrust law is often captured by interest groups and used for their own purposes rather than for the purpose of benefiting consumers. The same is true, and I would argue even truer, of the institutions of cultural regulation and censorship. These policies more directly further the government's interest in perpetuating its own grip on power and suppressing potential opposition. The historical record provides ample evidence confirming that this conflict of interest is a serious concern.

In *Slouching Towards Gomorrah*, Judge Bork suggests that we need not worry about censorship too much because for the first 175 years of American history there was very little judicial enforcement of the First Amendment. And yet, he claims, there was not much unjustifiable censorship.[11] My view of the record is a lot less sanguine than Judge Bork's. If we look at that 175 years, we see numerous examples of indefensible censorship. For example, the Alien and Sedition Acts directly attempted to suppress the opponents of government.[12]

Other cases abound. There was the suppression of abolitionist speech in the southern states for many decades prior to the Civil War.[13] Later, there was the censorship of serious literature under the guise of suppressing pornography or obscenity.[14] There are many examples of works that I think even Judge Bork

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10. *See generally* E. G. WEST, EDUCATION AND THE STATE: A STUDY IN POLITICAL ECONOMY (3d ed. 1994) (discussing this motive in the establishment of public education in the nineteenth century).

11. BORK, *supra* note 3, at 141.

12. *See, e.g.*, JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 41–43, 139–41 (1951).

13. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS 160–62 (1998); CLEMENT EATON, FREEDOM OF THOUGHT IN THE OLD SOUTH, at xi (1951).

14. MARJORIE HEINS, SEX, SIN, AND BLASPHEMY 27–28 (1993).

would consider to be serious literature, that were banned.[15] During World War I and its aftermath, and World War II, there was extensive repression of political speech—including speech that was in no way treasonous, but merely criticized the government's war policies.[16] I could probably fill this entire Essay just by listing these sorts of examples. Unlike Judge Bork, I am far from convinced that the first 175 years of American history proves that we can trust government with the power to regulate culture.

The Western European experience provides further evidence. In many European nations, government has a considerably freer hand to censor and regulate the culture than it does in the United States today. This power has routinely been abused. Several European governments have used their power to censor speech criticizing radical Islam or speech hostile to homosexuality.[17] European governments have certainly not exercised restraint in their use of the power to censor, and there is no reason to expect them (or other governments) to do so. As already noted, governments have strong incentives to use censorship to perpetuate their own grip on power and, in some cases, to use it to appease powerful interest groups.[18]

Perhaps we should reach a different conclusion if we could be absolutely certain that the power to censor will always be held by Judge Bork, Professor George, or other like-minded people. Frankly, I would not be willing to accept censorship even if that were true. But some conservatives perhaps would be. We cannot, however, be assured of any such thing. The power that we might want to give to Judge Bork or to a conservative President will sooner or later—and right now probably sooner rather than later—be wielded by a liberal administra-

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15. As late as 1953, a federal court of appeals upheld the censorship of Henry Miller's classic novels, *Tropic of Cancer* and *Tropic of Capricorn*, under a federal statute forbidding the importation of "obscene" books. *See* Besig v. United States, 208 F.2d 142 (9th Cir. 1953). For a discussion of the case, see RICHARD A. POSNER, LAW AND LITERATURE 341–42 (2d ed. 1998).

16. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 135–226, 235–303 (2004).

17. John O. McGinnis & Ilya Somin, *Should International Law be Part of Our Law?*, 59 STAN. L. REV. 1175, 1219–21 (2007).

18. *See supra* text accompanying notes 10–16.

tion, just as it has already been wielded by liberal and left-wing governments in Europe.

So even if one is a conservative comfortable with the idea that Judge Bork or Robert George might censor American culture and make decisions about what is permissible, ask yourself this question: Are you equally comfortable with Ted Kennedy, Hillary Clinton, or Barack Obama doing it? If you would not trust Hillary Clinton to exercise the power to censor, I would suggest that we should not entrust that power to government at all. Consider the likelihood, indeed the inevitability, that even if Hillary Clinton doesn't win the presidency in 2008, someone like her probably will win sooner or later in the future.

Perhaps all of these risks must be accepted if, as Judge Bork argues, censorship is the only way to maintain a healthy culture. Without censorship, he claims, American culture will inevitably slide into Gomorrah-like degradation.[19] According to Bork, "[t]he alternative to censorship, legal and moral, will be a brutalized and chaotic culture, with all that that entails for our society, economy, politics, and physical safety."[20] "Without censorship," he opines, "it has proven impossible to maintain any standards of decency."[21] In reality, there is little justification for this fear. The free market and civil society can do a much better job of regulating the culture than government.

Slouching Towards Gomorrah was published in 1996. In the book, Judge Bork argues that only through government censorship can we avoid social pathologies such as crime, illegitimacy, and rising welfare dependency.[22] Unfortunately for his thesis, in the years since 1996 each of those social pathologies

19. *See* BORK, *supra* note 3, at 140–53.
20. *Id.* at 140.
21. *Id.* at 147.
22. *Id.* at 142–53.

has greatly decreased. Crime,[23] welfare dependency,[24] illegitimacy,[25] and even divorce,[26] are all declining.

This improvement was achieved despite a near-total absence of the kind of censorship that Judge Bork said was essential to ensure progress. Indeed, with the rise of the Internet and other modern communications media, explicitly sexual and violent material is probably much more widely available today than it was when Judge Bork wrote his book.

International comparisons also bear out this point. Some countries such as Japan, where sexually explicit material is even more readily available than in the United States, have rates of social pathology significantly lower than ours.[27] Lack of correlation is not definitive proof of lack of causation. But the international evidence does show that the relationship between an absence of censorship and social pathology is far less clear than Judge Bork suggests. And the case for censorship is that much weaker as a result.

Moreover, private sector alternatives enable people to shape the cultural environment around themselves and their children without resorting to state coercion. For example, as Robert Nelson points out in an important recent book, today some 52 million Americans live in private planned communities of various

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23. *See, e.g.*, Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 163–66 (2004) (documenting massive decline in violent crime during the 1990s).

24. *See* Ron Haskins, *The Rise of the Bottom Fifth*, WASH. POST, May 29, 2007, at A13 (discussing massive decline in welfare dependency following the Welfare Reform Act of 1996).

25. *See* June E. O'Neill & M. Anne Hill, *Gaining Ground? Measuring the Impact of Welfare Reform on Welfare and Work*, 17 MANHATTAN INST. CIVIC REP. 1 (2001) (noting that the Welfare Reform Act of 1996 helped produce a decline in the percentage of children raised by single-parent families, especially among poor African-Americans).

26. *See* Betsey Stevenson & Justin Wolfers, *Divorced from Reality*, N.Y. TIMES, Sept. 29, 2007, at A15 ("[T]he divorce rate has been falling continuously over the past quarter-century, and is now at its lowest level since 1970."). For a more detailed academic analysis, see Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces* (Instit. for the Study of Labor, Discussion Paper No. 2602, 2007), *available at* http://ftp.iza.org/dp2602.pdf.

27. *See, e.g.*, Nobuo Komiya, *A Cultural Study of the Low Crime Rate in Japan*, 39 BRIT. J. CRIMINOLOGY 369 (1999) (noting Japan's very low crime rates).

types.[28] If they so choose, people in such communities can create a culturally conservative environment or any other type of environment that they prefer.[29] They can do so without imposing their preferences on other citizens with different values. Similarly, private schools, which conservatives are quite correct to champion, do a better job of promoting both education and civic values than do government schools.[30] Finally, of course, religious institutions and other institutions of civil society also play a valuable role in shaping the culture.

Professor George agrees that such private associations should have the primary role in promoting a healthy culture. But, he suggests, government should have a "subsidiary" role.[31] At an abstract level, I don't necessarily disagree with that view. But there are two serious practical problems with such proposals for limited censorship. The first is the great difficulty of keeping government censorship confined to a "subsidiary" role. Once established, censorship regimes have a strong tendency to expand. That is what has happened in Western Europe in recent years, as discussed above. Second, government regulation of culture can actually often undermine the very private institutions that Professor George and I agree should be the main bulwarks of a sound culture.

Certainly, a government that aggressively regulates culture may seek to undermine private schools, religious institutions, and other such civil society organizations. All of these institutions compete with the state in the marketplace of ideas, and the state has a strong incentive to suppress competitors.[32] That,

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28. ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT, at xiii (2005).

29. *See id.* at 67–68 (noting that many private planned communities were established to promote socially conservative religious values).

30. *See, e.g.*, David E. Campbell, *Making Democratic Education Work*, *in* CHARTERS, VOUCHERS, AND PUBLIC EDUCATION 241, 244–45, 258–61 (Paul E. Peterson & David E. Campbell eds., 2001) (documenting superiority of private schools in these fields).

31. George, *supra* note 5, at 509.

32. *See* WEST, *supra* note 10, at 190 (noting the importance of this motive in the government's efforts to displace private schools with public schools); *see also* EUGEN WEBER, PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870–1914, at 111 (1976) (discussing how the rise of government education in France was motivated by the desire to inculcate nationalism and loyalty to the state by displacing traditional religious and civil society institutions).

to some extent, is exactly what has happened in some European countries, and even to a limited degree with government regulation of private schools and other institutions here in the United States.[33]

Ultimately, the question is not whether a healthy culture is important. I agree that it is. The key question is whether to trust the government to promote a healthy culture, or whether to place our trust in communities, churches, schools, and other private institutions. I think we should place our bets on the private sector, not the state. The Robert Bork who wrote *The Antitrust Paradox* made the same case in the realm of economic regulation. He argued that most government antitrust regulation causes more harm than good to consumers. He also emphasized the danger that the regulatory process will be captured by narrow interest groups who will use it to advance their own agendas at the expense of the general public.[34] Judge Bork's well-taken criticisms of antitrust regulation apply even more strongly to government regulation of culture.

33. *See, e.g.*, HENRY PERKINSON, THE IMPERFECT PANACEA: AMERICAN FAITH IN EDUCATION 22–32 (4th ed. 1995) (discussing how American government schools originated in large part as a result of efforts to impose cultural uniformity and diminish the cultural influence of Catholics and other religious minorities); WEST, *supra* note 10 (discussing origins of public education in the United States).

34. BORK, *supra* note 1, at 134, 347.

PARTIAL-BIRTH ABORTION AND THE PERILS OF CONSTITUTIONAL COMMON LAW

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INTRODUCTION

Gonzales v. Carhart[1] continues the Supreme Court's haphazard development of its abortion jurisprudence—and neatly illustrates everything that has gone awry in modern constitutional law. Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, concluded that the federal Partial-Birth Abortion Ban Act of 2003 (PBABA)[2] did not, on its face, unduly burden a woman's constitutional right to obtain an abortion.[3] Justices Thomas and Scalia would have upheld the statute simply because "the Court's abortion jurisprudence . . . has no basis in the Constitution."[4] Justice Ginsburg and three other dissenters argued that the PBABA was indistinguishable from a state law that the Court previously had struck down in *Stenberg v. Carhart*.[5] Meanwhile, all of the Justices simply assumed Congress had the power to enact the challenged legislation.[6]

Gonzales followed a familiar pattern. Despite the new Chief Justice's professed desire to avoid splintered decisions,[7] the Court divided into moderate, conservative, and liberal camps—just as it has done with other contentious issues such as school integration, free speech, and the due process rights of enemy combatants.[8] As usual, the Justices applied a murky common law to reach results that tracked their ideological views.[9] Finally, the Court once again increased its own power and that of Congress.[10]

Gonzales exemplifies the modern disintegration of the ideal of "the Court" expounding "the Constitution"—i.e., its language read in light of its underlying political structure and theory, its drafting and ratification history, and the understandings manifested by those who implemented its provisions for over a cen-

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1. 127 S. Ct. 1610 (2007).

2. 18 U.S.C. § 1531(a) (2003).

3. *Gonzales*, 127 S. Ct. at 1619–39.

4. *Id.* at 1639–40 (Thomas, J., concurring).

5. *Id.* at 1640–53 (Ginsburg, J., dissenting) (citing Stenberg v. Carhart, 530 U.S. 914 (2000)).

6. *See infra* Part II.B.3.b.

7. *See Chief Justice Says His Goal is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16.

8. *See infra* notes 341–85 and accompanying text.

9. *See infra* Part III (developing this theme).

10. *See infra* Part II.B.3.b (discussing this aggrandizement of federal power).

tury. Rather, individual Justices have employed an eccentric version of common law.[11]

In the Anglo-American system, legislatures make rules expressing their constituents' preferred policies, but sometimes delegate this power in certain areas (e.g., property, contracts, and torts) to courts, which gradually develop the law on a case-by-case basis.[12] *Stare decisis* commands judges to follow established precedent absent compelling reasons for departure—most pertinently, concerns that a rule has become unacceptable in light of changed social conditions.[13] Moreover, common law is subject to legislative override.[14]

This traditional, and restrained, model of adjudication has not been faithfully applied in contemporary constitutional adjudication. Most notably, constitutional law has been marked

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11. Many scholars have observed that modern constitutional law has departed substantially and irreversibly from our founding document's text and original meaning and that, in practice, constitutional interpretation depends upon evolving understandings expressed in Supreme Court opinions. *See, e.g.*, Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988) (summarizing relevant cases and scholarship, and reluctantly concluding that the original meaning must yield to transformative or longstanding precedent); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (amplifying these themes and contending that a common law methodology constrains judges more effectively than textualism or originalism and better promotes democratic values); Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271 (2005) (defending Strauss's position). *But see* Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482 (2007) (maintaining that arguments for the rationality of ordinary *common* law—where the only alternative to respecting the latent wisdom embodied in precedent is for judges to rely on their own unaided reason—do not apply to *constitutional* law, where courts have the option of deferring to the considered judgment of collective bodies such as the Constitution's Framers, legislatures, or the executive branch).

I agree that, as a descriptive matter, constitutional law consists of judicially fashioned principles that have scant textual or historical basis. Nonetheless, I do not think that this situation is normatively desirable or that precedent restrains the Justices. The Court's partial-birth abortion jurisprudence illustrates why.

12. The classic works are OLIVER WENDELL HOLMES, THE COMMON LAW (1881); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); and KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

13. *See, e.g.*, Strauss, *supra* note 11, at 879, 885, 887, 891–94; *see also* Monaghan, *supra* note 11, at 741, 757–58 (describing the traditional American conception of *stare decisis* as precedent that remains binding unless there is a showing of substantial countervailing considerations, but noting that this doctrine has been weakened by the modern pragmatic view of law, which is skeptical of simple appeals to authority and instead demands that rules be justified).

14. For example, if the California legislature imposes a $250,000 cap on medical malpractice damages, the state's courts cannot ignore this statute and instead approve a larger award as consistent with the general "spirit" or "values" of tort law.

by abrupt shifts, not incremental doctrinal tinkering. For instance, in 1937, the Court suddenly abandoned a century-and-a-half of case law imposing limits on Congress and instead interpreted Article I as conferring virtually untrammeled legislative power.[15] This turnaround reflected five Justices' perception of sound governmental and economic policy during the Depression.[16] President Roosevelt solidified this jurisprudence by appointing Justices based primarily on their political commitment to the New Deal, not on judicial experience or legal acumen.[17] A generation later, the Warren Court dismantled most precedent concerning individual rights and reinterpreted the Constitution to implement ideas about liberty and equality that incorporated progressive social and moral views.[18] Even the

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15. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (overruling entrenched precedent by holding that Congress could enact legislation governing non-commercial activity occurring within a state, such as labor, if doing so was necessary and proper to regulate interstate commerce).

16. *See* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 79–83 (1999).

17. *See* William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525, 525 (2005).

18. Most significantly for present purposes, the Court revived the long-discredited notion that the Due Process Clause (especially the word "liberty") licensed it to create substantive rights (e.g., to privacy). *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (discussed *infra* Part I.A.). The Court also imposed its vision of liberty by dramatically expanding First Amendment freedoms and the rights of accused criminals under the Fourth, Fifth, Sixth, and Fourteenth Amendments. *See infra* notes 339–40 and accompanying text.

The Warren Court's two most important decisions concerned equality. First, *Brown v. Board of Education*, 347 U.S. 483 (1954), overturned precedent by holding that the Equal Protection Clause prohibited racial discrimination in public schools. The Court candidly acknowledged that it was interpreting this clause in light of evolving notions of racial justice and the importance of public education, not historical constitutional understandings. *See id.* at 492–93. Chief Justice Warren wisely wrote a short opinion that garnered a unanimous vote; his policy judgment proved to be correct and was vindicated by Congress within a decade. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).

Second, in *Baker v. Carr*, 369 U.S. 186 (1962), the Court made the novel decision to apply the Equal Protection Clause, originally designed to protect *civil* rights, to the formerly *political* question of ensuring that the apportionment of state legislatures was based strictly on population. *See infra* notes 24, 338, 398 and accompanying text. Despite its shaky legal foundation, *Baker* spawned a "one person, one vote" standard that resonated with Americans and quickly gained widespread acceptance. *See* Robert J. Pushaw, Jr., Bush v. Gore: *Looking at* Baker v. Carr *in a Conservative Mirror*, 18 CONST. COMMENT. 359, 372–81 (2001) (summarizing *Baker*, 369 U.S. 186, Gray v. Sanders, 372 U.S. 368 (1963), Wesberry v. Sanders, 376 U.S. 1 (1964), Reynolds v. Sims, 377 U.S. 533 (1964), and the positive reaction to them).

supposedly conservative Burger and Rehnquist Courts occasionally unleashed unprecedented thunderbolts, such as *Roe v. Wade*.[19]

These transformative cases have survived largely intact because of a coalition between two groups of Justices. First, those who joined the original opinions and their like-minded successors have voted to retain, and sometimes extend, the landmark decisions. Second, swing Justices (typically moderate Republicans like Stewart, Powell, O'Connor, and Kennedy) have tended to follow the basic precedents, sometimes with modifications.[20] Their stated justification has been *stare decisis*,[21] but their willingness to overturn precedent in other areas suggests that they selectively invoke this doctrine to disguise personal or policy judgments.[22] Finally, a third group of Justices—including those

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Justice Brennan, who wrote the majority opinion in *Baker*, repudiated the idea that modern constitutional problems should be resolved by relying upon the views of the Framers and Ratifiers. Rather, he contended that the Constitution sets forth generally worded provisions that the Justices must continually reinterpret in light of evolving notions of justice, morality, and social progress. *See* Justice William J. Brennan, Jr., To the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11–25 (Paul G. Cassell ed., 1986). Most constitutional law scholars have embraced this concept of a "living Constitution." *See, e.g.*, ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 45–141 (1987).

19. 410 U.S. 113 (1973) (establishing a right to abortion). Other examples include *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (creating a new equal protection right to have ballots in a presidential election recount judged according to uniform criteria), and *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which rejected the claim that the Due Process Clause contains a right of privacy that encompasses the freedom of consenting adults to engage in homosexual sodomy).

20. For example, Justice Stewart dissented when the Court devised a right to privacy in *Griswold*, but later joined the *Roe* majority in extending that right to abortion. *See infra* notes 50, 54, 75 and accompanying text. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), Justices O'Connor, Kennedy, and Souter wrote an unusual joint opinion reaffirming *Roe*'s basic holding of a right to abortion previability, but added significant qualifications to better accommodate states' legitimate interests. *Id.* at 844–901 (plurality opinion). The lesson of history is that, if five or more Justices ignore precedent and create a new constitutional right, they can be fairly confident that it will stick—primarily because some later Justices will have greater respect for precedent.

21. *See, e.g.*, *Casey*, 505 U.S. at 854–64 (plurality opinion) (citing fidelity to precedent and related concerns that too-frequent overrulings will damage the Court's integrity and hence public confidence in the institution).

22. For instance, a Justice might follow precedent to foster collegiality or to promote the policy embedded in an earlier case, regardless of the soundness of its legal analysis. Some commentators have suggested that certain Justices might adhere to a precedent like *Roe* that is popular among the legal and media intelligentsia in order to curry their favor. Although such speculation seems pointless be-

who dissented in the original cases and their sympathetic successors—often have tried to overrule these decisions or limit them to the extent practicable.[23]

Unlike in common law, then, *stare decisis* has little binding force in constitutional decision making. Some Justices have maintained that this is so because the fundamental law is the Constitution itself, not judicial interpretations of it.[24] More pragmatic Justices have invoked *stare decisis* when they wanted to reach a result that was dubious under conventional constitu-

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cause it is impossible to prove, the very fact that such charges can plausibly be made is itself deeply troubling.

23. *See infra* notes 115–19, 123–24, 149–50, 199–205 and accompanying text (describing the efforts of the *Roe* dissenters and Justices Scalia and Thomas to overturn its holding).

24. *See, e.g.*, United States v. Scott, 437 U.S. 82, 101 (1978) (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–08 (1932) (Brandeis, J., dissenting)) ("'In cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.'"); Agostini v. Felton, 521 U.S. 203, 235–36 (1997) (to similar effect).

Several scholars have argued that constitutional law precedents should be overruled if the Court concludes that they are legally erroneous, particularly if they conflict with the Constitution's original meaning. *See, e.g.*, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *The Instrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005). Other professors, however, have maintained that the Court must stand by its prior cases unless they are not merely wrong but also have substantial adverse consequences—for example, have proved to be morally unacceptable or unworkable. *See, e.g.*, Monaghan, *supra* note 11, at 743–47, 758–62; Strauss, *supra* note 11, at 894–97, 900–09, 913–14, 927–28, 935.

In practice, *stare decisis* exerts real force in certain areas, especially if the seminal decision has been widely accepted and reaffirmed over a time period lengthy enough that reversing course would exact serious costs in terms of legal stability, continuity, and governmental legitimacy. Obvious examples include the Court's New Deal-era judgments endorsing the modern administrative-social welfare state, and Warren Court cases like *Brown* and *Baker*. *See* Monaghan, *supra* note 11, at 748–62, 772. Overruling such entrenched landmarks would be unthinkable, even by Justices who conclude that the original decision rested on an erroneous interpretation of the Constitution's text, history, structure, and then-existing precedent. *See id.* at 743–47 (contending that the Court's endorsement of such cases casts doubt upon the conventional wisdom that *stare decisis* has minimal applicability in constitutional law).

Professor Monaghan has argued that the Court should determine the meaning of the Constitution both by examining original intent and by applying established precedent—including specific cases that cannot be justified on originalist grounds, such as *Griswold* and *Roe*. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 NYU L. REV. 353, 360, 363, 374–87 (1981). Nonetheless, he would prevent future departures from the written Constitution by rejecting a common law mode of analysis that licenses the Justices to elaborate current notions of political morality in areas like equality, autonomy, and justice. *Id.* at 364, 374, 377–80, 382, 386, 391–95.

tional analysis, but have ignored this doctrine when they wished to achieve a different policy outcome that conflicted with precedent.[25]

Furthermore, no legislative oversight of constitutional common law is permitted. Because the modern Court has adopted the ahistorical idea that it is the sole legitimate interpreter of the Constitution,[26] it has resisted congressional efforts to correct its mistakes, even in ways that enhance individual liberty.[27]

In short, constitutional adjudication involves an idiosyncratic common law in which *stare decisis* is either invoked selectively (to defend a previous revolutionary case implementing some preferred policy that had no constitutional roots) or flatly rejected, prior decisions are freely modified, and legislatures have no input. This approach makes it accurate, but somewhat beside the point, to criticize the Court for its lack of fidelity to the written Constitution. Rather, it would seem more sensible to evaluate the Justices' work under traditional common law standards, which focus on whether a decision maintains consistency with earlier holdings while developing the law in a fashion that achieves the soundest possible policy position. Under this test, many of the Court's constitutional cases fare poorly.

Realists, however, would judge constitutional opinions simply based on their agreement or disagreement with the outcome—and would support Justices who will pursue their political and ideological goals.[28] Most Americans have become

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25. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting) (pointing out that Justice Kennedy and several colleagues, who had invoked *stare decisis* in *Casey* to justify retaining *Roe*'s right to abortion, had overturned precedent in *Lawrence* to manufacture a constitutional right to practice sodomy). Again, I do not deny that *stare decisis* sometimes genuinely influences judicial decision making, especially where the landmark case has become firmly rooted and doctrinal stability seems critical. Rather, my point is that *stare decisis* does not restrain Justices who are determined to create a new constitutional rule, as the major Warren Court opinions illustrate.

26. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

27. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997) (rejecting Congress's attempt to restore the Court's formerly generous approach to protecting the free exercise of religion).

28. A distinguished scholar has faulted law professors for adopting "*The New York Times* view" of constitutional law—i.e., "judg[ing] the Court pretty much exclusively by the degree to which its decisions do—or do not—advance causes [the *Times*] editorially favors." William W. Van Alstyne, *Reflections on the Teaching of Constitutional Law*, 49 ST. LOUIS U. L.J. 653, 655 n.6 (2005).

> [T]he *Times* predictably condemns the Court when . . . its decisions seem unprogressive, just as it applauds the Court when its decisions seem

realists. Although many would contend that such pragmatism is healthy, I believe it has irreversibly corroded the idea of the Constitution as fundamental law.

This Article explores three aspects of *Gonzales*. Part I places this case in the context of the major abortion decisions. The Court has frankly admitted that its abortion jurisprudence has no foundation in the Constitution as originally intended, understood, and implemented, but rather embodies evolving constitutional "ideals" of privacy, liberty, and equality. Measured by classical common law standards, this case law retains one consistent thread—women have a right to abortion before fetal viability—but otherwise lacks coherence. Realistically, evaluations of the Court's decisions depend almost entirely on one's personal views about abortion.

Part II examines the partial-birth abortion litigation and reaches two conclusions. First, contrary to popular belief, *Gonzales* did not represent a major shift that will lead the Court to reject or severely curtail abortion rights. Indeed, only Justices Scalia and Thomas favored such a radical change, which is a cornerstone of the conservative policy agenda.[29] By contrast, four of their colleagues (Justices Stevens, Souter, Ginsburg, and Breyer) have embraced the diametrically opposite—and mainstream liberal—position of "abortion on demand."[30] The three swing Justices (Roberts, Kennedy, and Alito) not only refused to question the basic right to abortion, but also suggested that even laws banning partial-birth abortion might be unconstitutional as applied.[31] This remarkably narrow opinion adopts an

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> suitably progressive. . . . [The] *Times* appears to have little—if any—interest in measuring the extent to which the Court's decisions have any clear connection with the Constitution such as it is, as distinct from what the *Times* desires of its decisions whether or not they find warrant in the Constitution itself.

Id. Professor Van Alstyne urges scholars to return to impartial assessment of the professional qualities of the Court's opinions. *See id.* at 654–55.

29. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1639–40 (Thomas, J., concurring). Although the national Republican platform has long called for overruling *Roe*, it should be noted that doing so would not necessarily achieve the social conservative goal of outlawing abortion. Rather, Justices like Scalia and Thomas have always argued that *Roe* should be overturned so that abortion issues can be resolved through the political process. *See* Webster v. Reprod. Health Serv., 492 U.S 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment); *see also infra* notes 222, 421, 423 and accompanying text. The result would be different abortion laws in each state, some of them quite liberal.

30. *See Gonzales*, 127 S. Ct. at 1640–53 (Ginsburg, J., dissenting).

31. *See id.* at 1629–39.

incremental approach characteristic of classical common law. Although a dramatic reversal is always possible, it seems highly unlikely given the Court's current membership. Second, the Justices' exclusive focus on the individual right to abortion, mirrored by scholars, has obscured a critical constitutional issue: the judiciary's acquiescence to Congress's contestable assertion that its ban on partial-birth abortion is a valid exercise of its power to regulate interstate commerce.[32]

Part III argues that *Gonzales* is part of a broader, decades-long movement that has rendered the process and substance of constitutional decision making almost indistinguishable from simple politics. The most notorious example is *Bush v. Gore*,[33] in which five conservative Republican Justices reversed a Florida Supreme Court judgment ordering that contested ballots in a presidential election recount be determined by applying the state's statutory "intent of the voter" standard.[34] The majority held that this procedure violated a freshly minted equal protection right to uniform criteria in judging ballots and therefore halted the recount,[35] thereby ensuring the election of a conservative Republican President. *Bush v. Gore* compromised the credibility of the Justices in the majority, who had previously stressed their commitment to enforcing the Constitution as written, exercising judicial restraint, and deferring to state authorities.[36] Hence, when self-professed "originalists" like Justices Thomas and Scalia actually do adhere to the Constitution's textual and historical meaning in areas like abortion,[37] a now-skeptical public tends to assume that they are merely following their political and ideological views,[38] despite other opinions where they clearly have not done so.[39]

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32. *See infra* Part II.B.3.b.

33. 531 U.S. 98 (2000) (per curiam).

34. *Id.* at 103–11.

35. *Id.* at 104–11. Two Justices joined the equal protection holding but would have allowed the recount to continue under uniform standards. *See id.* at 134–35 (Souter, J., dissenting); *id.* at 144–47, 152, 158 (Breyer, J., dissenting). Justice Breyer, the only Democrat in the majority on the equal protection issue, followed his interpretation of the Constitution despite his political leanings. Regrettably, the same could not be said with certainty about any of the Court's other members.

36. *See infra* notes 309–13, 392–97 and accompanying debates.

37. The Constitution's text contains no right to abortion, its federalist structure commits such contentious social and moral issues to the states, the historical record confirms this view, and precedent did so as well until 1973.

38. Justice Scalia especially deserves an arched eyebrow. For instance, he abandoned his previous efforts to impose federalism-based limits on Congress's power under the Commerce Clause when that jurisprudence threatened the federal gov-

I recognize, of course, that the Justices face a difficult problem in reconciling often conflicting constitutional materials that might reasonably lead to different outcomes. The solution, however, should not be to adopt a wholly discretionary, pragmatic common law approach—or to apply originalism selectively. Rather, I have long advocated an apolitical "Neo-Federalist" methodology, which proceeds in two stages.[40] The first consists of attempting to recapture, in light of the Constitution's structure and underlying political theory, its original "meaning" (the ordinary definition of its terms), "intent" (the purpose of its drafters), and "understanding" (the sense of its

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ernment's War on Drugs, a Republican mainstay. *See* Gonzales v. Raich, 125 S. Ct. 2195, 2215–20 (2005) (Scalia, J., concurring); *see also* Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 883–84, 898, 901–09 (2005) (discussing Justice Scalia's opinion endorsing Congress's authority to regulate the non-commercial, wholly in-state possession and use of marijuana). Similarly, Justice Scalia has embraced the conservative mythology that Article III compels modern doctrines like standing, ripeness, and mootness, and he has simply ignored voluminous textual and historical materials that undercut his assertions. *See* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1996) [hereinafter Pushaw, *Justiciability*].

In the foregoing cases, Justice Scalia has insisted that his conclusions rest on the Constitution's original meaning. Such claims are categorically different from an acknowledgment that certain well-established precedents must be followed, regardless of whether they were correct initially. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138–39 (Amy Gutmann ed., 1997) (conceding that "originalism . . . must accommodate the doctrine of stare decisis").

39. For example, Justice Thomas adhered to his narrow prior interpretation of the Commerce Clause in rejecting Congress's power to regulate the non-commercial medical use of marijuana within a state, despite his policy preference against making an exception to federal drug laws. *See Raich*, 125 S. Ct. at 2229–39 (Thomas, J., dissenting). Similarly, contrary to his political support for the War on Terrorism, Justice Scalia concluded that the President could not indefinitely detain American citizens accused of being "enemy combatants," but rather must afford them a federal court trial with all attendant procedural rights. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting); *see also* Robert J. Pushaw, Jr., *The Enemy Combatant Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1048–52 (2007) (explaining that Justice Scalia adopted the most "liberal" position on the Court on this issue).

40. *See, e.g.*, Pushaw, *Justiciability*, *supra* note 38, at 397–472. I have followed the lead of Professor Amar, who has applied this approach to reach conclusions that span the political spectrum. *See* Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) [hereinafter Amar, *Foreword*]; Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985). Conversely, I am skeptical of scholars who have deployed Neo-Federalism and other historically based approaches to reach results that are uniformly either liberal or conservative. *See* Robert J. Pushaw, *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1185–87, 1191–1202, 1206–11 (2003).

ratifiers and early implementers in all three branches).[41] The second step is to apply those originalist principles that retain vitality in addressing modern problems, given two centuries of intervening changes.[42] Neo-Federalism can yield legal rules that are genuinely rooted in the Constitution, yet work far better in practice than doctrines the Court has improvised in a common law manner.[43]

Adoption of such an approach would help restore the idea that the Constitution is law. Admittedly, it might be quixotic to expect the Court to begin paying more attention to the Constitution and less to its interpretive opinions, because those who enjoy virtually unbridled discretion are loath to relinquish it. Nonetheless, if the Justices continue to apply their impressionistic and politicized constitutional common law, they cannot legitimately complain about the growing public perception of the Court as just another political organ.

I. THE "CONSTITUTIONAL" LAW GOVERNING ABORTION

The vast majority of Americans, including those who favor a right to choose during the early stages of pregnancy, support laws that prohibit partial-birth abortion.[44] Indeed, most people would find strange the notion that the Constitution forbids such legislation. To understand why the Court takes this claim seriously, it is necessary to consider the cases which created the right of privacy and then extended this right to abortion.

A. The Right of Privacy

In *Griswold v. Connecticut*,[45] the Court discovered in the Constitution a right of privacy that included the freedom of married couples to use contraceptives, and accordingly struck down a state law prohibiting such activity.[46] The Justices could not, however, agree on the source of this right.

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41. *See* Pushaw, *Justiciability*, *supra* note 38, at 397–99, 454, 402–72, 511–12.

42. *See id.* at 397–99.

43. *See, e.g.*, *id.* at 472–512 (developing and applying Neo-Federalist rules to make the justiciability doctrines more clear and coherent); *see generally* Nelson & Pushaw, *supra* note 16 (providing a solid textual and historical basis to support much, but not all, of the Court's Commerce Clause jurisprudence).

44. Gonzales v. Carhart, 127 S. Ct. 1610, 1621–23 (2007) (citing statistics).

45. 381 U.S. 479 (1965).

46. *Id.* at 480–86. A Connecticut law, which banned all persons from distributing or using contraceptives or assisting others in doing so, had been enforced against a

Writing for the majority, Justice Douglas found privacy to be implicit in the First, Third, Fourth, and Fifth Amendments: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[47] Justice Goldberg and two colleagues concurred, but asserted that marital privacy was one of the unenumerated fundamental rights "retained by the people" in the Ninth Amendment.[48] In separate concurrences, Justices Harlan and White eschewed reliance upon the Bill of Rights and instead concluded that the law "infringe[d] the Due Process Clause of the Fourteenth Amendment" by "violat[ing] basic values 'implicit in the concept of ordered liberty.'"[49]

Justices Black and Stewart each filed dissents and accused their colleagues of striking down a law simply because they found it personally offensive and unwise as policy, even though it did not violate any specific provision of the Constitution (which nowhere mentions a right of "privacy").[50] Justice Black faulted the majority for acting as "a court of common law" rather than as a tribunal bound by a written Constitution.[51] Justice Black's charge resonates because the Justices issued six opinions, which would have been remarkable if they

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doctor and a Planned Parenthood director who had given contraceptives to a married woman. *Id.* at 480. Justice Douglas repeatedly declared that the right of privacy arose out of the "intimate relation between husband and wife," *id.* at 482, which he twice deemed "sacred," *id.* at 485, 486; *see also id.* at 480 (stressing application of the law against "*married persons*"); *id.* at 481 (referring to the rights of "married people" and a "husband and wife").

47. *Id.* at 484–85 (citation omitted). Justice Douglas's strained "penumbral" reasoning reflected his desire to avoid grounding the decision in the Fourteenth Amendment's Due Process Clause, which the Court had creatively interpreted as supplying substantive principles (such as "freedom of contract") to justify striking down progressive state regulatory laws in the late 1800s and early 1900s. *See id.* at 481–82 (denying that the Court was following discredited precedents like *Lochner v. New York*, 198 U.S. 45 (1905), by "sit[ting] as a super-legislature" to evaluate "the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions"). *But see id.* at 514–16, 522 (Black, J., dissenting) (arguing that the Court was reviving *Lochner* by asserting such a legislative power).

48. *Id.* at 486–99 (Goldberg, J., concurring, joined by Warren, C.J. and Brennan, J.).

49. *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); *see also id.* at 502–07 (White, J., concurring) (agreeing with Justice Harlan's due process analysis and adding that the state had failed to show that banning married couples from using contraceptives furthered its declared goal of deterring illicit sex).

50. *See id.* at 507–27 (Black, J., dissenting); *id.* at 527–31 (Stewart, J., dissenting).

51. *See id.* at 510 n.1 (Black, J., dissenting).

had actually been interpreting a Constitution drafted in reasonably clear English to both empower and limit governments.

Griswold is a classic example of the Warren Court's penchant for reaching a result deemed fair (and sensible to most Americans), then trying to find some constitutional justification for it.[52] Justice Douglas's "penumbral" reasoning was so transparently fictional that it generated widespread ridicule,[53] and Justice Goldberg's analysis similarly turned the Ninth Amendment on its head.[54] Not surprisingly, these constitutional rationales were swiftly abandoned. Nonetheless, the right to privacy endured, albeit as a substantive component of the Due Process Clause, and it has become virtually unassailable.[55] Moreover, *Griswold*'s focus on refusing to "allow the police to search the sacred precincts of marital bedrooms"[56] quickly gave way to a notion of privacy as the freedom of any individual, married or single, to use contraception as part of "the decision whether to bear or beget a child."[57]

B. The Right to Abortion

1. Roe v. Wade

This reformulation of the privacy right opened the door to *Roe v. Wade*,[58] which struck down a Texas law prohibiting abortion except when necessary to save the mother's life.[59] Justice Blackmun began his majority opinion by acknowledging that the abortion controversy had produced "vigorous opposing

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52. *See supra* notes 18, 25 and accompanying text (providing other examples).

53. *See* Kenneth Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 124 (2007).

54. The Court had never before suggested that the Ninth Amendment—which was adopted to prevent the federal government (including its courts) from exceeding its enumerated powers and invading the rights of individuals and state governments—could be invoked for the opposite purpose of asserting virtually unchecked federal judicial power to veto state laws. *See Griswold*, 381 U.S. at 520 (Black, J., dissenting); *id.* at 529–30 (Stewart, J., dissenting).

55. Perhaps the best illustration of *Griswold*'s untouchable status is the confirmation hearing of Samuel Alito, a staunch conservative who nonetheless pledged his commitment to *Griswold*. *See* Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 109th Cong. 318, 380 (2006) (testimony of Judge Samuel A. Alito).

56. *Griswold*, 381 U.S. at 485.

57. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

58. 410 U.S. 113 (1973).

59. *Id.* at 117–19.

views" that reflected each side's different religious, philosophical, and moral views, but he assertedly sought "to resolve the issue by constitutional measurement, free of emotion and of predilection."[60] Justice Blackmun then proceeded to ignore traditional "constitutional measurements" (like text, history, and federalism) and instead to write an opinion that imposed his personal pro-choice predilection, as his recently released papers reveal.[61]

Initially, the Court traced the history of abortion and concluded that Anglo-American law generally had treated abortions before "the quickening" (the first fetal movement, which occurs around the fourth month of pregnancy) far more leniently than those performed after that point.[62] Justice Blackmun then crudely grafted a similar model onto the Constitution by holding that states must allow abortions until a fetus becomes viable (at the beginning of the seventh month).[63]

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[64]

The Court deemed this right "fundamental," meaning that restrictions on it had to survive strict scrutiny (i.e., be narrowly tailored to achieve a compelling government interest).[65] Justice Blackmun rejected Texas's argument that it had such an interest in protecting all fetuses as constitutional "person[s],"[66] but declined to resolve "the difficult question of when life begins," which had bedeviled doctors, philosophers, and theologians for centuries.[67] Nonetheless, the Court recognized that the

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60. *Id.* at 116.

61. *See* Gregory C. Sisk, *The Willful Judging of Harry Blackmun*, 70 MO. L. REV. 1049, 1053–60 (2005) (documenting that Justice Blackmun simply converted his longstanding personal opinion favoring a nearly absolute right to abortion into a constitutional right, showed little interest in its legal justification, obsessively defended and sought to expand his fabricated right, and perceived his colleagues largely through the lens of his political stance on abortion).

62. *Roe*, 410 U.S. at 129–47.

63. *See id.* at 159–63.

64. *Id.* at 153 (emphasizing that forcing a woman to give birth to an "unwanted child" would cause physical discomfort, stress, and psychological harm).

65. *Id.* at 155–56, 165–66.

66. *Id.* at 156–58.

67. *Id.* at 159.

state's interest in safeguarding the "potential life" of the fetus did become compelling at the point of viability.[68]

Justice Blackmun concretely implemented the foregoing analysis by segmenting pregnancy into "trimesters."[69] During the first three months of pregnancy, the government could not prohibit abortions or regulate them except as it would any other medical procedure.[70] In the second trimester, the state could not ban abortion but could control it in ways "reasonably related" to maternal health.[71] Finally, in the last third of pregnancy, when the fetus had attained viability, the government could proscribe abortion "except where it is necessary, in appropriate medical judgment," to preserve the mother's life or health.[72]

In the companion case of *Doe v. Bolton*,[73] the Court applied *Roe* to strike down a Georgia law that had prohibited abortions unless (1) the pregnancy seriously endangered the mother's life or health, the fetus was irreparably "defective," or the pregnancy resulted from rape, and (2) the abortion was performed in an accredited hospital, preapproved by a committee, recommended by at least three physicians, and allowed only for state residents.[74]

Roe and *Doe* featured several concurring opinions presenting different perspectives on their holdings and implications,[75] as well as two dissents. In *Roe*, Justice Rehnquist dissented on the

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68. *Id.* at 150, 154–55, 159–63. Justice Blackmun recognized that, because of the presence of the fetus, privacy in the abortion context was different from that implicated in previous cases, which concerned only the rights of individual litigants. *Id.* at 159.

69. *Id.* at 162–64.

70. *Id.* at 150, 154, 163–64.

71. *Id.* at 163 (listing as examples requirements that doctors have appropriate licensing and training and that proper facilities be used).

72. *Id.* at 164–65.

73. 410 U.S. 179 (1973).

74. *Id.* at 182–83.

75. *Compare id.* at 208 (Burger, C.J., concurring) (declaring that the Court had carefully balanced various concerns and "reject[ed] any claim that the Constitution requires abortions on demand"), *with id.* at 209–21 (Douglas, J., concurring) (interpreting the *Roe* and *Doe* holdings as recognizing a right that deferred completely to a woman's wishes and her doctor's judgment, which could include considerations not merely of physical health but also of psychological, social, economic, and educational factors); *see also Roe*, 410 U.S. at 167–71 (Stewart, J., concurring) (continuing to deny that the Constitution confers a right of privacy, but concluding that the Court's "substantive due process" precedent had established a liberty interest in family matters that encompassed freedom of choice regarding abortion).

ground that the Constitution contained no right of "privacy" and that, in any event, the cases creating such a right had no applicability to an operation performed in a public medical facility.[76] He further argued that the Texas statute easily met the Court's established test for social regulations alleged to infringe Fourteenth Amendment "liberty" interests, as they were "rationally related" to the state's valid objective of protecting fetal life.[77] According to Justice Rehnquist, the majority avoided this conclusion by transplanting the "compelling state interest" standard from its equal protection cases into its due process analysis,[78] and he stressed the pitfalls of doing so:

> As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.[79]

Indeed, that Amendment's framers and ratifiers obviously did not mean to include a right to abortion, as no one understood the Amendment to affect the thirty-six state laws that restricted or prohibited abortion in 1868 and long thereafter.[80] Thus, "the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[81]

Similarly, in *Doe* Justice White accused the majority of reading into the Constitution their personal judgment valuing a pregnant woman's convenience more than the life of a fetus:

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override

76. *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting).
77. *Id.* at 173.
78. *Id.*
79. *Id.* at 174.
80. *Id.* at 174–77.
81. *Id.* at 174 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

> most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus . . . against a spectrum of possible impacts on the mother . . . . [The decision] is an improvident and extravagant exercise of the power of judicial review . . . .[82]

He urged the Court to leave such a sensitive and controversial issue to the political process.[83]

2. *The Reaction to* Roe

Roe unleashed a firestorm of criticism. Indeed, even many pro-choice scholars lamented the Court's poor legal reasoning. Most famously, John Hart Ely assailed *Roe*

> [n]ot because it will perceptibly weaken the Court—it won't; and not because it conflicts with either my idea of progress or what the evidence suggests is society's—it doesn't. It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.[84]

Professor Ely argued that a right to abortion could not reasonably be inferred from the Constitution's language, drafting and ratification history, general values, or structure.[85] Both Ely and Richard Epstein contended that (1) the historical sources cited by the Court tended to support the personhood of fetuses,[86] and (2) in any event, the Constitution did not require the rights or life of another "person" to be implicated before a state could justifiably prohibit certain activities, even constitu-

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82. *Doe*, 410 U.S. at 221–22 (White, J., dissenting).

83. *Id.* at 222.

84. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

85. *Id.* at 923–27, 943, 949.

86. *See id.* at 924–27 (making this argument and adding that, at the very least, history suggested drawing the line of the state's compelling interest at "quickening" rather than "viability"); Richard A. Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 173–75 (noting that the law of crime, torts, and property had all treated a fetus as a person, even before quickening or viability); *id.* at 176–77 (observing that, if the fetus were indeed merely an unwanted body part, its removal would have no graver moral consequences than taking off a hangnail); *see also id.* at 167 (contending that Justice Blackmun's historical research did not "lend support for the ultimate decision to divide pregnancy into three parts, each subject to its own constitutional rules").

tionally protected ones.[87] Moreover, Professors Ely and Epstein noted that, even if one acknowledged a constitutional right of privacy in the home, this concept (and the cases recognizing it) had nothing to do with the medical procedure of abortion.[88] Echoing Justice Rehnquist and Professor Epstein, Ely concluded that *Roe* marked a regression to the *Lochner* era, in which the Court "simply manufactured a constitutional right out of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures."[89]

Professor Epstein further maintained that states should not only be *permitted* to protect the unborn child but should be *required* to do so.[90] Likewise, John Noonan claimed that the majority had replaced the state's reasonable judgment that safeguarding the fetus was a compelling interest with the Justices' personal view of "the unborn as pure potentiality . . . before viability" rather than actual human life.[91]

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87. *See* Ely, *supra* note 84, at 926 (illustrating this point by noting that the government could prohibit the destruction of draft cards, which are obviously not "persons," despite the First Amendment protection of freedom of expression); *see also* Epstein, *supra* note 86, at 179–80.

88. *See* Ely, *supra* note 84, at 929–30; Epstein, *supra* note 86, at 168–72, 183.

89. *See* Ely, *supra* note 84, at 937; *see also* Epstein, *supra* note 86, at 168, 182–85. Rejecting this comparison to *Lochner*, Professor Tribe argued that the Due Process Clause allocates the decision making role in previability abortion and similar personal matters to individuals rather than the government, but he lamented Justice Blackmun's failure to clearly articulate and justify this substantive judgment. *See* Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). Significantly, Professor Tribe acknowledged that states could properly conclude that allowing abortion after viability would be "tantamount to permitting murder," despite the possibility of "serious hardships for the woman . . . involved." *See id.* at 27–28; *see also id.* at 27 (distinguishing the right to abort a fetus before viability from the "entirely separate right to ensure its death after viability, which states can prohibit as infanticide"); *id.* at 4 n.24 (criticizing *Roe* for suggesting "a troublesome deference to the woman's desire to preserve her mental health by assuring that the unwanted [viable] fetus be killed").

90. *See* Epstein, *supra* note 86, at 184; *see also id.* at 180 (stressing that the Due Process Clause would still allow courts to balance these government interests against the woman's right to protect her life or health, in much the same way that self-defense justified certain homicides).

91. *See* John T. Noonan, Jr., *The Root and Branch of* Roe v. Wade, 63 NEB. L. REV. 668, 673 (1984); *see also* PHILLIP BOBBITT, CONSTITUTIONAL FATE 158–59 (1982) (faulting the Court for declining to explain why protection of the fetus was an insufficiently compelling interest or why viability should be the measurement of the state's interest); Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1185 (1991) (arguing that Justice Blackmun claimed to avoid the question of when life begins, but actually answered that question by effectively giving the fetus no real protection).

Finally, Ruth Bader Ginsburg contended that *Roe* should have been based not on due process but on equal protection, because laws banning or restricting abortion discriminate solely against women.[92] Other scholars have provided historical support for this claim.[93] Akhil Amar has emphasized that the abortion bans in Texas and other states were troublesome because they had been enacted at a time when women were denied basic political and legal rights:

> [A]n equality approach would have noticed that . . . the Court had before it a sex-based law predating women's suffrage, a law that restricted women's choices but had not earned women's votes. Rather than rushing to constitutionalize a trimester framework that may not be the most sensible solution for all time, a sounder—more democratic, less hu-

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92. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 382–87 (1985) (criticizing the Court for focusing on patient-physician autonomy rather than women's equality). Ginsburg relied upon Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984), which maintained that constitutional gender-equality doctrine should focus on the biological reproductive differences between men and women, and that almost all limitations on abortion should be struck down because they oppress women and reinforce sex-role constraints on their freedom. *See* Ginsburg, *supra*, at 375 n.1; *see also* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286–89, 1295–1328 (1991) (arguing that the Constitution incorporates a "sex equality" principle that prohibits the government from depriving women of reproductive control, because forced motherhood perpetuates their legally imposed social and economic disadvantages); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 58 (1977) ("The focus of equal citizenship here is not . . . a right to an abortion, but a right to take responsibility for choosing one's own future.").

A variation of this argument is that banning abortion effectively compels a woman to use her body (and risk her health) for the benefit of another, which would not be legally permitted in any other circumstance. *See* Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971); *see also* Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979) (asserting that the Constitution prohibits subordinating and physically burdening women by forcing them to be "Good Samaritans"). *But see* BOBBITT, *supra* note 91, at 163 (pointing out that this position treats the fetus as a stranger who has been inconveniently placed in the mother, and stressing that the law imposes a duty to care for one's child); *id.* at 159–67 (contending that *Roe* should have been rooted in the principle that the government may not coerce intimate acts).

Even under an equal protection analysis, the Court would still have to determine whether the government's interest in protecting the fetus warrants prohibiting or restricting abortion. Moreover, the standard of judicial review for gender discrimination is not strict scrutiny but rather intermediate scrutiny, meaning that state regulations would be more likely to be upheld. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 824 (3d ed. 2006).

93. *See, e.g.*, Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

> bristic—approach would have identified the issue of women's equality and remanded abortion to a political process in which women's voices and votes would count equally.[94]

In short, with rare exceptions,[95] scholars from across the ideological spectrum have assailed *Roe*'s legal analysis, and deservedly so.[96] Few major constitutional opinions have so thoroughly failed to justify their result.[97] Most obviously, Justice Blackmun cited nothing in the language, drafting and ratification history, or century-long understanding of the Due Process Clause that even hints at a right to abortion.[98] This silence, viewed in light of the idea of a written Constitution and the fundamental structural principle of federalism, means that abortion—like all medical procedures and controversial social issues not dealt with specifically in the Constitution—should have been left to state regulation.[99]

Moreover, *Roe*'s only real proffered justification was to invoke modern privacy cases like *Griswold*,[100] which rest on equally shaky constitutional grounds and have unsavory antecedents like *Lochner*. But even assuming the validity of substantive due process precedent, the right to privacy has little evident relevance to abortion. The procedure is not performed at

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94. *See* Amar, *Foreword*, *supra* note 40, at 76.

95. The seminal piece is Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees*: Roe v. Wade *and Its Critics*, 53 B.U. L. REV. 765 (1973), which defends *Roe* on the ground that a half-century of precedent had recognized a right of privacy in the areas of marriage, procreation, and family. *See also* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 99 (1990) (supporting the abortion decisions on the basis that, over the past century, the Court has protected other unenumerated rights (for example, to marry, raise children, and use contraceptives), and that most Americans have accepted that constitutional "liberty" includes such elements of personal and family autonomy).

96. *See, e.g.*, BOBBITT, *supra* note 91, at 157 ("[O]ne rarely encounters a law professor or judge willing to defend the decision. I think the universal disillusionment with *Roe v. Wade* can be traced to the unpersuasive opinion in that case."); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1008 (2003) (remarking on the absence of "a serious scholarly defense of *Roe*'s legal reasoning, on its own terms, by a distinguished legal academic (or even by an undistinguished one)").

97. *See* Sisk, *supra* note 61, at 1060 (*Roe* is "indefensible as a matter of any meaningful theory of constitutional interpretation beyond result-oriented preferences.").

98. *See* Ely, *supra* note 84, at 947.

99. *See* Roe v. Wade, 410 U.S. 113, 221–22 (1973) (White, J., dissenting); *cf.* Ginsburg, *supra* note 92, at 385–86 n.81 (citing Judge Henry Friendly's opinion, expressed three years before *Roe*, that abortion laws should be changed through state legislative processes rather than judicial invention of a "fundamental" right).

100. 381 U.S. 479 (1965).

home and involves not only individual rights (of the mother) but also the competing claims of the fetus, which millions believe has a moral right to continued existence. Thus, even judged purely in common law terms, *Roe* does not plausibly explain how its holding logically flows from precedent or achieves a balanced social policy.[101]

Despite *Roe*'s numerous and widely recognized flaws, the Court has consistently reaffirmed its core holding of a right to abortion. Later cases have simply worked out the details of this right.

3. *Refining* Roe

For two decades after *Roe*, the Court tended to show hostility to government attempts to regulate abortion. The major disputes involved three subjects.

First, the Court ruled that states could require standard informed consent,[102] but not the communication of graphic descriptions of the fetus and the risks of abortion designed to discourage women from choosing this option.[103] Similarly, a majority of Justices rejected laws mandating brief waiting periods[104] and the father's consent.[105] The Court did, however, uphold state requirements of parental notification[106] or consent for unmarried minors,[107] as long as such statutes provided for an alternative judicial hearing to determine if the minor was sufficiently mature to decide whether to have an abortion.[108]

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101. *See* BOBBITT, *supra* note 91, at 158–59; *see also id.* at 164 (deeming the opinion "a pretext" to mask the ethical judgment that the government cannot force a woman to carry the fetus to term).

102. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67 (1976).

103. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 444–45 (1983); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 760–64 (1986). The Court likewise invalidated statutory requirements regarding the distribution of information about adoption, paternal responsibility, and the availability of post-childbirth counseling. *See id.* at 760–63.

104. *See Akron*, 462 U.S. at 450–51 (holding that a 24-hour waiting period did not advance any legitimate state interest).

105. *See Danforth*, 428 U.S. at 67–71.

106. *See* H.L. v. Matheson, 450 U.S. 398, 409–13 (1981).

107. *See* Planned Parenthood v. Ashcroft, 462 U.S. 476, 492–94 (1983).

108. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622, 643 (1979); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510–14 (1990); Hodgson v. Minnesota, 497 U.S. 417, 427, 450–55 (1990); *Danforth*, 428 U.S. at 72–75.

Second, the Court allowed basic reporting and recordkeeping requirements for public health purposes.[109] Such data, however, had to be kept confidential to protect women's privacy.[110]

Third, the Justices generally invalidated states' attempts to regulate the medical profession. Examples included laws requiring abortions to be performed in accredited hospitals[111] or mandating the presence of a second physician (except for post-viability abortions, as long as there was an exception for medical emergencies).[112] Similarly, the Court struck down a state ban on the saline amniocentesis method of second-trimester abortion because the alternative procedures increased health risks.[113]

Of special relevance here, the Court initially invalidated state statutes requiring doctors to determine whether a fetus was viable—and, if so, to follow special procedures to maximize the chances that the fetus would survive—without any directive to safeguard the mother's health.[114] In 1989, however, *Webster v. Reproductive Health Services*[115] upheld a Missouri law that prohibited abortions after 20 weeks unless an evaluation showed that the fetus was not viable.[116] In a plurality opinion, Chief Justice Rehnquist, joined by Justices White and Kennedy, acknowledged that this statute would make abortions more costly and would restrict physicians' discretion, but concluded that it properly furthered the state's interest in protecting potential human life.[117] The plurality rejected *Roe*'s trimester

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109. *See, e.g., Danforth*, 428 U.S. at 79–81.

110. *Compare id.* (upholding a Missouri law authorizing abortion recordkeeping, which could be viewed only by public health officials), *with* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 472 U.S. 747, 766–68 (1986) (striking down a Pennsylvania statute requiring abortion records that the public could access).

111. Such a law was invalidated in *Roe*'s companion case, *Doe v. Bolton*, 410 U.S. 179, 192–94 (1973); *accord Ashcroft*, 462 U.S. at 481–82; City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 434–39 (1983).

112. *Compare Ashcroft*, 462 U.S. at 482–86 (sustaining a state law that contained an implicit statutory exemption for emergencies), *with Thornburgh*, 476 U.S. at 762, 770–71 (striking down a Pennsylvania regulation that neither expressly nor impliedly provided for such an exception).

113. *See Danforth*, 428 U.S. at 75–79; *see also* Colautti v. Franklin, 439 U.S. 379, 397–401 (1979). The Court also invalidated laws that imposed liability on doctors for failing to meet certain standards of care in performing abortions, on the ground that such requirements might negatively affect maternal health. *See Danforth*, 428 U.S. at 81–84; *Thornburgh*, 476 U.S. at 768–69.

114. *See, e.g., Colautti*, 439 U.S. at 391–96.

115. 492 U.S. 490 (1989).

116. *See id.* at 513–21 (plurality opinion).

117. *See id.* at 519–20.

framework and declared that the state's compelling interest in safeguarding the fetus existed both before and after viability.[118] Justice Scalia concurred and suggested that the plurality's implicit overruling of *Roe* should be made explicit, as the Court had no proper constitutional role in adjudicating the political questions of state law raised by abortion.[119] Finally, Justice O'Connor concurred on the ground that the statute did not impose an "undue burden" on a woman's freedom of choice,[120] and she saw no reason to revisit *Roe* because the law did not prohibit abortion.[121]

4. *Analyzing the Post-*Roe *Cases*

Once again, it seems fruitless to examine *Roe*'s progeny in light of traditional benchmarks such as fidelity to the Constitution's text, history, or structure. A Constitution that does not mention abortion obviously cannot resolve questions about the validity of, say, parental notification requirements. Rather, the Court's jurisprudence can most sensibly be judged according to common law standards.

Before *Webster*, the Court gradually had come to interpret *Roe* as creating something close to a right to abortion on demand. Such a result cannot be squared with *Roe* itself, which expressly denied it was doing any such thing and instead balanced a woman's rights against a state's interests in protecting fetal life and maternal health.[122] For instance, under *Roe* itself, a state should have been able to err on the side of caution in ensuring that abortions were never performed on viable fetuses.

Of course, common law evolves in light of changing perceptions of good social policy. To take one example, the Court's invalidation of laws requiring husbands to consent to abortions makes sense if one characterizes this decision as exclusively the province of a woman and her physician, but not if one views the father as having an independent interest in his future child. The evolutionary nature of common law, and the vague legal standards articulated in *Roe*, make it difficult to draw firm conclusions about whether any individual case was decided properly based on precedent and policy considerations.

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118. *See id.* at 518–19.

119. *See id.* at 532–37 (Scalia, J., concurring in part and concurring in the judgment).

120. *Id.* at 530 (O'Connor, J., concurring).

121. *See id.* at 525.

122. *See* Roe v. Wade, 410 U.S. 113, 150–64 (1973).

Moreover, because judicial opinions about abortion reflect politics and ideology, the party of the nominating President can be quite influential. When the first President Bush took office in 1989 on a pro-life platform and later appointed David Souter and Clarence Thomas to replace Justices Brennan and Marshall,[123] it appeared that the two new Justices would join the original *Roe* dissenters (Chief Justice Rehnquist and Justice White) and its later critics (Justices O'Connor, Scalia, and Kennedy) to overrule *Roe*. The Bush Administration pressed for this outcome.[124]

5. Planned Parenthood v. Casey

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[125] only Justices Blackmun and Stevens voted to retain *Roe* in its entirety.[126] Surprisingly, however, Justices O'Connor, Kennedy, and Souter authored an unusual joint opinion preserving *Roe*'s "central holding" that (1) women had a right to choose abortion before fetal viability; (2) states could restrict or prohibit this procedure after viability, except where necessary "in appropriate medical judgment" because a pregnancy endangered a woman's life or health; and (3) states had legitimate interests in protecting both maternal health and the fetus's potential life throughout the pregnancy.[127]

Initially, these three Justices asserted that *Roe* had properly recognized a right of abortion by relying on substantive due process cases that had identified a liberty interest in making personal decisions regarding family matters, procreation, and contraception:[128] "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they

123. *See* Notes, 498 U.S. IV (1990) (describing Souter's nomination and confirmation); Notes, 502 U.S. IV (1991) (noting Thomas's appointment).

124. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) (plurality opinion) (acknowledging the government's request to overturn *Roe*).

125. 505 U.S. 833 (1992).

126. *Id.* at 911–22 (Stevens, J., concurring in part and dissenting in part); *id.* at 922–43 (Blackmun, J., concurring in part and dissenting in part).

127. *Id.* at 844–901 (plurality opinion).

128. *Id.* at 851–53.

formed under compulsion of the State."[129] Moreover, the plurality asserted that abortion raised unique liberty concerns because women alone bore the physical and psychological sacrifices of pregnancy and childbirth, and therefore "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society."[130] The joint opinion then maintained that, even if *Roe* had been wrongly decided as an original matter, it should be adhered to because of its precedential value.[131]

Most importantly, *stare decisis* dictated following precedent because (1) a generation had grown up relying on the right to abortion, which facilitated women's ability to participate equally in social and economic life; (2) *Roe* remained workable; (3) no legal developments had undermined its doctrinal foundation; and (4) no changes in *Roe*'s factual premises had rendered its holding obsolete.[132]

A related problem was that overruling *Roe* would be perceived as a surrender to political pressure, which could damage the Court's legitimacy as a legally principled decision maker and hence Americans' confidence in the rule of law.[133] This concern was especially acute because *Roe* was a unique case, like *Brown*, in which "the Court's interpretation of the Constitution call[ed] the contending sides of a national contro-

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129. *Id.* at 851; *see also id.* at 850 (acknowledging that abortion offended many Americans' religious and moral views, but concluding that the Court's obligation was "to define the liberty of all, not to mandate our own moral code").

130. *See id.* at 852; *see also id.* at 869 (stressing "the urgent claims of the woman to retain the ultimate control over her destiny and her body").

131. As the plurality stated:

> We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have [agreed with the decision] . . . . [C]oming as it does after nearly 20 years of litigation in *Roe*'s wake we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding.

Id. at 871. The plurality repeatedly acknowledged that *Roe* may have committed a legal "error." *See id.* at 858–59, 869. Thus, they expressed "reservations" and "reluctance" at having to reaffirm it. *See id.* at 853, 861.

132. *Id.* at 854–64. The plurality contrasted *Roe* with cases like *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Lochner v. New York*, 198 U.S. 45 (1905), which the Court reasonably overruled in response to changing factual and legal understandings. *Casey*, 505 U.S. at 861–64 (plurality opinion); *see also Casey*, 505 U.S. at 912–14 (Stevens, J., concurring in part and dissenting in part) (agreeing with the plurality that *stare decisis* demanded reaffirming *Roe*'s central holding).

133. *See Casey*, 505 U.S. at 864–69 (plurality opinion).

versy to end their national division by accepting a common mandate rooted in the Constitution."[134]

Nonetheless, Justices O'Connor, Kennedy, and Souter altered three aspects of *Roe*. First, the constitutional right to abortion would now be squarely grounded in women's "liberty," not patient-doctor privacy.[135] Second, the plurality rejected the rigid trimester framework in favor of a simple line drawn at viability: States could prohibit abortion only after this point, unless one was necessary to preserve a woman's life or health.[136] Third, these swing Justices replaced "strict scrutiny" with a standard focusing on whether the government had imposed an "undue burden"[137]—that is, "plac[ed] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[138] The government, however, could still further its "profound interest in potential life" by ensuring that this choice was informed and by trying to "persuade the woman to choose childbirth over abortion."[139]

Turning to the specific provisions of the Pennsylvania statute at issue, the Court followed its precedent by striking down a

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134. *Id.* at 867.

135. *See id.* at 844, 846–53, 857–61, 869, 871, 876.; *see also id.* at 852 ("[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."). From the beginning, several Justices characterized abortion as an aspect of constitutional "liberty," not privacy. *See* Roe v. Wade, 410 U.S. 113, 167–71 (1973) (Stewart, J., concurring); *id.* at 172–73 (Rehnquist, J., dissenting). Others had echoed this idea of abortion as a matter of women's autonomy. *See, e.g.*, Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 775 (1986) (Stevens, J., concurring).

136. *See Casey*, 505 U.S. at 869–76, 878 (plurality opinion). *Roe* itself had used the trimester system as a rough proxy for viability, with the assumption that fetuses became viable only in the last trimester, thereby justifying state restrictions or even bans on abortion during that stage. *Roe*, 410 U.S. at 159–64. Advances in neo-natal medical care, however, moved the date of viability into the second trimester, putting *Roe* on "a collision course with itself." *See* City of Akron v. Akron Center for Reprod. Health, 462 U.S. 416, 457–58 (1983) (O'Connor, J., dissenting). Thus, various Justices had previously criticized the trimester framework as unduly rigid, incompatible with scientific progress, and insufficiently sensitive to the states' interest in protecting potential life. *See, e.g.*, Webster v. Reprod. Health Servs., 492 U.S. 490, 517–19 (1989); *Akron*, 462 U.S. at 455–57. Earlier cases had stressed that "viability is the critical point." *E.g.*, Colautti v. Franklin, 439 U.S. 379, 389 (1979).

137. *See Casey*, 505 U.S. at 874–78 (plurality opinion).

138. *See id.* at 877.

139. *See id.* at 878; *see also id.* at 871–76 (noting that the Court after *Roe* had consistently undervalued this state interest).

spousal notification requirement[140] but upholding provisions that authorized abortions in medical emergencies,[141] required parental notice (with a judicial bypass option),[142] and mandated various reports and records.[143] However, the Court overruled earlier cases by allowing a twenty-four hour waiting period[144] and an "informed consent" requirement that included truthful material about the fetus's status and the health risks of abortion.[145]

Justice Blackmun would have reaffirmed *Roe* and struck down all the challenged statutory provisions.[146] Nonetheless, he praised Justices O'Connor, Kennedy, and Souter for their "act of personal courage and constitutional principle."[147] Justice Stevens concurred with the joint opinion's reaffirmation of *Roe*'s "central holding," although he disagreed with the proposition that states could attempt to persuade women to forego abortion.[148]

Chief Justice Rehnquist and Justice Scalia wrote separate opinions, each joined by Justices White and Thomas, arguing

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140. *See id.* at 887–98 (stressing that, even if this requirement affected only a small percentage of women, it was precisely those women who were most in need of protection because they feared that disclosure would prompt abuse by their husbands).

141. *Id.* at 879–80.

142. *Id.* at 899–900; *see also* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320 (2006) (reaffirming this rule, but emphasizing that such state laws must contain an exception for medical emergencies).

143. *See Casey*, 505 U.S. at 900–01. All of the Justices except Blackmun joined this part of the plurality's opinion. *See id.* at 936 n.7 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

144. *Id.* at 881, 885–87 (plurality opinion) (acknowledging that a waiting period might make some abortions more expensive or inconvenient, but concluding that it did not rise to the level of a "substantial obstacle"); *see also id.* at 966–70 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (arguing that this slight delay helped to ensure that women thoroughly considered their decisions). *But see id.* at 918–21 (Stevens, J., concurring in part and dissenting in part) (maintaining that this provision unconstitutionally interfered with a woman's choice).

145. *Id.* at 881–87 (plurality opinion); *see also id.* at 966–70 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (agreeing that Pennsylvania's "informed consent" requirement furthered its legitimate interests in protecting the woman's health and fetal life). *But see id.* at 916–18, 921–22 (Stevens, J., concurring in part and dissenting in part) (contending that states could require physicians to inform women of the medical risks of abortion, but not to provide materials intended solely to dissuade them from choosing abortion).

146. *Id.* at 930, 934 (Blackmun, J., concurring in part and dissenting in part).

147. *Id.* at 923.

148. *See id.* at 912, 916–22 (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part).

that *Roe* should have been overruled.[149] They diverged on one doctrinal matter: Justice Scalia denied that the Due Process Clause created any protected "liberty" interest in abortion,[150] whereas Chief Justice Rehnquist recognized such an interest but deemed it non-fundamental—meaning that states could regulate abortion in ways rationally related to their legitimate interests in promoting fetal life and women's health (as Pennsylvania had done).[151] Otherwise, Chief Justice Rehnquist and Justice Scalia agreed on four points.

First, before *Roe*, the Constitution had always been viewed as leaving abortion to the democratic process, and states had regulated and often criminalized abortion rather than treating it as a fundamental right.[152] Moreover, contrary to the majority's assertions, *Roe* had not resolved the abortion issue but instead had inflamed it by foreclosing the possibility of state-by-state political compromise, thereby channeling Americans' attention to the national level (including direct protests to the Court).[153]

Second, *Roe* had mistakenly relied upon cases involving family privacy and autonomy. These decisions, however, were markedly different from the *sui generis* decision to terminate fetal life.[154]

Third, the plurality had adopted a novel conception of *stare decisis* that enabled them to retain *Roe*'s supposed "central holding" while discarding other seemingly crucial aspects of the decision, such as strict scrutiny and the trimester framework.[155] Furthermore, *stare decisis* did not require the Court to

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149. *See id.* at 944–79 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 979–1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

150. *Id.* at 979–80 (Scalia, J., concurring in the judgment in part and dissenting in part).

151. *Id.* at 951, 966–79 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

152. *Id.* at 952–53; *id.* at 979–81 (Scalia, J., concurring in the judgment in part and dissenting in part).

153. *Id.* at 995–96, 1002 (Scalia, J., concurring in the judgment in part and dissenting in part).

154. *Id.* at 951–52 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *see also id.* at 982–84 (Scalia, J., concurring in the judgment in part and dissenting in part) (asserting that *Roe* had unreasonably adopted a purported balancing test that rested on the majority's personal value judgment that the fetus was "potentially," not actually, human).

155. *Id.* at 993–94 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also id.* at 955–56 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

cling to erroneous constitutional judgments like *Roe*, especially because they could not be corrected by legislatures and would only rarely be overturned by constitutional amendment.[156] Particularly dangerous was the joint opinion's suggestion that the Court should stand by a mistaken constitutional decision merely because it had generated significant public opposition and its reversal might be perceived as caving in to political pressure.[157] Instead of speculating about popular reaction (which could as easily view the reaffirmance of *Roe* as yielding to liberal partisanship), the Court should rest its rulings on its faithful interpretation of the Constitution.[158]

Fourth, *Casey*'s novel "undue burden" standard had no constitutional basis.[159] Furthermore, applying this inherently malleable test would require judges to make subjective determinations that depended entirely upon their own preferences.[160]

6. *Critiquing* Casey

The overwhelming majority of law professors and commentators are pro-choice, and so they were understandably relieved by *Casey*.[161] Other legal scholars, most notably Michael

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156. *Id.* at 954–66 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *see also id.* at 957–63 (criticizing the plurality opinion for inexplicably invoking as supporting authority cases in which the Court had rejected *stare decisis* to overrule decisions that had misinterpreted the Constitution, such as *Plessy* and *Lochner*).

157. *See id.* at 958–64; *id.* at 996–99 (Scalia, J., concurring in the judgment in part and dissenting in part).

158. *See id.* at 963–64 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 996–1001 (Scalia, J., concurring in the judgment in part and dissenting in part) (making this point and adding that the Court, by imposing its personal preferences and value judgments instead of interpreting the Constitution's text and traditions, had caused the public to apply political pressure to the Justices).

159. *Id.* at 964 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 985, 987 (Scalia, J., concurring in the judgment in part and dissenting in part).

160. *See id.* at 945, 965–66 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 985–93 (Scalia, J., concurring in the judgment in part and dissenting in part).

161. *See, e.g.*, David A. Strauss, *Abortion, Toleration, and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 1–5, 20–28; Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 27–34, 70–75, 100–03, 108–11 (1992).

Paulsen, assailed *Casey* as a politically expedient decision that upheld the legally unprincipled *Roe*.[162]

Attacking *Casey* for its lack of fidelity to the Constitution, however, is like shooting fish in a barrel. Indeed, the plurality did not even try to refute the dissenters' unanswerable argument that nothing in the Constitution's text, structure, or history suggests that states cannot impose an "undue burden" on abortion prior to viability. Rather, Justices O'Connor, Kennedy, and Souter pinned their decision entirely on modern precedent. Consequently, their conception of *stare decisis* is crucial. It has two related, but distinct, components.

The first is that the Court must affirm its prior cases simply because they are precedent, without bothering to examine whether they were correctly decided.[163] The plurality cited no authority for this proposition, because there is none. Courts must interpret and apply the law, which necessarily requires determining whether previous decisions got the law right—with the caveats that all doubts must be resolved in favor of precedent and that little energy need be expended on cases that have permanently settled the law in a manner that the parties do not contest.[164] Nowhere is the duty to reexamine case law more imperative than in constitutional law, because formal amendments to reverse a Court decision are so rare (having occurred only three times in our nation's history) that reconsideration of previous interpretations of the Constitution is the only practical way of rectifying mistakes.[165] Of course, determining whether an error occurred—and, if so, what to do about it—are delicate endeavors.

That insight brings us to the second element of the joint opinion's treatment of *stare decisis*: its "new, keep-what-you-want-and-throw-away-the-rest version," to use Justice Scalia's color-

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162. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1538 n.6, 1539 & n.9 (2000) (listing numerous articles in which he develops that thesis); *id.* at 1538–1602 (arguing that Congress, pursuant to the Necessary and Proper Clause, can direct the Court to ignore *stare decisis* in *Roe* or any other constitutional case because that doctrine is a matter of prudential judicial policy rather than a constitutional command).

163. *See* Amar, *Foreword*, *supra* note 40, at 87 (criticizing this view of *stare decisis*).

164. *See, e.g.*, Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 799–849 (2001).

165. *See, e.g.*, *Casey*, 505 U.S. at 954–66 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

ful description.[166] A more charitable characterization would be that the plurality concluded that overruling *Roe* would upset important reliance interests, and therefore preserved its core holding while modifying or rejecting certain peripheral rules (for example, those regarding waiting periods) to strike a better social policy balance. This approach conflicts with the classical ideal of judicial review under our written Constitution,[167] but it has a respectable common law pedigree. In areas like contracts and torts, courts strive to preserve continuity by salvaging as much existing case law as possible, while changing the law to improve it as a matter of either logic or policy.[168] From a political standpoint, the plurality may well have captured the position of the crucial bloc of middle-of-the-road Americans: allow laws that express moral concerns about abortion by discouraging it and by ensuring that pregnant women weigh their options carefully and with full information, but ultimately leave the decision to each woman.[169]

Regardless of whether one favors a strong or weak version of *stare decisis*, however, the problem with *Casey* is that the plurality's "undue burden" test follows no precedent at all. The Court has always held that laws infringing any right it deems "fundamental" (including abortion) must withstand "strict scrutiny."[170] By contrast, non-fundamental rights can be abridged if the government merely has a "rational basis" for its law.[171] The Justices on both the right (Rehnquist, Scalia, Thomas, and White) and left (Blackmun and Stevens) agreed on exactly one point: The joint opinion's "undue burden" standard had no doctrinal foundation. The hopeless subjectivity entailed in determining which state burdens were "undue" only added to the confusion.[172]

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166. *See id.* at 993 (Scalia, J., concurring in the judgment in part and dissenting in part).

167. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

168. *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 475–79 (1994) (describing this traditional Blackstonean conception of common law).

169. *See* Gallup's Pulse of Democracy: Abortion, http://www.gallup.com/poll/1576/Abortion.aspx (documenting that most Americans do not favor overruling *Roe v. Wade*, but do support limitations such as laws requiring informed consent, parental consent, and bans on second- and third-trimester abortions).

170. *See* CHEMERINSKY, *supra* note 92, at 546, 675–76, 791–98.

171. *See id.* at 546, 676, 794.

172. Subsequent cases have illustrated this problem. *See, e.g.*, Mazurek v. Armstrong, 520 U.S. 968 (1997) (concluding that a Montana statute requiring that abortions be performed exclusively by licensed physicians did not "unduly burden" a

In short, the plurality articulated an eccentric vision of *stare decisis* and then ignored all precedent in formulating its governing test. Nonetheless, the result in *Casey* seemed politically acceptable. Furthermore, *Casey* gained traction when Bill Clinton became President and appointed two staunchly pro-choice Justices, Ruth Bader Ginsburg and Stephen Breyer, to replace Justices White and Blackmun.[173] Although the basic pre-viability abortion right appeared secure, the emergence of new late-term abortion techniques sparked fresh controversy.

II. THE BATTLE OVER PARTIAL-BIRTH ABORTION

In 1992, Dr. Martin Haskell publicly described a procedure he had developed called "intact dilation and evacuation (D & E)," in which a physician induces delivery by dilating the cervix, cuts open the fetus's skull, empties out its brains, and then removes the entire fetus.[174] Commonly deemed "partial-birth abortion," this procedure is typically performed during the late second trimester, when the fetus may or may not be viable.[175] It is an alternative to ordinary D & E, in which a doctor uses surgical instruments to dismember the fetus and remove the pieces by making several passes through the vagina.[176] Dr. Haskell admitted that such late-term abortions were often done as a matter of convenience, not because of any threat to a woman's life or health.[177] By contrast, very rare

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woman's right to choose, and rejecting the dissent's argument that the law's purpose was to limit access to abortion by targeting the lone physician assistant in the state who provided abortions).

It should be noted that the common law often relies on vague standards that are fleshed out on a case-by-case basis, such as the "reasonable person" test for negligence and contract interpretation. In making such determinations in a typical torts or contracts case, however, judges are unlikely to be influenced by the strong emotional feelings that accompany judgments about abortion.

173. *See* Notes, 512 U.S. IV (1994) (detailing the Breyer appointment); Notes, 509 U.S. IV (1993) (noting the Ginsburg nomination and confirmation).

174. *See* Stenberg v. Carhart, 530 U.S. 914, 927–28 (2000) (outlining this procedure, which is known as intact "dilation and extraction" (D & X) when the fetus presents feet first); *id.* at 987–89 (Thomas, J., dissenting) (setting forth Dr. Haskell's description of this abortion method); *id.* at 958–60 (Kennedy, J., dissenting) (noting that intact D & E raises special moral concerns because it mimics a live birth, subjects the fetus to measurable suffering, and is sometimes performed on viable fetuses).

175. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1621 (2007).

176. *See id.* at 1620–21; *Stenberg*, 530 U.S. at 924–26.

177. *See* Diane M. Gianelli, *Shock-Tactic Ads Target Late-Term Abortion Procedure*, AM. MED. NEWS, July 5, 1993, at 15–16.

emergency situations require the riskier methods of hysterectomy and hysterotomy.[178] A final procedure, induction, is used in fifteen percent of abortions after twenty weeks.[179]

Beginning in the mid-1990s, thirty states outlawed partial-birth abortion because their citizens viewed it as tantamount to infanticide, as it is the only abortion technique performed when the fetus is outside the mother's womb.[180] Doctors and abortion-rights groups swiftly challenged the constitutionality of these bans in litigation that reached the Court in 2000.

A. Stenberg v. Carhart

1. The Court's Decision

Stenberg v. Carhart[181] involved a Nebraska law that prohibited "intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the [doctor] . . . knows will kill the unborn child and does kill the unborn child," except where such an abortion was necessary to save a mother's life endangered by a physical illness, injury, or disorder.[182] Writing for a bare majority, Justice Breyer began with the following observations:

> We understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child; they recoil at the thought of a law that would permit it. Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of these virtually irreconcilable points of view, aware that constitutional law must govern a society whose different members sincerely hold directly opposing views, and considering the matter in light of the Constitution's guaran-

178. *See Gonzales*, 127 S. Ct. at 1623 (noting that these two procedures account for only .07 percent of second-trimester abortions).

179. *See id.* (describing how a doctor medicates a woman to cause fetal demise and then induces contractions to deliver the fetus).

180. *See id.* at 1623 (citing *Stenberg*, 530 U.S. at 989, 995–96 & nn.12–13 (Thomas, J., dissenting) (setting forth these state laws)); H.R. REP. NO. 108-58, at 4–5 (2003) (discussing the quick and widespread enactment of this state legislation).

181. 530 U.S. 914 (2000).

182. *Id.* at 921–22 (citing NEB. REV. STAT. ANN. § 28-328(1) (1999); NEB. REV. STAT. ANN. § 28-326(9) (1999)).

> tees of fundamental individual liberty, this Court, in the course of a generation, has determined and then redetermined that the Constitution offers basic protection to the woman's right to choose [citing *Roe* and *Casey*]. We shall not revisit those legal principles. Rather, we apply them to the circumstances of this case.[183]

The Court held that those principles dictated invalidating Nebraska's law, for two reasons.

First, the statute did not contain the requisite exception to protect the mother's health.[184] The Court acknowledged that (1) no studies had documented the comparative safety of the various abortion procedures, and (2) the American Medical Association, the Association of American Physicians and Surgeons, and many doctors had concluded that intact D & E posed unique risks.[185] Nonetheless, the majority accepted the district court's findings that "substantial" medical evidence suggested that, in some circumstances, intact D & E might potentially be safer than the alternatives.[186] In Justice Breyer's view, the uncertainties regarding which procedure would better protect the mother's health counseled leaving this decision to each physician's "appropriate medical judgment."[187]

Second, the Court concluded that the Nebraska law imposed an "undue burden" on a woman's ability to choose abortion.[188] The majority held that the statute, by prohibiting the intentional delivery of a "living fetus" or a "substantial portion thereof," included not only intact D & Es but also ordinary D & Es in which part of a fetus (say, an arm) was pulled out first.[189] Justice Breyer rejected as "not reasonable" the Nebraska Attorney General's contrary position that the law applied only

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183. *Stenberg*, 530 U.S. at 921–22; *see also id.* at 946 (Stevens, J., concurring) (noting that *Roe*'s basic holding had been endorsed by 13 of the 17 Justices who had considered the issue).

184. *Id.* at 929–38.

185. *Id.* at 933–36. The state relied upon this evidence to argue that no health exception was necessary because there remained available safe alternatives to the banned procedure. *Id.* at 931–36.

186. *Id.* at 932–38. Justice Breyer dismissed Nebraska's argument that the ban would have little effect (because intact D & Es were only rarely performed) on the ground that the legal issue was "whether protecting women's health requires an exception for those infrequent occasions." *Id.* at 934.

187. *Id.* at 937 (quotation marks omitted).

188. *Id.* at 930, 938–46.

189. *Id.* at 938–40.

to intact D & Es.[190] Because doctors could not perform any D & E abortion without fear of criminal liability, the Nebraska law placed a "substantial obstacle" in the way of the woman's choice.[191]

In a concurring opinion, Justice Stevens asserted that because all types of late-term abortions were "equally gruesome," it was "irrational" for the state to distinguish between them.[192] Justice Ginsburg joined this opinion and added her suspicion that this law was designed "to chip away at the private choice shielded by *Roe v. Wade*."[193] Justice O'Connor also concurred, but clarified that a specific ban on intact D & E abortions which included an exception to preserve the mother's life and health would be constitutional.[194]

Four Justices filed dissents. Justice Kennedy, joined by Chief Justice Rehnquist, argued that the majority had misapplied *Casey* by invalidating a law that (1) should have been interpreted narrowly as prohibiting only intact D & E abortions;[195] (2) imposed no undue burden on a woman's right to abortion (because safe alternative methods remained available);[196] and (3) promoted the state's important interests in manifesting its citi-

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190. *Id.* at 945. The Court's conclusion that this narrow reading was implausible enabled it to dispense with its rules governing the interpretation of ambiguous or vague statutes—for example, construing statutes to avoid constitutional doubts, deferring to state authorities' interpretations of their own laws, and certifying novel state law questions to the state's supreme court. *See id.*

191. *Id.* at 945–46.

192. *See id.* at 946–47 (Stevens, J., concurring). *But see id.* at 962–63 (Kennedy, J., dissenting) (lamenting this failure to recognize states' power to declare a moral difference between ordinary D & Es and partial-birth abortions, which mimic childbirth and hence resemble infanticide).

193. *Id.* at 952 (Ginsburg, J., concurring); *but see id.* at 1008 n.19 (Thomas, J., dissenting) (pointing out that Justice Ginsburg provided no evidence to support her speculation that Nebraska legislators had acted with an unconstitutional purpose and that they had in fact preserved the basic abortion right recognized in *Roe* and *Casey*).

194. *Id.* at 947–51 (O'Connor, J., concurring).

195. *See id.* at 972–79 (Kennedy, J., dissenting) (contending that the Court had ignored its duty to defer to state authorities' reasonable interpretation of their own statutes—here, that the Nebraska law applied only to intact D & E abortions—and to construe statutes to avoid constitutional difficulties). Two other dissenters echoed these arguments. *See id.* at 954 (Scalia, J., dissenting); *id.* at 989–1006 (Thomas, J., dissenting).

196. *Id.* at 957, 965–68, 979 (Kennedy, J., dissenting). He noted that the record did not reveal *any* situations in which intact D & E was the only appropriate option and that, even if some experts disagreed about whether such a situation might ever arise, legislatures should be given broad latitude in resolving conflicting evidence. *Id.* at 970; *see also id.* at 989–1006, 1020 (Thomas, J., dissenting).

zens' shock at a new procedure that resembled infanticide and in preserving the integrity of the medical profession:

> [T]he Court substitutes its own judgment for the judgment of Nebraska and some 30 other States . . . . The decision nullifies a law expressing the will of the people . . . . The State chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life, while the State still protected the woman's autonomous right of choice . . . . The Court closes its eyes to these profound concerns.[197]

Justice Kennedy further maintained that the Court's version of a health exception allowed each physician who wished to perform partial-birth abortions to veto a state's decision to proscribe this procedure, despite *Casey*'s repudiation of such extreme deference to doctors' discretion.[198]

Justice Thomas, joined by Justice Scalia and the Chief Justice (who filed a separate three-sentence opinion),[199] agreed that the majority had failed to apply *Casey* faithfully.[200] He did not, however, find *Casey* or its predecessors worth following in the first place. In his view, *Roe* should have been overturned because "[a]lthough a State *may* permit abortion, nothing in the Constitution dictates that a State *must* do so."[201] Similarly, Justice Thomas remarked that

> the *Casey* joint opinion was constructed . . . out of whole cloth. The standard set forth in the *Casey* plurality has no historical or doctrinal pedigree. The standard is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or rela-

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197. *Id.* at 979 (Kennedy, J., dissenting).

198. *Id.* at 964–70 (Kennedy, J., dissenting); *see also id.* at 1005–12 (Thomas, J., dissenting) (arguing that *Casey*, which required a health exception only for dangers presented by continuing a pregnancy, had been distorted into a right to obtain a particular abortion procedure that an individual doctor prefers and believes is comparatively safer, despite the state's contrary judgment and its prohibition of that technique as trivializing human life). Justice Scalia declared that "the Court must know (as most state legislatures banning this procedure have concluded) that demanding a 'health exception'—which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?)—is to give live-birth abortion free rein." *Id.* at 953 (Scalia, J., dissenting).

199. *See id.* at 952 (Rehnquist, C.J., dissenting) (noting that he continued to disagree with *Casey*, but that Justices Kennedy and Thomas had correctly applied its principles).

200. *Id.* at 982–1020 (Thomas, J., dissenting).

201. *Id.* at 980.

> tionship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace.[202]

Likewise, Justice Scalia argued that *Casey*'s "undue burden" test could never be applied in a principled fashion because it depended upon the value judgments of the Justices, who voted

> not on the question whether the text of the Constitution has anything to say about this subject (it obviously does not); nor even on the question (also appropriate for lawyers) whether the legal traditions of the American people would have sustained such a limitation upon abortion (they obviously would); but upon the pure policy question whether this limitation upon abortion is "undue"—*i.e.*, goes too far.
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> . . . [I]t is really quite impossible for us dissenters to contend that the majority is *wrong* on the law . . . . The most that we can honestly say is that we disagree with the majority on their policy-judgment-couched-as-law. And those who believe that a 5-to-4 vote on a policy matter by unelected lawyers should not overcome the judgment of 30 state legislatures have a problem, not with the *application* of *Casey*, but with its *existence*. *Casey* must be overruled.[203]

He predicted that the majority's decision that "the Constitution . . . prevents the prohibition of a horrible mode of abortion, will be greeted by a firestorm of criticism—as well it should."[204] More generally, Justice Scalia expressed incredulity that the majority of his colleagues

> persist[ed] in the belief that this Court, armed with neither constitutional text nor accepted tradition, can resolve [the] contention and controversy [over abortion] rather than be consumed by it. If only for the sake of its own preservation, the Court should return this matter to the people—where the Constitution, by its silence on the subject, left it—and let *them* decide, State by State, whether this practice should be allowed.[205]

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202. *Id.* at 982.

203. *Id.* at 955 (Scalia, J., dissenting).

204. *Id.* at 956. "The notion that the Constitution of the United States, designed, among other things, 'to . . . secure the Blessings of Liberty to ourselves and our Posterity,' prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd." *Id.* at 953.

205. *Id.* at 956.

2. *The Reaction to* Stenberg

Again, most legal scholars and commentators approved of the Court's decision in *Stenberg*.[206] One notable exception was Akhil Amar, who deemed the majority and concurring opinions "obtuse," "partisan," and "cold."[207] Professor Amar criticized Justice Breyer's opening statement that, even though Americans hold opposing opinions about abortion, those who value unborn life should obey the Court merely because it has asserted that the Constitution protects the right to abortion:

> There are several problems here. First, exactly where and how and why does "the Constitution" offer this basic protection? In other words, where is the first link in the chain of proper constitutional argument, connecting *Roe*'s rules to something actually in the document? . . . [I]t is hardly a state secret that *Roe*'s exposition was not particularly persuasive, even to many who applauded its result. *Casey* built on *Roe* without ever explaining why *Roe* was right. Now *Stenberg* builds on *Casey* and *Roe*, and critics may justly feel that this is a shell game with no pea. If all sides are being invited to come together in good faith, it is hard to ask them to cohere around *Roe* simply because "this Court" keeps incanting it without justifying it constitutionally. "We shall not revisit those legal principles." Shut up, he explained. Because I said so.
>
> Second, . . . [*Roe*] contained very little about women's equality, more about the rights of doctors, and rather a lot about privacy. But to talk about privacy is to beg the question of the moral status of the fetus. How can all be asked to come together around a discourse that fails to acknowledge the basic moral insight of one side—that the fetus is a moral entity? Even if the moral nothingness of the fetus were obvious to most right-thinking folk when the fetus is a near-microscopic clump of cells, the issue in *Stenberg* is very different—late second-trimester abortions of recognizable humans, with hands, organs, dimensions, senses, brains.[208]

Moreover, Amar found the equality argument unavailing because, unlike the statute invalidated in *Roe*, the laws in Nebraska and other states prohibiting partial-birth abortion had

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206. *See, e.g.*, B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277, 288–94 (2007) (praising the Court for recognizing a woman's constitutional right to choose the safest method of abortion for her, and citing numerous scholars who shared this view).

207. Amar, *Foreword*, *supra* note 40, at 109.

208. *Id.* at 110 (footnote omitted).

been passed recently through a political process in which women participated equally and supported the ban overwhelmingly.[209] Furthermore, the Nebraska law, if it had been properly construed as applying only to intact D & Es, left available safe alternative procedures.[210] According to Professor Amar, the majority's speculation that "the banned procedure might, perhaps, be ever so slightly safer" in certain situations has no constitutional significance because legislatures can oblige citizens to incur very small risks to promote other important values, "such as minimizing cruelty and barbarism."[211] He thus commended Nebraska for its sensitive balance of protecting women's choice while expressing society's conviction that partial-birth abortions were "dehumanizing" and tragic.[212] Finally, Amar thought that Justices Stevens and Ginsburg's dismissal of millions of Americans who disagreed with them as "irrational" was "politically obtuse and morally insensitive."[213]

I would add three observations to Professor Amar's critique. First, perhaps the most telling aspect of *Stenberg* is that the Justices issued *eight* separate opinions. This fragmentation reinforces the conclusion that *Stenberg*, like all abortion cases, reflects the personal views of the Justices rather than any law rooted in the Constitution.[214]

Second, if one evaluates *Stenberg* strictly in common law terms, it is difficult to discern whether the Court logically followed *Casey*, because the "undue burden" test is so malleable that it could justify either invalidating or approving the Nebraska law. Therefore, the majority plausibly held that the statute, if interpreted as criminalizing all D & E abortions, unduly burdened a woman's right to choose.[215] Equally logical was the dissenters' conclusion that Nebraska's law, if construed as banning only intact D & E abortions, did not erect a "substan-

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209. *Id.* at 110–11.

210. *Id.* at 111.

211. *Id.* at 111–12.

212. *Id.* at 112.

213. *Id.* at 112–13.

214. *See supra* notes 9, 82, 89, 91, 172, 202–05 and accompanying text. *Cf.* David D. Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1129, 1169–73, 1178–89 (2001) (emphasizing the Court's failure to acknowledge, much less explain, the value judgments that drove its decision in *Stenberg*).

215. *See supra* notes 188–94 and accompanying text.

tial obstacle" in a woman's path because many safe options remained available.[216]

Nonetheless, the majority clearly ignored *Casey*'s recognition of the states' legitimate interest in promoting respect for life.[217] To the contrary, Justices Stevens and Ginsburg deemed "irrational" most Americans' opinion that partial-birth abortion uniquely denigrates human life because it so closely resembles infanticide.[218] Moreover, *Casey* did not support the majority's assertion that state laws must contain a health exception that defers to each doctor's discretionary judgment that her preferred abortion method would be marginally safer.[219] In practice, such an exception would nullify all state attempts to regulate or ban any abortion procedure, thereby breaking *Casey*'s promise to uphold state laws reasonably designed to further the government's interest in acknowledging the dignity of fetal life.[220] Furthermore, neither the Constitution nor any other law reposes such blind faith in each physician's judgment. For instance, Dr. Kevorkian might believe patients should be free to choose physician-assisted suicide, but states may lawfully ban euthanasia.

Third, as a policy prescription, *Stenberg* unwisely adopted the most extreme pro-choice position: that women effectively have a right to abortion at any stage of pregnancy, by whatever method a doctor wishes.[221] To grasp the flaw in this approach, imagine if a majority of Justices had implemented the most radical conservative viewpoint: that the Constitution protects the fetus as a "person" from the moment of conception, and

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216. *See supra* notes 195–205 and accompanying text.

217. *See* Stenberg v. Carhart, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting).

218. *Id.* at 946–47 (Stevens, J., concurring). *Cf.* John M. Breen & Michael A. Scaperlanda, *Never Get Out'a the Boat:* Stenberg v. Carhart *and the Future of American Law*, 39 CONN. L. REV. 297 (2006) (lambasting the Court for allowing infanticide by prohibiting states from protecting children in the process of being born).

219. *See Stenberg*, 530 U.S. at 964–70 (Kennedy, J., dissenting).

220. *See supra* notes 197–98 and accompanying text (summarizing the dissenting opinions in *Stenberg* that stressed this problem).

221. *See* Meyer, *supra* note 214, at 1128 ("What is most remarkable about *Carhart* is that the Court struck down Nebraska's ban on so-called 'partial-birth abortions' on grounds so robust and uncompromising."); *id.* at 1162 (observing that the Court made "a woman's interest in health an absolute trump of a state's interests"); *see also* GALLUP, *supra* note 169 (demonstrating that only 40% of Americans find abortion morally acceptable, that 60% do not support legal abortion even in the first trimester if a mother merely does not want to have the child (e.g., for financial reasons), that the majority of Americans favor banning abortion in the second and third trimesters, and that only 22% believe that partial-birth abortion should be legal).

hence prohibits all abortions.[222] The Court, having chosen to enter the political arena in such a bitterly disputed area, has to craft a solution that is at least palatable to most Americans. Justice Kennedy best captured this compromise position: permit states to express their citizens' moral preference for childbirth; allow women nonetheless to choose abortion in the early stages of pregnancy; but recognize the government's power to ban abortion when a fetus becomes recognizably human, particularly through a method as offensive as intact D & E.[223] The appeal of this moderate approach explains why bans on partial-birth abortion passed so overwhelmingly and garnered the support even of many who self-identify as pro-choice.[224] The Court treated the majority of Americans with disdain—and gratuitously so, because partial-birth abortion bans have little real-world impact but great symbolic significance.[225] Such judicial contempt invited a political backlash.

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222. To effectuate the social conservative agenda, then, *Roe* would not have to be merely overruled but replaced with a new constitutional doctrine recognizing the personhood of the fetus. *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS., Summer 2004, at 105, 141, 146 (reprinting John Ashcroft's statement that he opposed all abortions because, among other things, the Fourteenth Amendment's protection of the "life" of a "person" includes the fetus); *see also* Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. L. REV. 767, 777 (1998) (pointing out that a conservative triumph equivalent to the victory obtained by liberals in *Roe* would be a decision not simply overturning *Roe*, but also holding that states cannot permit abortion). None of the conservative Justices has ever suggested such a course, thereby illustrating the fallacy of the familiar charge that they wish to impose their ideological views under the guise of constitutional interpretation. Rather, Justices like Scalia and Thomas have always maintained that abortion should be left to the democratic process, knowing that many states would enact liberal laws. Thus, although reversing *Roe* is a pillar of right-wing politics, doing so would not by itself achieve conservative goals.

The problem for self-styled "originalists" like Justices Scalia and Thomas is not that they are wrong about abortion, but that they often ignore the Constitution's historical meaning in other areas when it conflicts with their political or ideological goals. Perhaps the best example is their embrace of the historically dubious notion, cherished in Republican circles, that Article III uniquely limits the judiciary vis-à-vis the federal and state political branches, which has spawned doctrines such as justiciability and abstention. *See, e.g.*, Robert J. Pushaw, Jr., *Bridging the Enforcement Gap in Constitutional Law: A Critique of the Supreme Court's Theory that Self-Restraint Promotes Federalism*, 46 WM. & MARY L. REV. 1289 (2005).

223. *See Stenberg*, 530 U.S. at 956–79 (Kennedy, J., dissenting); *see also supra* notes 169, 221 (citing polls consistently showing strong majority approval of this approach).

224. *See supra* notes 180, 197, 218 and accompanying text.

225. *See* Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 335 (2005) (setting forth the legislative history of the PBABA, which captures the passions engendered by partial-birth abortion despite its relative rarity).

The majority also made a strategic blunder in double-crossing Justice Kennedy. He opposes abortion on religious and moral grounds, and before 1992 he also had criticized *Roe*'s constitutional analysis.[226] Nonetheless, in *Casey* he set aside his religious, moral, and legal convictions to cast the decisive vote to reaffirm *Roe*'s basic holding. Given this huge concession to the pro-choice forces, Justice Kennedy could reasonably have expected them to throw him a bone on partial-birth abortion bans. The liberal Justices' unwillingness to make even this small accommodation alienated their newfound ally—a foolish gamble since votes in abortion cases are usually so close.

In short, these Justices were naive if they believed that Americans who deplored partial-birth abortion would give up merely because the Court denigrated them as constitutionally ignorant or just plain "irrational." Rather, the Court succeeded only in redirecting opponents' efforts from the state to the federal level.

B. The Congressional Ban on Partial-Birth Abortion

1. The Statute

Beginning in 1996, Congress passed several bills prohibiting partial-birth abortion, which President Clinton vetoed on the ground that they violated the constitutional right to abortion.[227] *Stenberg* prompted renewed legislative efforts for a federal ban, and the second President Bush signed the Partial-Birth Abortion Ban Act (PBABA) in 2003.[228] Congress defined "partial-birth abortion" as

> (A) deliberately and intentionally vaginally deliver[ing] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose

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226. *See supra* note 117 and accompanying text. Geoffrey Stone has claimed that Justice Kennedy's decision for four fellow Catholic Justices in *Gonzales*, like his *Stenberg* dissent, implemented their religiously based moral opposition to abortion. *See* David Reinhard, *How Many Supreme Court Justices Are Catholic?: The Partial Birth Abortion Ban and Prejudice*, OREGONIAN, May 3, 2007, at B6 (quoting Professor Stone). If this charge were true, however, Justice Kennedy's vote in *Casey* would have been different—as would Justice Brennan's votes in earlier abortion decisions.

227. *See* H.R. REP. NO. 108-58, at 12–14 (2003) (discussing these bills); *see also* Gonzales v. Carhart, 127 S. Ct. 1610, 1623 (2007).

228. *See Gonzales*, 127 S. Ct. at 1623–24.

> of performing an overt act that the person knows will kill the partially delivered living fetus; and
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> (B) perform[ing] the overt act, other than completion of delivery, that kills the partially delivered living fetus.[229]

The PBABA imposes criminal penalties on "[a]ny physician who, in or affecting interstate . . . commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus . . . [except when] necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury."[230] Congress found that only an exception for life, not health, was needed because "a moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[231] Conceding that the Court in *Stenberg* had to accept the district judge's contrary and "very questionable" findings, Congress asserted that it was not similarly bound and that federal courts would have to defer to its factual determinations.[232]

The PBABA's legislative foes decried the law as materially indistinguishable from the statute invalidated in *Stenberg*, for two reasons. First, the Act banned all partial-birth abortions, without any recognition that those performed on previable fetuses were constitutionally protected.[233] Second, the PBABA contained no exception to preserve the mother's health.[234]

The debate in Congress focused on the individual right to abortion. Although Congress claimed that this law was an exercise of its power "to regulate Commerce . . . among the several States,"[235] it asserted rather than explained the connection between partial-birth abortion and interstate commerce.[236]

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229. 18 U.S.C. § 1531(b)(1) (2003).

230. *Id.* § 1531(a) (2003). A physician accused of violating the PBABA has the right to a hearing to determine whether he performed a partial-birth abortion as necessary to save the mother's life. *See id.* § 1531(d)(1).

231. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(1), 117 Stat. 1201.

232. *Id.* § 2(8).

233. *See* Pushaw, *supra* note 225, at 324 (setting forth the legislative history). The final statute retained this absolute prohibition. *See* 18 U.S.C. § 1531(a) (2003).

234. *See* Pushaw, *supra* note 225, at 324–25 n.39.

235. *See id.* at 319 (quoting U.S. CONST. art. I, § 8, cl. 3).

236. *See id.* at 319–26 (citing legislative history).

Pro-choice doctors and organizations successfully enjoined enforcement of the PBABA in three federal district courts.[237] During the course of this litigation, President Bush appointed John Roberts and Samuel Alito to succeed Chief Justice Rehnquist and Justice O'Connor. The Alito-for-O'Connor switch would prove decisive.

2. Gonzales v. Carhart

In *Gonzales v. Carhart*,[238] Justice Kennedy wrote for a 5-4 majority that the PBABA was constitutional on its face.[239] Initially, the Court invoked its longstanding rule, disregarded in *Stenberg*, of reasonably construing statutes to avoid constitutional questions—here, interpreting the PBABA as prohibiting only the deliberate performance of intact D & E abortions.[240]

Justice Kennedy then stressed that the PBABA differed from the statute in *Stenberg* in two ways. First, the Act required intentionally delivering an entire living fetus outside the mother's birth canal, past specific anatomical landmarks (either the fetal head or the trunk past the navel), whereas the Nebraska law lacked such particularity and also proscribed delivery of a "substantial portion" of an unborn child—perhaps including a piece of the fetus removed in a regular D & E.[241] Second, the PBABA added the requirement of an overt act that kills the fetus.[242]

The Court held that the PBABA, so interpreted, did not unduly burden a woman's ability to obtain a previability abortion.[243] Justice Kennedy emphasized that *Casey*, while reaffirming this core constitutional right, had also recognized the

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237. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1619–20 (2007) (describing this district court litigation).

238. 127 S. Ct. 1610 (2007).

239. *Id.* at 1626–39.

240. *Id.* at 1631.

241. *Id.* at 1629–30.

242. *Id.* at 1630–31. Accordingly, the Act applied only to doctors who, at the outset, intended to perform an intact D & E—not to those who decided to use that procedure during the operation, and not to those who performed any other type of second-trimester abortion (ordinary D & E, induction, hysterectomy, or hysterotomy). *Id.* at 1631–32. The PBABA clearly defined the proscribed conduct—knowingly delivering a living fetus to an identified anatomical landmark and then intentionally killing it—and thus was not void for vagueness, as the plaintiff doctors claimed. *Id.* at 1627–29.

243. *Id.* at 1632–38; *see also id.* at 1627 (acknowledging that the PBABA prohibited all intact D & Es, whether performed before or after viability).

government's critical interest in preserving, promoting, and expressing profound respect for fetal life.[244] Reading *Casey*'s health exception as authorizing all doctors to choose their preferred method of abortion would negate this interest.[245] Therefore, the majority concluded, Congress could reasonably prohibit the intact D & E procedure because it resembles killing a newborn infant, and hence implicates special moral concerns and undermines public confidence by compromising physicians' medical and ethical duties.[246] Furthermore, the Court found that the PBABA properly responded to the concern that a woman's later regret and grief over an abortion might be accentuated if she later discovered that the procedure used had been the uniquely gruesome intact D & E.[247]

Justice Kennedy rejected the claim that the PBABA imposed an "undue burden" merely because some doctors thought that the intact D & E procedure might be safer for women in certain circumstances.[248] Rather, the Court would respect Congress's judgment (supported by many physicians) that partial-birth abortions were unnecessary to preserve a woman's health, consistent with the broad deference historically shown to legislators in regulating areas of medical uncertainty.[249] Justice Kennedy stressed that Congress had not limited the availability of other abortion methods reasonably considered to be safe alternatives, such as ordinary D & E and induction.[250]

Finally, the majority confined its ruling to the context of a facial attack.[251] The Court expressed its willingness to consider an "as applied" challenge in which a doctor contended that the prohibited procedure had to be used in a particular case to protect a woman's health.[252]

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244. *See id.* at 1626–27, 1633.

245. *See id.* at 1633.

246. *See id.* at 1633–35.

247. *Id.* at 1634.

248. *Id.* at 1635–38.

249. *See id.* Justice Kennedy noted that Congress had unquestioned power, exercised here under the Commerce Clause, to regulate the medical profession. *Id.* at 1638. The Court did acknowledge that (1) it had an independent duty to review legislative factfinding when constitutional rights were at stake, and (2) some of Congress's findings were either incorrect or had been superseded (e.g., that no medical schools taught the intact D & E procedure). *See id.* at 1637–38. Despite these problems, Congress had sufficient evidence to support its ban. *Id.*

250. *Id.* at 1637–38.

251. *Id.* at 1638–39.

252. *Id.*

Justices Thomas and Scalia, concurring, made three points. First, the Court had correctly applied its current case law.[253] Second, this abortion jurisprudence "has no basis in the Constitution."[254] Third, the question of Congress's power to enact the PBABA under the Commerce Clause had not been presented.[255]

Justice Ginsburg dissented, joined by Justices Stevens, Souter, and Breyer.[256] She argued that the Court's "alarming" decision "refuses to take *Casey* and *Stenberg* seriously" by approving a ban on an abortion procedure with no exception to safeguard a woman's health, even though a leading medical organization had determined that intact D & Es were necessary in certain circumstances.[257] The dissenters emphasized that *Casey* and *Stenberg* had recognized that the right to abortion was crucial to women's liberty and socio-economic equality:

> [L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.[258]

Justice Ginsburg asserted that ensuring women's dignity and equality required protecting their health, as evidenced by the unbroken line of precedent since *Roe* holding that laws regulating abortion could not subject women to medical risks.[259] Indeed, *Stenberg* struck down a statute prohibiting intact D & E precisely because it lacked a health exception, as constitutionally mandated whenever "'substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health'" and a doctor determines that this method would be safest.[260]

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253. *Id.* at 1639 (Thomas, J., concurring).

254. *Id.*

255. *Id.* at 1640.

256. *Id.* at 1640–53 (Ginsburg, J., dissenting).

257. *Id.* at 1641.

258. *Id.*

259. *Id.* at 1641–42 (citing language in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992) (plurality opinion), *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768–69 (1986), and *Planned Parenthood v. Danforth*, 428 U.S. 52, 79 (1976)).

260. *Id.* at 1642 (quoting *Stenberg*, 530 U.S. at 938). The dissenters highlighted *Stenberg*'s clarifications that "substantial medical authority" did not mean "unanimity," that the prohibited procedure need be merely less risky rather than "absolute[ly] necess[ary]," and that a division of medical opinion signaled uncertainty, which in turn dictated reliance on a physician's "appropriate medical judgment"

Justice Ginsburg further contended that the Court should have respected the factual findings of three district courts which, after thoroughly considering all the evidence, concluded that in some instances intact D & E would better safeguard women's health.[261] Conversely, these trial courts had rejected Congress's contrary findings as unreasonable because they (1) consisted of statements by a few doctors who lacked relevant training and experience, and (2) were not accepted by leading medical organizations.[262]

Justice Ginsburg rejected as "flimsy" the government's two main rationales for the PBABA.[263] First, the PBABA did not further Congress's declared interest in preserving the life of the unborn because it did not save a single fetus; rather, it simply prohibited one method of abortion.[264] Second, the PBABA "irrationally" banned intact D & E but not equally brutal second-trimester abortion methods.[265]

Moreover, the dissenters faulted the Court for blurring the formerly bright line marked by viability through its focus on where the fetus was located when an abortion occurred, rather than on whether it could survive outside the womb.[266] Justice Ginsburg accused the majority of allowing their

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about the best treatment in each case in light of comparative risks and benefits. *Id.* at 1642–43. Justice Ginsburg claimed that second-trimester abortions were more likely to be sought by poor or adolescent females or by women who had experienced serious health-related problems or discovered fetal abnormalities. *Id.* at 1642 n.3.

261. *Id.* at 1644–46. Specifically, the evidence indicated that, compared to regular D & E, intact D & E was often safer because it (1) reduced the risk of trauma to the cervix and uterus, (2) decreased the likelihood that any fetal tissue would remain and cause health complications, (3) avoided sharp bone fragments, and (4) took less operating time. *Id.* at 1645.

262. *Id.* at 1644–46. Justice Ginsburg's argument here is disingenuous. Many doctors refuse to perform late-term abortions on ethical and moral grounds, and thus would never have the experience that Justice Ginsburg deems necessary to formulate an informed opinion.

263. *Id.* at 1646–47.

264. *Id.* at 1647.

265. *Id.* According to the dissent, the Court embraced "discredited" notions about women by invoking the unsubstantiated "shibboleth" that they become depressed over their abortion decision as a pretext to deprive women of their right to choose an abortion procedure that might be necessary for their safety. *Id.* at 1647–48; *see also id.* at 1648 n.7 (citing studies refuting the notion that women typically regret their abortion and suffer depression because of this choice). Justice Ginsburg further contended that, if Congress were truly concerned that doctors would withhold information about the intact D & E procedure, the solution would be to require physicians to provide such information rather than to ban it outright. *Id.* at 1648–49. This argument is logically unanswerable.

266. *Id.* at 1649–50.

"moral concerns" to "overrid[e] fundamental rights," thereby "dishonor[ing] our precedent."[267]

The dissent also deemed "perplexing" the Court's suggestion that facial challenges to abortion prohibitions were inappropriate where medical uncertainty exists, given *Stenberg*'s directly contrary holding in "materially identical circumstances."[268] Likewise, the majority's receptiveness to a "proper as-applied challenge" placed physicians in the "untenable position" of risking criminal prosecution for exercising their best medical judgment that an intact D & E would be the safest procedure in a particular case.[269]

Finally, Justice Ginsburg assailed the Court for deferring to Congress's override of its constitutional rulings that governments cannot ban an abortion procedure necessary to protect women's health.[270] The majority's defense of the PBABA, she said, "cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives."[271]

Overall, the majority and the dissent diverged sharply in their application of the constitutional principles governing abortion. Figuring out which side is "right" is ultimately a fruitless task, because abortion law develops haphazardly on a case-by-case basis.

3. *An Analysis of* Gonzales

Gonzales raises two significant constitutional issues—one obvious, one subtle. First, has the Roberts Court embarked on a

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267. *Id.* at 1647; *see also id.* at 1650 (highlighting the Court's moral condemnation implicit in referring to obstetricians and gynecologists as "abortion doctors," deeming their reasoned medical judgments "preferences," and calling a fetus a "baby" and an "unborn child").

268. *Id.* at 1650 (citing *Stenberg*, 530 U.S. at 930). Justice Ginsburg contested the majority's ruling that the facial attack failed because the claimants could not show that the PBABA would be unconstitutional as applied to all or "a large fraction" of cases. *Id.* at 1651. Rather, the "undue burden" should be measured by that minority of women who require an intact D & E because other procedures might endanger their health: "The very purpose of a health *exception* is to protect women in *exceptional* cases." *Id.*

269. *Id.* at 1651–52 (noting that it was pointless to wait for an as-applied challenge because the record contained many descriptions of discrete instances where intact D & E would better protect maternal health).

270. *Id.* at 1652–53.

271. *Id.* at 1653.

dramatic shift that will culminate in *Roe*'s demise? Second, did the Court correctly assume, without discussion, that Congress had power under the Commerce Clause to ban partial-birth abortion? I will answer these questions in turn.

a. Gonzales *as a Modest Common Law Adjustment to Abortion Rights*

Most commentators agreed that *Gonzales* took a large step in the direction of eventually overruling *Roe*. Pro-choice advocates viewed this development with trepidation,[272] while pro-life supporters welcomed it.[273]

The common assumption that *Gonzales* was a radical decision has no basis in the opinion itself.[274] Indeed, Justice Kennedy's opinion exemplifies "judicial minimalism": the Court's recent tendency to issue narrow and shallow decisions that resolve

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272. *See, e.g.*, Caroline Burnett, Comment, *Dismantling* Roe *Brick by Brick—The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003*, 42 U.S.F. L. REV. 227, 229–36, 249–63 (2007) (arguing that the Court mistakenly allowed Congress to pursue its goal of destroying *Roe*'s guarantee of reproductive freedom); Ronald Dworkin, *The Court and Abortion: Worse Than You Think*, N.Y. REV. BOOKS 20–21 (May 31, 2007) (portraying *Gonzales* as a "worrying," "dangerous," and "alarming" opinion that threatens the basic right to abortion); Graham Gee, *Regulating Abortion in the United States After* Gonzales v. Carhart, 70 MOD. L. REV. 979, 979 (2007) (describing this case as "a significant retreat" from *Roe* and *Casey*, and as "portentous . . . with respect to the future direction of abortion"); Judith G. Waxman, *Privacy and Reproductive Rights: Where We've Been and Where We're Going*, 68 MONT. L. REV. 299, 316 (2007) (deeming *Gonzales* an "ominous" decision that threatens a woman's constitutional right to choose under *Roe*); Erwin Chemerinsky, Editorial, *Partial Birth Decision Shows Court Will Overrule Precedent*, CHI. SUN-TIMES, Apr. 23, 2007, at 43 (stating that the Court "abandoned" *Roe*'s holding that a woman and her doctor should select the appropriate medical procedure, and that this "dramatic" and "radical[]"shift was "troubling").

273. *See, e.g.*, Steven Reinberg, *Supreme Court Abortion Ban Ruling Draws Mixed Reaction*, WASH. POST, Apr. 19, 2007, at B1 (quoting James Tonkowich, President of the Institute on Religion and Democracy, who characterized *Gonzales* as a "landmark ruling" that could lead to *Roe*'s demise).

274. *See, e.g.*, Hill, *supra* note 206, at 319 ("Although the case has been met with consternation by pro-choice advocates and has been viewed as a shocking reversal of the Supreme Court's longstanding doctrine with respect to abortion rights, what is perhaps most surprising . . . is the judicial modesty with which the Supreme Court ultimately acted in turning away the constitutional challenge."); David J. Garrow, Op-Ed., *Don't Assume the Worst*, N.Y. TIMES, Apr. 21, 2007, at A15 (cautioning that *Gonzales* is "an extremely limited upholding of the federal ban" affecting very few abortion providers and patients, and that the Court stressed the narrow scope of the prohibition). Professor Nussbaum conceded that *Gonzales*'s "actual holding is narrow," but warned that its "implications for the future of sex equality are ominous." Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutional Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 84 (2007); *see also* Karst, *supra* note 53, at 130–31 (to similar effect).

the dispute before it but leave most questions open for further political and judicial consideration.[275]

Most obviously, except for Justices Scalia and Thomas, the Court did not question *Roe* or *Casey*—or even overrule *Stenberg*, for that matter. Rather, the other seven Justices simply applied those cases, albeit in different ways. Moreover, the Court repeatedly emphasized that its holding was limited to the facial attack presented,[276] and explicitly said that it would be willing to hear an as-applied challenge.[277] Furthermore, the Court confined its consideration to a ban on one type of late-term abortion (intact D & E), emphasized the availability of other methods, and assumed the invalidity of a prohibition on all late-term (often post-viability) abortions.[278] These qualifications do not suggest a Court hell-bent on sustaining bans on abortion generally.

From a common law standpoint, then, *Gonzales* built incrementally on *Casey* by balancing a woman's right to abortion against the state's interest in regulating the procedure to promote respect for life. The problem, of course, is that *Gonzales* cannot easily be squared with *Stenberg*, which held that the government cannot prohibit any abortion procedure (including intact D & Es) that a doctor reasonably believes would be safer than alternative methods.[279] Justice Kennedy's attempts to distinguish *Stenberg* were strained and unconvincing.

Initially, he argued that the PBABA was drafted more precisely than the Nebraska statute.[280] Although that is true, both laws fail to include a health exception, which *Stenberg* identified as a fatal constitutional flaw.[281] Justice Kennedy then invoked Congress's findings that such an exception was not medically necessary.[282] Each of the district courts below, however, had rejected these findings as factually inaccurate, despite the usual deference to such legislative judgments.[283] The major-

275. For development of this theme, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

276. Gonzales v. Carhart, 127 S. Ct. 1610, 1619, 1626, 1629, 1632, 1638–39 (2007).

277. *Id.* at 1638–39.

278. *Id.* at 1627, 1629, 1631, 1635–39.

279. *Id.* at 1642 (Ginsburg, J., dissenting) (quoting Stenberg v. Carhart, 530 U.S. 914, 938 (2000)).

280. *Id.* at 1629–32 (majority opinion).

281. *See id.* at 1641–43 (Ginsburg, J., dissenting).

282. *Id.* at 1635–38 (majority opinion).

283. *See id.* at 1644–46 (Ginsburg, J., dissenting).

ity further asserted that, unlike the Nebraska statute, the PBABA covered only intact D & Es.[284] That interpretation is reasonable and consistent with the Court's longstanding rule of construing statutes to avoid constitutional difficulties. Nonetheless, *Stenberg* had gone the opposite way and also indicated that even a narrow ban on intact D & Es would be unconstitutional if a physician determined that this method would be safer.[285] Finally, Justice Kennedy concluded that prohibiting intact D & Es did not "unduly burden" a woman's right to abortion, especially because other alternatives were available.[286] Nonetheless, *Stenberg* said that the "undue burden" standard should be measured by the individual woman for whom that particular technique would be safer, not other women for whom alternative procedures would work.[287]

Justice Kennedy proceeded in venerable common law fashion by distinguishing, rather than overruling, *Stenberg*.[288] Unfortunately, his distinctions were tenuous.[289] It seems likely that Justice Kennedy sought to restore the proper understanding of *Casey* as applied to the partial-birth abortion context, which he thought the Court had distorted in *Stenberg*.[290] In particular, the majority in *Gonzales* were troubled by the dissenters' version of the required health exception, which would effectively give each doctor discretion to perform any abortion procedure that he deemed marginally safer, regardless of whether the people of the state had rejected this procedure as beyond the pale.[291]

Whatever the deficiencies of Justice Kennedy's *legal* analysis, his *political* instincts seem sound. To reiterate, he has roughly articulated the mainstream American view: allow women to

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284. *Id.* at 1629–32 (majority opinion).

285. *See id.* at 1642–46 (Ginsburg, J., dissenting).

286. *Id.* at 1635–38 (majority opinion).

287. *See id.* at 1651 (Ginsburg, J., dissenting).

288. *See, e.g.*, Robert Barnes, *Roberts Court Moves Right, But With a Measured Step*, WASH. POST, Apr. 20, 2007, at A3 (reporting Professor A.E. Dick Howard's observation that the Court is willing to reconsider precedent and move rightward, but only gradually).

289. Most constitutional law scholars concluded that *Gonzales* effectively overturned *Stenberg*. *See, e.g.*, Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2d 423, 425–27, 437 (2007); Charles Fried, Op-Ed., *Supreme Confusion*, N.Y. TIMES, Apr. 26, 2007, at A25; Linda Greenhouse, *Precedents Begin to Fall for Roberts Court*, N.Y. TIMES, June 21, 2007, at A21 (quoting Ronald Dworkin).

290. *See* Stenberg v. Carhart, 530 U.S. 914, 956–79 (2000) (Kennedy, J., dissenting).

291. *See supra* notes 197–98, 204–05, 245–50 and accompanying text (discussing the dissenting opinions in *Stenberg*, and Justice Kennedy's opinion in *Gonzales*, highlighting this concern).

choose abortion in the early period of pregnancy, but recognize the government's interest in expressing its citizens' moral condemnation of partial-birth abortion.[292]

By contrast, the dissenters took an extreme position which enjoys little popular support. Justice Ginsburg's opinion was the first to develop fully the idea that women must have a virtually unrestricted right to any abortion procedure at any time to guarantee their autonomy and their equal participation in social and economic life.[293] Although law professors tend to find that argument persuasive,[294] most Americans do not, for three reasons.[295]

First, it seems likely that modern laws prohibiting gender discrimination in education and employment, which both reflected and accelerated changing attitudes about women's appropriate roles, have been the key factor in fostering equality.[296] The availability of abortion created opportunities for some women who otherwise would have been occupied raising children, but this right would not have mattered much without legally guaranteed access to schooling and jobs.[297] Moreover, Justice Ginsburg's argument cannot explain why many women

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292. *See supra* notes 180, 197, 218, 224 and accompanying text.

293. Gonzales v. Carhart, 127 S. Ct. 1610, 1640–43, 1649, 1653 (2007) (Ginsburg, J., dissenting).

294. *See, e.g.*, Jack M. Balkin, *How New Genetic Technologies Will Transform* Roe v. Wade, 56 EMORY L.J. 843, 844–45, 849–60, 863–64 (2007); Nussbaum, *supra* note 274, at 83–87; Reva Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 815–38 (2007); Cass R. Sunstein, *Ginsburg's Dissent May Yet Prevail*, L.A. TIMES, Apr. 20, 2007, at 31. Several scholars anticipated Justice Ginsburg's argument. *See* Law, *supra* note 92, at 955–63, 981, 986–87, 1003–28; MacKinnon, *supra* note 92, at 1286–89, 1300–13, 1317–28. To be clear, Americans generally believe in women's equality and freedom. My point is that they do not agree with Justice Ginsburg and her academic defenders that *partial-birth abortion* is necessary to secure equal rights and liberty.

295. For a thoughtful and balanced treatment of the moral issues involved, see Alan E. Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689 (1992) (contending that a woman's privacy and autonomy interests in having an abortion decrease as her pregnancy progresses and become especially weak in the final trimester).

296. For a summary and analysis of such anti-discrimination laws, see KATHARINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, AND COMMENTARY 43–136, 154–313, 406–43, 453–65 (4th ed. 2006).

297. Most scholars view restrictions or bans on abortion as part of an entrenched legal and social framework designed to deprive women of educational and economic opportunities. *See, e.g.*, MacKinnon, *supra* note 92, at 1300–01, 1308–13, 1317–23. Thus, they would reject any claim that treats the availability of abortion as distinct from other economic and social issues. This argument does not, however, account for the success of millions of women who have never had an abortion.

who lived in the pre-*Roe* era (herself included), or who came of age after 1973 but never had an abortion, have nonetheless enjoyed great educational and career success. To the extent that childbirth places women at a competitive market disadvantage with men, the solution would seem to be legal, social, and economic programs that help women cope with pregnancy and child care responsibilities, not constitutionalizing partial-birth abortion.[298] Finally, even if one accepted the centrality of abortion to women's equality, many states (including populous ones like New York) had already liberalized their abortion laws before 1973 (and would likely retain such laws if *Roe* were overturned), so it is not clear that the decision itself had the huge effect supposed.[299]

Second, Justice Ginsburg purported to speak for "women" generally. She never acknowledged, however, that millions of women reject her view on abortion, and that the overwhelming majority (including female legislators) support bans on partial-birth abortion.[300] Under Justice Ginsburg's logic, all these women wish to thwart gender equality. Because this conclusion makes no sense, she labeled such women (and like-minded men) "irrational."[301]

Third, Justice Ginsburg fixated exclusively on the idea that forcing women to bear and raise unwanted children will destroy their equality and autonomy, without mentioning the fetus as a separate entity deserving of consideration, much less respect.[302] This rationale, however, has no obvious stopping

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298. *See* Posting of Douglas W. Kmiec to Talking Justice, http://communities.justicetalking.org/blogs/ (Apr. 23, 2007, 19:59 EDT); *see also* MacKinnon, *supra* note 92, at 1323–24 (contending that opponents of abortion should work to change the social and economic conditions that make it necessary); Law, *supra* note 92, at 956 (maintaining that the achievement of true sex-based equality would require transformation of the family, child-rearing arrangements, and the labor market).

299. Indeed, in 1983, then-Judge Ginsburg acknowledged that *Roe* had unwisely short-circuited the state legislative trend toward relaxing abortion restrictions. *See* Ginsburg, *supra* note 92, at 379–80, 385–86.

300. *See* Gallup's Pulse of Democracy: Abortion, http://galluppoll.com/content/abortion ("Abortion is often thought of as a women's issue, but polling data suggest, on the contrary, that the depth of one's religious beliefs, not gender, is what drives attitudes on abortion."); *see also supra* notes 180, 197, 203–05, 209, 218, 221, 223–24, 228, 293 and accompanying text.

301. *See* Gonzales v. Carhart, 127 S. Ct. 1610, 1647 (2007) (Ginsburg, J., dissenting) (quoting Stenberg v. Carhart, 530 U.S. 914, 946–47 (2000) (Stevens, J., concurring)).

302. Professor MacKinnon, to her credit, has addressed this issue forthrightly. *See* MacKinnon, *supra* note 92, at 1309–16. She recognizes that "the fetus is a human form of life," but concludes that "sex inequality in society requires that completed live birth mark the personhood line." *Id.* at 1316. I do not understand the logic of a

point and would apply at all stages of pregnancy (or, for that matter, infancy). When, if ever, would Justice Ginsburg recognize the power of the government to intervene? She does not say. To take a concrete example, Congress enacted the Born-Alive Infants Protection Act in 2002 in response to undisputed evidence that several hospitals had allowed doctors to deliver babies alive, then put them in storage rooms until they died.[303] Under Justice Ginsburg's reasoning, this federal law would be unconstitutional because the banned procedure is less invasive and hence safer for women than any late-term abortion method, and its availability would help women achieve their economic and social goals.

Justices Ginsburg, Stevens, Souter, and Breyer undoubtedly believe that they are defending constitutional rights against the excesses of the majoritarian hordes. Nonetheless, the Court can step only so far out of line with mainstream American thought, especially in matters seen as life-and-death.[304] Consequently, *Gonzales* can most accurately be described as a sensible retreat from *Stenberg*, not a prelude to overturning *Roe* and *Casey*.

b. The Neglected Constitutional Issue: Congress's Power to Enact the PBABA

The focus on the individual right to abortion has obscured a crucial constitutional issue: the judiciary's acquiescence to Congress's debatable assertion that its ban on partial-birth abortion is a valid exercise of its power to regulate interstate commerce.[305] The *Gonzales* dissenters did not mention this problem, and Justice Kennedy merely referred in passing to Congress's general authority to regulate the medical profession.[306] Justices Thomas and Scalia at least flagged the issue: "[We] also note that whether the Act constitutes a permissible exercise of Congress's power under the Commerce Clause is

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constitutional principle that acknowledges a woman's right to abort a fully formed, viable fetus minutes before birth, but not minutes afterward. Neither do the overwhelming majority of Americans, including women, who seek to protect this "human form of life."

303. *See* Pub. L. No. 107-207, 116 Stat. 926, 1 U.S.C. § 8 (2002).

304. Interestingly, then-Judge Ginsburg criticized *Roe* as provoking, rather than resolving, the conflict over abortion. Ginsburg, *supra* note 92, at 385–86. It is unclear why she now believes that a similarly broad Supreme Court edict on partial-birth abortion will definitively end the controversy over that procedure.

305. *See* H.R. REP. NO. 108-58, at 23–26 (2003).

306. *Gonzales*, 127 S. Ct. at 1638.

not before the Court. The parties did not raise or brief that issue; it is outside the question presented it; and the lower courts did not address it."[307]

Generally speaking, the Thomas/Scalia position reflects sound, and well-established, appellate litigation practice.[308] The Court grants certiorari, and seeks briefing and argument, on specified questions of law considered by inferior tribunals. Such targeted and careful review would be frustrated if the Justices routinely reached out to decide other legal issues.

This policy of restraint makes less sense, however, in that small subset of appeals where the Court has doubts about the federal government's very authority to act. The Court has frequently reaffirmed that the Constitution limits that government to its enumerated powers and leaves all other powers to the States.[309] This basic principle would be undermined by simply assuming that Congress, the President, and federal courts have power whenever they claim it and litigants do not object.

Indeed, the Court has always understood this point in the context of the judiciary's subject matter jurisdiction, which must be affirmatively established.[310] Even if Article III district and appellate courts have decided a case, the petition for review does not mention any jurisdictional defect, and the parties do not raise this issue, the Court has recognized its duty to ensure that both it and the lower federal courts possessed jurisdiction.[311] If they did not, the appeal must be dismissed.

Such a threshold jurisdictional inquiry should not be confined to judicial power. The Constitution does not uniquely

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307. *Id.* at 1640 (Thomas, J., concurring).

308. The rule that the Court will refuse to entertain legal issues not presented to or considered by the courts below (except for subject matter jurisdiction) originated in *Montana Railway Co. v. Warren*, 137 U.S. 348, 350–52 (1890). The limitation of review to questions presented in the certiorari petition was first mentioned in *Irvine v. California*, 347 U.S. 128, 129–30 (1954), and then promptly codified in SUP. CT. R. 14.1(a).

309. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 552–53, 566–67 (1995) (citing numerous sources dating back to Hamilton and Madison). Of course, since 1937 the Court has not been terribly vigilant about enforcing these federalism-based restrictions. For instance, Congress's power to tax and spend for the general welfare is virtually unbounded. *See, e.g.*, Sabri v. United States, 541 U.S. 600 (2004).

310. This rule traces to *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799). It was recently reaffirmed in *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006).

311. This requirement has long been justified on the ground that federal courts have limited jurisdiction, which must always be demonstrated in a particular case before a court can reach the merits. *See* Mansfield v. Swan, 111 U.S. 379, 382–86 (1884).

limit federal courts, but rather prohibits all three branches from exceeding their enumerated powers.[312] Nor does the Court's resolution of uncertainties about Congress's or the President's authority gratuitously show them disrespect. On the contrary, the Court has a duty, however unpleasant, to keep the political departments within their constitutional boundaries.[313]

But what about the rule of avoiding unnecessary determination of constitutional questions?[314] This doctrine properly applies only when the Court can fairly decide a case on other legal grounds, such as statutory interpretation.[315] It does not mean that the Court should evade one constitutional question (the government's power to act) to adjudicate another (individual constitutional rights). If anything, respect for constitutional structure and simple logic dictate deciding the issue of power first, because a negative judgment on that score would end the inquiry.[316]

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312. *See* Pushaw, *Justiciability*, *supra* note 38, at 395–99, 454–512.

313. This point should require little elaboration, as it is the classic justification for making federal judges independent and giving them the power of judicial review. *See* THE FEDERALIST NO. 78 (Alexander Hamilton); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–80 (1803).

314. This principle received its fullest explanation in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341–48 (1936) (Brandeis, J., concurring), although the Court has invoked this rule since its earliest days. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 441 (1821) (declaring that, if the Court could decide the case on statutory grounds, it would be "unnecessary, and consequently improper" to reach the constitutional issue).

315. A recent example is *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006), which held that Congress had not authorized the President to create military commissions in order to avoid reaching the question of whether such commissions violated the Due Process Clause. *See infra* notes 358–61 and accompanying text (discussing *Hamdan*).

316. I anticipate two criticisms of my idea that the Court should determine not only its own jurisdiction but also that of Congress and the President. First, one might contend that each branch has a constitutional duty to assess its own jurisdiction before acting and that the Court should defer to such judgments by the political departments to avoid conflict. Litigants cannot, however, agree to allow Congress or the President to assert power they do not possess, and the pressure on elected officials to implement their constituents' policy desires makes it exceedingly difficult for them to impartially evaluate constitutional limits on their power.

Second, one might object that application of my approach to Article II power would raise especially vexing problems. Indeed, even where parties have challenged the executive branch as exceeding its jurisdiction (e.g., by requesting a prerogative writ), this determination has proved to be quite tricky and hard to separate from the merits. *See* Pushaw, *supra* note 164, at 747–48, 756, 802–03, 817, 827–28, 843, 864–66. Such difficulties, however, suggest the wisdom of a deferential standard of judicial review, not the need to abandon this inquiry altogether.

As applied to the PBABA, the Court should have examined Congress's bald assertion that it was properly exercising its authority under the Commerce Clause,[317] especially given recent precedent limiting such power. In the 1995 case of *United States v. Lopez*,[318] the Court for the first time since 1936 struck down a law enacted under the Commerce Clause: the Gun-Free School Zones Act.[319] Five Justices—Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—held that Congress could not regulate firearm possession near schools because this activity (1) was not "commercial" or "economic," either of itself or as part of a larger commercial regulatory scheme; (2) did not "substantially affect" interstate commerce; and (3) interfered with areas of "traditional state concern" (crime and education).[320] Applying this same analysis five years later in *United States v. Morrison*,[321] the Court invalidated a law granting a federal cause of action to victims of gender-motivated violence that took place entirely within one state.[322] In *Gonzales v. Raich*,[323] however, Justices Scalia and Kennedy retreated from *Lopez* and *Morrison* by joining Justices Stevens, Souter, Ginsburg, and Breyer in upholding a federal statute that criminalized the non-commercial, in-state possession and medical use of marijuana, despite a California law authorizing and controlling such usage.[324]

Current Commerce Clause jurisprudence is muddled because the Court has subjectively applied vague standards. For example, the Court has refused to define "commercial" activity, provide any objective benchmarks (like minimum dollar amounts) for determining "substantial" effects on interstate commerce, and explain why Congress can regulate all areas of "traditional state concern" except for gun possession near schools and gender-based violence.[325] Even under these fuzzy standards, the constitutionality of the PBABA is debatable, for three reasons.

First, several scholars have maintained that the PBABA does not regulate "commerce," but rather is morals legislation that

317. *See supra* notes 235–36 and accompanying text.
318. 514 U.S. 549 (1995).
319. *Id.* at 551, 556–68.
320. *Id.* at 556–68.
321. 529 U.S. 598 (2000).
322. *Id.* at 600–19.
323. 545 U.S. 1 (2005).
324. *Id.* at 5–33.
325. *See* Pushaw, *supra* note 225, at 320–22, 327–38, 352.

criminalizes a certain abortion procedure regardless of whether it was performed for economic gain.[326] Although this argument is plausible, the Court after *Raich* would likely find that partial-birth abortion can be regulated overall as "commercial" activity because it is typically a compensated service—even if doctors sometimes waive their fees, and even if legislators were partly motivated by moral concerns.[327]

Second, partial-birth abortions are relatively rare (about 5,000 per year) and generate approximately $12 million annually in fees,[328] which would not seem to exert a "substantial" effect on our national economy.[329] Although the Court has sustained federal statutes involving similarly trivial amounts,[330] those cases were decided before *Lopez* ended the Court's long era of blind deference.[331]

Third, the PBABA arguably invades three areas of "traditional state concern": crime, health care procedures, and family law.[332] Proponents of the legislation might contend, however, that partial-birth abortion is such a recent procedure that it cannot be a "traditional" subject of state regulation, particularly because the Court has nationalized the abortion issue by turning it into a federal constitutional right.[333]

The foregoing analysis reveals that Congress's authority to enact the PBABA under the Commerce Clause is unclear. Therefore, the Court's unanimous decision in *Gonzales* to avoid that issue allowed Congress to aggrandize power. At the very least, the PBABA will remain in effect until a party successfully challenges its legitimacy under Article I. Moreover, the longer

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326. *See, e.g.*, Allan Ides, *The Partial-Birth Abortion Act of 2003 and the Commerce Clause*, 20 CONST. COMMENT. 441, 445–51, 461–62 (2004); David P. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 59–64, 68–70, 99, 104–06 (1997); Brannon P. Denning, Gonzales v. Carhart: *An Alternate Opinion*, 2007 CATO S. CT. REV. 167, 175–77.

327. *See* Pushaw, *supra* note 225, at 333 (noting that Congress can regulate any interstate commercial activity, even if it is also influenced by moral factors, as evidenced by statutes banning interstate prostitution and loan sharking).

328. *Id.* at 334.

329. *See, e.g.*, Ides, *supra* note 326, at 459–62; Kopel & Reynolds, *supra* note 326, at 105.

330. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 321–29 (1981) (sustaining a federal law that involved only 21,800 acres of farmland, a microscopic percentage of America's agricultural land).

331. *See supra* notes 318–20 and accompanying text.

332. *See, e.g.*, Ides, *supra* note 326, at 453–54, 462; Kopel & Reynolds, *supra* note 326, at 72, 105; Denning, *supra* note 326, at 182.

333. *See* Pushaw, *supra* note 225, at 336–37.

the Court waits to reach this question, the less likely it will be to invalidate the PBABA, even if it would have been inclined to do so had the case been decided earlier. The very fact that a federal statute has been in operation for a significant length of time is a reason not to disturb it, as Chief Justice Marshall stressed in *McCulloch v. Maryland*[334] in upholding Congress's contestable power to establish a national bank.[335]

Ducking the issue of congressional authority to pass the PBABA was a triumph of judicial activism, not restraint. Most obviously, the Court countenanced a constitutionally questionable power grab by Congress. More subtly, the Justices maximized their own power by freeing themselves to reach, perhaps unnecessarily, important questions of individual constitutional rights.

III. THE CONVERGENCE OF CONSTITUTIONAL LAW AND POLITICS

Gonzales and other abortion decisions are merely one illustration of the modern Court's failure to take seriously the Constitution's text, history, structure, and foundational precedent. Instead, the Justices (including self-styled "originalists") have developed an idiosyncratic constitutional common law, which I will describe and critique below.

A. The Common Law of the Constitution

Under traditional Anglo-American adjudication, *stare decisis* requires a court to adhere to established precedent but allows for gradual modifications.[336] By contrast, in constitutional law, the Court has often proceeded by suddenly announcing an unprecedented rule that reflects the majority's preferred social or economic policies. Prominent examples include the Court's abandonment of federalism-based limits on Congress in 1937,[337] its assertion in the 1960s that the Equal Protection Clause demands that state legislatures be apportioned according to a

334. 17 U.S. (4 Wheat.) 316, 352–53 (1819).

335. *Id.* at 405–23.

336. *See supra* notes 12–14 and accompanying text.

337. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34–40 (1937).

"one person, one vote" standard,[338] and the Warren Court's criminal procedure revolution.[339]

In later cases, Justices who favor the policy of the transformative decision aim to retain or expand it, whereas their opponents attempt to either overrule it or restrict its holding. Consequently, results usually depend on a few swing Justices, who typically follow precedent but make what they consider to be sensible adjustments.[340] The modern proliferation of separate opinions bears witness to the ideologically driven process of constitutional decision making.

The Court's peculiar common law approach is on display most clearly in cases involving "fundamental rights" that the Court concedes are not contained in the Constitution as written and intended. For instance, in 2003, Justice Kennedy and four colleagues discovered that Fourteenth Amendment "liberty" included a privacy right to engage in consensual sodomy.[341] Justice O'Connor found the same right lurking in the Equal Protection Clause.[342] Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, responded that this result had no foundation in the Constitution, as the Court had correctly held seventeen years before in *Bowers v. Hardwick*,[343] and they reminded Justice Kennedy of his defense of *stare decisis* in *Casey*.[344] Justice Thomas added that, although he personally disagreed with state laws banning sodomy, the Constitution did not prohibit them.[345]

Even where a relevant provision actually can be located in the Constitution, however, its meaning inevitably is determined by fairly recent precedent that is often creatively inter-

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338. *See* Baker v. Carr, 369 U.S. 186, 228 (1962); Reynolds v. Sims, 377 U.S. 533, 568 (1964).

339. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (creating a right to be free from coercive police questioning); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence must be excluded if it was seized without a warrant issued on probable cause).

340. This moderate approach reflects some combination of respect for *stare decisis*, pragmatic policy judgments, preservation of collegiality, and perhaps a desire to be treated respectfully by the legal and media elite. *See supra* notes 20–22 and accompanying text.

341. *See* Lawrence v. Texas, 539 U.S. 558, 562–79 (2003).

342. *Id.* at 579–85 (O'Connor, J., concurring).

343. 478 U.S. 186 (1986). *Lawrence* overruled *Bowers* directly. *See Lawrence*, 539 U.S. at 578.

344. *Lawrence*, 539 U.S. at 586–605 (Scalia, J., dissenting).

345. *Id.* at 605–06 (Thomas, J., dissenting).

preted. A good example is the Commerce Clause. From 1937 until 1994, the Court applied the following toothless test, which every federal statute met: Congress can legislate whenever it could have had a "rational basis" for concluding that an activity, considered in the aggregate, "substantially affects" interstate commerce.[346] This approach had no basis in the Constitution as originally intended, understood, and implemented for a century-and-a-half.[347] In 1995, the Court purported to adhere to its post-New Deal precedent, but contradicted it by holding that the regulated activity had to be "commercial" and could not invade an area of "traditional state concern" (terms the Court declined to define).[348] Since then, the Court has lurched from case to case trying to restrict Congress's power without disturbing entrenched New Deal and Great Society legislation.[349] Predictably, analytical chaos has ensued. For instance, the Court in *Lopez* and *Morrison* declared that Congress cannot interfere with areas of "traditional state concern," such as crime and education, but did not explain why it had allowed Congress to pass over 3,000 criminal laws and establish a Department of Education.[350] To cite but one example of contradictory outcomes, the Court has concluded that Congress can regulate

346. The "substantial effects" test was invented in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34–40 (1937). The Court later held that a regulated activity would be viewed in the aggregate to determine its effect on interstate commerce. *See* Wickard v. Filburn, 317 U.S. 111 (1942). The Warren Court relaxed standards further by upholding Commerce Clause legislation whenever Congress could have had a "rational basis" for concluding that an activity affected interstate commerce, even if Congress had not expressly considered the issue. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 255–58 (1964).

347. *See* Nelson & Pushaw, *supra* note 16, at 1–119.

348. The Court's earlier opinions clearly stated that the inquiry should focus not on whether the activity itself was "commercial," but rather on whether it exerted a "substantial effect" on interstate commerce. *See, e.g., Jones & Laughlin*, 310 U.S. at 37, 40; *Wickard*, 317 U.S. at 120–25; *Heart of Atlanta*, 379 U.S. at 258. Moreover, the Court rejected the notion that the Tenth Amendment or "federalism" imposed any independent limitations on Congress. *See Wickard*, 317 U.S. at 125; *see also* United States v. Darby, 312 U.S. 100, 123–24 (1941) (dismissing the Tenth Amendment as a mere "truism"). The Rehnquist Court did not formally overrule these cases, yet it resurrected the notion they had repudiated: that Congress could regulate only "commercial" conduct and could not interfere with subjects traditionally committed to the states. *See* United States v. Lopez, 514 U.S. 549, 558–59 (1995).

349. *See* Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879 (2005).

350. *See* Pushaw, *supra* note 225, at 331–32.

the mere possession of guns by some people (e.g., ex-felons),[351] but not others (e.g., those within 1,000 feet of a school).[352]

Even "originalists" like Justice Scalia cannot credibly claim that they consistently vindicate the Commerce Clause's historical meaning. On the contrary, in *Gonzales v. Raich*,[353] he set forth an astonishingly broad scope for federal legislative power: Congress can reach non-commercial activity occurring entirely within a state (e.g., the local growth, possession, and use of marijuana not bought in the market), even if the activity does not "substantially affect" interstate commerce, so long as Congress could reasonably have determined that its law was necessary and proper to effectuate a broader regulation of commerce (e.g., drug trafficking).[354] Skeptics have suggested that Justice Scalia's political support for the "War on Drugs" overcame his previously professed "originalist" legal commitment to limiting the federal government and protecting the states' reserved powers over areas like crime and medical care.[355]

The Court has also failed to address coherently the most important constitutional issue of our time: the boundaries on the President's power as Commander-in-Chief to fight terrorism using methods that allegedly infringe individual rights. In three decisions rendered in 2004, a majority of Justices ruled that "enemy combatants" could invoke federal habeas corpus jurisdiction to vindicate their due process right to an impartial hearing concerning the legality of their detentions.[356] However, the Court declined to reach the constitutional question of whether a military commission would be sufficiently impartial.[357] In *Hamdan v. Rumsfeld*,[358] the Court again ducked this issue by holding that Congress had not specifically authorized the President to establish such commissions[359]—a dubious interpretation that Congress immediately corrected.[360] All of

351. *See* Scarborough v. United States, 431 U.S. 563, 569–78 (1977).

352. *See Lopez*, 514 U.S. at 558–68.

353. 545 U.S. 1 (2005).

354. *See id.* at 33–42 (Scalia, J., concurring).

355. *See, e.g.*, Randy Barnett, *The Ninth Circuit's Revenge*, NAT'L REV. ONLINE, June 9, 2005, http://www.nationalreview.com/comment/barnett200506090741.asp.

356. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

357. *Hamdi*, 542 U.S. at 538.

358. 126 S. Ct. 2749 (2006).

359. *See id.* at 2772–98.

360. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10 U.S.C.).

these cases contained numerous separate opinions, including dissents assailing the Court for disregarding the Constitution's language, structure, history, and precedent by interfering with the President's discretionary exercise of his Article II powers.[361]

Many First Amendment decisions have also featured individualistic, policy-driven common law shorn of constitutional roots. I will put to one side the Court's confusing and fragmented Religion Clause jurisprudence and instead consider its free speech case law through the lens of its recent decision in *Morse v. Frederick*.[362] There a majority of Justices ruled that the First Amendment did not prohibit a public high school principal from confiscating a banner reading "Bong Hits 4 Jesus," which she had reasonably interpreted as promoting illegal drug use in violation of school policy.[363] Three Justices wrote concurring opinions. First, Justice Alito, joined by Justice Kennedy, read the Court's holding narrowly as not applying to restrictions on student expression that could plausibly be construed as commenting on any political or social issue, including the wisdom of the "War on Drugs."[364] Second, Justice Thomas argued that the First Amendment does not protect student speech in public schools.[365] Third, Justice Breyer would have avoided the constitutional issue by holding that the principal's qualified immunity barred the student's claim.[366] In dissent, Justice Stevens (joined by Justices Souter and Ginsburg) contended that the First Amendment prohibited school officials from disciplining a student who had made an ambiguous statement that contained an oblique reference to drugs.[367]

Morse has little basis in the original meaning of the First Amendment. Rather, the opinions mostly reflect attitudes that range from the political—the conservative Roberts-Scalia-Thomas support for the "War on Drugs" versus the liberal Ste-

361. *See, e.g.*, *Hamdi*, 542 U.S. at 579–99 (Thomas, J., dissenting); *Rasul*, 542 U.S. at 488–506 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.); *Hamdan*, 126 S. Ct. at 2810–23 (Scalia, J., dissenting, joined by Thomas and Alito, JJ.). *See generally* Pushaw, *supra* note 39, at 1058–78 (arguing that the Court in war powers cases has long rejected black-letter rules in favor of a flexible approach that reflects political and practical considerations, such as the gravity of the military crisis, the egregiousness of the legal violation, and the political strength of the President).

362. 127 S. Ct. 2618 (2007).

363. *Id.* at 2619–23.

364. *Id.* at 2626–38 (Alito, J., concurring).

365. *Id.* at 2623–26 (Thomas, J., concurring).

366. *Id.* at 2638–43 (Breyer, J., concurring in part and dissenting in part).

367. *Id.* at 2643–51 (Stevens, J., dissenting).

vens-Souter-Ginsburg antiauthoritarianism—to the deeply personal (Justice Breyer, whose father was legal counsel to a city board of education, expressed sympathy for the principal and departed from his usually vigorous defense of free speech).[368]

Turning to public school integration under the Equal Protection Clause, the Justices' unanimity in *Brown v. Board of Education*[369] has disintegrated because of conflicting policy views. In two cases involving the University of Michigan's affirmative action plans for undergraduate and law school admissions, thirteen separate opinions yielded the following result: Three liberal Justices who are politically sympathetic to such efforts (Stevens, Souter, and Ginsburg) found them valid,[370] whereas four conservative Justices who oppose such programs as reverse discrimination (Rehnquist, Scalia, Kennedy, and Thomas) deemed them unconstitutional.[371] The swing voter, Justice O'Connor (joined in part by Justice Breyer[372]), asserted that promoting racial and ethnic diversity to achieve educational benefits was a "compelling state interest"[373] (a concept previously reserved for matters such as public safety). She then determined that the law school's scheme was narrowly tailored to accomplish that diversity goal because it considered race as merely one factor in the individualized assessment of each ap-

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368. *See* Transcript of Oral Argument at 21, 36–38, Morse v. Frederick, 127 S. Ct. 2618 (2007) (No. 06-278) (reprinting Justice Breyer's statements of concern for interfering with a principal's ability to run an orderly school); Malcolm Gladwell, *Judge Breyer's Life Fashioned Like His Courthouse*, WASH. POST, June 26, 1994, at A1 (noting the impact on Justice Breyer of his father's career as an educational lawyer).

369. 347 U.S. 483 (1954).

370. *See* Grutter v. Bollinger, 539 U.S. 306, 311–44 (2003) (upholding the law school program); *id.* at 344–46 (Ginsburg, J., concurring); Gratz v. Bollinger, 539 U.S. 244, 282–91 (2003) (Stevens, J., dissenting) (rejecting the majority's invalidation of the undergraduate plan); *id.* at 291–98 (Souter, J., dissenting); *id.* at 298–305 (Ginsburg, J., dissenting).

371. *See Gratz*, 539 U.S. at 268–75 (Rehnquist, C.J., opinion for the Court); *Grutter*, 539 U.S. at 346–49 (Scalia, J., dissenting); *id.* at 349–78 (Thomas, J., dissenting); *id.* at 378–87 (Rehnquist, C.J., dissenting); *id.* at 387–96 (Kennedy, J., dissenting).

372. In the undergraduate case, Justice Breyer concurred only in the Court's judgment, not its opinion. *See Gratz*, 539 U.S. at 281 (Breyer, J., concurring). He agreed with Justice O'Connor that Michigan's effort to diversify its undergraduate college ran afoul of the Equal Protection Clause by failing to give each applicant individualized consideration. *Id.* at 281. Nonetheless, he joined the first part of Justice Ginsburg's dissenting opinion, which recognized that governments could constitutionally distinguish policies that attempted to include more underrepresented minorities from those that aimed to exclude such persons. *Id.* at 282.

373. *See Grutter*, 539 U.S. at 325–33; *Gratz*, 539 U.S. at 276–80 (O'Connor, J., concurring).

plicant,[374] but that the undergraduate program unconstitutionally gave minority candidates a numerical boost that resembled a quota.[375]

Justice O'Connor's fence-sitting defies both law and fact. Michigan's undergraduate and law school admissions programs had identical goals and yielded uncannily similar results.[376] Thus, both programs either violated the Equal Protection Clause or they did not. Justice O'Connor's controlling opinion encourages universities to engage in deception by consciously admitting a certain percentage of students from underrepresented minority groups while claiming that race is merely one factor in the calculus.[377] From a purely political standpoint, however, Justice O'Connor's opinion makes sense. Not only liberal interest groups but also America's business, military, and legal establishment filed briefs extolling the virtues of affirmative action,[378] and so a blanket rejection of these programs could have caused a backlash against the Court.

Unfortunately, the incoherent constitutional analysis in the Michigan cases set the stage for further confusion. In a recent decision,[379] Chief Justice Roberts—joined by Justices Scalia, Thomas, and Alito—declared that public school district plans that had assigned certain students to schools solely on the basis of race violated the Equal Protection Clause.[380] Justice Thomas agreed and reiterated his vision of a "color blind" Constitution.[381] In a partial concurrence, Justice Kennedy stepped into Justice O'Connor's shoes by arguing that the school districts could have considered race not by itself but as a factor in furthering the educational benefits of diversity and the goal of equal opportunity.[382] In dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, maintained that the school boards had properly attempted to achieve *Brown*'s promise of racial integration.[383] Justice Stevens added that the Court's de-

374. *See Grutter*, 539 U.S. at 333–44.

375. *See Gratz*, 539 U.S. at 276–80 (O'Connor, J., concurring).

376. *See Grutter*, 539 U.S. at 379–88 (Rehnquist, C.J., dissenting).

377. *See Gratz*, 539 U.S. at 304–05 (Ginsburg, J., dissenting).

378. *See id.* at 248–51 (listing amici curiae).

379. Parents Involved in Comm. Schools v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

380. *Id.* at 2746–68.

381. *Id.* at 2768–88 (Thomas, J., concurring).

382. *Id.* at 2788–97 (Kennedy, J., concurring in part and concurring in the judgment).

383. *Id.* at 2800–42 (Breyer, J., dissenting).

cision ignored the history of discrimination against blacks and subverted *Brown*.[384] Once again, the Justices' opinions about affirmative action appeared to hinge on their political and ideological views, which they superimposed onto the Constitution.

Examples from other areas could be multiplied, but the basic picture is clear. Modern constitutional law has devolved into an odd species of common law in which a majority of Justices break from precedent to declare a new rule that comports with their favored policy, then try to preserve and extend that rule against other Justices who have a different political or ideological agenda. Moreover, the Court has strenuously resisted congressional efforts to reexamine its constitutional rulings, despite the common law tradition recognizing the validity of legislative participation.[385] Neither the Constitution nor Congress, then, meaningfully constrains the Court's discretionary lawmaking.

B. A Critique of Modern Constitutional Decision Making

One obvious response to the foregoing analysis is: So what? A century of scholarship has discredited the classical model of courts adjudicating disputes by impartially applying a fixed law to the facts. Initially, Legal Realists explored how judges actually decided cases, and they employed social science research to recommend improved lawmaking by courts and legislatures.[386] The Critical Legal Studies movement offered a more radical vision of the law as a political weapon and hence candidly advocated manipulating constitutional law to achieve left-wing policy goals.[387] More mainstream social scientists have further undermined the notion that courts rationally and objectively apply the law. For example, political scientists have statistically documented the impact of judges' party affiliation on their votes and have concluded that they rationally seek to maxi-

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384. *Id.* at 2797–800 (Stevens, J., dissenting).

385. *See supra* notes 14, 26–27 and accompanying text.

386. *See, e.g.*, Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 500–02 (1996). Most significantly for present purposes, one of the founders of Legal Realism observed that the Court, despite its rhetoric, had long ignored the Constitution's text and departed from its own precedents whenever doing so furthered its ideological goals. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 39–40 (1934).

387. *See, e.g.*, Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 416, 424–25 (1981).

mize their policy preferences.[388] Similarly, psychological studies have shown that judges are not immune from the problems that distort decision making generally, such as cognitive bias.[389]

The aforementioned scholars have aimed to increase public awareness of the true nature of legal (including constitutional) decision making. Among other benefits, such a realistic analysis highlights the importance of the political, ideological, philosophical, and psychological characteristics of Supreme Court nominees—and hence the imperative of urging the President and the Senate to support candidates who will pursue the voters' goals.

Of course, the Justices would vehemently deny that such nonlegal factors influence their constitutional rulings, and they would never cite such unsettling scholarship. Rather, constitutional law opinions contain conventional legal analysis. Nonetheless, the skepticism among intellectuals toward the idea that law consists of neutral rules has likely contributed to the modern Court's preference for malleable constitutional standards that can be applied to particular cases to reach outcomes viewed as practical and fair.[390]

Many scholars have defended this case-specific, common law style of adjudication on the ground that it allows the Court to respond to unique factual circumstances and to broader legal, political, and social changes.[391] But such pragmatism has a price—as does the growing public perception that constitutional law is simply politics by other means.

Bush v. Gore[392] crystallized the problem. The Court held that the Equal Protection Clause requires voters to be treated equally, and therefore prohibited a state court from authorizing county election officials to apply different criteria in recounting contested presidential election ballots.[393] Accordingly, five conservative Republican Justices—Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—stopped the recount in Florida, effec-

388. *See, e.g.*, LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998).

389. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

390. *See* Pushaw, *supra* note 225, at 339; *see also* Sullivan, *supra* note 161, at 36–81.

391. *See, e.g.*, SUNSTEIN, *supra* note 275; Strauss, *supra* note 11.

392. 531 U.S. 98 (2000) (per curiam).

393. *Id.* at 101–11.

tively ensuring the election of a conservative Republican President, George W. Bush.[394]

As the dissenting Justices pointed out, this decision had no genuine basis in the Constitution, which left such electoral details to the state political process.[395] Such an arrangement should have commanded special respect from the five Justices in the majority, who had led the Court's "federalism" revival over the previous decade.[396] Nor did the Equal Protection Clause, as originally intended and understood for a century, impose any limits on the states' discretion, for the simple reason that it protects the *civil* rights of individuals and minority groups, not general *political* rights.[397] It was only in the 1960s that the Court invoked that clause as mandating equality among voters, and accordingly required all state legislatures to be apportioned by population[398] and rejected wealth-based voting classifications.[399]

Tellingly, liberal Democrats who had applauded the Court for inventing new political rights under the Equal Protection Clause lambasted the *Bush v. Gore* majority for doing exactly the same thing.[400] Conversely, conservative Republicans who had decried the Warren Court's activism (especially its creative interpretation of the Fourteenth Amendment) had a sudden conversion and praised the majority for their pragmatic wis-

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394. *Id.* at 110–11.

395. *Id.* at 124–27 (Stevens, J., dissenting).

396. This bloc of five Justices had recently reaffirmed federalism-based limits on Congress's Commerce Clause power in *United States v. Morrison*, 529 U.S. 598 (2000). They had also held that the Tenth Amendment and general principles of federalism prohibited Congress from "commandeering" state legislatures and executives to enact and enforce federal law. *See* New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 98 (1997). Finally, they had strengthened the notion of state sovereign immunity. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1996).

397. *See* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 753–54 (1994).

398. *See* Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

399. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

400. *See* Pushaw, *supra* note 18, at 386–88 (citing numerous examples). The one Justice who undoubtedly acted neutrally was Stephen Breyer, a Democrat who nonetheless joined the majority's equal protection holding—although he criticized them for reaching out to decide this political question in the first place and for halting the recount. *See Bush*, 531 U.S. at 145–58 (Breyer, J., dissenting). Obviously, he concluded that this ruling comported with post-*Baker* precedent despite his political views.

dom.[401] Public opinion polls and the popular media told the same story: Republicans overwhelmingly agreed with the Court's decision, while Democrats did not.[402]

The politicization of constitutional law had reached its apex.[403] Even those Americans who had clung to an objective view of constitutional law after the Warren Court revolution and *Roe* could no longer credibly do so.[404] This general loss of confidence in the traditional idea that "the Court" neutrally applies truly "legal" principles rooted in the Constitution has had several negative effects.

Most importantly, the Court's eccentric common law adjudication subverts the very premise of our written Constitution: that a supermajority of "We the People" ratified a supreme and fundamental law in order to identify the basic structure of our government and the individual rights seen as inviolable, with the understanding that the Constitution would remain binding absent formal amendment.[405] Instead, constitutional separation of powers, federalism, and individual rights have become whatever at least five Justices say they are. The Court enjoys all the fun of making common law, but none of the responsibilities (such as adherence to *stare decisis*).

A related problem is that most people—the general public, politicians, pundits, and even scholars—have come to judge constitutional law decisions based almost entirely on their re-

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401. *See, e.g.*, Robert H. Bork, *Sanctimony Serving Politics: The Florida Fiasco*, 19 NEW CRITERION 4, 5–11 (2001).

402. *See* Frank Newport, *President-Elect Bush Faces Politically Divided Nation, but Relatively Few Americans Are Angry or Bitter Over Election Outcome*, GALLUP, Dec. 18, 2000, http://www.gallup.com/poll/2200/PresidentElect-Bush-Faces-Politically-Divided-Nation-Relatively.aspx; Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 926 (2005) (noting the increased politicization apparent in cases like *Bush v. Gore*, but stressing that most Americans still view the Court favorably).

403. *See* Ronald J. Krotoszynski, Jr., *An Epitaphios for Neutral Principles in Constitutional Law:* Bush v. Gore *and the Emerging Jurisprudence of* Oprah!, 90 GEO. L.J. 2087 (2002) (characterizing *Bush v. Gore* as a logical outgrowth of a decades-long trend in which the Court made constitutional decisions based upon policy results rather than consistent adherence to precedent).

404. *See* Marshall, *supra* note 17, at 525–31.

405. *See* Pushaw, *Justiciability*, *supra* note 38, at 397–98, 411, 413, 427, 433–34, 469; Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1185–201 (2002); *see also* SCALIA, *supra* note 38, at 38–47 (contending that the Justices' continual revision of the Constitution, based upon their views of changing morality and social needs, is inconsistent with the purpose of a written Constitution and the democratic processes it established).

sults rather than on the quality of their legal reasoning.[406] For example, *Roe* is a "good" opinion if you are pro-choice, and a "bad" one if you are not. The notion that a Justice might be personally or politically opposed to a policy, yet find it constitutional, has been fading. Justice Blackmun's sudden shift on the constitutionality of the death penalty is a good illustration of this inability to stick to constitutional principles that conflict with one's individual political or moral views.[407]

Not surprisingly, the merger of constitutional law with raw politics has corrupted the judicial appointment process, especially at the Supreme Court level. Voters and interest groups exert enormous pressure on the President and Senate to nominate and confirm Justices who share their political and ideological views—and to reject those who do not.[408] Consequently, confirmation hearings have become a charade. Senators ask nominees like Clarence Thomas, John Roberts, and Samuel Alito very specific questions (most notably, whether they will uphold *Roe*), and they answer with general platitudes about their judicial philosophy—typically, that judges have a limited role and should apply the law faithfully.[409] This strategy makes perfect sense in light of what happened to Robert Bork when he answered questions directly and fully.[410] What effect this obfuscation has on the credibility of Justices who are confirmed is another matter.

The foregoing developments, particularly the emergence of clear-eyed pragmatism about constitutional decision making, may well be irreversible. If so, we should contemplate what we have lost. Nearly half a century ago, Herbert Wechsler lamented the erosion of the notion that the Court should base its decisions on neutral and general rules grounded in the Consti-

406. *See supra* note 28 (citing William Van Alstyne).

407. *See* Callins v. Collins, 510 U.S. 1141, 1143–59 (1994) (Blackmun, J., dissenting from denial of petition for writ of certiorari) (announcing that, although he had always personally opposed the death penalty as immoral, he had changed his previous view that it was nonetheless constitutional); *see also* Sisk, *supra* note 61, at 1067–68 (noting that Justice Blackmun simply elevated his personal opinion to constitutional status).

408. *See, e.g.*, Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523, 540–44 (2002).

409. *See* Richard W. Stevenson & Neil A. Lewis, *Alito, at Hearing, Pledges an Open Mind on Abortion*, N.Y. TIMES, Jan. 11, 2006, at A1.

410. *See* RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS 4–5, 75–76, 101–02, 127, 134–35, 166 (2005).

tution's text, structure, and history.[411] Professor Wechsler argued that, in the absence of such constitutional principles that transcended the result in any individual case, the Justices should defer to the democratic process instead of imposing their own personal values and beliefs.[412] Therefore, he condemned the substantive due process excesses of both the conservative *Lochner* Court and the liberal Warren Court.[413]

Few law professors today accept Professor Wechsler's critique.[414] Nonetheless, I believe that he was prescient in exposing the dangers of politicized constitutional decision making, although he obviously could not have foreseen the specific forms it might take, such as *Bush v. Gore* and the degeneration of the judicial confirmation process.

I also agree with Professor Wechsler that it is possible for Justices to articulate and apply reasonably clear rules of law, actually rooted in the Constitution, that may conflict with their personal and political views.[415] For instance, Justices Black and Stewart in *Griswold*, and Justice Thomas in *Lawrence*, argued that they disagreed with state statutes banning contraception and homosexual sodomy, but that such laws did not violate any provision of the Constitution and thus should be left to the state political process.[416] Similarly, in *Raich*, Chief Justice Rehnquist and Justice O'Connor joined Justice Thomas in concluding that the Commerce Clause did not empower Congress to prohibit the non-commercial, in-state possession and use of marijuana, even though they were politically sympathetic to

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411. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

412. *See id.* at 6, 10–20.

413. *See id.* at 8–9, 22–34.

414. *See* Pushaw, *supra* note 225, at 342–43.

415. I do not deny that it is also possible for Justices to apply constitutional common law standards to reach results at odds with their personal, political, or ideological views. One illustration is Justice Kennedy's vote to affirm *Roe*, although some skeptics have speculated that he did so to be taken seriously by the legal intelligentsia. *See supra* note 22 and accompanying text. Another is the decision by Justice Breyer, a liberal Democrat, to join the majority in *Bush v. Gore* in holding that the Court's equal protection precedent required invalidating Florida's standardless system for recounting votes. *See supra* note 35 and accompanying text. Nonetheless, I contend that such examples are rare, and that in any event Justices should not adhere to precedent that has no basis in the Constitution's text, structure, and history.

416. *See* Griswold v. Connecticut, 381 U.S. 479, 507–27 (1965) (Black, J., dissenting); *id.* at 527–31 (Stewart, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 605–06 (2003) (Thomas, J., dissenting).

this ban.[417] It is unfortunate that such insights are usually expressed in dissenting rather than majority opinions.

As an alternative to the Court's freewheeling common law approach, I have long recommended "Neo-Federalism."[418] This methodology initially requires recovering the original meaning and understanding of the Constitution's text, structure, and underlying political theory, as manifested in the framing and ratification records and in the early implementation of the Constitution by all three branches. If such originalist principles can be determined with reasonable certainty, and if they can usefully be applied to resolve modern constitutional problems, they should be followed despite relatively recent precedent to the contrary.

A Neo-Federalist approach in the area of abortion would begin by recognizing that the Constitution does not mention a right to abortion and that there is no evidence that the Fourteenth Amendment's drafters, ratifiers, or implementers understood the word "liberty" to encompass such a right.[419] Moreover, the Constitution's federalist structure and underlying democratic political theory commit such deeply contentious political, ideological, and moral issues to the state political process.[420] Application of Neo-Federalism to the abortion context, then, would require overruling cases like *Roe*, *Casey*, and *Stenberg*.

Although I will not canvass all objections to this analysis, one is of particular relevance to my overall project. Critics would contend that rejecting a constitutional right to abortion would not reflect neutral legal principles, but rather would simply impose the political and ideological agenda of social conservatives. That is incorrect. Justices would advance conservative policy goals if they creatively interpreted the word "person" in the Fourteenth Amendment to include fetuses, and accordingly struck down all laws allowing abortion.[421] Conversely, liberal Justices would promote their ideological preferences by imaginatively construing the term "liberty" to require abortion on demand until childbirth (which is close to the *Stenberg* holding).[422] A politically impartial approach would permit each

417. *See* Gonzales v. Raich, 541 U.S. 1, 45–57 (2005) (O'Connor, J., dissenting).

418. *See supra* notes 40–43 and accompanying text (summarizing this mode of analysis).

419. *See supra* notes 80, 82, 85, 98, 201–03 and accompanying text.

420. *See supra* notes 82–83, 85, 99, 152, 205 and accompanying text.

421. *See supra* notes 29, 222; *infra* note 422 and accompanying text.

422. *See supra* notes 183–91 and accompanying text.

state to adopt abortion laws that reflect the wishes of its voters, at least half of whom are women. The result would be a variety of abortion regimes—liberal, moderate, and conservative. Furthermore, application of a Neo-Federalist methodology would also sustain Acts of Congress, passed under the Commerce Clause, which protect medical professionals who provide—and patients who receive—state-authorized abortions and related commercial services.[423]

Far from imposing a monolithic conservative platform, then, Neo-Federalism would allow permissive state laws authorizing abortion and federal statutes designed to vindicate the exercise of such state rights. By contrast, the constitutional common law developed since *Roe* adopts the liberal side in the debate and shuts out any conservative voice in the democratic process.

CONCLUSION

The abortion cases illuminate the perils of the modern Court's idiosyncratic, politicized, common law style of constitutional decision making. *Roe* fabricated a right to abortion that reflected the policy views of a majority of Justices; *Casey* purported to reaffirm *Roe* but substantially altered and restricted it; *Stenberg* supposedly applied *Casey* but ignored its limitations; and *Gonzales* claimed to follow *Stenberg* but eviscerated it, thanks largely to the addition of one new Justice who happens to oppose abortion. All of these cases featured numerous concurring and dissenting opinions, which served only to reinforce the perception that the Justices were expressing their personal opinions, not expounding the law of the Constitution.

Unfortunately, this abortion jurisprudence follows a familiar pattern. It may be too late in the day to expect the Court to return to interpreting the actual Constitution—its language, history, structure, and foundational precedent. If so, then the Justices have only themselves to blame if the public loses faith in the idea of a written Constitution as the fundamental and supreme law.

423. *See* Pushaw, *supra* note 225, at 348–53.

DEMYSTIFYING THE *RIGHT* TO EXCLUDE: OF PROPERTY, INVIOLABILITY, AND AUTOMATIC INJUNCTIONS

SHYAMKRISHNA BALGANESH*

The right to exclude has long been considered a central component of property. In focusing on the element of exclusion, courts and scholars have paid little attention to what an owner's right to exclude means and the forms in which this right might manifest itself in actual property practice. For some time now, the right to exclude has come to be understood as nothing but an entitlement to injunctive relief—that whenever an owner successfully establishes title and an interference with the same, an injunction will automatically follow. Such a view attributes to the right a distinctively consequentialist meaning, which calls into question the salience of property outside of its enforcement context. Yet, in its recent decision in eBay Inc. v. MercExchange, L.L.C., *the Supreme Court rejected this consequentialist interpretation, declaring unequivocally that the right to exclude did not mean a right to an injunction. This Article argues that* eBay's *negative declaration sheds light on what the right has really meant all along—the correlative of a duty imposed on non-owners (the world at large) to keep away from an ownable resource. This duty (of exclusion) in turn derives from the norm of inviolability, a defining feature of social existence, and accounts for the primacy of the right to exclude in property discourses. This understanding is at once both non-consequentialist and of deep functional relevance to the institution of property.*

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"The notion of property . . . consists in the right to exclude others from interference with the more or less free doing with it as one wills."

—Justice Holmes in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (concurring).

"The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."

—Justice Marshall in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

"[T]he creation of a right [to exclude] is distinct from the provision of remedies for violations of that right."

—Justice Thomas in *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1840 (2006).

INTRODUCTION

What does it mean to speak of property in terms of the "right to exclude"? As a direct consequence of equity's avowed preference for property (over personal) rights in the grant of exclusionary relief, courts and scholars have developed a view that identifies property's right to exclude as meaning little more than an entitlement to injunctive relief against a continuing (or repeated) interference with a resource. This view attributes to the right an entirely consequentialist meaning, under which the right—and indeed all of property—is normatively meaningless except when sought to be enforced in a court of law. If property, as a fundamental social institution, is important outside

its remedial context, it is important to identify what the right to exclude means apart from the availability of an injunction. This Article attempts to do this by locating its meaning in the norm of inviolability and the obligation it casts on non-owners to stay away from resources that are owned (and capable of being owned) by someone else.

In his now-legendary formulation, Blackstone defined property as "that sole and despotic dominion . . . exercise[d] over the external things . . . in total *exclusion* of the right of any other."[1] Blackstone's definition has since been morphed into a more general definition of property rights in the abstract, centered around the *in rem* right to exclude.[2] On numerous occasions, in dealing with the issue of takings, the Supreme Court too has characterized the element of exclusion as a critical component of the property ideal.[3]

The idea of exclusion, in one form or the other, tends to inform almost *any* understanding of property, whether private, public, or community.[4] The only variation tends to be the person or group in whom it is vested. Private property entails vesting it in an individual; public property, in a government or other agency on behalf of a wider set of individuals; and community property, in members of a community against nonmembers. Consequently, the tendency among scholars, courts,

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1. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Univ. of Chicago Press 1979) (1766) (emphasis added). For elaborations on Blackstone's definition, see Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601 (1998). For analysis of Blackstone's view of property rights, see Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 U. CIN. L. REV. 67 (1985).

2. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 360–64 (2001) (attributing the *in rem* conception of property to Blackstone and discussing the progression of property law in general).

3. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (referring to the right to exclude as "one of the most treasured strands" of the property rights bundle); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (characterizing the right to exclude as "one of the most essential sticks"); *id.* at 179–80 (describing the right to exclude as a "universally held . . . fundamental element" of property); *see also* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987).

4. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 63 (1985) (noting that the idea of "exclusive possession" is implicit in the basic conception of property); *see also* JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS § 5.03[A] (Supp. 2006).

and legislators to equate conceptions of property with the notion of exclusion remains pervasive.[5]

Within the exclusionary conception of property, the right-based variant tends to dominate overwhelmingly. A decade ago, Thomas Merrill argued that the "*right* to exclude" remains the *sine qua non* of property.[6] The Supreme Court, whenever it invokes the idea, also speaks in terms of a "right" to exclude.[7] Although scholarship and judicial dicta over the years have attempted to understand and apply the exclusionary component of the right to exclude, the debate has tended to ignore altogether the right component.[8] Why is speaking of property in terms of a *right* to exclude unsurprisingly common? Does the identification of exclusion as a right shed light on its practical significance (as a remedy), or is it merely a rhetorical epithet emphasizing its centrality to the discourse (analogous to the right to life)?

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5. For prominent scholarly examples, see J.W. HARRIS, PROPERTY AND JUSTICE 13 (1996) (characterizing property as an open-ended set of privileges bounded by an exclusionary trespassory right); J.E. PENNER, THE IDEA OF PROPERTY IN LAW 71 (1997) (defining property in terms of exclusion); Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 373–74 (1954); Richard A. Epstein, *Weak and Strong Conceptions of Property: An Essay in Memory of Jim Harris*, *in* PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS 97 (Timothy Endicott et al. eds., 2006); Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835 (2006).

6. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (emphasis added).

7. *See, e.g.*, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005) (speaking of a right to exclude in the context of a regulatory taking); United States v. Craft, 535 U.S. 274, 280, 282 (2002) (right to exclude in the context of a tax dispute); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 667 (1999) (right to exclude in the context of the Fourteenth Amendment); *see also* Cleveland v. United States 531 U.S. 12, 24–25 (2000) (holding that the "right to exclude" may exist in the context of a state's domain of regulatory sovereignty); *supra* note 3. Interestingly, in his dissent in *International News Service v. Associated Press*, 248 U.S. 215 (1918), Justice Brandeis characterized the right as the "*legal* right to exclude others" from enjoying the resource. *Id.* at 250 (Brandeis, J., dissenting) (emphasis added). For an excellent overview of the Court's emphasis on the right to exclude, see David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39 (2000).

8. *See, e.g.*, Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, *in* THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 163 (William A. Fischel ed., 2006); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004); Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002); Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006); Strahilevitz, *supra* note 5.

Focusing on the *right* component of the "right to exclude" is of more than just theoretical value. This focus carries with it a deep functional relevance, one that derives from the interplay between the language of rights and remedies.[9] For quite some time, the right to exclude in the context of both tangible and intangible property has come to be associated with an entitlement to exclusionary (injunctive) relief. Thus, interferences with an owner's interests are thought to entitle the owner to a permanent injunction restraining such interferences. The right to exclude, according to this understanding, is a remedial attribute related to the automatic availability of injunctive relief for interferences with an owner's use and enjoyment of her property.

In *eBay Inc. v. MercExchange, L.L.C.*,[10] however, the Supreme Court effectively unlinked the right to exclude from any entitlement to exclusionary relief.[11] In *eBay*, the Court concluded that an affirmative finding of validity and infringement did not automatically entitle a patentee to an injunction against the infringer, and held that the traditional four-factor test used by courts of equity determined the availability of an injunction.[12] Put differently (in property terms), the Court concluded that an interference with a property interest, even a continuing interest, does not automatically entitle the owner to an injunction. The owner must still affirmatively establish the inadequacy of ordinary compensatory remedies. The point was driven home most forcefully by Justice Kennedy, who observed in his concurrence that an owner's "right to exclude does not dictate the remedy for a violation of that right."[13]

Almost all analyses of *eBay* thus far have focused on its impact on patent law (or intellectual property), and have tended to ignore the relevance of the Court's holding for property law

9. For an overview of the literature laying out the basic tenets of the debate over rights and remedies, see Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1 (2000); Neil MacCormick, *Rights, Claims and Remedies*, 1 LAW & PHIL. 337 (1982). For an extension of this debate into the realm of constitutional remedies, see Mark R. Brown, *Weathering Constitutional Change*, 2000 U. ILL. L. REV. 1091; John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1 (2002).

10. 126 S. Ct. 1837 (2006).

11. *Id.* at 1840.

12. *See id.* at 1839–40.

13. *Id.* at 1842 (Kennedy, J., concurring).

more generally.[14] Although the Court's holding was directed specifically at patent injunctions, the express basis of its holding remained the need to subject patent injunctions to the standard governing "other cases" where injunctions were granted.[15] By finding the four-factor test to be the correct standard, the Court implicitly acknowledged its universal applicability to *all* grants of injunctive relief. Viewed in this light, the *eBay* decision concluded that a grant of injunctive relief, regardless of context, could never be automatic or ensue as a matter of *right*.

The *eBay* decision thus calls into question, rather starkly, the meaning and relevance of the right to exclude, both within the domain of intellectual property and in the wider subjects of real and personal property, at least insofar as each remains premised on the idea of exclusion. If property is no longer automatically associated with exclusionary relief, is it meaningless to continue characterizing the right to exclude as its central attribute? Taking the functional interpretation of the right to exclude as a given, some have readily concluded that the *eBay* decision heralds the declassification of intellectual property (specifically, patents) as a species of property *strictu sensu*, or that it dilutes the significance of the right to exclude in understanding intellectual property, and thus all property.[16]

My argument in this Article is very different: I argue that the *eBay* Court's unlinking of right and remedy in relation to exclu-

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14. *See, e.g.*, Michael W. Carroll, *Patent Injunctions and the Problem of Uniformity Cost*, 13 MICH. TELECOMM. & TECH. L. REV. 421, 431–39 (2007); Richard B. Klar, eBay Inc. v. MercExchange, L.L.C.: *The Right to Exclude Under United States Patent Law and the Public Interest*, 27 WHITTIER L. REV. 985, 994–95 (2006); Harold C. Wegner, *Injunctive Relief: A Charming Betsy Boomerang*, 4 NW. J. TECH. & INTELL. PROP. 156, 166–69 (2006); Gavin D. George, Note, *What is Hiding in the Bushes? eBay's Effect on Holdout Behavior in Patent Thickets*, 13 MICH. TELECOMM. & TECH. L. REV. 557, 566–69 (2007). *But see* Thomas L. Casagrande, *The Reach of* eBay Inc. v. MercExchange, L.L.C.: *Not Just for Trolls and Patents*, HOUSTON LAW., Nov./Dec. 2006, at 10, *available at* http://www.thehoustonlawyer.com/aa_nov06/page10.htm (hinting at the possible applicability of *eBay*'s holding outside the realm of patent law to all grants of injunctive relief).

15. *eBay*, 126 S. Ct. at 1841.

16. *See, e.g.*, Yixin H. Tang, *The Future of Patent Enforcement after* eBay v. MercExchange, 20 HARV. J.L. & TECH. 235, 252 (2006) ("[A]fter the *eBay* ruling, one must question whether it is still tenable to call patent rights 'property rights.'"); Peter S. Menell, *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?*, (U.C. Berkeley Public Law Research Paper Series, Paper No. 965083, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=965083.

sion counterintuitively helps to shed light on what the right to exclude means in the context of intellectual property and property more generally, and to illuminate the role it plays in structuring different elements of the governing legal regime. The right to exclude, I argue, is best understood as a normative device, which derives from the norm of resource inviolability. Analogous to the role of *promising* in contract law, the right to exclude operates as an analytic tool, which seeks to transplant the norm of inviolability from morality to law (admitting of exceptions as circumstances demand).

Part I sets out different interpretations of the right to exclude, and uses three different theoretical frameworks. Part II then argues that if property is understood as an institution of significance independent of its actual enforcement, the right to exclude must be understood as a correlative right deriving from the norm of inviolability. Part II proceeds to show that the right to exclude can indeed have independent normative traction regardless of whether it is actually enforced, much like the performance right in contract law. Understanding the right along these lines is not only practical; it also explains its lingering persistence in property discourse. Part III focuses on the interpretation at issue in the *eBay* case: the exclusionary remedy variant. Part III.A examines the mechanical availability of injunctions in the context of tangible and intellectual property and the interface between equity courts' discretion and the status of the right. Part III.B then focuses on the impact of *eBay* on this interpretation of the right, and attempts to show that the *eBay* decision may be seen as foreshadowing the move towards a theory of efficient infringement or efficient trespass.

The objective of this Article is not to argue that the right to exclude is *all* that there is in property.[17] Although the idea of property most certainly consists of more than just exclusion, to be meaningful it must contain, at a minimum, some element of exclusion. How such exclusion might manifest itself in property theory and practice, then, serves as the focus of the Article.

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17. Some have made just such an argument. *See, e.g.*, Merrill, *supra* note 6, at 754 ("[P]roperty means the right to exclude others from valued resources, no more and no less."). Others have argued equally persuasively that the right to exclude is an "essential but insufficient component" of what property means. *See, e.g.*, Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 377 (2003) (offering an "integrated theory of property," of which exclusion is an essential part).

Accepting or rejecting the centrality, for property, of the right to exclude is conditioned upon a basic understanding of what the right means and entails. This Article is an attempt to further that very understanding.

I. CONCEPTUALIZING THE *RIGHT* TO EXCLUDE: A TAXONOMY

Comprehensive philosophical theories on the nature and function of legal rights have existed for several centuries now.[18] Yet, one finds little to no analysis of the right to exclude in their exegesis.[19] At the same time, property scholars have tended to focus almost entirely on the exclusion element, even though they continue to use the language of rights theorists.[20] Few have sought to pay close attention to both elements, with the result that the precise meaning of the phrase, in spite of its persistent usage, remains largely obscure.[21] Although some property theorists speak of the right as a unitary concept, others use it to represent a collective set of rights.[22] Ironically, virtually all property theorists consistently underplay their reasons for characterizing the situation as giving rise to a right when it is precisely the study of these reasons that remains the focus of rights theorists. It is therefore rather surprising that proponents of the right to exclude tend to neglect altogether the unique interface of their ideas with those of the rights discourse more generally.

This Part attempts to describe that interface by classifying possible conceptions of the right to exclude based on their structural and functional attributes. While a classificatory exer-

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18. One of the earliest expositions on the nature of rights in the English-speaking world was that of Jeremy Bentham. *See* H.L.A. Hart, *Bentham on Legal Rights*, *in* OXFORD ESSAYS IN JURISPRUDENCE (Second Series) 171–72 (A.W.B. Simpson ed., 1973). For a history of the development of rights, see ALAN DERSHOWITZ, RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS (2004). *See also* CARL WELLMAN, THE PROLIFERATION OF RIGHTS: MORAL PROGRESS OR EMPTY RHETORIC? (1999).

19. *But see* A.M. Honoré, *Rights of Exclusion and Immunities Against Divesting*, 34 TUL. L. REV. 453, 460–61 (1960) (distinguishing between real and personal rights in the context of exclusion).

20. *See, e.g.*, Merrill, *supra* note 6.

21. *See* Strahilevitz, *supra* note 5, at 1836 ("[F]or all its centrality, in the minds of courts and legal scholars, there is substantial conceptual confusion about the nature of the 'right to exclude.'").

22. *See, e.g.*, Merrill, *supra* note 6, at 730–31.

cise of this nature may seem irrelevant and largely academic, given that the common law is structured as a set of events and responses to them, differentiating one event (for example, infraction of a specific right) from another invariably dictates the law's response to it. Characterizing something as a right—absolute or conditional—brings with it certain well-defined legal consequences.[23] Therefore, understanding the basis of such a characterization helps to shed light on the kind of consequences that do and ought to follow.

A. Three Models of Analysis

This section sets out three independent conceptual devices that courts and scholars regularly employ in their analyses of rights and connected elements (duties, remedies, and so on).

1. The Right-Privilege Distinction

Perhaps the most important conceptual distinction in analyzing the right to exclude is the right-privilege (also known as the right-liberty) distinction. Although positivist scholars employed the distinction early on, Wesley Hohfeld is credited with laying out the distinction in its most lucid and concrete terms. Writing near the turn of the twentieth century, Hohfeld developed a comprehensive scheme for classifying legal concepts in the common law, which he called "jural relations."[24] Relations were thus classified into rights, duties, privileges, no-rights, powers, immunities, liabilities, and disabilities using two independent matrices.[25] In addition, legal relations were identified as *in personam* (or "*paucital*") when they involved

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23. *See* R.B. Grantham & C.E.F. Rickett, *Property Rights as a Legally Significant Event*, 62 CAMBRIDGE L.J. 717, 717 (2003) ("[O]nce in existence [property rights] are themselves a species of event that gives rise to legal rights and duties . . . .").

24. He did this in two well-known articles: Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 19 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions*]; and Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710 (1917). The two articles were combined in book form after his untimely death: WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter Wheeler Cook ed., 1919) [hereinafter HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS].

25. *See* Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 24, at 30 (laying out the matrices in some detail). For an application of the several concepts to tort law, see Albert J. Harno, *Tort-Relations*, 30 YALE L.J. 145 (1920).

discrete parties, such as contractual one-to-one connections,[26] or as *in rem* ("*multital*") when they involved a relation between an individual and multiple, indeterminate individuals.[27] Hohfeld characterized property relations as multital, because they involved the owner interacting with an indeterminate set of individuals (potential trespassers).[28]

In Hohfeld's analysis, a right (or a claim) is defined as a situation that places another individual (or group of individuals) under some sort of correlative duty.[29] The content of the right is defined entirely by the content of the correlative duty (or obligation) that it imposes on another. Hohfeld contrasts his idea of a right with that of a privilege, which has independent normative content in that it *privileges*, or allows its holder to do certain things, quite independent of others.[30] Its correlative is thus a "no-right," a position that represents the absence of a right in anyone else to stop the holder's privileged (or allowed) action. Hohfeld makes the distinction most obvious with the illustration of landowner *X*, noting that "*X* has a right against *Y* that he shall stay off the former's land" and, equivalently, "*Y* is under a duty toward *X* to stay off the place."[31] He further observes in the context of the right-privilege distinction that "whereas *X* has a *right* or *claim* that *Y*, the other man, should stay off the land, he himself has the *privilege* of entering on the land."[32] Later, specifically in the context of property, Hohfeld makes the distinction even clearer with the example of a hypothetical landowner.[33]

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26. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 24, at 50–53.

27. *See id.* at 53–54.

28. *See* Pavlos Eleftheriadis, *The Analysis of Property Rights*, 16 OXFORD J. LEGAL STUD. 31 (1996) (elaborating on Hohfeld's application of his concepts to property).

29. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 24, at 38.

30. *Id.* at 38–39.

31. *Id.* at 38.

32. *Id.* at 39.

33. *Id.* at 96. Hohfeld observes:

> First, A has multital legal rights, or claims, that *others*, respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties. Second, A has an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc. . . . he has privileges of doing on or to the land what he pleases . . . .

Id.

Whereas a right is brought into question only upon a breach of its correlative duty, a privilege offers its holder the opportunity to perform a positive act unfettered by another's claims or actions.[34] The right-privilege distinction is, then, little more than a positive-negative distinction. Yet the distinction is of more than just philosophical relevance. Although it is clear when the law protects a right—when it imposes a duty on another—it is not readily apparent when the law protects a privilege. If a privilege is understood as the absence of rights in others to restrict the privileged action, the negative definition does little to clarify the circumstances under which an action may be considered privileged. Consequently, scholars have been quick to point out that a privilege is not strictly legal in the same sense as rights (and duties), and therefore sits rather uneasily in Hohfeld's framework, given that it remains devoid of content absent specific circumstances.[35]

Although a right and a privilege in this understanding no doubt remain distinct, it is important to note that in a vast ma-

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34. For more recent attempts to use the distinction in the context of property and tort law, see Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400 (2007). *See also* Shyamkrishna Balganesh, *Property along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence*, 35 COMMON L. WORLD REV. 135 (2006).

35. *See* Alan R. White, *Privilege*, 41 MOD. L. REV. 299, 299 (1978) ("What makes anything a privilege is a particular characteristic of the circumstances in which it occurs."). Hohfeld's analysis is usually associated with the "bundle of rights" conception of property—that property consists of little more than a bundle of rights, privileges, and powers. The aforementioned lack of specific content in relation to the privileges that form part of the bundle led some critics to characterize the bundle view as a meaningless rhetorical concept. *See, e.g.*, J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 714 (1996).

In recognition of this criticism, and in order to give the idea more normative traction, some preferred the term "liberty"—rendering the idea circumstance-neutral. *See* Glanville Williams, *The Concept of Legal Liberty*, 56 COLUM. L. REV. 1129 (1956). *But see* Albert Kocourek, *The Hohfeld System of Fundamental Legal Concepts*, 15 ILL. L. REV. 24, 27–37 (1920) (arguing that Hohfeld's construction conflated privileges, liberties, and powers). Interestingly, it was Bentham who used the term "liberty" to denote precisely the same thing well before Hohfeld did. *See* Hart, *supra* note 18, at 174. Bentham characterized liberties as "[r]ights existing from the absence of obligation," to denote their specifically negative structure. JEREMY BENTHAM, GENERAL VIEW OF A COMPLETE CODE OF LAWS, *reprinted in* 3 THE WORKS OF JEREMY BENTHAM 181 (John Bowring ed., Russell & Russell 1962) (1838); *see also* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 302 (J.H. Burns & H.L.A. Hart eds., 1970) (1789). Many also objected that Hohfeld's usages contradicted established linguistic conventions. *See* Max Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1149 (1938).

jority of situations a privilege comes to be protected by a right. In other words, a privilege becomes capable of being exercised *because* of the existence of an overarching right that shadows it and requires others to abstain from interfering with the privileged area of action.[36] This is often referred to as the "shielding" thesis.[37] This thesis helps explain why rights and privileges are often conflated and why in a vast majority of situations privileges continue to derive at least indirect protection from the law. Privileges thus represent situations where the law protects behavior by its *active non-interference* (or acquiescence)—it both does not interfere on its own and additionally denies others a right to interfere. Even though rights are usually accompanied by privileges, situations do exist where privileges remain unprotected by rights,[38] and it is here that the distinction begins to assume practical significance.

2. *The Two-Tiered Structure of Rights (and Duties)*

The second analytic device of relevance for the purpose of this Article is the two-tiered nature of rights, often referred to as the distinction between primary and secondary rights (and duties). Alternatively characterized as the substantive-procedural or right-remedy distinction, the idea postulates the existence of a primary right that is brought into existence either volitionally (that is, contractually) or through the operation of law (tort law, for example). Upon an infraction of the right, the legal structure then provides for a secondary right to operationalize the primary one or remedy its breach.[39] Contract law is taken as paradigmatic of this structure, where the contract gives rise to a

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36. *See* H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 162, 171 (1982); MATTHEW H. KRAMER ET AL., A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES 12–13 (1998); John Finnis, *Some Professorial Fallacies about Rights*, 4 ADEL. L. REV. 377, 378–79 (1972).

37. KRAMER ET AL., *supra* note 36, at 12.

38. *See* Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 167–68 (1919).

39. For a lucid elaboration of the concept, see Peter Birks, *supra* note 9, at 4–5. For similar views in early American scholarship, see James Barr Ames, *Disseisin of Chattels*, 3 HARV. L. REV. 23 (1890); C.C. Langdell, *Classification of Rights and Wrongs*, 13 HARV. L. REV. 537 (1900). Hohfeld also spent some time elaborating on the primary-secondary distinction. *See* HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 24, at 102 (disagreeing with Ames).

set of rights and duties between the contracting parties.[40] Upon breach of the contract's terms, the law then provides the non-breaching party with the option of bringing an action for the breach, coupled with remedies for the same. Scholars have tended to disagree on their characterization of the secondary right; some call it a *right*, others a *remedy*, and yet others a *remedial right*.[41] All of them, however, refer to the idea that an interference with a primary relationship gives rise to a secondary one.

While contract law remains the paradigm of the tiered structure, problems begin to emerge when one enters the domain of tort law, for liability in this area is premised on a primary duty of care, the existence of which the law determines *ex post*, upon an alleged interference with it.[42] The primary relationship is thus determined at the stage of the secondary one. This artificial construction has resulted in some debate over whether tort law does embody the two-tiered structure.[43] The general view is that indeed it does, even though the determination often happens after the conduct, because, in a majority of situations, the basic contours of the duty remain known *ex ante*. When driving a car, for example, the driver knows not to drive *carelessly*.

The exact origins of the tiered structure remain somewhat unclear. Although both Blackstone and Austin employed the primary-secondary framework routinely,[44] some trace it to the French philosopher Robert Pothier, who employed it in the

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40. Lord Diplock, who is credited with introducing the concept to doctrinal analysis by courts, first applied it in the context of contract law. *See* Brice Dickson, *The Contribution of Lord Diplock to the General Law of Contract*, 9 OXFORD J. LEGAL STUD. 441, 448–49 (1989).

41. *See* Kit Barker, *Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right*, 57 CAMBRIDGE L.J. 301, 319 (1998) (advocating the use of "rights" to describe remedies); Birks, *supra* note 9, at 9 (observing that the term "remedy" remains obscure).

42. *See* Peter Birks, *The Concept of a Civil Wrong*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 31 (David G. Owen ed., 1995); *see also* Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 W. AUSTL. L. REV. 1 (1996).

43. *See* Nicholas J. McBride, *Duties of Care—Do They Really Exist?*, 24 OXFORD J. LEGAL STUD. 417 (2004).

44. *See* 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 787 (Robert Campbell ed., 3d ed. 1869); 1 BLACKSTONE, *supra* note 1, at 117–21.

context of his exposition of contract law.[45] Hohfeld too emphasized the distinction in his classification.[46]

A primary right thus represents a situation where an individual is vested with a right, independent of any preceding relationship.[47] A secondary right, on the other hand, is always contingent on the existence of a primary relationship involving the party asserting the secondary right, and is therefore conditional.[48]

3. *The Entitlement Framework*

In 1972, Guido Calabresi and Douglas Melamed propounded an independent theory of *entitlements*—a unified theory of property and tort—that focused entirely on mechanisms of protection.[49] Whereas Hohfeld had sought to lay out individual jural relations as they existed prior to any court pronouncement, Calabresi and Melamed focused on rules adopted by courts in "protect[ing]" the entitlement.[50]

The entitlement model involves two steps: in the first, the legal system vests the entitlement in someone; in the second, it adopts one of three rules to protect the entitlement so vested.[51] Calabresi and Melamed focus almost entirely on the second of these steps—"second order decisions"—and classify forms of protection as property rules (when the law protects against involuntary transfers), liability rules (when the law allows involuntary transfers), and inalienability (when the law disallows all transfers).[52] Calabresi and Melamed then argue that a host of considerations—including economic efficiency, distributional

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45. Bernard Rudden, *Correspondence*, 10 OXFORD J. LEGAL STUD. 288, 288 (1990). For more on Pothier's contribution, see Joseph M. Perillo, *Robert J. Pothier's Influence on the Common Law of Contract*, 11 TEX. WESLEYAN L. REV. 267 (2005).

46. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 24, at 108–09. Indeed, Hohfeld seems to hint at the possibility of a *tertiary* right as well, in situations where the breach of a primary right gives rise to a secondary right (of enforcement), which in turn results in a court decision that gives a party a third right against the party in breach. *See id.* at 108.

47. *See* Corbin, *supra* note 38, at 171–72.

48. *See id.* at 171; *see also* Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501, 511 (1924) [hereinafter Corbin, *Rights and Duties*].

49. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

50. *Id.* at 1092.

51. *See id.*

52. *Id.* at 1092–93.

goals, and morality—guide judges' and lawmakers' choice of rules.[53] Almost all the literature on the Calabresi-Melamed model has come to view it as focusing almost entirely on the issue of remedies, whether legal, equitable, or otherwise.[54] According to this literature, a property rule is commonly associated with *ex ante* injunctive relief, whereas liability protection is associated with an award of damages *ex post*.

The Hohfeldian model and the entitlement framework exhibit an interesting reflexive symmetry.[55] Hohfeld focuses entirely on the bare structure of conceptions (or entitlements), and disregards their actual enforcement or vindication. Calabresi and Melamed, on the other hand, focus entirely on remedies and disregard the structure and content of individual entitlements.[56] Whereas Hohfeld cautions against the use of remedies to understand a jural relation, Calabresi and Melamed exclusively use remedies to understand the functional relevance of an entitlement.[57]

In its focus on the actual mechanisms of protection (that is, enforcement), the entitlement framework neglects situations where jural relations (or entitlements) come to be protected not necessarily by operation of law, but rather with the acquiescence and approval of law. The distinction between a right and a privilege represents just such a situation. The effective exercise of a privilege, unlike a right, requires absolutely no re-

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53. *Id.* at 1093–105.

54. *See* Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1720 (2004); *see also* Richard R.W. Brooks, *The Relative Burden of Determining Property Rules and Liability Rules: Broken Elevators in the Cathedral*, 97 NW. U. L. REV. 267 (2002); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440 (1995).

55. Although in the past, scholars have attempted to analyze the interaction between the Calabresi-Melamed and Hohfeldian models, most of the attempts have involved unpacking the former's entitlement structure using Hohfeld's ideas rather than analyzing how the two actually might complement each other. *See, e.g.*, STEPHEN R. MUNZER, A THEORY OF PROPERTY 27 n.14 (1990); Fennell, *supra* note 34, at 1406; Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822 (1993).

56. *See* Calabresi & Melamed, *supra* note 49, at 1090 ("[T]he fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail.").

57. Ironically, Calabresi and Melamed do not so much as reference Hohfeld's work, even though they note that their project is aimed at integrating "legal relationships," a phrase that had formed the focus of Hohfeld's seminal study. *See id.* at 1089.

course to enforcement mechanisms. Privileges of this sort find no place in the entitlement framework, for they do not invoke any legal mechanism and therefore are not *protected* as such.[58]

The entitlement framework has had the effect of moving the discussion of rights away from its conceptualist traditions. Whereas the discussion of rights and duties had hitherto focused on issues such as the manner in which they vested and the parties between whom they operated, the entitlement framework now requires analyses to focus on rights and duties primarily through the *consequences of their breach*. This framework thus focuses on understanding the right through the lens of the remedy. For example, it matters little whether an entitlement has the structural attributes characteristically associated with ownership for it to be categorized as a property right.[59] All that is needed is that the law protect the entitlement with a property rule upon an infraction. In this framework, the right is meaningful only when protected by a specific kind of remedy. The entitlement framework thus effectively moves the emphasis in rights-analysis towards remedies.[60]

This near-exclusive focus on remedialism attributes to the law a principally corrective (or restorative) function. Legal rules become relevant *only* when they attach consequences to individuals' actions—as forms of enforcement—but never as independent sources of values and principles that could guide their behavior *ex ante*.[61] The enforcement framework thus as-

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58. For an elaboration of the problem in the context of the owner's remedy of self-help (a use-privilege), see Henry E. Smith, *Self-Help and the Nature of Property*, 1 J.L. ECON. & POL'Y 69 (2005) (attributing some of these problems to the overextensive use of symmetry in economic understandings of property).

59. *See* Merrill & Smith, *supra* note 2, at 379–83 (noting how the Calabresi-Melamed framework contributed to the demise of the traditional understanding of property as an *in rem* right). For more on the move in the economic analysis towards remedialism, see Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1339 (1986).

60. *See* Emily Sherwin, *Introduction: Property Rules as Remedies*, 106 YALE L.J. 2083, 2083–84 (1997) (emphasizing how the entitlement framework has shifted legal analysis in the direction of remedies).

61. For a comprehensive critique of the entitlement framework's emphasis on enforcement and its neglect of the "guidance" function, see Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837 (1997). *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (using the same distinction between rules consciously directed at individuals and those directed at officials, in the context of criminal law).

sumes that the law comes into play only during acts of recalcitrance (for example, breaches of contract or violations of the duty of care), but never influences behavior independent of its enforcement function.[62] It thereby ignores the fact that legal rules *do* elicit compliance and cooperation, most often out of a belief in the legitimacy and fairness of legal authority and not merely in contemplation of remedial consequences, such as sanctions.[63] Legal rules can be meaningful well before their breach is contemplated.

B. Possible Formulations of the Right to Exclude

Applying these three analytic devices to the right to exclude provides us with four possible conceptions of the right. The first two remain distinctly non-remedial and involve the claim-right and the privilege-liberty. The remaining two adopt a remedial approach to the right and build on the entitlement framework. The four versions together are: (1) the claim-right to exclude; (2) the privilege-right to exclude; (3) the right to vindicate one's ownership through enforcement; and (4) the right to an exclusionary remedy. Each is described in more detail below.

Table 1: A Conceptual Taxonomy of the Right to Exclude

Attribute / **Conception**	**Content**	**Example**	**Potential Drawback**
Claim-Right	Defined by the correlative duty (of non-interference) imposed on others	Patent law's "right to exclude" 35 U.S.C. § 154(a)(1)	Content dependent on independent normative source

62. Nance, *supra* note 61, at 858–69.

63. Indeed, the ideal formed the driving force behind much of legal positivism. Hart famously characterized this idea as the "critical reflexive attitude" of individuals in society. H.L.A. HART, THE CONCEPT OF LAW 56, 88 (1961). *See also infra* Part II.A.2 for an elaboration of this idea.

Privilege-Right	Defined by the exercise of use-privileges to achieve exclusion from resource	Self-help remedies	Impracticality of self-help (for example, intangibles)
Remedial Right	Defined by the remedy		Judicial discretion
Ownership Vindication	Defined by entitlement to commence action	Availability of action for trespass	Contingent on vagaries of common law action
Exclusionary Remedy	Defined by equitable injunctive relief (automatic or otherwise)	Automatic injunction rule	Subject to rules of equitable discretion (like a four-factor test)

1. *The Claim-Right to Exclude*

One of the characteristic features of claim-rights is that these rights are always *correlative.* Consequently, they can never be understood independent of the jural relationship of which they form a part and the correlative duty that they impose on others. Corbin provides an apt definition of a claim-right as "a relation existing between two persons when society commands that the second of these two shall conduct himself in a certain way (to act or to forbear) for the benefit of the first."[64] The claim-right, then, is to be understood entirely from the nature of the correlative duty that it imposes on others.[65] Although the term "correlative" carries with it the connotation of a bond of sorts between the two elements, in reality it signifies little more than the perspective from which the relationship is viewed. Thus, some have favored replacing correlativity with the word "converse" to signify the emphasis.[66]

64. Corbin, *Rights and Duties, supra* note 48, at 502.

65. When the right imposes a duty on a determinate (or identifiable) individual or class of individuals, it is a right *in personam;* when the group is indeterminate or open-ended, the right is *in rem.* It is critical, however, to note that the distinction is not merely one of numbers (that is, single and multiple), but rather of determinacy. *See* Radin, *supra* note 35, at 1153–56.

66. *See* Max Radin, *Correlation,* 29 COLUM. L. REV. 901, 904–05 (1929). For further criticism and defenses of the concept of correlation, see Jack Donnelly, *How Are Rights and Duties Correlative?,* 16 J. VALUE INQUIRY 287 (1982); David Lyons, *The*

Leaving aside the precise meaning (or appropriateness) of the term "correlative," what remains obvious about the claim-right is that its normative content is determined by the nature and structure of the duty imposed on others.[67] Understanding a right thus entails identifying its correlative duty and determining the origins of said duty. A duty may originate voluntarily (a contract, for example), or merely out of volitional behavior (a tort, for example). In addition, the source of the duty may lie in morality or social practice.[68] When this happens, the correlative right remains a moral right unless a legal rule internalizes it, whereupon it transforms into a legal right.[69]

The claim-right to exclude is understood through the correlative duty it imposes on others (*in rem*) to "exclude themselves" from an identifiable resource. When individuals view themselves as being placed under a duty (or obligation) to stay away from a resource, its owner is said to be vested with the claim-right to exclude. The source of this duty may be a legal directive (such as patent law) or completely independent of the law. The content of the duty (to exclude oneself) thus imparts meaning to the claim-right conception.

On its face, the claim-right to exclude may appear to be of little more than analytic value, for if it is to be understood entirely through its correlative duty, its independent value seems minimal. Consequently, discussions of the right to exclude tend to ignore this conception altogether. Its value, however, lies principally in its *correlativity*, which contributes to the functioning of property (and with it ownership) as a coordination device.

Correlativity of Rights and Duties, 4 NOÛS 45 (1970); Marcus G. Singer, *The Basis of Rights and Duties*, 23 PHIL. STUD. 48 (1972).

67. Yet the correlative normativity is unidirectional, for it remains possible to have a duty without a correlative right (for example, the tortious duty of care), whereas a claim-right cannot exist absent its correlative duty. *See* WILLIAM MARKBY, ELEMENTS OF LAW 90–91 (4th ed. 1889).

68. Interestingly, Hohfeld restricted his analysis to strictly *legal* relations, seemingly denying the existence or influence of morality. *See* HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 24, at 27. For an attempt to draw out similarities between moral rights and the idea of legal rights as Hohfeld used them, see Bruno R. Rea, *The Interplay of Legal and Moral Rights*, 20 J. VALUE INQUIRY 235 (1986). Hohfeld's structure remains readily applicable to moral relationships as well. *See* KRAMER ET AL., *supra* note 36, at 8 ("[V]irtually every aspect of Hohfeld's analytical scheme applies as well, *mutatis mutandis*, to the structuring of moral relationships."); *see also* Corbin, *Rights and Duties*, *supra* note 48, at 505–06.

69. *See* Joel Feinberg, *The Social Importance of Moral Rights*, *in* 6 PHILOSOPHICAL PERSPECTIVES: ETHICS 175 (James. E. Tomberlin ed., 1992).

2. *The Privilege-Right to Exclude*

Unlike claim-rights, which are understood entirely through their correlatives, privileges (or privilege-rights) represent specific activities, which, when undertaken by their holder, remain beyond reproach or the reach of sanctions. Ordinarily, privileges tend to accompany claim-rights and operate in their protective shadow, often thereby obscuring the important difference between them.

Understood in this vein, the privilege-right to exclude in the context of property entails the law affording the owner (or, at times, holder) of a resource the option of using the resource in such a way as to exclude others from it.[70] The exact nature of such *exclusionary use* tends to vary from one resource and circumstance to another. Thus, for chattels it may be no more than exercising complete physical control over the entity, whereas for realty it may involve the erection of a fence or other boundary.[71]

The rules of self-help most aptly represent the idea of exclusionary privileges.[72] Even though self-help exists in the context of both movable and immovable property, it remains significantly more common in the context of the former. Although the law tends to remain indifferent to exclusionary privileges in general—given that they derive their force *de facto* and not *de jure*—in the context of movables (chattels) it exhibits a preference for them. The common law of trespass to chattels consciously disfavors granting chattel owners a legal remedy for physical trespasses to the chattel in the belief that the privilege-based remedy of self-help remains sufficient, unless the owner is actu-

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70. Indeed, numerous exclusionary strategies involve the use of "exclusionary privileges," where owners use a resource and its myriad attributes to exclude others from it. "Exclusionary amenities," then, represent no more than such privileges. For a comprehensive overview of the use of exclusionary amenities as a strategy of exclusion, see Strahilevitz, *supra* note 8. On occasion, use-strategies that involve exclusion are referred to as "rights of exclusion," when terminologically they really represent exclusionary privileges. *See* Strahilevitz, *supra* note 5, at 1859–61, 1861 n.96 (noting that "exclusionary vibes" and "exclusionary amenities" do, in reality, represent privileges).

71. For more on the role of fences, boundaries, and the use of self-help, see generally Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

72. Self-help is as old as the idea of property itself. *See generally* Matthew R. Christ, *Legal Self-Help on Private Property in Classical Athens*, 119 AM. J. PHILOLOGY 521 (1998); Joshua Getzler, *Property, Personality and Violence*, *in* PROPERTIES OF LAW: ESSAYS IN HONOUR OF JIM HARRIS, *supra* note 5, at 246.

ally dispossessed or the chattel itself tangibly harmed.[73] Here, the privilege-right conception of exclusion remains central.[74]

Exclusionary privileges are not without drawbacks. First, to be of any utility, they depend directly on the owner's *ability* to exercise them. In the context of land, the effectiveness of an exclusionary privilege depends on the owner's ability to build a fence around his land. Once the fence is built, the owner must be able and willing to monitor infractions and enforce trespasses. So it is with chattels, too. Second, because the exercise of the privilege is dependent on the nature of the resource, there are resources where self-help is ineffective; this is most common in the context of informational and virtual resources, which are by nature non-excludable.[75] Consequently, the law protects exclusionary privileges here through an additional *duty* that it imposes on non-owners.[76]

3. *Remedial Rights to Exclude*

While the claim-right and privilege-right to exclude represent primary conceptions of the right, the remedial variants derive from a secondary right conception. Thus, they are premised on the existence of antecedent rights in furtherance of which they seek to operate: *ubi jus, ibi remedium*.[77] Within the remedial conception of the right, two further strands can be identified—one that focuses directly on *vindicating* a prior right and another that focuses on *enforcing* it.

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73. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 85–86 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 218 (1965); Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 78 (2003).

74. As the *Restatement* notes: "Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his *privilege* to use reasonable force to protect his possession against even harmless interference." RESTATEMENT (SECOND) OF TORTS § 218 cmt. e (1965) (emphasis added).

75. For an overview of self-help in the intangible world, see Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998); Kenneth W. Dam, *Self-Help in the Digital Jungle*, 28 J. LEGAL STUD. 393 (1999); Douglas Lichtman, *How the Law Responds to Self-Help*, 1 J.L. ECON. & POL'Y 215 (2005).

76. For example, in the nature of anticircumvention or digital rights management (DRM) measures.

77. Where there is a right, there must be a remedy. *See* 3 BLACKSTONE, *supra* note 1, at 23.

a. The Vindicatory Right

The first remedial variant takes as given the idea that exclusion (generally, as a claim-right) is an essential attribute of ownership and moves on to provide the owner of a resource with the option of reaffirming the exclusion by declaring him to be the owner of the resource. It thus derives its normative (or exclusionary) content entirely from the logically prior primary relationship that it attempts to vindicate.

What remains crucial is that this right does not bring about exclusion directly (by enforcing it) but merely reaffirms its existence as a necessary attribute of ownership. It tracks very closely the Roman law idea of the *in rei vindicatio*, which provided an owner with the ability to have his *dominium* over a resource declared by a court of law.[78] Whereas several civil law jurisdictions continue to provide for a *vindicatio*-type remedy, the common law instead uses the action of trespass to the same end, albeit in a less effective way.[79]

The right thus consists of an owner's ability to commence an action where his ownership or title is adjudicated upon, even if only in a relative sense.[80] It is worth reemphasizing that the right has no connection with the *nature* of the remedy that eventually results from the action. Therefore, if the trespassory action resulted in an award of damages, it would still have resulted in exclusion insofar as the favorable result (to the owner) vindicates his preexistent right to exclude, even if the remedy does not directly enforce the owner's right to exclude. The tendency to equate the right to exclude with a trespassory conception of the right often ignores this secondary nature of the right.[81]

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78. For an elaboration on the Roman understanding of ownership and the role of the *vindicatio* therein, see Peter Birks, *The Roman Law Concept of Dominium and the Idea of Absolute Ownership*, *in* 1985 ACTA JURIDICA 1 (1986). For more on the *in rei vindicatio*, see W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 675 (3d ed. 1963); BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 125 (1962); ALAN WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC 91 (1968).

79. D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 107–08 (1999); UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 182–87 (2000).

80. *See* David Fox, *Relativity of Title at Law and in Equity*, 65 CAMBRIDGE L.J. 330, 334 (2006).

81. This tendency is seen most clearly in the work of Jim Harris, who characterizes all of property as consisting of, *inter alia*, a "bounded trespassory right." *See* HARRIS, *supra* note 5, at 13–14.

b. The Right to Exclusionary Relief

Of the different formulations of the right to exclude, the one that associates it with an entitlement to an exclusionary remedy—an injunction—remains the most pragmatic and the most popular. In this formulation, the right to exclude consists of an owner's ability not only to bring an action for trespass, but also to obtain an injunction to restrain others from interfering with the owner's resource (thereby placing them under an additional duty). The right is thus converted into an enforceable claim. Much like the vindicatory option, it is predicated on the existence of an antecedent primary right.

Given that injunctive relief is an equitable remedy granted at the discretion of a court, the extent to which a property owner can be said to have a *right to it* remains questionable.[82] Still, on numerous occasions, courts have placed fetters on their discretion by identifying specific circumstances under which relief will necessarily follow and situations where it will not. Thus, over time, the discretionary element of injunctive relief has been weakened, with the consequence that it has become common to speak of a right to injunctive relief in specific situations.[83] Indeed, the automatic injunction rule at issue in *eBay* represented one such situation. Even if the entitlement may be characterized as a right, its recognition is dependent on a court's interpretation of the relevant circumstances, which remains a major drawback.[84]

C. Unitary, Bundled, or Disaggregative?

Which of the four conceptions do we mean, then, when we speak of the right to exclude being a central part of property? One might argue that *any* of the identified formulations should

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82. *See* Neil MacCormick, *Discretion and Rights*, 8 LAW & PHIL. 23 (1989). For more on the topic, see *infra* Part III.B.

83. *See* Birks, *supra* note 9, at 16–17. As Birks notes: "Orders for specific performance and for injunctions . . . are weakly discretionary. . . . To speak of a right to specific performance or injunction . . . is not nonsense. We know on what facts a person is entitled to such orders." *Id.* at 16. For the distinction between weak and strong conceptions of discretion, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31–33 (1977); George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747.

84. For more on courts' willingness to alter the standard for granting injunctive relief depending on subjective circumstances, see DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991) (analyzing the conspicuous inconsistency in courts' grants of injunctive relief in spite of identical circumstances).

suffice to constitute the right to exclude in the context of property. In other words, if an individual were to be vested with any of the options identified above, she could be deemed to have a property right in relation to the resource over which it operates. Yet, if any conception could sufficiently constitute the right, it follows that the right assumes different meanings in different contexts. Such an attribution of contextual fluidity to our definition of property would undermine its integrity as an institution of independent moral significance.[85] Consequently, if we are to continue characterizing the right to exclude as an integral part of what property is (on the assumption that property is something definite), it demands a level of consistency in our understanding of the right.

Of the two primary variants of the right, the privilege formulation is perhaps the most difficult to justify as an independent, freestanding conception of the right. Imagine a situation where only a privilege to exclude exists, without a claim-right. In this situation, the only thing holding the entire system of property in place would be the owners' (or holders') ability to exclude others from the resource. With there being no *a priori* duty on others to stay away, the law of self-help would become the default rule of law—a rule that favors the strong and powerful to the detriment of everyone else. As a potentially anarchical situation, this remains untenable as the basis for an ordered system of property.

If the privilege were to accompany the remedial (but not claim-right) conceptions, it would present the same problems. Because the remedial alternatives remain premised on the primary one, courts would be restricted to reaffirming or enforcing the privilege alone, in turn delegating much of its application to the holders' abilities. Accordingly, the shielding thesis—whereby a privilege is *always shielded* by a claim-right[86]—is not

85. This would in the process lend itself to a form of property skepticism—the belief that the term and institution of property are meaningless constructs whose content and significance tend to vary across time, place, and resource, and admit of no unifying features. *See* Kevin Gray, *Property in Thin Air*, 50 CAMB. L.J. 252 (1991); Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980). My argument no doubt derives from the belief that property is indeed a meaningful concept with a few identifiable unifying features, the primary one of which remains the right to exclude.

86. *See supra* notes 37–38 and accompanying text.

just an interesting coincidence, but rather a critical default for the very existence of a privilege.

In a similar vein, the vindicatory conception of the right depends almost entirely on the primary claim-right conception for its normative content and is therefore of little independent significance. Unless the right to be vindicated does indeed independently convey something, the vindication itself remains meaningless.

We are left, then, with the claim-right and exclusionary remedy variants of the right. In what follows, this Article argues that understanding the right to exclude as a correlative claim-right allows for an appreciation of property outside of its remedial context. Property remains an institution of deep social significance; the remedial variant (the exclusionary remedy conception) tends to gloss over this reality in its emphasis on functionalism.[87] The correlative right variant—contrary to popular belief—is just as functional and perhaps more pragmatic. Ironically, the correlative right conception also best explains the holding in *eBay* and its repudiation of the automatic injunction rule.

II. THE CORRELATIVE RIGHT TO EXCLUDE: GROUNDING PROPERTY IN SOCIAL MORALITY

The institution of property remains socially and morally significant outside of its remedial context. Individuals continue to respect the ideal of ownership by default, even when the enforcement of such ownership is known to be problematic. Exceptions certainly do exist, but the institution of ownership remains deeply entrenched in almost all societies. Surely then, the right to exclude, if indeed central to the institution of prop-

87. In spite of it being a remedial (and therefore dependent) variant, the exclusionary remedy conception of the right to exclude continues to dominate property debates among both scholars and courts. *See* David Frisch, *Remedies as Property: A Different Perspective on Specific Performance Clauses*, 35 WM. & MARY L. REV. 1691, 1713 (1994) ("[I]f an entitlement, under appropriate circumstances, cannot be protected by [a property] rule, the entitlement (whatever else it may be) is not a property interest."). Indeed, this conception remains ascendant in other common law countries as well. *See* William Gummow, *The Injunction in Aid of Legal Rights—An Australian Perspective*, 56 LAW & CONTEMP. PROBS. 83, 103–04 (1993) (noting how in Australia injunctions are granted only to protect property rights, but that the definition of property rights is often premised on the availability of an injunction, which makes the logic circular).

erty, must have some relevance outside of the enforcement context. This Part argues that the right is best understood as a correlative claim-right that consists exclusively of the duty it imposes on others to exclude themselves from resources over which they do not have a legitimate claim. The duty, in turn, derives from the moral norm of inviolability around which the institution of property is structured.

Although this moral foundation informs the general structure of property and the right to exclude, the frequent disconnect between law and morality with respect to enforcement closely tracks the right-enforcement interface in contract law between contracting and promising—two interrelated yet independent social practices. Much can therefore be learned by examining the role of the primary claim-right within contract law, bereft of remedial vindication. To be sure, contract and property law do remain distinct in several important ways; the argument is not that what remains true for contract will necessarily carry over to property, but rather that the structural interplay between law and morality within the former sheds light on a possible equivalent within the context of exclusion in property.

A. The Right to Exclude as a Moral Norm

Exclusion and its right-based manifestation, the right to exclude, perform a function in our understanding of property almost identical to the one played by that of promising and the duty of performance in the area of contract law. The right to exclude gives property its structural basis, a structure that derives from the social and moral basis of the institution, and remains intrinsically tied to the notion of inviolability in the same way that promising and the obligation (or right) to perform the promise form the foundation for contracting. This Part begins with an understanding of what the notion of inviolability is and how it operates in law and social morality.

1. The Principle of Inviolability

The right to exclude becomes a perfectly logical idea if understood entirely in its primary or correlative right conception—through the lens of the duty it imposes on others. The duty in turn derives its normative content from the moral notion of *inviolability* embodied in the institution of ownership.

Attempts to derive a moral explanation for the institution of private property abound in the literature, and the attempt here certainly is not to add to that debate.[88] Most moral constructions attempt to develop an explanatory theory for property so as to justify its continued existence as an institution of independent significance. In referring to the norms of morality surrounding the institution of property, the emphasis here is merely on establishing that the right to exclude can be understood independent of the enforcement structures that give it operative content, because property as an institution has extralegal (or social) elements that influence it and give it structure. As noted earlier, the correlative right is defined by its placing others (*in rem* or the world at large) under a duty to exclude themselves from the object over which the right is to operate.[89] The right is thus defined entirely by its imposition of correlative duties on others.[90] What, then, are the origins of such a right and its correlative duty?

Scholars have long noted that the principle of inviolability remains one of the most basic elements of social existence.[91] Inviolability refers to the idea that certain entities (things and persons) are considered off-limits, by default, to everyone. The default position is then lifted or relaxed when specific social circumstances allow for it (for example, consent, or an acquisition). Sociologists and anthropologists have long argued that the idea remains basic to all cultures, at all points in history, albeit to differing degrees and extents.[92] Anthropologists often

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88. For some recent work in the area, see Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007); Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897 (2007); Emily Sherwin, *Three Reasons Why Even Good Property Rights Cause Moral Anxiety*, 48 WM. & MARY L. REV. 1927 (2007). For previous attempts to ground the notion of property in ideals of justice and morality, see J.W. HARRIS, PROPERTY & JUSTICE (1996); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); David Lametti, *The Concept of Property: Relations* Through *Objects of Social Wealth*, 53 U. TORONTO L.J. 325 (2003).

89. *See supra* notes 24–33 and accompanying text.

90. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 24, at 96.

91. *See* Lawrence K. Frank, *The Concept of Inviolability in Culture*, 36 AM. J. SOC. 607 (1931).

92. *See, e.g.*, *id.* at 614–15. Frank notes:

> [A] careful, detailed exposition of the concept of inviolability, in its multitudinous ramifications and implications, will provide at once a basic scheme for the study of comparative culture, comparative law, and indeed all the social studies and a peculiarly significant program for

associate the idea of inviolability with the notion of taboo—a socially constructed meaning system whereby certain acts are proscribed.[93] Many seek to explain the idea biologically.[94]

The two most obvious and prominent areas where inviolability manifests itself in human behavior are in relation to persons and things. The inviolability of the person marks a basic tenet of social life, but is not directly relevant here.[95] The inviolability of things, however, remains equally well entrenched.

In relation to physical objects (as opposed to persons), the norm of inviolability requires individuals to stay away from things unless, through some socially accepted practice (such as first possession, or consumption), they have a legitimate claim over them. In other words, inviolability requires that unless object *X* belongs to *A*, *A* stays away from *X*. It thus establishes affirmatively a default position of staying away from things over which individuals actually or putatively do not have legitimate claims. Its importance is best seen through the counterfactual. In the absence of a norm of inviolability, individuals encountering objects around them would find little to prevent them from physically (or otherwise) appropriating an object that they need or desire. For example, *A* would not stay away from *X* unless *A* knew and was convinced of *B*'s (or someone else's) claim over *X*. The default would therefore point in the other direction: do not stay away from *X* unless you are made

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investigating the development of personality as it arises in and through the impact of culture upon the individual.

Id.

93. For an elaboration of the "taboo" concept at the interface of law and anthropology, see Lawrence K. Frank, *An Institutional Analysis of the Law*, 24 COLUM. L. REV. 480, 481 (1924) ("[E]verything used or useful in living which has been appropriated by someone, or has come from something appropriated, is taboo to all others . . . ."). Caution, however, needs to be exercised in taking the argument to its logical conclusion. Some have used anthropological studies to conclude that, because taboos connote little more than consequences that attach to certain proscribed activities, they remain independently meaningless. *See* Alf Ross, *Tû-Tû*, 70 HARV. L. REV. 812, 819 (1957) (noting how the rules of ownership are capable of being expressed without actual use of the word). Yet, for our purpose, the rules' ability to influence behavior in this way is precisely a recognition of their normative content.

94. *See* Frank, *supra* note 91, at 614.

95. *See, e.g.*, RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 84 (1993) (offering an investment-based theory as justification for the inviolability of the person). For an elaborate critique of Dworkin's theory, see Richard Stith, *On Death and Dworkin: A Critique of His Theory of Inviolability*, 56 MD. L. REV. 289 (1997).

to do so. Inviolability thus establishes the norm that, where an individual does not have a legitimate claim to a resource, he presumes that someone else has a legitimate claim, and stays away from that resource.

2. *Inviolability in Practice*

Morality is concerned with the ways in which people lead their lives and how they treat and interact with each other—often moving from the descriptive (the "is") to the prescriptive (the "ought").[96] In the process, morality sets certain ground rules—rules that may, of course, come to be modified through legal processes. This process is precisely how the norm of inviolability operates. It sets a default rule of noninterference, subject to alteration through specific avenues in both law and morality.

As a moral norm, inviolability is inward looking. Rather than relying on sanction or enforcement for its continued validity, its operation may be understood in terms of what H.L.A. Hart called the "internal point[] of view."[97] Writing in opposition to the views of consequentialists such as Oliver Wendell Holmes, who believed that obligations and duties were to be understood exclusively through the liability structure that they imposed on the holder, Hart argued that rules—and the duties and obligations that they imposed—come to be followed because individuals who are subject to them accept them as "guides to conduct."[98] Acceptance does not necessarily imply a belief in the moral legitimacy of the rule, but merely indicates a readiness to view oneself as bound by it. The reasons could be rudimentary convenience, social mores, efficiency, and the like.[99]

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96. For a detailed analysis of the "is-ought" distinction that remains central to moral philosophy, see Alan Gewirth, *The 'Is-Ought' Problem Resolved*, 47 PROC. & ADDRESSES AM. PHIL. ASS'N 34 (1973).

97. *See* H.L.A. HART, THE CONCEPT OF LAW 89 (2d ed. 1994).

98. *Id.*; *see also* Scott J. Shapiro, *What is the Internal Point of View?*, 75 FORDHAM L. REV. 1157 (2006).

99. Shapiro, *supra* note 98, at 1161–62; *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563 (2006); Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171 (2006); Benjamin C. Zipursky, *Legal Obligations and the Internal Aspect of Rules*, 75 FORDHAM L. REV. 1229 (2006).

Propertizing a resource and vesting someone with ownership over it conveys to the world a message of resource inviolability. That message, in turn, is understood as placing individuals under an obligation (or duty) to keep away from the resource by default, unless some other exception necessitates doing otherwise. Inviolability thus serves as a behavioral guide to individuals whereby they regulate their conduct in a certain way so as to accommodate it. The right to exclude is little more than the correlative of this obligation that inviolability casts on individuals.

The primacy of inviolability as a default norm is more than apparent in the context of property. James Penner, for instance, in his theory of property structured around the primacy of objects, notes that individuals automatically tend to refrain from interfering with objects they see around them without inquiring into the identity of an object's owner.[100] Referring to it as the "duty of non-interference," he notes that the relation is "mediated via the things the owner owns."[101] Indeed, when we walk down a street lined with parked cars, we do not make it a point to try opening the doors of the parked cars, even though we almost never know who the cars are owned by. We automatically, and by default, stay away. The moral norm of inviolability explains such behavior.[102]

Allusions to the moral idea of inviolability run through several well-known historical exegeses of property—most notably, those of Grotius and Pufendorf.[103] Grotius argues that interferences with owned resources produce an injustice analogous to affronts on a person's life, limbs, and liberty.[104] He thus uses the idea of *suum* ("one's own") to connect a person's self with his

100. PENNER, *supra* note 5, at 128.

101. *Id.*

102. Merrill and Smith refer to this duty as the "dut[y] of abstention." Merrill & Smith, *supra* note 88, at 1852. They go on to note in the context of a similar example involving cars that "virtually everyone must recognize and consider themselves bound by general duties not to interfere with autos that they know are owned by some anonymous other." *Id.* at 1854.

103. *See* Mossoff, *supra* note 17, at 379–85 (offering a more detailed analysis of Grotius and Pufendorf).

104. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 53–54 (Francis W. Kelsey trans., 1925) (1625).

resources.[105] Grotius's explanation is nothing more than a reference to inviolability and the contiguity of the idea in the context of bodily integrity and resource ownership.[106] Pufendorf similarly emphasizes that an act of acquisition ("seizure") produces a "moral effect" that is the "obligation on the part of others to refrain from a thing."[107] This is a much more direct reference to the norm of inviolability.

The precise strength of the norm tends to vary across resource and context. If walking across someone's front yard remains unambiguously objectionable behavior, touching someone's parked bicycle while walking along the street certainly does not seem as problematic. Similarly, touching someone's handbag may seem less problematic in a crowded train than in an open field. Yet in each case the resource is clearly owned by someone else and forms private property. Much of the variation depends on social custom. Interestingly enough, it must be noted that the law often contributes to this variation in the norm of inviolability. The variance explains the divergence between realty and chattels on issues of trespass, the ease with which the law readily presumes an abandonment of ownership,[108] and those situations in which courts allow other values to trump the right to exclude.[109]

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105. *See* STEPHEN BUCKLE, NATURAL LAW AND THE THEORY OF PROPERTY: GROTIUS TO HUME 29 (1991) (explaining Grotius's idea of *suum* and its use in the context of property and inviolability).

106. It is worth cautioning against the seemingly intuitive argument that because inviolability persists in both contexts, either (1) body parts are ownable resources or (2) that resources are mere extensions of one's body. *See* J.W. Harris, *Who Owns My Body*, 16 OXFORD J. LEGAL STUD. 55 (1996); Stephen R. Munzer, *Kant and Property Rights in Body Parts*, 6 CAN. J.L. & JURISPRUDENCE 319 (1993). This contiguity has formed the basis of the argument that property is nothing more than a logical extension of the control individuals exert over their bodies. *See* Samual C. Wheeler III, *Natural Property Rights as Body Rights*, 14 NOÛS 171 (1980).

107. 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 547 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1688).

108. *See* RESTATEMENT OF PROPERTY § 504 cmt. a (1944) (noting how an easement can be readily abandoned); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 518–21 (2007) (noting how real property cannot be abandoned).

109. Thus, situations in which free speech considerations or health and safety concerns preclude an owner from commencing an action for trespass may, in this framework, be interpreted as situations in which other values trump the norm of inviolability, contextually. The strength of the norm varies not just across resource, but also across context. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); State v. Shack, 277 A.2d 369 (N.J. 1971).

The norm of inviolability may have had its origins in rudimentary convenience, associated with abjectly rival resources. Yet over time, it seems to have developed into a complex device to coordinate human behavior across a vast array of resources, often in situations lacking such obvious convenience. Thus, we still hesitate to set foot on a stranger's land to get to the other side of the road, even when doing so is obviously convenient and of little harm to the owner—a hesitation that represents a clear inefficiency in the short term. Such behavior reflects how deeply entrenched the idea of inviolability is.[110]

3. *Inviolability Manifested Through the Right to Exclude*

If the primary right conception does indeed derive normative value from the moral notion of inviolability, it raises an important question. Why is inviolability best reflected in a *right* rather than a *duty* (the *right* to exclude)? Because, as a norm, it remains directed at individuals and attempts to modify their behavior, logic seems to dictate that inviolability operate as a duty (of excluding oneself from certain objects) rather than a right. Why, then, do we not speak of the duty of exclusion as being the most important element of property? The answer derives from the nature of the (right-duty) correlativity in question and the distinction between relations *in rem* (multital) and those *in personam* (paucital). Multital (or *in rem*) relations lack the basic symmetry of their paucital counterparts, which is a point that becomes crucial for our understanding of the right to exclude. If *A* has a claim against *B* for money, *A* has a right against *B*, and *B* owes a duty (to repay) to *A*. Defining the relationship either in terms of *A*'s right or *B*'s duty makes little normative difference.[111] When we move to multital relations, however, the distinction between multital rights and multital duties begins to assume relevance. A multital duty (or *in rem* duty) represents a situation in which an individual is under a duty (affirmative or negative) owed to an indefinite class of individuals. The duty of care, central to tort law, represents just

110. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997) (holding an intentional trespasser liable for punitive damages of $100,000 even though the jury had found the actual damage to plaintiff's property to be nominal and awarded a sum of $1).

111. *See* HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 24, at 73 (noting that the relationship can be viewed from "different angles").

such a situation. X driving his car down the road owes a duty (to drive carefully) to anyone likely to be in the vicinity. For analytical convenience, one might argue that this duty results in anyone actually or potentially in X's vicinity being vested with a "right" against X. To define the relationship along these lines, however, would detract from the intended point of normative emphasis in the law, which is X and his actions.[112] We remain concerned with X's actions (and the harm they cause) and hence understand the relationship in terms of X's duty. Accordingly, the language of tort law focuses on a "duty of care" instead of a "right to be cared for."

In analogous terms, the right to exclude is a multital right that operates against an indefinite set of individuals by placing them under an obligation of exclusion. Focusing on the duty of exclusion instead of the right to exclude would make sense, along the lines of tort law, if our emphasis were on the consequences of a breach of this duty.[113] We speak of a *right* to exclude, rather than a duty precisely because our focus is on the internal nature of property ownership and on the association between the right-holder and the resource. A duty-based conception would make perfect sense were the focus of the inquiry entirely on a liability structure and on events triggering liability.[114] By focusing instead on the right and its holder, the idea serves a coordination function: one of denoting that the holder of the right is responsible for it in more ways than one. This coordination function, in turn, assumes major relevance for a vast majority of resources that are by their nature both rival and exclusive. Whereas a duty analysis would not be focused on the moral basis for the duty (but rather entirely on the legal

112. Indeed, some might even argue that this typifies the situation where a duty exists without a correlative right altogether. *See* MARKBY, *supra* note 67, at 90–91.

113. For an overview of the evolution of the duty of care in tort law, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 357 (5th ed. 1984) (noting how the idea developed as negligence began to become an independent basis of liability in order to establish a causal connection between the plaintiff and the defendant).

114. In this sense, associating the right to exclude with an action for trespass remains problematic. Although trespass law does build on the basic notion that property entails the right to exclude, it certainly does not *provide* an owner with the right to exclude. Trespass is concerned directly with the duty of exclusion because its focus remains on liability. *See* Strahilevitz, *supra* note 5, at 1836 (noting the tendency among scholars to focus their discussion of the right to exclude around trespassory claims).

consequences of the breach), the *right* to exclude remains inward-looking and focuses on its origins and the distinctively social role of the institution of property as a coordination device.

Inviolability thus remains a normative ideal that is best captured by the right to exclude. It remains at once both forward-looking, in being capable of representation as a correlative duty, which when breached gives rise to liability (that is, the law of trespass), and yet deeply grounded in the connection between an individual and an object that is central to property's role as a coordination device. Understood in this way, the right to exclude begins to assume significance outside the context of enforcement. One sees why it is indeed the *sine qua non* of property, for it remains a manifestation of the norm of inviolability, on which the entire institution of property is centered.

4. *Simulations and Extensions: Intangibles*

As noted earlier, the norm of inviolability tends to operate differently depending on the resource in question. Intangible resources such as knowledge and information tend to be defined by two criteria: non-rivalrousness and non-excludability.[115] A resource is said to be non-rivalrous when its use by one person does not interfere with its use by another (or in other words, when such additional use entails no marginal cost) and non-excludable when it cannot easily be controlled in such a way as to exclude others from using it.[116] Tangible resources, most notably chattels, are both perfectly rival and excludable. Intangibles, by contrast, are perfectly non-rival and often non-excludable. The subject matter of intellectual property rights—ideas and expression—are perfectly non-rival and non-excludable.

It is only logical that as the rivalrousness and excludability of a resource decline, so too does the strength of the norm of inviolability that attaches to it. Consequently, for resources that are both non-rivalrous and non-excludable, the norm of inviolability is practically nonexistent. Informational property and intellectual property are thus characterized by low levels of intrinsic inviolability.

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115. *See* Joseph E. Stiglitz, *Knowledge as a Global Public Good*, *in* GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 308 (1999).

116. *Id.* at 308–10.

To compensate for this—and to thereby imbue the intangible resource in question with a genuine property-like character—the law artificially envelopes the resource in question with the element of inviolability. Thus, when the United States Code describes a patent as granting its holder the "right to exclude *others*" from making, using, or selling the protected subject matter,[117] it ought to be understood as doing little more than stipulating that *others* are placed under a correlative duty to exclude themselves from performing those activities in relation to the identified resource. It is not a reference to a remedial consequence because the statute does not use the phrase in its discussion of remedial options available to a court, but does so only in its discussion of the grant.[118] This is most certainly then a reference to the primary substantive right and not the secondary.

When we move from patent to copyright, things begin to change. Unlike patent rights that can be infringed without any actual imitation (that is, by simply doing one of the acts the exclusive right to which is vested in the patent owner), liability in copyright is contingent on a showing of actual *copying*, with independent creation being a complete defense.[119] It is not surprising that the law consciously avoids referring to copyright in terms of the right to exclude as it does for patents.[120] Inviolability for expressions remains significantly attenuated. Justice Holmes's analysis of the right to exclude in the context of copyright best expresses this difference:

> [I]n copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. It restrains the spontaneity of men where but for it there would be nothing

117. 35 U.S.C. § 154(a)(1) (2005) (emphasis added).

118. *See* 35 U.S.C. §§ 283–84 (2005).

119. For more on this distinction, see Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 MICH. L. REV. 1525 (2007); Samson Vermont, *Independent Invention as a Defense to Patent Infringement*, 105 MICH. L. REV. 475 (2006); *see also* Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465 (2004).

120. *See generally* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1800 (2007) (observing how copyright law tends to place less reliance on exclusion than patent law and is thus less "property-like"). *But see* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property.").

> of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right.[121]

Inviolability in the context of copyright is largely a fiction.

Understood in this way, the use of the right to exclude in the patent statute begins to appear logical and deeply functional. Given that intellectual property statutes seek to mimic the attributes of tangible property in more ways than one, the manner in which they do (or do not) invoke the right to exclude in some way signifies the extent of their property-ness.

B. The Analogy to Contract's Performance Right

The right to exclude in property law closely resembles the idea of a contractual performance right. Both remain ideals around which entire institutions are structured (and understood) and yet, if they were understood entirely through their remedial context, they would become divested of their normative significance.

Of the various primary rights that Hohfeld identified in his discussion, contractual rights find repeated mention,[122] establishing a right-duty relationship between two or more individuals. In the ordinary bilateral contract between *A* and *B*, where *A* agrees to do something in return for *B* paying him a fixed sum of money, *A* has a duty to perform his end of the bargain, the correlative of which is a right to the performance vested in *B*. Conversely, *B* has a duty to make payment to *A*, and *A* is vested with the correlative right to obtain such payment.[123] The critical point to remember for our purposes is that this analysis of rights and duties is independent of whether they may actually be enforced *as such*. In other words, *A* and *B* have these rights and duties regardless of their enforceability in a court of law, which would involve secondary rights and claims.[124]

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121. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

122. *See, e.g.*, HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 24, at 73, 108, 110.

123. *Id.* at 41–42.

124. *Id.* at 110 (noting how a primary right *in personam* may be enforced through a proceeding *quasi in rem*).

In exhorting the separation of the primary right from its remedial counterpart, Hohfeld glossed over a rather fundamental question, one that has puzzled moral philosophers for ages. In the absence of an enforcement mechanism (that is, a secondary right), why would individuals bother performing their duties? In other words, if the viability of the primary right is predicated on the existence of a secondary right, then its normative independence becomes meaningless.[125] But if it remains distinct, why do we have reason to assume continued adherence to contracts? Thus, in the example above, Hohfeld would seemingly argue that *A*'s duty to *B* (and vice-versa) arises *independent* of *B*'s ability (or *A*'s in the converse) to enforce the same in a court of law. Now, if *A* knows this *ex ante*—that is, that his duty to *B* is normatively independent of *B*'s ability to enforce it—why does *A* still adhere to his contractual duty? The answer seems to lie in the morality of promising.

1. *The Contractual Right of Performance as a Moral Right*

Under a promissory theory, contract law is viewed as a set of legal rules structured *around* the norms of morality associated with the institution of promising.[126] Under the law, contracts are generally understood as "promise[s] . . . for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[127] Promising thus forms the foundation of contract—or, put another way, its moral counterpart. The promise, in this conception, is a manifestation of individual moral agency, used to give effect to the ideal of trust.[128] It is a moral commitment as to a *future* act, one that allows the person to whom it is made (the promisee) to

125. It is not readily apparent that Hohfeld was advocating for its *complete* independence; his analysis seems to be restricted to arguing that the *nature* and *character* of the primary right were to be understood independent of the nature and character of the secondary right that comes into play to enforce the former. *See id.* at 102.

126. The most prominent promise-based theory of contract law is, arguably, that of Charles Fried. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981). For other prominent works, see Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

127. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

128. *See* FRIED, *supra* note 126, at 16 ("The obligation to keep a promise is grounded not in arguments of utility but in respect for individual autonomy and in trust.").

convert his hope into an expectation. Contract law, then, remains nothing more than a set of legal rules directed at giving effect to the norms surrounding the institution of promising.

The body of literature attempting to so situate contract within the skein of promising has grown rapidly over the last several decades. To be sure, it has its skeptics as well—most notably utilitarians, who use divergences between contract law and promissory norms (most common in the context of remedies) to argue instead that contract law reflects little more than considerations of transactional efficiency.[129] Still, the promissory view of contract law remains one of the most dominant in the literature.[130]

In accordance with the promissory understanding, contractual obligations to perform a bargain derive from the moral norms associated with promising. To speak of a promisee's "right of performance" is a reference to a correlative (or primary) right vested in the promisee, consisting entirely of the promisor's duty to perform. In turn, the promisor's duty to perform derives not from any recourse to sanction (for that would entail secondary obligations) but rather from the institution of promising, on which contract law is premised. The understanding of the contractual primary right as the correlative of a duty to perform tracks the view of contract as a set of mutual promises. Individuals perform their primary duties to one another, independent of the remedial consequences of nonperformance, because the ideal of adhering to one's commitments derives from norms of morality—norms that influence behav-

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129. For some of the nonutilitarian criticisms of the promissory theory, see P.S. ATIYAH, PROMISES, MORALS, AND LAW (1981); DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT (2003); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

130. *See* Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 721 (2007). As Shiffrin notes:

> In U.S. law, promises are embedded within contracts and form their basis. . . . The language of promises, promisees, and promisors saturates contract law—in decisions, statutes, and the *Restatement*. It also permeates the academic literature through its common characterization of contracts as the law of enforceable promises and by its formulation of the foundational questions of contract as which promises to enforce, why, and how.

Id.

ior and deter certain kinds of actions, independent of legal sanction.[131]

This moral or promissory understanding of the performance right allows one to make perfect sense of the law's reluctance to order performance of a contractual obligation by default upon a breach. Locating the meaning of the right in contract law's moral substructure avoids the need to deny the very existence of any right to actual performance.

2. *Enforcing the Promise: The Specific Performance Riddle*

While promissory theories of contract law continue to dominate the landscape, one major anomaly within contract doctrine that such theories often struggle to account for is the area of contractual remedies.[132] Not surprisingly, this area has also given utilitarian theorists their strongest argument against the promissory basis of contractual liability.[133]

In spite of all else, contract law to this day recognizes monetary relief (damages) as the default remedy for breach and specific performance to be the clear exception, available only in extraordinary cases where monetary damages are inadequate.[134] This remains true of the common law in general on both sides of the Atlantic.[135] If promising forms the basis of contract law and doctrine, then the morality of promising would

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131. It might be argued that Hohfeld would have had serious objections to the incorporation of moral elements into this classificatory structure. Early in his work, he sought to make a clear distinction between legal and nonlegal conceptions, though he never used the word "morality." *See* HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, *supra* note 24; *see also supra* note 68 and accompanying text.

132. *See* Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second* Restatement, 81 COLUM. L. REV. 111 (1981) (setting out the morality-efficiency debate among contract theorists and noting its reflection in the drafting of the *Restatement*).

133. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 118–26 (7th ed. 2007).

134. *See* 11 ARTHUR CORBIN, CORBIN ON CONTRACTS § 55.4 (Joseph M. Perillo ed., rev. ed. 2005); 24 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 64.1 (Richard A. Lord ed., 4th ed. 2002); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145 (1970). For some empirical arguments that courts nevertheless exhibit greater inclination to grant specific performance than theory would suggest, see M.T. Van Hecke, *Changing Emphases in Specific Performance*, 40 N.C. L. REV. 1 (1961).

135. *See* GARETH JONES & WILLIAM GOODHART, SPECIFIC PERFORMANCE 2 (2d ed. 1996); *see also* Andrew Phang, *Specific Performance—Exploring the Roots of 'Settled Practice,'* 61 MOD. L. REV. 421, 423 (1998) (noting that under English law the grant of specific performance remains the exception, unlike in civil law jurisdictions).

obviously require enforcement of the promise as the default remedial measure upon a breach.[136] Yet, specific performance remains the exception—hinting at the possibility of the law's divergence from morality. The reason for this divergence has baffled scholars for quite some time.

Utilitarians, of course, have made much of this. Most notable is Justice Holmes's famous statement that the "confusion between legal and moral ideas" was manifest in the law of contract and that "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."[137] This has since been developed into the "efficient breach" theory of contractual remedies, which is based on the argument that in situations where a promisor's profits from a potential breach are in excess of the promisee's loss from such breach, the breach should be encouraged (or at the very least, not deterred)—with no restraints whatsoever imposed by morality.[138] Thus, the promisor is at all times given the option of breaching, conditioned upon the payment of a penalty for the same, in the form of damages. Contractual promises are protected, in this understanding, entirely by liability rules.[139]

The utilitarian account views contract as a subspecies of tort law, where the law refrains from proscribing certain activities, preferring instead to interfere at the back end in the interests of corrective justice. In a similar vein, utilitarians argue that contract law *does not forbid* (or even discourage) a breach, but prefers to step in and award the injured party damages to make

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136. *See* Dori Kimel, *Remedial Rights and Substantive Rights in Contract Law*, 8 LEGAL THEORY 313, 320 (2002).

137. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). Justice Holmes is even more vitriolic later in the same paragraph when he notes, in the context of efficiency, that "such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can." *Id.*

138. The phrase "efficient breach" was first coined by Charles Goetz and Robert Scott. *See* Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977). For elaborations both agreeing and disagreeing with the theory, see POSNER, *supra* note 133, at 119–20; Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); James P. Nehf, *Contract Damages as Substitute for Full Performance*, 32 IND. L. REV. 765 (1999).

139. *See* Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 354 (1978).

good any loss.[140] The recent move from traditions of subjective intention to objective intention provides added strength to their claims.[141]

The efficient breach argument has met with disagreement from both utilitarians, who argue that specific performance is, in general, more efficient than monetary relief,[142] and promissory theorists, who attribute it to the vagaries of the common law process and as an exception to the general rule.[143] Relying on a Kantian approach to the role of morality in law, Charles Fried, one of the most notable promissory theorists, argues:

> Law can be, should be, but *need not be* a set of institutions that underwrite, facilitate, and enforce the demands and aspirations of morality in our dealings with each other. It is therefore entirely appropriate that various legal institutions resemble the moral institutions which they *partially* instantiate. Contract and promise are like that.[144]

The attempt to explain this rather major anomaly away as a menial exception may appear rather simplistic. Yet, *in spite of* the nonavailability of specific performance in every case, promising continues to form the basis of contracting—both as a matter of law and practice. Contract doctrine continues to understand itself in reference to the practice of promising and the moral precepts that underlie it.[145] Contracts continue to be made and performed by individuals, most of the time with little regard for the consequences of the breach.[146]

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140. *See, e.g.*, Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970).

141. For an overview of this change, see LARRY A. DIMATTEO, CONTRACT THEORY: THE EVOLUTION OF CONTRACTUAL INTENT (1998).

142. *See* Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979). For a more recent utilitarian criticism of the idea, see Richard R.W. Brooks, *The Efficient Performance Hypothesis*, 116 YALE L.J. 568 (2006).

143. *See, e.g.*, Thomas Scanlon, *Promises and Practices*, 19 PHIL. & PUB. AFF. 199 (1990).

144. Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 3 (2007), http://www.harvardlawreview.org/forum/issues/120/jan07/cfried.pdf (emphasis added) (footnote omitted).

145. *See* Linzer, *supra* note 132; *see also supra* notes 132–33 and accompanying text.

146. *See* DAVID HUME, A TREATISE OF HUMAN NATURE, bk. III, pt. II, § 5, at 519–21 (P.H. Nidditch ed., 2d ed. 1978) (1740) (noting that promises are human inventions based on the "necessities and interests of society"); ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 237 (1922) (characterizing promising as a basic social and economic institution); *see also* 1 ARTHUR CORBIN, CORBIN ON CONTRACTS § 1.1, at 2 (Joseph M. Perillo ed., rev. ed. 1993) ("[T]he law of contracts

Again, the internal point of view and the guidance function of law provide an explanation for the apparent anomaly. By employing the language of promising, contract law implicitly exhibits a preference for performance over breach and the ideal of *pacta sunt servanda* ("pacts must be respected")[147]—a preference that everyday practice deriving from ordinary social morality emphasizes. Since the function of contract law and its underlying norms of promising is to guide behavior (as much as, or perhaps more than, to guide judges), the absence of a direct remedial enforcement of the ideal does not detract from its centrality to the institution.

The analogy to contract law serves to highlight the role that moral norms and extralegal ideas can play in structuring legal doctrine. Much like the norm of inviolability in property law, the norm of keeping one's promises (that is, *pacta sunt servanda*) forms the foundation on which the rules of contract law are structured—even if there remain points where its internalization is incomplete. Rather than clouding doctrine in unintelligible abstraction, these moral norms remain rooted in social practice and are of great significance to understanding the operation of the system, be it contract or property.

C. *Toward a Pragmatic Conceptualism of Property*

Quite apart from emphasizing the role of nonlegal (that is, moral or social) norms in property law doctrine, using inviolability as a defining principle directs attention to something far more important: the role of conceptual thinking in comprehending the structural and functional attributes of property. Conceptualism (or formalism), the attempt to understand and analyze an institutional practice using its core concepts, has over the decades received harsh criticism from scholars located

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attempts the realization of reasonable expectations that have been induced by the making of a *promise*. . . . [I]t is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose." (emphasis added)); L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 57 (1936) (noting how the law backs the sense of injury that the "breach of a promise" engenders).

147. *See* Malcolm P. Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783 (1941) (describing the norm as deriving from the practical need for dependability in commercial interactions).

in the realist or utilitarian tradition.[148] Central to this criticism has been the notion that legal ideas and institutions always exist in furtherance of some goal external to the law and that, consequently, a focus on law's concepts alone tends to be overly myopic.[149] This idea of conceptualism tends to view it as a largely academic exercise—one with little to no practical influence at all.[150]

Yet, legal concepts can be of significant functional relevance. In analyzing tort law, Jules Coleman uses a method he terms "pragmatism" in arguing that the meanings of concepts and terms are central and need to be understood in relation to other concepts and ideas (*semantic non-atomism*).[151] Most importantly though, he argues that concepts need to be analyzed in terms of the role they play in actual social practice (*inferential role semantics*) and that an institution contains several concepts tied together through a general principle that is then at once both an embodiment of the practice in which the concepts operate and an explanation of it (*explanation by embodiment*).[152]

Having set out this general method, Coleman then uses it to analyze tort law and concludes that all of tort law can be understood through the principle of "corrective justice," and that the law's core concepts in the area (that is, the duty of care, proximate cause, and so on) *and* actual tort law practice both

148. *See* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950 (1988) ("Formalism is like a heresy driven underground, whose tenets must be surmised from the derogatory comments of its detractors."). For a historical account of formalism and its development in American legal thinking, see Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975).

149. *See* Weinrib, *supra* note 148, at 955.

150. Perhaps the most scathing attack on conceptualism in the first half of the twentieth century came from Felix Cohen, who characterized it as a form of "transcendental nonsense." *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). Cohen, however, seemed sympathetic to Hohfeld's project, including it in the functionalist paradigm along with the ideas of Holmes. *See id.* at 828. This likely ignores Hohfeld's primary-secondary distinction, where he sought to understand the former entirely outside the judicial paradigm. *See also* Walter B. Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 FORDHAM L. REV. 272 (1936) (offering a defense of conceptualism in response to Cohen).

151. JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 6–7 (2001).

152. *Id.* at 8.

reflect the functioning of this principle.[153] In the area of contract law, others have adopted similar functional approaches to analyzing concepts.[154]

Benjamin Zipursky terms this approach to conceptual analysis *pragmatic conceptualism*.[155] He further highlights a major advantage inherent in this strand of conceptualism: it offers a "way of grasping th[e] domain of moves that in some sense are built into the concepts of law."[156] This form of conceptualism is perfectly compatible with consequentialist analysis because it allows for the possibility that purely consequentialist reasons may have contributed to the development of the concept to begin with. It remains equally compatible with ideas from morality and other extralegal influences grounded in social practice. It is also directly responsive to Felix Cohen's call for functionalism, except that functionalism looks to institutionalized social practice and not merely judicial decisions.[157]

A pragmatism of this conceptual variety has yet to make its way fully into property law analysis.[158] It is indeed plausible that the fragmentation of property doctrine has contributed to this. This fragmentation is the result of different property-constitutive doctrines being classified as elements of either tort or contract law and analyzed under the guiding principles of those areas (such as corrective justice or utilitarianism), where they fit most

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153. *Id.* at 10; *see also* Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 315 (2007).

154. *See, e.g.*, STEPHEN A. SMITH, CONTRACT THEORY (2004).

155. Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000). Zipursky notes: "[T]o understand the concepts and principles within an area of the law is to grasp from within the practices of the law the pattern of verbal and practical inferences that constitute the relevant area of the law." *Id.* at 473. Jeremy Waldron offers a similar account of the role of concepts that he terms "systematicity." *See* Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16, 25 (2000) ("The rules in which [theoretical terms] appear fit together in complex interconnection, not as coordinate purposive rules in a coherent array of purposes but as interlocking parts of different shape, each contributing a particular functional component to an overall integrated picture.").

156. Zipursky, *supra* note 155, at 475.

157. *See* Cohen, *supra* note 150, at 829–34.

158. A major exception to this trend is the work of Merrill and Smith, most notably in their analysis of the doctrine of *numerus clausus* in terms of the information burdens it places on participants in the property system. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

uneasily.[159] Identifying a unifying principle in property would go a long way in remedying this by introducing a minimal level of consistency into all property-related discourse.

The previous analysis of inviolability—a functional attribute—and its connection to the idea of the right to exclude, fits perfectly within the skein of pragmatic conceptualism. The right to exclude remains a conceptual tool that finds a place in both property practice and doctrine, with inviolability operating as an explanatory principle. The right to exclude, centered around inviolability, explains not just how courts construct an owner's legal entitlements, but also how individuals understand the institution of property as constraining their actions and, at times, imposing affirmative obligations.

Conceptual analysis of property doctrine along these lines is likely to be beneficial across a broad spectrum of areas, with it becoming increasingly common to transplant property ideas and concepts from one context to another for instrumental purposes.[160] Grounding the right to exclude in the principle of inviolability and seeking its meaning in the duty it casts on others remains a modest first step in that direction.

III. THE REMEDIAL VARIANT: EXCLUSIONARY RELIEF AS A RIGHT

As noted earlier, it remains common in modern times to equate the right to exclude with an entitlement to exclusionary or injunctive relief. This approach is largely functional and developed from the realist idea that it is meaningless to speak of a right in the absence of a remedy capable of enforcing it.[161]

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159. Two obvious examples of this fragmentation are: (1) the tort of trespass (to realty and chattels), where tort law's corrective and distributive justice justifications have little explanatory force, *see* Shyamkrishna Balganesh, *Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass*, 12 MICH. TELECOMM. & TECH. L. REV. 265, 274 (2006), and (2) the enforcement of contracts relating to the sale of land and identifiable goods, where in contrast to other forms of contract, courts readily award specific performance, even in the absence of an obvious efficiency gain, *see* Kronman, *supra* note 139, at 355; *see also* RESTATEMENT (SECOND) OF TORTS §§ 158, 217 (2007).

160. *See, e.g.*, Balganesh, *supra* note 159, at 331–33.

161. As Karl Llewellyn, a well-known realist scholar, noted, "[A] right is best measured by effects in life. Absence of remedy is absence of right. Defect of remedy is defect of right." KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 94 (1960).

Pragmatic as it may seem, this view tends to gloss over numerous subtleties inherent in the idea of the exclusionary remedy. Almost all of these subtleties derive from the nature of injunctive relief as an equitable remedy. Since its inception, equitable relief has been considered subject to an independent set of doctrinal constraints, all of which result in it being characterized as an "extraordinary remedy" by courts. Talk of a *right to exclusionary relief* tends to ignore the unique role of equity in this conception of the right. What does it really mean, then, to speak of a right to an exclusionary remedy?

It was precisely this question that the Supreme Court took up in *eBay*.[162] This Part focuses on the equitable remedy conception of the right to exclude, examining the interface between equity and the rights discourse in the context of real and intangible property, and then attempts to use this analysis to understand the *eBay* holding and its aftermath.

Part III.A begins with an overview of the remedial conception of the right to injunctive relief, and concludes that the reference to a right here is little more than an expectation of a specific outcome given the nature of the subject matter involved: property rights. The conversion of a routine grant into a grant as of right was largely a rhetorical device. Part III.B then analyzes *eBay* and the Court's rejection of the routine-grant version of the right to injunctive relief.

The Court in *eBay* certainly was not presented with the inviolability-based (claim-right) conception of the right to exclude. Yet, its holding alludes to the possibility that this is indeed what the right has meant all along. Critics who fault the holding tend to ignore altogether the conceptualist construction of the right and the possibility of the Court implicitly endorsing it.

A. The Traditional Test and the Right to an Injunction

An injunction is best defined as "an order of the court directing a party to the proceedings to do or refrain from doing a specified act."[163] As a form of relief, the injunction is a preventive rather than restorative remedy;[164] and being equitable in nature, the injunction is rooted in the distinction between eq-

162. eBay Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837 (2006).

163. R. MEGARRY & P. BARKER, SNELL'S PRINCIPLES OF EQUITY 624 (27th ed. 1973).

164. WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS 1 (John Melvin Paterson ed., 5th ed. 1914).

uity and common law. As a historical matter, equity developed to alleviate the rigidity and inadequacy of the common law's system of remedies.[165] Consequently, establishing the *inadequacy* of ordinary common law remedies became a necessary precondition to the grant of equitable relief. Though its contours have varied over time, the "rule of inadequacy" remains an integral part of equitable doctrine.[166] In an indirect way, however, the rule of inadequacy worked to establish an implicit hierarchy in remedial forms: courts (and plaintiffs) were mandated to look to *ordinary* (common law) remedies in the first instance, and only after courts were able to establish that such remedies were either of little use or had been exhausted would they consider the grant of an extraordinary (equitable) remedy.[167] To even consider the option of injunctive relief, courts thus had to be convinced of the inadequacy of the default remedy—compensatory damages.

The rule of inadequacy eventually gave rise to a requirement of irreparability.[168] Under this formulation, plaintiffs had to establish that ordinary remedies were inadequate *because* the harm to be prevented was *irreparable* through ordinary compensation. Termed the irreparable injury rule, it is today associated with an inability (for whatever reason) to quantify the damage sought to be prevented.[169] While scholars often use the inadequacy and irreparability rules as synonyms, some formulations tend to list them as independent factors that need to be satisfied separately, though it is far from obvious that the content needed to satisfy each of them differs significantly.[170]

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165. *See* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 33 (1836).

166. *See Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 999–1000 (1965).

167. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 1 (1978).

168. *See* DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.1 (1973). For more on the inadequacy rule, see Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 346 (1981); *Developments in the Law, supra* note 166, at 1002.

169. For more on the irreparable injury rule, see Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990). *See also* Doug Rendleman, *Irreparability Irreparably Damaged*, 90 MICH. L. REV. 1642 (1992). For a more recent analysis of the doctrine, arguing that it represents somewhat of an asymmetry, see Douglas Lichtman, *Irreparable Benefits*, 106 YALE L.J. 1284 (2007).

170. For a comprehensive historical analysis of the inadequacy rule, concluding that historically, the Chancery Court did not have to adhere to it in copyright cases, see Tomás Gómez-Arostegui, *What History Teaches Us About Copy-*

Although the rules of inadequacy and irreparability require the plaintiff to establish a *need* for exclusionary relief, they never directly take into consideration the interests of anyone else—most notably, the defendant. In due course, therefore, courts developed the doctrine of "relative hardship," or "balancing of the equities." In simple terms, this rule prevents a court from granting a plaintiff injunctive (equitable) relief when "the cost to the defendant of obeying the injunction is substantially greater than the objective benefit to the plaintiff" from the same.[171] The rule thus forces courts to examine the individual circumstances of the parties before it, prior to granting relief.[172]

Once the rules of inadequacy, irreparability, and relative hardship are satisfied, courts are then required to ensure that the grant of the injunction would not run contrary to the public interest. The public interest requirement is a catch-all category that enables courts to factor in considerations that might ordinarily have been deemed extraneous to the dispute between the parties—such as whether the issuance of the injunction would impose costs on society as a whole, or whether it would defeat the purposes of the law.[173]

Together, these four rules—inadequacy, irreparability, relative hardship, and public interest considerations—constitute the traditional "four-factor" test for the grant of an injunction, which courts are obligated to apply. As is apparent, the test gives courts a significant amount of discretion in individual cases.[174] Indeed, the element of discretion (driven by the need for flexibility) has long been considered the defining feature of equity as a whole.[175] Quite apart from these injunction-specific

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right Injunctions and the Inadequate-Remedy-at-Law Requirement, 81 S. CAL. L. REV. (forthcoming 2008).

171. Barton H. Thompson, Jr., Note, *Injunction Negotiations: An Economic, Moral, and Legal Analysis*, 27 STAN. L. REV. 1563, 1577 (1975).

172. *See generally* W. Page Keeton & Clarence Morris, *Notes on "Balancing the Equities,"* 18 TEX. L. REV. 412 (1939); John Leland Mechem, *The Peasant in His Cottage: Some Comments on the Relative Hardship Doctrine in Equity*, 28 S. CAL. L. REV. 139 (1955).

173. *But see* Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 419 (1983).

174. Indeed, some argue that this discretion is difficult to reconcile with the terms of the test. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991).

175. *See generally* Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 22 (1905).

rules, the rules of equity grant courts broad authority to factor in a host of other considerations in deciding whether or not to grant equitable relief. These other considerations are referred to generically as "equitable considerations." Doctrines such as "clean hands," *in pari delicto,* and *laches* have long formed the basic building blocks of courts' equitable jurisdiction.[176] Given that the grant of relief is *discretionary,* the crucial question is whether it becomes credible to speak of a *right* to injunctive relief.

In spite of their adherence to these four rules in other contexts, courts have tended to exhibit a general predisposition towards granting injunctive relief in relation to property rights. Deriving from the maxim that "equity protects property rights, not personal rights," courts began recognizing that they were "bound to protect" property rights and focused their attention on whether or not a right in question could be legitimately classified as proprietary.[177] In focusing on this classificatory question (albeit with significant inconsistencies in their final determinations), courts operated on the assumption that legal (common law) remedies were inadequate to protect property rights and that injunctive relief was therefore often a *fait accompli.* It was not until much later that courts moved away from the property-personal distinction as the main focus of their inquiry.[178]

Equity's historical preference for property over personal rights is itself the subject of some controversy. Some attribute it to a misinterpretation of historical precedent,[179] while others argue that it arose as a consequence of equity's use of property rights to establish its jurisdiction in situations where it otherwise would not have had any.[180] Yet, almost everyone characterized the distinction as being artificial and often resulting in

176. These concepts are collectively referred to as the "maxims of equity." *See* CHARLES NEAL BARNEY, EQUITY AND ITS REMEDIES 39 (1915) ("Underlying the doctrines of equity and at the basis of this system of jurisprudence are certain general principles called maxims."); Roscoe Pound, *The Maxims of Equity—I: Of Maxims Generally,* 34 HARV. L. REV. 809 (1921).

177. *See* Gee v. Pritchard, (1818) 36 Eng. Rep. 670, 674 (Ch.); *Developments in the Law, supra* note 166, at 998.

178. *Developments in the Law, supra* note 166, at 1001.

179. W.B.G., Note and Comment, *A Re-Interpretation of* Gee v. Pritchard, 25 MICH. L. REV. 889, 890 (1927).

180. Joseph R. Long, *Equitable Jurisdiction to Protect Personal Rights,* 33 YALE L.J. 115, 132 (1923).

an abjectly unjust denial of relief.[181] Soon enough, the distinction was done away with, but ever since, equity's connection to property has been considered somewhat special.

Even after the property-personal distinction became diluted, the argument that property rights *necessitated* injunctive relief remained, deriving its force from the obvious inadequacy of damages as a preventive-deterrent mechanism. Central to this argument was the notion that if damages were to be the only (or even the primary) form of relief, in a majority of cases one private individual would effectively be allowed to take the resources of another without the latter's consent—a form of private taking.[182]

Whereas the grant of equitable relief (of any kind) had long been considered a matter "of grace," by the nineteenth century, courts had begun to expressly repudiate this rule and replace it instead with a rule that injunctions would issue "of right" whenever property rights were at issue.[183] What this meant was merely that the discretion to grant was being replaced with a discretion to deny—with the onus now on courts to justify their decisions refusing relief rather than granting it. Invariably, this derived from the "balancing of equities" part of the test.[184] When property rights were involved, courts deemed the irreparability and inadequacy components satisfied; implicit in that determination was the belief that property's element of *exclusion* could be protected only through injunctive relief. This approach became most apparent in the contexts of real property trespasses and patent infringement, and remains dominant even today.

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181. *See, e.g.*, Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640, 641 (1916).

182. 5 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 1944 (2d ed. 1919); Henry L. McClintock, *Discretion to Deny Injunction Against Trespass and Nuisance*, 12 MINN. L. REV. 565, 572 (1928).

183. *See, e.g.*, Walters v. McElroy, 25 A. 125, 127 (Pa. 1892) ("The phrase 'of grace' . . . has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate."); *see also* Hulbert v. Cal. Portland Cement Co., 118 P. 928, 931 (Cal. 1911); Currie v. Silvernale, 171 N.W. 782, 784 (Minn. 1919).

184. McClintock, *supra* note 182, at 569.

1. Real Property: Injunctions Restraining Acts of Trespass

Historically, courts were reluctant to grant injunctions preventing trespasses unless an element of waste was involved.[185] In due course, however, the waste-trespass distinction (in the context of injunctive relief) came to be repudiated and courts came to recognize that injunctions would issue "in aid of the legal [property] right."[186] The focus thus shifted to determining whether the right asserted was in fact legitimate—that is, whether the person claiming title or ownership did in fact have title over the land in question.[187]

Equity also developed a rule that distinguished between naked and destructive trespasses, based on the imminence of irreparable damage to the land in question.[188] In due course, however, the irreparable damage element became linked to the vitality of the plaintiff's legal right. Thus, courts came to recognize that trespassory interferences could be legitimately restrained even when the damage was not necessarily significant physically or monetarily, a possible allusion to normative damages (captured by the injury-damage distinction, or the rule of *injuria sine damno*—"legal injury without actual damage"[189]). Kerr thus notes that "[a]n act of trespass, not in itself amounting to serious damage, may from its continuance, amount in the opinion of the Court to trespass attended by irreparable damage," and that situations could exist "where

185. JAMES L. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS, AS ADMINISTERED IN THE LAWS OF THE UNITED STATES AND ENGLAND 254 (1874); Note, *Injunctions Against Continuing or Permanent Injury to Real Property*, 24 VA. L. REV. 786, 786 (1938).

186. FRANCIS HILLIARD, THE LAW OF INJUNCTIONS 345 (3d ed. 1874).

187. Courts thus developed the distinction between trespasses by strangers to the property and trespasses by those acting under color of right. Ironically though, the law favored the grant of injunctive relief in the case of the latter and not the former. *See V.C. Kindersley's Court:* Lowndes *vs.* Bettle, 13 AMER. L. REG. 169, 170 (1865) (reporting the decisions in *Lowndes v. Bettle*, (1864) 33 L.J. Ch. 451, where the distinction was described most lucidly); *see also* William Draper Lewis, *Injunctions Against Nuisances and the Rule Requiring the Plaintiff to Establish his Right at Law*, 56 U. PA. L. REV. 289 (1908).

188. *See* WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS 147–48 (Franklin S. Dickson ed., 3d ed. 1889).

189. *See* Samuel C. Wiel, *Injunction Without Damage As Illustrated by a Point in the Law of Waters*, 5 CAL. L. REV. 199, 201 (1917) (noting how the rule transforms something into a form of liability actionable *per se*).

great damage may be done to property, though the actual damage done by the trespass is nothing."[190]

In relation to trespasses, therefore, courts began to focus on assuring themselves of the plaintiff's legal right and a breach of or interference with that right, whereupon they proceeded to "interfere at once" and grant a perpetual injunction.[191] By contrast, where either the right or a breach of the right remained doubtful, courts were reluctant to interfere and proceeded instead to engage in a balancing of the equities. Where both (1) the right and (2) its breach were proven, the issuance of an injunction became in a sense mechanical, as long as the issuance of injunctive relief was not meaningless—that is, where the act complained of had ended, such as where the trespass was isolated. In such situations, the court's discretion came to be limited severely (to exceptional circumstances meriting a denial), and the law came to recognize the plaintiff as being entitled to the relief sought. The discretion to grant was transformed into a discretion to deny in exceptional situations. As Kerr notes, "[a]fter the establishment of his legal right and the fact of its violation, a man is entitled as of course to a perpetual injunction to restrain the recurrence of the wrong, unless there be something special in the circumstance of the case."[192]

Following from this, once the *a priori* right to exclude and an interference with it were established, it soon became legitimate to speak of an injunction issuing as of right.[193] While scholars

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190. KERR, *supra* note 188, at 149.

191. *See* Lowndes v. Bettle, (1864) 33 L.J. Ch. 451.

192. KERR, *supra* note 188, at 188.

193. For some recent instances where courts identify the grant of injunctive relief as the default norm, evidencing a move to the "discretion to deny" formulation, see: Amaral v. Cuppels, 831 N.E.2d 915, 920 n.10 (Mass. App. Ct. 2005) (identifying injunctive relief as the "appropriate remedy" when a repeated trespass occurs and recognizing that "exceptional circumstances" might merit the denial of such relief); Shapiro Bros., Inc. v. Jones-Festus Props., L.L.C., 205 S.W.3d 270, 278–79 (Mo. Ct. App. 2006) (identifying injunctions as the "proper remedy" whenever a harassing, continuing, and annoying trespass is involved); Warm v. State, 764 N.Y.S.2d 483, 486 (App. Div. 2003) (identifying injunctive relief as a proper remedy, but noting that "equity may withhold the use of such discretionary authority if warranted by the circumstances"); Young v. Lica, 576 S.E.2d 421, 424 (N.C. Ct. App. 2003) (identifying exclusion as a key component of ownership and injunctive relief as the "usual remedy" for a continuing trespass); Aguilar v. Morales, 162 S.W.3d 825, 836 (Tex. App. 2005) (identifying an injunction as the "proper remedy" for a repeated and continuing trespass). The operative presumption in all of these cases is that since the interference is continuing, damages—which are

have tended to equate rights with entitlements as of right in other contexts,[194] it bears emphasizing that the right here always remained discretionary. Courts never abdicated their discretion, but merely came to limit it to exceptional circumstances. Perhaps the most well-recognized "exceptional circumstance" where courts still routinely deny injunctive relief is that of good faith improvers (innocent encroachments).[195] In situations where the owner of an adjacent property mistakenly builds a structure on the property of his neighbor, courts usually prefer damages to having him destroy the structure. This preference for damages recognizes the burden and waste the destruction is likely to cause.[196] As is to be expected, the innocent encroachment exception is limited to mistaken improvements and has no application to intentional or "bad faith" encroachments.[197]

All of this is in contrast with the rule that was at issue in *eBay*, where the exceptional circumstances limitation had become redundant, with the right being in a sense absolute and courts devoid of discretion to deny.

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by their nature one time, or would alternatively require multiple actions—are intrinsically inadequate, making injunctive relief the default. *See also* 42 AM. JUR. 2D *Injunctions* § 110 (2007) ("Generally, an injunction will lie to restrain repeated trespasses *so as to* prevent irreparable injury and a multiplicity of suits. Indeed, it has been held that even the threat of continuous trespass *entitles* a party to injunctive relief." (emphasis added)); 43A C.J.S. *Injunctions* § 138 (2007) ("The general rule permits injunctive relief for repeated or continuing trespasses, even in cases where the damage is nominal and no single trespass causes irreparable injury."); JAMES C. SMITH & JACQUELINE P. HAND, NEIGHBORING PROPERTY OWNERS § 3.13 (2007).

194. *See, e.g.*, LOUIS HENKIN, THE AGE OF RIGHTS 3 (1990).

195. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 135 (6th ed. 2006); MERRILL & SMITH, *supra* note 108, at 50–56; Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37 (1985); John Henry Merryman, *Improving the Lot of the Trespassing Improver*, 11 STAN. L. REV. 456 (1959).

196. *See, e.g.*, Nebel v. Guyer, 221 P.2d 337 (Cal. Dist. Ct. App. 1950); Golden Press, Inc. v. Rylands, 235 P.2d 592 (Colo. 1951); Mannillo v. Gorski, 255 A.2d 258 (N.J. 1969); Goldbacher v. Eggers, 76 N.Y.S. 881 (Sup. Ct. 1902); Owenson v. Bradley, 197 N.W. 885 (N.D. 1924). Massachusetts remains an exception to this trend, refusing to recognize innocent improvements as an "exceptional circumstance." *See* Brink v. Summers, 227 N.E.2d 476 (Mass. 1967); Beaudoin v. Sinodinos, 48 N.E.2d 19 (Mass. 1943).

197. *See* DUKEMINIER & KRIER, *supra* note 195, at 153; MERRILL & SMITH, *supra* note 108, at 55.

2. *Injunctions Restraining Patent Infringement*

Intangible rights such as patents and copyrights remain different from other forms of property in more respects than one. Yet, here too we see the idea of exclusion forming the core around which the proprietary significance of the rights revolves. The law relating to patent injunctions was directly at issue in *eBay*.

A patent grants its holder a set of exclusive rights in relation to a "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement" of the same.[198] More importantly, though, a patent's functionality is understood in terms of the right to exclude. Once granted, a patent gives its holder the "right to *exclude* others from making, using, offering for sale, or selling the invention" in question.[199]

In most claims for patent infringement, two issues are almost always in play: the *validity* of the patent grant, and the fact of *infringement*. The former involves determining whether the administrative agency issuing the patent adhered to the conditions for the grant: novelty, utility, and non-obviousness. The latter entails proving that the defendant performed one or more of the activities that the patent holder is granted an entitlement to perform exclusively. Once both validity and infringement are established, the court then proceeds to the issue of remedies, where injunctive relief remains the most popular.

Courts initially applied the irreparability and inadequacy criteria with significant regularity. In due course, however, the realization emerged that, in situations where an infringement did in fact exist (and was continuing), denying the holder an injunction was tantamount to rendering the patent's grant of exclusivity meaningless.[200] Irreparability and inadequacy thus came to be presumed as a matter of course each time a valid patent was proven to have been infringed. Even though the traditional test remained in place, in practice, when "the right

198. 35 U.S.C. § 101 (2005).

199. *Id.* § 154(a)(1) (emphasis added).

200. *See* 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 612 (W.H. Lyon, Jr. ed., 14th ed. 1918) (1836) ("It is quite plain that if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights.").

[was] well established and the violation clear, neither considerations of public or private convenience, or hardship to the defendant, [prevented] the court from interfering."[201] Once validity and infringement were established, the norm thus became that a court "may interfere at once and grant an injunction."[202] All of this arose from the rather obvious inadequacy of damages to *prevent* further acts of infringement.

In this way, equity came to treat intellectual property analogously to real property. Once title (*validity*) and trespass (*infringement*) were established, the grant of injunctive relief seemed to follow naturally. Here too, however, courts never openly eliminated their discretion except to admit to exclusionary relief becoming the default option. The frequency with which this occurred created an expectation among plaintiffs (patent holders) that injunctive relief would *always* follow (once validity and infringement were no longer in issue), notwithstanding the traditional test and the vestige of judicial discretion.

Over time, courts of equity thus began to limit their remedial discretion by presuming elements of the traditional (four-factor) test to be satisfied whenever a valid property right was at issue and was shown to have been interfered with. What was initially discretion *to grant* was transformed into discretion *to deny*. Yet, the discretion always remained—however minimal it may have been. The right to injunctive relief (as a variant of the owner's right to exclude) is then, at best, a strongly conditional right. Property holders legitimately came to expect that when their valid interest was interfered with, courts would, with few exceptions, find the issuance of an injunction unproblematic.

It must be emphasized that even in situations where they readily came to limit their discretion and recognize that injunctive relief was the necessary, natural, or proper remedy, courts do not seem to have ever considered themselves legally bound to grant the injunction.

If the right to exclude truly entailed no more than this discretion-laden entitlement to injunctive relief, one might be justified in characterizing property law's emphasis on it to be misplaced. Yet, in *eBay*, the Court was confronted with a significantly

201. High, *supra* note 185, at 349; *see also* CHARLES STEWART DREWRY, A TREATISE ON THE LAW AND PRACTICE OF INJUNCTIONS 220, 223–24 (1841).

202. Kerr, *supra* note 188, at 296–97.

stronger version of the rule, one that effectively eliminated all remedial discretion.

B. Unlinking Right and Remedy: Understanding eBay

It remains possible to envisage an even stronger variant of the rule favoring the grant of injunctive relief for property violations. This would involve eliminating *any* possible discretion to deny the injunction, making the grant fully automatic once title and interference are established. This approach would involve abandoning altogether the idea of discretionary remedialism that once formed the central feature of equitable remedies.

Discretionary remedialism is the view that courts have the discretion to award plaintiffs an "appropriate remedy" in an individual case and are not necessarily limited to specific kinds of remedies within any category.[203] To be sure, it comes in different forms and flavors, but the idea of discretion is central to its conception.[204] Critics of discretionary remedialism argue that it becomes problematic to speak of rights (in the remedial sense) if discretion of any kind persists as an element of the remedial discourse. They, in turn, prefer a strict rule-based approach to the discretionary one.[205]

It was precisely this conflict—between a discretionary approach and a rule-based one—that the Court encountered in the context of the automatic injunction rule in *eBay*. Since its inception, the Federal Circuit had developed a general rule in the context of patent injunctions, under which courts granted plaintiffs a permanent injunction once validity and infringement were factually proven.[206] As a direct consequence, the right to exclude—statutorily delineated as the central element

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203. Simon Evans, *Defending Discretionary Remedialism*, 23 SYDNEY L. REV. 463, 463 (2001).

204. *See* Paul Finn, *Equitable Doctrine and Discretion in Remedies*, *in* RESTITUTION: PAST, PRESENT AND FUTURE 251 (W.R. Cornish et al. eds., 1998); Darryn M. Jensen, *The Rights and Wrongs of Discretionary Remedialism*, 2003 SING. J. LEGAL STUD. 178; Patricia Loughlan, *No Right to the Remedy?: An Analysis of Judicial Discretion in the Imposition of Equitable Remedies*, 17 MELB. U. L. REV. 132 (1989); David Wright, *Wrong and Remedy: A Sticky Relationship*, 2001 SING. J. LEGAL STUD. 300.

205. Peter Birks is perhaps the most outspoken critic of discretionary remedialism. *See* Peter Birks, *Three Kinds of Objection to Discretionary Remedialism*, 29 W. AUST. L. REV. 1 (2000).

206. *See* Craig S. Summers, *Remedies for Patent Infringement in the Federal Circuit—A Survey of the First Six Years*, 29 IDEA 333, 337 (1988) ("Once infringement has been established, an injunction normally follows.").

in a patent grant—came to be equated with a plaintiff's automatic entitlement to injunctive relief in infringement actions. In *eBay*, the Court unanimously rejected the Federal Circuit's rule.

1. *The Automatic Injunction Rule*

A few years after its establishment in 1982, the Federal Circuit formulated a general rule that, in suits for patent infringement, a permanent injunction would automatically issue upon a finding that the patent was infringed and that it was not invalid.[207] Although in formulating its rule the court had retained an exceptional circumstances limitation—perhaps in recognition of the discretion to deny formulation—in practice, it had interpreted the limitation as applicable only when public health or safety were at issue.[208] Given the court's general reluctance to invoke the exceptional circumstances rule, the issuance of injunctions came to be recognized as mechanical once infringement and validity were proven.[209] In so doing, the Federal Circuit had also explicitly refused to apply the traditional four-factor test in its standard formulation. The court's rationale, in simple terms, relied upon the preeminence of the right to exclude within the set of rights granted to the patentee. In one of its early cases, the court noted that, without an injunction, the patentee's right to exclude would be diminished, the owner would lack leverage, and the patent would have only a fraction of the value it was intended to have.[210] Under this understanding, a refusal to grant an injunction in a situation where validity and infringement had been affirma-

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207. The Court of Appeals for the Federal Circuit was established pursuant to the Federal Courts Improvement Act of 1982. Pub. L. No. 97-164, 96 Stat. 25. For a discussion of the tension between *eBay* and the general rule established by the Federal Circuit, see George M. Sirilla, William P. Atkins & Stephanie F. Goeller, *Will* eBay *Bring Down the Curtain on Automatic Injunctions in Patent Cases?*, 15 FED. CIR. B.J. 587 (2005).

208. *See, e.g.*, Xerox Corp. v. 3Com Corp., 61 F. App'x 680, 685 (Fed. Cir. 2003) ("The important public needs that would justify the unusual step of denying injunctive relief, however, have typically been related to public health and safety."); Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1547–48 (Fed. Cir. 1995) (citing instances where the exception had previously been invoked).

209. *See* David B. Conrad, Note, *Mining the Patent Thicket: The Supreme Court's Rejection of the Automatic Injunction Rule in* eBay v. MercExchange, 26 REV. LITIG. 119, 121 (2007).

210. *See* Smith Int'l, Inc. v. Hughes Tool Co., 718 F.2d 1573, 1577–78 (Fed. Cir. 1983).

tively established without question would amount to a denial of the basic right to exclude.[211]

In laying down this rule, the Federal Circuit adopted a rather counterintuitive interpretation of the patent statute, which provides that "courts having jurisdiction of [patent] cases . . . *may* grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent."[212] The automatic rule mandating the grant seemingly disregarded the unequivocally discretionary language used by Congress. It is therefore not surprising that, in 2005, a legislative effort was mounted to remedy this anomaly by *requiring* courts to apply the four-factor test in patent cases.[213] The automatic rule articulated by the Federal Circuit thus concretized the connection between property and injunctive relief through the right to exclude.

Although the Supreme Court, before *eBay*, had never directly considered the automatic rule, nearly a century ago it did expound on the philosophy behind injunctive relief in patent cases. In so doing, it seemed to both endorse the rule and attribute its primacy to a patent's conferral of the right to exclude. In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*,[214] the defendant questioned the court's authority to issue an injunction when the patent had not been put to use, even though validity and infringement had been affirmatively established. Although the Court did not rule on the automatic injunction rule, it went on to observe:

> From the character of the right of the patentee we may judge of his remedies. It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation. Anything but prevention takes

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211. *See, e.g.*, Richardson v. Suzuki Motor Co., 868 F.2d 1226, 1246–47 (Fed. Cir. 1989) ("Infringement having been established, it is contrary to the laws of property, of which the patent law partakes, to deny the patentee's right to exclude others from use of his property."); W.L. Gore & Assocs. v. Garlock, Inc., 842 F.2d 1275, 1281 (Fed. Cir. 1988) ("[A]n injunction should issue once infringement has been established unless there is a sufficient reason for denying it.").

212. 35 U.S.C. § 283 (2005) (emphasis added); *see also* Roche Prods., Inc. v. Bolar Pharm. Co., 733 F.2d 858, 865 (Fed. Cir. 1984) (emphasizing that section 283 made the issuance of an injunction discretionary).

213. This was part of the Patent Reform Act of 2005, H.R. 2795, 109th Cong. (2005). *See* Sirilla, Atkins & Goeller, *supra* note 207, at 588–89 n.5. The legislation was eventually unsuccessful.

214. 210 U.S. 405 (1908).

> away the privilege which the law confers upon the patentee. . . . Whether, however, . . . in view of the public interest, a court of equity might be justified in withholding relief by injunction, we do not decide.[215]

The Court's use of the terms "right" and "prevention" makes clear that it is, indeed, referencing the right to exclude. The privilege to which the Court refers is that of exclusive use, part of the patent grant that is shielded by the right to exclude. What is also clear from the Court's analysis is the implicit recognition that any judicial discretion is only the discretion to deny and not to grant, and that an injunction remains the default remedy when the right to exclude (property) is involved.[216] It is the existence of this discretion to deny an injunction that the Court seems unsure of, thereby implicitly endorsing the automatic rule in the context of patent infringements.

2. *The Supreme Court and the Automatic Injunction*

In *eBay*, the plaintiff MercExchange brought an action against the defendant, alleging infringement of its business method patent. The defendant had sought to license the patent from the plaintiff, but negotiations eventually broke down, and the plaintiff ultimately sued in the United States District Court for the Eastern District of Virginia.[217] At trial, the jury found the patent in suit to be valid and that the defendant had indeed infringed it. The district court, however, denied the plaintiff's motion for a permanent injunction to restrain the defendant's infringement, instead awarding damages. Applying the four-factor test to the facts before it, the court concluded that damages provided the plaintiff with an adequate remedy and would best serve the public interest.[218] Much of the district court's concern seems to have stemmed from three elements: one, that the patent in question was a business-method patent, the growing issuance of which had made the Patent and Trademark Office (PTO) introduce an additional level of review

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215. *Id.* at 430.

216. The Court additionally noted that "exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive." *Id.* at 429.

217. MercExchange, L.L.C. v. eBay, Inc., 275 F. Supp. 2d 695 (E.D. Va. 2003).

218. *Id.* at 710–15.

prior to issuance;[219] two, that the plaintiff was not actually using (working) the patent, but was merely seeking to license it;[220] and three, that the plaintiff had sought to license it to the defendant and made public its intent merely to seek damages.[221]

On appeal, the Federal Circuit characterized the district court's concerns as unpersuasive.[222] Restating the general rule that "courts *will* issue permanent injunctions against patent infringement absent exceptional circumstances," it reversed the district court's decision.[223] In so doing, it noted that injunctions were not reserved for inventors who intended to practice their inventions and that "the statutory right to exclude is equally available to both groups, and the right to an adequate remedy to enforce that right should be equally available to both as well."[224] The Supreme Court agreed to review the matter.[225]

During oral argument before the Court, Justice Scalia seemed most defensive of the Federal Circuit's approach. When the petitioner sought to argue that equity had systematically rejected the idea that relief might ensue categorically in particular circumstances, Justice Scalia retorted that this was not the case with the use of someone else's property, noting that "we're talking about a property right here . . . the right to exclude others . . . [t]hat's what the patent right is. And all he's asking for is 'give me my property back.'"[226] Later, in response to the government's intervention, Justice Scalia reemphasized the inconsistency between characterizing the right as a property right and providing only for damages, noting that this conveyed the message "[h]ere, take your money, and you . . . go continue to violate the patent."[227]

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219. *Id.* at 713–14.

220. *Id.* at 712.

221. *Id.* at 712–13.

222. MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1339 (Fed. Cir. 2005).

223. *Id.* (emphasis added).

224. *Id.*

225. eBay, Inc. v. MercExchange, L.L.C., 546 U.S. 1029 (2005) (granting certiorari to hear the case).

226. Transcript of Oral Argument at 6, *eBay*, 126 S. Ct. 1837 (No. 05-130).

227. *Id.* at 33.

Yet, when the Court eventually handed down its decision, its opinion side-stepped the property issue almost completely.[228] In three separate opinions (one for the Court and two concurrences), the Court reversed the Federal Circuit.[229] Without deciding on the facts of the case before it, the majority opinion merely reiterated that the grant (or refusal) of injunctive relief was a matter of equitable discretion, and one that had to be "exercised consistent with traditional principles of equity."[230] In other words, the Court reaffirmed the centrality of the four-factor test.

Chief Justice Roberts's short two-paragraph concurrence did little more. While noting the difficulty inherent in "protecting a right to exclude through monetary remedies," he nevertheless concluded that this "does not *entitle* a patentee to a permanent injunction or justify a *general rule* that such injunctions should issue."[231] This categorical language seemingly eliminates both variants of the automatic injunction rule discussed above—the weaker variant (converting the discretion to grant into a mere discretion to deny) and the stronger one (eliminating all discretion). Surprisingly, however, the Chief Justice's concurring opinion went on to draw a distinction between an exercise of equitable discretion and writing on a clean slate, observing that such discretion may indeed be limited by legal standards in order to ensure consistency.[232] This observation was presumably intended to set out the practical consequences of the Court's elimination of the automatic injunction rule: that even though the discretion does exist, to ensure consistency, it may only be applied according to well-established standards that result in consistent outcomes.

Justice Kennedy's concurring opinion added very little except to note that historical practice may provide courts with some guidance in the exercise of their discretion.[233] It attempted to identify the problems inherent in the automatic injunction rule—particularly that an injunction would grant undue lever-

228. *See* Richard A. Epstein, *The Structural Unity of Real and Intellectual Property*, PROGRESS ON POINT, Release 13.24, Oct. 2006, at 5 (characterizing the opinion as having made "complete intellectual hash" out of the balancing test).

229. eBay, Inc. v. MercExchange, L.L.C., 126 S. Ct. 1837, 1841–43 (2006).

230. *Id.* at 1841.

231. *Id.* at 1841 (Roberts, C.J., concurring).

232. *Id.* at 1841–42.

233. *Id.* at 1842 (Kennedy, J., concurring).

age to companies merely interested in obtaining licensing fees—that may be detrimental to the public interest.[234]

The Court was seemingly motivated by the need to curb the practice of companies making their revenues by simply licensing out inventions without actually working them—often referred to as "patent trolls." The petitioner made much of this during oral argument[235] and the Court seems to have been motivated by a similar concern, as Justice Kennedy's opinion makes amply clear.[236]

Whether legitimate or not, the concern over patent trolls ought to have been the subject of congressional intervention rather than judicial concern. The statute in its current form specifically recognizes the possibility of such trolling and expressly disables courts from denying a party relief for the refusal to license or use the patent in question.[237] In taking the matter into its own hands, the Court's opinion seemingly contradicts the express language of the statute. Property rights always introduce the problem of holdouts, and when this remains a genuine concern, legislative—not judicial—intervention can alleviate the problem.[238]

Potentially even more significant is the difficulty in reconciling the Court's decision in *eBay* with its decision in *Continental Paper Bag*. It is probably for this reason that the opinions make almost no reference at all to that case, even though the Court *suo moto* requested to be briefed on the matter and in fact heard oral argument on the same. The single isolated reference to the case is used to make the point that the district court's position—denying the patentee an injunction categorically because of its attempt to license the invention—was impermissible.[239] The Court thus implicitly affirmed its prior position in *Conti-*

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234. *Id.* at 1842–43.

235. *See, e.g.*, Transcript of Oral Argument at 25–26, *eBay*, 126 S. Ct. 1837 (No. 05-130).

236. *eBay*, 126 S. Ct. at 1842 (Kennedy, J., concurring).

237. 35 U.S.C. § 271(d)(4) (2005); *see also* Yee Wah Chin, *Unilateral Technology Suppression: Appropriate Antitrust and Patent Law Remedies*, 66 ANTITRUST L.J. 441 (1998); Mark A. Lemley, *The Economic Irrationality of the Patent Misuse Doctrine*, 78 CAL. L. REV. 1599, 1623–25 (1990).

238. For an overview of the holdout problem in the context of transaction cost economics, see Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553 (1993).

239. *eBay*, 126 S. Ct. at 1840–41.

nental Paper Bag, even while its express holding remains irreconcilable with it.

3. *The End of Automatic Injunctions: Intellectual Property and Beyond*

If there is one point that the Court's excessively narrow holding does affirmatively establish, it is that the automatic injunction rule for patents no longer exists. In its zeal to invalidate the stronger version of the rule, however, the Court eliminated the weaker version as well. The big question is whether its holding applies beyond the realm of intellectual property, to tangible property as well.[240]

The Court's ruling now requires courts to apply the traditional four-factor test, even after the issues of validity and infringement have been found for the plaintiff-patentee. Part of the test requires the patentee to establish that "remedies available at law . . . are inadequate to compensate" for the injury.[241] The test is thus founded on the idea that, ordinarily, damages (compensatory remedies) are the default option, and exclusionary remedies (injunctive relief) are to be invoked only in extraordinary circumstances. The weaker version of the automatic injunction rule would have merely altered the default by, in some sense, shifting the burden onto the defendant-infringer

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240. In an *amicus* brief filed by fifty-two intellectual property law professors in support of the petitioners' position in *eBay*, the argument was made that such a hierarchy was well-established in the cases of real and chattel property as well. As they observed:

> Courts apply the traditional principles of equity to real and personal property, and consider such factors as adequate remedy at law, the balance of hardships to the parties, and the public interest in deciding whether to grant an injunction. . . . Courts regularly award damages rather than injunctive relief against invasion of real property when the circumstances warrant.

Brief *Amici Curiae* of 52 Intellectual Property Professors in Support of Petitioners at 4, eBay Inc. v. MercExchange, L.C.C., 126 S. Ct. 1837 (2006) (No. 05-130), 2006 WL 1785363. For a foreword to the brief, published later, see Robert P. Merges, *Introductory Note to Brief of* Amicus Curiae *in* eBay v. MercExchange, 21 BERKELEY TECH. L.J. 997 (2006).

Interestingly, another brief filed by various law and economics professors in support of the respondents' position points out that the above-stated position was based on a misunderstanding and overreading of the law. *See* Brief of Various Law & Economics Professors as Amici Curiae in Support of Respondent at 10–11, eBay v. MercExchange, 126 S. Ct. 1837 (2006) (No. 05-130), 2006 WL 639164.

241. *eBay*, 126 S. Ct. at 1839.

to prove that injunctive relief was inappropriate in light of the circumstances. The holding effectively reintroduces the ancient remedial hierarchy that equity practice had come to dilute significantly over the course of the last century or so, specifically in relation to property rights.

Most importantly, the Court's holding is not restricted to the domain of patent or, indeed, intellectual property law, and would seemingly apply to automatic injunctions in the context of tangible property as well. The logic of the Court's rejection of the rule was the need to treat injunctive relief in the context of patents on equal terms with injunctive relief in other contexts. The Court's observation that the traditional factors "apply with equal force" to patent disputes is aptly indicative of the same.[242] Additionally, and perhaps of more relevance, is that in support of its holding that patent injunctions need to follow the traditional test, the Court relied on two cases, neither of which had *any connection* whatsoever to patents or intellectual property, but nonetheless did involve automatic injunctions.[243] Consequently, there remains good reason to believe that the Court's holding applies to the entire gamut of automatic injunctions, not just those related to patents.

Under this reading of *eBay*, the automatic injunction rule—in both variants and in connection with both intellectual and tangible property—stands abrogated. In its place, the traditional four-factor test and the preference for damages to all other remedies remains the norm.

4. *Moving to Efficient Infringement (and Trespass?)*

If the absence of a direct recourse to specific performance in the context of contract law serves as doctrinal evidence of a theory of efficient breach, does the *eBay* holding now signal a move towards a normative theory of efficient trespass or infringement in the context of property rights?

The four-factor test, with its emphasis on inadequacy and irreparability, has long been understood as involving little more

242. *Id.*

243. *See id.* The cases cited were *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), which involved the issuance of an injunction to restrain water pollution, and *Amoco Production Company v. Gambell*, 480 U.S. 531 (1987), which involved an injunction for noncompliance with a statute aimed at preserving lands in Alaska.

than a cost-benefit analysis.[244] In situations where it is inefficient to coerce performance of the contract, courts award damages. If this is precisely what the four-factor test entails, then mandating a rigid adherence to it in the context of property implies a similar emphasis on efficiency.

To be sure, the idea of "efficient trespass" or "efficient conversion" has been in existence for a long time, with some using it as a logical extrapolation of the efficient breach theory to illustrate the incompatibility of the theory with the idea of property.[245] This approach, however, tracks the remedial emphasis on the right to exclude; as we have seen, the centrality of the right to exclude does not derive from its actual enforcement. Others have raised the idea of efficient trespass in the context of other property doctrines (such as adverse possession),[246] but have stayed clear of offering a normative account of the theory, given the general structure of equity practice before *eBay*.[247]

Even if one doubts that the Court's holding has implications outside of intellectual property, within that context at least, it certainly signals a move towards a doctrine of efficient trespass of intangibles, or of efficient infringement.[248] In situations where the infringement of a patent (or other intellectual property) right appears to have short- and possibly long-term efficiency gains (especially in the social welfare sense), courts are now not just *allowed* but actually *mandated* to avoid granting

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244. *See* EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS 41 (1989); *see also* Kronman, *supra* note 139, at 351; Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 366–67 (1984).

245. *See, e.g.*, Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 13–14 (1989) (speaking of "efficient appropriations" and "efficient theft"); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 963–64 (1982) (noting the efficient theft argument).

246. *See* Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037 (2006).

247. *Id.* at 1081 n.164 ("It bears emphasis that I am not advocating a generalized normative theory of 'efficient theft.'"). For a more recent attempt, however, see Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. (forthcoming 2008) (manuscript at 3) (arguing that courts should look to the "costs and social value" involved in obtaining additional information about property rights in choosing between property and liability rule protection).

248. For more on this idea and its pros and cons, see Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655 (1994), and Julie S. Turner, Comment, *The Nonmanufacturing Patent Owner: Toward a Theory of Efficient Infringement*, 86 CAL. L. REV. 179 (1998).

exclusionary relief. This is borne out most distinctively in the Court's concern with patent trolls—entities that hold the right without actually using it directly. Even though the statute explicitly recognizes the possibility of such activity and requires courts to avoid factoring it into their decision on remedies,[249] the Court thought it appropriate to incorporate the matter into its standard analysis. Factoring in trolling is undoubtedly an efficiency or utilitarian calculation, premised on the belief that the public is somehow benefited by the actual working of a patent (even if by an infringer), rather than its non-working.

The move from trolling in the intangible world to other obvious utility-enhancing activities in the context of realty and chattels is not really that difficult. Take the case of an absentee landowner and a squatter (assuming of course, that the period of limitation for adverse possession has not passed), or that of a landowner who seeks to prevent someone (or the public) from crossing his land for reasons that cannot be justified on economic terms.[250] In each of these cases, the four-factor test would presumably militate against the grant of injunctive relief. In some areas of property doctrine, equity already recognizes just such an efficiency calculation in its grant of relief—the most obvious being that of unintentional building encroachments.[251] Its direct incorporation into the four-factor test, however, makes the efficiency trade-off applicable to all property disputes.

eBay thus signals a clear move towards efficiency concerns influencing the grant of injunctive relief in cases involving property and intellectual property rights. The previous presumption that property rights were intrinsically efficiency enhancing, which, therefore, obviated the need for a secondary

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249. 35 U.S.C. § 271(d) (2005) ("No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (4) refused to license or use any rights to the patent . . . ."). Indeed, this affirmatively establishes the nonexistence of a duty to *use* the patented invention at all—a principle that even before codification had been established in case law. *See* Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, *Unilateral Refusals to License*, 2 J. COMPETITION L. & ECON. 1, 2–3 (2006).

250. *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997) (involving a landowner who sought to prevent defendant from traversing unused field to get to the other side, even though it was the shortest possible route and would not have interfered with the owner's actual use).

251. *See* Merrill & Smith, *supra* note 158, at 54–55.

efficiency calculation at the time of their enforcement, no longer holds true.

Regardless of whether *eBay*'s formulation of equity's test for injunctions is consistent with the historical trend in the area, the Court's holding does conclusively establish that the remedial conception of the right to exclude *is not* what property entails. Ironically, then, at the same time that the Court's holding moves the law in the direction of a utilitarian approach to injunctive relief, it also rejects an exclusively consequentialist understanding of the right to exclude. To be sure, the Court did not hint at what an alternative conception of the right might be—and perhaps with good reason.

Central to the ambivalence surrounding *eBay* is that patents remain (by both structure and intent) a form of private property built around the right to exclude. Yet, if this did not entail exclusion by injunctive relief, it seemed futile, at first blush, to continue emphasizing the centrality of exclusion. The inward-looking conception of the right to exclude—deriving from inviolability—provides a complete answer to this apparent disconnect. Viewed in this light, the Court in *eBay* might have implicitly acknowledged the simple, yet often-overlooked reality that property (and with it the right to exclude) is a meaningful institution *independent* of its judicial enforcement.

CONCLUSION

Taken at one time as axiomatic of what the idea of property meant, the right to exclude has in recent times receded into the background. While the antiformalism that has characterized the modern property discourse has undoubtedly contributed to this development,[252] it is also the result of the insufficient attention that courts and scholars have paid to disaggregating the idea and its meaning. Consequently, it has indeed become increasingly common to characterize the idea as a "trope," or rhetorical epithet, devoid of functional relevance.[253]

Although the Court's holding in *eBay* may be interpreted by some as contributing to this move, this Article has argued that *eBay* actually directs attention to what the right to exclude has

252. *See* Merrill & Smith, *supra* note 2.

253. *See, e.g.*, Rose, *supra* note 1, at 604 (characterizing the right to exclude and the "Exclusivity Axiom" as a trope).

meant all along. Understanding the institution of property to be grounded in the norms associated with the principle of inviolability casts the right as nothing more than the correlative of the duty to keep away from a resource over which the norm applies. This, in turn, focuses attention on the role of property (and ownership) as a coordination device for scarce and rival resources. Counterintuitively, then, the Court's holding strengthens the normative significance of the idea.

The holding in *eBay* closed the door on but one conception of the right—the remedial version. The automatic injunction rule that the Court rejected had resulted in the right to exclude coming to be understood as the right to exclusionary relief. Yet, just as the absence of a right to specific enforcement is not considered indicative of the nonexistence of a contractual right to performance, the absence of a right to exclusionary relief has similarly little bearing on the centrality of exclusion to property. The primary right conception of exclusion, much like the primary right conception of contractual performance, derives its normative content from an underlying moral ideal on which the institution of property bases itself: inviolability. Inviolability represents a principle central to peaceful coordinated social existence, and the right to exclude, as a correlative to the duties that derive from it, converts it into a legal (as opposed to moral) norm.

The right to exclude, then, remains the defining ideal of property. If the idea of property is understood outside of its remedial (or enforcement) context, and instead is viewed as a social institution that coordinates access to and use of scarce resources, the primary or correlative right conception begins to make logical sense. Recasting the right to exclude along these lines, it is hoped, will contribute towards moving property debates away from their singular emphasis on remedialism and towards a broader analytical framework for the institution.

A NEW ARCHITECTURE OF COMMERCIAL SPEECH LAW

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INTRODUCTION

The commercial speech component of First Amendment doctrine is frequently considered an area in need of reform, and possibly even of demolition. The reasons advanced for protecting commercial speech often seem obscure. The Supreme Court, in a series of confusing and sometimes inconsistent

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opinions,[1] has not been very helpful in explaining such justifications. This Article offers a systematic defense of why commercial speech is deserving of First Amendment protection and how, with minimal doctrinal change, commercial speech law can be simplified and made coherent. Part I outlines the difficulties the Court has had in this area and explains why the question of justification for constitutional protection remains salient more than thirty years after constitutional protection for commercial speech first began.

Part II defends the general framework of commercial speech law; namely, that commercial speech is entitled to substantial but reduced protection under the First Amendment as a separate doctrinal category. This Article offers two independent but mutually reinforcing justifications for this framework. First, this Article argues that commercial speech furthers a variety of listener interests with which the First Amendment should be concerned. Second, even if one rejects the First Amendment principles that counsel in favor of protecting commercial speech as such, some justifications for regulation of *any* speech—most importantly, that speech can be regulated because listeners might come to agree with it—must be forbidden absent an especially compelling reason.[2] Such regulations would directly undermine the neutrality that the government must exercise toward the dissemination and discussion of ideas, and substitute the government's own judgment for that of individual citizens.[3]

Part III suggests that the Court has accidentally stumbled onto the correct treatment of commercial speech in another area. *R.A.V. v. City of St. Paul*[4] provides the appropriate schemata to protect commercial speech, subject to the state's legitimate interest in regulating speech attendant to economic transactions, and to preclude content-based or viewpoint-based regulations of disfavored speech. It achieves the former by requiring speech regu-

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1. *See infra* Part I.

2. According to what David Strauss calls the "persuasion principle," the government "may not justify a measure restricting speech by invoking harmful consequences that are caused by the persuasiveness of the speech." David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334 (1991).

3. *See* Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) ("There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard." (footnote omitted) (quotation marks omitted)).

4. 505 U.S. 377 (1992).

lation to be based on the reason for the categorical exception—that is, the reason that commercial speech may be constitutionally treated differently (subject to other limited exceptions).[5] This assures that commercial speech regulations may exist only where the government can point to an interest related to the reason commercial speech is subject to less protection than core non-commercial speech. This *R.A.V.*-inspired structure serves the latter by eliminating any possibility of discrimination in the same way—thus, the only acceptable justifications for restrictions on commercial speech are ones related to the particular class of harms that commercial speech poses.

I. THE LINGERING PROBLEM OF COMMERCIAL SPEECH: THE MEANING OF *CENTRAL HUDSON*

History reveals deep divisions over the appropriate treatment of commercial speech, especially regarding application of the leading test developed in *Central Hudson*[6] and whether it provides appropriate guidance for courts. This Part provides a brief overview of the major commercial speech cases decided by the Supreme Court. Although the Court initially offered an array of justifications for First Amendment protection of commercial speech, the Court's recent discussion of the topic has been confusing and internally contradictory. The Court's inability to articulate a coherent or consistent rationale for the protection of commercial speech is the principal reason that commercial speech law is an unsettled area of First Amendment doctrine.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[7] the Court's first foray into commercial speech protection, the Court voided a statute prohibiting pharmacists from advertising prescription drug prices.[8] To the majority, it was not dispositive that the interested parties had only an economic motivation, nor that the speech was perhaps not "newsworthy" in a general sense.[9] Indeed, the Court noted that

5. *Id.* at 383–84.

6. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

7. 425 U.S. 748 (1976). Redish has called *Virginia Pharmacy* the "watershed decision" of commercial speech. MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 14 (2001).

8. *Virginia Pharmacy*, 425 U.S. at 749–50, 770.

9. *Id.* at 761–62.

the interests of the parties "in the free flow of commercial information . . . may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate."[10]

The Court articulated a series of justifications for First Amendment protection of the disputed speech. The information pharmacists would provide—the price of drugs—has an important economic impact, for the suppression of that information hurts most "the poor, the sick, and particularly the aged," who are least able both to pay higher prices and to search for lower ones.[11] Furthermore, society generally has an interest in the free flow of commercial information; because the practices of businesses and the products they make available are often issues of substantial public import, a "general public interest" may be served by commercial speech.[12] Finally, as long as economic decisions are made privately in a capitalist system, it is in the public interest that those decisions be made on the basis of maximum available information, both so that they be made efficiently and so that people may be aware of the advantages and disadvantages of the present system in the event of proposed changes.[13]

The Court then addressed the proffered justifications for the ban. It summarily rejected Virginia's claim that the ban would lead to reduced professional standards stemming from price competition. Because Virginia directly regulated the practice of pharmacies, pharmacists would be required to operate at a high level even in the absence of restrictions on advertising.[14] The only interest furthered by the advertising ban was to keep people ignorant of the real prices pharmacists charge. To the extent that the statute affected professional standards at all, it did so "only through the reactions it is assumed people will have to the free flow of drug price information. . . . [I]f the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up

10. *Id.* at 763.

11. *Id.* at 763–64.

12. *Id.* at 764 (noting the public importance of advertisements touting the availability of abortions, of artificial fur coats as an alternative to the extinction of fur-bearing animals, and the use of domestic rather than foreign labor to increase job opportunities available to Americans).

13. *Id.* at 765.

14. *Id.* at 768–69.

on his offer by too many unwitting customers."[15] The Court continued:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.[16]

Commercial speech may, of course, be regulated—by reasonable time, place, and manner restrictions; to the extent that it is false or misleading; or when it proposes an illegal transaction.[17] Such partial protection is justified, in the Court's view, primarily because commercial speech is typically subject to verification by its speaker, and is generally less susceptible to chilling effects because of the economic motivations supporting it. Rules imposing liability for falsehood are therefore unlikely to silence the speaker inadvertently.[18] Nonetheless, a state cannot "suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."[19]

Virginia Pharmacy, then, appeared to offer three grounds for First Amendment protection of commercial speech: (1) the interest of an individual consumer "in the free flow of consumer information"; (2) a societal interest in the information provided by commercial speech that may, and often will, touch on a matter of public political concern; and (3) another societal interest in efficient individual decision making within a capitalist system that relies upon decentralized rational economic choice.[20] In addition, implicit in *Virginia Pharmacy* is an argument based on First Amendment principles more generally rather than the value of commercial speech itself: that the First Amendment limits the means by which government can achieve its legiti-

15. *Id.* at 769.
16. *Id.* at 770.
17. *Id.* at 771–72.
18. *Id.* at 772 n.24.
19. *Id.* at 773.
20. *Id.* at 748, 763–65.

mate goals. More specifically, the Court seemed to believe that the First Amendment clearly forbids achieving a regulatory goal by suppressing information relevant to citizens' choices.[21]

Parsing and evaluating the Court's rationales is no easy task. The first and third interests appear to be largely the same. Although treated separately in the opinion, the individual consumer interest is largely an interest in securing commodities at the most efficient prices,[22] and the third interest merely applies that principle to society as a whole. Understood this way, it is difficult to see why these interests, legitimate as they may be, are First Amendment concerns.[23] The government maintains wide latitude to fashion economic relationships; to review those decisions under the auspices of the First Amendment seems strange. Even if this rationale is contingent on the American economy remaining predominantly capitalist, it still appears to require the government to structure its speech-related laws, especially regulation of advertising, in such a way as to maximize economic efficiency.[24] Although the First Amendment might serve such interests, this interpretation seems a far cry from the interests that the First Amendment has traditionally protected, and would directly conflict with what the Court has said about the relationship between other constitutional provisions and economic matters.[25]

The second argument, as well as the argument from First Amendment principles, seem to be more promising. Both ad-

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21. *Id.* at 770 ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.").

22. *Id.* at 763–64 ("When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.").

23. *See* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 9–10 (2000); *see also* Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 1–2 (1979).

24. Some scholars accept this theory. *See, e.g.*, Fred S. McChesney, *De*-Bates *and Re*-Bates: *The Supreme Court's Latest Commercial Speech Cases*, 5 SUP. CT. ECON. REV. 81 (1997). Also, it is relatively well accepted among economics scholars that advertising usually does increase economic efficiency. *See, e.g.*, Anil Kaul & Dick R. Wittink, *Empirical Generalizations about the Impact of Advertising on Price Sensitivity and Price*, 14 MARKETING SCI. 3, G151 (1995); Tim R. Sass & David S. Saurman, *Advertising Restrictions and Concentration: The Case of Malt Beverages*, 77 REV. ECON. & STAT. 1, 66 (1995) (discussing the effects of advertising bans on market concentration).

25. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 491 (1955) (requiring only a "rational relation").

vertising and speech by corporations often concern matters of public importance. A complete ban on such speech might limit public access to information about matters of democratic concern. A ban might also limit access to economic facts, which are clearly relevant to political decisions about desirable forms of economic regulation. In extreme cases, an absolute ban on commercial speech might result in public exposure to only one side of a public debate: Who but tobacco companies would defend smoking, and who but Nike would defend its employment practices?[26]

The argument from First Amendment principles reflects more general, traditionally accepted First Amendment concerns. One might consider it a basic principle of First Amendment law that the government is usually forbidden to achieve its regulatory goals by suppressing information where its only fear is that people may be persuaded by that information to believe or behave differently.

Virginia Pharmacy's discussion, therefore, is at best inchoate. The Court gives several reasons for its holding, but it is not clear that the reasons can coexist, or if they are even legitimate First Amendment considerations.

Unfortunately, later cases did little to clarify matters.[27] In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[28] the Court struck down a ban on certain types of advertisements by public utility providers that were said to increase overall energy use.[29] After a review of its precedents, the Court summarized its approach to commercial speech:

> For commercial speech to come within [the scope of First Amendment protection], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries

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26. *See, e.g.*, Kasky v. Nike, Inc., 93 Cal. Rptr. 2d 854, 857 (Ct. App. 2000), *rev'd*, 45 P.3d 243 (Cal. 2002).

27. The Court, however, applied the *Virginia Pharmacy* rationale vigorously in both *Bates v. State Bar*, 433 U.S. 350 (1977), to strike down bans on lawyer advertising, and in *Linmark Association v. Township of Willingboro*, 431 U.S. 85 (1977), to strike down a ban on for-sale signs to prevent "white flight." In both instances, the Court found the restrictions constitutionally infirm because they restricted relevant commercial information to consumers merely on the basis of what they might do after learning it. *Bates*, 433 U.S. at 364–65; *Linmark*, 431 U.S. at 91–92.

28. 447 U.S. 557 (1980).

29. *Id.* at 569.

> yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[30]

Because the speech at issue obviously concerned a legal transaction and was not misleading,[31] the Court accepted the state's interest in conservation and cost control as substantial, and held that the former interest was directly advanced by the regulation.[32]

When the Court turned finally to the "critical inquiry"[33] of fit, a different approach to evaluating commercial speech restrictions seemed to appear. In *Virginia Pharmacy,* one of the regulation's flaws was that it achieved its goal by limiting the public's access to information; the Court rejected not the utility of that approach but its basic legitimacy.[34] It would seem that the same problem existed in *Central Hudson*; New York's justification for the advertising ban was precisely that fewer people will perform an activity if they have less information about it. Indeed, the Court noted in a footnote that "special care" was required to review "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy."[35]

The Court's rationale, however, appeared to follow neither *Virginia Pharmacy*'s earlier analysis nor the caveat in the *Central Hudson* footnote. Instead, the Court asserted that the ban was broader than necessary because it failed to distinguish between advertising that would and would not increase overall energy use.[36] In addition, the Court argued that more limited speech restrictions, such as requiring the presentation of information about efficiency and expense, might adequately advance the proffered goal.[37]

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30. *Id.* at 566.

31. *Id.*

32. *Id.* at 568–69 ("There is an immediate connection between advertising and demand for electricity."). The Court has not always been so willing to make such an assumption. *See* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 189 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 506–07 (1996) (plurality opinion).

33. *Central Hudson,* 447 U.S. at 569–70.

34. *See supra* notes 7–19 and accompanying text.

35. *Central Hudson,* 447 U.S. at 556 n.9.

36. *Id.* at 570.

37. *Id.* at 570–71.

This new approach, which seemed to abandon *Virginia Pharmacy*'s categorical rejection of commercial speech regulations that seek to influence consumer behavior by restricting the amount of information available, reappeared in the Court's 5-4 decision in *Posadas de Puerto Rico Associates v. Tourism Co.*[38] There, the Puerto Rican government had legalized casino gambling but forbade casinos from advertising to the local population, instead requiring them to direct solicitations only toward tourists or other visitors.[39] In many ways, the case was identical to *Central Hudson*; Puerto Rico asserted an interest in decreasing demand for a legal commodity (casino gambling) and chose to achieve that goal by reducing the amount of information available to certain members of the population. Again, the Court agreed that the government's interest "in the health, safety, and welfare of its citizens" was substantial.[40] And once again, the Court was prepared to accept the legislature's "belief" that a reduction in advertising would lead to a reduction in demand.[41] The Court in *Posadas*, however, held that the statute satisfied the last prong of the *Central Hudson* test. Specifically, the Court held that the restriction was no more extensive than necessary because it was directed only at that segment of the population among which the government wished to reduce demand.[42]

Posadas had argued that, because counterspeech—speech encouraging residents not to gamble—might be as effective as a speech ban, it was required in lieu of the legislature's chosen means. The Court rejected this argument, holding that "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective."[43] Furthermore, because the legislature concededly could ban the operation of casinos altogether, it was not constitutionally prohibited from allowing them to operate without the ability to advertise in certain respects:

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38. 478 U.S. 328 (1986).

39. *Id.* at 335–36; *see also* Philip B. Kurland, Posadas de Puerto Rico v. Tourism Company: "*'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful*," 1986 SUP. CT. REV. 1, 3–6 (discussing procedural history and historical background of Puerto Rico's gambling regulations).

40. *Posadas*, 478 U.S. at 341.

41. *Id.* at 341–42.

42. *Id.* at 343.

43. *Id.* at 344.

> In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.
>
> . . . It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.[44]

More recently, the division over the constitutional justification for commercial speech protection resulted in the fractured opinion of *44 Liquormart, Inc. v. Rhode Island*.[45] There, the Court struck down Rhode Island's ban on price advertising by liquor stores, but did so without any majority rationale. Joined by Justices Kennedy, Souter, and Ginsburg, Justice Stevens reviewed and attempted to revise *Central Hudson*'s holding. Justice Stevens began by noting the *Central Hudson* majority opinion's warning that "regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy" may require more stringent review and that absolute bans "could screen from public view the underlying governmental policy."[46]

Joined by Justices Kennedy and Ginsburg, Justice Stevens argued that higher scrutiny was required of this law than normal commercial speech doctrine would allow. State regulation of misleading, deceptive, or otherwise flawed commercial speech in its communicative form requires only mid-level review, for "its regulation is consistent with the reasons for according constitutional protection to commercial speech."[47] The complete ban of truthful, nonmisleading speech, however, forecloses other avenues of communication and cannot be justified by the

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44. *Id.* at 345–46; *see also* William W. Van Alstyne, *To What Extent Does the Power of Government to Determine the Boundaries and Conditions of Lawful Commerce Permit Government to Declare Who May Advertise and Who May Not?*, 51 EMORY L.J. 1513, 1529–30 (2002) (characterizing this decision as part of then-Justice Rehnquist's general view that sometimes "a litigant . . . must take the bitter with the sweet" (quoting Arnett v. Kennedy, 416 U.S. 134, 153–54 (1974) (Rehnquist, J., dissenting))).

45. 517 U.S. 484 (1996).

46. *Id.* at 500 (plurality opinion of four Justices) (quotation marks omitted) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 n.9 (1980)).

47. *Id.* at 501 (plurality opinion of three Justices).

"'commonsense distinctions'" between commercial and noncommercial speech.[48] Such bans usually serve only to achieve a governmental policy by stealth, hiding information from people; they rely on the "offensive assumption" that people will respond irrationally to truthful information, and also "impede debate over central issues of public policy."[49]

Joined again by Justice Souter, the Stevens plurality then reviewed the statute with "special care,"[50] evaluating Rhode Island's interest in reducing alcohol consumption by keeping consumers ignorant of price information. Here, the plurality rejected the state's interest for lack of substantial proof: "the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption."[51] Under this higher standard of review, such "speculation" failed to suffice. Furthermore, alternative means would be at least as effective; specifically, the Court maintained that price controls, per capita purchase limits, or education campaigns were likely to be as effective as the state's preferred solution.[52] Even under the lower *Central Hudson* standard, the plurality added, the state would fail to meet its burden.[53]

A different four-Justice plurality, substituting Justice Thomas for Justice Souter, rejected the *Posadas* argument that the legislature was free to choose the most efficient means of achieving temperance, as well as the related "greater-includes-the-lesser" principle.[54] Finally, the same plurality refused to find a "vice" exception for commercial speech regulation, relying on *Rubin v. Coors Brewing Co.*[55] for the proposition that the same commercial speech analysis applies regardless of the product regulated.[56]

The other Justices took varying approaches. Justice Scalia essentially abstained from the decision, expressing sympathy

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48. *Id.* at 502–03 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976)).

49. *Id.* at 503.

50. *Id.* at 504 (plurality opinion of four Justices) (quoting *Cent. Hudson*, 447 U.S. at 566 n.9).

51. *Id.* at 506.

52. *Id.* at 507.

53. *Id.* at 507–08.

54. *Id.* at 508–13.

55. 514 U.S. 478 (1995).

56. 44 *Liquormart*, 517 U.S. at 513–14 (quotations omitted) (citing *Rubin*, 514 U.S. at 478, 482 n.2).

with the plurality's approach but remaining unwilling to endorse it without a broader inquiry into the historical meaning of both the federal and state freedom of speech clauses.[57] Justice Thomas, who concurred in the part of Justice Stevens's plurality opinion rejecting *Posadas*, would have gone further and overruled *Central Hudson*, at least where the asserted interest "is to be achieved through keeping would-be recipients of the speech in the dark."[58] According to Justice Thomas, the plurality approach would have licensed the speech restriction had it more effectively achieved its goal, which would have meant, perversely, that the state could more successfully prevent consumers from receiving the information.[59]

The Court retreated from this doctrinal chasm in later commercial speech cases and applied *Central Hudson* in the now-familiar way, asking whether the challenged regulation advanced the state's asserted interest without restricting more speech than necessary.[60] Still, the analytic questions of how commercial speech can be regulated and why it is entitled to protection remain problematic, even if they fail to rise to the surface. Most problematic is that *Central Hudson* offers no guidance on these issues. Its first prong, and by extension the First Amendment, fails to cover commercial speech if it is "misleading,"[61] even if its contribution to one or more goals might outweigh the potential for deception or confusion. Furthermore, *Central Hudson*'s second prong—the substantiality of the government's interest—does not contain any restriction on the sorts of goals the government may pursue. The Court seemed to struggle with this issue in *Central Hudson* itself: the three Justices who concurred in the judgment objected to the majority's

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57. *Id.* at 517–518 (Scalia, J., concurring in the judgment).

58. *Id.* at 523 (Thomas, J., concurring in part and in the judgment).

59. *Id.* at 523–24. Justice Thomas also faulted the plurality and Justice O'Connor's concurrence for effectively achieving the result he favored by holding that a regulation failed the *Central Hudson* test any time a direct ban on the product would be more effective in achieving the desired social policy, which would always be the case. *Id.* at 524–25.

60. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 367–68 (2002) (applying *Central Hudson* to strike down restrictions on commercial speech); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (same).

61. "Misleading" is a concept of indeterminate scope. *See* Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1 (1992) (criticizing false advertising suits because of the ambiguity of the concept of "misleading").

analysis because it allowed the government to suppress information in order to control citizens' behavior.[62] The *Posadas* dissenters raised the same objection,[63] and Justice Stevens's attempt to revivify the caveat that the government has no legitimate interest in restricting information on the grounds that people may come to believe it failed for the lack of a fifth Justice in *44 Liquormart*.[64]

Finally, and perhaps most disconcerting, the third and fourth prongs of the *Central Hudson* test must do essentially all of the work, but they fail to provide any guidance for future cases. In this respect, consider the cases in which the Court has applied the *Central Hudson* test in striking down a commercial speech restriction. For example, a unanimous Court struck down the federal ban on beer alcohol labeling in *Rubin v. Coors Brewing Co.*[65] The Court accepted the government's proffered justification for the labeling ban but struck down the law on the grounds that the present scheme was so littered with exceptions that it could not possibly succeed in its goal.[66] But this approach creates perverse incentives for regulators. If the Court is willing to accept that reducing the amount of information available about a product will lead to decreased demand, and that this constitutes a substantial interest under *Central Hudson*, the obvious solution for the government is to make the informational ban more comprehensive. If one believes that commercial speech serves any constitutional interest, the likelihood of this strategy should raise concerns, because it will lead to speech regulations effecting a near-total blackout, for anything less might fail the third prong.[67]

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62. *See Cent. Hudson*, 447 U.S. at 574–75 (Blackmun, J., concurring in the judgment); *id.* at 581 (Stevens, J., concurring in the judgment).

63. *See Posadas*, 478 U.S. at 350–51 (Brennan, J., dissenting).

64. *See 44 Liquormart*, 517 U.S. at 496–98.

65. 514 U.S. 476 (1995).

66. *Id.* at 488. The Court undertook nearly identical analysis in *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173, 189–93 (1999) (striking down a broadcast ban on advertisements of private casino gambling).

67. *See 44 Liquormart*, 517 U.S. at 523–24 (Thomas, J., concurring in part and concurring in the judgment):

> Faulting the State for failing to show that its price advertising ban decreases alcohol consumption "significantly" . . . seems to imply that if the State had been *more successful* at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have

Any regulation aimed at reducing the use of a product by totally preventing commercial information from reaching consumers seems destined to fail *Central Hudson*'s fourth, tailoring prong. Massachusetts's blackout of tobacco advertisements in *Lorillard Tobacco Co. v. Reilly*[68] would surely have contributed to a decrease in smoking, assuming the link that the Court found between information and behavior was valid.[69] Yet, the Court struck down the Massachusetts ban under the fourth prong, because it unreasonably limited adults' access to tobacco information.[70] The Court performed this same bait-and-switch analysis in *Greater New Orleans Broadcasting Association v. United States*,[71] where it argued that an alternative reason for striking down a broadcast ban on gambling advertisement was that, even if the ban achieved its goal, it would eliminate too much truthful speech.[72] Additionally, Justice O'Connor's concurring opinion in *44 Liquormart*, joined by three other Justices, rejected Rhode Island's ban on liquor price advertising because other means of achieving the state's goal would have been equally effective.[73]

The Court might follow this approach because the Justices cannot agree on what constitutes a legitimate justification for the regulation and protection of commercial speech. Certainly, the chaos in *44 Liquormart* supports that inference. But not only does the Court's inability to reach consensus make its results unpredictable, in many cases the division also obscures the real reason that the Court struck down a given law. The *Central Hudson* test is extremely malleable in large part because the mutually antagonistic nature of the third and fourth prongs blurs the genuine issues. Therefore, the Court can use the test to defeat objectionable legislation without articulating any set

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been upheld. This contradicts *Virginia Bd. of Pharmacy*'s rationale for protecting "commercial" speech in the first instance.

Id.

68. 533 U.S. 525 (2001).

69. *See id.* at 556–61 (finding that the state's restrictions satisfied the third prong of *Central Hudson*).

70. *Id.* at 562–66. The dissenters also would have required additional inquiry into whether the scope of the ban was too broad. *Id.* at 590 (Souter, J., concurring in part and dissenting in part); *id.* at 599–603 (Stevens, J., concurring in part, concurring in the judgment in part, and dissenting in part).

71. 527 U.S. 173 (1999).

72. *Id.* at 194.

73. *44 Liquormart*, 517 U.S. at 530 (O'Connor, J., concurring in the judgment).

of coherent limits for commercial speech doctrine. And, of course, if there is no articulable reason why commercial speech is protected, how can any regulation proscribe too much speech? Too much for what?

II. THE CONSTITUTIONAL CASE FOR PROTECTING COMMERCIAL SPEECH

A. The Value of Commercial Speech

This Part describes the reasons why commercial speech is thought to have constitutional value and attempts to defend some of those rationales. Rather than attempting to provide a unitary account of the reasons why commercial speech is protected, this Article follows the suggestion of Frederick Schauer that our conception of free speech might be multipartite—"that free speech is not one right, liberty, or principle, but rather a collection of distinct (although perhaps interrelated) principles."[74] In Professor Schauer's words, the First Amendment might be "the umbrella under which are located a number of more or less distinct separate principles, each with its own justification, and each directed towards a separate group of problems."[75] This view stems in part from the recognition that neither the history nor the text of the Amendment provides any real guidance in evaluating its meaning, especially in the commercial speech context.[76] This Article extends that argument to support the proposition that commercial speech and First

74. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 114 (1982).

75. Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1303 (1984) [hereinafter Schauer, *Must Speech*]; *see also* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 277–78 (1981) [hereinafter Schauer, *Categories*].

76. *See* Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 304–05 (1978); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 633 (1990); Schauer, *Must Speech*, *supra* note 75, at 1298 & n.72. *See generally* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960). This range of commentators suggests that this proposition is one of general consensus, even among those with very different views on commercial speech. *Cf. 44 Liquormart*, 517 U.S. at 517–18 (Scalia, J., concurring in part and concurring in the judgment) (noting the First Amendment's ambiguous language and looking to the history of commercial speech).

Amendment doctrine might be justified by several independent, though perhaps interrelated, theories.

Three caveats are in order, however, to dispel any confusion. First, the various theories must come to identical or similar conclusions or be capable of giving way to each other in reasoned ways. If the justifications for protecting commercial speech require different results in a substantial number of relevant cases, then it seems that we must abandon this quest. Second, this approach must be distinguished from an argument for First Amendment balancing in commercial speech law.[77] In some cases, the many theories of First Amendment protection could lead to a required balancing of conflicting interests. As will become clear, this Article argues for a much more formal rule for evaluating commercial speech regulations.[78] It does so out of a belief that neutral rules can and should be fashioned to clarify First Amendment doctrine, to minimize the influence of individual judges' preferences, and to promote the constitutional legitimacy of the unelected judiciary.[79] Although even the most formal rule will not be able to predict future cases reliably, or totally eliminate the possibility of subjective valuations by judges, the sort of rule this Article proposes substantially answers the legitimacy concerns posed by First Amendment jurisprudence. The remainder of this section discusses in detail the two main theoretical justifications for commercial speech—democratic and individual[80]—explicating and critiquing their rationales, and evaluating their usefulness as defenses of commercial speech.

1. *The Democratic Rationale*

Historically, the intellectual defense of the First Amendment has been founded on a linkage between free speech and our system of democratic government. The most influential exponent of this theory in the early years of the explosion in First Amendment protection that occurred during the latter half of

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77. *See, e.g.*, Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1253–55 (1984).

78. *See infra* Part III.B.

79. *See* BeVier, *supra* note 76, at 314–17; Bork, *supra* note 76, at 3.

80. I take these categories with modification from Daniel Halberstam. *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999).

the twentieth century was Alexander Meiklejohn, especially through his book, *Free Speech and its Relation to Self-Government*.[81] Meiklejohn argued that the guarantee of free speech must be understood in relation to the sort of democratic government that the Constitution establishes.[82] He analogized the American democracy to the classic New England town meeting: "Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others."[83] Town meetings enable those who vote on proposals discussed during such gatherings to "know what they are voting about. . . . When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger."[84] To that end, democratic debate must be free of any restriction on the opinions or facts expressed, lest self-government be defeated.

Implicit in this rationale for free speech, however, is also a limitation: "The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest."[85] On the democratic view, therefore, it becomes critical to draw a clear line between matters of public and private relevance; because freedom of speech extends no further than what is necessary to allow informed democratic participation, we need to know exactly how far that is. For commercial speech, the pivotal question is what value, if any, does commercial speech have for informed decision making about public issues? Relatedly, one might also ask if the restriction of commercial speech might otherwise bias or obfuscate democratic outcomes or transparency.

In *Virginia Pharmacy*, the Court appeared to link commercial speech to this democratic rationale. First, it argued that some advertisements for commercial transactions have important public policy implications:

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81. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

82. *Id.* at 18.

83. *Id.* at 22.

84. *Id.* at 25–26.

85. *Id.* at 94.

> [A]dvertisements stating that referral services for legal abortions are available, that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals, and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs.[86]

From this perspective, information regarding the existence and manner of commercial services and production may speak to important policy concerns. The Court offered a few examples, but they could easily be multiplied: a restaurant advertising its racially integrated dining facilities and staff before the passage of the Civil Rights Act of 1964, a company promoting its donation of a portion of its proceeds to disaster relief, or a school's forgoing government funding to avoid conditions attached to the money. Were any of these statements to be prohibited, not only would a certain element of democratically relevant information be unavailable to people, but there would also be a legitimate fear that the government was seeking to suppress information concerning a particular commercial activity out of distaste for the values that it represents, and to ensure that more people did not partake in the activity and thereby increase its appeal. As Robert Post has said:

> [P]ublic discourse . . . is . . . an arena suffused with intense and contentious articulations of collective identity. Within public discourse, heterogeneous and conflicting visions of national identity continuously collide and reconcile. These visions may or may not have immediate policy implications, but they are nevertheless highly significant for the general orientation of the nation. Visions of the good life articulated within commercial advertisements are relevant to this process.[87]

Second, the Court in *Virginia Pharmacy* noted that commercial information of a more mundane sort—for example, information about prices or available products—might be relevant as a cue to people concerning how the economy is functioning on a larger scale: "[The free flow of commercial information] is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered."[88] Because the

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86. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 764 (1976) (citations omitted).

87. Post, *supra* note 23, at 11.

88. *Virginia Pharmacy*, 425 U.S. at 765.

economy is the subject of governmental regulation, information on how the economy functions, such as what goods and services it offers and at what prices, will be especially relevant to the public's opinion of how, if at all, that system needs to be changed. Commercial speech by corporations advertising their products is at least one substantial route, and perhaps the most effective route, by which such information may reach citizens.

Scholarly reaction to *Virginia Pharmacy*'s arguments in this vein was by no means uniformly positive. Lillian BeVier's 1978 article, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle,* following much of the analysis of Robert Bork's earlier work,[89] begins by accepting Meiklejohn's argument that the best available evidence of what the First Amendment is supposed to protect is found in the structure of the Constitution and the government that it establishes. According to Professor BeVier, "the constitutional process of self-government provides an indispensable clue to the meaning of the first amendment. . . . [T]he amendment protects the process of forming and expressing the will of the majority according to which our representatives must govern."[90] Applying that "political speech principle," Professor BeVier rejects commercial speech protection.[91] Thomas Jackson and John Jeffries, in a 1979 article criticizing *Virginia Pharmacy,* also reject commercial speech protection because of their embrace of a Meiklejohnian view of the First Amendment.[92] Although Professors Jackson and Jeffries initially purport to accept a broader notion of the principles justifying protection of speech,[93] it eventually becomes clear that their real problem with *Virginia Pharmacy* lies in the Court's failure to justify its holding by reference to the political speech principle.[94]

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89. *See* Bork, *supra* note 76.

90. BeVier, *supra* note 76, at 309.

91. *Id.* at 352–55.

92. Jackson & Jeffries, *supra* note 23, at 10–14.

93. *Id.* at 12–14.

94. This conclusion rests on two justifications. First, Professors Jackson and Jeffries argue that, because the state may ban the commercial activity, it may ban the advertising of it. *Id.* at 34–35. That proposition may be criticized both on logical grounds, *see* Shiffrin, *supra* note 77, at 1228 n.108, and on the grounds that it assumes that political speech is the only value at issue. As Professor Halberstam explains, the government may outlaw insurrection, but it cannot outlaw speech about insurrection; in that case, the greater power to ban an activity does not include the power to ban speech about it. *See* Halberstam, *supra* note 80, at 820 (cit-

Some of these commentators' arguments against giving protection to commercial speech must be deferred until Part III, particularly the arguments that commercial speech protection provides too much leeway to judges within a constitutional system and that protection of commercial speech might reduce the protection given to other kinds of speech.[95] The remainder of this Part will address the soundness of these "political speech" arguments as applied to commercial speech law, buttressing the Court's conclusion that commercial speech does have political value and relevance, and is therefore entitled to First Amendment protection.

First, one must concede that, at some place and at some time, statements appearing in advertisements or otherwise classified as commercial speech have elements that, when publicly disseminated, are politically significant. Consider, for instance, *Bigelow v. Virginia*,[96] where Virginia law effectively prohibited advertising for abortion providers.[97] Although one might theorize a constitutional protection enabling individuals to receive voluntary advertising relating to a constitutionally guaranteed right, a primary justification for such advertising lies in the fact that the information being provided—the where and how of seeking an abortion—conveyed an important message. Moreover, the message was politically important to the potential recipients.

In general, there is no necessary distinction between politically important information and commercial speech; where the underlying legal activities are politically charged, the mere fact

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ing Martin H. Redish, *Tobacco Advertising and the First Amendment*, 81 IOWA L. REV. 589, 599–600 (1996)). If the First Amendment supports nonpolitical values, the "greater includes the lesser" inference should fail in other contexts, too. Only if there are no other interests does the inference become obviously valid. *Id.* Second, Professors Jackson and Jeffries argue that several authors fail to adequately defend the First Amendment value of commercial speech, because they fail to link it to political value. Jackson & Jeffries, *supra* note 23, at 17 n.57. But that is exactly the point that Jackson and Jeffries claim to avoid. If those authors present a good argument that commercial speech has the First Amendment value they insist it has, then Jackson and Jeffries cannot dispute the argument unless they reject the interests at hand—again, exactly what was not supposed to happen.

95. *See, e.g.*, BeVier, *supra* note 76, at 311–17.

96. 421 U.S. 809 (1975).

97. *Id.* at 812–13. After *Roe v. Wade*, 410 U.S. 113 (1973), the Court vacated and remanded the Virginia Supreme Court's initial decision and once again that court affirmed Bigelow's conviction. *See Bigelow*, 421 U.S. at 815. Therefore, when the Supreme Court decided *Bigelow* in 1975, Virginia prohibited the advertising of abortions, though it could not prohibit abortions themselves.

that someone is offering them to others can have political significance. Once again, an integrated restaurant in the Jim Crow South would certainly have been a politically provocative topic, and its very existence would have been a political issue. In a more modern context, the willingness of a church to solemnify homosexual marriage would also be a politically salient piece of information.[98]

If commercial speech were entirely unprotected, then these and other politically important facts could be suppressed by regulation. In such a world, less politically relevant information would be disseminated for purposes of making decisions on matters of public policy. There are, of course, plausible responses to this line of argument. At least some of this information would come out through protected avenues, like newspapers. But one can hardly regard the two methods as equal. The distribution of such information by newspapers or other protected media alone is no guarantee that the information would reach citizens in the same manner as it would when broadcast by an interested commercial party.[99] First, protected media would almost certainly not disseminate the material as often as a commercial entity. Second, there is no reason to conceive of the press as a neutral conduit of information. As is true with all other media, a message is changed subtly (at least) in its very telling. The likelihood that information would be conveyed in the same manner by the press as it would be in an advertisement seems quite remote indeed,[100] and manner, no less than the information itself, changes the import of a communication.[101] More generally, if the information is politically relevant, it is hard to see how its being broadcast in a commercial manner somehow disqualifies it from First Amendment protection.[102] Of course, there may be myriad ways in which that information is

98. For other examples and the suggestion that such a linkage could always be manufactured, see MICHAEL G. GARTNER, ADVERTISING AND THE FIRST AMENDMENT 21–22 (1989).

99. *See* Van Alstyne, *supra* note 44, at 1543.

100. *See, e.g.*, Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 383 (1979) ("[T]he economically motivated speaker is often the most likely to raise important issues . . . ."); Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 258 (1998).

101. *See, e.g.*, Cohen v. California, 403 U.S. 15, 19 (1971).

102. *See* Farber, *supra* note 100, at 382–83.

imperfect; the motives of the broadcaster may have contributed to its being false, misleading, incomplete, or otherwise deceptive. But none of those caveats detract from the more fundamental point that the information itself has political value.[103]

Relatedly, in a world without any commercial speech protection, one might fear the impact of politically sinister motives in commercial speech regulation. That is, if there were no review of laws restricting commercial speech, a legislature could ban advertising concerning only a single product. When the government enacts such a narrow law in any other speech-related context, there is reason to believe that official discrimination is afoot.[104] In the absence of judicial review, the same phenomenon would likely occur in the commercial speech context. This concern does not arise from the fact that commercial speech regulations might hide economic discrimination.[105] Economic discrimination may be a bad thing from an efficiency standpoint, but that hardly makes it a constitutional problem. The point is, rather, that the government may seek to prevent certain commercial messages from being publicized—not because of anything misleading or problematic about them, but because the government disagrees with the message that the product or service sends. Arguably, Virginia's ban on abortion advertising in *Bigelow* had such a purpose, especially when one considers that the law dated from the late nineteenth century.[106]

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103. *See* BURT NEUBORNE, FREE SPEECH—FREE MARKETS—FREE CHOICE 19 (1987) ("Advertising has served as the principal voice of th[e] shared political and social vision [of the American dream].").

104. *See* Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111 (1978) (arguing that narrow subject-matter regulations are likely more suspect).

105. *See* Van Alstyne, *supra* note 44, at 1518–23 (describing the motivation for a ban on motorcycle advertising by a hypothetical small town as the product of lobbying by car dealers).

106. *See* Bigelow v. Virginia, 421 U.S. 809, 813 n.2 (1975) (noting that the statute was enacted in 1878). Of course, when abortions were illegal in Virginia, the ban was unproblematic because traditional commercial speech doctrine allows the prohibition of advertisements for illegal products or services. Where the state prohibits conduct, it can also prohibit solicitation of that conduct, which would itself be a crime. *See, e.g.*, MODEL PENAL CODE § 5.02 (Proposed Official Draft 1962). It was only once Virginia was forced to legalize abortions that the speech ban became potentially unconstitutional. The question is not addressed here, but one might argue that the state has less of a legitimate interest in regulating advertising of illegal products if the advertisement clearly informs the recipient that the conduct is legal elsewhere and that the recipient has the legal right to travel there to procure it.

One could imagine a court screening commercial speech for "redeeming value" or other such "plus" factors before protecting it, but that seems like an unnecessary epicycle. It would be trivially easy for advertisers to satisfy such a requirement,[107] and most speakers likely already do—one cannot help but notice that contemporary advertisements are often much less about the features of a particular good than they are a brief essay about the kind of person who uses it and the lifestyle for which the product or service stands.[108] Moreover, to the extent that we worry about judges making such discretionary decisions, we might generally shy away from asking the judiciary to perform that type of screening function, much as we do in other areas of First Amendment law.[109]

Finally, First Amendment protection of commercial speech fosters accountability in the political sphere. For many reasons, politicians may wish to impose burdens short of an absolute ban on a particular business. There are, of course, very few constitutional obstacles to such economic discrimination under current doctrine, so long as a rational basis for the regulation can be articulated.[110] Nonetheless, imposing speech restrictions to achieve a regulatory goal short-circuits the accountability of the process in important ways. Where government imposes a tax or other restrictions on the use or sale of a product, those restrictions are obvious to the user. For example, if there is now a tax on the product, or if the store selling it is now open only six hours a day, those restrictions can be easily traced back to a government regulator, and the political process will provide an avenue for change. If there is sufficient public support for the restriction, it will continue. *Ceteris paribus*, if the restriction lacks such support, the outcry will force a repeal of the restrictive measure.

By contrast, a restriction on speech reduces the amount of information available to the public. In general, like a tax or other restriction, it will increase price and decrease use. But it is substantially less likely that, even if the economic effects are un-

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107. *See* Farber, *supra* note 100, at 384.

108. *See* RONALD K.L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE 75–77 (1996).

109. *See* Farber, *supra* note 100, at 384 & n.52 (discussing the redeeming value standard in pornography cases).

110. *See supra* note 23.

popular, it will lead to the same public outcry. In the case of a restriction on speech, people will not know what they are missing.[111] Legislators will therefore be able to achieve their regulatory goals covertly, avoiding the normal political response. Put differently, instead of imposing a cost or restriction on the disfavored activity, the government has acted to stifle speech that promotes it. Such action will likely have a similar effect on the disfavored activity, but it will do so in a way hidden from all but the most intensely interested observers. Insofar as the First Amendment is meant to play a structural role in fostering communication between citizens and government by making government responsive to its citizens' demands, restrictions that most people cannot observe are *prima facie* objectionable and are perhaps *per se* objectionable when they short-circuit accountability by hiding information. Although there may be legitimate reasons for the government to limit access to information, making the results of republican decision making difficult to detect is not one of them.[112]

Of course, most commercial speech has less political content than newspaper editorials, political campaign speeches, or other examples of the Meiklejohnian debate envisioned by those who hold a narrower view of the First Amendment. It suffices, for present purposes, to show that commercial speech, even standard advertising, will often have some political relevance because of the products it advertises, the linkages it suggests between important issues of the day and those products, or the economic state of affairs that it communicates through price or availability advertising. This Article has also suggested that bans on certain types of commercial speech might give rise to reasonable inferences of official censorship on the basis of content, and that speech suppression as a legislative means to an otherwise legitimate end might itself make government less responsive by concealing the legislature's goals. In sum, this Article argues that, in the absence of any protection for commercial speech, serious political values might be undermined.

Two final objections merit consideration. The first is that constitutional history might support extending First Amendment protection to speech that is explicitly political but not to com-

111. *See* Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080, 1082–83.

112. *See* Redish, *supra* note 94, at 601–02.

mercial speech. This is not an entirely implausible argument, but the general consensus has been that history furnishes little support for the sort of robust protection now given to any kind of speech, even political speech.[113] Indeed, once one realizes that the kind of absolute protection afforded to political speech is only a little more than a decade older than commercial speech protection, it is difficult to say that constitutional history warrants excluding any particular type of speech from the protection of the First Amendment.

Second, one might argue that this foregoing analysis has shown that commercial speech has political relevance, but only at the cost of showing that almost everything does. That would make all speech subject to First Amendment protection, a conclusion few are willing to reach. The first response to this objection is that political relevance is more aptly described as a spectrum than a binary decision. To the extent that we protect any speech beyond the explicitly political (and the reason for any such limitation must be administrative rather than substantive, given that spectrum of values), there will be an unavoidable line-drawing problem. Where to draw that line will be based on one's evaluation of the social importance of the speech. This Article attempts to show that commercial speech has sufficient value that the line should be drawn so as to include it within the First Amendment's ambit. Part III in particular seeks to demonstrate that administrability concerns related to the extending of First Amendment protection to commercial speech can be minimized.

Once one concedes that a type of speech has more than trivial social importance, the danger of official discrimination against ideas, leading to the biasing of the intellectual and social climate, becomes a legitimate concern. This is not only because such discrimination may have political results, but also because of a more general concern for individual autonomy; namely, that the government should not be able to decide in advance what are valuable and valueless ideas.[114] A complete absence of

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113. *See, e.g.*, LEVY, *supra* note 76, at 266–67 (arguing that the scope of the Jeffersonians' opposition to the Alien and Sedition Acts was likely limited to the use of federal power to prosecute seditious libel, rather than the general permissibility of such laws under the First Amendment).

114. *See infra* Part II.B. One might argue that a better First Amendment doctrine would focus not on the social or political value of some type of speech; instead, it would set a very low threshold level of value required for First Amendment cov-

commercial speech protection would allow the government to employ discriminatory regulation.[115]

This Article is not committed to a singular justification for commercial speech protection. It has attempted, however, to present the most serious criticism of commercial speech protection leveled by those who would limit First Amendment protection to explicitly "political" speech, and to counter such criticism effectively. This Article has not argued that commercial speech necessarily deserves the same level of protection as "core" (whatever that may be) First Amendment speech; it has instead shown that, even if one assumes that the First Amendment protects only speech of a political character, commercial speech cannot be completely ignored.

The argument presented here seeks to overcome the serious structural objection to any expansion of First Amendment law; namely, that it allows unelected judges to substitute their wisdom for that of democratically elected majorities.[116] The principal response to that objection posits that suppression of the speech would change the very public deliberations that coalesce into a representative government, thereby shifting the burden to those suppressing the speech to show that this possibility is so unlikely as to be trivial or actually impossible.[117] Because of its power, the First Amendment must be more than merely a policy tool; it must play a structural role in securing some minimum political freedom of the individual or protecting the process by which political deliberation is conducted. Although the political aspect of commercial speech may plausibly be said to be weaker than that of other speech, it cannot be said that it is so lacking as to render the speech beneath the First Amendment's structural protections.

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erage. The real concern for courts, then, should be whether governmental action is motivated by bias or will have the effect of skewing the social discourse.

115. Individuals are likely to differ over the likelihood of official discrimination in the commercial speech area. Demonstrating one side to be right is at this point impossible. However, the increasing political relevance of corporate policies and the growing social role of corporations make it at least more possible that the future will not be entirely unlike the past.

116. *See* BeVier, *supra* note 76, at 312–13.

117. *Cf.* Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 955–57 (1993); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 419–23 (1996).

2. *The Individual Rationale*

The political rationale is directed at the transformation of individual preferences into governing majorities. The First Amendment protects the process by which individuals receive and synthesize information, lest the government restrict speech to control the outcome of political contests. Some commentators, however, have questioned what lies behind that conception of politics; that is, why do we favor a system in which it is the sovereign individuals who get to choose how they are governed?[118] The answer to that question suggests another justification for commercial speech protection: the value of commercial speech to the individual *qua* individual. This Part explains how violations of the individual rationale, although seemingly innocuous, may actually be attempts to control the cultural life of the society, and thereby to limit individual freedom.

Although the individual rationale is intimately connected with its political counterpart, it moves the analysis one step back. The American people, as a political entity, choose our form of government for a reason; specifically, citizens think that having a democratic government is inherently good. One might choose a democratic system of government for entirely consequentialist reasons, but it would be difficult to establish how a democratic government would somehow be "best." In a utilitarian calculus, it is entirely plausible that another form of government would generate a greater amount of good for a greater number.[119] But, as Professor Redish has said, "it is doubtful that many of us would be anxious to discard democracy even if it were established definitely that an alternative political system was more efficient."[120] That points to a nonconsequentialist reason for a democratic government—that, as a moral proposition, people deserve to be governed by themselves, and, as a corollary, that people deserve the opportunity to develop, through speech, their own interests and faculties, free from government interference.[121]

The first proposition—that people deserve self-government as a moral matter—is obviously true. If there exists any norma-

118. *See, e.g.*, Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 438–39 (1971).

119. *See* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 602 (1982).

120. *Id.*

121. *See id.* at 602–03; Redish & Wasserman, *supra* note 100, at 244–45.

tive argument in favor of democratic government, at least part of that argument must be that people deserve, in some morally relevant way, to be part of the process by which they are governed. This is, of course, the foundation of the political rationale for the First Amendment—that individuals must be allowed to discuss freely matters of public concern, because it is they who will ultimately decide what the government will do. The second proposition—that people deserve the opportunity to develop their own interests and faculties—may not seem so obvious. Those who would restrict the First Amendment's scope to political speech must necessarily reject this proposition.

Putting aside, for now, questions of how broadly the First Amendment should be interpreted, it must first be acknowledged that embracing the first proposition and not its corollary leaves us with a curious form of democracy. Consider an issue that is, at present, largely immune from governmental restriction, such as one's choice of employment. If the second proposition is rejected, then an issue that does not qualify as "political" would not receive First Amendment protection—that is, it would be subject to governmental restrictions.[122] However, as soon as the government began regulating the activity itself—the choice of employment[123]—the government would have to grant such speech First Amendment protection, as it would now qualify as a part of an active political debate. Such a system would severely limit the scope and utility of the First Amendment. In the absence of the freedom to discuss a topic, the government is effectively able to control information and opinion. It could thereby dictate (or at least influence) the results of future political debates merely by acting first upon speech.

One way out of this problem is to say that future topics of regulation are necessarily political in nature. But that would remove any limitation imposed by the political speech rationale, for nearly anything is the potential subject of political deliberation and legislation. The point is that democracy is diminished if the government is able to control the opinions that people have on various topics by restricting access to informa-

122. That is, unless one argued that the very fact that there were restrictions on it made it a political issue. In that case, the political rationale collapses into a much broader one, for every issue on which there could be legislation would be political and speech about it would receive First Amendment protection.

123. This example is inspired by Redish, *supra* note 119, at 606–07.

tion about them.[124] A form of government that recognizes the moral value of self-determination must therefore apply that value uniformly across all issues, lest it engage in the business of selectively shaping and forming private thoughts.

Alternatively, one might argue that the choice of a democratic form of government evinces a type of respect for the individual that requires a broad sphere of intellectual development and freedom. As Professor Redish, the principal advocate of this theory, puts it, "the first principle which leads to the normative conclusion of self-government, the belief in the integrity of the individual's power of reason, leads also to the conclusion that the development of the mind is an important goal in itself."[125] Fundamentally, a commitment to democracy is a belief that people must be free to decide for themselves the best way to live, and that a broad range of discussion must therefore be allowed to take place.

> If society holds as valuable the ability of the individuals as members of society to attain their collective goals, the same principle would seem to place a similar value on the ability of the individual as an individual to determine and achieve his personal goals for a satisfactory life-style as long as those goals do not significantly and unduly interfere with the interests of others.[126]

On this view, the recognition of individual self-worth inherent in the choice of a democratic government brings with it a commitment to the "development of the individual's human faculties."[127]

Although it is not implausible, it is also not obvious why a commitment to democracy entails a commitment to complete "self-realization," divorced from any explicit link to the political question. Although individual improvement is a goal—implicitly recognized in the individualism inherent in the democratic system of government—it is only one goal among many. It is not clear why the goal of individual improvement must trump others. Consider Professor Schauer's discussion of the justification for freedom of speech:

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124. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970); Redish, *supra* note 118, at 442.

125. Redish, *supra* note 118, at 441–42.

126. *Id.* at 442.

127. Redish, *supra* note 119, at 603.

> Our physical well-being, our non-intellectual pleasures, our need for food and shelter, and our desire for security are also important. . . . Because any governmental or private action to restrict communication is usually justified in the name of one of these or other similar wants of all or part of humanity, a particular protection of communication . . . must assume that communication is *prima facie* more important than these other interests.[128]

Professor Schauer's observation seems to sever the connection between Professor Redish's theory, which ultimately rests on a right to self-fulfillment, and the justification for free speech.[129]

Nonetheless, the argument becomes much more reasonable when the link between free speech and democratic decision-making is emphasized. The problem, on this view, is not that some important mode of self-fulfillment is being stifled; rather, it is that restrictions on speech narrow the polity's range of possible beliefs and thoughts by limiting the information that it receives. When that happens, democracy is cut off at the heels—it resembles the former communist states' elections with but one candidate. Where discussion on any topic is restricted, the government is allowed to control that area of life more easily, and to avoid the reasoned and robust alternative debates that would otherwise exist. Because individual political or social issues can hardly be hermetically sealed from influencing one another, any restriction on the content or viewpoint of speech is likely to change the public's access to information about many topics, its knowledge of and opinions about them, and its ability to respond to political action concerning them.

The academic debate on advertising serves as a useful cautionary tale, demonstrating how commercial regulation can become another front in the culture wars. Several commentators have argued that advertising should be restricted because of its negative effects on society. For example, Tamara Piety has argued that advertising contributes to the degradation of women, promotes alcohol and tobacco use, and creates a demand for happiness that cannot ultimately be fulfilled—thus creating "a

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128. SCHAUER, *supra* note 74, at 55.

129. *Id.* at 56 ("If [such] an argument . . . supports a right to free speech, so too can it support a right to eat, a right to sleep, a right to shelter, a right to a decent wage, a right to interesting employment, a right to sexual satisfaction, and so on *ad infinitum*.").

vicious cycle wherein the consumer continues to buy in the hope that the next acquisition or experience will deliver the promised feeling."[130] Relatedly, Richard Moon argues that the lifestyle focus of present advertisements is so far removed from anything resembling rational deliberation that society actually benefits when such advertisements are removed from view.[131]

If people are unable rationally to evaluate certain messages, that would be a genuine concern. One should, however, be wary that the legitimation of this rationality concern might lead to its general acceptance as a First Amendment principle. How many modern political advertisements can claim to be reasoned, thoughtful explanations of the different policy positions of the candidates? Much more often, it seems, they should be categorized as emotive appeals to deeper, subrational values—values to which First Amendment protection already extends in the areas of art and other less-than-deliberative modes of expression.[132]

It appears that the commentators' real concern is not people's inability to evaluate advertisements rationally; rather, they are worried about the impact of advertising messages on cultural values:

> Is this degradation of discourse not an inevitable consequence [of First Amendment protection]? In fact, your constitutional posture does more than protect such trivialization—it perpetuates it. By elevating mass advertising's pap to the level of fundamental discourse, you invite the citizen self to become the consumer self; you invite the distortion of logic and the debasement of values; and you invite the commercialization of politics.[133]

If this were true, it would present a serious cultural problem. But this type of normative evaluation of the cultural impact of speech is largely forbidden by the First Amendment itself. The critique raises fundamental objections to the form of modern

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130. Tamara R. Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377, 386–87 (2001).

131. *See* Richard Moon, *Lifestyle Advertising and Classical Freedom of Expression Doctrine*, 36 MCGILL L.J. 76, 115–17 (1991).

132. *See* Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 932 (1992).

133. COLLINS & SKOVER, *supra* note 108, at 134; *see also* Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993).

capitalist society and its values.[134] Although that is an important debate to have, it is a debate into which the government cannot step. In fact, the more important and wide-ranging an impact that advertising has on the culture, the less justification the government has for reining it in. Accepting the alternative view would make the government the ultimate arbiter of what is and is not valuable within society. It would entrust the government with power to determine what sort of discourse is acceptable within the public sphere. First Amendment doctrine must adhere to the principle that regulation of discourse allegedly for the public good is nevertheless barred from excluding points of view and reshaping discourse to the government's liking: "[I]f the state attempts to use such visions [of national identity] to censor public discourse, if the state excludes communicative contributions on the grounds of a specific sense of what is good or valuable, the state stands in contradiction to the central project of collective self-determination."[135]

More traditional criticisms of expanding First Amendment protection along the lines suggested in this Part usually rest on one of two ideas. The first is that expansion of protection would result in unprincipled decisions by judges or, relatedly, that it would reduce the amount of protection for the most important class of speech.[136] The second is that the individual rationale proves too much, as almost any activity might also be plausibly thought to contribute to the creation of the robustness of culture, and would thus be necessary to maintain an effective democratic society.[137] Discussion of the first issue is delayed until Part III, because the possibility of doctrinal dilution or lack of principled decision making is largely a question of the manner in which commercial speech is protected relative to other speech; such questions are better addressed together. The second concern, however, may be addressed immediately, for

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134. *See* REDISH, *supra* note 7, at 41–42.

135. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 273–74 (1995); *see also* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 50 (1992) ("Neither intellectual nor emotional revulsion to speech is ever enough, standing alone, to justify its abridgement . . . ."); POST, *supra*, at 268–89.

136. *See, e.g.*, BeVier, *supra* note 76, at 313–17; Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1194–97 (1988).

137. SCHAUER, *supra* note 74, at 56–58.

if there is no limit to the individual rationale, that would clearly be a strike against it.

According to Professor Schauer's argument against the individual rationale for commercial speech protection, experience produces an expansion of knowledge and faculties, and can be gained in many ways unrelated to speech.[138] Thus, the individual rationale is not plausibly limited to speech, and in reality extends to any and all experiences that would be valuable to the individual.[139] The rationale, therefore, encompasses much more than speech and contains no inherent reason for privileging speech as such. For Professor Schauer, this presents a problem insofar as it suggests that free speech is merely one manifestation of a general liberty interest. Any general interest of that sort will be subject to a variety of limitations and exceptions in the public interest and therefore cannot function as the kind of absolute bar to speech-related legislation that we think the free speech principle imposes.[140] In addition, this expansive conception of the free-speech right might pose a problem for the notion of principled adjudication. As Professor Schauer argues, a principled court must act consistently, and if it protects an activity under the self-fulfillment rationale, it must be prepared to apply that rationale equally in all cases. However, the self-fulfillment rationale does not and must not assert that all such actions are entitled to the First Amendment protection accorded to speech; this represents an internal inconsistency.[141]

The response to this line of argument is prefigured in Professor Redish's analysis, which suggests that a return to the text of the Constitution solves the problem:

> If one were to look for an appropriate basis for limiting the protection of the first amendment to "speech," the natural starting place would seem to be the language of the amendment itself. . . . Thus, we need not find a logical distinction between the value served by speech and the value served by conduct in order to justify protecting only speech, for the framers have already drawn the distinction.[142]

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138. *Id.* at 57.

139. *See id.*; *see also* Redish, *supra* note 119, at 600–01 (criticizing a similar argument set forth by Judge Bork).

140. SCHAUER, *supra* note 74, at 58.

141. Schauer, *Must Speech*, *supra* note 75, at 1295–97.

142. Redish, *supra* note 119, at 600.

Accordingly, even if the individual rationale might prove logically infirm as a principle justifying only free speech, there is no obvious reason to maintain that the First Amendment itself must be so limited. Especially if we find that the individual rationale is related to the structural political importance of the First Amendment, we have good reason to accept such a theory.

Moreover, the First Amendment's restriction on governmental power is best read as a legislative compromise, especially once one rejects the notion that we have much to gain from the history surrounding its adoption.[143] That is, one must concede that all manner of experience might contribute to the kind of robust intellectual life that is necessary in a democracy. However, as Schauer's argument recognizes, such an expansive reading of the First Amendment could handicap a government, for it would have to deal with the potential experiential consequences of all laws. The First Amendment can be seen as a compromise position—a knowingly underinclusive way of achieving an important goal, reached because it would be too difficult or impractical to realize that goal completely. A democracy needs the kind of mental life that the individual rationale posits, but a government cannot allow itself to be totally disempowered by that goal. So, the First Amendment strikes a compromise: It allows speech alone to exist beyond government interference, in the hope that this freedom will be sufficient to allow democracy to flourish, and with the expectation that protecting speech will be the least costly way of achieving that end. The Constitution is a legislative document, full of compromises and less-than-principled distinctions. If the First Amendment can plausibly serve many goals, it might also serve some less than completely.[144]

Schauer's response is to ask why speech would be singled out for protection; after all, speech itself causes a wide variety of harms, yet one expects speech to be protected in spite of the harms it causes.[145] Although true, this response fails to meet the argument entirely. If we believe that the individual rationale is

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143. *See supra* note 76 and accompanying text.

144. Of course, one might still be concerned that such half-measures leave too much room for judicial leeway. That is, to the extent that constitutional commands are less than completely principled, judges might be able to exploit those gaps and expand or contract First Amendment protections to suit their own preferences. *See infra* Part III.A.

145. Schauer, *Must Speech*, *supra* note 75, at 1294–95.

a powerful one, but that it requires limitation, we might well allow the individual interest to flourish within defined boundaries. A compromise position is not impossible. The individual argument, again, turns on the value of the rationale in the first place. If the rationale is a good one, then one should have little trouble accepting that constitutional adjudication should proceed with it in mind, subject to the textual limitation that only "speech" is protected. If, however, the individual rationale is a poor justification, then one is more likely to see its use as a dangerous appendix to a simpler and less dangerous principle that really underlies the protection of free speech.

B. The Case Against Commercial Speech Regulation

This Part proposes a general theory that restricts the government's ability to regulate all forms of speech. Although rooted in much of Western philosophical thought, the most recent important exposition of the so-called "negative case" for freedom of speech—which argues not that speech has value but that restricting it would be illegitimate—is Thomas Scanlon's statement that, as a first pass,

> those justifications [for restricting speech] are illegitimate which appeal to the fact that it would be a bad thing if the view communicated by certain acts of expression were to become generally believed; justifications which are legitimate, though they may sometimes be overridden, are those that appeal to features of the acts of expression (time, place, loudness) other than the views they communicate.[146]

The negative case for freedom of speech ultimately rests on a strong assumption about human rationality and responsibility, for it rules out restricting speech on the ground that the speech might give people reason to act in a certain way. It is, of course, the duty of the state to protect its citizens from certain harms, and to judge when those harms become so substantial that only the coercive power of the state can defeat them. The meaning of free speech, however, consists in part of the rejection of certain kinds of harms as legitimate grounds for state intervention: namely, "[t]he harm of coming to have false beliefs."[147]

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146. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 209 (1972).

147. *Id.* at 217.

That justification is illegitimate because, "[i]n order to be protected by such a law[,] a person would . . . have to concede to the state the right to decide that certain views were false and, once it had so decided, to prevent him from hearing them advocated even if he might wish to."[148] Likewise, even when something is against the law, the state cannot prohibit people from advocating in favor of it, "since [such a prohibition] gives the state the right to deprive citizens of the grounds for arriving at an independent judgment as to whether the law should be obeyed."[149]

The negative case for freedom of speech does not proceed from the premise that truth will ultimately prevail.[150] Rather, it rests on a view concerning the relationship between a government and its free citizens. If its citizens are to remain free, the government must be prohibited from using its laws to compel compliance on the basis of ignorance. David Strauss has called this idea the "persuasion principle": "[T]he government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful."[151] Professor Strauss links the persuasion principle to the state's duty to respect its citizens' personal autonomy, arguing that violations of the principle are equivalent to "a manipulative lie," because they attempt to substitute, by deceit, the will of the victim for that of the perpetrator.[152]

The persuasion principle is not limited to any particular type of speech. Rather, when the government suppresses speech to prevent individuals from agreeing with the message that the speech contains, it undermines their ability to decide what to believe and how to live. This is true regardless of the type of speech involved. Such a restriction is antidemocratic, because it permits the government to control policy in advance by substituting its judgment for the people's.[153] Although the govern-

148. *Id.* at 217–18.

149. *Id.* at 218.

150. *Id.* at 218–19.

151. Strauss, *supra* note 2, at 335.

152. *Id.* at 354.

153. *See* SCHAUER, *supra* note 74, at 69 (linking this argument to Meiklejohnian democratic theory). Professor Schauer has argued that this version of Scanlon's argument is flawed because it requires the government to recognize a general right to civil disobedience in any case where people disagree with the reason for the law. *See id.* at 70. Whether this is a fair interpretation of Professor Scanlon's

ment may certainly restrict a wide range of behavior to prevent harm, it cannot restrict the available range of reasons that motivate people's actions; such restrictions make the government the final arbiter of what is right and wrong, and thereby sever the link between the people and their government as a representative institution.

Professor Scanlon's argument rules out only a very narrow set of reasons for regulation. Regulation is permissible wherever the reason for a restriction is unrelated to the content of the expression.[154] Regulation may also be permitted based on exceptional individual failings; that is, if one exercises an excessive measure of control over another, or if the person or class of persons is so weak willed or rationally incompetent as to be unable to separate reasons for action given by others from his own deliberative reasons.[155] The principle is, therefore, in an important sense defeasible; under certain conditions, it no longer applies.

There are at least two potential reasons to think that such a principle need not apply as strictly in the context of commercial speech. First, one might try to isolate some features of commercial speech that defeat the conditions under which the persuasion principle operates. For example, one could contend that the speech is directed at incompetent people or is otherwise so misleading as to be deceptive in its own right. Second, one

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argument is beyond the scope of this Article. But an argument similar to Professor Scanlon's need not be subject to such a criticism. In the case of any particular law, there will be a set of reasons for and against the particular law; under this version of Professor Scanlon's theory, the government may not restrict access to those reasons. However, there will also be a separate set of reasons justifying adherence to the laws created by a particular authority; to those, as well, the government may not deny access. Even a law with which an individual disagrees would still be worthy of obedience as a legitimately enacted statute if the reasons for general obedience trump the reasons why the individual statute is objectionable.

This take on Professor Scanlon's argument does not necessarily license civil disobedience; it only requires that a state not suppress the reasons that militate against a particular statute. The right rests not on a right to civil disobedience, as Professor Schauer maintains, but on a right to dissent. In most cases, the reasons for general adherence to the law justify both individual adherence and the state's right to enforce compliance justifiably, regardless of any individual's disagreement with the justification for a particular law.

154. Scanlon, *supra* note 146, at 209–12.

155. *Id.* at 212. *But see* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 557–58 (1991) (noting that a skepticism toward irrationality is an important component of modern First Amendment doctrine).

might argue, as Professor Scanlon does, that people are less concerned with government regulation in this area because citizens are more confident of government neutrality in its regulation of commercial speech.[156]

With respect to the first reason, there are almost certainly instances of misleading or deceptive commercial speech. Clearly, regulations restricting false advertising are consistent with the persuasion principle. When one is being influenced by a lie, there is no reason to protect the underlying speech. Still, expansion of the exception for misleading speech must be viewed with great skepticism. The exception may, as Piety and Moon suggest,[157] be used to disguise an attack on the cultural merits of the speech itself. For the First Amendment to withstand all serious intrusions, even in core areas, the presumption that people are able to evaluate information rationally, even explicitly persuasive information, must be very strong.

Cigarette advertising provides a useful illustration. Some have argued that the government could ban cigarette advertising on the theory that it is inherently misleading: "[N]o cigarette advertising gives adequate warning of the wide range of serious and life threatening diseases induced by the ordinary use of the product. Quite to the contrary, the effect of the advertising is to conceal or to minimize these facts."[158] Disclosure of side effects in advertising seems unobjectionable on any theory; if the purpose of advertising is to inform, then the government has a legitimate interest in ensuring that the information distributed is accurate, and in some cases, that interest might require a disclosure.[159] But the idea that cigarette advertising is *per se* misleading because it mimimizes the adverse health effects is different. In an advertisement with appropriate disclaimers, it seems more accurate to characterize the speech as Professor Redish does:

> When they join these warnings with the promotional material contained in the advertisements, tobacco advertisers are

156. *See* T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 534–35 (1979).

157. *See* Piety, *supra* note 130; Moon, *supra* note 131.

158. Vincent Blasi & Henry Paul Monaghan, *The First Amendment and Cigarette Advertising*, 256 J. AM. MED. ASS'N 502, 506 (1986).

159. This Article leaves aside considerations of the constitutional limits of compelled disclosure. Those are legitimate questions and warrant their own treatment.

> effectively saying to the potential consumer: "The government believes that engaging in this activity presents serious health risks, but you should choose to live for the enjoyment and pleasures of the moment, and use of our product will provide you with pleasure." While such an argument may not be persuasive to many, it is difficult to say that it is inherently deceptive.[160]

This is not to deny that, to a certain audience, such as children, similar advertising may indeed be deceptive because of the audience's inability to distinguish persuasive from factual speech, or its unquestioning acceptance of certain tones. But if the argument is ultimately that certain advertising is too persuasive, or that the government is justified in making intellectual decisions for its people because the harms of a person choosing to believe something to which the government objects are so great, that raises a much more difficult question and would seem problematic in most contexts.

Sylvia Law has also suggested that the government could ban tobacco advertising because it is linked to an addictive product and the resulting dependency undermines the autonomy interests that the First Amendment is supposed to protect.[161] Here, too, one must consider the strong presumption in favor of individual rational capacity, which might be undermined by the concept of addiction. Although Professor Law offers some preliminary criteria for addiction—dependency and withdrawal[162]—the inexactness of those concepts presents substantial dangers. The numbers of alleged addictions, for example, to fast food and marijuana,[163] suggest that the concept is less firm than we would hope, especially if addiction is to be a basis on which to build a First Amendment exception. Though there may be such "induced" failings of rationality in the world, we must be very wary of relying on them, lest they extend far beyond the original intention.

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160. Redish, *supra* note 94, at 609.

161. Law, *supra* note 132, at 945–46.

162. *Id.* at 947.

163. *See* MITCH EARLEYWINE, UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE 32–47 (2002) (noting differences opinion about marijuana's addictiveness, based in part on varying concepts of addiction); Erica Goode, *The Gorge-Yourself Environment*, N.Y. TIMES, July 22, 2003, at F1 (reporting on the alleged fast food addiction).

The second reason that commercial speech regulations are allegedly less sinister—the possibility that the government may be less viewpoint-oriented in the commercial speech area—is not obviously persuasive. If the government can use speech restrictions to achieve economic regulatory goals, there is no reason to think that a law restricting a certain type of advertising is not really an attempt to benefit another industry.[164] But even if that goal would not raise a First Amendment concern, the imposition of restrictions on products to achieve political ends would certainly be problematic. Consider again the tobacco example. Whether or not tobacco should be legal is a question for public debate, and therefore the government could not legitimately silence one side of the discussion. But assume that the government could outlaw, as it does in large measure,[165] advertising for the product. The question then would become one of definition: how much could a tobacco company say about the benefits of smoking before it became a commercial advertisement? Would a tobacco company be able to suggest that smoking is glamorous? Would it be able to suggest that it is part of an American spirit of individualism? Would it be able to use colored pictures or be restricted to black-and-white images or only text? Any or all of these restrictions would seriously change the effectiveness of the speech.[166] Furthermore, it seems unlikely that the same speech would be generated by actors who were not potentially subject to commercial speech restrictions because there are probably no independent political groups devoted to protecting smoking that are not affiliated with tobacco companies.

This argument suggests that there is no good reason to doubt either that commercial speech restrictions can discriminate based on content or viewpoint or that persons are generally capable of rationally evaluating commercial speech messages. We therefore have no reason to reject the persuasion principle's application to commercial speech, or to retreat from the pre-

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164. *See* Van Alstyne, *supra* note 44, at 1517–23.

165. *See* 15 U.S.C. §§ 1331–41 (2000).

166. This is at least the beginning of an answer to Mitchell Berman's argument that speech about products, as distinguished from advertising, would be constitutionally permissible in the face of a complete ban on advertising. *See* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693, 714–15 (2002).

sumption that the government cannot limit speech on the grounds that people may come to be convinced by it.

C. Summary

This Part has articulated and criticized three grounds for extending First Amendment protection to commercial speech. One is free to accept or reject, in whole or in part, portions of this analysis without thereby concluding that commercial speech should be unprotected. One may also discount, short of rejection, portions of the discussion. Ideally, one should view the arguments as constitutive of each other. Each brings to bear a consideration that militates in favor of commercial speech protection. Even if one is not convincing by itself, combined they point to an overlapping argument based on commercial speech's value to society and the dangers of regulation that is free from constitutional constraints.

This Part has not argued that commercial speech is the sole or primary concern of the First Amendment, or even that it should be treated equivalently to other forms of speech. Rather, at most, this Part seeks to demonstrate that there are serious First Amendment interests in the commercial speech area and that regulation of commercial speech poses similar problems to the regulation of any other speech. As will soon become clear, the framework that this Article proposes does not increase the level of protection commercial speech should be given; it merely systematizes the rationales for regulation to ensure that legitimate First Amendment concerns are addressed in commercial speech litigation.

III. PROTECTING COMMERCIAL SPEECH

A. The Problem: Legitimate Regulation and Unstructured Balancing

Some commentators have mounted what is essentially a collateral attack on the commercial speech doctrine. They argue that extending protection to commercial speech creates dangers of error in other areas of First Amendment doctrine and that judicial application of the principles supporting commercial speech protection would allow judges too much discretion to insert their personal, unprincipled preferences. Obviously,

these concerns will be heightened or alleviated by the degree to which one considers commercial speech to have an important role in realizing the First Amendment's purpose. But even so, given that commercial speech protection is likely to be more limited—if for no other reason than that the Court is willing to permit greater regulation in the name of consumer protection—rationales available in the commercial speech context might bleed into and weaken other areas of free speech doctrine.

The concern about unprincipled decision making[167] is largely answered by the analysis set forth in Part II. As Part I explained, the Court has been unable to articulate a unitary ground for commercial speech protection. *Central Hudson* does not provide a coherent test because it fails to specify the legitimate bases of regulation. Even if a coherent basis for commercial speech protection could be articulated, however, the manner in which courts adjudicate commercial speech cases may still lead to problematic decisions.

It is worth noting that Part II hardly explains what instances of commercial speech are politically relevant or individually important, and such decisions, even among people who agree on the soundness of those grounds, may vary. Therefore, it might be wise to focus commercial speech doctrine not on the positive value of a given speech act, but on the concerns relating to censorship discussed in Part II.B. That is, one could formulate a doctrine that simultaneously asks why the government must regulate a particular instance of commercial speech given the general reasons why commercial speech is less valuable, and whether the regulation at issue is likely to contain discriminatory animus or effect. One would thereby shift the question of the importance of an instance of commercial speech to a question of the general, and presumably more universally acceptable, reasons for commercial speech regulation, combined with an inquiry into the potential for discrimination. This approach would move the doctrine away from the subjective question of evaluating speech to a much more objective question about the grounds for regulation and the possibility of malicious intent.

In addition to unprincipled judicial decision making, a second concern arises from the difference between regulation of

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167. *See, e.g.*, BeVier, *supra* note 76, at 313–17; Bork, *supra* note 76, at 20–21.

commercial speech and core political speech. For example, as Professor Schauer notes, misbranded or false commercial speech may be restricted, or so most people think.[168] Achieving that result through the traditional unitary First Amendment test[169] would lead either to the radical result of foreclosing all commercial speech regulation or to the loosening of *Brandenburg* and the protection it gives to political speech.[170] Although the Court has avoided this problem by creating a separate category for commercial speech, Professor Schauer argues that subcategorization can itself be harmful to the integrity of the First Amendment, as it might increase the likelihood of further subcategorization in the future to secure particular results.[171] This further subcategorization might in turn increase the possibility of mistakes, confusion, or intentional errors in classification, especially by the bureaucrats responsible for quotidian enforcement: "[A]ny increase in doctrinal complexity increases as well the risk that the non-legally trained front line soldiers in the defense of the important [F]irst [A]mendment will think and react initially in accordance with their personal preconvictions rather than in accordance with what the doctrine commands."[172]

Another concern about current commercial speech doctrine, particularly its reliance on ad hoc balancing of the challenged regulation's fit, is that it might increase judges' willingness to apply a similar methodology to other speech in times of political instability.[173] Especially where there is a definitional trigger for applying the balancing test, both that trigger and the balancing itself may be skewed in favor of regulation in times of political stress. Here, then, a more formal rule might be helpful, particularly if that rule could counter these two expansionary tendencies by limiting the number of First Amendment categories and limiting the balancing decisions required. Thus, an ideal rule is one that could apply across contexts, thereby mini-

168. Schauer, *supra* note 136, at 1194–95.

169. Brandenburg v. Ohio, 395 U.S. 444 (1969).

170. Schauer, *supra* note 136, at 1195.

171. *Id.* at 1199.

172. *Id.* at 1200.

173. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 485 (1985).

mizing the need to weigh the merits and demerits of individual regulations.[174]

B. R.A.V. v. City of St. Paul: *A Proposal for Commercial Speech Regulation*

In *R.A.V. v. City of St. Paul*,[175] the Court struck down a Minnesota ordinance that criminalized

> plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.[176]

The majority, assuming that the regulation appropriately encompassed only "fighting words" that could be constitutionally proscribed entirely, nevertheless concluded that the ban of these particular fighting words was unconstitutional because "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[177] Because the ordinance discriminated among speakers on the basis of the viewpoint expressed, the statute was unconstitutional even though it applied only to a subset of a class of speech that the legislature could have banned entirely.

Picking up on the equal protection theme from *Police Department v. Mosley*,[178] the Court noted that even proscribable expression cannot be regulated in a manner untethered to the First Amendment. Fighting words may be regulated on the basis of their objectionable features; namely, that they cause offense and are unnecessary to the expression of any point of

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174. As Vincent Blasi notes, it would be impossible to eliminate balancing tests altogether. Nevertheless, structuring the tests more narrowly and reducing or eliminating balancing where possible are still legitimate and worthy goals. *See id.*

175. 505 U.S. 377 (1992).

176. *Id.* at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

177. *Id.* at 386, 391; *see* Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 34–35 (describing the Court's requirement of "content-neutrality").

178. 408 U.S. 92 (1972).

view.[179] Legislatures may not, however, "regulate use based on hostility—or favoritism—towards the underlying message expressed."[180] In accordance with this caveat, the Court announced the general rule that such "content-based underinclusion"[181] is not permitted under the First Amendment. The Court also articulated the following three acceptable bases for subregulation of a proscribable category.

First, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[182] This is the "very reason" exception[183]—a government may regulate a subclass of speech if the legislation tracks the very reason that the speech is proscribable in the first instance. The Court offered the example of obscenity. A government may ban a subclass of obscene speech because it is especially offensive or prurient; insofar as the reason for the regulation has been judged sufficiently neutral to justify exclusion of the class, it is also neutral enough to justify the proscription of only the most extreme example within that class.[184]

Second, a government may also regulate only a subclass of proscribable speech when it regulates on the basis of the "secondary effects" of the speech.[185] When a regulation is not targeting the content of the expression but its coincidental effects, regulation of a smaller class is also permissible. This applies equally to regulations of conduct that incidentally encompass some class of speech.[186]

Third, the Court provided something of an escape clause, permitting regulation where "the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot."[187] This clause presumably leaves some flexibility for future cases in which the government points to some heretofore unarticulated ground for the

179. *R.A.V.*, 505 U.S. at 384–86 & n.4.
180. *Id.* at 386.
181. Kagan, *supra* note 177, at 45.
182. *R.A.V.*, 505 U.S. at 388.
183. *Id.* at 393.
184. *See id.* at 388.
185. *Id.* at 389 (quotation marks omitted).
186. *Id.* at 389–90.
187. *Id.* at 390.

subclass of regulation that the Court has not yet considered but that appears to raise no cause for concern.

R.A.V.'s holding, although the product of a bare majority of the Court, provides the established test in the area of limited proscriptions of proscribable speech. Every member of the Court, with the possible exception of Justice Thomas, applied *R.A.V.* in *Virginia v. Black*[188] to determine the constitutionality of Virginia's law against cross burning. In *Wisconsin v. Mitchell*,[189] the Court used the second *R.A.V.* exception for conduct bans to allow a bias-motivated crime law to stand.[190] Therefore, despite its initial novelty, the *R.A.V.* schema has become an established part of First Amendment jurisprudence. *Virginia v. Black* is a particularly good example of *R.A.V.*'s lasting influence, as the two Justices who were not on the *R.A.V.* Court applied its schema, and the two Justices who refused to join *R.A.V.* when it was decided both joined an opinion applying it in *Black*.[191]

The *R.A.V.* Court provided an analysis of restrictions on low-value speech that remains sensitive to the potential for viewpoint discrimination and resulting biases to the political process.[192] Whether or not the majority was correct to hold that the St. Paul ordinance unfairly restricted speech on one side of the debate, there is no doubt that such unfairly restrictive ordinances could exist[193] This analysis can be extended to the problem of commercial speech.

First, the *R.A.V.* test is sensitive to viewpoint discrimination. As argued in Part II, restrictions on commercial speech have the potential to be viewpoint discriminatory. Especially in the context of low value speech, where the government has broad regulatory authority, a proper First Amendment doctrine must find a way to protect against potential abuse of governmental

188. 538 U.S. 343 (2003).

189. 508 U.S. 476 (1993).

190. *Id.* at 487–88.

191. Justices Ginsburg and Breyer applied *R.A.V.*'s schema, and Justices Stevens and O'Connor joined opinions in *Black* that applied *R.A.V.*

192. *See* Kagan, *supra* note 117, at 421–23.

193. Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 143 (1992) ("Even a law that is applied evenhandedly can be designed to disadvantage one side of the public debate. In the 1960s, for example, a law that banned *anyone* from using the words 'baby-killing' or 'napalm' in public discourse would, of course, have disadvantaged critics of the government.").

power to silence or benefit speakers on one side of an issue.[194] *Central Hudson*, with its unstructured balancing, fails to achieve that goal.

More importantly, *R.A.V.* has the potential to do nearly all the work that a commercial speech test should do, without any extraneous moving parts. A good commercial speech test should accomplish two things. First, it should filter out restrictions that rest on hostility to the message or viewpoint expressed, and regulations, like the one in *44 Liquormart*, that seek to control people's behavior by limiting their exposure to truthful information. Both sorts of justifications reflect the government's attempt to prevent citizens from being influenced to do or believe something of which the government disapproves.[195] Second, a good commercial speech test should allow regulation based on the unique harms present in commercial speech.[196] Recall that the reason commercial speech may be regulated to a greater degree than other speech is that the government has a legitimate interest in protecting its citizens from deception, mislabeling leading to misuse, and similar consumer harms.

The first two *R.A.V.* exceptions to regulation of speech subcategories track these goals almost exactly. When the "very reason" and secondary effects or conduct prongs are united, they allow the government to regulate a subcategory of speech based either on the very reason the category is treated differ-

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194. It is not clear whether *R.A.V.* is designed to act as a filter only for deliberate discrimination or whether it also screens for neutral statutes that may have a greater effect on one class of speech than on others. *Cf.* Kagan, *supra* note 117 (arguing that *R.A.V.* is only about intentional discrimination). Dean Kagan argues that skewing the marketplace of ideas is not *per se* objectionable because the marketplace may already be "distorted" by other laws that benefit certain speakers. *Id.* at 420. Therefore, any objection to skewing must be based on the fear that what lies behind a law with such an effect is a purpose to favor particular ideas or speakers. *Id.* at 421.

This Article does not take a firm position on the question. *R.A.V.* itself does not look directly to intent, even if the test is in fact a screen for intentional discrimination. An intent to bias the intellectual realm would be illegitimate on this Article's view, but it is not clear that such an intent is a necessary feature of an objectionable regulation. Even if the regulation was in fact based on a neutral ground, its de facto effects, if they were to bias the public sphere, would also be objectionable. Resisting that result requires an argument, which Dean Kagan might make, because there is no natural allocation of speech in the first place, governmental regulation, so long as not hostile to a point of view, is permissible.

195. *See supra* Part II.B.

196. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993).

ently, or based on the secondary effects of such speech or of conduct incidentally involving speech when the justification is unrelated to the content of the speech.[197] Applying these two exceptions to the commercial speech context would allow the government to regulate commercial speech either if it regulates for the reason commercial speech is less protected—that is, because of the commercial harms against which government may protect its citizens—or if it is really regulating conduct attendant to commercial speech, such as sales practices, contracts, or similar business transactions that contain elements of speech.

Accordingly, to apply *R.A.V.*'s "very reason" exception to commercial speech, one must begin by identifying the harms unique to commercial speech. Some are straightforward enough: as the *Virginia Pharmacy* Court said, false commercial speech may result in consumer misuse of a product or purchasers not getting what they thought they paid for.[198] Commercial propositions for illegal transactions might be viewed as incidental regulations of conduct, for the First Amendment erects no barrier against laws prohibiting criminal solicitation or conspiracy.[199] The majority of modern advertising regulations thus seem to be covered under the "very reason" exception, as they are justified by a neutral desire to protect consumers from being misled and, therefore, financially or even physically injured by a product.

Consider, however, a potentially more sinister example: a blanket ban on cigarette advertising. Under *Central Hudson*, such a ban is subject to an unstructured balancing exercise, with the Court weighing the interests of the state and the effectiveness of the rule against the amount of speech that it sweeps up. That test is no more than a rule of reason analysis, and it would not be surprising to find different judges reaching very different conclusions, based almost entirely on their own subjective evaluations of the public health dangers of smoking. By contrast, under *R.A.V.*, the government would need to establish that it was regulating cigarette advertisements because they

197. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 388–90 (1992).

198. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976).

199. *See id.* at 772–73 (explaining that the First Amendment "does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely").

caused a uniquely commercial harm. There might be such harm; indeed, some advertisements might be *per se* misleading, particularly those aimed to younger people. But simply not wanting people to smoke, or fearing that they may be convinced by the message that smoking is a good thing would be unacceptable, because those concerns are unrelated to any *commercial* harm. The requirement that commercial speech restrictions must relate back to the difference between commercial speech and other speech would seriously limit the scope of available justifications and would weed out regulations that, as in *R.A.V.*, were actually rooted in governmental dislike of the activity or viewpoint expressed.

A test modeled on *R.A.V.* would also address the structural objections to commercial speech doctrine. First, changing the test from one that tracks the value of particular speech to one that focuses on legitimate bases for regulation would limit ad hoc balancing and produce a much more objective inquiry. Second, by reducing the need to weigh the value of particular restrictions, and by decreasing the total number of analytic tests used in First Amendment law—because, presumably, the *R.A.V.* approach could be used for all non-core speech—the proposed test would diminish the risk of doctrinal dilution.

Admittedly, like all formal tests, an *R.A.V.*-based test applied to commercial speech would be imperfect. The most difficult element to meet would be the requirement of a uniquely commercial harm; in hard cases, the Court might be tempted to find only some general harm, rather than a harm unique to commercial speech. Such problems might be unavoidable, but the test at least makes clear the sorts of harms that would be legitimate. In principle, then, the scope of uniquely commercial harms is limited and determinable. Furthermore, looking for the required link to commercial harms would help the Court take notice when the regulation rests on a kind of harm that is equally present in core speech cases. In this way, the test would force the Court to evaluate its commercial speech jurisprudence in light of its treatment of other cases in core areas of speech.

This approach might not be far removed from the direction in which the Court is already heading. For example, in *City of Cincinnati v. Discovery Network, Inc.*,[200] the Court explicitly af-

200. 507 U.S. 410 (1993).

firmed and extended the core principle of the *R.A.V.* test—that the government must identify a commercial harm caused by the commercial speech at issue, rather than merely assert a general harm to which the speech contributes.[201] The *R.A.V.* approach also tracks Justice Stevens's and Justice Thomas's unsuccessful attempts to heighten the standard for bans of truthful speech, as evidenced in the plurality opinion in *44 Liquormart*: "[B]ans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech."[202]

Such a scheme is compatible with this Article's attempt at axiological pluralism.[203] Because *R.A.V.* tests the motive and effect of the challenged regulation, rather than the positive value of the speech at issue, it can be applied by courts with differing views on the rationale for commercial speech protection. Under an *R.A.V.* regime for commercial speech, the Court would need to provide much less guidance than it currently does to lower courts applying the *Central Hudson* test. Occasionally, a dispute may arise over whether some particular justification addresses a commercial harm, but the Court can easily settle such disputes by giving a definitive answer. Once it is clear what sorts of reasons the Court is willing to countenance as legitimate—and past opinions offer substantial guidance on this question—lower courts need ask only whether a regulation is actually justified on permissible grounds. Presumably, the Court could continue to adhere to the tailoring standard an-

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201. *Id.* at 426 ("Cincinnati has not asserted an interest in preventing *commercial* harms by regulating the information . . . which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." (emphasis added)).

202. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 502–03 (1996) (plurality opinion) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 n.9 (1980)); *see also* Thompson v. W. States Med. Ctr., 535 U.S. 357, 377 (2002) (Thomas, J., concurring) (arguing that the *Central Hudson* test should not be applied in cases where the asserted interest is achieved by keeping consumers ignorant); Rubin v. Coors Brewing Co., 514 U.S. 476, 493–98 (1995) (Stevens, J., concurring) (arguing that the regulation of misleading commercial speech should be subject to less scrutiny than other types of speech). It is important to note Justice Thomas's agreement in this approach, because he was the only Justice in *Black* who arguably did not apply the *R.A.V.* framework. *See* Virginia v. Black, 538 U.S. 343, 388–400 (2003) (Thomas, J., dissenting).

203. *See supra* Part II.

nounced in *Board of Trustees v. Fox*,[204] while being especially careful where the government regulates only a single form of commercial speech.

This approach would likely be stricter than the Court's current commercial speech jurisprudence, which, in theory if not in practice, is relatively lenient. *R.A.V.* allows substantial room for regulation so long as regulations relate to the commercial nature of speech rather than its communicative qualities. The *R.A.V.* test also provides a much more determinate and principled basis on which to make decisions than does current commercial speech doctrine. This more neutral and less variable approach should appeal even to those who are lukewarm about commercial speech protection. This approach does not, however, give commercial speech full First Amendment protection. As a compromise, it appropriately satisfies neither the adamant advocate for commercial speech nor the proponent of limiting protection to explicitly political speech. Instead, this test links regulation to the reason that commercial speech is treated differently, leaves substantial room for the regulation of commercial harms, and provides a principled and determinate way of moving commercial speech doctrine forward, especially in hard cases. For a non-absolutist position, it serves the goals of determinacy and principle rather well.

CONCLUSION

One of the difficulties in commercial speech law is that it is, by necessity, a compromise. The Court does not appear willing to jettison the historical restrictions on speech and start completely anew, as it has in the incitement and libel areas. Rather, commercial speech doctrine reveals a tendency to preserve the traditional role of the state in the regulation of economic transactions and the speech associated with them. The doctrine reflects a tension between the desire to protect speech from improper or discriminatory restriction by the government and the recognition that a large sphere of enterprise regulation appears to be in the public interest. Neither position has proved domi-

204. 492 U.S. 469 (1989). In addition, it appears that the other rules differentiating commercial speech from core speech, such as the lack of a presumption against prior restraint, could continue to apply. For a discussion of the difference in treatment of different types of speech, see Post, *supra* note 23, at 26–32.

nant, perhaps because the historical impetus to abandon entirely one side or the other is lacking.[205] As a result, commercial speech doctrine is the constant subject of reinterpretation and revision.

This Article proposes a middle ground: Commercial speech regulation should be permitted exactly to the extent that commercial speech threatens the public interest *as commercial speech.* That is, the government may regulate commercial speech only because of the unique set of harms it poses. The resulting sphere of permissible regulation would preserve the government's traditional authority over economic affairs and consumer protection. It would, however, prevent the government from using commercial speech restrictions to achieve other ends. Put differently, the government may continue to regulate commercial speech insofar as it is commercial, but the government must give appropriate deference to speech as speech.

This middle ground is particularly sensitive to the structure—as Professor Schauer puts it, the "architecture"[206]—of First Amendment law. Because constitutional law is almost exclusively judge-made, under a Constitution that grants limited powers to the federal government and even more limited powers to the federal judiciary, the manner in which those powers are exercised is of particular concern. Nowhere is that more true than in First Amendment law, where decisions consist almost entirely of judicial invalidations of democratically enacted laws, based on judicial elucidation of principles that are derived from a relatively barren text. In the field of commercial speech, which is the product of conflicting intuitions, it is even more important that judicial decisions result from determinable applications of law rather than merely personal opinions. That is why this Article proposes a rather formal test for commercial speech in place of the unstructured balancing test currently in use. A formal test, of course, gives the appearance of judicial neutrality. Moreover, the proposed test, based on *R.A.V.*, explicitly links the principles of judicial decision making to the grounds of commercial speech regulation. The slippage between the formality and the substance of the rule is therefore minimal.

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205. *Cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273–77 (1964) (interpreting the historical rejection of the Sedition Act convictions as reflecting a national commitment to unfettered public criticism of public officials).

206. Schauer, *supra* note 136, at 1181.

It is impossible to tell whether the Court will follow the path proposed here. Nonetheless one can find, through the chaos of recent jurisprudence, some encouraging signs, at least in the Court's rejection of certain grounds for regulation. The intended contribution of this Article is more modest: to show that a moderate position regarding commercial speech regulation is tenable, and that it can be achieved by a formal (and relatively simple) doctrinal rule that avoids the free-ranging balancing that has plagued this area. Any movement toward that goal is something that all parties to the commercial speech debate should support.

JUDICIAL REVIEW OF LOCAL LAND USE DECISIONS: LESSONS FROM RLUIPA

ASHIRA PELMAN OSTROW*

This Article questions whether traditional judicial deference to local land use regulators is justified in light of the highly discretionary, and often corrupt, modern system of land use regulation. In 2000, Congress determined, first, that unlike other forms of economic legislation, land use regulation lacks objective, generally applicable standards, leaving zoning officials with unlimited discretion in granting or denying zoning applications, and second, that this unlimited discretion lends itself to religious discrimination. Congress therefore enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), which requires courts to apply strict scrutiny review to land use decisions that impact religious land uses.

Since its enactment, the constitutionality of RLUIPA has been debated extensively. Many scholars maintain that the statute is an overly broad exemption that creates a privileged class of land users and allows religious institutions to avoid a community's reasonable land use concerns. In contrast, this Article argues that in enacting RLUIPA, Congress identified a global flaw in land use regulation that impacts all land users, but limited its remedy to religious land users. While RLUIPA's strict scrutiny review is clearly inappropriate for land use cases that involve neither fundamental rights nor suspect classes, traditional judicial deference is equally inappropriate in light of the discretionary nature of modern zoning. Fortunately, the Supreme Court established the appropriate standard of review in its earliest zoning cases. This Article thus maintains that RLUIPA is significant because it highlights a fundamental flaw in local land use regulation, and because its bifurcated approach to judicial review of zoning decisions revives an early facial/as-applied dichotomy in land use jurisprudence and encourages more meaningful judicial review of all as-applied land use decisions.

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INTRODUCTION

In 2000, the city of New London, Connecticut, undertook a redevelopment project designed to rejuvenate the economically depressed Fort Trumbull portion of the city. As part of that plan, the city condemned several private homes and transferred them to a private developer. In what is now a well-known story, the Supreme Court, in *Kelo v. City of New London*,[1] upheld the transfer as a valid public use under the Takings Clause.[2] The *Kelo* decision sparked a public outcry, with many

1. 545 U.S. 469 (2005).
2. *See id.* at 488–90.

worrying that it cast all private property rights into doubt.[3] In the year following *Kelo*, twenty-nine states acted to restrict the use of the eminent domain power.[4] In light of this tremendous resurgence of private property rights protection in the eminent domain arena, it is surprising that so little attention has been paid to a more common threat to private property rights: local zoning.[5] This Article seeks to bridge that gap by focusing more broadly on judicial review of local land use regulation.

In the United States, zoning has traditionally been a function of local governments.[6] Despite the universality of local control, as the pace and complexity of development has increased in recent decades, both scholars and planning experts have begun to question the value of localism in the context of land use regulation.[7] In fact, there is a growing belief that excessive re-

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3. *See, e.g.*, Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court:* Kelo v. City of New London, 7 VT. J. ENVTL. L. 41, 41 (2006) ("[P]roperty rights groups and libertarian think tanks excoriated the majority opinion and celebrated the dissents[,] . . . [and] Americans of most political persuasions found the majority decision wrong-headed and oppressive."); Paul Craig Roberts, Commentary, *The* Kelo *Calamity*, WASH. TIMES, Aug. 7, 2005, at B4 (arguing that "[t]he *Kelo* decision threatens all private property" by eliminating the distinction between public and private uses); Ilya Somin, *Robin Hood in Reverse: The Case Against Economic Development Takings*, 535 POL'Y ANALYSIS 1, 4 (2005), *available at* http://www.cato.org/pubs/pas/pa535.pdf (describing the "the economic development rationale for condemnation" as a "blank check" for the use of the power of eminent domain on behalf of private interests).

4. U.S. GOV'T ACCOUNTABILITY OFFICE, PUBL'N NO. GAO-07-28, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 5 (2006), *available at* http://www.gao.gov/new.items/d0728.pdf.

5. The extreme reaction to *Kelo* and to the use of eminent domain can be explained in part by the fact that "the opponents of eminent domain for economic development have a leading national libertarian law firm funding a country-wide media campaign about the individual and community effects of a legal tool available to government." Patricia E. Salkin & Amy Lavine, The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Local Governments 51 (Jan. 3, 2008) (unpublished manuscript *available at* http://ssrn.com/abstract=1081492).

6. *See, e.g.*, Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435, 435 (2006); Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 335 (2003).

7. In fact, some scholars have advocated national, as opposed to local, land use regulation. *See, e.g.*, Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445 (2000) (discussing national land use planning); Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381 (2002) (describing previous efforts at national land use reform); Edward J. Sullivan & Carrie

liance upon local governments to regulate land use has not only failed to achieve satisfactory results, but has also created problems such as exclusionary zoning,[8] fiscal zoning,[9] environmental degradation,[10] and conflicting land uses at municipal borders.[11] At the same time, scholars and planning experts have realized that local governments are often unable to resolve intra-local land use disputes fairly and rationally.[12]

Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 URB. LAW. 449, 450–51 (2002) (recommending national reforms to land use decision making procedures). Additionally, some courts have suggested that national land use regulation could be accomplished under the Commerce Clause. *See, e.g.*, Freedom Baptist Church v. Twp. of Middletown, 204 F. Supp. 2d 857, 867 (E.D. Pa. 2002) ("[T]he mere fact that zoning is traditionally a local matter does not answer Congress's undoubtedly broad authority . . . to regulate economic activity even when it is primarily intrastate in nature.").

8. *See, e.g.*, 5 ZONING AND LAND USE CONTROLS § 33.01 n.3 (Eric D. Kelly ed. 2007) ("The local zoning ordinance, which is the mainstay of land use control in the United States, has proved relatively ineffective to deal with statewide social and environmental problems."); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 453 (1990) (highlighting the downside of local autonomy and arguing that in order to reduce inequality and improve race and class relations, the view of the superiority of local power must be abandoned); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1082 (1996) (arguing that zoning is used to keep out "'the wrong kind of people'—those who have to be excluded in order to make a residential neighborhood seem desirable").

9. Fiscal zoning seeks to increase municipal revenues and limit municipal expenses through a variety of zoning devices that raise barriers against low- and moderate-income people, who are seen as requiring a high level of municipal services while contributing relatively little in taxes. *See, e.g.*, S. Burlington County NAACP v. Twp. of Mt. Laurel, 336 A.2d 713, 732 (N.J. 1975) (explaining the exclusionary impact of fiscal zoning and holding that municipalities "must zone primarily for the living welfare of people and not for the benefit of the local tax rate").

10. As Professor Carol Rose has noted, "environmentalism heightened national awareness of other consequences of local land use decisions allowing too much new development, e.g., downstream siltification, increased auto fumes, and the loss of historical landmarks and fragile ecosystems." Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 840 n.4 (1983). *See generally* David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 21 ENVTL. & URB. ISSUES 1 (1994); James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994).

11. See, for example, *Watab Township Citizen Alliance v. Benton County Board of Commissioners*, 728 N.W.2d 82, 91 (Minn. Ct. App. 2007), in which a proposed project would "create a[] . . . residential zone within an . . . agricultural zone located four miles from the nearest city limits," and *Borough of Cresskill v. Borough of Dumont*, 100 A.2d 182, 185 (N.J. Super. 1953), *aff'd*, 104 A.2d 441 (N.J. 1954), in which one side of a street was zoned for single-family residences and the other was zoned for industrial purposes.

12. *See* Rose, *supra* note 10, at 839 (arguing that local governments are unable to make small-scale land use decisions "fairly and rationally—that is, with a reason-

The original advocates of zoning believed that local legislatures would create fixed plans of development that zoning officials would have little discretion in implementing.[13] Modern zoning, however, is far removed from its theoretical underpinnings. In place of substantive planning, municipalities have adopted a "wait and see" approach to zoning, designed to maintain flexibility and to allow localities to deal with property owners on an individual basis.[14] Under this modern approach, local zoning officials, who generally lack any training or experience with land use planning,[15] have no objective standards against which to measure individual zoning requests. Thus, in most jurisdictions, standard zoning decisions are made through subjective, case-by-case assessments of the proposed use of the property.[16]

Historically, local control over land use planning has been reinforced by a deferential standard of judicial review. Land use decisions, made by local administrative or legislative bodies, are accorded a formal presumption of rationality and constitutionality, and are upheld unless unreasonable.[17] Although perhaps justifiable under the original conception of zoning, the discretionary nature of modern zoning does not warrant such judicial deference. In fact, judicial deference to subjective zoning decisions has made it difficult to remedy even the most egregious

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able distribution of burdens among individuals, and with the care and deliberation commensurate with the long-term implications of land development").

13. *See infra* Part I.A (discussing the original conception of zoning).

14. Rather than devise a general plan of development, under the so called "wait and see" approach to zoning, all undeveloped land in a municipality is underzoned. As a result, property owners seeking to develop their land must strike a bargain with the municipality in order to receive the necessary zoning approvals. For further discussion, see *infra* Part I.A.

15. *See infra* note 78 and accompanying text.

16. *See infra* note 34; *see also infra* Part I.B.

17. *See infra* Part I.A.

abuses of zoning power.[18] Moreover, where remedies do exist, they are applied inconsistently within and across jurisdictions.[19]

It is within this context that Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) to provide a uniform and meaningful judicial remedy to religious land users. Prior to enacting RLUIPA, Congress held nine hearings over a three-year period and compiled evidence of religious discrimination in land use regulation.[20] Congress determined that, in contrast to other forms of economic legislation, land use regulations lack objective, generally applicable standards, leaving zoning officials with virtually unlimited discretion in granting or denying zoning requests. Congress further concluded that this highly discretionary context readily lends itself to religious discrimination.[21] In passing RLUIPA, Congress sought to prevent such discrimination by requiring courts to apply strict scrutiny

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18. *See* Rose, *supra* note 10, at 842 (arguing that deferential judicial review of zoning decisions cannot effectively address the fairness claims of individual property owners whose interests are impacted by zoning decisions); Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil,"* 20 NOVA L. REV. 707, 710 (1996) (arguing that deferential judicial review of zoning decisions "so badly imbalanced public and private interests in regard to the use of land that it is practically impossible to redress even outrageous abuses of the zoning power").

19. For example, some state courts have applied increased scrutiny in cases of suspected spot zoning. *See, e.g.*, Fritts v. City of Ashland, 348 S.W.2d 712, 713 (Ky. 1961) (invalidating a rezoning to industrial uses because "[t]here was no evidence of any change in the neighborhood since the enactment of the original zoning ordinance in 1955, nor was there proof that the . . . tract was . . . distinguishable in character from the surrounding . . . property[;] [t]herefore, . . . the burden was on the city authorities to justify the change"); Randolph v. Town of Brookhaven, 337 N.E.2d 763, 764 (N.Y. 1975) (requiring a showing that a "zoning amendment was made in accordance with a comprehensive plan" in cases of suspected spot zoning (internal quotation marks omitted)); Godfrey v. Union County Bd. of Comm'rs, 300 S.E.2d 273, 275–76 (N.C. Ct. App. 1983) (requiring a "clear showing of a reasonable basis for suspected spot zoning" (quotation marks omitted) (quoting Blades v. City of Raleigh, 187 S.E.2d 35, 45 (N.C. 1972))); *see also infra* notes 184–91 and accompanying text.

20. In their Joint Statement in support of RLUIPA, Senators Hatch and Kennedy noted that the statute "is based on three years of hearings—three hearings before the Senate Committee on the Judiciary and six before the House Subcommittee on the Constitution—that addressed in great detail both the need for legislation and the scope of Congressional power to enact such legislation." 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) [hereinafter Joint Statement].

21. *See* HOUSE JUDICIARY COMMITTEE, RELIGIOUS LIBERTY PROTECTION ACT OF 1999, H.R. REP. NO. 106–219, at 18 (1999).

review to local land use decisions that impose a substantial burden on religious exercise if such decisions are made through "individualized assessments" of the proposed use of the property.[22]

Since its passage, the constitutional validity of RLUIPA has been extensively debated.[23] Although the Supreme Court has upheld RLUIPA's institutionalized persons provisions against an Establishment Clause attack,[24] it has yet to pass judgment upon the constitutionality of its land use provisions.[25] It seems likely that as RLUIPA's land use cases continue to make their way through the federal courts, the Supreme Court will be called upon to resolve the debate.

Regardless of the statute's ultimate fate in the courts, this Article argues that in enacting RLUIPA, Congress identified a fundamental flaw in the zoning process and that RLUIPA is significant because its bifurcated approach to judicial review of religious zoning decisions provides a framework for reviewing all land use decisions. Specifically, RLUIPA distinguishes between objective zoning ordinances and the subjective application of such ordinances to individual parcels of land through a

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22. 42 U.S.C. § 2000cc(a)(2)(C) (2000).

23. For arguments that RLUIPA is constitutional, see, for example, Frank T. Santoro, *Section Five of the Fourteenth Amendment and the* Religious Land Use and Institutionalized Persons Act, 24 WHITTIER L. REV. 493 (2002); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001); and Aaron Keesler, Note, *Religious Land-Use and the Fourteenth Amendment's Enforcement Clause: How the FMLA Paved the Way to the RLUIPA's Constitutionality*, 3 AVE MARIA L. REV. 315 (2005).

For arguments that RLUIPA is unconstitutional, see, for example, Hamilton, *supra* note 6; Julie M. Osborn, *RLUIPA's Land Use Provisions: Congress' Unconstitutional Response to City of Boerne*, 28 ENVIRONS ENVTL. L. & POL'Y J. 155 (2004); Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361 (2002); Shawn Jensvold, Note, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1 (2001).

24. *See* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (holding that the institutionalized persons provision is compatible with the Establishment Clause "because it alleviates exceptional government-created burdens on private religious exercise"). For further discussion of RLUIPA's prisoner provisions, see Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501 (2005).

25. The lower federal courts seem to have agreed, however, that "the reasons given by the Court for upholding the individualized persons aspect of the Act apply equally to the section dealing with land use." Salkin & Lavine, *supra* note 5, at 15–16 & n.78 (citing federal cases).

system of individualized assessments.[26] The application of a zoning ordinance in a particular case requires more meaningful judicial review because a subjective system of individualized assessments readily lends itself to abuse.[27]

Under RLUIPA, *facial* challenges to zoning ordinances, or challenges to objective, generally applicable ordinances, are decided using a deferential standard of judicial review. In contrast, challenges to a zoning ordinance *as applied*[28] to a particular piece of property through a subjective, individualized assessment, are strictly scrutinized to ensure that the decision is the least restrictive means of achieving a compelling government interest.[29]

The strict scrutiny review mandated by RLUIPA is clearly inappropriate for as-applied land use decisions that impact neither fundamental rights nor suspect classes. Yet, given RLUIPA's recognition of the discretionary nature of local land use regulation, traditional judicial deference seems equally inappropriate. Fortunately, the Supreme Court provided the correct standard of review in its earliest land use decisions. Indeed, after announcing a highly deferential standard of review for zoning ordinances in *Village of Euclid v. Ambler Realty Co.*,[30] the Court explicitly limited its holding to *facial* challenges and

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26. In determining whether a particular zoning decision was arrived at through an individualized assessment, courts look to whether the decision was subjective in nature. *See infra* note 130 and accompanying text.

27. *See infra* Part II.B (describing the dangers of a system of individualized assessments).

28. In *WMX Technologies, Inc. v. Gasconade County*, 105 F.3d 1195 (8th Cir. 1997), the Eighth Circuit explained the distinction between facial and as-applied due process challenges in the land use context as follows:

> A "facial" substantive due process challenge to a land use ordinance bears important differences to an "as applied" substantive due process challenge to the same ordinance. As noted, when one makes a "facial" challenge, he or she argues that *any* application of the ordinance is unconstitutional. . . . When one makes an "as applied" challenge, he or she is attacking only the decision that applied the ordinance to his or her property, not the ordinance in general.

Id. at 1198 n.1. In the land use context, the remedy for a facial challenge "is the striking down of the regulation," while the remedy for an as-applied challenge "is an injunction preventing the unconstitutional application of the regulation to plaintiff's property and/or damages resulting from the unconstitutional application." Eide v. Sarasota County, 908 F.2d 716, 722 (11th Cir. 1990).

29. *See infra* Part II.C.

30. 272 U.S. 365 (1926).

warned that the application of a zoning ordinance to a particular piece of property might be found unreasonable.[31]

Less than two years later, in *Nectow v. City of Cambridge*,[32] the Supreme Court reviewed such an ordinance as applied to a particular property. Although *Nectow* involved neither a fundamental right nor a suspect class, the Court engaged in a more rigorous review of the underlying record and ultimately concluded that the ordinance, as applied, violated the property owner's due process rights because it lacked a substantial relationship to the public health, safety, or welfare. The facial/as-applied dichotomy that emerges from these cases provides that facial challenges to zoning ordinances are reviewed under *Euclid*'s highly deferential standard, while as-applied land use challenges are reviewed under *Nectow*'s less deferential, fact-oriented approach.

Despite these precedents, most courts ignore the facial/as-applied dichotomy and review both facial and as-applied challenges deferentially.[33] Thus, this Article argues that RLUIPA's primary value lies in its recognition of the discretionary nature of local land use laws and its potential to encourage meaningful judicial review of all as-applied land use decisions. The facial/as-applied dichotomy advanced by this Article rejects traditional judicial deference to local officials as unwarranted in light of the highly discretionary,[34] inconsistent,[35] and often cor-

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31. *See id.* at 395.

32. 277 U.S. 183 (1928).

33. *See infra* Part III.B.

34. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738 (1997) (noting "the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer"); Goldfien, *supra* note 6, at 438 (describing the discretion afforded to local land use regulators); Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 URB. LAW. 635, 635 (2003) (noting that the Standard State Zoning Enabling Act, upon which most state zoning acts are based, "did not contemplate the extensive use of discretion that occurs today"); Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 349 (2002) (noting that land use decision making has grown increasingly discretionary and "has shifted significantly from the planned to the particularized, affording a more ad hoc response to individual development proposals").

35. *See* Bd. of County Comm'rs v. Snyder, 627 So. 2d 469, 472 (Fla. 1993) ("Inhibited only by the loose judicial scrutiny afforded by the fairly debatable rule, local zoning systems developed in a markedly inconsistent manner."); Goldfien, *supra* note 6, at 437 n.9 (noting that inconsistency "is troubling for many, especially in the developer community, and [that] there have been periodic calls for the devel-

rupt system of land use regulation that prevails throughout the country.[36] Rather than deferring to local decision makers, *Nectow*'s as-applied review requires courts to examine the underlying record to determine whether the government's justifications for its decision can be supported by factual findings.[37]

Part I of this Article describes the rise of zoning and the origins of the deferential standard of review. It then explores the discretionary nature of modern zoning and questions the appropriateness of judicial deference in this context. Part II reviews the history and purpose of RLUIPA's land use provisions. In particular, it analyzes RLUIPA's application of the Free Exercise Clause's individualized assessments doctrine and RLUIPA's bifurcated approach to judicial review of land use regulation. Part III demonstrates that RLUIPA's main insight—that zoning ordinances applied in a subjective fashion are undeserving of judicial deference—impacts all land users. Thus, this Article argues for a less deferential standard of judicial re-

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opment and adoption of more uniform laws and regulations"); Sullivan & Richter, *supra* note 7, at 451 (recommending reform of "the current Balkanized systems of planning").

36. *See, e.g.*, ROBERT C. ELLICKSON & VICKIE L. BEEN, LAND USE CONTROLS 308 (2005) (describing the land use system as one which "has long been tainted with discoveries and allegations of corruption"); PETER D. SALINS & GERARD C.S. MILDNER, SCARCITY BY DESIGN: THE LEGACY OF NEW YORK CITY'S HOUSING POLICIES 42 (1992) (discussing corruption in the administration of New York City's housing code); Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions: Installment One*, 24 STAN. ENVTL. L.J. 3, 42 (2005) (noting that "[t]here are many accounts of unfair dealing facilitated by bilateral deal-making in local land use regulation—with outright corruption of local officials as the extreme, although not exceptional, case"); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1272–74 (1997) (discussing accounts of bribery and developers' influence in local government); Patricia E. Salkin, *Ethical Considerations in Land Use Decision Making: 2006 Annual Review of Cases and Opinions*, 38 URB. LAW. 669, 669 (2006) (summarizing "reported cases and opinions documenting allegations of unethical conduct involved in land use planning and zoning decision making").

For older studies documenting corruption in land use decision making, see GEORGE AMICK, THE AMERICAN WAY OF GRAFT 77 (1976) (surveying corrupt practices in several contexts, and concluding that land use control is the governmental activity "most closely associated with corruption in the public's mind"); JOHN A. GARDINER & THEODORE R. LYMAN, DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND-USE AND BUILDING REGULATION (1978) (reporting instances of corruption in six states).

37. *See infra* Part III.B.

view, modeled after the Supreme Court's review in *Nectow*, in all as-applied land use cases.

I. JUDICIAL DEFERENCE AND THE DISCRETIONARY NATURE OF LOCAL LAND USE REGULATION

Although zoning originated as an effort to create legislatively-fixed plans of community development, almost a century of experience in zoning reveals that municipalities rarely create such substantive plans, preferring instead to zone individual parcels on a highly discretionary, case-by-case basis. The absence of substantive planning means that zoning officials, who often lack training or planning expertise, have no objective guidelines against which to measure individual zoning requests. Moreover, in many localities, zoning hearings lack basic procedural safeguards. Not surprisingly, this combination of factors leaves ample room for inconsistency and corruption in the zoning process. As Professor Carol Rose has noted,

> [s]ince the middle 1960's, legal scholars have complained that local land decisions can make a mockery of orderly and predictable planned development. Individual land decisions, the critics say, amount to deals with landowners and developers; these deals gut the local plan (if indeed any exists) and are merely ad hoc impulse choices that neither safeguard the surroundings for present and future residents, nor enable those residents and would-be developers to predict future actions.[38]

This Part argues that the formal presumption of validity and deferential judicial review accorded to general economic legislation is not appropriate in the context of modern, discretionary, "wait and see" zoning.

A. The Rise of Zoning and the Origins of Judicial Deference

Today, zoning is the primary means for regulating and coordinating land use. Local governments use zoning to control local aesthetics and local finances, and even to confer competitive

38. Rose, *supra* note 10, at 841; *see also* Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 5 (1992) (noting that over the past few decades, "[c]ourts became increasingly aware that many local decisions were highly arbitrary to the two major stakeholders in the process, landowners and neighbors, as well as to those whose potentially legitimate claims were excluded from the process").

advantages on one area of a municipality over another.[39] But zoning was not always used so extensively. Early land use ordinances were limited in scope, focusing on fire prevention and building standards,[40] or on restricting noxious uses in or near residential neighborhoods.[41]

By the end of the nineteenth century, however, local governments became increasingly concerned about the compatibility of land uses within municipalities.[42] By separating residential districts from commercial and industrial areas, early city planners hoped to stabilize neighborhoods and protect property values.[43] In 1916, New York City passed a widely-publicized comprehensive zoning ordinance, inspiring then-Secretary of Commerce Herbert Hoover to convene a committee to study zoning.[44] In 1922, the committee promulgated the Standard State Zone Enabling Act (SZEA) to assist states in authorizing municipalities to zone.

Municipalities were eager to exercise the zoning power. In fact,

> urban America was in something of a crisis in the early 1920's. Like a patient who could endure his fever until he

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39. *See* Mandelkar & Tarlock, *supra* note 38, at 4.

40. See ELLICKSON & BEEN, *supra* note 36, at 75 (describing the limited purpose of early regulatory efforts); Charles L. Siemon, *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603, 607 (1987) (noting that prior to the Civil War, "local land use controls were limited in focus and generally related to fire and building standards").

41. *See, e.g., In re* Hang Kie, 10 P. 327 (Cal. 1886) (upholding an ordinance restricting the operation of laundries); Shea v. City of Muncie, 46 N.E. 138 (Ind. 1897) (upholding an ordinance restricting the operation of taverns and liquor stores); Cronin v. People, 82 N.Y. 318 (1880) (upholding an ordinance restricting the operation of slaughterhouses).

42. As the Supreme Court noted in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926):

> Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities.

Id. at 386–87 (1926); *see also* Siemon & Kendig, *supra* note 18, at 724; Katia Brener, Note, Belle Terre *and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. REV. 447, 465 (1999).

43. *See* J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 762.

44. Richard H. Chused, Euclid's *Historical Imagery*, 51 CASE W. RES. L. REV. 597, 598 (2001).

> suddenly learned that there was now a new remedy for it and who was then impatient to be cured, urban America was now sure that it would perish if it did not have zoning . . . . Zoning was the heaven-sent nostrum for sick cities, the wonder drug of the planners, the balm sought by lending institutions and householders alike. City after city worked itself into a state of acute apprehension until it could adopt a zoning ordinance.[45]

The practice of zoning spread rapidly, and "[b]y 1930, 35 states had passed zoning enabling acts patterned after the SZEA."[46]

In its landmark decision of *Village of Euclid v. Ambler Realty Co.*,[47] the Supreme Court confirmed the validity of zoning as a proper exercise of the state's police power,[48] thus solidifying zoning's place as the primary means of land use regulation in the United States. The property owner in *Euclid* brought a facial challenge to a zoning ordinance that divided all land in the municipality into various use districts. The Supreme Court upheld the ordinance, concluding that a zoning ordinance violates due process only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[49] Moreover, the Court held that "[i]f the validity of the *legislative classification* for zoning purposes be fairly debatable, the *legislative judgment* must be allowed to control."[50]

Euclid's characterization of a zoning ordinance as a legislative judgment established the presumption of constitutionality and the related tradition of judicial deference in land use cases.[51] Courts examine due process claims against zoning or-

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45. Siemon, *supra* note 40, at 608 (quoting M. SCOTT, AMERICAN CITY PLANNING SINCE 1890 (1969)).

46. ELLICKSON & BEEN, *supra* note 36, at 76; *see also* DANIEL R. MANDELKER, LAND USE LAW § 4.15 (5th ed. 2003) ("All state zoning legislation is based on [the] Standard Zoning Enabling Act. . . . Although many States have modified the Standard Zoning Act," the basic statutory framework has remained relatively unchanged.).

47. 272 U.S. 365 (1926).

48. *Id.* at 390.

49. *Id.* at 395.

50. *Id.* at 388 (emphasis added).

51. *See* Mandelker & Tarlock, *supra* note 38, at 7; *see also* City of Lowell v. M & N Mobile Home Park, Inc., 916 S.W.2d 95, 98 (Ark. 1996) (noting that when zoning ordinances are reviewed, "there is a presumption that the legislative branch acted in a reasonable manner, and the burden is on the moving party to prove that the enactment was arbitrary"); Bd. of County Comm'rs v. City of Olathe, 952 P.2d 1302, 1309 (Kan. 1998) (stating that the zoning authority is presumed to have acted

dinances, as well as other legislation affecting property rights, under a loose reasonableness standard.[52] Under this standard, the purpose of challenged legislation is presumed valid, and the reviewing court evaluates whether the means are reasonably calculated to achieve the stated purpose.

In practice, this test grants great deference to legislative judgments because the link between the means and the purpose of the legislation is satisfied by any conceivable rational basis, regardless of whether it was the actual basis of the legislative action.[53] As the First Circuit explained in upholding a zoning ordinance, "the 'true' purpose of the Ordinance, (e.g., the actual purpose that may have motivated its proponents, assuming this can be known) is irrelevant for rational basis analysis. The question is only whether a rational relationship exists between the Ordinance and a *conceivable* legitimate governmental objec-

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reasonably when it prescribes, changes, or refuses to change zoning); Goldberg Cos. v. Council of Richmond Heights., 690 N.E.2d 510, 514–15 (Ohio 1998) (following *Euclid* and holding that "a zoning regulation is presumed to be constitutional unless determined by a court to be clearly arbitrary and unreasonable").

52. *See* 1 ARDEN H. RATHKOPF ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 3.13 (4th ed. Supp. 2005) ("As a matter of judicial deference, the legislative branch of government is presumed to have made a reasonable judgment that the law in question will further the public purposes underlying enactment of the law.").

In land use decisions that implicate the Due Process Clause, heightened scrutiny is generally required only where the legislative classification is considered to be "suspect" (such as race), or where a "fundamental right" (such as speech or religion) is involved. *See, e.g.*, State v. Champoux, 566 N.W.2d 763, 765 (Neb. 1997) (asserting that "when a fundamental right or suspect classification is not involved in the legislation, the legislative act is a valid exercise of the police power if the act is rationally related to a legitimate state interest"); Fanelli v. City of Trenton, 641 A.2d 541, 546 (N.J. 1994) (noting that the plaintiff's federal and state due process challenges to a zoning ordinance should be analyzed "under minimum scrutiny, because the ordinance is an economic regulation that does not affect a suspect class").

53. *See, e.g.*, Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1214 (11th Cir. 1995) ("The proper inquiry is concerned with the *existence* of a conceivably rational basis, not whether that basis was actually considered by the legislative body.") (quotation marks omitted) (quoting Panama City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1547 (11th Cir. 1994)); Dodd v. Hood River County, 59 F.3d 852, 865 (9th Cir. 1995) (holding that a zoning action will be upheld so long as "the issue of whether the County acted arbitrarily and without a legitimate and rational basis for its decision is 'at least debatable'"); City of Lilburn v. Sanchez, 491 S.E.2d 353, 355 (Ga. 1997) (holding that under the rational basis test "any plausible or arguable reason that supports an ordinance will satisfy substantive due process"); *see generally* Siemon, *supra* note 40 (arguing against the use of post-hoc rationalizations in upholding the validity of zoning regulations).

tive."[54] Since the Supreme Court's decision in *Euclid,* courts have reviewed land use decisions made by both local administrative and legislative bodies under this highly deferential reasonableness standard.[55]

Moreover, in the land use context, courts have frequently warned against substituting their judgment for that of a community's elected representatives.[56] For example, in overturning

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54. Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 907 F.2d 239, 246 (1st Cir. 1990).

55. *See, e.g.,* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1222–24 (6th Cir. 1992) (articulating a highly deferential standard of review for both local administrative and legislative zoning decisions); *see also* Mandelker & Tarlock, *supra* note 38, at 1 (noting that zoning bodies can perform both legislative and administrative functions and that courts often extend the presumption of rationality to both functions); Rose, *supra* note 10, at 842 (noting that small-scale land use decisions have traditionally been "tested only within the ample girth of a loose reasonableness standard").

More specifically, zonings and rezonings are considered legislative actions and are reviewed under a highly deferential "fairly debatable" rule, which has also been termed the "anything goes" rule. *See* Siemon & Kendig, *supra* note 18, at 710. Variances and conditional use permits are considered local administrative actions and in the state courts are ostensibly held to a higher, "substantial evidence" standard of review. In practice, however, these administrative, or "quasi-judicial" actions, are reviewed under certiorari review, which is "every bit as deferential to local decision-makers' prerogatives as is . . . fairly debatable review." *Id.* at 738–39. In contrast to the state courts, in the federal courts local administrative acts are held to an even more deferential "shock the conscience" standard. *See, e.g.,* Natale v. Town of Ridgefield, 170 F.3d 258 (2d Cir. 1999); Anderson v. Douglas County, 4 F.3d 574 (8th Cir. 1993).

56. *See, e.g.,* Burnham v. Planning & Zoning Comm'n, 455 A.2d 339, 341 (Conn. 1983) ("We have said on many occasions that courts cannot substitute their judgment for the wide and liberal discretion vested in local zoning authorities when they have acted within their prescribed legislative powers. Courts must not disturb the decision of a zoning commission unless the party aggrieved by that decision establishes that the commission acted arbitrarily or illegally."); Oak Park Trust & Sav. Bank v. City of Chicago, 438 N.E.2d 630, 635 (Ill. App. Ct. 1982) ("It is within the province of the local municipal body to determine the uses of property and establish zoning classifications."); Prete v. City of Morgantown, 456 S.E.2d 498, 500 (W. Va. 1995) ("'In passing upon an ordinance imposing zoning restrictions courts will not substitute their judgment for that of the legislative body charged with the duty of determining the necessity for and the character of zoning regulations and, where the question whether they are arbitrary or unreasonable is fairly debatable, will not interfere with the action of the public authorities.'" (quoting Carter v. City of Bluefield, 54 S.E.2d. 747, 761 (W. Va. 1949))).

In the post-*Lochner* era, courts are particularly wary of substituting their judgment for that of the community's elected representatives when examining economic legislation. The *Lochner* era refers to a period of time in which the Court invalidated regulatory economic legislation because it disagreed with its legislative purpose. *See* Lochner v. New York, 198 U.S. 45 (1905) (striking down a state

an appellate court decision that had overturned a local zoning decision, the Supreme Court of Ohio stated that

> [n]o appellate court, under the guise of judicial review, should nullify the zoning code, which has been written and adopted by the members of a city council, the duly-elected representatives of the people. It is better to leave the formulation and implementation of zoning policy to the city council, or other legislative body, which has not only the expertise and staff, but also, the constitutional responsibility to police this area effectively.[57]

Traditional judicial deference, stemming from *Euclid*'s characterization of zoning as a legislative judgment, is best understood in the context of the SZEA and the early conception of "Euclidean Zoning."[58] The SZEA was based on several crucial assumptions: first, that segregating uses within a city would create a "quality urban environment";[59] second, that it would be possible to "formulate an intelligent, all-at-once decision to which the market would conform";[60] and third, that once the comprehensive plan was in place, zoning officials "would rarely change the rules."[61] In other words, as originally conceived, the zoning map would embody a legislative blueprint for local land use that would rarely need to be amended.[62] Zon-

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law regulating employment in the bakery industry because the law unreasonably interfered with employers' and workers' freedom of contract); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 to 8-7 (2d ed. 1988) (discussing the *Lochner* era and the reaction against the Court's holding in *Lochner*). As the Supreme Court has stated, "[t]he day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).

57. Leslie v. City of Toledo, 423 N.E.2d 123, 125 (Ohio 1981).

58. Traditional Euclidean Zoning divides a city into use districts, and prescribes architectural and structural regulations as well as the permissible uses for buildings in each district.

59. Ira Michael Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 URB. LAW. 1, 2 (1973).

60. *Id.*; *see also* Rose, *supra* note 10, at 849 (noting that when zoning first emerged "[i]t was widely assumed that localities could indeed set their goals far in advance, that changes in land regulation would therefore seldom be necessary, and that citizens would not face fluctuations in the status of their own or their neighbors' land").

61. Heyman, *supra* note 59, at 2.

62. *See* MANDELKER, *supra* note 46, § 4.18 (noting that the drafters of the Standard Zoning Enabling Act treated the adoption and amendment of a zoning ordinance as a legislative act).

ing officials would have had little discretion in implementing the plan, as they would have merely applied the rules set out in the zoning ordinance. Indeed, as one court explained,

> [t]he original zoning ordinances were to have broad uniform application to all. It was believed that the local governmental body would allow or disallow under fixed terms, applicable to all, a particular type of development in a particular area. Development was seen as a matter of right if the fixed criteria of the zoning ordinances was satisfied.[63]

When zoning ordinances embody a legislative plan of development and zoning officials have little discretion in implementing the plan, judicial deference to zoning decisions made in accordance with the plan is entirely reasonable. As the next section will explain, however, neither of these assumptions holds true. Instead, modern zoning ordinances bear little resemblance to legislative plans of development, and modern zoning officials have virtually unlimited discretion in making zoning decisions. Thus, according a formal presumption of rationality and judicial deference to zoning decisions made in this context cannot be justified.

B. Judicial Deference in Light of Discretionary Modern Zoning Practice

Although the original proponents of zoning envisioned a system in which local legislatures would enact an "intelligent all-at-once" plan for local development, "as early as the 1930s, planners began to turn away from static end-state plans and to shift the focus of zoning away from fixed advance allocations and toward case-by-case review of landowners' or developers' proposed development plans."[64] In place of a comprehensive legislative plan, at the inception of zoning "most land was

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63. Snyder v. Bd. of County Comm'rs, 595 So. 2d 65, 72 (Fla. Dist. Ct. App. 1991), *quashed*, 627 So. 2d 469 (Fla. 1993).

64. ELLICKSON & BEEN, *supra* note 36, at 90 ("Experience quickly revealed that it is not practicably possible to predict future market demand, and that zoning provisions that run counter to the market create great political pressure for change and are apt to be amended."); *see also* MANDELKER, *supra* note 46, § 4.15 ("Although the drafters contemplated a zoning system in which uses are permitted as of right and modifications few, everyone knows that municipalities do not manage the zoning process in this manner.").

zoned according to its then use, exceptions were grandfathered in and most vacant land was underzoned or 'short-zoned.'"[65]

Modern zoning ordinances similarly assign most undeveloped land to low-density, residential zones that do not permit intensive land development. Individual parcels are then rezoned on an ad hoc basis in response to particular development proposals. As the Florida District Court of Appeal explained,

> in reality most development has not occurred "as-of-right" under actual zoning practices. Most communities in actual practice have zoned their undeveloped land under a highly restrictive classification such as "general use" and agriculture. . . . The original intent was not to permanently preclude more intensive development but to adopt a "wait and see" attitude toward the direction of future development.[66]

This "wait and see" approach to zoning "allows local zoning agencies to exercise considerable control over the land development process"[67] and to extract concessions from developers in exchange for granting zoning requests.[68]

Scholars have long condemned municipalities for enacting zoning ordinances without adequate substantive planning.[69] As early as the 1950s, Professor Charles Haar argued that

> any zoning done before a formal master plan has been considered and promulgated is per se unreasonable, because of failure to consider as a whole the complex relationships between

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65. *Snyder*, 595 So. 2d at 73 (citing 3 RATHKOPF ET AL., *supra* note 52, § 27A-5 (4th ed. Supp. 2006)).

66. *Id.* at 72–73.

67. MANDELKER, *supra* note 46, § 4.15.

68. *See* ELLICKSON & BEEN, *supra* note 36, at 90 (noting that modern zoning ordinances assign undeveloped land to "holding zones," or overly restrictive zoning classifications, to enable the municipality to extract concessions from developers in exchange for rezoning to a less restrictive use); JOHN M. LEVY, CONTEMPORARY URBAN PLANNING 123–25 (6th ed. 2003) (noting that zoning officials admit that they often zone large tracts restrictively to create an artificially strong bargaining position).

69. *See, e.g.*, Charles M. Haar, *"In Accordance with a Comprehensive Plan,"* 68 HARV. L. REV. 1154, 1174 (1955); Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 909–10 (1976) (arguing that the SZEA's failure to require comprehensive zoning at the local government level was a serious oversight); Siemon, *supra* note 40, at 606–07 (arguing that "zoning without planning lacks coherence" and should not be entitled to a judicial presumption of validity).

> the various controls which a municipality may seek to exercise over its inhabitants in furtherance of the general welfare.[70]

In addition, because localities lack coherent substantive plans for development, there are no objective standards upon which to base individual zoning decisions.[71] This leaves zoning officials to make typical zoning decisions—involving the issuance of variances,[72] special use permits,[73] and single-parcel rezonings—on a highly discretionary, ad hoc basis.[74] Moreover, local governments continue to develop new techniques—including floating zones,[75] planned unit developments,[76] and development agreements[77]—that are specifically designed to maintain local discretion by affording zoning authorities the ability to make zoning decisions on a case-by-case basis.

The problems caused by subjectivity are exacerbated by the fact that zoning officials, either appointed to administrative boards or elected to legislatures, often have no training or plan-

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70. Haar, *supra* note 69, at 1174.

71. Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1162 (1985) (noting that municipal land use plans, which are "notoriously vague, . . . provide no genuine standards for individual zoning decisions").

72. In theory, variances are granted in cases of unusual hardship. In practice, variances have often been freely granted in spite of the contrary recommendations of the local planning staff. *See* RATHKOPF ET AL., *supra* note 52, §§ 58:1–58:2; *see also* Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 918 (2007).

73. According to Professor Rose, "[t]he discretionary character of such special permits makes them attractive to municipalities wishing to exercise case-by-case control" over land use development. Rose, *supra* note 10, at 841 n.8.

74. ELLICKSON & BEEN, *supra* note 36, at 308; Goldfien, *supra* note 6, at 438 (describing the discretion accorded to local land use regulators); Ryan, *supra* note 34 (describing the ad hoc nature of modern zoning).

75. Floating zones are zoning classifications that are approved in a zoning ordinance but not placed on a zoning map. A floating zone allows the municipality discretion to locate the zone on the map in conjunction with a particular development proposal. *See generally* ZONING AND LAND USE CONTROLS, *supra* note 8, § 13.01.

76. Planned unit developments, or cluster zoning, introduce flexibility into the rezoning process by replacing the lot-by-lot requirements of Euclidean Zoning with a site plan review process, under which the overall density of the preexisting Euclidean Zoning remains in place, but the placement of individual improvements may be clustered. *See generally id.* § 12.01.

77. Development agreements are formal contracts between a developer and the local government that limit the power of the government to apply newly enacted ordinances to ongoing developments. The developer gains stability, and the municipality gains concessions and land development conditions beyond what it could reasonably require through ordinary conditions, subdivision exactions, or impact fees. *See id.* § 9A.01.

ning experience.[78] Moreover, the zoning decision making process, particularly for rezoning decisions, often lacks procedural safeguards. For example, in many jurisdictions zoning "hearings are not transcribed and decisions are issued without findings of fact or statements of reasons."[79]

In addition, individual zoning decisions made by the local legislature lack certain democratic safeguards that legitimize decisions of larger legislatures. In making individual zoning decisions "which involve only a few interested parties meeting only on single issues, legislatures are restrained neither by a coalition-building process that assures the fairness of the decisions, nor by a clash of interests that gives time for sober consideration."[80] Moreover, because of their small size and homogeneous constituency, local decision making bodies are particularly vulnerable to political capture by a single interest or faction.[81] Factional domination can manifest itself in several ways at the local level:

> One is sheer corruption, made possible in smaller representative bodies because a limited number of persons have influence which must be bought. Another possibility is domination by a few who are perceived by others as the powerful. The decisions of these few can affect many within the community; others must curry their favor, and even larger interests find difficulty in organizing against their "cabals." Finally . . . is the factional domination created by a

78. ELLICKSON & BEEN, *supra* note 36, at 308 ("[Zoning officials] range from citizen volunteers with no training or expertise in administration or land use, to persons chosen more for their political connections than for their expertise or wisdom, to professionals."); Goldfien, *supra* note 6, at 440 (noting that zoning officials "are not planning or technical experts"); Serkin, *supra* note 72, at 919 ("[M]ost zoning boards charged with granting variances are staffed by laypeople who make their decisions informally and in relative secrecy."); Sullivan & Richter, *supra* note 7, at 473 (stating that "planning commissions, in many cases, are comprised of local volunteers who have neither the expertise nor the time" to make land use decisions).

79. ELLICKSON & BEEN, *supra* note 36, at 308; *see also* Mandelker, *supra* note 34, at 639 (describing decision making under the SZEA as "chaotic," with "no real attempt at a fair process that includes necessary procedural safeguards").

80. Rose, *supra* note 10, at 856.

81. Mandelker & Tarlock, *supra* note 38, at 36 ("Capture theory was initially developed to explain why administrative agencies were unresponsive to new values, but can also be applied to local government politics.").

> popular "passion"—sometimes a sudden whim, sometimes a longstanding prejudice—that carries a majority before it.[82]

Indeed, a review of the modern zoning process led one court to conclude that

> rezoning is granted not solely on the basis of the land's suitability to the new zoning classification and compatibility with the use of surrounding acreage, but, also, and perhaps foremost, on local political considerations including who the owner is, who the objectors are, the particular and exact land improvement and use that is intended to be made and whose ox is being fattened or gored by the granting or denial of the rezoning request.[83]

Judicial deference to this process—in which decisions are made in the absence of procedural safeguards, by untrained zoning officials, on a subjective and highly discretionary basis—cannot be considered reasonable. In fact, judicial deference has made it almost impossible to remedy abuses of the zoning power.[84] In enacting RLUIPA, Congress recognized that judicial deference is inappropriate in the free exercise context and created a statutory remedy for religious land users. The next Part of this Article explores RLUIPA's remedy, focusing in particular on RLUIPA's bifurcated approach to judicial review of local land use decisions.

II. RLUIPA'S LAND USE PROVISIONS AND THE "INDIVIDUALIZED ASSESSMENTS" DOCTRINE

Since RLUIPA's enactment in 2000, its constitutionality and effectiveness have been extensively debated.[85] To Congress and religious advocates,

> RLUIPA is necessary to prevent local governments from discriminating against particular religions (or religion in general) by limiting religious congregations' ability to build or

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82. Rose, *supra* note 10, at 855 (footnotes omitted).

83. Snyder v. Bd. of County Comm'rs of Brevard, 595 So. 2d 65, 73 (Fla. Dist. Ct. App. 1991) (footnote omitted), *quashed* 627 So. 2d 469 (Fla. 1993); *see also* Mandelker & Tarlock, *supra* note 38, at 2 ("[Z]oning decisions are too often ad hoc, sloppy and self-serving decisions with well-defined adverse consequences without off-setting benefits.").

84. *See supra* note 18 and accompanying text.

85. *See supra* note 23 and accompanying text.

> expand places of worship. The charge is that localities enforce religious bigotry through the strategic use of often vague and standardless land-use ordinances and development processes.[86]

To others, RLUIPA unnecessarily interferes with local governments' ability to enforce generally applicable land use regulation and creates an overly broad exemption that allows religious institutions to avoid a community's reasonable land-use concerns.[87] To these critics, RLUIPA is particularly objectionable because it represents a federal intrusion into an area traditionally regulated by local governments.[88] The following sections explore the history of RLUIPA and the mechanics of the remedy it provides.

A. The History and Purpose of RLUIPA's Land Use Provisions

RLUIPA is the product of a decade-long struggle between Congress and the Supreme Court over the scope of the Free Exercise Clause of the First Amendment.[89] The battle began in 1990 with the Supreme Court's decision in *Employment Division v. Smith*.[90] In contrast to earlier Free Exercise Clause decisions that applied strict scrutiny review to laws burdening religious exercise,[91] *Smith* applied rational basis review and held that the

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86. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1839 (2004) (footnotes omitted).

87. *See id*; *see also* Hamilton, *supra* note 6, at 335–41 (arguing that RLUIPA inappropriately interferes with local governments' ability to regulate land use planning); MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 95–96 (2005) ("Before RLUIPA, religious landowners in virtually every jurisdiction were just landowners, required to abide by zoning and land-use restrictions, with the concomitant market price for property and for obtaining zoning alterations. . . . RFRA and then RLUIPA changed all that.").

88. Schragger, *supra* note 86, at 1839 ("RLUIPA is, in essence, the first national land-use ordinance.").

89. As the Supreme Court has noted, RLUIPA is "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [Supreme Court] precedents." Cutter v. Wilkinson, 544 U.S. 709, 714 (2005); *see also* Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 806–12 (2006) (describing the "tug of war" between Congress and the Supreme Court that eventually led to the enactment of RLUIPA); Schragger, *supra* note 86, at 1838 ("RLUIPA is Congress's latest salvo in its war with the Court over free exercise.").

90. 494 U.S. 872 (1990).

91. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234–36 (1972) (applying strict scrutiny and holding that the Free Exercise Clause provided the Amish with an exemption from compulsory school attendance laws); Sherbert v. Verner, 374 U.S.

right to free exercise of religion does not relieve individuals of the obligation to comply with valid, religiously neutral laws of general application.[92] The Court, therefore, upheld a criminal law that banned the use of peyote, even though the law resulted in the denial of unemployment benefits to Native Americans who used peyote for sacramental purposes.[93]

The *Smith* decision was met with public outrage,[94] prompting Congress to react. In 1993, Congress attempted to overturn the holding of *Smith* through the passage of the Religious Freedom Restoration Act (RFRA).[95] The text of RFRA explicitly stated that the Act was intended to restore the strict scrutiny review employed by the Supreme Court before *Smith* to evaluate laws that substantially burden the free exercise of religion.[96] Thus, RFRA broadly prohibited states and the federal government from placing a "substantial burden" on religious exercise without first demonstrating that the action was in furtherance of a compelling governmental interest and was the least restrictive means of furthering that compelling interest.[97]

Four years later, in *City of Boerne v. Flores*,[98] the Supreme Court responded by finding that RFRA, as applied to the states, unconstitutionally exceeded Congress's enforcement power

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398, 403–06 (1963) (applying strict scrutiny and mandating an exemption to a state law that prevented a Seventh-Day Adventist from receiving unemployment benefits because the claimant could not work on Saturdays).

92. *Smith*, 494 U.S. at 878–79; *see also* ZONING AND LAND USE CONTROLS, *supra* note 8, § 7.04 ("The Court refused in *Smith* to apply its doctrine from *Sherbert v. Verner*, which would essentially have shifted the burden of proof to the state and required that it demonstrate a 'compelling state interest' for the apparent burden imposed on a religious practice by its criminal laws.").

93. 494 U.S. at 878–79.

94. *See, e.g.*, John Dart, *Religious Faiths Decry High Court Ruling; Constitution: Critics say a basic freedom is imperiled by the opinion in the peyote case that religious exemptions are a 'luxury,'* L.A. TIMES, Apr. 21, 1990, at F14; Linda Greenhouse, *Court is Urged to Rehear Case on Ritual Drugs*, N.Y. TIMES, May 11, 1990, at A16 (noting that an "unusually diverse coalition of religious groups and constitutional scholars" petitioned for a rehearing of the case); Nat Hentoff, Editorial, *Justice Scalia Vs. the Free Exercise of Religion*, WASH. POST, May 19, 1990, at A25 (describing the *Smith* holding as a "radical revision of the First Amendment").

95. 42 U.S.C. §§ 2000bb, 2000bb-1 to bb-4 (2003).

96. *Id.* § 2000bb(a)–(b).

97. *Id.* § 2000bb-1(b) (2003) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

98. 521 U.S. 507 (1997).

under the Fourteenth Amendment. The Court held that although Section 5 of the Fourteenth Amendment grants Congress the authority to remedy unconstitutional behavior,[99] Congress must first establish the pervasiveness of such behavior and then enact a proportionate remedy.[100] Using this "congruence and proportionality" standard, the Court found that "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."[101]

After the Supreme Court invalidated RFRA, Congress once again attempted to increase protection for religious freedom through passage of a more narrowly tailored statute—RLUIPA.[102] Mindful of the need for legislative findings of un-

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99. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

100. *Flores*, 521 U.S. at 519–20; *see also* Hamilton, *supra* note 6, at 324 ("The severe disproportion between the scope of RFRA and any evidence of state malfeasance led the Court to announce the principle that a prophylactic law must be 'congruent and proportional' to the record of state unconstitutional actions.").

101. *Flores*, 521 U.S. at 532.

102. In contrast to RFRA, which applied to every state and federal law, RLUIPA applies to two specific areas of law: land use and institutionalized persons. *See* 42 U.S.C. § 2000cc (2003) (zoning); 42 U.S.C. § 2000cc-1 (institutionalized persons). Additionally, in order to avoid the pitfalls of RFRA, RLUIPA applies only in narrow circumstances in which Congress is empowered to act.

First, RLUIPA applies when a substantial burden is imposed by a program that receives federal financial assistance. 42 U.S.C. § 2000cc(a)(2)(A). This section was designed to fall within Congress's power under the Spending Clause. *See generally* South Dakota v. Dole, 483 U.S. 203 (1987) (explaining the parameters of congressional power under the Spending Clause).

Second, RLUIPA applies when the substantial burden affects interstate commerce. 42 U.S.C. § 2000cc(a)(2)(B). This section was designed to fall within Congress's power under the Commerce Clause. *See generally* United States v. Lopez, 514 U.S. 549 (1995) (explaining the requirement of a jurisdictional hook for Congress to properly exercise power under the Commerce Clause).

Third, RLUIPA applies when the substantial burden is imposed through an individualized assessment. 42 U.S.C. § 2000cc(a)(2)(C). This section was designed to fall within Congress's remedial power under Section 5 of the Fourteenth Amendment. *See* Joint Statement, *supra* note 20, at S7775; H.R. REP, NO. 106-219, at 12–13 (1999). An individualized assessment serves as the jurisdictional basis for most of the land use cases litigated under RLUIPA. *See, e.g.*, Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 985 (9th Cir. 2006) ("We decide that the County made an individualized assessment of Guru Nanak's [conditional use permit], thereby making RLUIPA applicable . . . ."); Konikov v. Orange County, 410 F.3d 1317, 1323 (11th Cir. 2005) ("We may exercise jurisdiction in this case because the [zoning ordinance] is a 'land use regulation . . . under which a gov-

constitutional behavior, Congress held hearings over the course of three years—including three hearings before the Senate Committee on the Judiciary and six hearings before the House Subcommittee on the Constitution—to determine the scope of religious discrimination throughout American society.[103]

The congressional hearings revealed evidence of religious discrimination in land use regulation.[104] In particular, Congress found that

> [s]ome [land use regulations] deliberately exclude all new churches from an entire city, others refuse to permit churches to use existing buildings that non-religious assemblies had previously used, and some intentionally change a zone to exclude a church. For example, churches who applied for permits to use a flower shop, a bank, and a theater were excluded when the land use regulators rezoned each small parcel of land into a tiny manufacturing zone.[105]

The hearings also revealed that "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation."[106] This discrimination often "lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'"[107]

In analyzing the evidence, Congress determined that land use decision making processes are particularly susceptible to religious discrimination because land use regulations lack objective and generally applicable standards, leaving zoning offi-

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ernment makes . . . individualized assessments of the proposed uses for the property involved.'" (quoting 42 U.S.C. § 2000cc(a)(2)(C))); Midrash Sephardi v. Town of Surfside, 366 F.3d 1214, 1225 (11th Cir. 2004) (finding jurisdiction because zoning officials made an individualized assessment in denying zoning permit); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) (same); Freedom Baptist Church of Del. County v. Twp. of Middletown, 204 F. Supp. 2d 857, 868–69 (E.D. Pa. 2002) (same). For further discussion of this jurisdictional hook, see *infra* Part II.B.

103. Congress thus sought to comply with *Flores* by compiling a legislative record that would satisfy *Flores*'s "congruence and proportionality" test even if RLUIPA were to exceed existing constitutional requirements. *See* Joint Statement, *supra* note 20, at S7774–75.

104. *See* 146 CONG. REC. E1564–67 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde).

105. 146 CONG. REC. E1235 (daily ed. July 14, 2000) (statement of Rep. Canady).

106. Joint Statement, *supra* note 20, at S7774.

107. *Id.*

cials with "virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws."[108] As the Seventh Circuit similarly noted, discrimination is likely "when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards."[109] Congress, therefore, enacted RLUIPA in order to protect religious land users from religious discrimination made possible by the highly subjective nature of modern zoning.

B. The "Individualized Assessments" Doctrine

In contrast to the contentions of its critics, RLUIPA was not intended to exempt religious institutions from generally applicable land use regulations. Indeed, the Hatch-Kennedy Joint Statement contains a section entitled, "Not Land Use Immunity," which explicitly states that "[t]his Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay."[110]

Instead, as the Supreme Court explained in upholding RLUIPA's institutionalized persons provisions, "RLUIPA is . . . [a] congressional effort[] to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents."[111]

This disclaimer is necessary because most zoning ordinances are facially neutral and generally applicable. In other words, zoning ordinances are not aimed at religious organizations but apply to all land users. As the Supreme Court held in *Employment Division v. Smith*,[112] such generally applicable laws are to be analyzed under rational basis review. RLUIPA, however, takes advantage of an exception created by *Smith* for laws that are implemented through a system of individualized assessments.[113]

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108. H.R. REP. NO. 106-219, at 20 (1999).

109. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005).

110. Joint Statement, *supra* note 20, at S7776.

111. Cutter v. Wilkinson, 544 U.S. 709, 714 (2005).

112. 494 U.S. 872 (1990).

113. *Id.* at 884.

Under the individualized assessments exception, strict scrutiny is used to review governmental decisions made pursuant to a system "in which case-by-case inquiries are routinely made, such that there is an 'individualized governmental assessment of the reasons for the relevant conduct' that 'invite[s] considerations of the particular circumstances' involved in the particular case."[114]

The individualized assessments doctrine originated in 1963 with the Supreme Court's decision in *Sherbert v. Verner*.[115] In *Sherbert*, the Court held that South Carolina could not withhold unemployment benefits from a member of the Seventh-Day Adventist Church because she refused to work on Saturdays.[116] The unemployment statute at issue in *Sherbert* provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work.[117] The Court held that because the unemployment statute permitted "individualized exemptions" based on "good cause," South Carolina could not refuse to consider a religious reason for refusing to work on Saturday a "good cause" unless such refusal satisfied strict scrutiny.[118]

In *Smith*, the Supreme Court refused to apply the strict scrutiny standard from *Sherbert* to a neutral law of general applicability.[119] The Court distinguished *Sherbert* by explaining that the test in that case "was developed in a context that lent itself to individualized governmental assessment of the reasons for

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114. Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004) (quoting *Smith*, 494 U.S. at 884); *see also infra* notes 129–134 and accompanying text.

115. 374 U.S. 398 (1963); *see also* Freedom Baptist Church of Del. County v. Twp. of Middletown, 204 F. Supp. 2d 857, 868–69 (E.D. Pa. 2002) ("What Congress manifestly has done in this subsection is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert v. Verner* . . . ."); Joint Statement, *supra* note 20, at S7775; H.R. REP. NO. 106-219, at 17 (1999).

116. *Sherbert*, 374 U.S. at 399, 410.

117. *Id.* at 400–01.

118. In the words of Justice Brennan, writing for the Court, "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406; *see also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (reaffirming that strict scrutiny remains the standard of review in an unemployment benefits case involving a religious applicant); Thomas v. Review Bd., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

119. Employment Div. v. Smith, 494 U.S. 872, 878–79 (1990).

the relevant conduct."[120] According to the Court in *Smith*, "our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[121]

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[122] decided three years after *Smith*, the Supreme Court extended the "individualized assessments" doctrine beyond the unemployment compensation arena.[123] *Lukumi* involved an animal cruelty ordinance that punished anyone who killed an animal "unnecessarily."[124] The Court determined that the ordinance constituted "a system of 'individualized governmental assessment'" because the law required government officials to decide which animal killings were "necessary" and which were "unnecessary."[125]

Although the animal cruelty ordinance was facially neutral and generally applicable, the Supreme Court looked behind the law's written provisions and held that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt."[126]

The *Lukumi* Court, following *Smith*'s reading of *Sherbert*, stated that "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'"[127] *Lukumi* concluded by reaffirming that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[128]

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120. *Id.* at 884.

121. *Id.*

122. 508 U.S. 520 (1993).

123. *Id.* at 537–38.

124. *Id.* at 537.

125. *Id.* (quoting *Smith*, 494 U.S. at 884). Although government officials considered the killing of animals for religious sacrifice unnecessary, they considered hunting and many other secular killings necessary. *Id.*

126. *Id.* at 534.

127. *Id.* at 537 (quoting *Smith*, 494 U.S. at 884).

128. *Id.* at 546.

The rule that emerges from *Sherbert, Smith,* and *Lukumi* is that neutral, generally applicable laws are subject to rational basis review, while neutral, generally applicable laws that are implemented through a system of individualized assessments are subject to strict scrutiny. Although the Supreme Court has not explicitly provided a standard by which to distinguish between laws of general applicability and individualized assessments,[129] the "general rule that emerges from the case law is that the determination of whether the governmental action is an 'individualized assessment' depends on whether the decision was *subjective* in nature."[130]

In *Blackhawk v. Pennsylvania,*[131] the Third Circuit explained that "a law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct."[132] Indeed, "[t]he real problem with discretionary systems of individualized exemptions is . . . that such subjective review creates too great a risk of discrimination and bias against unpopular or minority religious beliefs."[133]

An analogous situation can be seen in the delegation of discretionary authority to government officials to license parades and other expressive activity.[134] Such delegation is unconstitutional because "the risk is too great that government officials will abuse this discretion by refusing to license unpopular

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129. *See id.* at 543–45 (expressly declining to define precisely the appropriate standard for determining whether a law is one of general applicability).

130. Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 541–42 (S.D.N.Y. 2006), *aff'd,* 504 F.3d 338 (2d Cir. 2007) (emphasis added) (quoting Living Water Church of God v. Charter Twp. of Meridian, 384 F. Supp. 2d 1123, 1130 (W.D. Mich. 2005)); *see also* Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004) (finding that individualized assessments involve considerations of the particular circumstances involved in the particular case); Town of Foxfield v. Archdiocese of Denver, 148 P.3d 339, 345 (Colo. Ct. App. 2006) (holding that "an action constitutes an individualized assessment when the decision is based upon a subjective determination"). For further discussion, see *infra* notes 150–55 and accompanying text.

131. 381 F.3d 202 (3d Cir. 2004).

132. *Id.* at 209.

133. Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert, *Hogwarts, and Religious Liberty,* 83 NEB. L. REV. 1178, 1202 (2005).

134. Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality,* 18 J.L. & POL. 119, 193–94 (2002).

speech or disfavored opinions."[135] Similarly, a discretionary system of individual assessments for zoning decisions permits inexperienced zoning officials to make subjective zoning decisions in an arbitrary, inconsistent, and discriminatory manner.

C. *RLUIPA's Bifurcated Framework for Judicial Review*

1. *Zoning Ordinances "As Applied" Through Individualized Assessments*

In enacting RLUIPA, Congress determined, first, that land use regulations lack objective standards, leaving zoning officials with unlimited authority to make zoning decisions on an individual, ad hoc basis,[136] and second, that these "individualized [zoning] assessments readily lend themselves to discrimination, and . . . make it difficult to prove discrimination in any individual case."[137]

Section 2000cc(a)(2)(C) of RLUIPA, therefore, applies *Smith*'s "individualized assessments" exception by prohibiting the government from imposing a substantial burden on a person's religious exercise "in the implementation of a land use regulation or system of land use regulations, under which a government makes . . . *individualized assessments of the proposed uses for the property involved*,"[138] unless the government demonstrates that the imposition of the burden (a) "is in furtherance of a

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135. Duncan, *supra* note 133, at 1187; *see also* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 772 (1988) (holding unconstitutional an ordinance giving the mayor "unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems 'necessary and reasonable'"); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153 (1969) (ruling that a "municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community"); MacDonald v. City of Chicago, 243 F.3d 1021, 1026 (7th Cir. 2001) ("It is well established that where a statute or ordinance vests the government with virtually unlimited authority to grant or deny a permit, that law violates the First Amendment's guarantee of free speech.").

136. Joint Statement, *supra* note 20, at S7775 ("The hearing record demonstrates a widespread practice of individualized decisions to grant or refuse permission to use property for religious purposes."); H.R. REP. NO. 106-219, at 20 (1999).

137. Joint Statement, *supra* note 20, at S7775.

138. 42 U.S.C. § 2000cc(a)(2)(C) (emphasis added).

compelling government interest" and (b) "is the least restrictive means of furthering that . . . interest."[139]

In *Corporation of the Presiding Bishop v. City of West Linn*,[140] the Court of Appeals of Oregon explained RLUIPA's bifurcated framework as follows:

> By its terms, [42 U.S.C. § 2000cc(a)(2)(C)] refers to both "a land use regulation or system of land use regulations," on the one hand, and "individualized assessments" made under such a regulation or system of regulations, on the other. Based on that text and structure, we understand the former phrase to refer to *preexisting, generally applicable laws* and the latter phrase to refer to the *application of those laws to particular facts* or sets of facts.[141]

RLUIPA thus distinguishes between the zoning ordinance itself, and the *application* of the zoning ordinance in a particular case. In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*,[142] the Ninth Circuit agreed that RLUIPA "does not apply directly to land use regulations . . . which typically are written in general and neutral terms."[143] Instead, RLUIPA is triggered when the zoning code is "applied to grant or deny a certain use to a particular parcel of land."[144] Similarly, other courts have noted that "even assuming that a governmental entity's enactments are neutral laws of general applicability, *their application to particular facts* nevertheless can constitute an individualized assessment—particularly where . . . the application does not involve a mere numerical or mechanistic assessment, but [involves] criteria that are at least partially subjective in nature."[145]

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139. *Id.* § 2000cc(a).

140. 86 P.3d 1140 (Or. Ct. App. 2004).

141. *Id.* at 1148 (emphasis added).

142. 456 F.3d 978 (9th Cir. 2006).

143. *Id.* at 987.

144. *Id.* RLUIPA cases arise in three common types of zoning circumstances: requests to rezone, special use permits, and variances. *See* Lennington, *supra* note 89, at 821 n.88. Although the majority of cases have determined that RLUIPA applies to all individual land use decisions, several cases have distinguished between rezoning decisions, on the one hand, and variance or conditional use permit decisions, on the other. *See, e.g.*, Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 754 (Mich. 2007) (holding that the denial of a rezoning request did not involve an individualized assessment).

145. Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 U.S. Dist. LEXIS 28, at *15 (D. Mich. Jan. 3, 2007) (emphasis added); *see also* Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477 (S.D.N.Y. 2006)

Indeed, the vast majority of courts reviewing zoning ordinances "as applied" to a particular property have concluded that, in contrast to the ordinance itself, the application of the zoning ordinance in a particular instance involves an individualized assessment of the proposed use of the property.[146] For example, in *Freedom Baptist Church of Delaware County v. Township of Middletown*,[147] the first federal court to address the constitutionality of RLUIPA held that

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(emphasis added) (quoting Living Water Church of God v. Charter Twp. of Meridian, 384 F. Supp. 2d 1123, 1130 (W.D. Mich. 2005)) (holding that the denial of a special use permit was an "individualized assessment" where the determination was based on subjective criteria), *aff'd*, 2007 U.S. App. LEXIS 24267 (2d Cir. Oct. 17, 2007); Town of Foxfield v. Archdiocese of Denver, 148 P.3d 339, 345 (Colo. Ct. App. 2006) (same); Castle Hills First Baptist Church v. City of Castle Hills, No. SA-01-CA-1149-RF, 2004 U.S. Dist. LEXIS 4669, at *61 (W.D. Tex. Mar. 17, 2004) (finding that the city's land use decisions are not generally applicable laws, and that "[z]oning, and the special use permit application process specifically, inherently depend upon a system of individualized assessment").

146. *See, e.g.*, *Westchester Day Sch.*, 417 F. Supp. 2d at 541–42; *Castle Hills*, 2004 U.S. Dist. LEXIS 4669, at *61; *see also* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1225 (11th Cir. 2004) (holding that the town's procedure for granting or denying conditional use permits, which involved a "case-by-case evaluation of the proposed activity of religious organizations," was "quintessentially an 'individual assessment' regime"); Living Water Church of God v. Charter Twp. of Meridian, 384 F. Supp. 2d 1123, 1130–31 (W.D. Mich. 2005) (finding that zoning officials made an individualized assessment in denying zoning permit); United States v. Maui County, 298 F. Supp. 2d 1010, 1016 (D. Haw. 2003) (finding that even without RLUIPA, strict scrutiny applies where a "generally applicable and neutral [zoning] law also contains exceptions based upon 'individualized assessments' which can be used in a pretextual manner"); Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1073 (D. Haw. 2002) (finding that a county's denial of a special use permit involved an individualized assessment where the underlying statute permitted issuance of special use permits for "unusual and reasonable" uses); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1222–23 (C.D. Cal. 2002) ("Defendants' land use *decisions* here are not generally applicable laws. . . . [T]he City's refusal to grant Cottonwood's application for a [conditional use permit] invite[s] individualized assessments of the subject property and the owner's use of such property, and contain[s] mechanisms for individualized exceptions.") (emphasis added) (internal quotation marks omitted); Keeler v. Mayor & City Council of Cumberland, 940 F. Supp. 879, 885 (D. Md. 1996) (holding that a generally applicable landmark ordinance "has in place a system of individualized exemptions"); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 675 N.W.2d 271, 279–80 (Mich. Ct. App. 2003) (finding that zoning officials made an individualized assessment in denying zoning permit); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 86 P.3d 1140, 1148 (Or. Ct. App. 2004) (finding that a neutral law of general applicability constitutes an individualized assessment when applied using subjective criteria).

147. 204 F. Supp. 2d 857 (E.D. Pa. 2002).

> zoning ordinances must by their nature impose individual assessment regimes. That is to say, *land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations.* They are, therefore, of necessity different from laws of general applicability which do not admit to exceptions on Free Exercise grounds.[148]

In *Guru Nanak,* the Ninth Circuit also determined that the application of a zoning ordinance involved an individualized assessment of the proposed use of the property at issue.[149] In that case, a religious organization claimed that the county's denial of a conditional use permit to build a Sikh temple on land zoned for agricultural use violated RLUIPA.[150] The county argued that its denial of the conditional use permit did not implicate RLUIPA, because its use permit process constituted a neutral law of general applicability.[151]

In rejecting the county's argument, the Ninth Circuit held that "RLUIPA applies when the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use."[152] The court focused on the discretion afforded the planning commission to approve a use permit following a finding that the use, under the circumstances of the particular case, will not be detrimental to the neighborhood.[153] The court concluded that RLUIPA applied, because the "Zoning Code directed the Planning Commission and the Board of Supervisors to 'implement [its] system of land use regulations [by making] individualized assessments of the proposed uses of the land involved.'"[154]

Similarly, in *Konikov v. Orange County,*[155] the Eleventh Circuit found that a zoning ordinance that included a procedure for

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148. *Id.* at 868 (emphasis added).

149. Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 985 (9th Cir. 2006) ("We decide that the County made an individualized assessment of Guru Nanak's [conditional use permit], thereby making RLUIPA applicable.").

150. *Id.* at 981.

151. *Id.* at 986 ("The County argues that its denial of Guru Nanak's second [conditional use permit] application falls outside the legislative scope of RLUIPA because its use permit process is a neutral law of general applicability.").

152. *Id.*

153. *Id.* at 986–87 & n.9 (noting that "Sutter County's Zoning Code implementation process is individualized and discretionary").

154. *Id.* at 987 (quoting 42 U.S.C. § 2000cc).

155. 410 F.3d 1317 (11th Cir. 2005).

obtaining special exception approval involved an individualized assessment.[156] Although the court held that applying for a special use permit did not constitute a "substantial burden" under RLUIPA, it determined that the zoning code

> is a "land use regulation . . . under which a government makes . . . individualized assessments of the proposed uses for the property involved." . . . The Code Enforcement Officers and the [Code Enforcement Board] must determine in each case whether a particular use of the land goes beyond occasional, casual gatherings and constitutes an "organization" in violation of the Code. *Congress was concerned about such individualized scrutiny because it runs the risk that the standards in such regulations will be applied in an unequal fashion.*[157]

In determining whether land use *decisions*—that is, land use ordinances *as applied* to particular pieces of property—constitute individualized assessments, courts generally focus on the subjective and discretionary nature of the government action. As a result, if an individual zoning decision is based on objective criteria, it is not an individualized assessment. For example, in *Grace United Methodist Church v. City of Cheyenne*,[158] the Tenth Circuit concluded that the zoning board's non-discretionary denial of a variance to operate a daycare center was not an individualized assessment.[159] The court determined that the application of the zoning ordinance was based on objective criteria, and that the board lacked the authority or discretion to grant the requested variance.[160] The court explicitly distinguished this non-discretionary denial from the individualized assessment in *Sherbert* by noting that the "Board's *mandatory* denial of the Church's variance in this case is thus very different from the government employee's *discretionary* denial of Ms. Sherbert's unemployment benefits in *Sherbert*."[161]

In *Mount St. Scholastica, Inc. v. City of Atchison*,[162] the United States District Court for the District of Kansas confirmed that

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156. *Id.* at 1323.

157. *Id.* (emphasis added) (quoting 42 U.S.C. § 2000cc(a)(2)(C)); *see also* Midrash Sephardi v. Town of Surfside, 366 F.3d 1214, 1225 (11th Cir. 2004).

158. 451 F.3d 643 (10th Cir. 2006).

159. *Id.* at 654.

160. *Id.*

161. *Id.* (citation omitted) (emphasis added).

162. 482 F. Supp. 2d 1281 (D. Kan. 2007).

Grace United Methodist turned on the zoning board's lack of discretion under the particular circumstances of that case. In *Mount St. Scholastica,* a monastic community was denied a demolition permit under the Kansas Historic Preservation Act.[163] The district court considered the Tenth Circuit's decision in *Grace United Methodist,* concluding that unlike the zoning board in *Grace United Methodist,*

> it is clear that the City in this case had the "authority or discretion" to permit the requested construction. *This ability to grant or deny the requested construction based on subjective criteria is the key distinction.* Because the decision was necessarily made on a case-by-case basis with individualized scrutiny, the facts of this case are similar to the distinctions hypothesized in *Grace United Methodist.*[164]

2. *The Facial/As-Applied Dichotomy*

The preceding review of RLUIPA cases reveals a clear dichotomy between zoning ordinances generally and the application of a zoning ordinance in a particular case: although land use ordinances are often facially neutral laws of general applicability, such laws are *applied* to individual parcels of land through a subjective system of individualized assessments. As a result, under RLUIPA, *facial* challenges to zoning ordinances are subject to *Smith*'s deferential review, while challenges to zoning ordinances *as applied* to individual parcels of land through a system of individualized assessments are subject to *Sherbert*'s strict scrutiny review.[165]

The logic of this distinction is clear: Facial challenges involve claims that a particular religious entity should be *exempt* from a process with which all other entities must comply—a process that includes applying for rezonings, variances, and special use permits.[166] A challenge to a particular land use decision, how-

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163. *Id.* at 1287.

164. *Id.* at 1294 (citation omitted) (emphasis added).

165. For a discussion of the distinction between facial and as-applied land use challenges, see *supra* note 28.

166. *See, e.g.,* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764 (7th Cir. 2003) (finding that a zoning ordinance which mandates application for a special use permit is generally applicable, and noting that "Appellants appear to confuse exemption from a particular zoning provision (in the form of Special Use, Map Amendment, or Planned Development approval) with exemption from the procedural *system* by which such approval may be sought"); Cornerstone

ever, involves "examination of government action that employs great discretion and much subjective analysis."[167]

Although RLUIPA is expressly limited to cases of religious land use, the statute's recognition of the subjective nature of the land use decision making process implicates all land users. Indeed, because the application of a zoning ordinance to an individual parcel of land is made on a discretionary, case-by-case basis, individual zoning decisions cannot be equated with ordinary economic legislation, which is entitled to traditional judicial deference and a presumption of constitutionality. The question, then, is what standard of judicial review is appropriate for as-applied land use challenges that do not involve the free exercise of religion.

III. LOOKING BEYOND RELIGIOUS LAND USE

Judicial review of local zoning decisions has traditionally been limited. Local zoning decisions are considered either legislative or administrative acts, both of which are accorded a strong presumption of constitutionality and are upheld so long as they are not arbitrary or capricious. Although perhaps justifiable in the context of early Euclidean Zoning, judicial deference to local land use decisions is unwarranted in light of "wait and see" zoning and the tremendous discretion afforded to modern zoning officials. Indeed, as Professor Rose has argued, the traditional arbitrary and capricious standard "is too broad to treat seriously the fairness claims of the individual property owners with interests at stake in piecemeal changes."[168]

RLUIPA explicitly recognizes the subjective nature of local zoning and establishes a bifurcated framework for review of local land use decisions. Under RLUIPA, facial challenges to objective land use ordinances are reviewed deferentially, while challenges to land use ordinances as applied through subjective "individualized assessments" are strictly scrutinized.

Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir. 1991) (holding that the zoning code in the whole was generally applicable and that the instant lawsuit was a facial challenge to exclusion of churches from the central business district, rather than an as-applied challenge to a particular zoning decision).

167. Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Plaintiff-Appellant and in Support of Reversal at 6, Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006) (No. 03-8060).

168. Rose, *supra* note 10, at 842.

Although RLUIPA was enacted to prevent religious discrimination in land use regulation, the true extent of such discrimination in land use is unknown. In fact, it seems likely that many of the obstacles faced by religious land users are no different than the obstacles faced by ordinary land users in the subjective zoning process.[169] While most would agree that strict scrutiny review is inappropriate for as-applied land use challenges involving neither fundamental rights nor suspect classes, traditional judicial deference is equally inappropriate.

Fortunately, the Supreme Court established the correct standard of review in its early zoning jurisprudence. Under existing precedent, facial challenges to generally applicable zoning ordinances are subject to the deferential standard of review set out in *Village of Euclid v. Ambler Realty Co.*[170] In contrast, as-applied challenges are reviewed less deferentially in accordance with *Nectow v. City of Cambridge*. *Nectow*'s less deferential, as-applied review helps limit the discretion of zoning officials by ensuring that the challenged zoning decision is substantially related to the public health, safety, or welfare.

A. Religious Discrimination or Zoning as Usual?

RLUIPA was enacted to protect religious land users from religious discrimination in the highly discretionary zoning process.[171] Yet, despite RLUIPA's extensive legislative history, the scope of antireligious bias in zoning is actually subject to heated debate. Although some argue that religious discrimination is rampant in the zoning context,[172] others maintain that

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169. *See infra* Part III.A.

170. 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

171. *See* 146 CONG. REC. E1235 (daily ed. July 14, 2000) (statement of Rep. Canady) (noting that RLUIPA is "designed to remedy the well-documented and abusive treatment suffered by religious individuals and organizations in the land use context"); *see also* Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 255 (W.D.N.Y. 2005) ("The legislative history indicates that Congress was concerned about local governments' use of their zoning authority to discriminate against religious groups by making it difficult or impossible for them to build places of worship or other facilities."); Lennington, *supra* note 89, at 816 ("The overriding message from the legislative history is that religious institutions suffer from *intentional* discrimination in the zoning context; it is this *intentional* discrimination that RLUIPA seeks to remedy.").

172. *See, e.g.*, Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999);

religious institutions are not discriminated against, and in fact, are often treated more favorably than secular institutions.[173]

During RLUIPA's congressional hearings, proponents of the law introduced a study from Brigham Young University that found substantial discrimination against minority religions.[174] More recent scholarship, however, has challenged the study's methodology and conclusions.[175] Moreover, subsequent empirical studies have concluded that religious institutions are not discriminated against in the land use context. For example, one frequently cited study determined that "[t]he nearly universal experience of American congregations seeking government authorization to do something they want to do is one of facilitation rather than roadblock."[176] Another empirical study of religious institutions in New Haven, Connecticut found that "religious institutions, both large and small, face little discernable discrimination from municipal land use regulations."[177]

Given the empirical uncertainty, it is possible that what Congress and some scholars termed "religious discrimination" is actually no different than the obstacles faced by any land user navigating the discretionary zoning process.[178] As the Seventh

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Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999); Jane Lampman, *Uneasy Neighbors: Religious Groups Find Cities Less Hospitable on Zoning Matters*, CHRISTIAN SCI. MONITOR, Sept. 21, 2000, at 13–14 ("While issues of building size and traffic are familiar local concerns, religious groups say the problems they confront today are diverse: from zoning codes that favor secular over religious uses, to discrimination against certain faiths, to exclusion of churches altogether from land-use plans.").

173. *See, e.g.*, Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 859–60 (2007) (concluding that religious institutions in New Haven are not subject to discrimination in the zoning process); Hamilton, *supra* note 6, at 341–52 (analyzing the legislative history of RLUIPA and concluding that religious institutions are not subject to pervasive discrimination in land use).

174. Keetch & Richards, *supra* note 172, at 729–31. The complete study is available at *id.* app. A, at 736–42.

175. *See* Adams, *supra* note 23, at 2397–400 (outlining problems with the BYU study, including its use of outdated statistics and its examination of only those zoning decisions appealed to the courts); *see also* Clowney, *supra* note 173, at 865 n.29 (challenging the methodology of the BYU study).

176. Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335, 341 (2000).

177. Clowney, *supra* note 173, at 860.

178. *See* Hamilton, *supra* note 6, at 348 ("The vast majority of the evidence gathered by Congress regarding land use authorities and churches involved garden variety land use laws.").

Circuit explained in a pre-RLUIPA church-zoning case, "whatever specific difficulties [the plaintiff church] claims to have encountered, they are the same ones that face all rentors."[179]

This is not meant to imply that strict scrutiny is inappropriate for religious land use cases. As the *Freedom Baptist* court noted:

> Whatever the true percentage of cases in which religious organizations have improperly suffered at the hands of local zoning authorities, we certainly are in no position to quibble with Congress's ultimate judgment that the undeniably low visibility of land regulation decisions may well have worked to undermine the Free Exercise rights of religious organizations around the country.[180]

Rather, the argument presented here is that all land users are vulnerable to discrimination, inconsistency,[181] and corruption in land use regulation.[182] As Congress recognized in drafting RLUIPA, many of the difficulties that land users face stem from the fact that objective zoning ordinances are applied through a discretionary system of individualized assessments that leaves room for the consideration of factors unrelated to zoning. Traditional judicial deference does not provide an adequate remedy for property owners injured by this process. Fortunately, as the next section will demonstrate, a remedy for all land users can be found in the Supreme Court's land use jurisprudence.

B. *Judicial Review of As Applied Land Use Decisions:* Euclid *and* Nectow

The dichotomy that RLUIPA creates between zoning ordinances generally and zoning ordinances *as applied* to a particular piece of property through a system of individualized assessments is reminiscent of an earlier dichotomy established by the Supreme Court in its first two zoning cases, *Village of Euclid v. Ambler Realty Co.* and *Nectow v. City of Cambridge.*

The property owner in *Euclid* challenged the municipality's power to divide the land in the municipality into zones and to

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179. Love Church v. City of Evanston, 896 F.2d 1082, 1086 (7th Cir. 1990).

180. Freedom Baptist Church of Del. County v. Twp. of Middletown, 204 F. Supp. 2d 857, 867 (E.D. Pa. 2002).

181. *See supra* note 35 and accompanying text.

182. *See supra* note 36 and accompanying text.

restrict certain uses in each zone.[183] The Supreme Court upheld the ordinance as a valid exercise of the police power and determined that a zoning ordinance violates due process only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[184] The Court, however, explicitly limited its holding to a facial challenge, emphasizing that

> when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be *concretely applied to particular premises*, . . . or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.[185]

Thus, according to the *Euclid* Court, a zoning ordinance, though valid on its face, might be invalid and unreasonable as applied to particular premises if it lacks a "substantial relation" to the alleged purpose of the regulation.[186]

In *Nectow*, a case decided less than two years after *Euclid*, the Supreme Court set forth the standard of review for determining whether the application of a zoning ordinance to a particular tract of land bears a substantial relationship to the purpose of the regulation.[187] In *Nectow*, a portion of the plaintiff's land was zoned for residential use, a portion was zoned for industrial use, and a portion was not restricted.[188] In contrast to *Euclid*'s facial challenge, the zoning ordinance in *Nectow* was challenged on the grounds that "as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment."[189]

Although the Court reiterated the "arbitrary and capricious" standard of review established in *Euclid*, it undertook a far more critical review of the factual record to determine whether the or-

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183. Village of Euclid v. Ambler Realty, Co., 272 U.S. 365, 395 (1926) (noting that the plaintiff's claim rested "upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury").

184. *Id.*

185. *Id.* (emphasis added).

186. *Id.*

187. Nectow v. City of Cambridge, 277 U.S. 183, 183 (1928).

188. *Id.* at 186–87.

189. *Id.* at 185.

dinance as applied violated the due process rights of the plaintiff. The *Nectow* Court began by citing *Euclid* for the proposition that a court should uphold a public officer's zoning action "unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of [the police] power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'"[190]

The *Nectow* Court then undertook a substantive review of the factual circumstances underlying the challenged zoning decision, including "[a]n inspection of a plat of the city upon which the zoning districts are outlined" and a review of the findings of the special master to whom the case had been referred.[191] Based on its review, the Court determined that the inclusion of the plaintiff's land in a residential district had "no foundation in reason," and that, as applied to the plaintiff's land, the zoning action appeared to be a mere arbitrary and irrational exercise of the police power without "a substantial relation to the public health, safety, morals, or general welfare" of the community.[192] Because the required connection to the public welfare did not exist, the Court held that the residential restriction as applied to plaintiff's land was an unconstitutional deprivation of the owner's property interests without due process of law.[193]

The facial/as-applied dichotomy that emerges from the Supreme Court's decisions in *Euclid* and *Nectow* mirrors RLUIPA's bifurcated approach to judicial review of land use decisions. Although deferential, rational-basis review is appropriate for facial challenges to generally applicable legislative acts, such as zoning ordinances, a more intense factual review is required when zoning ordinances are applied to particular property in order to determine whether the application is substantially related to legitimate zoning interests. Unlike the statutory remedy created by RLUIPA, however, *Nectow*'s as-applied rational review involves analyzing the factual record whenever a zoning ordinance is applied to a particular parcel of land, even if the application does not involve a fundamental right.

After *Euclid* and *Nectow*, the Supreme Court declined to decide another zoning case for over 50 years, leaving the lower federal

190. *Id.* at 187–88 (quoting *Euclid*, 272 U.S. at 395).
191. *Id.* at 188.
192. *Id.* at 187–88.
193. *Id.* at 188–89.

and state courts to elaborate upon the facial/as-applied dichotomy established by those cases.[194] Unfortunately, "the lower federal courts have had limited enthusiasm for cost/benefit balancing like that the *Nectow* special master performed."[195] Instead, most federal courts have applied *Euclid*'s deferential review to both facial and as-applied zoning challenges.[196]

Some state courts, however, have been more open to implementing the facial/as-applied dichotomy and have adopted *Nectow*'s standard of review for as-applied cases.[197] Some have gone so far as to compile lists of factors to be used to determine whether zoning ordinances are reasonable as applied to a property owner.[198] For example, in *Oak Lawn Trust & Savings*

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194. *See* Douglas W. Kmiec, *Permit Conditions and the Takings Clause: Did the Supreme Court Mean What It Said in the* Nollan *Case?*, 6 PREVIEW U.S. SUP. CT. CAS. 225, 225 (1994) ("Ever since [*Euclid*] (upholding the facial constitutionality of zoning), municipalities have had broad authority to regulate land use; and ever since [*Nectow*] (striking down zoning as applied), landowners have had spotty success in arguing that a particular land-use regulation exceeds the scope of the authority sanctioned in *Euclid*." (citations omitted)).

195. ELLICKSON & BEEN, *supra* note 36, at 98.

196. *See, e.g.*, Tex. Manufactured Hous. Ass'n v. City of Nederland, 101 F.3d 1095, 1106 (5th Cir. 1996) (applying a highly deferential standard of review to a denial of a zoning permit); Pearson v. City of Grand Blanc, 961 F.2d 1211, 1221–23 (6th Cir. 1992) (articulating a highly deferential standard of review for both local administrative and legislative zoning decisions); *see also* RATHKOPF ET AL., *supra* note 52, § 3.15 n.4 ("Federal courts apply the 'minimum rationality' due process test for both original zoning ordinances and amendments and in determining the reasonableness of an ordinance both on its face and as-applied.").

197. *See, e.g.*, Town of Tyrone v. Tyrone, LLC, 565 S.E.2d 806, 809 (Ga. 2002) (holding an agricultural-residential zoning of fifty-three acres of land invalid because testimony established that the land could not feasibly be developed for economic uses); Rogers v. City of Allen Park, 463 N.W.2d 431 (Mich. Ct. App. 1990) (holding that a single-family restriction was arbitrary as applied to plaintiffs whose houses were located on a divided highway that served as a major exchange connecting two interstate highways); Pheasant Bridge Corp. v. Twp. of Warren, 777 A.2d 334, 341 (N.J. 2001) (holding an increase in a minimum lot size requirement unreasonable and unconstitutional as applied to an owner's tract of land); Shemo v. Mayfield Heights, 722 N.E.2d 1018, 1024 (Ohio 2000) (holding that, as applied to the owner's land, "the city lack[ed] any legitimate governmental health, safety, and welfare concerns" in zoning the property for residential use).

198. *See e.g.*, Sellars v. Cherokee County, 330 S.E.2d 882, 884 (Ga. 1985) (holding that an applicant for rezoning "is entitled to have the application scrutinized in light of the character of the land in question and the impact of the zoning decision upon property owner's rights . . . [because a] failure to afford this scrutiny under the facts in evidence amounts to a denial of due process"); Taco Bell v. City of Mission, 678 P.2d 133, 140 (Kan. 1984) (finding the city's zoning action arbitrary, in light of "(1) the character of the neighborhood; (2) the zoning and uses of properties nearby; (3) the suitability of the subject property for the uses to which it has been restricted; (4) the extent

Bank v. City of Palos Heights,[199] the Appellate Court of Illinois listed a number of factors that should be considered in determining the validity of an ordinance as applied to a property owner, including:

> (1) [T]he existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restriction; (3) the extent to which the destruction of property values of plaintiff promotes the health, safety, morals or general welfare of the public; (4) the relative gain to the public as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned, considered in the context of land development in the area in the vicinity of the subject property.[200]

The *Oak Lawn* court undertook an extensive analysis of each factor in light of the underlying factual record and concluded that the ordinance was invalid as applied to the property owner's land.[201]

A majority of state courts, however, follow the lead of the federal courts and apply a deferential standard of review to as-applied zoning challenges.[202] Yet, as this Article has argued, increased judicial review of as-applied zoning decisions is required both under existing Supreme Court precedent and in light of Congress's recognition that the discretionary, individualized land use decision making process differs from ordinary economic legislation and is particularly susceptible to abuse.[203]

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to which removal of the restrictions will detrimentally affect nearby property; (5) the length of time the subject property has remained vacant as zoned; (6) the relative gain to the public health, safety, and welfare by the destruction of the value of plaintiff's property as compared to the hardship imposed upon the individual landowner; . . . [(7)] the recommendations of . . . staff[; and (8)] the conformance of the requested change to the [city's] adopted or recognized master plan" (quotation marks omitted)).

199. 450 N.E.2d 788 (Ill. App. Ct. 1983).

200. *Id.* at 793.

201. *See id.* at 793–97.

202. *See e.g.*, City of Conway v. Hous. Auth. of Conway, 584 S.W.2d 10 (Ark. 1979) (requiring a showing of arbitrariness to sustain an as-applied challenge); City Council of Salem v. Wendy's of W. Va., Inc., 471 S.E.2d 469, 470 (Va. 1996) (applying a "fairly debatable" standard to an as-applied challenge).

203. H.R. REP. NO. 106-219, at 20 (1999); *see also id.* at 17.

CONCLUSION

Since RLUIPA was enacted in 2000, many more zoning cases have been brought in federal courts. Both federal and state courts now have the opportunity, indeed the responsibility, to explicitly acknowledge that traditional judicial deference to local land use decisions, based initially on the characterization of zoning decisions as "legislative," is not appropriate in light of the discretionary, highly subjective nature of modern zoning.

RLUIPA recognizes that objective, generally applicable zoning ordinances are applied to individual parcels of land through a discretionary, case-by-case assessment of the proposed use of the land. As a result, under RLUIPA's bifurcated approach to judicial review of land use decisions, the zoning ordinance itself is subject to deferential rational basis review, while the application of the zoning ordinance to an individual parcel of property through an individualized assessment is subjected to strict scrutiny review.

RLUIPA's bifurcated approach to judicial review of land use regulation hearkens back to the facial/as-applied dichotomy established by the Supreme Court in its earliest zoning cases. Under this approach, facial challenges to zoning ordinances are reviewed under *Euclid*'s highly deferential rational basis review, while as-applied challenges are more strictly scrutinized under *Nectow* to ensure that the zoning decision is substantially related to a legitimate government interest. By reviving this facial/as-applied dichotomy, RLUIPA provides a framework through which to review all as-applied land use decisions and encourages more meaningful review of those decisions.

ESSAY

LOPEZ, MORRISON, AND *RAICH*: FEDERALISM IN THE REHNQUIST COURT

LINO A. GRAGLIA*

I. FEDERALISM: VALUABLE, BUT NOT NECESSARILY JUDICIALLY ENFORCEABLE

Federalism, as distinguished from pure nationalism, is an attempt to create a form of government that has the advantages, at least in part, of both centralization and local autonomy. The advantages of each are obvious. Centralization creates economies of scale; defense and scientific research, for example, can be provided more efficiently and at lower cost by a central government than by several separate governments. Centralization can also solve collective action problems. It allows the country as a whole to achieve a goal like environmental protection that would be prohibitively costly for individual states to pursue unilaterally. Finally, centralization has the advantage of uniformity, reducing conflicts and increasing simplicity and predictability. The disadvantages of centralization, however, are generally the obverse of its advantages. The virtues of uniformity, for example, preclude the virtues of diversity, such as the ability to adjust rules to meet local circumstances.[1]

Local autonomy, on the other hand, provides the great advantage of keeping government close to the individual. Decision making in smaller units means that fewer persons will be frustrated in their policy preferences. In a political unit of 1,000 people, for example, a vote could go 501 for policy A and 499 for policy B. If broken into two units, the vote could go 301 to 199 for A in one unit and 300 to 200 for B in the other, depriv-

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1. *See generally* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE (1995).

ing only 399 people rather than 499 of their preference.[2] A likely consequence of smaller political units is that the people will be more involved with their government and that government will be more responsive to the people. A multiplicity of units with free movement by the people among them makes for competition among the units themselves. This in turn can result in a welcome diversity of policy choices among the smaller units, and can also encourage experiments that will eventually lead to policy improvements.[3]

It is clear that, at least in some circumstances, the advantages of decentralized policy making outweigh its costs. That does not mean, however, that federalism can usefully be instituted and maintained as a matter of constitutional law enforceable by courts. Discussions of federalism often focus on the national and state governments being assigned separate "spheres" of power by the Constitution, with each being supreme in its own sphere. The reality, however, is that divided supremacy is an oxymoron.[4] Policy making power is not a physical object that can be divided into non-overlapping parts. Virtually everything in the real world has some connection to or impact upon everything else. The federal government cannot have full power over interstate trade, for example, if the states have full power over intrastate trade, which competes with and otherwise affects interstate trade. The Constitution deals with this problem by providing that when federal and state regulations conflict, as they often and inevitably do, the federal regulation prevails.[5] It is the federal government, therefore, that is the true sovereign, and, as American history amply illustrates, the scope of its ultimately unchecked sovereignty has consistently

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2. *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987).

3. For a thorough and enthusiastic review of the virtues of federalism, see Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995).

4. Alexander Hamilton said of proponents of a system with both federal and state sovereignty: "They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority without a diminution of state authority . . . . They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio*." THE FEDERALIST NO. 15, at 103 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kesler eds., 1999).

5. U.S. CONST. art. VI, cl. 2 (stating that the Constitution, laws, and treaties of the United States "shall be the supreme Law of the Land").

expanded over time and will almost certainly continue to do so in the future.

II. FEDERALISM IN THE SUPREME COURT BEFORE *LOPEZ*

With few exceptions,[6] the Supreme Court largely facilitated and validated[7] the expansion of federal power until its short-lived attempt to prevent the massive centralization of policy making required by President Franklin Roosevelt's New Deal.[8] The Court's attempt to stop the New Deal, however, was doomed to failure in the face of overwhelming popular support for President Roosevelt's vision. In the end, President Roosevelt did not even need to make good on his "court packing" threat to win over the support of the Court, as his landslide re-election in 1936 apparently convinced Justice Owen Roberts, the swing vote in most of the New Deal cases, that he could not save the country from a centralization of power from which it did not want to be saved.

Since President Roosevelt's appointment of several new Justices during his second term in office, the Court has never again seriously questioned the constitutional basis for New Deal-type legislation, illustrating nicely how little the Constitution itself has to do with constitutional law. The Court, in a trilogy of decisions in 1937, appeared completely and permanently to abandon all attempts to limit national legislative power on federalism grounds,[9] and subsequent decisions reinforced this conclusion.[10] In 1964, the Court announced a "rational basis" test for determining the validity of Commerce Clause legislation.[11] It was not necessary for the Court to find

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6. The principal examples prior to the New Deal (both of which were soon ignored by the Court) are *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and *United States v. E. C. Knight Co.*, 156 U.S. 1, 11 (1895).

7. *See* The Lottery Case, 188 U.S. 321, 354–55 (1903); *see also* The Shreveport Rate Cases, 234 U.S. 342, 350–51 (1914); The Daniel Ball, 77 U.S. (10 Wall.) 557, 565 (1870).

8. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 291 (1936); United States v. Butler, 297 U.S. 1, 62–63 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528–29 (1935).

9. NLRB v. Freidman-Harry Marks Clothing Co., 301 U.S. 58, 75 (1937); NLRB v. Fruehauf Trailer Co., 301 U.S. 49, 57 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

10. Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).

11. Katzenbach v. McClung, 379 U.S. 294 (1964).

that a regulated activity actually affected interstate commerce; it was enough, the Justices said, to find that Congress could rationally think that it did. Given that virtually everything can rationally be said to affect interstate commerce to some degree, almost no legislation could fail this test. In the 1985 case of *Garcia v. San Antonio Metropolitan Transit Authority*,[12] the Court, in upholding the application of the Fair Labor Standards Act to employees of a municipal transit facility, seemed to indicate explicitly that the judiciary would no longer protect federalism through constitutional limits on federal power, declaring that "[s]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[13]

Garcia, however, turned out not to be the final word on the Court's role in protecting federalism. In its 1995 decision in *United States v. Lopez*,[14] the Court shocked constitutional observers by asserting a judicially-enforceable limit on the power of Congress to regulate interstate commerce.

The earliest indication of an interest by the more conservative members of the Court, led by then-Justice Rehnquist, in finding a limit on the commerce power came in 1976 in *National League of Cities v. Usery*.[15] In *Usery*, the Court invalidated the application of a federal wage control law to state employees. The Court did so, however, not on the ground that the law was an invalid exercise of the commerce power, but rather because the exercise was subject to a supposed state immunity from direct federal regulation.[16] Justice Brennan, with every reason to be confident that the era of judicial interference with federal power was long past, could hardly control his rage in a dissent joined by two of his colleagues.[17]

The decision in *Usery* was made possible only because Justice Blackmun unexpectedly voted with the conservatives in a

12. 469 U.S. 528 (1985).
13. *Id.* at 552.
14. 514 U.S. 549 (1995).
15. 426 U.S. 833 (1976).
16. *Id.* at 854–55.
17. *Id.* at 856–57 (Brennan, J., dissenting).

separate opinion.[18] Yet, Justice Blackmun would not permit the decision to be applied in any other case.[19] Indeed, writing for the majority in *Garcia*, he invoked the Court's failure to apply the principle of state immunity as a reason to overrule *Usery* and seemingly renounce virtually all judicial enforcement of federalism.[20] It was now the conservatives' turn to dissent, in an opinion written by Justice Powell and joined by Chief Justice Burger and Justices Rehnquist and O'Connor.[21] In separate opinions, Justice Rehnquist predicted that his view would "in time again command the support of a majority of this Court,"[22] and Justice O'Connor indicated that she shared Justice Rehnquist's belief.[23]

Chief Justice Rehnquist and Justice O'Connor made good on this prediction, at least to some extent, in 1991 in *Gregory v. Ashcroft*.[24] In a five-to-four decision, the Court imposed on Congress the mild restraint of a "plain statement" requirement where Congress seeks to limit a state's power when the state's "political functions" are involved.[25] The following year, in *New York v. United States*,[26] another five-member majority went a step further, holding that Congress could not require the States to implement a federal program.[27] Finally, in *United States v. Lopez*,[28] the Court actually invalidated a law as not authorized by the commerce power. *Lopez* seemingly presented to the Justices seeking to limit federal power a unique opportunity too tempting to resist.

Lopez involved a challenge to the Gun-Free School Zones Act of 1990, which made it a crime "knowingly to possess a fire-

18. *Id.* at 856 (Blackmun, J., concurring) (stating that he joins the majority opinion on the belief that the Court "adopts a balancing approach [that] does not outlaw federal power in areas . . . where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential").

19. *See, e.g.*, Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

20. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530–31 (1985).

21. *Id.* at 557 (Powell, J., dissenting).

22. *Id.* at 580 (Rehnquist, J., dissenting).

23. *Id.* at 589 (O'Connor, J., dissenting).

24. 501 U.S. 452 (1991).

25. *Id.* at 463–70.

26. 505 U.S. 144 (1992).

27. *Id.* at 171–77.

28. 514 U.S. 549 (1995).

arm"[29] in a school zone, defined as "a distance of 1,000 feet from the grounds of a public, parochial or private school."[30] Because the Act made no reference to taxing or a federal grant, it ostensibly could only have been based on the commerce power, which Congress certainly had reason to believe was unencumbered by any judicially-enforceable limit. Such a case might not have been expected to arise again, because in this instance Congress carelessly failed to make any reference to the commerce power, either in the Act or its legislative history. Still, the district court judge dutifully upheld the Act, finding that Congress has the "well-defined power to regulate activities in an[d] affecting commerce, and [that] the 'business' of elementary, middle and high schools . . . affects interstate commerce."[31]

To the government's misfortune, the Act then came before a panel of the Fifth Circuit Court of Appeals led by one of the most able, conservative, and independent-minded of federal judges, Judge William Garwood, who was joined by two colleagues willing to go along for the ride.[32] Judge Garwood made clear that if Congress had simply mentioned interstate commerce, there would have been no question as to the Act's constitutionality: "Where Congress has made findings, formal or informal, that regulated activity substantially affects interstate commerce, the courts must defer [to them] 'if there is any rational basis for' the finding."[33] "Practically speaking," the court continued, "such findings almost always end the matter."[34] But here Congress had "not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the Commerce Clause."[35] No sensible person could doubt that Congress's use of the Commerce Clause to do indirectly what it supposedly had no power to do directly had long ago become a charade, but it was offensive to the dignity of the court for Congress to refuse even to play the game to which the judiciary

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29. United States v. Lopez, 514 U.S. 549, 551 (1995) (quoting 18 U.S.C. § 922 (q)(1)(A) (Supp. V 1988)).

30. *Id.* at 551 n.1 (quoting 18 U.S.C. § 921(a)(25) (Supp. V. 1988)).

31. United States v. Lopez, 2 F.3d 1342, 1345 (5th Cir. 1993).

32. The two other members of the panel were Judges Thomas M. Reavley and Carolyn Dineen King.

33. *Lopez*, 2 F.3d at 1363 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981)).

34. *Id.*

35. *Id.* at 1365–66.

had tacitly assented. But for the incredible sloppiness of Congress's bill drafting and Judge Garwood's willingness to take advantage of it, this exciting event would not have occurred.

The Supreme Court granted a writ of certiorari, and in an opinion by Chief Justice Rehnquist, affirmed the Fifth Circuit's decision.[36] Justice Kennedy joined the majority opinion but added a separate concurrence, joined by Justice O'Connor. Justice Thomas also joined Chief Justice Rehnquist's opinion and wrote a separate concurrence. Justice Breyer wrote a dissenting opinion joined by Justices Stevens, Souter, and Ginsburg. Justices Stevens and Souter also wrote separate dissents.

In contrast to the Fifth Circuit, the Court declined to hold that it could not apply the rational basis test in the absence of congressional findings.[37] After all, it is usually the role of the Solicitor General, not Congress, to find a rational basis for Congress's supposed Commerce Clause statutes. Adopting a statement made in an earlier case, the Court found that Congress may regulate three "broad categories of activity"[38] on the basis of the Commerce Clause. First, it may "regulate the use of the channels of interstate commerce,"[39] prohibiting or placing conditions on the movement of things or persons across state lines. Second, it may "regulate and protect the instrumentalities of interstate commerce."[40] Finally, it may "regulate those activities having a substantial relation to interstate commerce."[41] Because the operations of the instrumentalities of interstate commerce clearly affect the commerce itself, the second category is really part of the third, and all modern litigated cases involve only the third. After briefly reviewing its past cases and purporting not to overrule any of them, the Court concluded that Congress can regulate only activities that "substantially affect" interstate commerce.[42]

In perhaps the most significant aspect of *Lopez*, the Court effectively rejected, while purporting to accept, the "rational basis"

36. United States v. Lopez, 514 U.S. 549 (1995).
37. *Id.* at 557.
38. *Id.* at 558.
39. *Id.*
40. *Id.*
41. *Id.* at 558–59.
42. *Id.* at 559.

test that was first explicitly stated in *Katzenbach v. McClung*[43] in 1964 and followed in all subsequent cases. Instead of confining the role of the Court to testing the rationality of a supposed congressional finding of the regulated activity's effect on interstate commerce, Chief Justice Rehnquist referred to the test in passing, as if it required the Court itself to make the finding of "substantial effect" independently.[44] Thus, the Court substituted a "substantiality" test for the rational basis test. However, the *Lopez* majority's invalidation of the Act was not based, as one might expect, on a finding that the effect of guns around schools on interstate commerce did not meet the Court's new substantiality test. Rather, it was based primarily on a finding that the regulated activity "has nothing to do with 'commerce' or any sort of economic enterprise" and "is not an essential part of a larger regulation of economic activity."[45]

Also important, if not dispositive, was that the Act "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession [alleged in each prosecution under the Act actually] affects interstate commerce."[46] Finally, the Court noted that although "Congress normally is not required to make formal findings" as to the effect of the regulated activity on interstate commerce, the absence of findings in this case rendered the Court unable "to evaluate the legislative judgment" that it has a sufficient effect.[47] After the passage of the Act, Congress did in fact purport to make the necessary findings, but the government's attorney, for some reason, stated, "[w]e're not relying on them in the strict sense of the word."[48] The Court, therefore, felt free to ignore the "findings," which did not, in any event, add anything to the effects relied on by the United States.

The government argued that the Court could find the required effect on the grounds that violent crime has substantial costs that are spread by insurance throughout the population,

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43. 379 U.S. 294, 303–04 (1964).

44. *See Lopez*, 514 U.S. at 557 ("[T]he Court has heeded that warning [not to obliterate the distinction between what is local and what is national] and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.").

45. *Id.* at 561.

46. *Id.*

47. *Id.* at 562–63.

48. *Id.* at 563 n.4.

that violent crime reduces the willingness of people to travel to areas seen as unsafe, and that violent crime hampers the "educational process," which "will result in a less productive citizenry," and therefore less interstate commerce.[49] It is difficult to disagree with Chief Justice Rehnquist's conclusion that these arguments make a farce of the idea of a central government of limited powers. If Congress can regulate the possession of guns around schools because it affects education, which in turn affects productivity, Congress obviously could directly regulate education itself. The result would be, as Chief Justice Rehnquist pointed out, to obliterate the federal-state distinction.[50] The problem that the United States (and the dissent) faced was the need to insist, in the face of this clear contrary fact, that the result would not obliterate the distinction. Employing his lawyerly immunity from embarrassment, Justice Breyer undertook to do just that in a lengthy dissent.[51]

If the difficulty with the dissent is that its position would make a farce of federalism, the difficulty with the majority's position is that the Court had already made a farce of federalism long ago, and the majority, with the possible exception of Justice Thomas, was clearly unwilling to do anything about it. It required no less an immunity from embarrassment for Chief Justice Rehnquist to claim that for the Court to uphold the Act "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[52] It is as if he had never heard of the *Lottery Case*[53] upholding federal regulation of gambling, the many Pure Food and Drug Acts regulating in the interest of health, the Mann Act, regulating sexual immorality, and the many federal statutes regulating gambling, kidnapping, arson, auto theft, and so on. Mr. Caminetti, who was convicted of a federal crime after he traveled from California to Nevada with his lady friend and engaged in sexual activity, would have been surprised to learn that the federal government does not possess the police power.[54]

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49. *Id.* at 563–64.
50. *Id.* at 567–68.
51. *Id.* at 615–31 (Breyer, J., dissenting).
52. *Id.* at 567 (majority opinion).
53. 188 U.S. 321 (1903).
54. *See* Caminetti v. United States, 242 U.S. 470 (1917).

It is true that most of these cases were decided under the "prohibit commerce" ("channels") theory rather than the "affects commerce" theory of the commerce power, but that should make no difference. In any event, the Court had also previously upheld under the "affects theory" several pieces of legislation that fell within the police power umbrella of health, safety, and welfare. For example, in *Heart of Atlanta Motel v. United States*,[55] the Court upheld a federal prohibition on race discrimination in restaurants,[56] and in *Perez v. United States*,[57] it upheld a federal law against loan sharking.[58]

The *Lopez* Court made clear that it had no intention of challenging Congress's use of the power to prohibit commerce to achieve police power objectives, pointing out that "there is no indication that [the defendant] had recently moved in interstate commerce, and there is no requirement [in the Act] that his possession of the firearm have any concrete tie to interstate commerce."[59] But Lopez, his gun, or both having once crossed a state line (and the gun, at least, almost surely had), would not make the challenged statute any less a police power measure or more a *bona fide* regulation of commerce. The Court had to ignore not only Mr. Caminetti's case, but also other cases seemingly directly on point, such as *Scarborough v. United States*,[60] which held that Congress's criminalizing a man's in-state, noncommercial possession of a gun was a regulation of interstate commerce because the gun had once crossed a state line.[61]

Equally ludicrous was the Court's statement that findings by Congress would have helped it "evaluate the legislative judgment that the activity in question substantially affected interstate commerce."[62] It is highly unlikely that Congress made any such judgment or even considered the matter. Congress was obviously simply responding to an insistent public concern about the apparently very serious problem of violence in schools. According to studies cited by Justice Breyer, "12 per-

55. 379 U.S. 241 (1964).
56. *Id.* at 242.
57. 402 U.S. 146 (1971).
58. *Id.* at 156–57.
59. United States v. Lopez, 514 U.S. 549, 567 (1995).
60. 431 U.S. 563 (1977).
61. *Id.* at 570–71.
62. *Lopez*, 514 U.S. at 563.

cent of urban high school students have had guns fired at them" and "20 percent . . . have been threatened with guns."[63] Under our unusual and complicated system of government, Congress lacks legislative authority to deal with such problems directly. Congress can deal with them, however—except for *Lopez*—provided it is simply willing to pretend, or more realistically, have the Solicitor General pretend, that it is actually regulating interstate commerce.

In short, American federalism has largely degenerated into little more than a requirement of dishonesty. The current concept of federalism is not that there are some things Congress cannot do, but rather that there are some things Congress can do only in an indirect and underhanded manner. Officially, Congress has no power to prohibit activities such as gambling, prostitution, drug use, or non-state race discrimination. This does not mean, however, that we have no federal laws prohibiting those things; it merely means that the laws must purport to be something they are obviously not—typically, an exercise of the commerce power.

Law students in the United States begin their studies by learning that the practice of constitutional law, at least as far as federalism is concerned, requires the ability to assert patent fictions with a straight face. The study teaches them early the great advantage of a high threshold of embarrassment. When people complain of the ability of lawyers to assert fictions as truth, they should be made aware that it is not an inborn skill, but the result, at least in part, of training provided by professors in required constitutional law courses. This training complicates, no doubt, the task of professors in legal profession courses—another required part of the legal curriculum—to teach obligations of candor and openness.

Justice Kennedy's concurring opinion in *Lopez*, joined by Justice O'Connor, seems to be nothing more than a lengthy apology for voting to invalidate the statute. He urged the Court to exercise "great restraint" on this issue and gave assurance that no earlier Commerce Clause decision was "called in question . . . today."[64] *Lopez*'s distinguishing feature, according to Justice Kennedy, was that in no other case had the Court held

63. *Id.* at 619 (Breyer, J., dissenting).

64. *Id.* at 568, 574 (Kennedy, J., concurring).

that the "commerce power may reach so far."[65] He later admitted, however, that "the intrusion on state sovereignty [in *Lopez*] may not be as severe" as in some of the Court's recent Tenth Amendment cases in which Congress's power was upheld.[66]

Justice Thomas also submitted a lengthy concurring opinion, arguing for a strict definition of "commerce" (in accordance with his view of original understanding) as essentially limited to trade and transportation, and seemingly urging total rejection of the "substantially affects" doctrine.[67] This left him with the difficult task of explaining away Chief Justice Marshall's statement in the seminal case of *Gibbons v. Ogden*,[68] defining as interstate all commerce that "concerns more States than one" and excluding only commerce that does not "affect other States,"[69] which he did not succeed in doing.[70] Justice Thomas's view would result in a drastic reduction of the commerce power, limiting Congress's ability to regulate even economic and business affairs of national import, such as monopolistic mergers or cartels among manufacturers. Justice Thomas, like Chief Justice Rehnquist, was concerned that the affects doctrine could result in granting Congress the police power, but, like the Chief Justice, failed to note that Congress had already been granted that power on the basis of the Commerce Clause at least since the 1903 *Lottery Case*.

Justice Stevens would have upheld the Act based partly upon the argument that commerce "is vitally dependent on the character of the education of our children."[71] As already noted, under this premise, Congress could regulate education directly, thereby bringing an end to any pretense of a national government with limited powers. Instead of candidly addressing that concern, Justice Stevens joined Justice Breyer's opinion denying that the adoption of his view would have such profound consequences.

Justice Souter's lengthy dissent added the unflattering accusation that the Court's prior decisions finding limits to the commerce power were not based on a concern with federalism,

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65. *Id.* at 580.
66. *Id.* at 583.
67. *Id.* at 585 (Thomas, J., concurring).
68. 22 U.S. (9 Wheat.) 1 (1824).
69. *Id.* at 194.
70. *See Lopez*, 514 U.S. at 593–96 (Thomas, J., concurring).
71. *Id.* at 602 (Stevens, J., dissenting).

but—like the decisions of the economic substantive due process era—on a commitment to *laissez-faire* economics.[72] He did not try to explain why the famous *Schechter Poultry*[73] decision, which limited the commerce power, was joined by Justices Brandeis, Stone, and Cardozo, all of whom were staunch opponents of the concept of economic substantive due process.

Justice Breyer attached to his dissenting opinion a lengthy appendix documenting the seriousness of violence in schools,[74] as if the seriousness of a problem gave Congress the power to regulate it under the Commerce Clause. Instead of openly espousing this position and arguing that the Court therefore has no role in maintaining federalism, Justice Breyer undertook the heroic task of showing that upholding the Gun-Free School Zones Act as a regulation of interstate commerce was not the practical equivalent of upholding Congress's regulation of virtually any activity. Justice Breyer argued that upholding the Act would not mean, as the majority claimed, that Congress would be able to "regulate any activity that it found was related to the economic productivity of individual citizens."[75] This was because the Act, he explained, dealt with a "particularly acute threat to the educational process," and because of the "immediacy of the connection between education and the national economic well-being."[76]

Justice Breyer did not address the fact that the power to regulate a threat to education entails the power to regulate education itself; nor did he meet Chief Justice Rehnquist's challenge to identify a putative use of the commerce power that he would not uphold. The position of the dissenters was, in essence, that the Court should continue to pretend to review Congress's purported exercises of its commerce power, as it had since 1937, although it would in practice uphold and thereby legitimize each and every purported exercise.

Lopez could have been viewed as a very important precedent, establishing definitively, after sixty years of contrary indications, that the power of Congress to legislate under the Commerce Clause *would* be subject to judicial limitation. Alterna-

72. *Id.* at 605–06 (Souter, J., dissenting).
73. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
74. *Lopez*, 514 U.S. at 631 (Breyer, J., dissenting).
75. *Id.* at 624.
76. *Id.*

tively, it could have been viewed as an aberration, unlikely to have any progeny. This aberrational view would clearly be the better initial reaction to *Lopez* if one believed, with Justice Kennedy, that the decision did not "call in question the essential principles"[77] of prior cases, but was based instead on Congress's careless failure to connect the regulated act to (or even mention) interstate commerce. Perhaps the Court was simply pointing out to Congress the unseemliness of failing to at least insert the words "interstate commerce" somewhere in a purported exercise of its commerce power. If hypocrisy is the tribute vice pays to virtue, Congress should pay the tribute by at least mentioning commerce instead of leaving it to the courts to concoct a commerce theory. Five years later, however, it appeared that *Lopez* would not be so narrowly confined.

III. *UNITED STATES V. MORRISON*: *LOPEZ* AFFIRMED AND STRENGTHENED

United States v. Morrison[78] involved a challenge to the Violence Against Women Act of 1994, which provided a civil remedy to "victims of gender-motivated violence."[79] The victim of an alleged rape by two college football players brought suit under the Act against the school and the players. Relying on *Lopez*, the Fourth Circuit, sitting en banc, upheld the defendants' contention that the Act was unconstitutional.[80] The Supreme Court, again in an opinion by Chief Justice Rehnquist, affirmed, with Justice Thomas writing a separate concurring opinion,[81] and, as in *Lopez*, the four liberal Justices dissenting.[82]

Chief Justice Rehnquist began his discussion of the applicable law by carefully and helpfully explicating his opinion in *Lopez* as resting on four "significant considerations."[83] First, the criminal statute had "nothing to do with 'commerce' or any sort of economic enterprise."[84] Second, the statute contained

77. *Id.* at 574 (Kennedy, J., concurring).

78. 529 U.S. 598 (2000).

79. *Id.* at 602.

80. Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 889 (4th Cir. 1999) (en banc).

81. *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

82. *Id.* at 628 (Souter, J., dissenting).

83. *Id.* at 609 (majority opinion).

84. *Id.* at 610 (quoting *Lopez*, 514 U.S. at 561).

"no express jurisdictional element which might limit its reach" to instances of the regulated conduct that "have an explicit connection with or effect on interstate commerce."[85] Third, the legislative history of the statute contained no "express congressional findings regarding the effects" of the regulated activity on interstate commerce.[86] Finally, "the link between gun possession and a substantial effect on interstate commerce was attenuated."[87]

The Violence Against Women Act similarly regulated conduct that was non-economic, had no express jurisdictional element (in that it applied to all gender-motivated violence against women), and had an attenuated connection with interstate commerce. Surely the most significant aspect of *Morrison*, distinguishing it from *Lopez*, was that this time Congress played the game of pretending to be concerned with interstate commerce. Congress held extensive hearings about the effects of gender-motivated violence against women on interstate commerce and found that such violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, . . . diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate products."[88] These findings did not save the statute, however, because the asserted effects were too "attenuated."[89] Were such findings—of diminishing national productivity, for example—accepted as sufficient, Chief Justice Rehnquist pointed out, Congress could "regulate any crime" so long as the nationwide, aggregated impact of that crime has substantial effects on "employment, production, transit, or consumption."[90] Congress would even be able to regulate family law and other areas of traditional state regulation.[91]

Because Congress explicitly relied on its commerce power in the Violence Against Women Act, purporting to make findings about the effects of the regulated activity on interstate commerce, the *Morrison* Court's departure from earlier law was

85. *Id.* at 611–12 (quoting *Lopez*, 514 U.S. at 562).
86. *Id.* at 612 (quoting *Lopez*, 514 U.S. at 562).
87. *Id.* (quoting *Lopez*, 514 U.S. at 563–67).
88. *Id.* at 615 (citing H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.)).
89. *Id.*
90. *Id.*
91. *Id.*

clear. "[T]he existence of congressional findings is not sufficient, by itself," the Court said, "to sustain the constitutionality of Commerce Clause legislation."[92] In earlier cases, congressional findings had effectively been sufficient, because the only question was whether Congress could rationally think that the regulated activity substantially affected interstate commerce, as virtually all activities do.[93] It was hardly imaginable that the Court would ever find that Congress's belief was not rational. After *Morrison*, however, whether an activity's effects on interstate commerce are sufficient to sustain a statute enacted under the Commerce Clause became "ultimately a judicial rather than a legislative question."[94] The quotation is from Justice Black's concurring opinion in *Heart of Atlanta Motel*,[95] not from the majority opinion, which actually limited the Court's role to determining Congress's rationality. Chief Justice Rehnquist had earlier quoted the statement in a footnote in *Lopez*;[96] now he fully endorsed it by re-quoting it in the text, effectively overruling *Heart of Atlanta Motel* on the issue.

The Court was now to determine for itself the sufficiency of effects in Commerce Clause cases. Perhaps even more important is that in some cases, effects, even if substantial, simply do not count. Although Congress may regulate *economic* activity that "substantially affects interstate commerce" when the effects are aggregated, as noted in *Lopez*,[97] it may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[98]

Justice Thomas's concurring opinion reiterated his view that the "substantial effects" theory of Commerce Clause regulation is "inconsistent with the original understanding of Congress's

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92. *Id.* at 614.

93. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) ("The only question [is] whether Congress had a rational basis for finding that racial discrimination by motels affected commerce . . . ."); Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964) ("[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.").

94. *Morrison*, 529 U.S. at 614 (quoting *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring)).

95. *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring).

96. United States v. Lopez, 514 U.S. 549, 557 n.2 (1995).

97. *Id.* at 560.

98. *Morrison*, 529 U.S. at 617.

powers and with this Court's early Commerce Clause cases."[99] Justice Souter's dissenting opinion, joined by Justices Stevens, Ginsburg and Breyer, correctly pointed out that the Court had "supplant[ed] rational basis scrutiny with a new criterion of review."[100] The Court would now determine the sufficiency of the effects, and it would no longer be determined by their "cumulative effects."[101]

IV. THE "CONSERVATIVE" REHNQUIST COURT

Lopez and *Morrison* may be seen as the defining decisions of the Rehnquist Court—the acme of its federalism jurisprudence and the most prominent example of the influence of the supposedly conservative Justices. The Rehnquist Court was almost uniformly characterized (and deplored) by constitutional law professors and the liberal media as a conservative Court guilty of right-wing activism.[102] It was indeed activist, like its immediate predecessors (the Warren and Burger Courts), but its activism—that is, its rulings of unconstitutionality not clearly required by the Constitution—was, like that of its predecessors, overwhelmingly in the service of liberal causes.[103]

The Rehnquist Court did, however, provide some examples of conservative activism, giving conservatives victories on policy issues that they were unable to obtain through the ordinary political process. Of these, its federalism decisions, seeking to protect or restore a degree of state autonomy, were probably the most important, or at least the most prominent. Two other areas were its "affirmative action" decisions, invalidating some official uses of racial preferences,[104] and its "regulatory takings"

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99. *Id.* at 627 (Thomas, J., concurring).

100. *Id.* at 637 (Souter, J., dissenting).

101. *Id.*

102. *See* Lino A. Graglia, *Constitutional Law without the Constitution: The Supreme Court's Remaking of America*, *in* "A COUNTRY I DO NOT RECOGNIZE": THE LEGAL ASSAULT ON AMERICAN VALUES 1, 32 (Robert H. Bork ed., 2005).

103. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (homosexuality); United States v. Virginia, 518 U.S. 515 (1996) (sex discrimination); Lee v. Weisman, 505 U.S. 577 (1992) (school prayer); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (term limits).

104. The Rehnquist Court apparently gave conservatives an important victory when it held that the "strict scrutiny" test applies to laws granting preferences to blacks as well as to laws discriminating against blacks. If the rational basis test is one that can hardly be failed, the strict scrutiny test was thought to be one that can

decisions, requiring compensation to property owners for losses caused by certain governmental regulations that decreased property values even though the government did not formally "take" the property by eminent domain.[105] In each of these latter two areas, the victories proved to be very limited and probably short-lived. The same is likely to prove true, if it has not already been so proven, in the third major area of conservative victories, federalism.

The Rehnquist Court's "federalism" decisions undertook to protect state autonomy in three ways. First, in two cases the Court held that Congress may not "commandeer" the resources of a state by requiring it to enforce or aid in enforcing or implementing a federal program.[106] The issue is not likely to arise frequently—the latter of the two cases was decided more than a decade ago—or to be very important. In any event, Congress can ordinarily obtain state cooperation in federal programs through

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hardly be passed. Applying the test, the Court in three cases held the use of racial preferences favoring blacks to be unconstitutional. Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995); City of Richmond v. J.A. Croson Co., 488 US. 469, 493–94, 505–06 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 279–84 (1986) (plurality opinion). The era of racially preferential "affirmative action," it seemed, was finally over. Liberal constitutional law scholars protested mightily and considered this result so unacceptable that they began to question the value of judicial review. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154, 172–73 (1999). The whole point of leaving the final decision on basic social policy issues to the Supreme Court, in their view, was to produce a more, not less, liberal outcome than obtained in the ordinary political process. *Id.* Their fear that the Court would abolish "affirmative action" proved to be unfounded when, in 2003, thanks to a switch by Justice O'Connor, the Court upheld the use of racial preferences in law school admissions. Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003).

105. In a fifteen-year period between 1987 and 2001, the Court upheld regulatory takings claims in five cases. Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). The principal result of these decisions was a rule that a regulation that deprives land of "all economically beneficial use" constitutes a taking and that the government must compensate owners even for temporary takings. Like the other conservative victories, however, the decisions were by narrow five-to-four or six-to-three votes, with the liberal Justices usually in dissent. In 2002, joined by the "moderates," Justices O'Connor and Kennedy, the liberals prevailed. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). The result was to overrule the "all economically beneficial" rule in all but name, and to undo most, if not all, of the little that the conservatives had been able to accomplish.

106. Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

conditional spending, and other decisions indicate that the non-commandeering cases give the States very limited protection.[107]

The second way in which the Rehnquist Court undertook to protect state autonomy was to hold in a series of cases, beginning in 1996, that the Eleventh Amendment limits the power of Congress to create causes of action against the States.[108] One of the Court's most recent decisions on the issue, however, indicates that, as with the regulatory taking and racial preference issues, this development has likely been brought to an end, if not actually reversed.[109]

The third and most important way in which the Court attempted to protect state autonomy was by holding in *Lopez* and *Morrison* that there really are judicially-enforceable limits to Congress's commerce power, contrary to all indications of the previous sixty years. The question is how far this development will go. As with the other Rehnquist Court efforts to advance conservative causes, the prospects are bleak. The Court has not invalidated a federal statute on Commerce Clause grounds since *Morrison* in 2000. The Court cited *Lopez* in two cases as providing a reason to interpret a Commerce Clause statute narrowly and to avoid the constitutional question raised by *Lopez* about the extent of the commerce power.[110] In both cases, the interpretation that the Court adopted seemed, in any event, to be the more reasonable one. More important, the Court's next decision on the Commerce Clause power found the four liberals in the majority and three of the conservatives in dissent.

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107. *See* Reno v. Condon, 528 U.S. 141 (2000) (unanimously upholding a federal law controlling a state commercial operation).

108. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Alden v. Maine, 527 U.S. 706 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

109. *See* Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding, by a six-to-three vote, a federal cause of action against a state under the Family and Medical Leave Act).

110. *See* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001) (holding that a small, non-navigable intrastate pond was not covered by the Clean Water Act, despite periodic use of the pond by migratory birds that cross state lines); Jones v. United States, 529 U.S. 848 (2000) (holding that a private dwelling was not "used in" interstate commerce despite its consumption of natural gas obtained out-of-state).

V. *GONZALES V. RAICH*: THE *LOPEZ* REVOLUTION HALTED, IF NOT REVERSED

The Court's most recent decision on the commerce power indicates that the reach of *Lopez* and *Morrison* is likely to be limited. The Court upheld a federal statute in the face of a seemingly substantial challenge on Commerce Clause grounds.[111] Justice Stevens, a dissenter in *Lopez* and *Morrison*, now wrote for a majority of the Court, joined by the other three former dissenters. Three members of the majority in those cases now wrote in dissent—a strong indication in itself that a change in direction, if not a reversal of position, had taken place.

Gonzales v. Raich involved a challenge to an application of the Controlled Substances Act (CSA), a part of the Comprehensive Drug Abuse and Prevention Act of 1970 (CDAPA), which prohibits the manufacture, distribution, or possession of a "controlled substance," including marijuana.[112] California law generally prohibits the possession and use of marijuana, but the state's Compassionate Use Act of 1996 permits its use for medicinal purposes by "seriously ill" residents with the approval of a physician.[113] Two seriously ill California residents used locally grown marijuana for medicinal purposes on their physicians' recommendations.[114] Relying on *Lopez* and *Morrison*, they argued that the CSA could not constitutionally apply to the intrastate possession and use of marijuana for medicinal purposes in accordance with state law.[115] The Ninth Circuit agreed,[116] but the Supreme Court reversed.[117]

The Court, unsurprisingly, maintained that the case was governed by *Wickard v. Filburn*,[118] which involved a challenge to the 1938 Agricultural Adjustment Act (AAA), a statute that sought to control the price of wheat in the national market by restricting supply. The *Wickard* Court held that the AAA could constitutionally be applied to the portion of a wheat farmer's

111. Gonzales v. Raich, 545 U.S. 1 (2005).
112. *Id.* at 7, 12–14.
113. *Id.* at 5–6.
114. *Id.* at 6–7.
115. *Id.* at 7–8.
116. Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003).
117. *Raich*, 545 U.S. at 9.
118. 317 U.S. 111 (1942).

crop that he raised solely for home consumption.[119] Congress could prohibit the growing of such wheat, the Court reasoned, because it might find its way into the interstate market, thereby increasing supply, and in any event, its consumption reduced demand.[120] In *Raich*, Congress sought to eliminate the interstate market in marijuana, as it clearly could, for the power to regulate interstate commerce includes the power to prohibit such commerce, as first established in the *Lottery Case*.[121] As in *Wickard*, Congress could therefore prohibit intrastate production intended for home use, because such production might enter the interstate market and thereby implicate Congress's power to regulate.[122]

Wickard established the commonsense rule that, when the activities of a class of actors substantially affects interstate commerce in the aggregate, Congress can regulate all members of the class, even though the activity of an individual member of the class might have only a trivial effect.[123] In *Raich*, as in *Wickard*, the Court held that the relevant class was the producers of a product for home consumption that Congress sought to keep from entering the interstate market.[124] The Court refused to limit the relevant class further, as the dissenters urged, to producers of marijuana for home consumption for medicinal purposes pursuant to a physician's recommendation and in accordance with state law.[125]

In *Lopez* and *Morrison*, Chief Justice Rehnquist sought to weaken, indeed to reject, the rational basis test, but he was unable to do so explicitly as that probably would have cost him Justice Kennedy's vote. It was legitimate, therefore, for the liberals, back in the saddle in *Raich*, to reinstate and apply the rational basis test without mention of *Lopez* and *Morrison* on this point. Because Congress had a rational basis for determining that the relevant class of activities (production for home consumption) would, in the aggregate, have a substantial effect on

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119. *Id.* at 128–29.

120. *Id.*

121. The Lottery Case, 188 U.S. 321 (1903).

122. *Id.* at 345–48.

123. *See Wickard*, 317 U.S. at 127–28.

124. *Raich*, 545 U.S. at 32–33.

125. *Id.* at 28; *id.* at 53 (O'Connor, J., dissenting) (defining the relevant class narrowly); *id.* at 72 (Thomas, J., dissenting) (same).

interstate commerce, application of the CSA to the plaintiffs in *Raich* was a valid exercise of the commerce power.[126]

The Court distinguished *Lopez* and *Morrison,* in which the Court had refused to apply the *Wickard* aggregate effects test, on the ground that the regulated activity in those cases was non-economic and not part of a larger regulatory scheme.[127] The production of goods, however—the activity involved in *Raich*—is, according to a standard dictionary, part of the definition of "economics."[128] Furthermore, growing marijuana is not only an economic activity itself, but its regulation by the CSA was part of a larger scheme of economic regulation, the CDAPA, which was meant to suppress the interstate market in dangerous drugs. The foregoing considerations were sufficient to distinguish *Raich* from *Lopez* and *Morrison,* and to uphold the constitutionality of the challenged regulation.[129]

Not only did Justice Kennedy switch to the side of the liberals, but so did Justice Scalia, who concurred in the judgment but did not join the majority opinion.[130] Justice Scalia insisted that Congress's power to regulate activities that affect interstate commerce or that must be regulated to make the regulation of interstate commerce effective comes not from the Commerce Clause alone, but from both the Commerce and the Necessary and Proper Clauses.[131] The majority seemed not to disagree, stating that the "question presented" was not whether the regulation involved was within Congress's power to regulate interstate commerce, but whether it was within Congress's power to "make all Laws which shall be necessary and proper for carrying into Execution" the power to regulate interstate commerce.[132] Justice Scalia apparently believed that the majority did not sufficiently emphasize the distinction, however, which he found very important. Although the simple possession of marijuana prohibited by the CSA is, in Justice Scalia's view, a non-economic activity (which the majority did not concede),

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126. *Id.* at 32 (majority opinion).

127. *Id.* at 25–27.

128. *Id.* at 25–26 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

129. *Id.* at 26–28.

130. *Id.* at 33 (Scalia, J., concurring in the judgment).

131. *Id.* at 34.

132. *Id.* at 5 (majority opinion) (quoting U.S. CONST. art. I, § 8).

Congress may still regulate it because the regulation of possession is "an essential part of a larger regulation of economic activity," namely, the effort to extinguish the interstate market in controlled substances.[133]

Justice O'Connor, joined in part by Chief Justice Rehnquist and Justice Thomas, dissented.[134] Although she doubted that "[t]he homegrown cultivation and personal possession and use of marijuana for medicinal purposes" was economic activity,[135] she wrote that even if it were, there was no "proof that [it had] a substantial effect on interstate commerce and [was] therefore an appropriate subject of federal regulation" under the Commerce Clause, even in conjunction with the Necessary and Proper Clause.[136] Here, as in *Lopez* and *Morrison*, she said, there was no "express jurisdictional requirement" connecting the regulated activity to interstate commerce, and its alleged effects on interstate commerce were "attenuated."[137] Justice O'Connor would have distinguished homegrown medicinal marijuana from other marijuana, and, applying the approach of *Lopez* and *Morrison*, would not have found that this marijuana had "a discernable, let alone substantial, impact on the national illicit drug market."[138] Furthermore, that the regulated local activity was part of a larger regulatory scheme did not show "that it [was] essential to that scheme."[139] The present case, Justice O'Connor therefore concluded, was indistinguishable from *Lopez* and *Morrison*.[140]

In a separate dissenting opinion, Justice Thomas reiterated the view he expressed in *Lopez* that the commerce power applies only to interstate commerce, which means traffic and trade, and does not apply to things that merely affect interstate commerce.[141] Nor could the Necessary and Proper Clause sustain the application of the CSA in this case, because the government did not show that "banning medical marijuana use

133. *Id.* at 42 (Scalia, J., concurring in the judgment) (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

134. *Id.* at 42 (O'Connor, J., dissenting).

135. *Id.* at 50.

136. *Id.* at 43.

137. *Id.* at 44.

138. *Id.* at 53.

139. *Id.* at 46.

140. *Id.*

141. *Id.* at 58–59 (Thomas, J., dissenting).

[was] necessary" to control the interstate drug market.[142] Even if it were "necessary," Justice Thomas would have found that it was not "proper" because it unjustifiably encroached on the traditional police powers of the States.[143]

If the dissenters in *Raich* are correct that *Lopez* and *Morrison* have been effectively overruled, the Rehnquist Court's attempt to establish a judicially-enforceable limit on Congress's commerce power has come to an end, meeting the same fate as the two other major victories—on racial preferences and regulatory takings—that the Court seemed to grant to conservatives. It appears, however, that the *Raich* dissenters attempted to find in *Lopez* and *Morrison* more than was really ever there. The central factor of the *Lopez-Morrison* approach was that the regulated activity was not commercial or economic. The conduct regulated in *Raich*, the production and even the mere possession of a good, seems clearly more economic or related to economics, despite the dissenters' doubts, than the conduct regulated in *Lopez* and *Morrison*. Therefore, by rejecting the rational basis and aggregation of effects tests even for the regulation of economic or quasi-economic activity, the dissenters would have expanded, not merely maintained, the holdings of *Lopez* and *Morrison*.

Potentially the most significant aspect of *Lopez* and *Morrison* was the statement that the sufficiency of a regulated activity's effects on interstate commerce is a judicial question,[144] effectively repudiating the well-established rational basis test that made the sufficiency of effects a question for Congress, with the Court merely passing on the rationality of Congress's determination. In *Raich*, the Court strongly reasserted and applied the rational basis test, ignoring *Lopez* and *Morrison*'s pronouncements on the issue,[145] and drawing no complaint from either Justice Kennedy or Justice Scalia. The result is that rational basis is again the test of purported exercises of the commerce power with a possible de facto, even if not de jure, exception for cases involving the regulation of clearly non-economic conduct that is not part of a larger regulatory

142. *Id.* at 64.

143. *See id.* at 64–66.

144. *See* United States v. Morrison, 529 U.S. 598, 614 (2000) (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).

145. *See* Gonzales v. Raich, 545 U.S. 1, 22 (2005).

scheme. With this narrow exception, *Raich* indicates a return to the Court's practice since 1937 of reviewing purported exercises of the commerce power in name only, which makes judicial review a means of validation rather than a limitation.

It is hard to view the Court's, and particularly Justice Scalia's, insistence on the importance of the Necessary and Proper Clause as more than formalistic and semantic. When the so-called Anti-Federalists made the Clause a major basis for their opposition to the Constitution, Alexander Hamilton and James Madison responded that it did not add to the powers of Congress but merely made explicit what was clearly implied: a grant of legislative power necessarily includes the means to make it effective.[146] In *McCulloch v. Maryland*,[147] when Maryland tried to make the Necessary and Proper Clause serve as a limit on the enumerated powers, Chief Justice Marshall responded, in agreement with Hamilton and Madison, that it was essentially a redundancy.[148] Although the Necessary and Proper Clause may add useful rhetorical force to an opinion, it seems unlikely that without it the Court would have come to a different conclusion about Congress's power.

VI. THE COURT SHOULD WITHDRAW FROM COMMERCE CLAUSE REVIEW

It does not seem that the power of Congress would have been construed less broadly without the Necessary and Proper Clause. It simply makes sense for the country to have, and the people apparently want it to have, a "normal" national government, able to deal with whatever it sees as a national problem, like other national governments. The best course for the Court to take in Commerce Clause cases (in fact, in all cases challenging

146. *See* THE FEDERALIST NO. 33, at 170 (Alexander Hamilton) (Clinton Rossiter & Charles R. Kesler eds., 1999) ("[I]t may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same if these clauses were entirely obliterated . . . ."); THE FEDERALIST NO. 44, at 253 (James Madison) (Clinton Rossiter & Charles R. Kesler eds., 1999) ("Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication.").

147. 17 U.S. (4 Wheat.) 316 (1819).

148. *Id.* at 419 ("To waste time and argument in proving that, without [the Necessary and Proper Clause], Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun.").

Congress's legislative authority as distinguished from cases alleging a violation of a constitutional prohibition on a use of that authority), therefore, would be to withdraw explicitly from review, treating the scope of the commerce power as a non-justiciable "political question." Chief Justice Marshall came very close to adopting this position in *Gibbons v. Ogden*.[149] Defining the power so broadly as to be potentially without limit—extending to all "commerce which concerns more States than one," "plenary," and "vested in Congress as absolutely as it would be in a single government"—did not mean, he said, that there was a need for the Court to limit it.[150]

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.[151]

Among the many reasons for the Court to withdraw from Commerce Clause review, the most basic is that the Constitution does not provide a clear basis for such review; that is, it does not sufficiently define the scope of the power to make review the application of a rule of law rather than simply a policy decision. It is true that the Constitution purports to create a national government limited to its enumerated powers,[152] but those powers include the most important powers, to tax, to regulate commerce, and to declare war, very broadly stated.[153] The power to regulate interstate commerce, for example, could have been limited, but was not, to the power to prevent state discrimination against interstate commerce, which was thought to be its primary purpose.

Common usage may define "commerce" as business or economic transactions or activity, but "[c]ommerce . . . among the several States"[154] is more difficult to define. One could define it very narrowly as the transportation of things (goods, people,

149. 22 U.S. (9 Wheat.) 1 (1824).
150. *Id.* at 194, 197.
151. *Id.* at 197.
152. *See* U.S. CONST. amend. X.
153. *See* U.S. CONST. art. I, § 8.
154. U.S. CONST. art. I, § 8, cl. 3.

information, and so on) across a state line, but to be effective, the power to regulate such transportation must include the power to regulate intrastate activities that are a part of or an impediment to interstate transportation, or which otherwise affect such transportation or its regulation. Congress cannot regulate interstate railroad rates, for example, without the power to regulate competing intrastate rates.[155] The difficulty is that all intrastate activity, even guns around schools and gender-motivated violence against women, affects interstate commerce in some way, as the dissenters in *Lopez* and *Morrison* illustrated.[156] Thus, the commerce power is potentially *all* power, which cannot be right.

To make the commerce power all encompassing would be to eliminate the enumerated powers limitation on federal authority. It is necessary, therefore, to draw a line. That it is difficult to do this as a matter of principle rather than by *ad hoc* policy judgments, however, makes it more appropriate to leave the matter to Congress than to the Court. Delineating divisions of power between governments is certainly not part of the ordinary judicial function. The Court attempted to deal with the problem in *United States v. E. C. Knight Co.*[157] by narrowly defining "commerce" as trade and transportation but not including manufacturing.[158] This did provide a rule, but it was not an acceptable one, for it deprived Congress of the power to deal with a national manufacturing monopoly that very much affected interstate commerce, without enhancing or protecting state power to do so.

Lopez and *Morrison* are based on a similar, though even broader, definitional approach to the problem, defining "commerce" as confined not to trade or transportation, but to business and economic affairs. That too may provide a fairly clear and administrable rule, but it is not clear that it will prove to be a useful one. It is doubtful that it can or will be applied consistently to important legislation, such as the Endangered Species

155. *See* The Shreveport Rates Cases, 234 U.S. 342, 351–52 (1914).

156. *See* United States v. Morrison, 529 U.S. 598, 628–34 (2000) (Souter, J., dissenting); United States v. Lopez, 514 U.S. 549, 620–23 (1995) (Breyer, J., dissenting).

157. 156 U.S. 1 (1845).

158. *See id.* at 13.

Act,[159] and even more doubtful that either the States or the people would want it so applied.

Even if the Court could find a principled way to limit Congress's legislative authority, it should not strain to do so. It now appears that a national government of limited legislative authority is neither a workable arrangement, nor what the American public actually wants. Federalism remains an American ideal favored by everyone in principle, but defended by practically no one when it presents an obstacle to national action to further some favored interest. President Reagan, for example, although an ardent supporter of federalism in principle, signed a federal statute requiring states to impose a minimum drinking age of twenty-one years or lose a portion of their federal highway funds.[160] Highway safety, President Reagan believed, was more important than federalism. This easy trumping of federalism reflects the view of most congressmen and most people that, as a practical matter, Congress can and should be able to address any problem. The people apparently approved of the New Deal's massive centralization of legislative authority by reelecting President Roosevelt three times. The Hurricane Katrina disaster that struck New Orleans seemed to produce an almost uniform reaction that the federal government, not Louisiana, should have done more, and acted more quickly.

Another reason that the Court should explicitly withdraw from Commerce Clause review is its inability to limit the power of the federal government, even when it consistently tries to do so. One could not expect the Court, an arm of the federal government, to limit the power of the federal government in order to protect the power of the States; the umpire is a member of one of the teams. Throughout its history, the Court's decisions have served more to validate than to restrict federal power. The Court's most important decision to that effect was probably the *Lottery Case*,[161] which upheld a federal statute that sought to suppress gambling by prohibiting the interstate shipment of lottery tickets. The issue was important

159. *See, e.g.*, Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997).

160. *See* South Dakota v. Dole, 483 U.S. 203, 205 (1987).

161. 188 U.S. 321 (1903).

and difficult enough to warrant argument three times before the matter was decided by a five-to-four vote.[162]

Despite Chief Justice Marshall's warning in *McCulloch* that the Court would not uphold a "pretext" use[163] of Congress's powers, the *Lottery Case* Court held that the power to regulate interstate commerce includes the power to prohibit it to achieve general legislative (that is, "police power") ends, such as prohibiting gambling, that it could not achieve directly.[164] After all, to prohibit is to regulate, even though it prevents rather than facilitates interstate commerce, and to prohibit goods from crossing a state line is therefore to regulate interstate commerce, even though the objective is non-commercial.[165] This argument is perfectly logical, but as the dissenters pointed out, it represents a triumph of form over substance.[166]

If the commerce power enables Congress to prohibit anyone or anything (including electromagnetic waves and polluted air) from crossing a state line for any reason, American federalism has become largely a matter of sleight-of-hand; Congress can regulate virtually anything by simply pretending to be regulating interstate commerce.[167] In addition, if Congress can use this technique to regulate conduct not only in the state of origin (for example, by requiring payment of a minimum wage) but, less logically, also in the state of destination (for example, by prohibiting sexual conduct by people who have crossed a state line to engage in that conduct or restricting the behavior of those who have a connection with goods that have crossed a state line), as the Court has held,[168] then Congress's police power is complete. Chief Justice Rehnquist's expression of concern in *Lopez* that an attenuated "affects" doctrine might allow Congress to exercise the police power is therefore farcical. There would have been no problem in *Lopez*, apparently, if the statute applied only to guns

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162. *See id.* at 325; *id.* at 364 (Fuller, C.J., dissenting).

163. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

164. *The Lottery Case*, 188 U.S. at 356–57 (majority opinion). The Court has also upheld pretextual uses of the tax power. *See, e.g.*, McCray v. United States, 195 U.S. 27 (1904).

165. *The Lottery Case*, 188 U.S. at 363–64.

166. *Id.* at 371 (Fuller, C.J., dissenting).

167. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941).

168. *See, e.g.*, United States v. Sullivan, 332 U.S. 689 (1948) (holding that Congress can regulate a retail druggist's relabeling of a package containing pills that have crossed a state line).

that, like nearly all guns, had crossed a state line.[169] Congress's exercise of the police power, not only by prohibiting interstate shipment or movement, but also by regulating any activity involving goods that have crossed a state line, is no longer viewed as even raising a constitutional question.[170]

There is nothing to be gained from requiring Congress to achieve its police power objectives by use of the "prohibit" rather than the "affects" theory of commerce. In fact, there is much to be lost, because the prohibit device is even more obviously dishonest than the alternative; indeed, it amounts to little more than a semantic trick. The Court will uphold a statute as a regulation of interstate commerce even though that was no part of Congress's purpose, as in the 1964 Civil Rights Act's prohibition of race discrimination in public accommodations.[171] A certain amount of trickiness and deception is inherent in law, essential to maintaining the illusion that rules are dictating legal decisions, but the law should not flaunt its dishonesty. A mature system of law should seek to minimize fictions; adults, even lawyers, should be spared the embarrassment of having to declare in public things that are obviously untrue.

From 1937 to 1995, judicial review of Congress's power under the Commerce Clause was fictional review, a virtually automatic rubberstamping of the challenged statute. Despite *Lopez* and *Morrison*, this reality, as *Raich* indicates, is not likely to change significantly. The result is the worst of all possible worlds. Congress excuses itself from paying serious attention to the constitutional question of the scope of its commerce power, instead insisting that dealing with such questions is the job of the Supreme Court. The Court, applying the rational basis test that it reinstated in *Raich*, then defers to a congressional judgment of constitutionality that Congress never made and hardly even considered relevant. All putative Commerce Clause legislation, then, is validated by the two-part formula providing that the commerce power is "plenary" and that Congress had a "rational basis" for determining that the regulated activ-

169. *See* United States v. Lopez, 514 U.S. 549, 567 (1995) (noting that "there is no requirement that [Lopez's] possession of the firearm have any concrete tie to interstate commerce").

170. *See, e.g.*, Scarborough v. United States, 431 U.S. 563 (1977) (upholding a federal law making it a crime for a felon to possess a gun that has moved in interstate commerce).

171. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

ity affects interstate commerce. The principle of federalism is lost in the shuffle.

Another reason that efforts by the Court to limit the "affects" theory of the commerce power will prove pointless is Congress's possession of the perhaps even more potent power to tax and spend. Finding a principled basis for preventing an unlimited power to tax from developing into an all-encompassing power to regulate is difficult enough;[172] to do so when the power to tax is combined, as it must be, with the power to spend is an even greater challenge. Congress can discourage conduct it does not want by penalizing it with a tax and encourage conduct it does want by fostering it with a subsidy. What, if anything, Congress cannot command it can almost always purchase. This "spending power" might be thought to be limited by the fact that the need to spend money for Congress to get its way can generate political resistance. In fact, however, Congress pours endless subsidies into the States, and all it must do to get the States to comply with a policy that Congress supposedly cannot implement directly is threaten to withhold a subsidy related to that policy.[173]

This explains why, for example, although we do not have a national law prohibiting the sale of alcoholic beverages to persons under twenty-one years of age, that is nonetheless the law of the land. It is the law because all states that had a lower minimum drinking age "voluntarily" enacted the prohibition to avoid a reduction in the receipt of federal funds. There is no reasonable possibility that the Court will or can limit the spending power, which it has come close to calling a "political question,"[174] as it would be entirely inappropriate for the Court to override Congress's conception of the "general welfare." Again, it would be better if Congress could achieve directly what it now can achieve only indirectly, if it did not have in effect to bribe or coerce states to enact the laws it is supposedly unable to enact itself.

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172. *See* Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922).

173. School social segregation, for example, did not end as a result of *Brown v. Board of Education*, 347 U.S. 483 (1954), but of Title VI of the Civil Rights Act of 1964, which provided for the withdrawal of federal school subsidies from school districts that did not desegregate.

174. *Id.* at 207 n.2 ("[T]he Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction [on the spending power] at all.").

VII. THE COURT IS THE ENEMY, NOT THE PROTECTOR, OF FEDERALISM

It is always problematic in a system of self-government to have constitutional limitations on policy choices, which amount, as President Jefferson pointed out, to the rule of the living by the dead. Probably the best justification is that a constitutional limitation may sometimes actually serve to further rather than frustrate democracy by correcting a supposed defect in the democratic political system. For example, the justification offered for a balanced budget amendment is that special interests have an advantage in obtaining federal expenditures because the benefits go to those who will work intensely to obtain them (the few), while the cost is spread among the general public (the many). The consequence might be a higher level of expenditures (and taxation) than the majority favors, which a constitutional cap on spending could prevent. Similarly, the justification for term limits must be that the advantage of incumbency prevents other candidates from competing effectively, even when their positions are preferred by the people.

Perhaps a similar justification exists for judicial enforcement of federalism to protect a degree of state autonomy. A group seeking federal involvement in some cause, for example, prohibiting guns around schools or violence against women, is usually able to defeat the federalist argument that such matters are best left to the States. Because it is difficult to defeat specific, concrete interests with a general principle, the federalism interest almost always loses in the political process. The result may be less federalism—and therefore less local autonomy—than the public favors. Thus, for the Court to step in to invalidate national legislation in the interest of federalism could, unlike most of the Court's rulings of unconstitutionality, actually advance democracy. It does not seem, however, that the public wants a high degree of federalism or limited national legislative authority. The public seems to prefer to invest national elected officials with the legislative authority to do whatever they feel needs to be done. In any event, it does not appear, for the several reasons stated—most basically that divided sovereignty is an oxymoron—that it is appropriate or feasible for the Court to attempt to limit Congress's legislative authority.

The conclusive reason that the Court should not protect federalism is that a Court with the power to disallow policy

choices by the national government on federalism grounds will necessarily have power to disallow them on other grounds, as well as to disallow policy choices by the States. The Court itself is the greatest enemy of federalism. The principal assault on state sovereignty since the middle of the twentieth century has come not from Congress, but from the Court. It is the Court that has taken from the States the right to make policy on abortion, capital punishment, criminal procedure, pornography, prayer in the schools, vagrancy control, street demonstrations, term limits, sexual morality, distinctions on the basis of sex, illegitimacy, alienage, and so on almost without end. The power of the Court to disallow in the name of the Constitution any policy choice it disagrees with has reduced the States to supplicants before the Court, pleading to be allowed to continue to make policy choices in some areas.

The power to limit the authority of the national legislature is the most impressive example of the Court's power. Allowing the Justices to do that makes it easy for them to believe they can do anything. It then becomes futile to complain that they have arrogated to themselves the final word on all controversial policy issues. The power to control Congress means that the Court is, by definition, the most powerful institution of American government. In light of that reality, it is no surprise that the Court has become the source of all major innovations in domestic social policy. We cannot plead with the Justices to protect us from our elected representatives in Congress in some cases and then object that they consider themselves authorized to "protect" us from our elected state representatives in others.

If we wish to preserve any element of federalism, as well as of democracy, our greatest need is not protection from Congress by the Court, but protection from the Court by Congress.

BOOK REVIEW

YOO'S LABOUR'S LOST: JACK GOLDSMITH'S NINE-MONTH SAGA IN THE OFFICE OF LEGAL COUNSEL

THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION. BY JACK GOLDSMITH. W.W. NORTON & COMPANY, 2007.

DOUGLAS W. KMIEC*

In his book, *The Terror Presidency*,[1] Harvard Professor Jack Goldsmith writes about his nine months of service as head of the Office of Legal Counsel (OLC) at the Department of Justice. The book is a useful and interesting contribution to the modern debate over the balance between national security and civil liberties. It is also a provocative contribution, perhaps sometimes in ways unintended by the author, to what it means to be a nation governed by the rule of law rather than the rule of men. Until recently, this Office was not well known to the general public,[2] even though it played pivotal roles in advising Franklin Roosevelt on constitutional aspects of U.S. support for Great Britain in World War II,[3] Dwight Eisenhower in the use of

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1. JACK GOLDSMITH, THE TERROR PRESIDENCY (2007).

2. *See, e.g.*, *Fall Meeting Dinner Honors Office of Legal Counsel*, 23 ADMIN. & REG. L. NEWS, Winter 1998, at 1 ("To most of the legal world, the Office of Legal Counsel is an unknown entity. Indeed, Chief Justice Rehnquist, one of the former Assistant Attorneys General honored at the dinner, commented that, when he was called by the Attorney General and offered the job, he asked what the office did; he had never heard of it. Its relative obscurity, however, is at odds with its importance.").

3. *See* Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484 (1940); *see also* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 337 (1993) (citing LUTHER HUSTON, THE DEPARTMENT OF JUSTICE 60 (1967)).

troops to integrate schools in Little Rock, Arkansas,[4] and, as Professor Goldsmith now documents, George W. Bush in the assessment of legal authorities in the wake of 9/11. Towering figures in American law have occupied the front office in OLC, including Nicolas Katzenbach, Malcolm Wilkey, William H. Rehnquist, Antonin Scalia, Theodore Olson, and Walter Dellinger.[5] Even some of those who worked in OLC but did not head the Office, such as Samuel Alito, have gone on to great national service.[6] Many others have enjoyed a legal career greatly enriched by service to OLC.[7]

Compared to other divisions of the Department of Justice, OLC is tiny. It consists of only a handful of lawyers, but its influence is disproportionate to its size.[8] It was the one place in government where one expected—or at least received, whether wanted or not—objective, candid advice on the interpretation of the law.[9] Throughout its history, OLC prided itself on keeping a

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4. *See* President's Power to Use Federal Troops to Suppress Resistance to Enforcement of Federal Court Orders—Little Rock, Arkansas, 41 Op. Att'y Gen. 313 (1957); *see also* Kmiec, *supra* note 3, at 337–38.

5. DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT 2 (1992).

6. Justice Alito, along with the Author of this Essay, was a Deputy Assistant Attorney General in OLC from 1985 to 1987. *See* Tony Mauro, *Alito Enters the Arena: Reagan Influence Shines Through Vague Testimony*, LEGAL TIMES, Jan. 16, 2006, at 1.

7. Among OLC alumni are name and managing partners of major law firms, deans of law schools, distinguished chaired professors, and other leaders of the bench and bar, including: Alden Abbott, William Barr, Rebecca Brown, Michael Carvin, Charles Cooper, Robert Delahunty, Michael Fitts, Timothy Flanigan, John Harmon, John Harrison, Kevin "Seamus" Hasson, Dawn Johnsen, Martin Lederman, Michael Luttig, John Manning, John McGinnis, Randolph Moss, Beth Nolan, Michael Stokes Paulsen, Todd Peterson, Cornelia Pillard, H. Jefferson Powell, Michael Rappaport, Teresa Wynn Roseborough, Christopher Schroeder, Richard Shiffrin, Ralph Tarr, William Michael Treanor, Daniel Troy, Carol Williams, and John Yoo, to mention but a few from recent Republican and Democratic administrations.

8. KMIEC, *supra* note 5, at 2.

9. One author has described the Office well:

> The quasi-judicial conception of the Attorney General's opinion function, and, by extension, the function of OLC, has its classic statement in the words of President Pierce's Attorney General, Caleb Cushing. Cushing wrote that the Attorney General, in giving opinions and advice, "is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation."
>
> According to former Attorney General Griffin Bell, the Attorney General has a "duty to define the legal limits of executive action in *a neutral manner*." Theodore Olson, when he was AAG for OLC, explained that "it is not our function to prepare an advocate's brief or simply to find

low public profile, advising the President on constitutional questions presented by pending legislation, drafting the President's executive orders to ensure their proper form and legality, and resolving internal executive branch disputes over conflicting interpretations of constitutional provisions and statutes.[10]

The operations of OLC were in many ways structured like those of a court.[11] Prior to the Bush administration, it was uniform practice to insist that those requesting advice do so in writing, both to identify precisely the nature of the question being asked and to secure the preliminary thoughts or analysis

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support for what we or our clients might like the law to be"; rather, OLC seeks to make "the clearest statement of what we believe the law provides and how the courts would resolve the matter. . . . The Attorney General is interested in having us provide *as objective a view as possible*. . . ." [Professor Sanford] Levinson similarly contends that when executive action is or seeks to be outside of the purview of judicial review, "[t]he President must have . . . *the 'best,' and not merely a 'possible,' argument* behind his assertion of constitutional power."

Randolph Moss, head of OLC under President Clinton, finds statutory, prudential, and constitutional bases for a "neutral expositor," or independent, quasi-judicial model of OLC. In establishing an office of "Attorney General" with authority to render "opinions," Congress alluded to the English Attorney General, a position characterized by a tradition of objective legal advice; moreover, legislative history "seem[ed] to presuppose that the advice provided [by the Attorney General would] be objective and not colored by the exigencies of a particular circumstance or policy goal." As a prudential matter:

> Objectivity and balance in providing legal advice are the currency of the Attorney General and the Office of Legal Counsel. . . . [T]he legal opinions of the Attorney General and the Office of Legal Counsel will likely be valued only to the extent they were viewed by others in the executive branch, the courts, the Congress, and the public as fair, neutral, and well-reasoned.

Moss rejects the view that OLC should give a legal green light to any conduct supported by a legally colorable, nonfrivolous argument."

Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 726–28 (2005) (citations omitted) (ellipses in original).

Professor Pillard, who served in OLC as a deputy assistant attorney general in the Clinton administration, believes that OLC's interpretive effort is largely, and perhaps unnecessarily, bounded by Supreme Court precedent, and she quite thoughtfully explores the possibility of the development of a separate body of executive constitutional doctrine.

10. *See* 28 C.F.R. § 0.25 (2007); Office of Legal Counsel Homepage, http://www.usdoj.gov/olc/ (last visited Mar. 17, 2008).

11. John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 427–30 (1993).

of those seeking assistance.[12] In providing counsel, OLC insisted upon the freedom to seek the written views of other components of government that might be affected or see the matter differently. When the Office of Legal Counsel delivered its advice, it would never do so in draft form, so as to avoid the impression that it could be influenced by considerations other than interpretive merit.[13] The advice would be given in writing, and it would almost always begin with a disclaimer that its views were informed solely by the law and not the policy wisdom or prudence of the action being analyzed.[14]

The Office of Legal Counsel almost never testified before Congress, because doing so would assume the role of advocate rather than interpreter.[15] When OLC communicated with Con-

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12. *See id* at 426–27.

13. As Professor Pillard notes:

> OLC traditionally requires that requests for advice come from the head or general counsel of the requesting agency, that advice-seekers submit their own view of the question to OLC, and that independent agencies (not already presumptively bound) agree in advance to abide by the advice—even oral advice—that OLC delivers. The agreement to be bound forestalls opportunistic advice-shopping by entities willing to abide only by advice they like, and it preserves the resources and authority of OLC against being treated merely as an extra source of legal research on issues that other lawyers or officials will ultimately resolve for themselves.

Pillard, *supra* note 9, at 711.

14. For example, OLC noted this qualification explicitly in the opinion by Dan Levin, Acting Assistant Attorney General for OLC, withdrawing OLC's so-called "torture memorandum" of August 2002, discussed later in this Essay. Levin wrote, "Our task is only to offer guidance on the meaning of the statute, not to comment on policy. It is of course open to policymakers to determine that conduct that might not be prohibited by the statute is nevertheless contrary to the interests or policy of the United States." Office of Legal Counsel, Memorandum Opinion for the Deputy Attorney General, Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (2004), 2004 WL 3554701, at *2 n.11.

15. This was the practice followed during my tenure in OLC and before. OLC viewed the practice as an extension of the attorney-client privilege, and in some cases where the client was the President, the executive privilege as well. Rare exceptions were made when the issue was uniquely related to a constitutional question squarely within the province of OLC. In such instances, as a matter of comity, the Attorney General and the President would permit the head of OLC to assist the legislative deliberations of Congress. One of these rare instances was the testimony of Assistant Attorney General Charles Cooper relating to the OLC's participation in the Iran-Contra investigation. Even on the rare occasions when OLC staff would testify, the head of the Office or his deputy would bear the responsibility of providing testimony, with OLC's career staff lawyers (attorney-advisors) insulated from inquiry. For some years, OLC has released selected opinions, with the consent of the client, for publication. Not all of its work product has been published, however.

gress, it routed its advice or questions through the Department of Justice's legislative liaison or the equivalent official at the White House. These were more than formalities. As Professor Goldsmith records, "OLC is, and views itself as, the frontline institution responsible for ensuring that the executive branch charged with executing the law is itself bound by law."[16]

Of course, OLC was not charged with taking a crabbed view of the law that failed, as Robert Jackson once said, to give "the benefit of a reasonable doubt as to the law" to the President.[17] Professor Goldsmith rightly observes that this was especially true in matters of national security, "where the President's superior information and quite different responsibilities [than those of the other branches] foster a unique perspective."[18] That Professor Goldsmith had an intellectual grasp of what it takes to be the head of the Office of Legal Counsel is evident by his own thoughtful words:

> The head of OLC must be a careful lawyer, must exercise good judgment, must make clear his independence, must maintain the confidence of his superiors, and must help the President find legal ways to achieve his ends, especially in connection with national security. OLC's success over the years has depended on its ability to balance these competing considerations—to preserve its fidelity to law while at the same time finding a way, if possible, to approve presidential actions.[19]

Professor Goldsmith's first and principal opportunity to implement this proper intellectual conception of the role of the head of the Office of Legal Counsel came when the White House requested an opinion on the applicability of the Geneva Conventions to the citizens of Iraq during the U.S. occupation of that country. Professor Goldsmith reports that the request came over the telephone and that his advice was expected within a week.[20] It is obvious that pressuring him to respond under those terms was not consistent with OLC's customary traditions of deliberation. Perhaps this was understandable given the emergency nature of events facing the country. Nevertheless, this context bears remembering as others, including

16. GOLDSMITH, *supra* note 1, at 33.
17. *Id.* at 35.
18. *Id.*
19. *Id.* at 38–39.
20. *Id.* at 32.

myself, review the handiwork of OLC in a calmer, more extended period.

In this regard, Professor Goldsmith's book gives low marks to the legal advice rendered by his predecessor, Professor John Yoo.[21] Certainly, however, Professor Goldsmith would want his sometimes blunt and harsh criticism to be understood in light of the unprecedented and uncertain times in which Professor Yoo did his work. Indeed, the book's criticism is aptly qualified by the following observation by Professor Goldsmith:

> Everyone in the administration with access to highly classified intelligence on threats to the homeland was scared of another deadly attack, and of not knowing how to prevent it. This fear created enormous pressure to stretch the law to its limits in order to give the President the powers he thought necessary to prevent a second 9/11. . . . But unlike [several] other presidents, President Bush acted in an era in which many aspects of presidential war power had become encumbered by elaborate criminal restrictions, and in which government officials seriously worried that their heat-of-battle judgment calls would result in prosecution by independent counsels, Justice Departments of future administrations, or foreign or international courts.[22]

Understanding this human reality, it turns out, is necessary for a fair evaluation of Professor Goldsmith's advice as well.

The Geneva Conventions of 1949 codify the laws of war.[23] Under the Conventions, there are two broad categories of per-

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21. Professor John Yoo, a distinguished scholar and law professor at the University of California, Berkeley (Boalt Hall), served as Deputy Assistant Attorney General in the Office of Legal Counsel from 2001 to 2003. Tim Golden, *A Junior Aide Had a Big Role in Terror Policy*, N.Y. TIMES, Dec. 23, 2005, at A1.

22. GOLDSMITH, *supra* note 1, at 11–12. As this Essay was being written, Professor Yoo was sued by convicted terrorist Jose Padilla. Padilla alleges that he was routinely subjected to torture that was authorized as legal and defensible by Professor Yoo's legal analysis for OLC. Karoun Demirjian, *Padilla sues ex-official at Justice*, CHI. TRIB., Jan. 4, 2008, at C5.

23. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. Several articles are common to all four treaties and are hereinafter referred to as "Common Articles."

sons who can be detained lawfully by an occupying power: (1) prisoners of war (POWs), and (2) civilians.[24] The Conventions that cover these two categories—commonly known as the Third and Fourth Geneva Conventions, respectively—set out the terms of detention for each category of individuals, the protections to be accorded during their detention, and the circumstances under which they are to be released.[25]

Professor Goldsmith's book is at its very best when outlining the considerations that led to the determination, prior to his arrival at OLC, that the Third Geneva Convention did not apply to members of al-Qaeda because they were unlawful enemy combatants. Although the Supreme Court would later chip away at this determination in *Hamdan v. Rumsfeld*[26]—finding that Common Article 3 of the Conventions applied to al-Qaeda[27] (a conclusion that Professor Goldsmith views as "legally erroneous"[28])—the fundamental conclusion that al-Qaeda was not deserving of POW status has never been set aside.[29] This is important to remember, because the United States has been unfairly criticized for relying upon this distinction,[30] even though it is well settled in the law of armed conflict.[31]

What is the difference between lawful and unlawful combatants?[32] Lawful combatants are worthy adversaries. They fight

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24. Third Geneva Convention, *supra* note 23; Fourth Geneva Convention, *supra* note 23.

25. Third Geneva Convention, *supra* note 23, arts. 12–16, 109–119; Fourth Geneva Convention, *supra* note 23, arts. 41–43, 68, 78–135.

26. 126 S. Ct. 2749 (2006).

27. *See id.* at 2756–57.

28. GOLDSMITH, *supra* note 1, at 136.

29. *See id.* (addressing the applicability of Common Article 3, but not addressing the district court's denial of "prisoner of war" status, Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 158 (D.D.C. 2004), or the court of appeals's reversal, Hamdan v. Rumsfeld, 415 F.3d 33, 40–41 (D.C. Cir. 2005)).

30. *See, e.g.*, Knut Dörmann, *The legal situation of "unlawful/unprivileged combatants,"* 85 INT'L REV. RED CROSS 45 (2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5LPHBV/$File/irrc_849_Dorman.pdf.

31. *See generally* Lieutenant Colonel (S) Joseph P. "Dutch" Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1 (2004) ("There is no legal or moral equivalence . . . between lawful combatants and unlawful combatants . . . [and] al-Qaeda and Taliban detainees are presumptively unlawful combatants not entitled to POW status [under the Geneva Conventions].").

32. Ingrid Detter, for example, suggests that the primary effect of being a lawful combatant "is entitlement to prisoner of war status," while unlawful combatants who remain "a legitimate target for any belligerent action, are not, if captured,

in uniform. They fight with their weapons openly displayed. They operate under a command and control structure. They observe the laws of war insofar as they do not target civilian populations but rather only military installations. If a lawful combatant is captured in the context of a military engagement, he is entitled to the prisoner of war protections of the Geneva Conventions and the common law of war that preceded them. Those captured cannot be prosecuted for the taking of life or other bodily assaults associated with military engagement.[33] Furthermore, interrogation is limited to rudimentary identification and any detention is for the purpose of preventing return to the battlefield and can last only for the length of the war.[34]

The unlawful combatant side of the ledger involves a contrary set of presumptions, as the Supreme Court recognized in its unanimous opinion in *Ex parte Quirin*.[35] Unlawful combat-

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entitled to prisoner of war status." INGRID DETTER, THE LAW OF WAR 148 (2d ed. 2000) (citations omitted) ("[Unlawful combatants] are . . . personally responsible for any action they have taken and may thus be prosecuted and convicted for murder if they have killed an enemy soldier. They are often summarily tried and enjoy no protection under international law."); *see also* A. ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 419 (Institute for Human Rights 2005) (1976) ("[P]ersons who are not entitled to prisoner-of-war status are as a rule regarded as unlawful combatants . . . ."); Richard R. Baxter, *So-called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L. L. 323, 328 (1951) (defining unlawful belligerents as "[a] category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949").

33. *See* TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 19 (1970) ("War consists largely of acts that would be criminal if performed in time of peace—killing, wounding, kidnapping, destroying or carrying off other people's property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. But the area of immunity is not unlimited, and its boundaries are marked by the laws of war."); *see also* John C. Yoo & James C. Ho, *International Law and the War on Terrorism* 13–14 (Boalt Hall School of Law Working Paper Series, Volume 2003), *available at* http://www.law.berkeley.edu/cenpro/ils/papers/yoonyucombatants.pdf. ("The customary laws of war immunize only lawful combatants from prosecution for committing acts that would otherwise be criminal under domestic or international law. And only those combatants who comply with the four conditions are entitled to the protections afforded to captured prisoners of war . . . .").

34. *See* Third Geneva Convention, *supra* note 23, arts. 17, 21, 118.

35. 317 U.S. 1, 30–31 (1942). As Chief Justice Stone held for the Court in *Quirin*:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.

ants do not fight in uniform. They are not subject to a centralized system of command and control.[36] Unlawful combatants hide weapons and do not observe any semblance of the laws of war—as we know from 9/11 and the Madrid and London bombings. They not only endanger civilians by hiding among them, but also target civilian populations. Indeed, as the World Islamic Front Declaration of War illustrates, targeting civilians is al-Qaeda's central purpose.[37] Such unlawful combatants have never been immune from prosecution for war crimes under any convention. They can be captured and interrogated. There is even common law authority to summarily execute them in the field.[38]

> Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

Id. (citations omitted).

36. Al-Qaeda, for example, exists worldwide in loosely affiliated "cells." Though traced to opposition fighters in the 1979 Soviet invasion of Afghanistan, officials say that al-Qaeda has no single headquarters, with autonomous underground cells in over 100 countries. *See* Council on Foreign Relations, *al-Qaeda (a.k.a. al-Qaida, al-Qa'ida)*, http://cfrterrorism.org/groups/alqaeda.html (last visited Mar. 17, 2007).

37. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 47 (2004), *available at* http://www.9-11commission.gov/report (Osama bin Laden published, in the name of a "World Islamic Front," a "fatwa" that "called for the murder of any American, anywhere on earth, as the 'individual duty for every Muslim who can do it in any country in which it is possible to do it.'").

38. *See* LEE A. CASEY ET AL., THE FEDERALIST SOCIETY, UNLAWFUL BELLIGERENCY AND ITS IMPLICATIONS UNDER INTERNATIONAL LAW (2005), http://www.fed-soc.org/publications/pubID.104/pub_detail.asp ("Traditionally, at least in theory, unlawful combatants could be killed out of hand, entitled to little more than a blindfold by way of procedure. During World War II, unlawful combatants were often subject to summary disposition, and the war crimes tribunals established after the War acknowledged that their deaths would not justify later criminal charges against their executioners."); *see also* THE CENTENNIAL OF THE FIRST INTERNATIONAL PEACE CONFERENCE: REPORTS & CONCLUSIONS 202 (Frits Kalshoven ed., Kluwer Law Int'l 2000) ("[A] clear distinction between combatants and civilians is essential if the latter are to receive the protection which the law requires."); FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES

The differentiation between lawful and unlawful combatants is not an exercise of revenge or animus; it is aimed at the preservation of civilization. The military is asked to direct its aim at military targets and to preserve the lives of civilians and POWs. For this to be possible, lawful soldiers must be assured that civilians and prisoners are not trying to kill them. As two historians succinctly put it:

> Civilians who abuse their noncombatant status are a threat not only to soldiers who abide by the rules, they endanger innocents everywhere by drastically eroding the legal and customary restraints on killing civilians. Restricting the use of arms to lawful combatants has been a way of limiting war's savagery since at least the Middle Ages.[39]

In 1987, President Reagan rejected a proposed modification to Geneva Protocol I, Article 44(3), noting that it was "fundamentally and irreconcilably flawed . . . [in part because it] would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war."[40]

IN THE FIELD, Art. 83, *promulgated as* U.S. WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE, GENERAL ORDERS NO. 100 (Apr. 24, 1863), *available at* http://fletcher.tufts.edu/multi/texts/historical/LIEBER-CODE.txt ("Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death."); J. L. WHITSON, THE LAWS OF LAND WARFARE: THE PRIVILEGED GUERILLA AND THE DEPRIVED SOLDIER 3 (1984), *available at* http://www.globalsecurity.org/military/library/report/1984/WJL.htm ("[U]nconventional forces were generally accorded no legal status as combatants and no mercy when captured. Instead, they were summarily executed outright or were tried for their 'treacherous' acts and then executed.").

39. ANDREW APOSTOLOU & FREDRIC SMOLER, THE FOUNDATION FOR THE DEFENSE OF DEMOCRACIES, THE GENEVA CONVENTION IS NOT A SUICIDE PACT 3–4 (2002), *available at* http://www.defenddemocracy.org/usr_doc/GenevaConvention_11_6_02_2.pdf.

40. *See* Message from the President of the United States Transmitting The Protocol II Additional To The Geneva Conventions Of August 12, 1949, And Relating To The Protection Of Victims Of Noninternational Armed Conflicts, June 10, 1977, 1977 U.S.T. LEXIS 465; *see also The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 420 (1987) (remarks of Michael J. Matheson) (describing how the U.S. government was unprepared to treat the rules set forth in the 1977 Protocol additions as "a definitive indication of the rules that the United States forces will observe in the event of armed conflict and will expect its adversaries to observe"); *id.* at 427–29.

Professor Goldsmith affirms the distinction between lawful and unlawful combatants and approves President Bush's decision to be guided by that distinction. He also records that in regard to this distinction, the President had "the full support not only of the Justice Department but also of the Department of Defense and the State Department. 'The lawyers all agree that al Qaeda or Taliban soldiers are presumptively not POWs,' wrote Will Taft, the State Department's Legal Adviser, in February 2002."[41]

Goldsmith recounts the interdepartmental dispute between the Justice and State Departments over whether Taliban soldiers in Afghanistan were to be denied POW status because Afghanistan was a failed state, or simply because they fell within the unlawful combatant category. Secretary of State Colin Powell preferred the latter rationale because determining what was and was not a failed state could be overly subjective and would suggest to international allies that America was weakening its commitment to Geneva protections. The contemporary demonization of President Bush obscures the fact, correctly recounted by Professor Goldsmith, that "President Bush ultimately adopted the Defense and State Departments' position."[42]

"By February 2002," before Professor Goldsmith's arrival on the scene, and under the intelligent guidance of Professor Yoo,

> the administration had developed a coherent legal strategy for incapacitating terrorists. Congress had authorized the war and triggered the President's traditional war powers, and the President possessed independent war powers as Commander in Chief. The President exercised these traditional powers to detain enemy soldiers and, possibly, to try them in military commissions. He chose Guantanamo Bay as the main detention site, a place that other presidents had used for similar purposes. And he had embraced the traditional American view that the Geneva Conventions did not give POW protections to combatants who fought out of uniform and failed to comply with the laws of war.[43]

Notwithstanding the importance of drawing and maintaining a reasonably bright line between lawful and unlawful combatants, the President determined to provide al-Qaeda and the Taliban with humane treatment well in excess of the minimum stan-

41. GOLDSMITH, *supra* note 1, at 113.
42. *Id.* at 114.
43. *Id.* at 114–15.

dards of international law.[44] As Lieutenant Colonel Bialke notes, "as a matter of policy, the U.S. has exercised its discretion by caring for captured al-Qaeda and Taliban detainees, *ex gratia*, 'as a matter of grace,' in a manner beyond the minimal standards of humane treatment required by customary international law."[45]

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44. *See* Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) (outlining the minimum standards of humane treatment); *see also* Protocol Additional to the Geneva Conventions of August 12, 1949, Protocol I, art. 75 (Jun. 8, 1977), *reprinted in* 16 ILM 1391, 1423 (1977) (prohibiting, among other things, torture, hostage-taking, collective punishments, and threats to perform such acts). Article 75 requires that detainees be given notice of the reasons for their detention and that detainees be released when the reasons for their detention no longer exist.

45. Bialke, *supra* note 31, at 56. Lieutenant Colonel Bialke describes the treatment afforded detainees at length:

> [T]he detainees held in Guantanamo are provided *inter alia* with adequate shelter in a mild climate with the ability to communicate among themselves, metal bed frames/bunks with foam mattresses, sheets, blankets, hot showers, sinks, running water, and clean new clothes and shoes.
>
> Dietary and religious privileges include three nutritious *halal* (culturally-appropriate and conforming to Islamic dietary laws) meals a day with assorted condiments (or, should a detainee elect, as a few have, a detainee may have the same food as the detention facility guards), special meals at special times during traditional Muslim holy periods such as *Ramadan* (a holy month in Islam, celebrating when the *Q'uran*, the holy scripture of Islam, was revealed to the prophet Muhammad in 610 A.D.), hot tea, unrestricted access to Muslim *Imam* military chaplains, a *Quibla* (a huge green and white sign that points toward Mecca, Saudi Arabia, the holiest city in Islam—the city revered by Islam as being the first place created on earth), an arrow in each cell pointing to Mecca, a recorded loudspeaker call to prayer five times a day, regular opportunities to worship, copies of the *Q'uran* in the detainees' native languages as well as other religious reading materials in numerous languages, prayer caps, prayer rugs, prayer beads, and holy oil (provided by Muslim military chaplains).
>
> Personal hygiene products include toiletries, towels, wash cloths, and toilets. Detainees are also provided letter writing materials, secular reading materials in numerous languages, the ability to send and receive mail and packages subject to security screening, regular exercise, initial medical examinations, continuing modern medical care to include rehabilitative surgery, dental care, eye examinations & glasses, medications (ultimately, the same medical care afforded to the detention facility guards), counseling, and access to Arabic translators as needed. Further, although POWs can lawfully be required to work for the detaining power (work that has no direct connection to armed conflict operations), the U.S. does not require al-Qaeda and Taliban detainees to work.
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> Additionally, since January 2002, the International Committee of the Red Cross (ICRC) has maintained a permanent mission at the Guantanamo Bay installation, and its delegates continually assess the confinement facilities and the treatment the U.S. provides the detainees.

Professor Goldsmith notes that, notwithstanding this level of coherence within the administration, things were perceived differently outside the administration. "The press, scholars, human rights groups, the International Committee of the Red Cross, and American allies balked loudly at decisions that in World War II would have been commonplace."[46] What explains the disconnect between the internal coherence—indeed integrity—of the Bush administration's approach, and the external criticism? Media distortion is one possibility. Media reports have seldom detailed the humanity of the overall Bush detention practice, choosing instead to give prominent coverage to the ugliness and aberration of Abu Ghraib. But then, the media has had some difficulty getting an accurate assessment of the facts of detention practices, as some notable examples of unfortunate misreporting reveal.[47] Beyond media mistakes or distortion is a lack of clear presidential articulation. Presidents must explain themselves persuasively. In ways that are well parodied on late-night television, President Bush has always had some difficulty in this area.

Professor Goldsmith speculates that "[a]t the most fundamental level, much of the country and most of our allies didn't

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ICRC delegates also conduct regular private visits with the detainees, personally speaking with each detainee in the detainee's native language.

Further, the U.S. has constructed a medium-security detention facility in Guantanamo Bay, consisting of several 20-member unit communal dormitories. A large number of select detainees who have exhibited acceptable behavior, adhered to facility rules, and cooperated during interviews have been admitted to the new medium-security facility and are able to spend more time outdoors, have considerably more exercise time, and may participate in group recreation. Further, they are allowed to eat together at outdoor picnic tables, interact, sleep, pray, and worship together. Detainees, whose intelligence worth is exhausted, and who no longer pose a security risk to the U.S. or its allies, and are not facing criminal charges, will be released when it is appropriate to do so.

Id. at 56–59.

46. GOLDSMITH, *supra* note 1, at 115.

47. *Newsweek* reported—without an identified source—and then retracted the claim that U.S. interrogators had flushed the *Qur'an* down a toilet to "rattle" detainees being questioned. The story proved false, but not before it led to rioting in Afghanistan, causing over two dozen deaths and a rupture in U.S. relations with a number of Arab leaders who had been helpful in the war on terror. As a Pentagon spokesman noted, the reporting was "irresponsible," and although the retraction was helpful, "[u]nfortunately, they cannot retract the damage that they have done to this nation or those who were viciously attacked by those false allegations." Howard Kurtz, *Newsweek Apologizes; Inaccurate Report on Koran Led to Riots*, WASH. POST, May 16, 2005, at A1.

think we were (or should be) at war with Islamist terrorists, and thus didn't think military detention and military commissions were appropriate tools for the President to use."[48] Given the nature of the barbarous and inhumane challenge to the civilized world that radical Islam represents, this is a broad and troubling contention. But Professor Goldsmith explains his assertion with an admirable charity toward even this base enemy.[49] Unlike conventional warfare, a war against al-Qaeda

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48. GOLDSMITH, *supra* note 1, at 115.

49. It bears mentioning that a more responsible Islamic voice has been raised in objection to the radical and murderous ways of al-Qaeda, and in pursuit of common ground between Muslims and Christians. *See, e.g.*, Letter from Muslim Religious Leaders to Pope Benedict XVI and Others (Oct. 13, 2007), *available at* http://www.brandeis.edu/offices/communications/muslimletter.pdf. This is to be praised and is indeed far more significant than any legal development recorded in Professor Goldsmith's book or this Essay. That this effort at common understanding has received so much less media coverage than the hate purveyed by al-Qaeda or the distortions of President Bush's sincere, if not always well-advised or considered, efforts to maintain his nation's safety is a sad commentary upon the human condition. The open letter states:

> We thus as Muslims invite Christians to remember [Jesus'] words in the Gospel (Mark 12:29–31):
>
> > *. . . the LORD our God, the LORD is one. / And you shall love the LORD your God with all your heart, with all your soul, with all your mind, and with all your strength.' This is the first commandment. / And the second, like it, is this: 'You shall love your neighbour as yourself.' There is no other commandment greater than these.*
>
> As Muslims, we say to Christians that we are not against them and that Islam is not against them—so long as they do not wage war against Muslims on account of their religion, oppress them and drive them out of their homes, (in accordance with the verse of the Holy Qur'an [*Al-Mumtahinah*, 60:8] quoted above). Moreover, God says in the Holy Qur'an:
>
> > *They are not all alike. Of the People of the Scripture there is a staunch community who recite the revelations of God in the night season, falling prostrate (before Him). / They believe in God and the Last Day, and enjoin right conduct and forbid indecency, and vie one with another in good works. These are of the righteous. / And whatever good they do, nothing will be rejected of them. God is Aware of those who ward off (evil). (Aal-'Imran, 3:113–115)*
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> Is Christianity necessarily against Muslims? In the Gospel [Jesus Christ] says:
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> > *He who is not with me is against me, and he who does not gather with me scatters abroad.* (Matthew 12:30)
> >
> > *For he who is not against us is on our side.* (Mark 9:40)
> >
> > *. . . for he who is not against us is on our side.* (Luke 9:50)
>
> According to the *Blessed Theophylact's Explanation of the New Testament*, these statements are not contradictions because the first statement (in the actual Greek text of the New Testament) refers to demons, whereas the

means taking custody of enemies who do not wear uniforms and apprehending them outside traditional battlefields. This strategy increases the likelihood that American soldiers will cause accidental harm to innocent civilians in pursuit of the enemy:

> There were, of course, mistakes in past wars. But the legitimate worry—a worry once again caused by our enemy's purposeful failure to comply with traditional rules of warfare—is that mistakes are more likely and thus systematically more unjust in this one. And since this war has no apparent end, mistaken identifications of the enemy can result in indefinite and thus brutally unfair confinement, simply on the basis of mistakes about membership.[50]

America's respect for religious freedom makes the United States reluctant to think of any enemy in terms of religious belief. We are far more accustomed to accepting secular or political ideology as a basis for grievance against us. Tragically, President Bush's decision to occupy Iraq further complicated and obscured a better understanding of the nature of the enemy we confront, because it is all too easy for American and non-American alike to perceive the Iraqi occupation as explainable on political or ideological terms, including a U.S. interest in having a strategic presence in an oil-rich area of the world.[51]

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second and third statements refer to people who recognised Jesus, but were not Christians. Muslims recognize Jesus Christ as the Messiah, not in the same way Christians do (but Christians themselves anyway have never all agreed with each other on [Jesus Christ's] nature), but in the following way: . . . *the Messiah Jesus son of Mary is a Messenger of God and His Word which he cast unto Mary and a Spirit from Him* . . . (*Al-Nisa'*, 4:171). We therefore invite Christians to consider Muslims *not against* and thus *with them*, in accordance with Jesus Christ's words here.

Finally, as Muslims, and in obedience to the Holy Qur'an, we ask Christians to come together with us on the common essentials of our two religions . . . *that we shall worship none but God, and that we shall ascribe no partner unto Him, and that none of us shall take others for lords beside God* . . . (*Aal 'Imran*, 3:64).

Let this common ground be the basis of all future interfaith dialogue between us, for our common ground is that on which hangs *all the Law and the Prophets* (Matthew 22:40).

Id. at 14–15 (ellipses in original).

50. GOLDSMITH, *supra* note 1, at 116.

51. *See, e.g.*, Michael T. Klare, *The Bush/Cheney Energy Strategy: Implications for U.S. Foreign and Military Policy*, 36 N.Y.U. J. INT'L L. & POL. 395, 407 (2004) ("Of course, oil had nothing to do with Washington's motives for America's March

Professor Goldsmith properly highlights a procedural error that further aggravated the uneasiness of the American public toward the manner in which we were identifying the enemy:

> While it was appropriate to deny al Qaeda and Taliban soldiers POW rights, there was a big question as to whether the people at Guantanamo were in fact members of the Taliban or al Qaeda. Geneva mandated that a "competent tribunal" assess whether individual combatants should receive POW protections in case of "any doubt" about their status. The United States denied detainees these procedures on the ground that the President himself had made a "group status determination" . . . . Whatever its legal merits, this was an inadequate response to concerns that particular *individuals* were not enemy fighters but instead were innocent farmers scooped up in Afghanistan.[52]

Professor Goldsmith was right to highlight this presidential misstep. But in the scheme of things, it was a relatively minor blunder, and in fact, reasonably correctable. Indeed, before Professor Goldsmith's arrival at OLC, as a former head of the Office, it was my pleasure to have an occasional informal lunch meeting with its staff and leadership while I was in Washington, D.C., serving as the Dean of the Catholic University of America School of Law. On one of these occasions, I raised concerns about the President's decision to make a unilateral group determination of detainee status. Properly, I did not inquire, and the staff lawyers did not volunteer, the nature of any OLC advice that had been given to the President on this question. It was clear to all of us present, however, that there were existing Pentagon regulations that could be relied upon to implement the portion of the Geneva Conventions providing for a competent tribunal where there was doubt about a captured individual's status.

The significance of these Pentagon regulations took on greater force after the Supreme Court's decision in *Hamdi v. Rumsfeld*,[53] which held that, at a minimum, a U.S. citizen detained as an enemy combatant was entitled to some reasonable level of due process to ensure that he was not being improperly detained.[54]

2003 invasion of Iraq—or so the public was told. . . . But a close look at the administration's planning for the war reveals a very different picture.").

52. GOLDSMITH, *supra* note 1, at 118.

53. 542 U.S. 507 (2004).

54. *See id.* at 509.

The Combat Status Review Tribunals (CSRT) were created shortly thereafter for exactly this purpose: to individually review President Bush's previous group status determination.[55] Although there is some remaining doubt about the sufficiency of the CSRT process,[56] its codification as part of the Military Commissions Act of 2006[57] (under which CSRT determinations are subject to review in the United States Court of Appeals for the District of Columbia Circuit)[58] arguably fills any due process gap. This remains a debatable proposition only because the Supreme Court, in a surprise reversal of itself, has chosen to decide whether the Constitution provides a different avenue of detainee access to the federal courts by means of the writ of habeas corpus.[59]

Arguably, the Supreme Court should not strain to find in the common law history of habeas corpus a remedy that would be largely redundant given what the President and Congress have already provided. Judicial intervention into military decision-making is not costless, notwithstanding the view of Justice Breyer in his concurring opinion in *Hamdan*, in which he writes:

> The dissenters say that today's decision would "sorely hamper the President's ability to confront and defeat a new and deadly enemy." They suggest that it undermines our Nation's ability to "preven[t] future attacks" of the grievous sort that we have already suffered. That claim leads me to state briefly what I believe the majority sets forth both explicitly and implicitly at greater length. The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check."[60]

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55. Memorandum for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

56. *See, e.g.*, Human Rights First, Human Rights First Analyzes DOD's Combatant Status Review Tribunals, http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm (last visited Mar. 17, 2008) ("[T]he new hearings fail to satisfy the Supreme Court's rulings, and are otherwise inadequate to meet basic requirements of national and international law.").

57. Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

58. 10 U.S.C. § 950g (2007).

59. *See* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007) (No. 06-1195) (granting certiorari after it was initially denied).

60. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring) (citations omitted).

With due respect to Justice Breyer, it is an unnecessary and unhelpful caricature to portray President Bush and Vice President Cheney as seeking unlimited executive power for the sake of power, or in the Justice's words, a "blank check." A fairer assessment is that these men sought to defend their nation against a particularly virulent and unconventional enemy, and that they were guided by legal principles and precepts devised at an earlier time for different and more manageable conflicts. As Justice Thomas notes in his dissent in *Hamdan* (joined by Justices Scalia and Alito),

> the Court's resolution of the merits of petitioner's claims . . . openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs. The Court's evident belief that *it* is qualified to pass on the "[m]ilitary necessity," of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered.[61]

In like manner, if there is a substantive criticism of Professor Goldsmith's analysis of the Bush presidency, it is found at those points where he leaves the specifics of scholarly detail and indulges instead in popular presidential calumny. The coherence of the President's legal framework for handling the war on terror, conceded by Professor Goldsmith to predate his arrival at OLC, was not undermined in its entirety by the President's initial failure to grasp the importance of individually assessing the bona fides of those being detained at Guantánamo. It is unfortunate overstatement, therefore, for Professor Goldsmith to write that "[t]he administration chose to push its legal discretion to its limit, and rejected any binding legal constraints on detainee treatment under the laws of war."[62] That type of categorical, one-sided statement shows up from time to time throughout Professor Goldsmith's book and detracts from its overall value. One suspects that these non-scholarly interventions may have been thrust upon him by an editor with an eye toward sales. Nevertheless, overbroad and simplistic condemnation cannot be wholly excused, even if it comes directly from the Professor's pen, for it plays into the

61. *Id.* at 2823 (Thomas, J., dissenting) (citation omitted).

62. GOLDSMITH, *supra* note 1, at 119–20.

confused understanding of the continuing threat facing the United States.

At times in his book, Professor Goldsmith seems to underestimate the nature of this threat by questioning the decision of the President to view the conflict with Islamic terrorism as a war.[63] He writes:

> In 2007 and beyond, it may be a good idea to stop using the rhetoric of a "war on terror," either because the phrase misleads the public to think we are fighting a tactic; or because, as Donald Rumsfeld noted in 2006, it "creates a level of expectation of victory and an ending within 30 or 60 minutes [like] a soap opera"; or because, as the British Foreign Office concluded at about the same time, the use of "war" rhetoric strengthens terrorists and invites attacks; or for some other reason.[64]

Of course, if you don't call it a war, and it is more than a crime, one needs a new rubric of analysis and response. This new rubric for dealing with terrorism over the long-term still eludes the nation as a whole, and Professor Goldsmith's book, unlike, for example, that of Judge Richard Posner,[65] does not contribute to a superior approach beyond restating the problem.

This leads to the following question: what did Professor Goldsmith do during his brief tenure in OLC to help matters? In particular, how did he answer the inquiry pertaining to the Fourth Geneva Convention that he received by telephone from the White House in his first week of service? By his own retelling, Professor Goldsmith concluded that notwithstanding the fact that neither al-Qaeda nor the Taliban in Afghanistan deserves POW status under the Third Geneva Convention, the Fourth Geneva Convention did govern the United States as an occupying power in Iraq.[66] Specifically, Professor Goldsmith concluded that the Convention "protected all Iraqis, including those who were members of al Qaeda or any other terrorist group, but not al Qaeda terrorists from foreign countries who entered Iraq after the occupation began."[67]

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63. *See id.* at 103.

64. *Id.* at 105.

65. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

66. *See* GOLDSMITH, *supra* note 1, at 39–40.

67. *Id.* at 40.

Professor Goldsmith recounts that his conclusion was accepted by both Attorney General Ashcroft and then-White House Counsel Alberto Gonzales, though both expressed initial surprise at the conclusion. Professor Goldsmith indicates, however, that his advice was strongly resisted by David Addington, Vice President Cheney's legal counsel. I take Professor Goldsmith at his word, but it is not clear of what consequence this resistance was. Professor Goldsmith does not say that the President ignored his legal counsel or even favored Mr. Addington over himself. In this regard, readers will be perplexed as to why a scholar of Professor Goldsmith's stature finds it necessary here, and at other points in the book, to diminish the human or intellectual qualities of Mr. Addington. In this particular instance, he portrays Mr. Addington as "just plain mad."[68] At other times, Mr. Addington's knowledge of national security is assailed as "impressive [but] often idiosyncratic" in comparison to the Professor's own expertise, gleaned from years as an academic.[69] Later, he would describe Mr. Addington as a person whose judgments were sometimes crazy.[70]

A closer look at Professor Goldsmith's opinions suggests that the black-and-white portrayal of saints and demons may be a bit overstated. Article 49 of the Fourth Geneva Convention, which broadly prohibits transfers of "protected persons from occupied territory," had early been conceded by the President to apply to Iraq. So clear was the judgment that the Conventions would apply in Iraq that Judge Gonzales noted that the reason President Bush had not made a formal determination invoking the Conventions before the invasion was "because it was automatic that Geneva would apply."[71] Given that conclusion by President Bush, the portrayal of the scene in the White House where Mr. Addington was described as "just plain mad" seems odd. OLC was not actually saying "no" to the President but rather confirming his understanding.

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68. *Id.* at 41.

69. *See id.* at 78.

70. *See id.* at 129.

71. *See* Judge Alberto Gonzales, White House Counsel, White House Press Briefing (June 22, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html (reflecting upon President Bush's judgment as he undertook the invasion and occupation of Iraq in March 2003).

Moreover, OLC under Professor Goldsmith—contrary to its better practice aimed at ensuring independence and objectivity[72]—issued a "draft" memorandum on March 19, 2004.[73] Indeed, the March 19 memorandum stated that it was elaborating on October 2003 "interim guidance,"[74] which suggests that Professor Goldsmith very early in his tenure had departed from OLC practice of not giving oral advice on complex problems prior to complete deliberation.

Even more curious, given the account in the book, is that the draft memorandum seems less interested in actually limiting presidential power under the international accord and more interested in exploring how the provisions of the Geneva Conventions might be elided in order to permit the relocation of at least some "protected persons." In this regard, Professor Goldsmith concluded that the United States would be acting consistently with Article 49 were it to remove one set of protected persons, such as illegal aliens, from Iraq pursuant to local immigration law. Additionally, the United States could relocate both illegal aliens and other protected persons from Iraq to another country to "facilitate interrogation," so long as the relocation was for a "brief but not indefinite period" and adjudicative proceedings had not been brought against such individuals.[75]

Professor Goldsmith's draft memorandum analysis may well be correct as a matter of law, but it is nonetheless troubling because it may have had the effect of encouraging what human rights organizations have called the "ghost detainee" program of secret detentions.[76] The *Washington Post* reported that Judge

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72. *See supra* text accompanying notes 13–14.

73. Memorandum from Jack Goldsmith, Assistant Attorney General, Office of Legal Counsel, Re: Permissibility of Relocating Certain "Protected Persons" from Occupied Iraq (Mar. 19, 2004) (labeled "Draft"), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20040319_Golds_Gonz.pdf.

74. *Id.* at 1.

75. *See id.* at 2.

76. *See, e.g.*, MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, *available at* http://www.agonist.org/annex/taguba.htm. The so-called "Taguba report" made the following determination relating to the "ghost detainee" program:

> (S/NF) The various detention facilities operated by the 800th MP Brigade have routinely held persons brought to them by Other Government Agencies (OGAs) without accounting for them, knowing their identities, or even the reason for their detention. The Joint Interrogation and Debriefing Center (JIDC) at Abu Ghraib called these detainees "ghost detainees." On at least one occasion, the 320th MP Battalion at Abu

Gonzales initially asked the Office of Legal Counsel to address the legality of the removal of at least one Iraqi detainee, Hiwa Abdul Rahman Rashul (known as "Triple X" by government officials).[77] Because OLC suggested limitations on that removal, the *Post* reported that the CIA urged Judge Gonzales to obtain a broader legal opinion that would expand the number of people who could be moved secretly out of Iraq.[78] The March 19, 2004, Goldsmith memorandum is apparently the result of that inquiry.

As already noted, Professor Goldsmith's memorandum argues that the Fourth Convention, which the United States Senate ratified in 1955, does not prohibit the removal of protected persons who are illegal aliens.[79] Article 49 of the Fourth Geneva Convention, however, clearly states that "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive."[80] The draft Goldsmith memorandum asserts that this provision only contemplates the deportation of inhabitants of occupied territory.[81] Yet, the International Committee of the Red Cross—an authoritative commentator on the Convention—views the prohibition as absolute and allowing for no exceptions.[82]

The draft Goldsmith memorandum also argues that any protected person under the Convention, whether an Iraqi or not, may be transferred out of the country so long as the military has not accused the individual of wrongdoing.[83] Article 76 of

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> Ghraib held a handful of "ghost detainees" (6-8) for OGAs that they moved around within the facility to hide them from a visiting International Committee of the Red Cross (ICRC) survey team. This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law.

Id. at 26, finding 33.

77. Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1.

78. *Id.*

79. *See* Goldsmith, *supra* note 73, at 2.

80. Fourth Geneva Convention, *supra* note 23, art. 49, para. 1.

81. *See* Goldsmith, *supra* note 73, at 8.

82. International Committee of the Red Cross, Commentaries to the Fourth Geneva Convention, art. 49, para. 1, *available at* http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument ("The prohibition is absolute and allows of no exceptions, apart from those stipulated in paragraph 2[, 'Evacuation'].").

83. *See* Goldsmith, *supra* note 73, at 9, 13.

the Fourth Convention provides that "protected persons accused of offenses shall be detained in the occupied country."[84] The draft memorandum tries to evade this prohibition by concluding that the United States may remove a person from Iraq where the intent is only to interrogate that person for something short of an "indefinite" period.[85] In theory, Professor Goldsmith's legal conclusion would permit the U.S. military to simply designate all protected persons for interrogation and remove them from Iraq. Human rights organizations and European allies objected that this would put detainees beyond the reach of the ICRC and, thus, beyond accountability.[86]

Again, I defer to Professor Goldsmith's more detailed study of the Fourth Convention as to whether or not these legal conclusions are correct. Professor Goldsmith says his memorandum ultimately did not matter because he "never finalized the draft, it never became operational, and it was never relied on to take anyone outside of Iraq."[87] A great many people are skeptical. My point is not to settle this particular "he said, she said." Rather, my point is that Professor Goldsmith's portrayal of how he conferred "legal protections on the terrorists who were killing U.S. soldiers and threatening the Iraq project," contrary to "an administration bent on pushing antiterrorism efforts to

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84. Fourth Geneva Convention, *supra* note 23, art. 76.

85. *See* Goldsmith, *supra* note 73, at 13.

86. According to human rights expert Christina M. Cerna,

> [a]nother aspect of the torture issue is the rendition by the U.S. Government of detainees to third party countries, where there are allegations of torture, and the detention of a number of detainees in secret prisons apparently operated by the CIA in Poland and Romania. Memo 28 from Jack Goldsmith, Assistant Attorney General at DOJ to Alberto Gonzales, dated March 19, 2004, argues for the legality of relocating certain "protected Persons," who are "illegal aliens" from occupied Iraq to places outside that country, under the Fourth Geneva Convention. Memo 28 concludes that other protected persons (illegal aliens or not) who have not been accused of an offense may be temporarily relocated from occupied Iraq to another country for a brief but not indefinite period "to facilitate interrogation." Recently, the U.S. Secretary of State traveled to Europe to respond to alarm voiced by the European Union over allegations of secret detention camps and the transport of terror suspects to Europe.

Christina M. Cerna, *The Torture Papers: The Road to Abu Ghraib*, HUMAN RIGHTS AND HUMAN WELFARE, Feb. 2006 (book review) (citations omitted), *available at* http://www.du.edu/gsis/hrhw/booknotes/2006/cerna-2006.html.

87. GOLDSMITH, *supra* note 1, at 172.

the limits of the law,"[88] is in tension with the substance of the draft memorandum prepared by Professor Goldsmith during his term of office. Indeed, the draft memorandum understated other provisions in the Fourth Geneva Convention as well as U.S. military regulations requiring a system that ensures an accounting of detainees, including a system to notify families of those interned of the fact of their internment, their address, their state of health, and of changes to their condition.[89] Maybe, in short, the protagonist of our story was wearing a grey hat, rather than a white one. That is the usual case in the world, though perhaps not in public television documentaries[90] and political memoirs.

If there is one theme that runs through Professor Goldsmith's book, it is his professed doubt about the wisdom of what he terms the "legalization of war." There is much wisdom in Professor Goldsmith's observation, even though it sits uneasily with two other features of the book: (1) Professor Goldsmith's willingness to assail the legal analysis of his predecessors (most notably Professor Yoo) and (2) his own obvious contribution to the legalization of war, both by that criticism and by his self-portrayal as the vindicator of law over politics. As for why the war was so dominated by lawyers, Professor Goldsmith depicts as the main reason the simple fact that there were "legal restrictions as never before. Everywhere decision-makers turned they collided with confining laws that required a lawyer's interpretation and—in order to avoid legal liability—a lawyer's sign-off."[91] As with his trenchant observation that it may be prudent to think of terrorism as neither war nor crime, Professor Goldsmith leaves us wondering exactly what he perceives the role of law to be in confronting whatever one wants to call the massive killing of innocent civilians and the repeated threat of that killing.

Professor Goldsmith devotes an entire chapter to "[t]orture and the [d]ilemmas of [p]residential [l]awyering."[92] This chapter is introduced by a reminder of the ugly abuses at Abu Ghraib

88. *Id.* at 42.

89. *See, e.g.*, Fourth Geneva Convention, *supra* note 23, arts. 25, 105–108.

90. *See, e.g.*, *Frontline: Cheney's Law* (PBS television broadcast Oct. 16, 2007), *available at* http://www.pbs.org/wgbh/pages/frontline/cheney/ (featuring Professor Goldsmith).

91. GOLDSMITH, *supra* note 1, at 130.

92. *See id.* ch. 5.

and Professor Goldsmith's admirable and thoughtful self-examination of whether or not he was indirectly responsible for the abuses.[93] In short order, Professor Goldsmith finds that the aggressive interrogation practices had been approved by OLC in two memoranda written by his predecessor—who brought Goldsmith into government—Professor John Yoo. Several weeks into Professor Goldsmith's OLC responsibilities, Patrick Philbin, a deputy in OLC who had worked with Professor Yoo, brought to Goldsmith's attention two memoranda dated August 1, 2002, and March 14, 2003. Professor Goldsmith recounts Mr. Philbin as saying that the memoranda may have contained "serious errors."[94] According to Professor Goldsmith, Mr. Philbin had been working hard to correct those errors, which related to the legal issue of what constituted torture.[95] It is a bit mysterious as to why Mr. Philbin, who one assumes assisted Professor Yoo in drafting those memoranda, was incapable of avoiding the errors in the first place, or what exactly was inhibiting his correction efforts even before the appearance of Professor Goldsmith at OLC. In any case, as Professor Goldsmith notes,

> Congress defined the prohibition on torture very narrowly to ban only the most extreme of acts and to preserve many loopholes. It did not criminalize "cruel, inhuman and degrading treatment" (something prohibited by international law) and did not even criminalize all acts of physical or mental pain or suffering, but rather only those acts "specifically intended" to cause "severe" physical pain or suffering or "prolonged mental harm."[96]

Congress would tighten the definition of torture after the Abu Ghraib scandal in the Detainee Treatment Act of 2005.[97] But as Professor Goldsmith fairly reports, at the time OLC was called upon to give its advice, closer to 9/11, there were many legal

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93. *See id.* at 141.

94. *Id.* at 142.

95. *Id.* at 142–44.

96. *Id.* at 143.

97. Pub. L. No. 109-148, 119 Stat. 2680 (2005) (codified in various sections of Title X of the U.S.C.). Section 1003 prohibits "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."

questions and uncertainties even as to what fit within Congress's initially narrow definitions of torture. Professor Goldsmith deserves much credit for putting Professor Yoo's work in the context of the vague phraseology that Congress employed. Far too often, unthinking and unwarranted personal invective has been aimed at Professor Yoo without any acknowledgment of the indefiniteness of the statute he had been asked to construe. To his credit, Professor Goldsmith avoids this objectionable technique of pseudo-argument.

Professor Goldsmith is nevertheless highly critical of Professor Yoo, summarizing Professor Yoo's advice as justifying some violent acts by describing them as not necessarily torture. Furthermore, he states that if one does torture, under the Yoo memoranda,

> you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under color of presidential authority. CIA interrogators and their supervisors, under pressure to get information about the next attack, viewed the opinion as a "golden shield," as one CIA official later called it, that provided enormous comfort.[98]

Although Professor Goldsmith characterizes the Yoo opinions as "typically thorough and scholarly OLC work," he goes on to contend that

> not far below the surface there were problems. One was that the opinions interpreted the term "torture" too narrowly. Most notorious was OLC's conclusion that in order for inflicted pain to amount to torture, it "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[99]

Professor Goldsmith explains how this definition was borrowed from other federal statutes relating to matters of health policy, which he did not think analogous.[100] He thought OLC's attempt to give meaning to "severe pain" to be "clumsy definitional arbitrage [that] didn't seem even in the ballpark."[101]

Echoing the curious reticence of his colleague Mr. Philbin, Professor Goldsmith then asserts that "[t]hese and other ques-

98. GOLDSMITH, *supra* note 1, at 144.
99. *Id.* at 144–45.
100. *Id.* at 145.
101. *Id.*

tionable statutory interpretations . . . were not enough to cause me to withdraw and replace the interrogation opinions."[102] Professor Goldsmith did not think he had the authority to overrule the previous decisions, because he "knew of no precedent for overturning OLC opinions within a single administration. It appeared never to have been done, and certainly not on an important national security matter."[103] Had he called me, Professor Goldsmith could have learned that it had once been my responsibility to overrule the decision of my predecessor in the Office of Legal Counsel (in the same presidential administration) who had drafted an opinion that found individuals with AIDS to be outside the scope of protection of the federal Rehabilitation Act.[104] After a presidential commission questioned this conclusion, the surgeon general supplied a more complete explanation of the nature of AIDS-related incapacity, and the Supreme Court decided a related case[105] that shed more light on the question, I was tasked by President Reagan to reexamine OLC's first conclusion. In light of these developments, I overruled the opinion.[106] Our subsequent opinion found even those with asymptomatic HIV infection to be protected from discrimination in a federal program or a program receiving federal financial assistance.[107] To be sure, this OLC opinion did not relate to a national security question, but it was a matter of national news at the time.[108]

It is not an easy matter, nor should it be, to second-guess the thinking of a colleague for whom one has great respect. But this is another aspect of the rule of law tradition of OLC that is vitally important to preserve. I suspect it is for that reason that Professor Goldsmith emphasizes that his review of the interrogation memoranda predated Abu Ghraib, even though he formally withdrew the memoranda only after the Abu Ghraib

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102. *Id.*

103. *Id.* at 146.

104. 29 U.S.C. § 794 (2000).

105. School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (dealing with tuberculosis and the Rehabilitation Act).

106. Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 209, 210 n.4 (1988) (stating that the opinion was overruling an earlier one).

107. *See id.*

108. *See* Philip Shenon, *Protection for U.S. Workers with AIDS is Widened*, N.Y. TIMES, Oct. 7, 1988, at A17.

photographs were released: "Obviously, the public release of the opinions and the resulting outcry precipitated my decision. But the fact was that I had made my decision six months earlier under a veil of ignorance about government abuses or public perception."[109]

Separately, Professor Goldsmith thought it prudent to withdraw an opinion that defined presidential power far more broadly than necessary. Specifically, the opinion recited that any "effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."[110] Professor Goldsmith writes:

> This extreme conclusion has no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law. And the conclusion's significance sweeps far beyond the interrogation opinion or the torture statute. It implies that many other federal laws that limit interrogation—anti-assault laws, the 1996 War Crimes Act, and the Uniform Code of Military Justice—are also unconstitutional, a conclusion that would have surprised the many prior presidents who signed or ratified those laws, or complied with them during wartime.[111]

It is arguable whether Professor Yoo ever intended his comment about the power of Congress to regulate interrogation on the battlefield to sweep as broadly as Professor Goldsmith indicates, but this much is true: Professor Yoo's speculation about the relationship between presidential and congressional power was unneeded and untethered to any specific factual matter before the office. As Professor Goldsmith correctly notes, "[t]he August 1, 2002, opinion analyzed the torture statute in the abstract, untied to any concrete practices."[112] It was in a separate set of documents that the OLC opinions were applied to specified interrogation techniques; such techniques contained elaborate safeguards and were far less worrisome than the opinions' abstract analysis. The problem was that the statements could be taken out of context. As Professor Goldsmith relates, "someone might rely on their green light to jus-

109. GOLDSMITH, *supra* note 1, at 159.
110. *Id.* at 148.
111. *Id.* at 149.
112. *Id.* at 150.

tify interrogations much more aggressive than ones specifically approved and then maintain, not without justification, that they were acting on the basis of OLC's view of the law."[113]

Professor Goldsmith would leave the Department of Justice without replacing the torture memoranda with his own legal analysis. Professor Goldsmith writes that his "main goal after tendering [his] resignation . . . was to write replacements for the August 2002 and March 2003 interrogation opinions before [his] departure, which was scheduled for six weeks later."[114] However, for largely unexplained reasons, he says that "it was impossible to finish them."[115] Professor Goldsmith recounts that it was left to his acting temporary successor, Dan Levin, to complete the work by issuing a new opinion that gave torture

> a much more rigorous and balanced interpretation, correcting the errors and exaggerations of the original opinion. The new opinion declined to address the presidential override issue analyzed in the earlier memo, reasoning that consideration of these matters "would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."[116]

Did this new opinion change government practices? Professor Goldsmith reports that "no approved interrogation technique would be affected by this more careful and nuanced analysis. The opinion that had done such enormous harm was completely unnecessary to the tasks at hand."[117] If that is the case, one gets the impression that, at any moment in time, whether one is perceived as saint or demon in the practice of the law depends less on effect than on appearance.[118] If both Professor Yoo and Professor Goldsmith approached their work in good faith and in fidelity to the law as they saw it, and as it could reasonably be ascertained, is it worthy of our time to canonize one and demonize the other? When the plaudits for Professor Goldsmith recede, as they always do, he will hear the echo of

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113. *Id.* at 151.

114. *Id.* at 162.

115. *Id.*

116. *Id.* at 164.

117. *Id.* at 165.

118. This may also explain why, after ushering Attorney General Gonzales off the public stage, the Senate Judiciary Committee found itself unable to perceive whether his nominated successor, Judge Michael Mukasey, was an authentic saint or only a more polished and credentialed demon.

this question because he is an honest man of letters. As a matter of professional responsibility, how he answers it at that moment is more important than anything he can tell us now.

There are some parts of the book that are not becoming to Professor Goldsmith. By his own admission, he seemed almost ready to resign his position at OLC even before he started. He reports that he prepared three letters of resignation after a little more than nine months.[119] Shortly before he left the Department, he stood by while his boss, Attorney General Ashcroft, testified before Congress in defense of OLC's interrogation memoranda, even as Professor Goldsmith had concluded in his mind to withdraw them. When he finally withdrew these opinions, he rather promptly resigned his position. He did this not because the Attorney General asked him to, which might have been understandable given the embarrassment the Attorney General might have avoided had he been kept better informed, but rather because he wanted to take up a new law school post at Harvard.

Even Professor Goldsmith has to admit in the book that the timing of his exit "would make it hard for the White House to reverse my decision without making it seem like I had resigned in protest."[120] But there is something wrong, even self-serving, about that observation. Professor Goldsmith was not resigning in protest, because the ever-generous and understanding Attorney General Ashcroft was willing to accept Professor Goldsmith's rethinking of the interrogation memoranda without recrimination and, as Professor Goldsmith reports, then-White House Counsel Gonzales and his deputy "several times asked [him] to stay."[121] Why, then, was there ever any question in Professor Goldsmith's mind that the President, who put his trust in him by his nomination for high responsibility so very few months earlier, would want anything other than to "take care that the laws are faithfully executed," regardless of how many times it took OLC to get the interpretation of those laws correct? Was there not some obligation on the part of Professor Goldsmith to more fully perform his public contract? *Pacta sunt servanda.* At a minimum, did not Professor Goldsmith have a

119. GOLDSMITH, *supra* note 1, at 10.
120. *Id.* at 161.
121. *Id.*

professional and personal obligation to eliminate as best he could any public misimpression?

Of course, among the general population, President Bush is not currently very popular. He is perceived as having launched an unnecessary and costly invasion and occupation of Iraq and, by that action, endangering the lives of his fellow citizens and Iraqis alike. He is said to have destabilized a region of the world that was already badly fractured.[122] There has also been great damage both to America's international standing and its national defense preparedness. It is widely anticipated that public disapproval of the President will result in serious losses for his party in the next national election. In short, the President is an easy target, and one hopes that no part of Professor Goldsmith's motivation for writing his book was to simply take advantage of this weakness. I doubt that it was, and I know he would not want it to be so perceived. In the months and years ahead, it will be important for him to be completely candid in his assessment of his motivations for writing. To Professor Goldsmith's credit, near the end of the book, after less flattering portrayals of David Addington, he concludes:

> My fights with David Addington and others were not struggles between the forces of good and evil. Our sharp disagreement over the requirements of national security law and the meaning of the imponderable phrases of the U.S. Constitution was not a fight between one who loves the Constitution and one who wants to shred it. Whether and how aggressively to check the terrorist threat, and whether and how far to push the law in so doing, are rarely obvious, especially during blizzards of frightening threat reports, when one is blinded by ignorance and desperately worried about not doing enough. Addington and I had different experiences, different perspectives, different roles, and different responsibilities. Despite our many fights, and despite what I view as his many errors of judgment, large and small, I believe he acted in good faith to protect the country.[123]

The redeeming humility in those words alone makes Professor Goldsmith's book well worth reading.

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122. *See generally* ZBIGNIEW BRZEZINSKI, SECOND CHANCE: THREE PRESIDENTS AND THE CRISIS OF AMERICAN SUPERPOWER (2007).

123. GOLDSMITH, *supra* note 1, at 175.

On 9/11, the United States was attacked by an enemy without the accountability of a nation state, a discernible ideology, or any discernible respect for the human person. Much to his credit, Professor Goldsmith notes in conclusion how the President has succeeded, at least thus far, in preventing a second attack on the homeland. Indeed, that achievement is worthy of respect regardless of what ultimately happens in Iraq. And worthy of further legal study is Professor Goldsmith's invitation to reexamine the role of lawyers in the conduct of war or its equivalent. As Professor Goldsmith observes:

> When advising the President about what he should do in wartime, some lawyers often confound the formal legal powers they discover in statutes or precedents with the actual determinants of presidential power, which include the context of action, political support, credibility, and reputation. Lawyers advising the President also tend to be backward-looking rationalizers rather than forward-looking problem solvers. Asked to craft detention and trial policies in the war on terrorism, they looked to laws and precedents from past wars. Since the White House had taken working with Congress off the table, a lot of sensible policy options—such as establishing criminal laws for military commissions that were specifically tailored to the problem of modern terrorism, or creating a long-term preventive detention regime under the supervision of a national terrorism court—simply were not available. The lawyers were forced to squeeze the twenty-first-century war with al Qaeda into Civil War and World War II precedents, which did not account for the massive differences between the 1860s and 1940s and today."[124]

There are highs and lows in *The Terror Presidency*, but overall the above passage reveals the sagacious and constructive nature of Professor Goldsmith's analysis. He deserves our attention, and perhaps in a future administration, another President will also find that Professor Goldsmith deserves his or her trust. One can hope that Professor Goldsmith's life and career at that future point will permit that opportunity, and that Harvard will release him to accept a longer tenure in government service.

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124. *Id.* at 133–34.

RECENT DEVELOPMENTS

A "PLAUSIBLE" EXPLANATION OF PLEADING STANDARDS: *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007)

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a plaintiff's complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[1] Fifty-one years ago, in *Conley v. Gibson*,[2] the Supreme Court unanimously declared that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[3] Last term, in *Bell Atlantic Corp. v. Twombly*,[4] the Court called into question this mantra, holding that plaintiffs alleging an antitrust conspiracy under section 1 of the Sherman Act[5] must allege "some factual context suggesting agreement."[6] In requiring that plaintiffs plead "enough facts to state a claim to relief that is plausible on its face,"[7] the Court issued a broad decision that appears to tighten the reins on pleading standards. The more stringent approach in *Twombly* signals a growing hostility toward litigation and a shift away from the liberal *Conley* mindset. Because *Twombly*'s holding is somewhat ambiguous, however, lower courts and plaintiffs' lawyers have significant leeway to tease out the meaning of "plausibility" in different contexts.

In 1984, telephone conglomerate AT&T underwent divestiture, leaving behind a number of regional service monopolies.[8] Congress then passed the Telecommunications Act of 1996 to facilitate market entry and encourage these regional service

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1. FED. R. CIV. P. 8(a)(2).
2. 355 U.S. 41 (1957).
3. *Id.* at 45–46 (emphasis added).
4. 127 S. Ct. 1955 (2007).
5. 15 U.S.C. § 1 (2000).
6. *Twombly*, 127 S. Ct. at 1961.
7. *Id.* at 1974.
8. *See id.*

providers to compete with one another.[9] In 2003, a class of subscribers to local telephone and high-speed Internet services brought suit against the regional service providers, alleging violation of section 1 of the Sherman Act,[10] which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States."[11] The plaintiffs' complaint alleged that the regional service providers conspired to restrain trade by inhibiting the growth of their competitors and by agreeing to refrain from competing against one another, as indicated by their common failure to pursue attractive business opportunities in one another's territories.[12] To support their conspiracy claim, the plaintiffs asserted facts showing parallel behavior, but no facts showing concerted action or actual agreement.[13]

The United States District Court for the Southern District of New York dismissed the complaint.[14] Citing precedent, the court noted that plaintiffs alleging conspiracy "must always assert facts [in their complaint] that, if true, support the existence of a conspiracy, such as motivation or conduct that lends itself to an inference of an agreement."[15] The district court concluded that plaintiffs' complaint in the instant case "provide[d] no reason to believe that defendants' parallel conduct was reflective of any agreement."[16]

The United States Court of Appeals for the Second Circuit reversed the district court's dismissal.[17] The Second Circuit rejected the notion that the plaintiffs were required to plead facts, and instead reiterated the standard set forth in *Conley v. Gibson*[18] that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would

9. *Id.* at 1962.

10. *Id.*

11. 15 U.S.C. § 1 (2000).

12. *See* Consolidated Amended Class Action Complaint at 20–26, Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003).

13. *Id.*

14. *Twombly*, 313 F. Supp. 2d at 189.

15. *Id.* at 180.

16. *Id.* at 189.

17. Twombly v. Bell Atlantic Corp., 425 F.3d 99, 119 (2d Cir. 2005).

18. 355 U.S. 41 (1957).

entitle him to relief."[19] The court concluded that the plaintiffs' allegations met this standard and thus were "sufficient to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[20]

The Supreme Court granted certiorari and reversed. Writing for the Court,[21] Justice Souter asserted that *Conley*'s "no set of facts" language has "earned its retirement,"[22] holding that plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face."[23] Justice Souter conceded that allegations of parallel conduct are "consistent with conspiracy," but added that, without more, such allegations are "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[24] Expressing alarm over potentially exorbitant discovery costs, and concomitant *in terrorem* increases in settlement values,[25] the majority contended that a plaintiff's obligation "requires more than labels and conclusions . . . and a formulaic recitation of the elements of a cause of action."[26] Instead, a complaint must contain "enough [additional] factual matter (taken as true) to suggest that an agreement was made."[27] "Because the plaintiffs here [had] not nudged their claims across the line from conceivable to plausible," the Court concluded, "their complaint must be dismissed."[28]

Justice Stevens dissented,[29] contending that the plaintiffs had properly set forth an allegation that defendants entered into an agreement and that this allegation was in itself sufficient in "describing unlawful conduct."[30] Justice Stevens invoked the history of the rules to argue that "the pleading standard the

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19. *Id.* at 45–46.

20. *Twombly*, 425 F.3d at 118–19 (omission in original) (citation omitted).

21. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito joined Justice Souter.

22. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007).

23. *Id.* at 1974.

24. *Id.* at 1959.

25. *Id.* at 1966–67.

26. *Id.* at 1965.

27. *Id.*

28. *Id.* at 1974.

29. Justice Ginsburg joined Justice Stevens in all but Part IV of the dissenting opinion.

30. *Twombly*, 127 S. Ct. at 1975 (Stevens, J., dissenting).

Federal Rules meant to codify does not require, or even invite, the pleading of facts."[31] Indeed, Justice Stevens characterized the majority's plausibility requirement as "a question not of *notice* but of *proof*," properly relegated to later stages of litigation.[32] Although Justice Stevens acknowledged the majority's concerns about discovery costs, he contended that such concerns would be best addressed through means such as careful judicial management of cases, not a revised interpretation of the Federal Rules.[33] Justice Stevens concluded, "I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so."[34]

The Court's decision in *Twombly* is an important change. It reflects a significant shift away from the litigation-promoting mindset embodied in *Conley* and instead solidifies what has been a growing hostility toward litigation. The decision, however, gives lower courts and plaintiffs little guidance on the future of pleading standards, leaving lower courts to define precisely the meaning of the "plausibility" standard and requiring plaintiffs simply to divine what is expected of them.

The implications of *Twombly* extend far beyond the field of antitrust. The decision reaches toward the foundations of what it means for a civil complaint to be sufficient. Many portions of the opinion signal its broad reach. First, during oral arguments, various Justices referred to Form 9 in the Appendix of the Federal Rules,[35] indicating their concern with model pleading across subject matter.[36] Second, in the opinion itself, the Court explicitly cited the long-established *Conley* standard, the traditional standard for the sufficiency of any type of complaint. The Court then asserted that *Conley* had "earned its retire-

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31. *Id.* at 1979.

32. *Id.* at 1984 n.8.

33. *See id.* at 1975.

34. *Id.* at 1979.

35. Transcript of Oral Argument at 6, 16, 52, *Twombly*, 127 S. Ct. 1955 (No. 05-1126).

36. Form 9 is a complaint alleging negligent driving. *See* FED. R. CIV. P., Form 9, Complaint for Negligence; *see also* FED. R. CIV. P. 84 ("The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate."). The Federal Rules of Civil Procedure underwent a stylistic revision in December 2007. This Comment refers to the Forms in their pre-revision content and numbering, upon which the Court relied.

ment."[37] Third, the Court cited to *Twombly* as its primary authority for pleading standards in a later opinion, *Erickson v. Pardus*,[38] even though that case involved a prisoner's civil rights claims.[39] Fourth, lower courts have confirmed and heeded these signals,[40] citing *Twombly* in an array of litigation contexts ranging from breach of contract[41] to race discrimination[42] to Title VII retaliatory discharge.[43]

Twombly furthermore represents a significant change in basic pleading standards, as evidenced by the decision's internal logic. The Court essentially purported to be dismissing a complaint that did not directly allege an agreement to conspire.[44] Accepting the Court's assumptions,[45] the circumstances invite the question: Why did the plaintiffs not simply amend their complaint to allege agreement directly, streamlining their argument and using Form 9 as a model?[46] Barring attorney incompetence, the answer must be that the plaintiffs did not believe that such an amended pleading would have succeeded.

Indeed, if an alternative, simplified complaint directly alleging agreement would have succeeded, then the *Twombly* litiga-

37. *Twombly*, 127 S. Ct. at 1969.

38. Erickson v. Pardus, 127 S. Ct. 2197 (2007) (per curiam).

39. *Id.* at 2200.

40. *See* Iqbal v. Hasty, 490 F.3d 143, 157 n.7 (2d Cir. 2007) ("[I]t would be cavalier to believe that the Court's rejection of the 'no set of facts' language from *Conley*, which has been cited by federal courts at least 10,000 times in a wide variety of contexts (according to a Westlaw search), applies only to section 1 antitrust claims."); *see also* Collins v. Marva Collins Preparatory Sch., No. 1:05cv614, 2007 WL 1989828, at *3 n.1 (S.D. Ohio July 9, 2007) (noting that eight federal district courts in the Sixth Circuit have applied *Twombly* in the manner described in *Iqbal*, and only one has restricted *Twombly* to the antitrust conspiracy context).

41. Goodman v. Praxair, Inc., 494 F.3d 458, 466 (4th Cir. 2007).

42. Gregory v. Dillard's, Inc., 494 F.3d 694, 710 (8th Cir. 2007).

43. EEOC v. Concentra Health Servs., Inc., 496 F.3d 773, 776–79 (7th Cir. 2007).

44. *See Twombly*, 127 S. Ct. at 1970, 1971 n.11.

45. The Court assumed that the plaintiffs did not intend to allege agreement directly, but rather by inference. *See Twombly*, 127 S. Ct. at 1970, 1971 n.11. This appears to be, at best, a questionable reading of the complaint, and, at worst, a convenient one. Despite the majority's cursory dismissal of "[the] few stray statements [that] speak directly of agreement," *id.* at 1970, such statements were very much present in the complaint and can reasonably be considered to have constituted a direct allegation of agreement. *See id.* at 1974 (Stevens, J., dissenting).

46. Because leave to amend is given liberally, the plaintiffs' failure to cure this defect here is even more perplexing. *See* FED. R. CIV. P. 15(a)(2) ("[L]eave shall be freely given when justice so requires.") (amended 2007); Foman v. Davis, 371 U.S. 178, 182 (1962) (holding that leave to amend should be "freely given" absent bad faith, repeated failure to cure, undue prejudice, and futility).

tion would have been spectacularly wasteful. Future plaintiffs would simply amend their complaints, and none of the objectives the Court aimed to promote through *Twombly*, such as less discovery abuse and fewer frivolous claims,[47] would follow. The Court would likely not have engaged in an exercise this pointless.[48]

Given that the plaintiffs were likely correct in their belief that an amended pleading would not have succeeded, *Twombly* seems to have created a more stringent pleading standard.[49] Certainly, one might argue that the alternative complaint would have been insufficient even under pre-*Twombly* pleading standards.[50] Indeed, the *Twombly* complaint stands out from the model forms in one main respect: it does not specify a particular date on which the wrongful conduct—the agreement—occurred. Whereas virtually all of the complaints in the model forms cite to a particular date,[51] the *Twombly* complaint gives only a seven-year range.[52] A date provides better notice by calling the parties' attention to the particular moment of alleged wrongful conduct, and thereby enables less expensive and

47. *Twombly*, 127 S. Ct. at 1966–67.

48. It is worth noting that such an outcome is possible, however, if lower courts take the Court at its word, because the Court is not explicit about raising the Rule 8 standard or creating a heightened pleading standard for Sherman Act violations.

49. According to its previous jurisprudence, the Court cannot create a heightened pleading standard for only one area of law without a formal amendment to the Federal Rules of Civil Procedure. *See* Swierkiewicz v. Sorema, N. A., 534 U.S. 506, 515 (2002) ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" (quoting Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993))); *see also Twombly*, 127 S. Ct. at 1973 n.14. Thus, the Court's treatment of pleading standards in *Twombly* must be a reinterpretation of the general Rule 8 standard, and not just confined to the realm of antitrust.

50. The Court alluded to this possibility in a footnote. *See Twombly*, 127 S. Ct. at 1970 n.10 ("If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs [incumbent local exchange carriers] would have given the notice required by Rule 8.").

51. *See* FED. R. CIV. P., Forms 3–18, 29.

52. *See* Consolidated Amended Class Action Complaint at 30, Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) ("Beginning at least as early as February 6, 1996, and continuing to the present . . . .").

more targeted discovery. Indeed, the *Twombly* Court alluded to this shortcoming.[53]

But that objection is unconvincing. An imprecise date of agreement does not necessarily render the complaint insufficient. Several of the model forms approve of approximations—such as "on or about"[54]—and at least one form provides for a time range similar to that in *Twombly*.[55] These model forms confirm that, even if a complaint *can* be more precise, such precision is not *necessary* for the complaint to be sufficient.[56] Furthermore, in the antitrust context, there is a strong case for leniency in specifying dates in pleadings. A specific date is difficult for plaintiffs to obtain because the conduct at issue involves internal (and possibly covert) communications among private businesses.[57] It is therefore unlikely that the *Twombly* complaint was insufficient under pre-*Twombly* standards; rather, *Twombly* itself represents a change in the pleading standard.

The Court's decision in *Twombly* reflects a growing hostility toward litigation and a definite shift away from *Conley*'s litigation-promoting mindset. The historical trends that led to the creation of the Federal Rules embodied the notion that plaintiffs' claims ought to be disposed of on the merits.[58] To this end,

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53. *See Twombly*, 127 S. Ct. at 1970 n.10 ("[T]he pleadings mentioned no specific *time*, place, or person involved in the alleged conspiracies[,] . . . [w]hereas the model form alleges that the defendant struck the plaintiff . . . at a specified date and time . . . . [A] defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin." (emphasis added)); *see also id.* at 1973 (distinguishing *Swierkiewicz*, 534 U.S. at 508, 512, 514, and emphasizing that "Swierkiewicz's pleadings detailed the events leading to his termination, provided *relevant dates*, and included the ages and nationalities of at least some of the relevant persons involved with his termination" (quotation marks omitted) (emphasis added)).

54. *See, e.g.*, FED. R. CIV. P., Form 3, Complaint on a Promissory Note ("on or about June 1, 1935 . . . ."); *accord* FED. R. CIV. P., Forms 11–14, 18.

55. *See* FED. R. CIV. P., Form 17, Complaint for Infringement of Copyright and Unfair Competition, ¶ 10 ("After March 10, 1936, and continuously since about . . . .").

56. *See also, e.g.*, *Swierkiewicz*, 534 U.S. at 511–14 (declining to require that plaintiffs plead facts establishing a prima facie case of employment discrimination because a general employment discrimination allegation is sufficient for notice).

57. Such information is all the more difficult to obtain where, as in *Twombly*, the defendants are not made to answer the complaint.

58. *See* Clif J. Shapiro, Note, *Amendments That Add Plaintiffs Under Federal Rule of Civil Procedure 15(c)*, 50 GEO. WASH. L. REV. 671, 671 (1982) ("The primary purpose of the Federal Rules of Civil Procedure is to facilitate the presentation of cases and promote their disposition on the merits."). The principle was later affirmed in *Conley*.

the purpose of pleadings was simply to give notice.[59] The Rules focused on simplicity, emphasizing the need for only a "short and plain statement."[60] The creators of the Rules sought to eliminate confusion by downplaying fine distinctions between ultimate facts and legal conclusions.[61] Courts enabled a plaintiff to state his claim without technical finesse[62] and gave him "the benefit of reasonable intendments in his allegations."[63] In *Conley*, the Supreme Court affirmed these trends and articulated a definitive mindset promoting a liberal approach to pleadings.[64] That *Conley*'s "no set of facts" language was in some sense hyperbolic[65] is all the more evidence of this "mood":[66] the decision was "intended to put the matter of deciding cases on the pleadings to rest, and proposals to tighten the pleading rules

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Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules . . . accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.").

59. *See* Hickman v. Taylor, 329 U.S. 495, 501 (1947) (noting that the Federal Rules "restrict the pleadings to the task of general notice-giving"); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434 (1986) ("Pleadings were intended only to give general notice . . . ."); *id.* at 436 (noting that the conventional wisdom was that the "sole purpose of pleadings is to give notice").

60. FED. R. CIV. P. 8(a)(2).

61. *See* Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 1291, 1301 (1935) ("[T]oo great insistence upon pleadings alone was made by the early code courts, and fine distinctions between 'facts' on the one hand, and 'law' or 'evidence' on the other, were drawn. Now it has come to be appreciated that the distinction is one between generality and particularity in stating the transaction sued upon and that considerable flexibility should be accorded the pleader."); Marcus, *supra* note 59, at 433 (reporting that Rule 8(a)(2) was "designed to escape the complexities of fact pleading under the codes, which had generated great confusion about how to allege the required 'ultimate facts' while avoiding forbidden 'conclusions' and 'mere evidence'").

62. *Cf.* Maty v. Grasselli Chem. Co., 303 U.S. 197, 200 (1938) (noting that "[t]echnical rules will not be applied" in assessing the sufficiency of amended pleadings); *accord Conley*, 355 U.S. at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . . .").

63. Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

64. *See* Marcus, *supra* note 59, at 433–34 (characterizing the Court's decision in *Conley* as a decisive endorsement of the developing "new liberal ethos").

65. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 3.6, at 190 (5th ed. 2001).

66. *Cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951) ("It is fair to say that in all this [phraseology] Congress expressed a mood. . . . [T]hat mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules . . . .").

ceased."[67] Lower courts adopted the *Conley* mindset themselves and took its cue seriously.[68]

More recently, however, the country has grown more hostile toward litigation. Over the past few decades, lawyers and lawsuits have proliferated.[69] The proliferation has been criticized widely,[70] even within the legal profession.[71] Litigation has been

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67. Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 (1998).

68. *See, e.g.*, Vincent v. City Colls. of Chicago, 485 F.3d 919, 923–24 (7th Cir. 2007):

> [A] judicial order dismissing a complaint because the plaintiff did not plead facts has a short half-life. Any decision declaring "this complaint is deficient because it does not allege X" is a candidate for summary reversal, unless X is on the list in Fed.R.Civ.P. 9(b). Civil Rule 8 calls for a short and plain statement; the plaintiff pleads claims, not facts or legal theories. Factual detail comes later—perhaps in response to a motion for a more definite statement, perhaps in response to a motion for summary judgment. Until then, the possibility that facts to be adduced later, and consistent with the complaint, could prove the claim, is enough for the litigation to move forward. Facts that substantiate the claim ultimately must be put into evidence, but the rule "plaintiff needs to prove Fact Y" does not imply "plaintiff must allege Fact Y at the outset."

Id. (citations omitted) (quotation marks omitted). Another case, *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 726–27 (7th Cir. 1986), suggested that

> the court is not to pounce on the plaintiff and by a crabbed and literal reading of the complaint strain to find that he has pleaded facts which show that his claim is not actionable, and then dismiss the complaint on the merits so that the plaintiff cannot replead. The dismissal would preclude another suit based on any theory that the plaintiff could have advanced on the basis of the facts giving rise to the first suit.

Id. (parenthesis omitted).

69. *See* Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists*, 70 TEX. L. REV. 645, 646 (1992) (noting the dramatic growth of lawyers and lawsuits in the past fifteen years and the "lawyerification" of society); Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?: A Restrospective*, 21 HARV. J.L. & PUB. POL'Y 607, 610 (1998) (noting that, from 1961 to 1996, the percentage of lawyers in the general population increased from .141 percent to .331 percent).

70. *See* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 4 (1985):

> Compared to a century ago, there is more of just about every aspect of our legal system—more lawyers, more cases, more statutes, more rules and regulations. To the jaundiced eyes of some observers, the lawyers are running the country, a condition they consider totally deplorable. There is a great wringing of hands, a great chorus of complaints, all up and down the land.

Id.; Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 451–52 (2004) (cataloguing opposition to litigation from entities in politics, commerce, and lobbying).

71. *See, e.g.*, Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 573 (1983) (noting that the increasing number of lawyers means "a massive diversion of exceptional talent into pursuits that often add little to the

denounced as costly,[72] harmful,[73] frivolous,[74] dishonest,[75] and undemocratic.[76] The hostility has also manifested itself in the courts.[77] In an effort to manage the litigation explosion,[78]

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growth of the economy, the pursuit of culture, or the enhancement of the human spirit"); Warren E. Burger, *Too Many Lawyers, Too Many Suits*, N.Y. TIMES BOOK REV., May 12, 1991, at 12 (noting that "our society is drowning in litigation" and that the "view that there are too many lawyers is widely held by other intelligent laymen, as well as by many leaders of the bar").

72. *See* Adam Cohen, *Are Lawyers Running America?*, TIME, July 17, 2000, at 22, 24 ("Corporate executives complain that the cost of fighting lawsuits, let alone losing them, drives up prices of products ranging from ladders to automobiles and holds down wages and job creation and profits."); *see generally* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 84–85 (2000) (outlining the litigation tactics meant to exhaust opponents' resources).

73. *See* Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, 2 REGULATION 15 (1978) (arguing that too great an expansion of the legal process causes both political and economic harm); *see also* Silberman, *supra* note 69 (re-emphasizing and updating his prior argument). There is a great deal of literature arguing that large lawyer populations harm economic growth. *See generally* STEPHEN P. MAGEE, WILLIAM A. BROCK & LESLIE YOUNG, BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY: POLITICAL ECONOMY IN GENERAL EQUILIBRIUM 111 (1989); Samar K. Datta & Jeffrey B. Nugent, *Adversary Activities and Per Capita Income Growth*, 14 WORLD DEV. 1457 (1986) (arguing that lawyers impair economic growth because they engage in parasitic rent-seeking behavior against economic producers); David N. Laband & John P. Sophocleus, *The Social Cost of Rent-Seeking: First Estimates*, 58 PUB. CHOICE 269 (1988); Kevin M. Murphy, Andrei Shleifer & Robert W. Vishny, *The Allocation of Talent: Implications for Growth*, 106 Q.J. ECON. 503 (1991); Stephen P. Magee, Letter to the Editor, *How Many Lawyers Ruin an Economy?*, WALL ST. J., Sept. 24, 1992, at A17.

74. *See* Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497, 515 (2000) (discussing a 1996 report finding that more than 80 percent of jurors "believed that there were too many frivolous lawsuits"); David G. Savage, *A Trial Lawyer on Ticket Has Corporate U.S. Seeing Red*, L.A. TIMES, Sept. 13, 2004, at A1, A12 (citing a poll finding that 80 percent of Americans believe that the nation has too much litigation).

75. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 67–103 (Princeton University Press 1988) ("Few of our institutions are trusted less than adversary adjudication, precisely because it seems to license lawyers to trample on the truth, and legal rights, and morality.").

76. Cohen, *supra* note 72, at 26 ("Critics of law-by-trial-lawyer say it's an undemocratic way for a nation to decide its approach to controversial issues like handgun and tobacco regulation. The key players—the lawyers and often the judges—are unelected, and most of the critical decisions in litigation are made in secret.").

77. *See, e.g.*, Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1430 (7th Cir. 1993) ("It is true that the original theory of the Federal Rules of Civil Procedure was that the plaintiff ought to be permitted to fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint until the final pretrial conference. No judge or lawyer in this age of crowded dockets takes that completely seriously . . . .").

courts have begun to tighten the requirements for pleading,[79] particularly in areas prone to frivolous litigation.[80] Even as *Conley* remained the law, hostility to litigation grew in society and in the courts.[81]

Twombly captured the shift. Rather than merely reiterating the requirement that a plaintiff make a "short and plain statement of the claim," the *Twombly* Court placed new emphasis on the requirement that the claim "show[]" that the plaintiff is entitled to relief.[82] To this end, the *Twombly* Court characterized Rule 8(a)(2) as constituting a two-pronged requirement: "the requirement of providing not only 'fair notice' of the nature of the claim but also 'grounds' on which the claim rests."[83] In the process, the Court restarted the debate over technical distinctions in pleadings. The main disagreement between the majority and the dissent over the sufficiency of the complaint appears to be whether the plaintiffs' allegation of the existence of an agreement is a "straightforward [factual] allegation"[84] or merely a "legal conclusion[] resting on the prior allegations."[85] Thus, the Court demanded more from preliminary pleadings, showing a desire to curtail discovery abuse and to compensate for the inability of judicial supervision to check such abuse.[86]

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78. *See* Marcus, *supra* note 59, at 444–51 (discussing the revival of fact pleading as a product of the litigation boom).

79. *See, e.g.*, Heart Disease Research Found. v. Gen. Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972) ("Although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.").

80. *See, e.g.*, Marcus, *supra* note 59, at 436 ("[F]ederal courts are insisting on detailed factual allegations more and more often, particularly in securities fraud and civil rights cases.").

81. *See* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1097 (2006) (noting the Rehnquist Court's "hostility toward the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice").

82. FED. R. CIV. P. 8(a) ("A pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . .").

83. *Twombly*, 127 S. Ct. at 1965 n.3.

84. *Id.* at 1974 (Stevens, J., dissenting).

85. *Id.* at 1970 (majority opinion).

86. *See id.* at 1959; *see also* Credit Suisse Sec. LLC v. Billing, 127 S. Ct. 2383 (2007) (Stevens, J., concurring) ("Surely I would not suggest, as the Court did in *Twombly*, and as it does again today, that either the burdens of antitrust litigation or the risk 'that antitrust courts are likely to make unusually serious mistakes'

Ultimately, the Court's decision creates uncertainty among lower courts and practitioners. Courts will likely now consider both fair notice and potential for discovery abuse when determining the sufficiency of a complaint. At least one of those factors—potential for discovery abuse—varies depending upon the type of litigation at hand. Therefore, basic pleading standards are now likely to fluctuate with the subject matter of the lawsuit. Indeed, a "flexible"[87] minimum pleading standard is the only way to reconcile the validity of the succinct forms that still serve as models of sufficient complaints[88] and the invalidity of more complex and detailed complaints that nonetheless fail for lack of plausibility. "Plausible" will mean something different in each case, or category of cases: "*Twombly* draws no bright line to distinguish 'conceivable' claims from 'plausible' claims. This, of course, leaves the details of implementation to the lower courts and invites creative advocacy. The lower courts will have to puzzle out new tests for determining plausibility."[89] In the process of experimentation, courts would do well to consider a number of factors, not just fair notice and potential for discovery abuse. Other factors might include the prevalence of frivolous claims in particular areas, the likelihood that factual information is publicly available, and asymmetry of information between the parties.

Plaintiffs' lawyers drafting complaints after *Twombly* may be uncertain about what constitutes a sufficient complaint. One way to deal with the uncertainty is to look to the pleading norms and standards of non-notice-pleading jurisdictions.[90]

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should play any role in the analysis of the question of law presented in a case such as this." (citation omitted)).

87. *See* Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007) ("After careful consideration of the Court's opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.").

88. Form 9, by mandate of FED. R. CIV. P. 84, must be sufficient for negligence claims, even though it is devoid of any facts but for time and date.

89. Andrée Sophia Blumstein, *A Higher Standard: 'Twombly' Requires More for Notice Pleading*, 43 TENN. B.J., Aug. 2007, at 12, 15.

90. These jurisdictions include: Arkansas, California, Connecticut, Delaware, Florida, Illinois, Louisiana, Maryland, Missouri, Nebraska, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Texas, and Virginia. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378 (1986).

Several states, even before *Twombly*, had "plausibility" standards in place for non-federal complaints.[91] The norms in these states may provide important guidance for federal pleading in the future.

Another approach to confronting the uncertainty in pleading is to plead facts with an eye towards building a plausible narrative and avoid getting mired in details. Lawyers and courts have long recognized that pleading is just as much about story telling and narration as about legal minutiae.[92] Even the *Twombly* Court appeared concerned with this: the Court was careful to note that specificity was distinctly not at issue; "rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible."[93] Plaintiffs should thus seek to tell a compelling and holistic story by way of their complaint.

Although plaintiffs might be tempted to plead all known facts to satisfy the Court's request for the "grounds" upon which a claim rests, plaintiffs should be careful not to plead themselves out of court.[94] Extensive and confusing cataloguing of detail, like that in *Twombly*,[95] may lend itself to unnecessary vulnerabilities. When a plaintiff's pleading of facts appears comprehensive, a court might assume that facts not pled simply do not exist. Furthermore, when a plaintiff's pleading of facts is too technical or confusing to convey a clear narrative, a court is more likely to accept the defendant's characterization of what occurred. For example, in *Twombly*, the Court ignored the possibility that there was direct (and not merely circumstantial)

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91. *See, e.g.*, Desimone v. Barrows, 924 A.2d 908, 929 (Del. Ch. 2007) ("[O]ur nation's high court has now embraced the pleading principle that Delaware courts have long applied, which is that a complaint must plead enough facts to plausibly suggest that the plaintiff will ultimately be entitled to the relief she seeks.").

92. *See, e.g.*, NAN D. HUNTER, THE POWER OF PROCEDURE (2007); *see also* STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE (2d ed. 2004).

93. *Twombly*, 127 S. Ct. at 1973 n.14. Even defense counsel admitted that the complaint was "quite specific," providing adequate notice. Transcript of Oral Argument at 14, *Twombly*, 127 S. Ct. 1955 (No. 05-1126) ("Our problem with the current complaint is not a lack of specificity, it's quite specific. It provides color maps and such.").

94. *See* Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 724 (1986) ("A plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded.").

95. *See* Consolidated Amended Class Action Complaint at 20–27, Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003).

evidence of agreement, because plaintiffs' suggestions to that effect[96] were obfuscated by the extensive, jargon-ridden allegations of mere parallel conduct.[97] Plaintiffs should thus be careful in their pleading of detail and take comfort in knowing that an error of less detail is rectifiable through a motion for a more definite statement,[98] whereas too much detail risks summary dismissal altogether.

In the end, *Twombly* has reshaped civil standards of pleading to reflect the policy preferences and practical demands of modern civil litigation. As plaintiffs and lower courts determine how to proceed in its wake, one thing is clear: this will not be the last case the Court will hear on pleading standards.

Saritha Komatireddy Tice

96. *See id.* at 27.

97. *See id.* at 20–27 (using numerous technical terms from the telecommunications industry).

98. *See* FED. R. CIV. P. 12(e).

THE VEIL OF VAGUENESS: REASONABLENESS REVIEW IN *Rita v. United States*, 127 S. Ct. 2456 (2007)

Three years ago, in *United States v. Booker*,[1] a 5-4 majority of the Supreme Court held that the Sentencing Reform Act of 1984 (SRA),[2] which required federal judges to impose sentences within the Federal Sentencing Guidelines (the Guidelines)[3] based upon judicially-found facts, violated the Sixth Amendment.[4] A different 5-4 majority of the Court held, in what is known as the *Booker* "remedial" opinion, that the appropriate remedy was to excise from the SRA the two provisions that made the Guidelines mandatory, thus rendering them effectively advisory.[5] For the federal courts of appeals, the effect of *Booker* was to replace a clear set of standards of review for federal criminal sentences[6] with a vague "review for unreasonableness" standard.[7] This holding left many unanswered questions—a point well noted by the dissenters—not least among them the question of the role that the Guidelines would play under the new standard of review.[8]

Last term, in *Rita v. United States*,[9] the Supreme Court held that courts of appeals could afford a presumption of reasonableness to sentences that fall within the relevant Guidelines

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1. 543 U.S. 220 (2005).

2. 18 U.S.C. §§ 3551–3559 (2000).

3. *Id.* § 3553(b)(1).

4. *Booker*, 543 U.S. at 226–27.

5. *Id.* at 245 (excising 18 U.S.C. §§ 3553(b)(1) and 3742(e)).

6. *See* 18 U.S.C. § 3742(e) (2000) (outlining standards and directing appellate courts to "review de novo the district court's application of the guidelines to the facts" in the cases of aggravating and mitigating circumstances); *see also id.* § 3553(b)(1) (requiring courts of appeals to reverse and remand any sentence outside the Guidelines unless the trial court made and documented a determination that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described").

7. *Booker*, 543 U.S. at 261 (internal punctuation omitted).

8. *See id.* at 301 (Stevens, J., dissenting) (asking "[h]ow will a judge go about determining how much deference to give to the applicable Guidelines range?").

9. 127 S. Ct. 2456 (2007).

range.[10] This decision fails to resolve a core problem inherent in the *Booker* remedial opinion: If judicially-found facts can be decisive under "reasonableness review," the constitutional defect identified by the *Booker* majority—that all facts necessary to increase the maximum possible sentence must be proved to a jury—remains. Conversely, if the Court drastically limits the role of the Guidelines under reasonableness review to avoid this constitutional problem, it undermines its assertion that the remedial provisions of *Booker* were the best possible way to further the congressional goal of sentencing uniformity. In *Rita*, the Court relied upon the uncertainty of the reasonableness review standard it created in *Booker* to dodge this problem. This holding masks, but cannot resolve, the tension inherent in *Booker*.[11]

Victor Rita was accused of perjury before a federal grand jury.[12] Federal agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives had been investigating a company named InterOrdinance for importing and selling kits that could be assembled into machineguns without required registrations.[13] Rita purchased such a kit, but after federal agents approached him, he contacted InterOrdinance and exchanged the kit for a non-machinegun kit before allowing the agents to inspect it.[14] When Rita was brought before a grand jury, he denied that the agents had asked him for the machinegun kit and denied that he had contacted InterOrdinance.[15] After a jury

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10. *Id.* at 2459.

11. The Court recently decided two cases, *Kimbrough v. United States*, 128 S. Ct. 558 (2007), and *Gall v. United States*, 128 S. Ct. 586 (2007), in which judges departed from the Guidelines. In both cases, the district court's departure was downward, and in both cases, the Court affirmed the lower sentence. These decisions advance the Court's unstated goal of increasing judicial discretion, *see infra* note 66 and accompanying text, but neither of them presents a solution to the constitutional problem inherent in *Rita*, which is that some harsh sentences will only be affirmed by appellate courts because of the presence of judicially-found facts. As Justice Scalia noted in his *Gall* concurrence, the freedom of district courts to depart downward from the Guidelines does not eliminate the constitutional infirmity. *Gall*, 128 S. Ct. at 602 (Scalia, J., concurring). The Court did adopt a deferential standard of review for sentences handed down by district courts; such deference should limit the number of cases in which constitutional problems arise, but it will also directly undermine the SRA's goal of sentencing uniformity. *See id.*; *see also infra* text accompanying note 65.

12. *Rita*, 127 S. Ct. at 2459.

13. *Id.* at 2459–60.

14. *Id.* at 2460.

15. *Id.*

trial, Rita was convicted of perjury, making false statements, and obstruction of justice.[16]

After the verdict, a probation officer prepared a presentence report in accordance with federal law.[17] This report calculated that the appropriate sentence under the Guidelines, based upon the gravity of the set of offenses, the gravity of the underlying crime, and Rita's lack of relevant criminal history, was 33 to 41 months' imprisonment.[18] The report also concluded that there appeared "to be no circumstance or combination of circumstances that warrant[ed] a departure from the [Guidelines]."[19] During the sentencing hearing, Rita contended that his previous work in federal criminal justice, his lengthy and distinguished career in the armed forces, and his poor health justified a lower sentence than the minimum required by the Guidelines.[20] The judge rejected this argument and sentenced the defendant to 33 months' imprisonment, the low end of the recommended Guidelines range.[21]

On appeal to the Fourth Circuit, Rita argued that "his 33-month sentence was 'unreasonable' because (1) it did not adequately take account of 'the defendant's history and characteristics,' and (2) it '[was] greater than necessary to comply with the purposes of sentencing set forth in [federal law].'"[22] The Fourth Circuit noted that after *Booker*, "a sentencing court is no longer bound by the range prescribed by the [Guidelines]," but explained that "in determining a sentence post-*Booker*, sentencing courts are still required to calculate and consider the guideline range prescribed thereby as well as the factors set forth in 18 U.S.C. § 3553(a) (2000)."[23] The court also restated its holding, announced in *United States v. Green*,[24] that "a sentence imposed within the properly calculated Guidelines range is presump-

16. *Id.*

17. *Id.*

18. *Id.* at 2461; *see also* 18 U.S.C § 3552(a); FED. R. CRIM. P. 32(c).

19. *Rita*, 127 S. Ct. at 2461.

20. *Id.*

21. *Id.* at 2462.

22. *Id.* (quoting Brief for Appellant at i, United States v. Rita, 177 F. App'x 357 (4th Cir. 2006) (No. 05-4674)).

23. United States v. Rita, 177 F. App'x 357, 358 (4th Cir. 2006).

24. 436 F.3d 449, 457 (4th Cir. 2006) (citing United States v. Newsom, 428 F.3d 685, 687 (7th Cir. 2005)).

tively reasonable."[25] The Fourth Circuit found that "the district court properly calculated the guideline range . . . and, because the court sentenced Rita within the applicable guideline range and the statutory maximum, . . . Rita's sentence of thirty-three months' imprisonment [was] reasonable."[26] The Supreme Court granted certiorari, noting a circuit split "as to the use of a presumption of reasonableness for within-Guidelines sentences."[27]

Justice Breyer's majority opinion[28] affirmed the judgment of the Fourth Circuit and held that the courts of appeals could apply a presumption of reasonableness to sentences within the Guidelines.[29] After reciting the facts, the Court began its discussion by noting that

> the presumption is not binding. It does not . . . insist that one side, or the other, shoulder a particular burden of persuasion or proof. . . . Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant greater fact-finding leeway to an expert agency than to a district judge.[30]

Instead, the presumption, "rather than having independent legal effect, simply recognizes the real-world circumstance that when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable."[31] In the majority's view, this presumption correctly reflects a—perhaps indefinable—form of deference to the "serious, sometimes controversial" work of the Commission to "embody in the Guidelines the factors and considerations set forth in § 3553(a)."[32]

Justice Breyer next addressed the central objection to the Court's holding: namely, that the presumption raises the same

25. *Rita*, 177 F. App'x at 358 (quotation marks and ellipses omitted).

26. *Id.*

27. *Rita*, 127 S. Ct. at 2462.

28. Justice Breyer was joined by Chief Justice Roberts and Justices Stevens, Kennedy, Ginsburg, and Alito. Justices Scalia and Thomas joined only in the holding that the sentencing judge correctly analyzed the relevant sentencing factors. *See id.* at 2474 (Scalia, J., concurring in part and concurring in the judgment).

29. *Id.* at 2459, 2466.

30. *Id.* at 2463.

31. *Id.* at 2465.

32. *Id.* at 2463.

Sixth Amendment concerns addressed in *Booker*. This objection posits that, in certain cases, the sentence will only be within the Guidelines because the sentencing court has engaged in judicial fact-finding. As the majority describes the argument, a "pro-Guidelines 'presumption of reasonableness' will increase the likelihood that courts of appeals will affirm such sentences, thereby increasing the likelihood that sentencing judges will impose such sentences. For that reason . . . the presumption raises Sixth Amendment 'concerns.'"[33] Justice Breyer, relying on *Booker* and the related case of *Blakely v. Washington*,[34] stated that the relevant Sixth Amendment question was "whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)."[35]

The majority's response to this question was that the *Booker* standard of reasonableness review, with or without a presumption, never created this problematic situation. In Justice Breyer's words, "[a] nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the sentencing judge to impose that sentence. Still less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone."[36] Put differently, reasonableness review is never strict enough—neither "forbidding" nor "requiring" any particular sentence—to raise Sixth Amendment concerns. Finally, applying the reasonableness presumption, the majority had little difficulty concluding that the Fourth Circuit's decision to affirm Rita's within-Guidelines sentence was lawful.[37]

Justice Stevens, joined in part by Justice Ginsburg, wrote a separate concurrence in which he sought to develop the idea of reasonableness review by rooting it in the Court's pre-SRA precedents. In particular, Justice Stevens noted that before the passage of the SRA,[38] the Supreme Court had determined that departures from the Guidelines were to be reviewed by appel-

33. *Id.* at 2465 (quoting Brief for Petitioner).
34. 542 U.S. 296, 303–04 (2004).
35. *Rita*, 127 S. Ct. at 2466.
36. *Id.*
37. *See id.* at 2470.
38. That is, before the Guidelines were made mandatory.

late courts using an abuse-of-discretion standard.[39] He argued that this standard should again be applied by courts of appeals in the post-*Booker* era, and that this standard should apply whether or not the sentence was within the Guidelines' recommendations.[40] Finally, although acknowledging that the history of appellate review in the post-*Booker* era had not seen many reversals for within-guidelines sentences, Justice Stevens emphasized that the Guidelines were advisory only, and that the "rebuttability of the presumption is real."[41]

Justice Scalia, joined by Justice Thomas, concurred in the judgment, but wrote separately to object to the majority's interpretation of reasonableness review. The core holding of the *Booker* "merits" opinion majority, according to Justice Scalia, was that "'[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.'"[42] On this view, the problem with the majority's construal of reasonableness review is that "some lengthy sentences will be affirmed (*i.e.*, held lawful) only because of the presence of aggravating facts, not found by the jury, that distinguish the case from the mine-run."[43] In the absence of such judicially-found aggravating facts, those same lengthy sentences would often be substantially above the appropriate Guidelines range, and thus would likely be overturned under the majority's construal of reasonableness review. If there are such sentences, which would be reversed if there were only a guilty plea but are upheld because of additional, judicially-found facts, then the majority's construal of reasonableness review "reintroduce[s] the constitutional defect that *Booker* purported to eliminate."[44]

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39. *Rita*, 127 S. Ct. at 2472 (Stevens, J., concurring) (citing Koon v. United States, 518 U.S. 81, 99 (1996)).

40. Id.

41. *Id.* at 2474.

42. *Id.* at 2476 (Scalia, J., concurring in part and concurring in the judgment) (quoting United States v. Booker, 543 U.S. 220, 244 (2005)).

43. *Id.* at 2476.

44. *Id.* at 2476. Justice Scalia noted that the majority's response to his argument was to call it "hypothetical." *Id.* at 2479 n.4. And, indeed, he acknowledged that there was no Sixth Amendment violation in this case. *Id.* at 2478. Justice Scalia argued, however,

Rather than accede to this course, Justice Scalia argued that reasonableness review should be construed as a mere "procedural review," designed to ensure that the sentencing court follows the procedures set forth in 18 U.S.C. § 3553(a), considers only permissible factors, does not order a sentence "based on clearly erroneous facts," and includes the statutorily required statement of reasons.[45] Such appellate review would not raise any Sixth Amendment concerns because it would never uphold or reverse sentences based upon the presence or absence of judicially-found facts.[46]

Justice Souter filed the only dissenting opinion. Like Justice Scalia, he worried that the majority's construal of reasonableness review—and particularly the presumption of reasonableness that courts of appeals were now permitted to attach to within-Guidelines sentences—would restore the same constitutional problem that *Booker* was supposed to solve.[47] On this basis, Justice Souter would have reversed the opinion of the Fourth Circuit and remanded for a determination of the reasonableness of the sentence without using the presumption.[48] But the major themes of Justice Souter's opinion were a generalized objection to the *Booker* remedy in its historical context and a restatement of the *Booker* remedial dissent's argument that the proper remedy should have been to continue the mandatory guidelines and merely require jury determination of any

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that Sixth Amendment violations are inevitable under the form of reasonableness review defended by the majority, and noted that the Court's precedents require that when deciding between "'two plausible statutory constructions,'" if one such construction "'would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.'" *Id.* (quoting Clark v. Martinez, 543 U.S. 371, 380–81 (2005)).

45. *Id.* at 2483.

46. Justice Scalia contended that this form of appellate review would also, over time, promote the congressionally-mandated goal of sentencing uniformity. *Id.* at 2482–83. It could achieve this goal by ensuring that the sentencing courts generate sentencing statements that allow the Commission to update the Guidelines; then, as the Guidelines improve, "district courts will have less reason to depart from the Commission's recommendations, leading to more sentencing uniformity." *Id.* at 2483.

47. *Id.* at 2487 (Souter, J., dissenting) (noting that "if [sentencing judges] treated the Guidelines result as persuasive or presumptively appropriate, the *Booker* remedy would in practical terms preserve the very feature of the Guidelines that threatened to trivialize the [Sixth Amendment] jury right").

48. *Id.* at 2488 & n.2.

fact necessary to increase a sentence beyond what would be authorized by a guilty plea or a jury verdict.[49]

Rita, in one sense, is an almost stunningly trivial case. The net result was that a trial court could impose a sentence at the lower end of the Guidelines recommendation. Indeed, it is almost impossible to imagine an appellate review standard that *would not* have upheld this sentence. *Rita* is an important case not because it presented any constitutional faults on its own facts, but because the standards used to review Rita's sentence revealed tensions inherent in *Booker*'s remedial opinion. That opinion purported to adhere to the Sixth Amendment and to fulfill the congressionally-mandated goal of ensuring uniformity in sentencing. Its decision to meet these requirements by severing the part of the SRA that mandated uniform sentencing revealed that the Justices in the majority were not just considering, but also deferring to, an additional, unacknowledged policy goal: to ensure the continued viability of judge-based sentencing. In this way, judge-based sentencing won by losing: Whereas *Booker* denied judges the ability to sentence within the Guidelines based on facts that they found themselves, it confirmed their ability to sentence within or depart from the Guidelines, even when the lawfulness of their sentencing decisions, at least implicitly, still depends upon judicially found facts.

When considering whether the *Booker* remedial scheme comports with the Sixth Amendment, the question is not whether a statute theoretically allows an unlimited range of sentences, but instead which sentences, under which circumstances, will be upheld on appeal. Although this question was squarely before the Court in *Rita*, the majority opinion avoided it. In doing so, the Court relied upon and increased the confusion inherent in its reasonableness standard. The most direct example of this is in its discussion of the presumption. The majority offered almost no insight into what the presumption is or how it should operate. Instead, the Court offered a commentary about what the presumption does not do: it "is not binding," it is not "like a trial-related evidentiary presumption," and it does not "reflect strong judicial deference" as do some other presump-

49. *Id.* More directly, Justice Souter argued that because the Court had failed to arrive at this legally correct outcome, Congress should pass legislation to mandate it. *Id.*

tions.[50] The Court then shifted quickly into an explanation of why the presumption exists. The presumption is valid, the Court wrote, because "by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case."[51] The only problem is that the Court omitted any discussion of what the presumption is.[52] The clearest comment on the presumption seems to be the Court's holding that the "courts of appeals' 'reasonableness' presumption" does not have "independent legal effect."[53] Apart from this statement's falsity as a descriptive matter,[54] the idea of a legal presumption without "independent legal effect" is deeply confusing. Perhaps the presumption was described only by what it is not, because it is, in terms of its "independent legal effect," nothing at all.

The second confusing element of the Court's opinion is its discussion of the Sixth Amendment. The majority stated that its presumption does not "*forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone."[55] This is true but misleading. In a case that does not contain any reasons to depart from the Guidelines, the appellate reasonableness review *does forbid* the judge from imposing a sentence substantially higher than the Guidelines provide. Nonetheless, the presumption *does allow* the imposition of such a sentence provided that the judge finds facts that sufficiently increase the sentence recommended by the Guidelines. This combination of results violates the Sixth Amendment.

In the majority opinion, Justice Breyer criticized "[Justice Scalia's] need to rely on *hypotheticals*" to present this chal-

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50. *Id.* at 2463.

51. *Id.*

52. This problem is particularly confusing because the Court's understanding of the presumption differs from the understandings of the Fourth and Seventh Circuits that the presumption shifts the burden to the defendant. *See* United States v. Montes-Pineda, 445 F.3d 375, 379 (4th Cir. 2006) (quoting United States v. Sharp, 436 F.3d 730, 738 (7th Cir. 2006)) ("'[A] defendant can only rebut the presumption by demonstrating that the sentence is unreasonable when measured against the § 3553(a) factors.'").

53. *Rita*, 127 S. Ct. at 2465.

54. *See Montes-Pineda*, 445 F.3d at 379.

55. *Rita*, 127 S. Ct. at 2466.

lenge.[56] The concerns raised by both the petitioners and by Justice Scalia, however, are not merely theoretical exercises.[57] Justice Scalia's opinion reported that, even "[i]n those Circuits that *already* decline to employ the presumption, a within-Guidelines sentence has *never* been reversed as substantively excessive."[58] Those within-Guidelines sentences have likely included sentences that are substantially longer than they would have been absent judicially-found facts; that is the nature of the Guidelines. If, as seems almost certain, those same longer sentences would have been overturned by appellate courts as excessive had they not been supported by such judicially-found facts, then the *Booker* remedy has failed to solve the *Booker* problem—that is, judges can still find facts that raise defendants' maximum sentences.

Not only has the Court failed to solve the *Booker* problem across a set of as-yet-unlitigated cases, but the Court's remedy would almost certainly not have solved it in *Booker* itself.[59] In *Booker*, the defendant, Freddie Booker, was convicted by a jury of possession with intent to distribute 92.5 grams of cocaine base, an offense carrying a maximum sentence of 262 months imprisonment under the sentencing Guidelines.[60] Based, in part, upon a judicial finding that Booker had possessed an additional 566 grams of cocaine base, the judge determined that the Guidelines allowed a sentence of 360 months and imposed that sentence.[61] The sentence was upheld on appeal because it was within the then-mandatory Guidelines. It would have been reversed on appeal had the judge not found that Booker had possessed the additional cocaine. *Rita* does not cure this constitutional problem. If the Fourth Circuit were to review Booker's 360-month sentence under current law, it would almost certainly uphold it based upon the judicially-found facts, and would almost certainly overturn it had those facts not been

56. *Id.*

57. *See id.* at 2475–76 (Scalia, J., concurring in part and concurring in the judgment).

58. *Id.* at 2478 n.3.

59. *See* Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After* United States v. Booker, 41 U. RICH. L. REV. 625, 641 (2007).

60. United States v. Booker, 543 U.S. 220, 227 (2005).

61. Id.

found.[62] This constitutional problem returns in the post-*Rita* regime not in unusual cases, but in those "run-of-the-mill" cases, like *Booker*, for which the *Booker* remedy was presumably designed.[63]

Thus, given the *Booker* remedy, a problematic result was almost inevitable and was not avoided by the Court's construal of the remedy in *Rita*. The remedial majority claimed that its two goals were to solve the constitutional defect and to uphold the legislative goal of sentencing uniformity.[64] Yet, the majority's decision to excise the portion of the Code that made the Guidelines mandatory undermined sentencing uniformity without remedying the constitutional defect. Furthermore, the result of the decision is that neither of these defects can be remedied without making the other worse. The more the Court emphasizes that trial and appellate courts should abide by the Guidelines, the more clearly the constitutional problem will appear. On the other hand, if the Court were to follow Justice Scalia's recommendation and remove all substantive elements from appellate review of sentencing, this would only further undermine the SRA's goal of uniform sentencing. In the face of this dilemma, the Court's solution was merely to obscure both of these issues: it upheld a presumption that, at best, could give the appearance of sentencing uniformity while remaining meaningless enough so as not to violate the Sixth Amendment. The *Booker* remedial majority, however, seems to have failed to

62. This is particularly true given that *Booker* was a "run-of-the-mill case" that "[did] not present any factors that were inadequately considered by the Commission." *Id.* at 235. Thus, according to § 3553, *Booker* did not give the trial court any reason to depart from the sentence recommended by the Guidelines. *Id.* at 235. The lack of any justification under § 3553 to depart from the Guidelines is equally true in a post-*Booker* world. *See* Mullen & Davis, *supra* note 59, at 641.

63. Justice Scalia's dissent in *Booker* anticipated these problems, particularly the irony that the Court, "[i]n order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, . . . discard[ed] the provisions that eliminate discretionary sentencing." *Booker*, 543 U.S. at 304 (Scalia, J., dissenting in part). Justice Scalia commented that "[t]he worst feature of the scheme is that no one knows—and perhaps no one is meant to know—how advisory Guidelines and 'unreasonableness' review will function in practice." *Id.* at 311. Finally, he expressed a worry that the appellate review standard would "preserve *de facto* mandatory Guidelines." *Id.* at 313.

64. *Booker*, 543 U.S. at 246 ("We answer the remedial question by looking to legislative intent.").

achieve either of its goals.[65] Indeed, the only interest that such a scheme does preserve is the interest in ensuring that judges retain as much power as possible in the sentencing process.[66] The Court's conclusion that true sentencing uniformity always "depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction,"[67] makes preservation of judicial power paramount. The *Booker* remedial majority chose the preservation of this power as its primary goal, and it succeeded. Even

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65. The constitutional analysis and practical wisdom of *Booker* have been extensively debated in the literature. *Compare* Douglas B. Bloom, United States v. Booker *and* United States v. Fanfan: *The Tireless March of* Apprendi *and the Intercourt Battle to Save Sentencing Reform*, 40 HARV. C.R.-C.L. L. REV. 539, 555 (2005) (noting that the *Booker* remedial majority had "sacrifice[d] the Guidelines's central tenet: uniformity"), Erwin Chemerinsky, *Making Sense of* Apprendi *and its Progeny*, 37 MCGEORGE L. REV. 531, 540 (2006) (arguing that the Sixth Amendment implies that "it is wrong to convict a person of one crime and sentence the person for another" and that the *Booker* remedy violates this principle and thus was "wrongly decided"), *and* Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts after* Booker: *What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895, 925, 968 (2005) (contending that *Booker*'s constitutional and remedial majority opinions cannot be reconciled and noting that, under *Booker*, perversely, a criminal defendant's Sixth Amendment rights are inferior to a civil litigant's Seventh Amendment Rights), *with* Douglas A. Berman, *Tweaking* Booker: *Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 352 (2006) ("[T]o the extent *Booker* has changed federal sentencing at all, it appears *Booker*'s changes have been mostly for the better and have furthered the basic goals [of the SRA]."), Erica J. Hashimoto, *The Under-Appreciated Value of Advisory Guidelines*, 37 MCGEORGE L. REV. 577, 588 (2006) (contending that the *Booker* remedy is constitutional and that it "appear[s] to further the goals of the Sentencing Reform Act"), Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in* Booker *and* Fanfan, 33 PEPP. L. REV. 615, 636, 673 (2006) (arguing that post-*Booker*, "a judge can avoid a Sixth Amendment violation by exercising genuine sentencing discretion" but worrying that courts might "continue the 'rote' sentencing at issue in *Booker*" and thus continue to violate the Sixth Amendment), *and* Robb London, *Aftermath: the Federal Sentencing Guidelines are dead. Long live the Guidelines.*, HARV. L. BULL., Summer 2005, at 12, 17 (quoting Professors Carol Steiker and William Stuntz as welcoming the positive policy effects of *Booker*).

66. This conclusion is supported by the arguments advanced in Justice Breyer's remedial opinion. That opinion offered two primary reasons why the Court chose the remedy of making the Guidelines advisory rather than merely requiring that all necessary sentencing facts be proven to a jury (which surely would have remedied that constitutional problem and would likely have ensured greater sentencing uniformity as well). First, Justice Breyer maintained that statutory references to decisions made by "the court" during sentencing can only refer to the judge and cannot possibly refer to the judge working together with the jury. *Booker*, 543 U.S. at 249. Second, only judicial determination of facts and sentencing can create true uniformity. *Id.* at 250. Note that both of these reasons operate as justifications for choosing the preservation of judicial autonomy as the Court's primary goal.

67. *Id.* at 250.

though the constitutional part of *Booker* seemed to threaten the right of judges to "determine" the real conduct of defendants, the remedial opinion ensured not only that judges were allowed to determine the relevant sentencing facts, but also that they were allowed to sentence defendants based upon those facts without being confined by mandatory Guidelines.

Rita presented the Court with an opportunity to clarify the remedial holding of *Booker* in a way that ensured that the federal sentencing system no longer violated the Sixth Amendment. Rather than confront this problem directly and craft a real solution to it, the Court obfuscated the issue and left unresolved a tension created by *Booker*. This outcome may have been the best that the Court could have made of a bad situation. Justices Stevens, Scalia, and Souter all noted that the opinions in *Rita* were premised on an acceptance of the remedial holding in *Booker* based on *stare decisis*.[68] Unless the Court was willing to reverse the remedial holding of *Booker*, the only other available option was to adopt Justice Scalia's procedural review, a move that would have been tantamount to admitting that the *Booker* remedial majority had been an abject failure in its attempt to achieve sentencing uniformity. The real test of the *Booker* remedy may well be yet to come, if a case arises where a sentence is only "reasonable" based upon judicially found facts, and where, in the absence of such facts, the given sentence would likely have been held unreasonable.[69] The confused nature of the Court's explanations of the presumption and of reasonableness review make the identification of such cases substantially more difficult. It seems almost certain, however, that such cases will occur, and that at least some defendants will suffer the effects that *Booker* was supposed to eliminate.

John Playforth

68. *Rita*, 127 S. Ct. at 2470 (Stevens, J., concurring); *id.* at 2475 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2488 (Souter, J., dissenting).

69. Neither of the two cases that the Court decided this term, *Kimbrough v. United States*, 128 S. Ct. 558 (2007), and *Gall v. United States*, 128 S. Ct. 586 (2007), seems to present this kind of as-applied challenge to the *Booker* remedial opinion.

THE COURSE CORRECTION A CENTURY IN THE MAKING: *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007)

Numerous sources pointed to the first full term of the Roberts Court as proof of a strong rightward tilt in the political orientation of the Supreme Court.[1] Drawing from disparate cases in areas ranging from election law[2] and free speech[3] to school segregation[4] and the stringency of court filing deadlines,[5] journalists,[6] public officials,[7] academics,[8] and advocacy groups[9] de-

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1. *See, e.g*, Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423 (2007); Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at B16.

2. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007).

3. Morse v. Frederick, 127 S. Ct. 2618 (2007).

4. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

5. Bowles v. Russell, 127 S. Ct. 2360 (2007).

6. *See, e.g.*, Greenhouse, *supra* note 1, at B16; Helen Thomas, Editorial, *High Court Takes Giant Steps Backward*, SEATTLE POST-INTELLIGENCER, July 5, 2007, at B6.

7. *See, e.g.*, Press Release, Senator Edward M. Kennedy, The Supreme Court's Wrong Turn—And How to Correct It (Nov. 19, 2007), *available at* http://kennedy.senate.gov/newsroom/press_release.cfm?id=BAC956EE-CD30-4C9C-9E4B-B0C0A3D6451F ("Chief Justice John Roberts and Associate Justice Samuel Alito have already moved the Supreme Court—and United States law—dramatically to the right. Their judicial record belies the commitment to open-mindedness, modesty, and compassion they professed during their confirmation hearings."); Senator Charles E. Schumer, Keynote Speech to the American Constitution Society (July 27, 2007), http://www.senate.gov/~schumer/SchumerWebsite/pressroom/record.cfm?id=280107 ("[A]t their confirmation hearings, both Roberts and Alito presented themselves as fair and compassionate, as jurists who would treat the powerful and the powerless equally before the law. Yet the decisions this term were especially cruel, advancing the traditional conservative preferences for the government over criminal defendants and the interests of business over consumers and employees.").

8. *See, e.g.*, Chemerinsky, *supra* note 1, at 432, ("[E]very Republican President has sought to create a solid conservative voting majority on the Supreme Court. Now, apparently, it exists thanks to the two newest members, Chief Justice John Roberts and Associate Justice Samuel Alito."); *see also* Greg Stohr, Roberts Steered U.S. Supreme Court as It Trimmed Precedents, Bloomberg.com, (June 29, 2007), http://www.bloomberg.com/apps/news?pid=washingtonstory&sid=a3oDxXo5yETw (quoting Professor Cass Sunstein's description of Chief Justice Roberts as "unrelenting in his conservative voting pattern").

9. *See, e.g.*, Press Release, People for the American Way, Supreme Court Swerves Hard Right (June 28, 2007), *available at* http://www.pfaw.org/pfaw/

cried the 2006 Supreme Court Term as a full-frontal assault on democratic institutions and evidence that Chief Justice Roberts and Justice Alito were far more conservative than their confirmation hearings had suggested. Furthermore, various commentators suggested that the two newly appointed Justices had joined Justices Scalia, Kennedy, and Thomas in forming a five-Justice "conservative" majority that abandoned sound legal principles to reach politically conservative results.[10]

Last term, a closely divided Court decided *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[11] For 96 years, the Court had adhered to a rule of *per se* illegality for minimum resale price maintenance (RPM) on the grounds that it was a violation of the Sherman Act.[12] That is, it was illegal for any manufacturer to require its distributors to agree to sell its manufactured product at or above a set retail price floor, regardless of the agreement's impact on overall competition. In *Leegin*, however, a 5-to-4 majority of the Court overturned this "*Dr. Miles* rule" in favor of a broader "rule of reason" analysis that considers the likely competitive effects of potentially anticompetitive practices on a case-by-case basis.[13] Following the dissent's lead, various commentators condemned the ruling as a rejection of longstanding precedent in favor of business interests and at the expense of consumers.[14] To the contrary, the Court's decision was not only the economically appropriate outcome, it was consistent with the doctrine of *stare decisis*, the original understanding and text of the Sherman Act, and the ordinary defer-

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general/default.aspx?oid=24287&print=yes; Press Release, Center for American Progress, The Politicization of the Supreme Court (June 28, 2007), *available at* http://www.americanprogress.org/issues/2007/06/supreme_court.html.

10. *See, e.g.*, Jeffrey Rosen, *Court Approval: Will John Roberts Ever Get Better?*, THE NEW REPUBLIC, July 23, 2007, at 9–12; Schumer, *supra* note 7 ("In case after case, our most recently confirmed Justices have appeared to jettison decisions recently authored by their immediate predecessors. Although Roberts and Alito both expressed their profound respect for stare decisis at their confirmation hearings, many of their decisions have flouted precedent.").

11. 127 S. Ct. 2705 (2007).

12. *See* Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408–09 (1911).

13. *Leegin*, 127 S. Ct. at 2725.

14. *See, e.g.*, Chemerinsky, *supra* note 1, at 432; Greenhouse, *supra* note 1, at B16; Thomas, *supra* note 6, at B6 ("[T]he high court tossed out a flurry of decisions that overturned or reinterpreted long-standing liberal precedents . . . . They also showed a pro-business and anti-consumer slant."); Press Release, People for the American Way, *supra* note 9; Press Release, Center for American Progress, *supra* note 9.

ence extended to the political branches for those questions that do not require legal inquiry.

Leegin Creative Leather Products designs, manufactures, and distributes leather goods and women's fashion accessories under the brand name "Brighton."[15] Brighton products are sold at more than 5,000 locations, primarily small, independent boutiques and specialty stores.[16] Kay's Kloset, a women's apparel store owned and operated by PSKS, Inc., sold Brighton goods from 1995 until 2002.[17] Brighton was the store's most important brand and at one time accounted for nearly half of the store's profits.[18] Two years after Kay's began carrying Brighton products, Leegin initiated a pricing policy under which the company refused to sell Brighton goods to retailers that discounted the goods below suggested retail prices.[19] The policy was in harmony with Leegin's choice to distribute through smaller, independent retailers on the theory that those retailers provided customers more services and an overall shopping experience superior to that offered by large, impersonal discount stores.[20]

Leegin adopted the pricing policy so that its retailers would have sufficient profit margins to provide customers those services it regarded as key to its overall sales strategy.[21] The company had also expressed concern that heavy discounting by retailers harmed the Brighton brand image and reputation.[22] In late 2002, Leegin discovered that Kay's had marked down its entire Brighton inventory by 20 percent. It requested that Kay's cease discounting and, when Kay's refused, Leegin stopped selling to the store.[23] The loss of the Brighton brand had a significantly negative impact on Kay's subsequent sales.[24] Kay's parent company sued Leegin for violating section 1 of the Sherman Act, alleging that Leegin had entered into illegal agreements with its retailers to fix the prices of Brighton prod-

15. *Leegin*, 127 S. Ct. at 2710.
16. *Id.*
17. *Id.* at 2711.
18. *Id.*
19. *Id.*
20. *Id.* at 2710–11.
21. *Id.* at 2711.
22. *Id.*
23. *Id.*
24. *Id.*

ucts.[25] A jury awarded PSKS $1.2 million in damages, which the court trebled.[26]

On appeal, Leegin claimed that an outcome-oriented rule of reason approach should be applied to PSKS's antitrust claims, arguing that the Supreme Court had not consistently applied the *per se* rule of RPM illegality established in *Dr. Miles*.[27] Alternatively, Leegin argued that its pricing policy did not result in any competitive harm and that it therefore qualified for an exception to the *per se* rule.[28] The United States Court of Appeals for the Fifth Circuit affirmed the jury verdict, holding that the Supreme Court had consistently applied the *per se* rule to minimum price-fixing agreements and, further, that this continued application was consistent with congressional intent.[29] The court likewise concluded that prior exceptions made to the *per se* rule did not apply, because they did not involve vertical minimum price fixing (that is, manufacturers setting the prices their distributors charge) and had occurred prior to the Supreme Court's reaffirmation of the *per se* rule's application to RPM in recent years.[30]

The Supreme Court reversed and remanded. In so doing, the Court overruled *Dr. Miles* and held that vertical price restraints should be judged by the rule of reason.[31] Writing for the majority, Justice Kennedy[32] declared that "[t]he rule of reason is the accepted standard for testing whether a practice restrains trade,"[33] and that *per se* rules are confined to restraints "that would always or almost always tend to restrict competition and decrease output."[34] Citing prior antitrust cases, the Court noted that *per se* prohibitions are reserved for restraints that have "'manifestly anticompetitive' effects,"[35] and "'lack . . . any re-

25. *Id.* at 2712.

26. *Id.*

27. PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 171 F. App'x 464, 466 (5th Cir. 2006).

28. *Id.* at 467.

29. *Id.* at 466–67.

30. *Id.* at 467.

31. *Leegin*, 127 S. Ct. at 2725.

32. Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

33. *Leegin*, 127 S. Ct. at 2712.

34. *Id.* at 2713 (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

35. *Id.* (quoting Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977)).

deeming virtue.'"[36] The majority also pointed to precedent holding that a *per se* rule is "appropriate only after courts have had considerable experience with the type of restraint at issue"[37] and "only if [courts] can predict with confidence that [the restraint] would be invalidated in all or almost all instances under the rule of reason."[38] Indeed, the Court had previously "expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices [was] not immediately obvious."[39]

In addition, the majority contended that the original rationales for the *per se* rule had since been rejected by the Court, and that it was therefore necessary to revisit the appropriateness of *per se* rules for agreements to fix minimum resale prices.[40] The opinion noted that economics literature provides many competitive justifications for RPM that are barred by the *per se* rule.[41] Indeed, the Court asserted that most competitive justifications for minimum RPM, such as encouraging investment in services and facilitating market entry, are similar or identical to the justifications for other vertical restraints to which the Court already applies the rule of reason.[42] While conceding that RPM has the potential for serious anticompetitive uses, the majority asserted that "it cannot be stated with any degree of confidence that retail price maintenance always or almost always tends to restrict competition and decrease output," nor that efficient uses are either infrequent or hypothetical.[43]

The Court further found that maintaining the *per se* restriction was not justified by administrative convenience or the

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36. *Id.* (quoting Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985)).

37. *Id.* (citing Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 9 (1979)).

38. *Id.* (citing Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344 (1982)).

39. *Id.* (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997)).

40. *Id.* at 2714.

41. *Id.* The majority quoted from an amicus brief filed by several notable economists asserting that "[i]n the theoretical literature, it is essentially undisputed that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects." *Id.* at 2714–15 (quoting Brief of Amici Curiae Economists in Support of Petitioner at 16, *Leegin*, 127 S. Ct. 2705 (No. 06-408)).

42. *Id.* at 2715–16. The Court has abandoned the *per se* rule in favor of the rule of reason for non-price restrictions, Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56–59 (1977), and for maximum resale price maintenance, *Khan*, 522 U.S. at 18.

43. *Leegin*, 127 S. Ct. at 2717.

possibility of higher consumer prices. Preserving an inefficient and ill-reasoned rule simply for administrative convenience "suggests *per se* illegality is the rule rather than the exception," a misinterpretation of antitrust law.[44] Adhering to such a rationale "would undermine, if not overrule, the traditional 'demanding standards' for adopting *per se* rules."[45] Furthermore, the majority asserted, the *per se* rule may actually "increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage."[46] Regarding the dissent's assertion that RPM likely results in higher prices, the Court noted that numerous forms of producer behavior may increase the price of the goods manufactured and that a *per se* rule cannot be justified by the possibility of higher prices "absent a further showing of anticompetitive conduct."[47] Additionally, such an argument misrepresents the aims of the manufacturer and "overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins."[48]

Despite the faulty reasoning of *Dr. Miles* and its status as an outlier among vertical restraint cases, the Court's opinion acknowledged the weight of longstanding precedent and the importance of maintaining settled law when deciding cases.[49] The majority contended, however, that *stare decisis* is not as significant in cases that consider the scope of the Sherman Act, which, from its inception, has been treated by the Court as a statute conferring common law making authority on courts "to meet the dynamics of present economic conditions."[50] Moreover, considering the early narrowing of *Dr. Miles*,[51] the nearly forty years

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44. *Id.* at 2718.

45. *Id.* (quoting *GTE Sylvania*, 433 U.S. at 50). The majority also cited *GTE Sylvania* for the proposition that, ultimately, "administrative 'advantages are not sufficient in themselves to justify the creation of *per se* rules.'" *Id.* (quoting *GTE Sylvania*, 433 U.S. at 50 n. 16).

46. *Id.* This includes encouraging an optimal level of retail services and promotional efforts, as well as giving consumers a broader range of brand options to choose from. *Id.* at 2718–19.

47. *Id.* at 2718.

48. *Id.*

49. *Id.* at 2720.

50. *Id.*

51. "Only eight years after *Dr. Miles*, . . . the Court reined in the decision by holding that a manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them." *Id.* at 2721 (citing United States v.

of RPM legality subsequently established by congressional statute,[52] and the Court's holdings limiting and even overruling other strict vertical restraint prohibitions,[53] the precedential argument was insufficient to overcome the other problems with the *per se* rule. Finally, the Court rejected the argument that the passage of the Consumer Goods Pricing Act (CGPA), repealing the Miller-Tydings and McGuire Acts,[54] had codified *per se* illegality for vertical price restraints, noting that the CGPA merely rescinded the statutory provisions that made the practice *per se* legal, and that the question of legality would again be determined solely by judicial interpretations of the Sherman Act.[55]

Justice Breyer dissented.[56] He argued that: (1) although it was clear that RPM can be anticompetitive, it is unclear how often it is procompetitive;[57] (2) the rule of reason will make it too difficult for courts to "separate the beneficial sheep from the antitrust goats," and a *per se* rule is much easier to administer;[58] and (3) whether or not the underlying economic rationale is flawed, *stare decisis* concerns merit upholding the *per se* rule.[59] Further, the *per se* rule had been relied upon by the legal profession, business, and the public for close to a century.[60]

In addition, the dissent criticized what it viewed as the majority's over-reliance on economic arguments, describing econo-

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Colgate & Co., 250 U.S. 300, 307–08 (1919)). Under *Colgate*, the Sherman Act applies only to concerted action, not universal pricing policies. *See Colgate*, 250 U.S. at 307–08.

52. In 1937, Congress passed the Miller-Tydings Fair Trade Act, 50 Stat. 693 (1937) (codified as amended at 15 U.S.C. § 1 (2000)), amending the Sherman Act to legalize resale price maintenance and thus effectively overturning the Court's decision in *Dr. Miles*. Resale price maintenance remained *per se* legal until Congress repealed the Miller-Tydings Act, along with the McGuire Act, 66 Stat. 632 (1952) (codified as amended at 15 U.S.C. § 45 (2000)), with the passage of the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (codified at 15 U.S.C. §§ 1, 45 (2000)). *See Leegin*, 127 S. Ct. at 2723–24.

53. *See, e.g.*, Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); State Oil Co. v. Khan, 522 U.S. 3 (1997).

54. *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (codified at 15 U.S.C. §§ 1, 45 (2000)).

55. *Leegin*, 127 S. Ct. at 2723–24.

56. Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg.

57. *Leegin*, 127 S. Ct. at 2729–30 (Breyer, J., dissenting).

58. *Id.*

59. *Id.* at 2731–32.

60. *Id.* at 2731.

mists' opinions as "conflicting" and lacking in consensus.[61] It noted that most of the arguments relied on by the majority to overturn the *per se* rule had been well known for close to half a century and that Congress had repeatedly found those grounds insufficient for overturning the rule.[62] The dissent also cited studies suggesting that RPM tends to produce higher consumer prices than would otherwise be the case.[63] The dissent acknowledged some procompetitive justification for RPM and conceded that vertical price fixing "can bring benefits," but concluded that it was unclear how frequently these benefits accrue.[64] Given the lengthy precedent of *per se* treatment and the view that courts will "not very easily" be able to "identify instances in which the benefits [of vertical price fixing] are likely to outweigh potential harms,"[65] the dissent found insufficient cause to overturn *Dr. Miles*.

Finally, the dissent applied the same guidelines for overturning precedent[66] outlined by Justice Scalia in a concurrence handed down three days earlier,[67] and concluded that "every *stare decisis* concern . . . counsel[ed] against overruling" *Dr. Miles*.[68] "It is difficult for me to understand," Justice Breyer wrote, "how one can believe both that (1) satisfying a set of *stare decisis* concerns justifies overruling a recent constitutional decision . . . but (2) failing to satisfy any of those same

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61. *Id.* at 2729.

62. *Id.* at 2725–26.

63. *Id.* at 2728.

64. *Id.* at 2729.

65. *Id.* at 2730.

66. *See id.* at 2734–36 ("First, the Court applies stare decisis more 'rigidly' in statutory than in constitutional cases. This is a statutory case. Second, the Court does sometimes overrule cases that it decided wrongly only a reasonably short time ago. . . . We here overrule one *statutory* case, *Dr. Miles*, decided 100 years ago . . . . Third, the fact that a decision creates an 'unworkable' legal regime argues in favor of overruling. Implementation of the *per se* rule . . . has proved practical over the course of the last century . . . . Fourth, the fact that a decision 'unsettles' the law may argue in favor of overruling. The *per se* rule is well-settled law . . . . It is the majority's change here that will unsettle the law. Fifth, the fact that a case involves property or contract rights, where reliance interests are involved, argues against overruling. This case involves contract rights and perhaps property rights (considering shopping malls). And there has been considerable reliance upon the *per se* rule. . . . Sixth, the fact that a rule has become 'embedded' in our 'national culture' argues strongly against overruling. The *per se* rule . . . has long been 'embedded' in the law of antitrust." (citations omitted)).

67. FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2684–86 (2007) (Scalia, J., concurring).

68. *Leegin*, 127 S. Ct. at 2737 (Breyer, J., dissenting).

concerns nonetheless permits overruling a longstanding statutory decision."[69]

Justice Breyer's conclusion that the Court had overreached and his suggestion that the majority had been less than intellectually consistent in doing so was repeated in the media, among politicians and academics, and by politically progressive organizations. Only days after the *Leegin* decision, Linda Greenhouse called the Roberts Court "the Supreme Court that conservatives had long yearned for and that liberals feared," declaring that, "[t]his was a more conservative court, . . . its majority sometimes differing on methodology but agreeing on the outcome."[70] Referencing *Leegin* among other decisions, Greenhouse intoned that "how the court is treating its precedents" was a recurring question throughout the term.[71] On the day *Leegin* was decided, People for the American Way issued a statement opining that the "Court has shown the same respect for precedent that a wrecking ball shows for a plate glass window,"[72] while the Center for American Progress decried *Leegin*'s "disregard for precedent," declaring that Chief Justice Roberts and Justice Alito, in their first full term, had treated the notion of precedent with an "alarming lack of respect."[73] Less than three months after the decision was issued, the Senate held hearings on whether *Leegin* meant the end of consumer discounts.[74] Many of these critiques seemed to suggest that, in overturning *Dr. Miles*, the conservative wing of the Supreme Court had abandoned the principles of judicial restraint[75]—adherence to text and original meaning, deference to the political branches, and respect for *stare decisis*—in order to achieve a pro-business result. The *Leegin* decision thus seemed to fit neatly

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69. *Id.*

70. Greenhouse, *supra* note 1, at B16.

71. *Id.*

72. Press Release, People for the American Way, *supra* note 9.

73. Press Release, Center for American Progress, *supra* note 9.

74. *The Leegin Decision: The End of Consumer Discounts or Good Antitrust Policy?: Hearing Before the Subcomm. on Antitrust, Competition Pol'y and Consumer Rights of the S. Comm. on the Judiciary*, 110th Cong. (forthcoming 2007), *available at* http://judiciary.senate.gov/hearing.cfm?id=2893.

75. *See, e.g.*, Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)); Richard G. Wilkins et al., *Supreme Court Behavior 2005 Term*, 34 HASTINGS CONST. L.Q. 505, 507 n.9 (2007).

into the broader narrative of a conservative majority determined to place results above principle.[76]

Contrary to these criticisms, *Leegin*'s reversal of *Dr. Miles* and its corresponding application of rule of reason review to RPM was a sorely needed injection of economic rationality into this area of antitrust law. The decision was also completely in harmony with principles of judicial restraint. Many commentators have argued that the economic reasoning behind then-Justice Hughes's majority opinion in *Dr. Miles* was unambiguously flawed.[77] The fatal turn in *Dr. Miles*'s logic came as Justice Hughes equated vertical price fixing with horizontal cartel behavior.[78] His assumption that a manufacturer's motive in eliminating price rivalry among its dealers is the same as that of dealers choosing to form a cartel has been widely challenged by scholars.[79] A producer has no interest in guaranteeing its dealers monopoly profits at the cost of a reduction in the quantity of its goods sold.[80] Rather, as the Court in *Leegin* rightly pointed out, a producer will generally pursue distribution costs that are as low as possible.[81] Thus, Justice Hughes's conclusions that RPM never serves producer interests and has the same effects as dealer cartels are based on mistaken assumptions.

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76. For example, Professor Erwin Chemerinsky opined that "conservatives finally got their Court," and that Chief Justice Roberts and Justice Alito "have been everything that conservatives could have dreamed of." Chemerinsky, *supra* note 1, at 423. Professor Chemerinsky construed the *Leegin* decision as one that "favor[ed] businesses over consumers and employees," *id.* at 432, concluding that "the Court made it much more difficult to sue businesses for antitrust violations," *id.* at 436. Professor Martha Nussbaum described *Leegin* as a holding with a "libertarian link," in which "the Court, in [a] highly disputed technical context[], favored business and disfavored consumers." Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 81 n.350 (2007). Professor Nussbaum also noted that *Leegin* was "particularly surprising because it overrules a longstanding precedent on grounds that, as the dissenting opinion notes, appear not to conform to factors previously found relevant, particularly in statutory cases." *Id.*

77. *See, e.g.*, 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (2d ed. 2004); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (2d ed. 1993); RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001).

78. *See* BORK, *supra* note 77, at 33.

79. *See id.*

80. *See, Leegin*, 127 S. Ct. at 2718–19.

81. *Id.* at 2718.

Indeed, most antitrust scholars have attacked the *Dr. Miles* decision. Professor Phillip Areeda wrote that "the *Dr. Miles* rule seems to rest on categorical premises that are undoubtedly incorrect and therefore ripe for reexamination."[82] Judge Posner has called the *per se* rule "a sad mistake," with neither "theoretical basis, nor empirical support."[83] On *Dr. Miles*, Judge Bork wrote, "It is rarely possible to identify one decisive misstep that has controlled a whole body of law," calling Justice Hughes's rationale "such an instance" and the resulting approach to RPM "mischievous and arbitrary to this day"[84] and "at war with sound antitrust policy."[85] All three called for the abolition of the *per se* rule.[86] Some scholars would have gone farther than the Court did in *Leegin*.[87]

Not only was the initial decision in *Dr. Miles* incorrect, its doctrine had become inconsistent with the Court's approach to similar forms of vertical arrangements that were subsequently held subject to the rule of reason. Thirty years ago, when the Court held that non-price restrictions on competition, such as exclusive sales territories, should be governed by the rule of reason, it recognized the possible procompetitive effects of such restrictions, including the dealers-service theory frequently raised in support of RPM.[88] Various experts have argued persuasively that RPM and vertical non-price restraints have parallel competitive justifications and similar influence

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82. 8 AREEDA & HOVENKAMP, *supra* note 77, ¶ 1628e, at 294.

83. POSNER, *supra* note 77, at 189.

84. BORK, *supra* note 78, at 32.

85. *Id.* at 280.

86. *See* 8 AREEDA & HOVENKAMP, *supra* note 77, ¶ 1628, at 289; BORK, *supra* note 77, at 298; POSNER, *supra* note 77, at 189. Notably, Justice Breyer once wrote of Professor Areeda's seminal compendium of antitrust law, that "most practitioners would prefer to have two paragraphs of Areeda's treatise on their side than three Courts of Appeals or four Supreme Court Justices." Justice Stephen Breyer, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889, 890 (1996).

87. Judge Bork has argued that resale price maintenance ought to be *per se* legal, *see* BORK, *supra* note 77, at 288, as has Judge Posner, *see* Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 6 (1981). Additionally, Judge Frank Easterbrook has argued for a presumption of legality in certain resale price maintenance cases. *See* Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 157–59 (1984).

88. *See* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 70 (1977) (White, J., concurring).

on both competition and consumer welfare.[89] Yet RPM remained bound to the *per se* rule. Conversely, the law has long treated horizontal price fixing and horizontal market division identically.[90] Furthermore, eleven years ago, the Court in *State Oil Co. v. Khan*[91] held maximum RPM subject to the rule of reason, concluding unanimously that the practice did not have a "predictable and pernicious anticompetitive effect"[92] that would merit *per se* treatment.[93] Writing for the Court, Justice O'Connor justified overruling *Albrecht v. Herald Co.*,[94] stating that, since its decision in *GTE Sylvania*, the Court had become more sensitive to the actual procompetitive effects of vertical arrangements.[95]

The concerns of the dissent and commentators notwithstanding, the majority opinion showed appropriate respect for *stare decisis*. Although the Court did overturn a longstanding precedent, it replaced it with a better-established rule for how courts should consider potentially anticompetitive practices. As the majority properly noted, the default rule in antitrust cases is the rule of reason.[96] The *per se* rule is disfavored, and should only be used when the outcome of a particular practice is clear and where the practice is anticompetitive all or nearly all of the time.[97] The dissenters implicitly acknowledged that RPM fails this standard, conceding that procompetitive uses for RPM theoretically exist.[98] Still, the dissenters dismissed the consequences of their concession, stating that they were unsure of the real prevalence of RPM benefits in practice.[99] They did not credit empirical evidence on the question, finding it insufficiently demonstrative of the positive effects of RPM.[100]

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89. *See, e.g.*, Herbert Hovenkamp, *Vertical Restrictions and Monopoly Power*, 64 B.U. L. REV. 521, 522–23 (1984).

90. BORK, *supra* note 77, at 282.

91. 522 U.S. 3 (1997).

92. *Id.* at 10.

93. *Id.* at 18.

94. 390 U.S. 145 (1968) (holding vertical maximum price restrictions *per se* illegal).

95. *See Khan*, 522 U.S. at 13–15.

96. *Leegin*, 127 S. Ct. at 2712.

97. *Id.* at 2713.

98. *See id.* at 2729 (Breyer, J., dissenting).

99. *See id.* at 2730.

100. *See id.* at 2732.

The dissent misplaced the burden of persuasion on the majority, suggesting that "[t]hose who wish this Court to change so well-established a legal precedent bear a heavy burden of proof."[101] To the contrary, the rule of reason is the *de facto* rule, and it is up to the dissenting Justices to demonstrate how RPM "always or almost always tend[s] to restrict competition," has "manifestly anticompetitive effects," and "lack[s] any redeeming virtue."[102] Indeed, the lack of concrete examples should be sufficient to return the practice to the rule of reason, because "the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue."[103] As Areeda and Hovenkamp note, the Court's willingness to formulate rigid legal rules without sufficient familiarity with the practice at issue is what complicated the treatment of vertical price fixing in the first place:

> Unlike the usual development of antitrust law—to start with case-by-case analysis and then move over time toward subrules specifying criteria and presumptions—minimum resale price maintenance was condemned absolutely from the beginning, at a time when the practice was very poorly understood. The unfortunate result is that it has rarely been examined by courts since, because the per se rule makes development of a record concerning anticompetitive effects unnecessary.[104]

Rather than disdain for precedent, the majority showed respect for the Court's longstanding duty in interpreting the Sherman Act to craft sound and cohesive antitrust doctrine, to correct outliers as economic knowledge and case experience increases, and to broadly protect and expand competition. Thus, overturning *Dr. Miles* functioned as a course correction that placed the legal approach to vertical RPM much more in line with broader antitrust precedent. In fact, the *Leegin* decision fits far better with present antitrust law than *Dr. Miles* ever did.

Similarly, the majority in *Leegan* showed deference to the interpretive principles of originalism and textualism. The Sherman Act was written in intentionally broad and ambigu-

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101. *Id.* at 2731.

102. *Id.* at 2713 (majority opinion) (citations omitted) (punctuation omitted).

103. *Id.*

104. 8 AREEDA & HOVENKAMP, *supra* note 77, ¶ 1628e, at 294.

ous terms: "Every contract, combination . . . or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal."[105] Although the statute's text seems to establish a broad scope for the types of activities that can trigger an antitrust violation, it limits illegality only to those shown to restrain trade. Shifting away from a *per se* rule toward a case-by-case approach is more in line with the statute's text, which prohibits those practices (and only those practices) that hurt competition. Whereas Congress clearly intended to outlaw unreasonably anticompetitive practices, it has been difficult to determine what particular practices Congress aimed to restrict, because the legislative history surrounding the Sherman Act is generally considered vague[106] and contradictory.[107] As such, originalist analysis of the statute has largely focused on identifying Congress's broad policy goals, a subject that is itself in dispute. Modern courts have tended to adopt the fictional premise that Congress intended to maximize economic efficiency[108]—an interpretation influentially advocated by then-Professor Robert Bork[109]—but other scholars have asserted that Congress's primary concern was either to prevent unfair transfers of wealth from consumers to producers[110] or to protect small firms against larger competitors.[111] Because it results in increased efficiency[112] and benefits

105. The Sherman Act, 15 U.S.C. § 1 (2004). Although the Act does not specify that restraints must be "unreasonable," the Court has not taken a literal approach to the language, but has instead interpreted the Act to prohibit *undue* restraints of trade. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59–60 (1911); United States v. American Tobacco Co., 221 U.S. 106, 179–80 (1911).

106. *See, e.g.*, 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 106, at 14 (1978) ("Neither the language nor the legislative history . . . is very illuminating about what specifically is allowed or prohibited.").

107. *See, e.g.*, 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 103b, at 52 (3d ed. 2006) (noting that "[t]he legislative history of the Sherman Act does not point consistently in any single direction," particularly on whether courts should protect consumers or competitors, and the importance of maximizing economic efficiency); David F. Shores, *Antitrust Decisions and Legislative Intent*, 66 MO. L. REV. 725 (2001).

108. *See, e.g.*, 1 AREEDA & HOVENKAMP, *supra* note 107, ¶ 103d2, at 61.

109. *See* Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966).

110. *See, e.g.*, Robert H. Lande, *Wealth Transfers as the Original and Primary Concerns of Antitrust*, 34 HASTINGS L.J. 65 (1982).

111. *See, e.g., id.* at 101–05; 1 AREEDA & HOVENKAMP, *supra* note 107, ¶ 103c2, at 53.

consumers[113] and smaller retail firms,[114] eliminating the *per se* treatment of RPM furthers each of these goals, regardless of which one it was Congress's primary purpose to effect.

Lastly, the Court's opinion shows appropriate deference to the legislative and executive branches. *Leegin* did not overturn or undermine any political branch decision; it merely modified the common law understanding of broad legal categories. The dissent, however, suggested that the majority acted contrary to the will of Congress, as evidenced by its passage of the Consumer Goods Pricing Act. According to Justice Breyer, in repealing legal RPM, Congress "thereby consciously *extended Dr. Miles' per se* rule,"[115] and "fully understood, and consequently intended, that the result of its repeal . . . would be to make minimum resale price maintenance *per se* unlawful."[116] The dissenters acknowledged that Congress did not prohibit the Court from reconsidering the *per se* rule, but nevertheless argued that "enacting major legislation premised upon the existence of that rule constitutes important public [that is, legislative] reliance" on it.[117]

Courts exhibit appropriate deference to the political branches when they leave the broader policy questions to elected officials. Judicial deference is not accomplished, as the dissent seemed to suggest, by attempting to divine how elected officials would have the Court vote on such questions and following suit. As the majority pointed out, Congress could have gone further by explicitly prohibiting vertical RPM through statute, but instead chose a "more flexible option" in the

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112. *See, e.g., Leegin*, 127 S.Ct. at 2714–16.

113. For a discussion of how RPM can benefit consumers despite leading to higher prices, see F. M. Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687, 691–705 (1983); Richard Posner, *Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 17–19 (1977).

114. Efficient RPM should help smaller retail businesses, which tend to provide a greater number of services for customers, compete against national retailers, which typically compete purely on price.

115. *Leegin*, 127 S. Ct. at 2731 (Breyer, J., dissenting).

116. *Id.* at 2732.

117. *Id.* The dissent goes on to argue that Congress's decision to enact the CGPA while "aware of the relevant arguments [in favor of RPM] constitutes even stronger reliance upon the Court's keeping the [*per se*] rule, at least in the absence of some significant change in respect to those arguments." *Id.*

CGPA.[118] Judge Easterbrook has explained how the Court should treat the passage of the CGPA within the context of RPM:

> Congress always has a choice when it legislates on antitrust, and the Court honors Congress when it respects that choice. The choice made in 1975 [with the passage of the CGPA] was to return RPM issues to the control of antitrust principles, free of state law, rather than to adopt a legislative rule specifying how to treat RPM. . . . It would be quite unfortunate if legislators' *assumptions*, rather than positive legislation, could alter the course of legal development.[119]

In its modern life, antitrust law has often been manipulated for political purposes. Indeed, some have suggested that the Sherman Act was initially passed simply "to satisfy the demands of an array of political interest groups."[120] The Supreme Court's decision in *Leegin* will not put an end to antitrust laws that limit procompetitive practices and thereby inadvertently injure consumers; Congress retains the authority to impose such restrictions, regardless of their competitive merit. The majority's decision in *Leegin* did, however, correct an area of antitrust law long in need of intellectual updating in a way that will benefit consumers. In so doing, the Court issued a decision reflecting deference to congressional intent, sound jurisprudence, and the best practices of economics and market competition, not a political agenda.

Michael Komenda

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118. *Id.* at 2724 (majority opinion).

119. Easterbrook, *supra* note 87, at 139. In addition, Judge Easterbrook points out that, at the time of the repeal, the state of the law had two components: (1) *per se* illegality of RPM; and (2) the common law nature of antitrust, which allows judges to modify aspects of antitrust law whenever they are presented with better arguments. "If Congress approved one (the per se rule) by silence, it approved the other too." *Id.*

120. Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-examined*, 30 ECON. INQUIRY 263, 264 (1992).