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INTERNATIONAL LAW AND U.S. FOREIGN POLICY

THE FORTIETH ANNUAL FEDERALIST SOCIETY
NATIONAL STUDENT SYMPOSIUM ON LAW AND PUBLIC POLICY—2021

Senator Mike Lee
Ronald A. Cass
Oona A. Hathaway
John O. McGinnis
John Yoo

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SPEECH

ESSAY

ARTICLES

NOTES AND CASE COMMENTS

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PREFACE

The *Harvard Journal of Law & Public Policy* is America's law journal. For over 40 years, JLPP has published some of the most influential conservative and libertarian legal scholarship in the country. When I took over as Editor-in-Chief for Volume 45, I endeavored to make this our best volume yet. Against the backdrop of a global pandemic, this task has come with challenges, but the Journal's fantastic editors have demonstrated extraordinary diligence and grace in pursuing this goal.

It has been a banner year for JLPP thus far. Perhaps most notably, we launched *JLPP: Per Curiam*, an online counterpart to our vaunted print edition. *Per Curiam* kicked off in August 2021 with an online symposium celebrating Justice Clarence Thomas's 30th Anniversary on the Supreme Court. The symposium featured essays and video interviews with various prominent former Justice Thomas clerks. Since then, *Per Curiam* has continued to publish high-quality scholarship. Moreover, we revived JLPP's Twitter account, growing our following to nearly 2,000 followers since transitioning to Volume 45 (a 150-percent increase). We took tremendous strides in recruiting new editors to join JLPP, as showcased by the fact that our masthead now runs onto a second page. And we have worked hard to get Issue 1 ready—a labor of love.

None of this would have been possible without the most amazing team in the country. I am indebted to the entirety of our masthead. To mention a few individuals, I am grateful for the work of Deputy Editor-in-Chief Jason Altabet; Managing Editors Kat Barragan, Catherine Cole, and Jacob Harcar; Articles Chair John Acton; Notes Chair Brett Raffish; and Chief Financial Officer Ross Hildabrand. Catherine did double duty for Issue 1, serving as National Symposium Editor as well. I am also thankful for Alexander Khan, who has done a terrific job getting *Per Curiam* up and running. Furthermore, I would not be here without the mentorship of Volume 44's Editor-in-Chief Max Bloom, who displayed exceptional commitment to getting me up to speed when I took

over this role last year. There are plenty of others to thank, too, and I will have more to say in the coming prefaces to Issues 2 and 3.

Issue 1 has always been a special occasion for JLPP—year after year, we publish essays from the prior spring's Federalist Society National Student Symposium to go alongside our ordinary content. This Volume is no different, and we are proud to share a few essays from the 40th Annual 2021 National Student Symposium at Penn Law, whose focus was international law and U.S. foreign policy. We start off Volume 45 with Senator Mike Lee's keynote address to the symposium. Issue 1 also includes symposium pieces from Dean Ron Cass and Professors Oona Hathaway, John McGinnis, and John Yoo. To prepare these essays, we were fortunate to have the help of a stellar team of symposium editors from law schools across the country, as we do each year. I thank these symposium editors for their rigorous review.

After the symposium portion of Issue 1, we have a real treat: JLPP is honored to publish Justice Samuel Alito's speech to the 2020 Federalist Society National Lawyers Convention. Delivered remotely, the speech represents a significant moment in time, during which the world collectively came to a halt amid the COVID-19 pandemic. Following Justice Alito's remarks, we have a few other excellent pieces. Professor Adrian Vermeule has co-authored an essay with Professor Conor Casey, aiming to dispel myths about common good constitutionalism. Issue 1 also features an article on overbroad injunctions against speech by Professor Eugene Volokh and an article on originalism in the lower courts by Professor Ryan Williams.

In addition, we have made student writing a priority in Volume 45, and we are thrilled to publish three student pieces: a Note on *Stinson* deference by John Acton, a Note on arbitrary property deprivations by Brett Raffish, and a Case Comment on *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) by recent graduate (and former JLPP Articles Chair) Jason Muehlhoff.

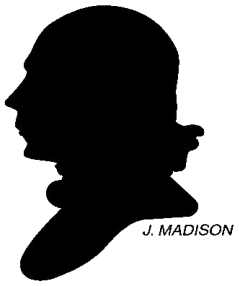
I also note a couple of changes we are making to JLPP. First, we are now going to include year of publication in the header of pieces published in JLPP. Scholarly work in JLPP has long failed to

indicate the year in which it was published. This practice makes it difficult to cite JLPP, as the Bluebook requires citation to the year in which a piece was published. This volume, we are changing our standard practice, which has been to list the issue number (a detail that is irrelevant for the purpose of Bluebook). Now, we will include the year of publication. Second, we are going to allow student authors to include an acknowledgments footnote in their writing. We have typically mentioned the student author's name at the end of the piece of writing, but this change will allow students to thank those who have assisted them in their process.

JLPP's lifeblood is its staff, and I have been blown away by the care that this group has taken to produce one of the best issues in the Journal's history. Issue 1 of Volume 45 features adapted remarks by a U.S. Senator and a sitting Supreme Court Justice, numerous timely essays and articles by some of the most distinguished law professors in the country, and what appears to be the most student writing we have had in one issue in nearly a decade. Between this issue and the launch of *Per Curiam*, JLPP is off to a fast start for Volume 45.

Eli Nachmany
Editor-in-Chief

THE FEDERALIST SOCIETY



presents

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International Law and U.S. Foreign Policy

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THE IMPORTANCE OF THE LEGISLATURE: INTERNATIONAL LAW, FOREIGN POLICY, AND ARTICLE ONE POWERS

SENATOR MIKE LEE*

Inviting me to speak at a symposium on international law is kind of like inviting an atheist to preach at your church—and that might be understating the matter. I have not been a big fan of the concept of international law, in part because the term is so widely misused. Specifically, I think the term "international law" fails to capture how law actually works. More on that later.

To be clear, I do not purport to be an expert on international law. But I do know a thing or two about the Constitution and our Founding Fathers' vision of government. And I know something about United Nations (UN) conventions and the difference between public and customary international law. These things are best understood against the backdrop of the U.S. Constitution. As with so many other things, the Framers—and what they wrote in the Constitution—offer us some wisdom and insights in this area, too.

There is a common thread that runs through our Constitution, in what our systems of government and law should look like when they are properly functioning—that is, in how our government is structured to keep its power close to and accountable to the people. That is the context in which I would like to speak to you today.

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* This essay has been adapted from a keynote address delivered at the 2021 Federalist Society National Student Symposium. The original remarks can be viewed at The Federalist Society, *Presentation of the Joseph Story Award & Keynote Address by Sen. Mike Lee*, YOUTUBE (Mar. 20, 2021), https://www.youtube.com/watch?v=SJKthOp2pM4 [https://perma.cc/XM77-U4H4].

So let's talk about international law—what it means and what it does not mean. First, we must define our terms. What are laws to begin with? I think they are best understood as norms. A norm becomes a law when it is backed up by a government actor with the physical wherewithal to enforce it and the legitimacy of a sovereign government.[1] This is one way we distinguish cartels—or, for that matter, self–proclaimed "sovereign citizens"—from states.

In the international realm, this principle—that laws are backed up by the legitimate use of collective, coercive force—is why people like me tend to get worried when we start talking about international law.[2] Because this framework begs all sorts of questions—chiefly, *who* can legitimately enforce an *international* law? There is no worldwide government, thankfully and mercifully. And the UN—the only body that would want to lay claim to that—is a non-starter. China and Russia sit on the "Security Council," and Pakistan sits on the "Human Rights Council."[3]

Nevertheless, the term "international law" can be useful in some areas. In the realm of trade, there are countless instances where we have agreed to enforce certain laws according to a set of international standards. For example, as a member state of the World Trade Organization (WTO), we have signed on to the General Agreement on Tariffs and Trade, in which we have committed to eliminating or reducing tariffs and quotas on certain goods in exchange for similar commitments from other countries.[4] So too with bilateral investment treaties—we get protection in a certain country

1. *See* Roscoe Pound, *What Is Law?*, 47 W. VA. L.Q. 1, 3 (1940) (explaining that law can be defined as "the regime of adjusting relations and ordering conduct by the systematic and orderly application of the force of a politically organized society").

2 *See* 1 LASSA FRANCIS OPPENHEIM, INTERNATIONAL LAW 8 (2d ed. 1912) ("We may say that law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power.").

3. *Current Members*, UNITED NATIONS SEC. COUNCIL, https://www.un.org/securitycouncil/content/current-members [https://perma.cc/FE3Z-8CMP] (last visited Aug. 8, 2021); *Current Membership of the Human Rights Council*, UNITED NATIONS HUM. RTS. COUNCIL, https://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx [https://perma.cc/L4G6-LYLK] (last visited Aug. 8, 2021).

4. General Agreement on Tariffs and Trade art. 8, 11, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194.

for our investors in exchange for offering protection to investors from that country.[5]

The North Atlantic Treaty Organization (NATO) is another good example. As part of that treaty, we have committed to a common defense strategy with member nations by providing funds, technology, and troops.[6] And Congress maintains a firm hand in the governance of our obligations under NATO, including congressional oversight of burden–sharing requirements,[7] congressional authority to declare war in the event that the Article 5 mutual defense requirement is invoked,[8] and the requirement of Senate ratification to add a new member state.[9] Most importantly, the NATO treaty preserves each member nation's sovereignty and relies on the domestic laws of each member nation to implement the treaty's common defense commitments.[10]

In this respect, our commitment to international law—as manifested in agreements like NATO—is reminiscent of something that we learned back in the 1740s. While attending a conference in Albany, Benjamin Franklin and an Iroquois Indian chief of the Onondaga Tribe named Canasatego discussed how the Iroquois Confederacy had become so successful by maintaining its strength while allowing each member nation to retain its distinctiveness within the Confederacy.[11] He explained it by comparing the Confederacy to a

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5. *Trade Guide: Bilateral Investment Treaties*, INT'L TRADE ADMIN., https://www.trade.gov/trade-guide-bilateral-investment-treaties [https://perma.cc/4ASX-79JJ] (last visited Aug. 8, 2021).

6. *Funding NATO*, N. ATL. TREATY ORG. (June 22, 2021, 4:29 PM), https://www.nato.int/cps/en/natohq/topics_67655.htm [https://perma.cc/S77R-V6H3].

7. Paul Belkin, Cong. Rsch. Serv., RL30150, NATO Common Funds Burdensharing: Background and Current Issues 8 (2012).

8. North Atlantic Treaty art. 5, 11, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; *see also* U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power to declare war).

9. S. EXEC. DOC. NO. 81-8, at 18 (1949).

10. North Atlantic Treaty art. 11, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

11. *See* William A. Starna & George R. Hamell, *History and the Burden of Proof: The Case of Iroquois Influence on the U.S. Constitution*, 77 N.Y. HIST. 427, 430–31, 437, 439 (1996). Historical evidence indicates that Benjamin Franklin may have found inspiration to unite the American colonies from the Iroquois model. Note, however, that recent scholarship suggests that anecdotes of Benjamin Franklin and Canasatego's conversations may be overstated. *See id.* at 427, 427–28, 451.

bundle of arrows.[12] It is very easy for someone to break one arrow, but when you bind them together, the bundle is very difficult for any one person to break.

Now, we do not want our NATO obligations to resemble a country. We want each individual nation that is a member to retain its own sovereignty. While not a unified nation, we join together for certain broader purposes.[13] And the U.S. can do that appropriately under our Constitution, so long as those treaty obligations are backed up—that is, made legitimate—by something within our domestic legal system.

In many instances, however, we use the term "international law" to refer to a host of things that really are not—or should not be considered to be—"law."

Take "international agreements." The Paris Climate Agreement is a great example. It was signed with great fanfare by many nations, including such "environmental luminaries" as China and Iran, and signed by President Obama—ostensibly on behalf of the United States.[14]

But here is the secret about the Paris Agreement: *it does not mean anything.* At least not insofar as our laws are concerned. It has some language about being a "legally binding international treaty on climate change," but as far as we are concerned, it does not have the force of law.[15] Even before President Trump got us out of it, it was not really *law*. It would be an insult to law to call it that. If a party—say, China—signed the Agreement and carried on emitting CO2 as

12. *Id.* at 447–49.

13. *See* North Atlantic Treaty art. 2–5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

14. *See* Paris Agreement, Dec. 12, 2015, in MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, volume XXVII, chapter 7D; Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, THE WHITE HOUSE (Sept. 3, 2016, 10:41 AM), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement [https://perma.cc/W457-KKWC].

15. *The Paris Agreement*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (Aug. 8, 2021), https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement [https://perma.cc/HY9A-4M9W].

if nothing ever happened, there would be *no consequences whatsoever*.[16] Which is exactly what China has done, by the way.[17]

Here is another one: the UN Convention on the Law of the Sea. This is the kind of international law that I *loathe*. It creates an International Seabed Authority—headquartered in Kingston, Jamaica—that purports to mandate that royalties, primarily from oil and gas extraction, be paid to the authority and "equitably distributed" among member states but with special priority given to developing and landlocked nations.[18] If you are thinking this sounds a lot like a tax, you would be correct. If you are thinking this sounds like a socialistic model for forcing redistribution of wealth from one group of countries to another, you would also be correct. And if you are guessing that this will increase consumer prices, inuring specifically to the detriment of poor and middle–class people in the U.S. and elsewhere, you would be correct in that too.

Participation in the UN Convention on the Law of the Sea would also require the U.S. to request permission from the International Seabed Authority before engaging in deep–seabed mining activities in our *own* continental seabed.[19]

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16. Paris Agreement to the United Nations Framework Convention on Climate Change, art. 2, 4, 6, Dec. 12, 2015, T.I.A.S. No. 16-1104.

17. *See* Steven Mufson & Brady Dennis, *Chinese Greenhouse Gas Emissions Now Larger than Those of Developed Countries Combined*, WASH. POST (May 6, 2021, 6:00 AM), https://www.washingtonpost.com/climate-environment/2021/05/06/china-greenhouse-emissions/ [https://perma.cc/36JM-UA2P] ("China's greenhouse gas emissions in 2019 surpassed those of the United States and the developed world combined."); *China*, CLIMATE ACTION TRACKER (Sept. 21, 2020), https://climateactiontracker.org/countries/china/ [https://perma.cc/G69G-9PTU] (showing that China's emission levels surpass those prescribed by the Paris Climate Agreement).

18. *The United Nations Convention on the Law of the Sea*, UNITED NATIONS: OCEANS & LAW OF THE SEA, https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm [https://perma.cc/J55Z-686J] (last visited Aug. 20, 2021) ("[C]oastal States must also contribute to a system of sharing the revenue derived from the exploitation of mineral resources beyond 200 miles. These payments or contributions . . . are to be *equitably distributed* among States parties to the Convention through the International Seabed Authority.") (emphasis added); Convention on the Law of the Sea art. 82, 156, Dec. 10, 1982, 1833 U.N.T.S. 397.

19. Convention on the Law of the Sea, *supra* note 18, at art. 76, 157, 9 (Annex III).

While you ponder *that* strange protocol, recall that China is a member of the Convention—and regularly ignores it.[20] Back in 2016, the "International Court of Justice" (a misnomer as far as titles go, by the way) ruled against China's seabed claims in the South China Sea.[21] China did not even show up to the trial and continued on as if nothing had ever happened.[22]

Moreover, ratification of the UN Convention on the Law of the Sea would require a massive delegation of U.S. sovereignty and the imposition of a new tax on the American people.[23] And because I took an oath to uphold and defend the Constitution from all enemies, and I was (and still am) convinced that committing the United States to the UN Convention on the Law of the Sea would be a vio-

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20. Sarah Lohschelder, *Chinese Domestic Law in the South China Sea*, 13 CTR. FOR STRATEGIC & INT'L STUD. 33, 34–35 (2017); Mark J. Valencia, *Might China Withdraw from the UN Law of the Sea Treaty?*, THE DIPLOMAT: THE DEBATE (May 3, 2019), https://thediplomat.com/2019/05/might-china-withdraw-from-the-un-law-of-the-sea-treaty/ [https://perma.cc/CEW3-BF7V]; Isaac B. Kardon, *China Can Say "No": Analyzing China's Rejection of the South China Sea Arbitration*, 13 U. PA. ASIAN L. REV. 1, 3, 5–6, 10, 36 (2018).

21. Bernard H. Oxman, *The South China Sea Arbitration Award*, 24 U. MIA. INT'L & COMP. L. REV. 235, 237 (2017).

22. *See id.* at 240; *Five Years After South China Sea Ruling, China's Presence in Philippines' Waters Is Only Growing*, CNBC (July 9, 2021, 12:57 AM), https://www.cnbc.com/2021/07/09/5-years-after-hague-ruling-chinas-presence-in-south-china-sea-grows.html [https://perma.cc/9BBJ-3H2B].

23. *See* Steven Groves, *The Law of the Sea: Costs of U.S. Accession to UNCLOS*, HERITAGE FOUND. (July 14, 2012), https://www.heritage.org/testimony/the-law-the-sea-costs-us-accession-unclos [https://perma.cc/SDD4-A5GQ] (arguing in testimony before the United States Senate Committee on Foreign Relations that "UNCLOS is a controversial and fatally flawed treaty" and that "[a]ccession to the convention would result in a dangerous loss of American sovereignty"); Ted R. Bromund et al., *7 Reasons U.S. Should Not Ratify UN Convention on the Law of the Sea*, HERITAGE FOUND. (June 4. 2018), https://www.heritage.org/global-politics/commentary/7-reasons-us-should-not-ratify-un-convention-the-law-the-sea [https://perma.cc/UNM7-4QBZ] ("U.S. accession would penalize U.S. companies by subjecting them to the whims of an unelected and unaccountable bureaucracy . . . . If the U.S. accedes to the convention, it will be required to transfer a large portion of royalties generated on the U.S. extended continental shelf to the International Seabed Authority, and, through the authority, to corrupt and undemocratic nations.").

lation of my oath, I opposed it. It is that bad. Mercifully, the Convention's proponents have not brought it back up again recently for Senate ratification.[24]

One final aside on these types of international agreements. The primary argument I hear for why the United States should join these kinds of conventions is to get a "seat at the table."[25] I think this argument is completely indefensible. What actually occurs is that U.S. sovereignty deteriorates for no legitimate gain.

And here is possibly the worst offender of all: "customary international law." First, we should contrast "customary international law" with a similar concept: "public international law." The latter is based in treaties, which involve a legal document that a sovereign state has agreed to abide by.[26] At least, that is the theory respecting treaties.

Customary international law is different. Scholars define it as "[g]eneral principles common to the major legal systems, *even if not incorporated or reflected in customary law or international agreement*."[27] General principles? There are so many problems here. To begin with, *which* legal systems are in view? And who gets to define these general principles? This kind of language sets off emanation – and–penumbra[28] alarm bells for me.

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24. *See* Raul Pedrozo, *The U.S Position on the U.N. Convention on the Law of the Sea (UNCLOS)*, 97 INT'L L. STUD. 81, 86 (2021) ("Despite . . . overwhelming support [for UNCLOS], Republican opposition doomed U.S. accession and ratification, as thirty-four Republican Senators signed a letter to the Chairman of the SFRC indicating that they would vote against U.S. accession, effectively killing Senate action on the Convention in the 112th Congress.").

25. *See* S. EXEC. REP. NO. 110-9, at 3 (2007) (quoting President George W. Bush's statement to Congress in which he argued that joining UNCLOS would give the U.S. a seat at the table where decisions implicating U.S. interests are made).

26. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(3) (Am. L. Inst. 1987) (explaining that "[i]nternational agreements create law for the states parties thereto").

27. *Id.* § 102(4) (emphasis added).

28. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

What is the through–line here? What distinguishes the Paris Agreement from NATO? Sovereignty.

The United States Congress never ratified the Paris Agreement or the UN Convention on the Law of the Sea.[29] For our purposes, they are dead letters. That is, they are no more legally binding than speeches given by advocates of international regulations on any subject. NATO and the General Agreement on Tariffs and Trade, by contrast, have been ratified by the Senate and embedded into U.S. law through enabling legislation.[30] These are the critical steps to making them law for our purposes. So, as American lawyers, if we are talking about international law that is, in fact, *law*, we are really talking about *domestic* law.

Let me reiterate. For something to be international law that affects our country, it must be backed up by some legitimate force within our domestic legal system. Again, there is no global government in place to enforce international norms.

Now, it is the case that certain policy principles undergirding international agreements—even if not ratified by the Senate—could become part of U.S. domestic law if legislation is introduced, debated, and passed by both houses of Congress. Nonetheless, Congress could not pass legislation that submits the United States to the

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29. *See* Jessica Durney, Note, *Defining the Paris Agreement: A Study of Executive Power and Political Commitments*, 11 CCLR 234, 234 (2017) ("President Obama did not obtain two-thirds consent from the Senate, and instead, declared the Paris Agreement as a non-binding political agreement, distinct from a treaty, for which he had the power to unilaterally sign."); Will Schrepferman, *Hypocri-sea: The United States' Failure to Join the UN Convention on the Law of the Sea*, HARV. INT'L REV. (Oct. 31, 2019, 9:00 AM), https://hir.harvard.edu/hypocri-sea-the-united-states-failure-to-join-the-un-convention-on-the-law-of-the-sea-2/ [https://perma.cc/KH4C-F6RQ] (explaining that the U.S. has not signed the UNCLOS).

30. *See The United States and NATO*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/declassified_162350.htm [https://perma.cc/7LN7-RYGB] (last visited Aug. 7, 2021) ("The Senate ratified the treaty on 21 July 1949 by a vote of 83-13. On 25 July 1949, President Truman and Secretary Acheson signed the Instrument of Accession, making the United States a founding member of NATO."); Elaine S. Povich, *New Era In World Trade Begins As Senate Approves GATT Treaty*, CHI. TRIB. (Dec. 2, 1994), https://www.chicagotribune.com/news/ct-xpm-1994-12-02-9412020142-story.html [https://perma.cc/BQG2-SGJP] ("The Senate on Thursday approved the GATT treaty, the most sweeping expansion of world trade ever.").

whims and powers of a decision–making or dispute resolution body without the ratification of a treaty by two–thirds of the Senate.[31] The reason for this distinction is sovereignty. Binding the U.S. to following the rules and subsequent consequences of an international authority is an explicit surrender of a portion of our sovereignty.[32] The benefits and costs of this must be weighed, and that is why the Senate is the body vested with the power to ratify or reject treaties.[33]

The American people have consented to be bound by these agreements through the decisions of their elected representatives.[34] That is why the "International Seabed Authority" does not—and should not—have the right to make laws for us. Under our Constitution, only Congress has that right, vesting "[a]ll legislative Powers . . . in a Congress of the United States, which shall consist of a Senate and

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31. U.S. CONST. art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, *provided two thirds of the Senators present concur*.") (emphasis added); *see also* Rachel S. Brass, Made in the USA Foundation v. United States*: NAFTA, the Treaty Clause, and Constitutional Obsolescence*, 9 MINN. J. GLOB. TRADE 663, 680–83 (2000) (tracing the origin of the treaty clause and its status as the exclusive method for binding the United States to international law); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 115 (1998) ("[C]oncerns are exacerbated when Congress attempts to delegate authority to individuals or entities that lie outside the national government. Congress cannot enforce its standards through the usual legal or political methods when the recipient of the delegated power is not responsible to Congress, the President, or any other federal authority.").

32. *See* Brass, *supra* note 31, at 678 (describing the surrender of certain domestic sovereignty as the defining feature of a treaty as understood by the framers).

33. *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1139 (2000) (noting that because the Framers recognized that treaties concern the country's relationship with the rest of the world, "the Senate was to be conjoined with [the President] in the treaty-making process"). *See generally* David Auerswald & Forrest Maltzman, *Policymaking Through Advice and Consent: Treaty Consideration by the United States Senate*, 65 J. POL. 1097 (2003) (detailing the process of Senate advice and consent and its importance to treaty ratification).

34. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the consent of the governed.").

a House of Representatives."[35] It is not an accident that this clarification was included right at the beginning of the Constitution in Article I, section 1. The Framers knew that the most dangerous power within the federal government—that of establishing laws of general applicability backed by the force of the federal government—should be entrusted to the branch of government most accountable to the people at the most regular intervals.[36]

So one of the reasons I am opposed to the lazy, haphazard way people often talk about international law is because we repeat the same mistakes we make in the nondelegation realm.[37] It is just another realm in which Congress delegates its rightful—and nondelegable—lawmaking authority to the President, ambassadors, or, worse, international institutions. This tendency shows up all over the place in the foreign policy context.

Consider how this plays out in the war powers realm. Now, the Framers set very careful parameters around the nation's war powers. After the tyranny of King George III—which the founding generation suffered under both as subjects and as soldiers—the Framers were keen to avoid a dangerous and kingly concentration of power in the hands of one (or a few) people in this arena.[38]

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35. U.S. CONST. art. I, § 1.

36. *See* THE FEDERALIST NOS. 47–58, 62–63 (James Madison), NOS. 59–61 (Alexander Hamilton) (explaining the power of the legislature, controls over that power, and reasons for vesting the power in a frequently elected House of Representatives that is close to the voting public and a Senate differently selected to attain more consideration and more congruence with state interests, urging that this composition gains the benefits of democracy while checking its deficiencies). *See generally* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1 (2006) (stating that treaty power does not serve as a free-standing grant of power to the executive, but rather falls under Congress's necessary and proper clause authority).

37. *See* Brass, *supra* note 31, at 683–84 (describing how the North American Free Trade Agreement violates the nondelegation principle of the Constitution).

38. The Federalist Society, *How Did the Framers Define Executive Power? [No. 86]*, YOUTUBE (Mar. 27, 2019), https://www.youtube.com/watch?v=X04uJV0IfOo&ab_channel=TheFederalistSociety [https://perma.cc/A5VN-HJTQ] ("The Framers looked at all the prerogative powers that historically belonged to the British king, and gave them to multiple branches, to multiple Constitutional actors.").

As James Madison wrote to Thomas Jefferson in 1798, "[t]he constitution supposes, what the History of all [Governments] demonstrates, that the [Executive] is the branch of power most interested in war, [and] most prone to it. It has accordingly with studied care vested the question of war in the [Legislature]."[39] So, in Article I, Section 8, the Framers placed the power to declare war in Congress,[40] the branch where open and public debate would happen and the branch most easily held accountable to the people.

Likewise, in Federalist No. 69, Alexander Hamilton pointed to the legislature's power over treaties as one of the key distinctions between our constitutional system and that of England.[41] Under the English system, he wrote, the monarch had the power to take the country to war, which ended—frequently and tragically—in the loss of tears, treasure, and blood.[42] Meanwhile, Parliament had the unenviable task of figuring out how to pay for it.[43] Worse, the King could never be voted out of office, leading to a constant expansion of the executive's (that is, the monarch's) power at the expense of the legislature.[44]

We can also see how this dangerous delegation tendency affects the treaty power. The Framers entrusted the Senate with treaty ratification and the duty to provide "advice and consent" on the President's ambassadorial and other nominees.[45] These responsibilities

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39. Letter from James Madison to Thomas Jefferson, *in* 6 The Writings of James Madison: Comprising His Public Papers and His Private Correspondence, Including Numerous Letters and Documents Now for the First Time Printed 1, 312 (Gaillard Hunt ed., 1906).

40. U.S. CONST. art. I, § 8, cl. 11.

41. THE FEDERALIST NO. 69, at 418 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("The President is to have power, with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur. The king of Great Britain is the sole and absolute representative of the nation in all foreign transactions. He can of his own accord make treaties of peace, commerce, alliance, and of every other description.").

42. *Id.* at 416.

43. *Id.* at 418.

44. *Id.* at 414.

45. U.S. CONST. art. II, § 2, cl. 2

were intentionally crafted as "shared powers" by the Framers because they saw the dangers of vesting the full power of foreign relations in the hands of one powerful individual.[46]

Alexander Hamilton understood that the unique status of treaties as both international agreement *and* domestic law made the legislature's involvement crucial. In Federalist Paper No. 75, he wrote:

The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions [making treaties]; while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.[47]

The powers of treaty–making, selecting who represents the U.S. abroad, committing the United States to obligations and alliances with other nations, and waging war have enormous impacts on our Republic's wellbeing. Use or abuse of these powers can expand the nation's prosperity, security, and influence abroad—or trigger its decline. That is exactly why it is so important that the Senate provides vigorous debate on those decisions, which can serve as a check on those impulses.

Yet, in the modern era, Congress—and specifically the Senate—shies away from exerting its full authority, choosing simply to delegate this responsibility to the executive branch.[48]

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46. *See* THE FEDERALIST NO. 66, at 404 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("The security essentially intended by the Constitution against corruption and treachery in the formation of treaties, is to be sought for in the numbers and characters of those who are to make them.").

47. THE FEDERALIST NO. 75, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

48. *See, e.g.*, Editorial Board, *Congress Gave the President Too Many Powers. Now It Must Scale Them Back*, WASH. POST (Jan. 10, 2019), https://www.washingtonpost.com/opinions/congress-gave-the-president-too-many-powers-now-it-must-scale-them-back/2019/01/10/ac128504-1508-11e9-803c-4ef28312c8b9_story.html [https://perma.cc/89BD-LQ4M] (explaining that Congress has delegated a significant number of powers to the executive branch); Julian Davis Mortenson & Nicholas Bagley, *There's No Historical Justification for One of the Most Dangerous Ideas in American Law*, THE ATLANTIC (May 26, 2020), https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-orliginalism/612013/ [https://perma.cc/GL28-QRFD] ("Most government activity in the United States rests on a simple idea: that it's okay for the legislature

And what is the result of this delegation of powers? Consider the treaty power. Now, the Constitution requires that the President submit the treaty to the Senate for ratification, and the Senate must debate and choose to ratify or reject based on a two–thirds threshold.[49] Yet today, the Senate rarely receives treaties for consideration.[50]

A few years ago, when President Obama signed the Joint Comprehensive Plan of Action (JCPOA, also known as the "Iran Nuclear Deal"), I asked then–Secretary of State John Kerry why the President had not submitted the agreement to Congress. His answer struck me as very strange; he said that because there were multiple nations involved, plus some organizations that were not sovereign entities, Senate ratification would not be appropriate. Fortunately, I happened to have the State Department's own definition of "treaty" handy at the time, which expressly included agreements between multiple nations involving nongovernmental organizations.[51] Secretary Kerry then fell back on less persuasive defenses, including, predictably: after "quite a few years trying to get a lot of treaties through the United States Senate," Secretary Kerry claimed, "it has become physically impossible." But that is exactly the point of requiring Senate ratification. If you do not have the votes to submit the treaty for ratification, you should not try to ram it through.

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to authorize the executive branch to regulate basically anything the legislature itself could reach.").

49. U.S. CONST. art. II, § 2, cl. 2

50. *See U.S. Senate Consideration of Treaty Documents*, U.S. CONG., https://www.congress.gov/search?q=%7B%22source%22%3A%5B%22treaties%22%5D%7D [https://perma.cc/EN8E-R57J] (last visited Aug. 8, 2021). The U.S. Senate received three treaties in 2020, one treaty in 2019, one treaty in 2018, and two treaties in 2017 for consideration from the President.

51. *Treaties and International Agreements*, U.S. DEP'T OF STATE, https://www.state.gov/policy-issues/treaties-and-international-agreements/ [https://perma.cc/9TKC-49EC] (last visited Aug. 6, 2021).

Meanwhile, the President continues to commit the United States to a smorgasbord of international commitments—like the Paris Climate Agreement,[52] the "Iran Nuclear Deal,"[53] and agreements to join the UN Human Rights Council[54] and the World Health Organization[55]—without submitting those agreements to the Senate for ratification. Despite these abuses, and despite the Senate's constitutional obligation, there is little appetite in Congress to restrain the executive from foisting broad international commitments on the American people.

The result? De facto rule by foreign powers. Here, it is worth remembering Washington's warning in his farewell address: "[a]gainst the insidious wiles of foreign influence (I conjure you to believe me, fellow–citizens) the jealousy of a free people ought to be *constantly* awake; since history and experience prove that foreign influence is one of the most baneful foes of Republican Government."[56]

These twin harms—undercutting American sovereignty and delegating lawmaking power away to the executive or foreign entities—are best remedied by reviving the Constitution's structural

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52. *Paris Climate Agreement*, THE WHITE HOUSE, (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/ [https://perma.cc/X9N2-ZNF9].

53. Anne Gearan & Karen DeYoung, *Biden Team Exploring How U.S. Might Rejoin Iran Nuclear Deal*, WASH. POST (Feb. 5, 2021, 7:46 PM), https://www.washingtonpost.com/politics/biden-iran-deal/2021/02/05/b968154c-67d7-11eb-886d-5264d4ceb46d_story.html [https://perma.cc/JU6E-A9SS].

54. John Hudson, *U.S. Rejoins U.N. Human Rights Council, Reversing Trump-era Policy*, WASH. POST (Feb. 8, 2021, 10:40 AM), https://www.washingtonpost.com/national-security/us-rejoins-un-human-rights-council-reversing-trump-era-policy/2021/02/08/91694b3e-6a1a-11eb-9ed1-73d434b5147f_story.html [https://perma.cc/ZRW7-8RYL].

55. Emily Rauhala, *Biden to Reengage with World Health Organization, Will Join Global Vaccine Effort*, WASH. POST (Jan. 20, 2021, 7:48 PM), https://www.washingtonpost.com/world/biden-administration-who-covax/2021/01/20/3ddc25ce-5a8c-11eb-aaad-93988621dd28_story.html [https://perma.cc/U4XZ-MAZT].

56. 35 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 233 (John C. Fitzpatrick ed., 1940). I thank President Washington for accurately characterizing our government as a "republic[]."

protections envisioned by the Framers. These structural protections, as Justice Scalia used to say, form the crucial difference between our Constitution and that of any "tinhorn" dictatorship.[57]

To protect our liberty, the Founding Fathers created horizontal—congressional, judicial, and executive branches—and vertical—states versus federal—protections in our Constitution.[58] These protections are designed to limit the power of government and to expand and protect the space in which "We the People" pursue our happiness together.

The Founding Fathers understood something that has been lost among many in Washington in recent years: government power only expands at the expense of individual liberty. Accordingly, if the purpose of government was the happiness of the people, then success would depend on diffusing power, so that no individual or faction could misuse too much of it.

This logic is no less valid in the foreign policy realm. The case for congressional control over American *war*–making is roughly the same as the case for congressional control over federal *policy*–making writ large. That is, it is a case for *dispersing* political power and placing it in the most diverse, representative, and regularly accountable branch of government suited to the task.

It is not a coincidence that the history of Congress's slow–motion surrender of its constitutional role in the foreign policy realm mirrors its surrender of *domestic* policymaking authority. They both stem from Congress's self–serving, bipartisan, and shameful retreat from constitutional responsibility. The real reason Congress defers to the executive branch on questions of foreign relations and do-

57. Sadly, Justice Scalia never explained the distinction between a "tinhorn" dictator and a regular dictator. *Justices Scalia and Ginsburg on the First Amendment and Freedom*, C-SPAN (Apr. 17, 2014), https://www.c-span.org/video/?318884-1/conversation-justices-scalia-ginsburg-2014 [https://perma.cc/7LRP-JQA8].

58. *See* Gregory v. Ashcroft, 501 U.S. 452, 457-58 (1991) (quoting U.S. CONST. amend. X) ("[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government. . . . The Constitution created a Federal Government of limited powers. 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'").

mestic policy has nothing to do with the exigencies of modern political or military technocracy—it is just easier to engage in rank punditry than it is to make hard decisions for which you will be held accountable by the people.

This is the problem that James Madison did not entirely foresee. To be sure, he correctly predicted that "[a]mbition must be made to counteract ambition," as the legislature, executive, courts, and state governments all vied for power, achieving balance.[59] But what he did not anticipate was that there would be a concurrent retreat from both federalism *and* the separation of powers, resulting in the cession of powers from the States to the federal government and, within the federal government, from Congress to the executive and the judiciary. This has ultimately resulted in the exact inverse of the Constitutional design: the powers of the federal government are numerous and indefinite, while those of the States are few and strictly defined.

But this is the beauty of Article I: when Congress is "in charge of" making laws, ultimately, the American people are "in charge of" Washington. If you put the power in the right branch, no one person or small group will become too powerful. And that is why it is so important for Congress to reclaim its Article I powers and not delegate its authority to the executive branch, to ambassadors, or to international bodies. We do not want to live under the tyranny of a king—or an international oligarchy in Brussels, or Vienna, or Kingston.

The restoration of constitutional balance through Congress's reclamation of its rightful role in domestic and foreign policymaking is not just one choice among many paths towards stability. It is the only way forward. If you agree, please join me in this noble cause. Let us "re–constitutionalize" the federal government to put the American people back in charge of foreign and domestic policy alike.

59. THE FEDERALIST NO. 51 (James Madison).

TRADE AND SOVEREIGNTY: WHAT YOU CAN SEE BY LOOKING

RONALD A. CASS*

Dr. Henry Kissinger, famous American scholar, advisor to presidents, and former Secretary of State, has a widely recognized voice.[1] It is deep, resonant, cultured, and profoundly accented. Henry's brother Walter, who was a year younger than Henry, was a tad less famous. But he was notable, as is a story about both Kissingers. One of Walter's friends is said to have pulled him aside and said, "Walter, I just have to ask you something. You and Henry both came to America from Germany as teenagers. Now, you speak English like everybody else in America, while to this day Henry retains his heavy German accent. Can you explain why that is?" Walter looked him in the eye and said, "Henry actually doesn't speak with a German accent. That's simply the way you speak English if you never listen to anyone."[2]

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* Dean Emeritus, Boston University School of Law; Distinguished Senior Fellow, Gray Center for the Study of the Administrative State, George Mason University; Senior Fellow, International Centre for Economic Research; President, Cass & Associates, PC; former Commissioner and Vice–Chairman, U.S. International Trade Commission.

1. This essay has been adapted from remarks delivered at the 2021 Federalist Society National Student Symposium in a debate on "Trade and Sovereignty" with Professor Jacques deLisle, Gary N. Horlick, Professor Jide Okechuku Nzelibe, and, as Moderator, Hon. Stephen A. Vaden of the United States Court of International Trade. The original debate can be viewed at The Federalist Society, *Panel II: Trade and Sovereignty followed by Presentation of the Article I Award*, YOUTUBE (Mar. 19, 2021), https://www.youtube.com/watch?v=wVhWV32hBRQ [https://perma.cc/RY3S-SH7U].

2. *Cf.* Katharine Q. Seelye, *Walter Kissinger, Businessman and Brother of Henry, Dies at 96*, N.Y. TIMES (May 27, 2021), https://www.nytimes.com/2021/05/27/business/walter-kissinger-dead.html [https://perma.cc/3F6G-Y9QS] ("Another overt difference was that Walter shed his Bavarian accent while Henry notably retained his. When asked

Whether Walter's critique of Henry was valid or fanciful, the value of listening to others is undeniable. It was the great American philosopher Yogi Berra who, discussing the game of baseball, reportedly said, "You can see a lot just by looking."[3]

Trade and sovereignty are much the same.

What follows is an essay that describes what can be seen with a modest amount of looking. It reviews the meaning of sovereignty, the basics of international trade and trade policy, and the relation of considerations relevant to the two topics. In particular, the essay discusses the role that open trade plays in both protecting and potentially undermining national security and the impact of trade–related agreements and institutions on national sovereignty. The essay ends with observations about relative risks posed by particular forms of cooperation and with cautions for policymakers in the trade arena.

Sovereignty in a Nutshell

Start with sovereignty. I will use the term to refer to nation–states, although the concept pre–dates the nation–state (for centuries applying primarily to city–states and smaller principalities[4]) and, for some commentators today, extends beyond nation–states to supranational entities such as the European Union.[5]

Simply put, sovereignty denotes the right and power to do things. It encompasses control over internal governance (the who, how, and what of governing within a nation's jurisdiction), control of borders (regulating people and products crossing a nation's borders), and control over relations with other sovereign entities (how

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why this was the case, Walter would tell interviewers, 'Because I am the Kissinger who listens.'").

3. Christopher H. Achen, *Let's Put Garbage-Can Regressions and Garbage-Can Probits Where They Belong*, 22 CONFLICT MGMT. & PEACE SCI. 327, 327 (2005) (quoting Berra).

4. *See* ERNST H. KANTOROWICZ, THE KING'S TWO BODIES 236–58 (Princeton Univ. Press, reprint ed. 1997).

5. Mujtaba Rahman, *European Sovereignty Has Lost Its Biggest Champion*, POLITICO (Apr. 7, 2021, 4:00 AM), www.politico.eu/article/european-sovereignty-has-lost-its-biggest-champion-emmanuel-macron [https://perma.cc/H2S3-GWHK].

the nation relates to other nations, cooperatively or antagonistically, at war or peace).[6]

Sovereignty is not measured by how aggressive a nation is in its exercise of those prerogatives. It is not a matter of the choices a nation makes with respect to these powers, although those choices may affect the quality of life for the nation's residents and even the nation's ability to exercise sovereignty in the future. Whether a nation chooses to have an economy that is controlled by the government or is relatively laissez–faire, implementing either choice is an exercise of sovereign authority. So is the choice between open borders and tightly controlled borders, though, again, that choice may have considerable impact on the quality of a nation's sovereignty going forward, as it can alter the effective power to control different aspects of life within the nation.

Trade: A Primer

Trade, here meaning international trade, is equally simple. Although generally thought of in terms of international product (or service) flows and the rules that govern them, the underlying decisions that drive trade are more granular. Trade is best understood by looking first at individual–level decisions.

The essence of international trade is a decision by someone in one sovereign jurisdiction to buy something that will come from another sovereign jurisdiction. This simple version of trade oversimplifies in important respects but provides a useful starting heuristic for understanding trade.[7] The fact that trade takes place across sovereign borders is important, but understanding trade begins with the considerations that drive individuals' decisions on both sides of a transaction.

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6. *See* MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 63–82 (Penn State Univ. Press 1995).

7. Among other things, the simple heuristic used here should not be understood as drawing a sharp line between source and destination—it does not presuppose that objects of international trade can be said to be wholly products of one nation, making the exchange a simple transfer of product from one nation and funds to pay for it from another nation.

In its most basic sense, trade takes place because one person wants to acquire something that is better, cheaper, or different—something that person values more than his or her next best use of whatever the thing costs—and the person on the other side of the transaction values the money price more than the goods being sold. You buy things because you want them and think they are worth the cost; people sell them to you because they think the price gives them something more valuable than the goods. From a strictly economic standpoint, trade makes parties on both sides better off.

Of course, this does not mean that trade makes everyone better off. If I buy from you instead of John (my former supplier), you and I are both better off, but John is not. That relationship is endemic to competition, domestic or international. And that observation provides an essential insight into much of the controversy about trade. With trade, as with pretty much everything else, people tend to make arguments that are consistent with their own self–interest, whether promoting or opposing trade restraints.

U.S. Trade History

In the United States, from the nation's inception, international trade has been recognized as both important and politically divisive. The very first substantive law passed by the first Congress was an international trade bill that placed tariffs on a variety of items.[8] The southern states wanted tariffs on agricultural goods (which they produced) but not on finished products (which they primarily purchased).[9] The northern states wanted tariffs on finished products (their own focus for production) but not agricultural goods or inputs to production.[10] And our political forebears did things the way we have always done them: they compromised by putting tariffs on both![11]

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8. An Act for Laying a Duty on Goods, Wares, and Merchandises Imported into the United States, 1 Stat. 24 (1789)

9. *See* DOUGLAS A. IRWIN, CLASHING OVER COMMERCE: A HISTORY OF U.S. TRADE POLICY 75–77 (Univ. of Chicago Press 2017).

10. *Id.*

11. *Id.*

Our nation has, over time, had an up – and–down relationship with tariffs. From about 1820 to 1900, U.S. tariffs were relatively high compared to most of the world.[12] After that, the tariffs came down substantially until 1930 when the Smoot–Hawley Tariff raised tariffs to prior levels.[13] Other countries placed reciprocal tariffs on our exports to them,[14] and in a period of two years, the GNP of the United States dropped by about a third, and over a four–year period by almost half.[15] The aftermath of Smoot–Hawley showed the difficulty of walking the rising tariffs back quickly and, more generally, illustrated the problem of endeavoring to get agreement to open trade in an environment where each trade adjustment has opponents as well as advocates in each country. The result at the time was that Americans, and citizens in much of the rest of the world, found themselves cut off from access to a wide variety of more complex, more readily available, and more varied goods at better prices than if they had been able to open their economies to trade. That was a loss not just for the economy but for many people's quality of life as well.

Having (largely) learned that lesson, the United States has followed a relatively open trade policy since that time.[16] One element in that transformation was a change in the process for adopting trade rules. Starting with the Reciprocal Trade Act of 1934, trade

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12. Kevin H. O'Rourke, *Tariffs and Growth in the Late 19th Century*, 110 ECON. J. 456, 461 (2000) (making a partial comparison of tariffs over this time period). *See also* UNITED STATES BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 539 (U.S. Gov't Printing Off. 1960).

13. *See* 19 U.S.C. §§ 1202–1683g (2012); *see also* Douglas A. Irwin, *The Smoot–Hawley Tariff: A Quantitative Assessment*, 80 REV. ECON. & STAT. 326, 328 (1998) (Figure 2).

14. *See id.* at 326 ("Smoot–Hawley has been blamed for poisoning international trade relations by triggering a wave of foreign tariff increases that put world commerce on a downward spiral.").

15. *See* BUREAU OF CENSUS, *supra* note 12, at 139; Irwin, *supra* note 13, at 327.

16. *See* Douglas A. Irwin, Opinion, *How 'Protectionist' Became An Insult*, WALL ST. J. (June 18, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748704575304575296610452014710 [https://perma.cc/LG4B-C6NG] ("The damage wrought by this tariff had only one silver lining. Ever since, the ghosts of Reed Smoot and Willis Hawley (a Republican congressman from Oregon) have stood in the way of anyone arguing for higher trade barriers. They almost singlehandedly made the term 'protectionist' an insult rather than a compliment.").

was treated as a subject for ordinary legislation rather than a matter of treaties—even when implementing international agreements—meaning trade laws could be adopted by a simple majority in each house rather than by a two–thirds vote of the Senate.[17] That made for an easier time passing trade laws, but over the past seventy–five years, the nation essentially ran through the subjects on which there had been a consensus sufficient for even that legislative format. In other words, the U.S. has reduced a number of different trade barriers but also has reached a point where further reductions in trade barriers are difficult.

It is worth noting that the reductions in trade barriers coincided with the unusual confluence of three events. First, tariffs became less important as the source of funding for the national government. Prior to adoption of the Sixteenth Amendment to the U.S. Constitution in the early 1900s, which authorized the graduated income tax,[18] tariffs and customs duties typically accounted for eighty–five to ninety–five percent of the federal government's revenues.[19] Replacing that with income tax revenues reduced one source of support for trade restrictions.[20] Second, the United States rose dramatically in prominence as a producer of tradable goods, and for a period after the Second World War accounted for almost

17. *See* 19 U.S.C. § 1351.

18. U.S. CONST. amend. XVI.

19. *See* THOMAS L. HUNGERFORD, CONG. RSCH. SERV., RL33665, U.S. FEDERAL GOVERNMENT REVENUES: 1790 TO THE PRESENT 5 (2006) ("Over the 50-year period between 1863 and 1913, excise taxes generated about 40% of federal revenue, and customs duties generated 49%.").

20. *See* Douglas A. Irwin, *From Smoot–Hawley to Reciprocal Trade Agreements: Changing the Course of U.S. Trade Policy in the 1930s*, *in* THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY 325, 333 (Michael D. Bordo et al. eds., 1998) ("[T]he income tax, which the Democrats had consistently linked to tariff reform, dramatically reduced the dependence of the federal government on revenues from import duties after 1916. Tariffs generated over 90 percent of federal revenue prior to the Civil War, about 50 percent from 1870–1910, but only about 10 percent of federal revenue in the 1920s. The tariff was now free to be set with objectives other than revenue in mind.").

half the world's manufacturing value.[21] Third, during the post–war and Cold War period, the U.S. sought support from trading partners for containing the Soviet Union's and other Communist regimes' adventurism.[22] To that end, U.S. policymakers were willing to make trade concessions to secure cooperation from other nations.[23] Together, these circumstances provided support for reductions in trade barriers.

Trade and National Security

Despite general agreement that a mostly open trade regime is beneficial to the United States,[24] there are areas in which Americans believe that restrictions on trade are also beneficial. National security is a special concern that often is cited as a reason for restricting trade.[25]

Many economists say that national security is advanced by open trade because it gives a nation more access to cheaper products that can be used for investments that promote national security—such as purchasing more planes, ships, and tanks for the military—

21. *See* Paul Bairoch, *International Industrialization Levels from 1750 to 1980*, 11 J. EUR. ECON. HIST. 269, 284 (1982) (Table 5).

22. *See* Michael Mastanduno, *Trade as a Strategic Weapon: American and Alliance Export Control Policy in the Early Postwar Period*, 42 INT'L ORG. 121, 122 (1988) ("U.S. officials preferred a strategy of international economic closure in trade with the East during this period. They perceived it to be in America's national security interest to deny the benefits of international economic exchange to the Soviet Union, Eastern Europe and China, and organized a broad export embargo against them.").

23. William A. Lovett, *Rethinking U.S. Industrial-Trade Policy in the Post-Cold War Era*, 1 TUL. J. INT'L & COMP. L. 135, 141 (1993) (stressing the importance to the United States of building freer trade in an integrated world economy with allies in Western Europe and Japan); Norman A. Graebner, *The Cold War: An American View*, 15 INT'L J. 95, 109-10 (1960) (acknowledging toward the beginning of the Cold War that the United States will not be able to have its way in world affairs and will need to "demand less than [it] has in the past").

24. *See The Benefits of Open Trade and Investment Policies*, 2009 ECON. REP. PRES. 127, 129 (2009) ("Many studies have shown that greater openness to trade and investment is associated with faster growth in the long run.").

25. *See, e.g.*, Thad Cochran, *Free Trade and National Security*, 4 TEX. REV. L. & POL. 115 (1999).

within the nation's security budget.[26] In addition, open trade promotes more efficient use of all resources, which makes for a stronger economy. And, ultimately, a stronger economy promotes national security (among other ways, by expanding potential budgets for the military).

At the same time, there are legitimate concerns that, without trade restraints, items important to our economy and our national security could be monopolized by nations that are (or could become) adversaries of the United States. Think, for example, of rare earth metals necessary for a wide range of high–technology products. This concern covers more than potential "hot war" adversaries. A cold war adversary will do. China is the nation that raises most concerns on that front, especially as it relates to trade. China's combination of a single–party authoritarian government, extensive government (especially military) control of economic activity, commitment to expansion of global influence, and particular focus on competition with the United States makes the relation between trade and national security especially problematic.

In addition to concerns about an adversary withholding products or materials essential to American national security, there are concerns about national security threats for certain products that are not being withheld but instead are being exported allegedly at prices that promote their use by Americans. These concerns focus on cases where products that are sold into the United States may have embedded in them attributes that are detrimental to U.S. national security. Consider assertions that trapdoor or backdoor access capabilities may be embedded in communications and computing devices widely purchased and used in the United States. This is part of the complaint animating special attention to products

26. *See, e.g.*, Harlan Grant Cohen, *Nations and Markets*, 23 J. INT'L ECON. L. 793, 795–96 (2020) (critiquing the practice of states asserting their security interests to hamper the flow of goods); DICK K. NANTO, CONG. RSCH. SERV., R41589, ECONOMICS AND NATIONAL SECURITY: ISSUES AND IMPLICATIONS FOR U.S. POLICY (2011) (discussing generally the trade–offs and effects of international trade policy on the United States, both economically and in national security).

from Huawei, for instance, among other firms. Recognition that there can be valid national security concerns about trade provides the rationale for Section 232 of the Trade Expansion Act of 1962.[27]

Trade and Security: Public Debate and Policy Input

We should take seriously assertions that national security risks are associated with particular imports. Many claims of national security risks for trade are plausible. But there is always the question of whether claims accurately characterize the risks. Does restricting trade in response to a specific claim address a real security risk or merely one that provides cover to people with other reasons to argue against trade in a given product, perhaps because it competes with products made by advocates of limiting trade?

In just the same way, arguments in favor of open trade—advanced in opposition to calls for restricting imports to advance national security—may be strategic or sincere. Arguments may be made by people with an interest in promoting importation, whether because the imports would be components in those people's products or would help satisfy their customers or because those who are making the arguments receive support tied to the exporter.

Some academic commentary argues that other considerations, such as personal identity and emotional affiliations, explain reactions to and contentions about trade.[28] It certainly is possible that

27. Many factors are considered during a Section 232 investigation, including national defense requirements, domestic capacity to meet those requirements, and how the import or export of goods affects the United States' capability to meet those requirements. Simon Lester & Huan Zhu, *Closing Pandora's Box: The Growing Abuse of the National Security Rationale for Restricting Trade*, CATO INST. (June 25, 2019), https://www.cato.org/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale-restricting-trade [https://perma.cc/K7GH-YRXF].

28. *See, e.g.*, Cohen, *supra* note 26, at 807 n.58 (noting concerns about "protecting national wealth and pride"); Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CALIF. L. REV. 401 (2002) (discussing how nationalist pride affects global trade); *see also* Pierre Sauvé & Americo Beviglia Zampetti, *Subsidiarity Perspectives on the New Trade Agenda*, 3 J. INT'L ECON. L. 83, 92 (2000) (arguing that multilateral trade requires factual agendas, not emotional ones); Jide Nzelibe, *American Identity Politics and International Law*, 58 COLUM. J. TRANSNAT'L L. 332 (2020)

some inclination to identify one's own interests with those of others who seem to be in similar circumstances could be described in those terms. Trade–related voting patterns may even give a patina of support for arguments based in identity politics. After all, those who have concerns about potential loss of economic advantages, jobs, or benefits associated with the presence of strong employment hubs in their own locales will naturally relate to the complaints of others whose interests are more directly implicated in stories respecting trade's effects. That is true irrespective of the accuracy of the links drawn between trade and changes in particular firms', individuals', and locales' economic fortunes.

This is not, however, a story of identity politics in the ordinary sense. Instead, it is a description of people making common cause with those whose circumstances are similar and of people expressing sympathy for those who have similar interests in a particular issue in settings where there is no cost to the expression (a commonplace with voting, which is almost never outcome–determinative for elections in large polities). In the end, people deeply invested in a given trade issue are going to lead arguments about what trade policy should be. In those arguments, analytical commitments and personal self–interest have long been the more powerful motivators in trade debates.

More significantly, given the potential mix of motives and of arguments, we should recognize that the concerns expressed in debates over trade and security present what is often labeled a "thermos problem." The thermos keeps hot liquids hot and cold liquids cold, but the grand philosophical question is, how does it know which to do? Protecting national security is important, and either limiting trade or opening trade can be an essential tool in the right circumstances. Like the thermos, however, we must figure out how to know which to do.

(arguing that political appeals to identity make it difficult to form durable trade relationships).

Trade and Sovereignty: Accords and Institutions

When I became a member of the U.S. International Trade Commission, some people in the trade community warned me that international trade was something that very few people liked. The observation that accompanied this warning was that Republicans did not like international trade because it was international, and Democrats did not like it because it was trade.

True to form, many political "liberals" are not at all liberal with respect to trade, and many political conservatives are skeptics of international agreements and international institutions.[29] That skepticism extends to agreements respecting trade and institutions for overseeing implementation of trade agreements and resolving disputes. This often is cast as a concern for a loss of sovereignty—of national control over the nation's fate.

In one sense, the concerns are mislabeled or misdirected. After all, each sovereign nation decides whether to join an international agreement and whether to accept a particular institutional arrangement for implementing an agreement and for resolving disputes respecting it. That includes the power for a nation to decide not to accept a particular decision by an international body.

In fact, the history of dispute resolution in the trade arena is one of long–running resistance to acceptance of decisions from the

29. *See* Richard V. Reeves, *Yes, Capitalism Is Broken. To Recover, Liberals Must Eat Humble Pie.*, BROOKINGS (Oct. 2, 2019), https://www.brookings.edu/opinions/yes-capitalism-is-broken-to-recover-liberals-must-eat-humble-pie/ [https://perma.cc/55WM-WF65] ("Capitalism in its liberal variant is under serious pressure. But an inwards turn, away from markets, away from trade, away from competition, away from dynamism, would spell dark times indeed . . . ."); Michael Goldfarb, *Liberal? Are We Talking About the Same Thing?*, BBC (July 20, 2010), https://www.bbc.com/news/world-10658070 [https://perma.cc/9D4M-A9T9] ("Liberals in America question free trade because it costs American workers their jobs."); Colin Dueck, *Policy Roundtable: The Future of Conservative Foreign Policy*, TEX. NAT'L SEC. REV. (Nov. 30, 2018), https://tnsr.org/roundtable/policy-roundtable-the-future-of-conservative-foreign-policy/ [https://perma.cc/8U8F-S9DP] (noting that some conservatives are "deeply skeptical regarding the continued benefits of U.S. alliances, free trade agreements, . . . and economic globalization").

"accepted" dispute resolution bodies. The U.S.–EU disputes over chickens and airplanes are well–known examples.[30]

Large, powerful nations such as the United States are especially well–positioned to decide unilaterally which international rules to accept and which to ignore. So, too, are nations, sometimes referred to as "rogue states," that simply do not care about international rules.[31] The general absence of enforcement mechanisms analogous to the coercive measures available to enforce domestic law is testament to agreements' non–interference with sovereignty. It also explains frequent commentary denying the propriety of the term "international law."[32]

At the same time, agreements and institutions can alter the conversation between representatives of sovereign states. That can be helpful, lubricating the path toward resolving differences where the nations truly have overlapping interests. Or it can be harmful, where the agreements and institutions provide impetus for collaboration that serves the interests of the collaborators—committed regulators whose interests align against competition that advances broader national interests at the expense of well–positioned insiders and established entities.

Given their relative invisibility to outsiders, regulatory harmonization programs among cooperating national bureaucracies are far more likely mechanisms than international agreements for accomplishing results that could not be achieved through constitutionally sanctioned lawmaking. Government–to–government programs—really, administrator–to–administrator programs—tend to reinforce biases common to people in government who deal regularly

30. *See* RENÉE JOHNSON & ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., R46241, U.S.–EU TRADE AGREEMENT NEGOTIATIONS: TRADE IN FOOD AND AGRICULTURAL PRODUCTS 1, 14 (2020); Bill Tomson, *US and EU Agree to Lift Tariffs in Deal on Aircraft Disputes*, AGRI PULSE (June 15, 2021), https://www.agri-pulse.com/articles/16043-us-and-eu-agree-to-lift-tariffs-in-deal-on-aircraft-disputes [https://perma.cc/53HQ-SWLM].

31. Anthony Clark Arend, *International Law and Rogue States: The Failure of the Charter Framework*, 36 NEW ENG. L. REV. 735, 735 (2002).

32. *Id.*

with international or regulatory topics. These individuals often see government regulatory actions as salutary correctives to problems of unregulated markets. They often also have confidence in their own ideas for achieving better results for society, a confidence seldom shared equally by the populace they nominally serve. Regulatory harmonization projects often are vehicles for forestalling deregulatory forces associated with international trade.[33] These mechanisms for altering national decisions are not directly at odds with national sovereignty, but they certainly are in tension with that concept.

CONCLUSION

Trade does not inherently enhance or conflict with the exercise of sovereignty. Nations can adopt different approaches to trade, but each approach—whether internationalist or isolationist—constitutes an exercise of the nation's sovereignty. While true at a definitional level, this does not mean that all policies are equal in their implications for future sovereignty: the way those policies play out can affect the sovereign power enjoyed by a nation down the road.

Open trade generally supports sovereign power by expanding the range of choices for a nation's residents. Allowing trade that undermines national security, however, while equally an exercise of current sovereign power, reduces the nation's likely capacity to exercise that power effectively in the future.

The serious issue for trade and sovereignty is not defining their relationship but crafting policies for trade and trade–related institutions that protect sovereign interests. Decisionmakers should be cautious in listening to pleas either for or against trade restraints, as the most voluble speakers are likely to represent their, and their supporters', self–interest. There is substantial economic analysis on basic trade issues, but applying the lessons from that analysis requires sensitivity to specific facts. On that score, pace Dr. Kissinger, both looking and listening matter.

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33. *See, e.g.*, Ronald A. Cass & John R. Haring, *Domestic Regulation and International Trade: Where's the Race?—Lessons from Telecommunications and Export Controls*, 11 J. ÉCONOMISTES & ÉTUDES HUMAINES 531 (2001).

MYTHS AND REALITIES OF GLOBAL GOVERNANCE

OONA A. HATHAWAY*

Is more global governance necessary? That was the question posed to me by the organizers of the 2021 Federalist Society Annual Conference.[1] It struck me when hearing this question that there are often deep misconceptions about the meaning of global governance lurking behind debates over whether there should be "more" or "less" of it. I hope to shine light of some of them today.

Global governance is not one thing, of course. It is a multitude of different international legal arrangements covering an array of activities that states as well as nonstate actors engage in. Yes, there is the United Nations, but that is simply one of many multinational organizations—and perhaps not even the most important of them. Global governance includes well–known organizations such as the International Monetary Fund,[2] the International Criminal Court,[3] and the North Atlantic Treaty Organization,[4] but it also includes

* Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School.

1. This essay has been adapted from remarks delivered at the 2021 Federalist Society National Student Symposium in a debate entitled "Is More Global Governance Necessary?" with Professor Jonathan R. Macey and, as Moderator, Hon. James C. Ho, United States Court of Appeals, Fifth Circuit. The original debate can be viewed at The Federalist Society, *Debate: Is More Global Governance Necessary?*, YOUTUBE (Mar. 20, 2021), https://www.youtube.com/watch?v=jIh321vyauI [https://perma.cc/4MRT-QYM8].

2. *The IMF at a Glance*, INT'L MONETARY FUND, (Mar. 2, 2019), https://www.imf.org/en/About/Factsheets/IMF-at-a-Glance [https://perma.cc/4GSV-AQYA].

3. *About the Court*, INT'L CRIM. CT., https://www.icc-cpi.int/about [https://perma.cc/874J-5PP8] (last visited Aug. 9, 2021).

4. *What is NATO?*, N. ATL. TREATY ORG., https://www.nato.int/nato-welcome/index.html [https://perma.cc/23RE-LGV9] (last visited Aug. 9, 2021).

lesser–known organizations such as the International Coffee Organization,[5] the Court of Arbitration for Sport,[6] and the Wassenaar Arrangement.[7] These organizations did not emerge of their own accord. Indeed, the greatest misconception that exists about global governance is that international organizations operate at the *expense* of states. The reality, instead, is that they are created *by* states to serve specific purposes that states find valuable.[8] They give states a way to achieve ends that they could not achieve on their own—or that they would find much more difficult and expensive to achieve on their own. To illustrate this argument, this essay examines five key topics in global governance—international courts and tribunals, trade, use of force, international human rights, and geopolitical competitition.

International Courts and Tribunals

International courts and tribunals have been a hot–button topic in debates over international institutions and global governance more generally. There are different ways in which this debate plays out. Here I offer a couple of examples to illustrate those differences.

First, consider the *Avena* case,[9] in which the International Court of Justice ordered the United States to reconsider death sentences of over fifty Mexican nationals whose rights under the Vienna Convention on Consular Relations had not been observed. When they

5. *Mission*, INT'L COFFEE ORG., https://ico.org/mission07_e.asp?section=About_Us [https://perma.cc/23Q9-FD6G] (last visited Aug. 9, 2021).

6. *Frequently Asked Questions*, CT. OF ARB. FOR SPORT, https://www.tas-cas.org/en/general-information/frequently-asked-questions.html [https://perma.cc/R7GP-YTF3] (last visited Aug. 9, 2021).

7. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (1995).

8. *See* Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003); Oona Hathaway & Scott J. Shapiro, *What Realists Don't Understand About Law*, FOREIGN POL'Y (Oct. 9, 2017), https://foreignpolicy.com/2017/10/09/what-realists-dont-understand-about-law/ [https://perma.cc/JE56-JXJU].

9. REPORTS OF JUDGMENTS, ADVISORY OPINIONS & ORDERS: CASE CONCERNING AVENA & OTHER MEXICAN NATIONALS (I.C.J., 2003) [hereinafter AVENA & OTHER MEXICAN NATIONALS].

were initially charged, their local Mexican consulate should have been notified that they were being charged with a crime.[10] And then the consulate should have had an opportunity to assist in their defense.[11] That was not done, and they did not receive any assistance as a result.[12] After they were sentenced to death, there was a realization that for a long time, many U.S. jurisdictions had not been meeting the United States' obligation under the Vienna Convention on Consular Relations to notify consuls when foreigners were charged.[13] Mexico brought a case against the United States in the International Court of Justice.[14] The International Court of Justice decided that the United States had violated its treaty obligations and ordered the United States to review and reconsider the convictions and sentences of the Mexican nationals who were on death row.[15]

Now, you might wonder why the International Court of Justice had jurisdiction over the case. The answer is that the United States had signed an Optional Protocol to the Vienna Convention on Consular Relations.[16] The Optional Protocol says that if there is a dispute under the Convention, then a state can go to the International Court of Justice to seek resolution.[17] The United States ratified the treaty and the protocol because they were seen as advantageous to the United States and its citizens.[18]

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10. *Id.* at 17.
11. *See id.* at 26.
12. *Id.*
13. *Id.* at 121.
14. *Id.*
15. *Id.* at 153.
16. *See* Optional Protocol Concerning the Compulsory Settlement of Disputes art. I, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol].
17. *Id.*
18. Richard Nixon, *Message to the Senate Transmitting the Vienna Convention on Consular Relations and the Optional Protocol Concerning the Compulsory Settlement of Disputes*, UC SANTA BARBARA: THE AM. PRES. PROJ. (May 5, 1969), https://www.presidency.ucsb.edu/documents/message-the-senate-transmitting-the-vienna-convention-consular-relations-and-the-optional [https://perma.cc/3LSZ-ERFG].

Here's why: if you travel abroad, and you get charged with a crime while you're in a foreign country that has signed and ratified the treaty (which most states have), you have the right, under the Vienna Convention on Consular Relations, to have a U.S. consulate notified.[19] And then the consulate can assist in your defense.[20] If you're an American traveling abroad, you want that because that means you're going to get American support and there is much less likelihood that you will be railroaded and thrown in jail without anybody knowing it. If there is a dispute between the United States and the country that is holding you, you want some place for that dispute to be able to go other than that country's own courts. The International Court of Justice is a pretty good place for that.[21] So the United States signed the treaty and the Optional Protocol, giving jurisdiction over disputes to the Court, because it was in the best interest of Americans.

The other court that has attracted a lot of attention in recent years is the International Criminal Court (ICC).[22] This court has recently been especially controversial because the prosecutor there was permitted to proceed with an investigation of crimes that were committed in Afghanistan during the war there by the United States,

19. Vienna Convention on Consular Relations art. 36, Apr. 2, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

20. *Id.*

21. *The Court*, THE INT'L CT. OF JUST., (https://www.icj-cij.org/en/court [https://perma.cc/V4K7-KYDD] (last visited Aug. 11, 2021). *See, e.g.*, REPORTS OF JUDGMENTS, ADVISORY OPINIONS & ORDERS: CASE CONCERNING ELECTTRONICA SICULA S.P.A. (ELSI) (I.C.J., 1989) (demonstrating the United States using international courts to sue another country as a way to protect American shareholders' rights).

22. John Bolton, for example, criticized the ICC in remarks delivered to the Federalist Society in Washington, D.C. while he was National Security Adviser. *National Security Adviser John Bolton on Global Threats and National Security*, C-SPAN, (Sept. 10, 2018), https://www.c-span.org/video/?451213-1/national-security-adviser-john-bolton-addresses-federalist-society [https://perma.cc/7GFU-X3Q7]; *See* Oona Hathaway, *The International Criminal Court Is No Threat to America, but John Bolton Is*, NEWSWEEK (Sept. 12, 2018), https://www.newsweek.com/international-criminal-court-no-threat-america-john-bolton-opinion-1115820 [https://perma.cc/JN4L-T2NM].

Taliban, and other actors.[23] That investigation proceeded through the initial approval process that allows the prosecutor to begin to move forward.[24] Under the Trump Administration, the United States put in place sanctions against judges, the prosecutor, and others from the court who were involved in the case, including lawyers who were just representing clients at the ICC.[25]

Now, the first thing to keep in mind about both of these courts, and really all international courts, is that none of these courts have jurisdiction over Americans without reason.[26] The courts themselves did not suddenly decide that they want to have jurisdiction. They're granted jurisdiction by states through various rules, usually through treaties.[27]

As I noted earlier, the International Court of Justice had jurisdiction in the *Avena* case because the United States gave it jurisdiction by ratifying the Optional Protocol to the Vienna Convention on Consular Relations.[28] And, again, it did so because Americans benefit from the Vienna Convention and the protections it offers.

But what about the ICC? The United States has not joined the ICC,[29] and that has been a key argument against the investigation

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23. Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17 OA4, 4 (Mar. 5, 2020) (rendering judgment on the appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan).

24. *Id.* Subsequently, the ICC prosecutor's request to authorize resumption of the investigation, which had been the subject of a deferral request, focused only on the Taliban and Islamic State Khorasan. Office of the Prosecutor, Request to Authorize Resumption of Investigation Under Article 18(2) of the Statute, ICC-02/17-161 (Sept. 27, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_08317.PDF [perma.cc/45AZ-DJP9].

25. Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020) (revoked by Exec. Order No. 14022, 86 Fed. Reg. 17895 (Apr. 1, 2021). These sanctions were lifted by President Biden after this speech was delivered. *See* Exec. Order No. 14022, 86 Fed. Reg. 17895 (Apr. 1, 2021).

26. *See, e.g.*, OPTIONAL PROTOCOL, *supra* note 16.

27. *See, e.g., id.*

28. *Id.*

29. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [https://perma.cc/2WZ8-D3G7] [hereinafter *The States*].

of U.S. actions in Afghanistan.[30] But what this argument against ICC jurisdiction ignores is that Afghanistan *is* a party to the ICC.[31] It signed and ratified the Rome Statute, which created the ICC and gives it jurisdiction over crimes committed by or *in the territory of* member states.[32] The alleged crimes fall within the jurisdiction of the Court, then, because they occurred in Afghanistan,[33] which is a party to the ICC.

The idea that a sovereign state has jurisdiction over a person who commits a crime in its territory is usually taken for granted. If I go to London and I commit a crime – say, I steal something—I can be brought in front of English courts even though I am an American, because I committed my crime in England.[34] There is a similar principle at work here. The main difference is that Afghanistan has transferred jurisdiction over the crime to the ICC by joining the Rome Statute.[35] So the ICC has been granted jurisdiction by the state that has the right to exercise jurisdiction over the crime.

Let me then turn to the question: should we have more international courts? It is worth noting that there are already a lot of international courts and tribunals.[36] I just mentioned two of them. There

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30. *International Criminal Court Officials Sanctioned by US*, BBC NEWS (Sept. 2, 2020), https://www.bbc.com/news/world-us-canada-54003527 [https://perma.cc/JD4V-TD7R].

31. *The States*, *supra* note 29.

32. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

33. *The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan*, INTERNATIONAL CRIMINAL COURT (Nov. 20, 2017), https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh [https://perma.cc/N364-UCE8].

34. *Jurisdiction*, CROWN PROT. SERV. (July 26, 2021), https://www.cps.gov.uk/legal-guidance/jurisdiction [https://perma.cc/5FDY-GBW3].

35. Rome Statute, *supra* note 32. This is true, as well, of the crimes allegedly committed at CIA black sites in Poland, Lithuania, and Romania, which were also part of the investigation. *See* Office of the Prosecutor, Pre-Trial Chamber III, Situation in the Islamic Republic of Afghanistan, No. ICC-02/17 (Nov. 20, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF [https://perma.cc/8XVY-42BH].

36. *See The International Judiciary in Context: A Synoptic Chart*, THE PROJ. ON INT'L CTS. & TRIBUNALS, https://elaw.org/system/files/intl%20tribunals%20synoptic_chart2.pdf [https://perma.cc/N4YP-GEPT] (last visited Aug. 29, 2021).

are also a number of international arbitral bodies.[37] There are many more formal and informal dispute resolution bodies at the international level than is commonly recognized.

Why do all these bodies exist? Why do states create them? It is because they need some way to resolve disputes among and between them and their citizens. These courts, and these arbitral bodies, give states a peaceful way to resolve disputes. Without them, the alternative would be to go to a foreign court where the state or its citizen might not necessarily get a fair hearing.[38] And so one of the reasons a state might want to have access to an international court for certain kinds of disputes is it provides neutral ground on which to make its arguments.

In addition to the courts I have mentioned, for instance, there are arbitral bodies that address questions like investment disputes[39] or commercial disputes.[40] These are very much favored by international business, because they offer an important way in which, if a business investment is illegally expropriated by a state, a business can seek recourse.[41] It is favored by states, as well, because access to international arbitration encourages international investment, especially in countries with less developed legal systems. Under the New York Convention,[42] the party that is harmed can enforce the decision of that arbitral body pretty much anywhere in the world.

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37. *Id.*

38. Historically, the mode of dispute resolution was for states to go to war with one another. *See* HATHAWAY & SHAPIRO, *infra* note 61.

39. One example is the International Centre for Settlement of Investment Disputes. *About ICSID*, INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org [https://perma.cc/B2B2-9ZEY] (last visited Aug. 29, 2021).

40. One example is the ICC International Court of Arbitration. *Who We Are*, INT'L CHAMBER OF COM., *Who We Are*, https://iccwbo.org/about-us/who-we-are/ [https://perma.cc/52HM-ZXML] (Aug. 29, 2021).

41. *Id.*

42. Convention on the Recognition & Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201–208 (1988).

And so states, businesses, and individuals benefit from these bodies.[43] That is why they have been created, and that is why I expect we will continue to see more of them.

U.S. courts are the place of first recourse for most Americans. But sometimes Americans are going to have disputes with foreigners, and we may prefer to have access to an international court or arbitral body rather than be stuck in the courts of other nations or have access to no court at all. That is why we see these courts emerging, evolving, and continuing to expand.

Trade

The key global institution for trade is the World Trade Organization,[44] the successor organization to the trade regime that the United States and its allies worked hard to build in the years immediately following World War II. The idea behind this global trade regime is that we need a robust global economic order if we're going to keep the peace.[45] State economies were devastated after the war, and expanding global trade was seen as core to the effort to rebuild them. Not only would that help rebuild societies that had been devastated by war, but the vision was that if we have robust, thick trade relations, then we will be less likely to go to war again in the future.[46]

43. It is worth noting that arbitration has sometimes been criticized as *too* business friendly, and insufficiently attentive to human rights and environmental concerns, though there have been some signs that could be beginning to change. *See, e.g*, Fabio Giuseppe Santacroce, *The Applicability of Human Rights Law in International Investment Disputes*, 34 ICSID REV. 136 (2019).

44. *Accession in Perspective*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c1s1p1_e.htm [https://perma.cc/U5VZ-8T7C] (last visited Jan. 12, 2022) (stating the percentage of world trade accounted for by member states is 96.4%).

45. G. JOHN IKENBERRY, AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS (2001).

46. *Id.*

Today there are 164 members of the World Trade Organization (WTO).[47] Membership comes with an array of obligations as well as benefits.[48] There are rules that a state has to follow to become a member of the WTO.[49] And once a state becomes a member, there are rules that govern its behavior: there are limits on tariffs, for instance, that every member state has to follow.[50] The upside, of course, is every state not only has to follow the rules but also benefits from them as well: for instance, no other member state can place tariffs on their exported goods that exceed agreed levels.[51] So member states are both constrained by and benefit from the same rules. And states join because, all things considered, they benefit from those shared constraints.

The WTO has a dispute resolution process to resolve any disagreements that arise between states.[52] So if a state breaks the rules and harms another state as a result, then the harmed state can bring a complaint to the dispute resolution body.[53] That body then will resolve the dispute.[54] If a state loses, it can appeal.[55] If that appeal is

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47. *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/39nglish/thewto_e/whatis_e/tif_e/org6_e.htm [https://perma.cc/9YXB-QU24] (last visited Jan. 13, 2022).

48. *Overview*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm [https://perma.cc/R5W4-KV2V] (last visited Jan. 13, 2022).

49. *Membership, Alliances and Bureaucracy*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm [https://perma.cc/W3S9-26GG] (last visited Aug. 29, 2021).

50. *Tariffs*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm [https://perma.cc/WPA5-6TVJ] (last visited Aug. 29, 2021).

51. *Id.*

52. *A Unique Contribution*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [https://perma.cc/X64Z-EZ6Y] (last visited Aug. 29, 2021).

53. *Dispute Settlement Body*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm [https://perma.cc/5PXK-CYHV] (Aug. 29, 2021) [hereinafter *Dispute*].

54. *Id.*

55. *Appellate Body*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm [https://perma.cc/KV2N-G39E] (last visited Aug. 29, 2021).

not successful, then the state that filed the complaint is permitted to put in place countermeasures against the state that has been found to have broken the rules.[56] This is a way of giving bite to the legal obligations of membership.

The idea behind this global trade organization was that it would encourage free trade across all countries who are party to it.[57] The aim of the dispute resolution process was to prevent a trade war.[58] After World War II, states wanted to avoid a breakdown in trade relations in which states might start tit–for–tat trade sanctions against one another that might get out of control.[59] This was the kind of fiasco that, for instance, preceded the Great Depression: the U.S. Smoot–Hawley tariffs and the spiraling trade protectionism that followed.[60] The long–standing consensus has been that this is in the best interests of everyone.[61] Yet, we have seen that consensus unravel in the last several years.[62] And I think that there are a few reasons for that.

Many of the attacks on free trade are not based in fact. But some of the concerns arise from the failure to fully appreciate that while free trade is in the interest of the United States as a whole, certain communities are going to be particularly hard hit, especially communities supported by industries where the United States just

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56. *Dispute*, *supra* note 53.

57. *Introduction to the WTO Dispute Settlement System: 1.3 Functions, Objectives and Key Features of the Dispute Settlement System*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p1_e.htm [https://perma.cc/4KZV-Y8MG] (last visited Aug. 7, 2021).

58. WORLD TRADE ORG., 10 THINGS THE WTO CAN DO 12 (2013), *available at* https://www.wto.org/english/res_e/publications_e/wtocan_e.pdf [https://perma.cc/67F4-PQGF].

59. CHAD P. BOWN, SELF-ENFORCING TRADE: DEVELOPING COUNTRIES & WTO DISPUTE SETTLEMENT 11 (2009).

60. Tariff Act of 1930 (Smoot–Hawley Tariff), Pub. L. 71-361, 46 Stat. 590 (codified as amended at 19 U.S.C. § 1202 et seq.).

61. *See* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 378–80 (2017).

62. *See* Alan S. Blinder, *The Free-Trade Paradox: The Bad Politics of a Good Idea*, FOREIGN AFFS. (Jan./Feb. 2019), https://www.foreignaffairs.com/articles/2018-12-11/free-trade-paradox [https://perma.cc/Q8TS-5R4V].

simply cannot compete in the global market. One industry that has been hard hit is steel.[63] The future of that industry has been a subject of debate for quite some time.[64] The United States has, at various points, put in place illegal steel tariffs to try and preserve steel manufacturing in the United States when, really, there are other countries that can produce steel much more effectively at lower cost than we can.[65] Even when we compete on a fair and level playing ground, they beat us. That is just the reality of the situation.

Now, those hard–hit communities have not been sufficiently supported, and so people are thrown out of work as a result of free trade.[66] It is not just individuals who are put out of work, but it is whole communities that suffer. And we did not do enough to address those costs. We had a very minimal trade adjustment assistance program,[67] but it provides nowhere near enough to those in hard hit industries and communities. We have not offered sufficient retraining of people thrown out of work so that they could move

63. ANTHONY P. D'COSTA, THE GLOBAL RESTRUCTURING OF THE STEEL INDUSTRY: INNOVATIONS, INSTITUTIONS AND INDUSTRIAL CHANGE (1999); ROBERT P. ROGERS, AN ECONOMIC HISORY OF THE AMERICAN STEEL INDUSTRY (2009).

64. *See* Action Under Section 203 of the Trade Act of 1974 Concerning Certain Steel Products, 67 Fed. Reg. 10,593 (Mar. 5, 2002) (declaring the Bush Administration steel tariffs of 2002); Elizabeth Becker, *U.S. Tariffs on Steel are Illegal, World Trade Organization Says*, N.Y. TIMES (Nov. 11, 2003), https://www.nytimes.com/2003/11/11/business/us-tariffs-on-steel-are-illegal-world-trade-organization-says.html [https://perma.cc/Z787-ABBB].

65. *See Ineffective Steel Tariffs Now Illegal, Too*, FORBES (Nov. 11, 2003, 9:50 AM), https://www.forbes.com/2003/11/11/cx_da_1111topnews.html?sh=139922b3d004 [https://perma.cc/HF2C-RUNM] (describing the tension between American leadership to enforce international free-trade laws and the Bush Administration's desire for political leverage in the face of rising Chinese steel production); HATHAWAY & SHAPIRO, *supra* note 61, at 371–73.

66. Stephen J. Rose, *Is Foreign Trade the Cause of Manufacturing Job Losses?*, URB. INST. (Apr. 2018), https://www.urban.org/sites/default/files/publication/97781/is_foreign_trade_the_cause_of_manufacturing_job_losses_2.pdf [https://perma.cc/8UK3-8NKQ].

67. *Trade Adjustment Assistance for Workers*, U.S. DEP'T OF LAB.: EMP. & TRAINING ADMIN., https://www.dol.gov/agencies/eta/tradeact [https://perma.cc/AP4X-W5RK] (last visited Aug. 7, 2021).

into other industries where they could earn roughly equivalent incomes to the ones they lost. That short–sightedness created real pain for not only individuals but also communities that were hurt by free trade. And I think we could have, and should have, done more to try and address that.

The answer to this problem is not to reduce free trade, as some have advocated. But we have to be mindful that the costs of a policy of free trade are real. We should try to address these costs through much more robust trade adjustment assistance, better education, thinking about what industries can come in to replace those we have lost, and stronger unemployment insurance. We need to understand ways to address real harms that people suffer as a result of the adjustments that are required as a result of free trade.

Use of Force

The rules that govern the use of force are absolutely foundational to the modern legal order. Let us start with the United Nations (UN) Charter. The UN Charter was put in place at the close of World War II.[68] And the fundamental commitment in the Charter is Article 2(4)'s prohibition on use of force: All members of the United Nations are obligated to refrain from use of force against every other state in the world.[69]

I spend a lot of time providing the background on the Charter's prohibition on force in my book with Scott Shapiro, *The Internationalists*.[70] We argue that the idea of outlawing war began in 1928 with the Kellogg Briand Pact and the UN Charter reaffirmed that central obligation.[71] In the book, we try to show that while that prohibition may seem not particularly interesting or important when viewed

68. *United Nations Charter*, UNITED NATIONS, https://www.un.org/en/about-us/un-charter [https://perma.cc/5TZR-YXFF].

69. U.N. Charter art. 2, ¶ 4.

70. *See generally* HATHAWAY & SHAPIRO, *supra* note 61 (describing the transformation from the Old to the New World Order by way of a prohibition on the use of force).

71. *Id.* at 313–14 (observing empirically a marked decline in the frequency of conquest after the Second World War); U.N. Charter art. 2, ¶ 4.

from our modern perspective, it looks very different if you view it against history. Historically, states were allowed to go to war to resolve their disputes.[72] If, for example, a state failed to repay its debts to another, the state that was owed money could go to war.[73] Or if a king of one state stole another king's wife, the king who was wronged could go to war over it.[74] If a state interfered with another's trade relations, the harmed state could go to war over it.[75] War was historically how disputes were settled between states if they could not resolve them amicably.[76]

The Kellogg Briand Pact and then the U.N. Charter said that states could not do that anymore—states cannot go to war against each other if they have disputes.[77] There are now very limited reasons that states can go to war. First, a state can act in its own self–defense if it is attacked, as outlined in Article 51.[78] Second, the U.N. Security Council can authorize an intervention under Chapter VII.[79] When Iraq invaded Kuwait, for example, the United States and its allies were authorized by the Security Council to expel Iraq from Kuwait for violating Article 2(4).[80] Here it is worth noting that the United States is one of the five permanent members of the Security Council, each of which has a veto over any Security Council resolution issued under Chapter VII.[81] The United States is therefore in a highly privileged position in that it is able to prevent the United

72. HATHAWAY & SHAPIRO, *supra* note 61, at 38.

73. *Id.* at 39 (describing President Polk's justification for the Mexican-American War as the collection of debts).

74. *See id.* (describing Maximilian I's justification for war with France after King Charles VIII stole Maximilian's wife).

75. Oona A. Hathaway et al., *War Manifestos*, 85 U. CHI. L.R. 1139, 1193–94 (2018) [hereinafter *War Manifestos*] (cataloging examples).

76. *See* HATHAWAY & SHAPIRO, *supra* note 61, at 44–45 (identifying war as the historical enforcement mechanism of international law); *see also generally War Manifestos*, *supra* note 75 (cataloging examples).

77. U.N. Charter art. 2 ¶ 4.

78. *Id.* at art. 51.

79. *Id.* at art. 42.

80. U.N. Sec. Council Res. 678, ¶ 2 (Nov. 29, 1990).

81. U.N. Charter art. 23 ¶ 1; *id.* art. 27 ¶ 3.

Nations from authorizing war. Third, and finally, the host state can consent to the use of force on its territory.[82] For instance, as of this moment, the United States is using force in Iraq with the consent of the Iraqi government to assist it in counter–terrorism operations.[83]

One just needs to read the news to know that the prohibition on the use of force has not been perfectly observed. Lately, we have seen many ways in which the prohibition on war has been chipped away. Just to give a few quick examples: Russia invaded and seized Crimea from Ukraine in 2014.[84] That is the first successful conquest in Europe since World War II.[85] We really should be deeply concerned about that and what it signals for Russia's intent in the region. Meanwhile, China has occupied contested territory in the South China Sea, turning a number of islands and rocks that other states also claim sovereignty over into military installations.[86] China also rejected an arbitral panel decision that found its actions illegal.[87] And the United States itself has been responsible for stretching the idea of self–defense to its breaking point by claiming a wide range of operations in the Middle East were justified as legitimate acts of self–defense. For instance, the killing of Qasem Soleimani in Iraq in early 2020 was justified by the Trump Administration as an act of self–defense.[88] But the Administration really

82. Michael Wood, *International Law and the Use of Force: What Happens in Practice?*, 53 INDIAN J. INT'L L. 345, 352 (2013).

83. *U.S. Security Cooperation with Iraq*, U.S. DEP'T OF STATE (July 16, 2021), https://www.state.gov/u-s-security-cooperation-with-iraq/ [https://perma.cc/JDX9-PGE7].

84. Robin Geiß, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91 INT'L L. STUD. 425, 426–27 (2015).

85. Dainius Žalimas, *Lessons of World War II & the Annexation of Crimea*, 3 INT'L COMPAR. JURIS. 25, 25 (2017).

86. *See generally* RONALD O'ROURKE, CONG. RSCH. SERV., R42784, U.S.-CHINA STRATEGIC COMPETITION IN SOUTH AND EAST CHINA SEAS: BACKGROUND & ISSUES FOR CONGRESS (2021).

87. *In the Matter of the South China Sea Arbitration*, PCA Case No. 2013–19 (2013), https://pcacases.com/web/sendAttach/2086 [https://perma.cc/TA37-G5UT].

88. Jean Galbraith, *U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani*, 114 AM. J. INT'L L. 313, 316 (2020).

never provided any evidence that there was an immediate threat that would have justified an act of self–defense under Article 51.[89]

Those of us who think that the prohibition on war is a foundational norm of the international order are concerned by these developments. To reverse the erosion of this norm, it really is up to the United States to lead the way. As a leading member of the global community and member of the Security Council, the United States is in a unique position to do so. The United States has played an important role in the past. For example, it led the charge in putting economic sanctions on Russia after the Crimea invasion.[90] The United States has also led the world in the pushback against China in the South China Sea by refusing to acknowledge formally and accept the claims that it has made over certain territories in the South China Sea.[91]

I would also like to see the United States be more careful about its own behavior. Pushing the boundaries of self–defense to the point where the exception threatens to swallow the rule is very troubling. Unfortunately, the Biden Administration seems to be following in the footsteps of previous administrations. For example, it recently took strikes against Iran–supported non–state actor groups in Syria, claiming that it was an act of self–defense because the

89. Oona A. Hathaway, *The Soleimani Strike Defied the U.S. Constitution*, THE ATLANTIC (Jan. 4, 2020), https://www.theatlantic.com/ideas/archive/2020/01/soleimani-strike-law/604417/ [https://perma.cc/8BUP-K34Q]. It is important to acknowledge that there has been an increase in civil wars, or what are often called "intrastate wars" (which are not regulated by the UN Charter) even as there has been a rapid decline in "interstate wars"—that is, wars between states (which are prohibited by Article 2(4) of the UN Charter). *See* HATHAWAY & SHAPIRO, *supra* note 61, at 352–70.

90. *See generally* DIANNE E. RENNACK & CORY WELT, IF10779 CONG. RSCH. SERV., U.S. SANCTIONS ON RUSSIA: AN OVERVIEW (2021); HATHAWAY & SHAPIRO, *supra* note 61, at 390-94.

91. Chun Han Wong, *U.S. Rejects Most Chinese Maritime Claims in South China Sea*, WALL ST. J. (July 13, 2020, 7:58 PM), https://www.wsj.com/articles/u-s-set-to-reject-certain-chinese-maritime-claims-in-south-china-sea-11594661229 [https://perma.cc/Q3T5-WBH9].

group posed a threat to U.S. troops and coalition forces in Iraq.[92] But we have not seen clear evidence that these strikes were justified as acts of self defense under Article 51.[93] Moving forward, I would like to see the United States do more to reinforce the prohibition on the unilateral use of force instead of continuing to chip away at it.

The danger in adopting such an expansive interpretation of self–defense and collective self–defense under Article 51 is that other states will follow in our footsteps. To take one example: one of the claims that Russia makes for its continuing military operations in Eastern Ukraine, where it has continued to foment disruption and support separatist groups, is that it is defending Russian nationals in Ukraine.[94] The same thing has happened in northern Syria, where Turkey has argued that its right of self–defense allows it to attack Syrian Kurdish forces that have received support from the United States.[95] Crucially, once we open the door to an expansive notion of self–defense and we use it in one context, it opens the door to others to use it as well. And once self–defense becomes so expansive, the prohibition on offense threatens to become irrelevant.

International Human Rights

92. Eric Schmitt, *U.S. Carries Out Airstrikes in Iraq and Syria*, N.Y. TIMES (June 27, 2021), https://www.nytimes.com/2021/06/27/us/politics/us-airstrikes-iraq-syria.html [https://perma.cc/84HW-WDHF].

93. *See* Adil Ahmad Haque, *Biden's First Strike and the International Law of Self–Defense*, JUST SEC. (Feb. 26, 2021), https://www.justsecurity.org/75010/bidens-first-strike-and-the-international-law-of-self-defense/ [https://perma.cc/45K2-ZTVT] (analyzing the international law justifications for the first strike, which took place in February).

94. *Ukraine Conflict: Moscow Could 'Defend' Russia–Backed Rebels*, BBC NEWS (Apr. 9, 2021), https://www.bbc.com/news/world-europe-56678665 [https://perma.cc/GW72-ZAN3] (quoting Russian official stating that "Russian forces could intervene to 'defend Russian citizens'").

95. Oona Hathaway, *Turkey Is Violating International Law. It Took Lessons from the U.S.*, WASH. POST (Oct. 22, 2019), https://www.washingtonpost.com/outlook/2019/10/22/turkey-is-violating-international-law-it-took-lessons-us/[https://perma.cc/GWU2-ZT2L].

My first major law review article was titled, "Do Human Rights Treaties Make A Difference?"[96] It concluded that states that ratify human rights treaties not only do not generally do better than those that do not have treaties, but rather they, albeit counterintuitively, sometimes do worse.[97] And that was something of a bombshell in the human rights community because, of course, a lot of effort had been put into creating these treaties and encouraging states to ratify them.[98] Part of the reason for that result is that human rights treaties, with only a few exceptions, generally are not internationally enforced.[99]

It is very easy for a state that has a bad human rights record and no expressed intention to change it to ratify a treaty and then not do anything differently as a result. Does that mean that human rights treaties are pointless? No. These treaties have a lot of value even if they are not directly effective in changing the behavior of states who ratify them. But the next step in the human rights revolution should be to think about how we transform those promises into reality. How do we give them life? How do we make them effective?

We need better ways to enforce human rights obligations if we think they are important commitments, as I do. Countries should not torture. People should enjoy rights to freedom of assembly and freedom of speech. People should be free of the threat of genocide. The basic protections that are included in the core human rights treaties are fundamental.[100] Indeed, many of these human rights obligations are ones the United States pressed hard for in the years

96. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

97. *Id.* at 2021.

98. *See id.* at 2024.

99. *See id.* at 2022–23.

100. *See, e.g.*, U.N. Charter ch. IX, art. 55(c) ("[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (affirming, in the Preamble, that

following World War II.[101] Many of the core human rights instruments are based on commitments that the United States made domestically and wanted to internationalize. For example, the International Covenant on Civil and Political Rights really is an internationalization of the U.S. Bill of Rights.[102]

If that is right, then we need to develop better ways to enforce these obligations. As noted earlier, international courts are one option.[103] For instance, in Europe, there is the European Convention on Human Rights, which is enforced by a European Court on Human Rights.[104] That court has been quite effective in finding that states have engaged in human rights violations and requiring them to make changes. Russia, for instance, gets brought in front of that court a lot and has been ordered to pay a lot of money and to make policy and legal changes.[105] There is also the Inter–American Court on Human Rights.[106] Unlike the European Court of Human Rights, it does not have compulsory jurisdiction.[107] That makes it too easy for states to evade responsibility. But it is, nonetheless, a widely accepted international mechanism for enforcing human rights.[108]

"the inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world").

101. John W. Dietrich, *U.S. Human Rights Policy in the Post-Cold War Era*, 121 POL. SCI. Q. 269, 270 (2006); MARY ANN GLENDON, WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001).

102. *See* International Covenant on Civil & Political Rights (1976) (Preamble recognizes "that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights . . .").

103. *See* AVENA & OTHER MEXICAN NATIONALS, *supra* note 9.

104. European Convention on Human Rights art. 46(2), Nov. 4, 1950, 213 U.N.T.S. 221 (explicitly prescribing "the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution").

105. *See* Jeffrey Kahn, *The Relationship Between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St. Petersburg*, 30 EUR. J. INT'L L. 933, 934 (2019).

106. American Convention on Human Rights, Nov. 22, 1969, OAS Treaty Ser. No. 36, 1144 U.N.T.S. 123 (1978).

107. *Id.* at arts. 62–64.

108. *Id.*

Despite these examples, international courts are likely not the best answer to the problem of human rights enforcement. Human rights are best enforced domestically, through domestic political and legal institutions.[109] For example, the Alien Tort Statute is one way in which human rights law is enforced in the United States.[110] The statute was enacted in 1789 by the first U.S. Congress, and it allows an alien to sue in tort for violations of the law of nations.[111] It has been a controversial tool for enforcing human rights.[112] And there has been lots of debate about what exactly it means.[113] In June 2021, the U.S. Supreme Court decided *Nestlé v. Doe*, which it joined with *Cargill v. Doe*.[114] The plaintiffs were children trafficked from Mali to Cote d'Ivoire to work in cocoa plantations.[115] They claimed that Nestlé and Cargill were working closely with cocoa suppliers that were using child slave labor and thereby aided and abetted child slavery.[116] The question in front of the Supreme Court was whether U.S. corporations can be held liable for aiding and abetting a human rights violation—here, child slavery—abroad.[117] The decision, unfortunately, was no: the Court decided that the Alien Tort Statute did not apply to the extraterritorial conduct at issue in the case.[118] That leaves the plaintiffs with no remedy for the human

109. Oona A. Hathway, Hamdan v. Rumsfeld*: Domestic Enforcement of International Law*, *in* INTERNATIONAL LAW STORIES 229 (Foundation Press 2007).

110. *The Alien Tort Statute*, THE CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/legal-strategy/the-alien-tort-statute/ [https://perma.cc/BS5B-UNHA] (last visited Jan. 13, 2021).

111. *Id.*

112. *See id.*

113. *See id.*

114. *See* Nestlé USA, Inc. v. Doe, 141 S.Ct. 1931 (2021).

115. *Id.* at 1935.

116. *Id.*

117. *Id.* at 1935–36.

118. *Id.* at 1936.

rights violations they suffered.[119] These kinds of cases play an important role in policing human rights violations around the world. If we do not want international courts to provide the only tool for human rights enforcement, we need to find a way to provide other fora to human rights victims.

There are efforts to enforce human rights in domestic courts in Europe as well.[120] There have been more recent cases against corporations that engage in human rights violations and environmental violations either directly or through subsidiaries in other countries, particularly in the Global South.[121] There are cases in U.K. courts and Dutch courts against Shell Dutch Oil Company for environmental degradation caused by oil spills in Nigeria.[122] Just in the last year, both U.K. and Dutch courts have allowed those cases to proceed.[123] That is one way in which human rights could be enforced. In Europe, there is also an effort to require corporations to engage

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119. Lawrence Hurley, *U.S. Supreme Court Rules for Nestle, Cargill over Slavery Lawsuit*, REUTERS (June 17, 2021), https://www.reuters.com/business/us-supreme-court-rules-nestle-cargill-over-slavery-lawsuit-2021-06-17/ [https://perma.cc/873C-QS4N]. The plaintiffs moved to amend their complaint in order to continue to case, but the district court denied that motion.

120. Kiobel v. Royal Dutch Shell, Rechtbank Den Haag, ECLI:NL:RBDHA:2019:4233 (May 1, 2019), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:6670 [https://perma.cc/M8NM-DBJ5]; Patrick McAllister, *UK Supreme Court Approval of Shell-Bodo Case: Could This Be a Step Towards a More Equitable Future?*, GLOB. RISK INSIGHTS (May 4, 2021), https://global-riskinsights.com/2021/05/uk-supreme-court-approval-of-shell-bodo-case-could-this-be-a-step-towards-a-more-equitable-future/ [https://perma.cc/TXA3-HM43].

121. *Id.*

122. Rechtbank Den Haag, ECLI:NL:RBDHA:2013:BY9854 (Jan. 30, 2013), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:BY9854 [https://perma.cc/E5NL-QWHX]; David Vetter, *Niger Delta Oil Spills: Shell Ruled Responsible in Landmark Verdict,* Forbes (Jan. 29, 2021, 10:14 AM), https://www.forbes.com/sites/davidrvetter/2021/01/29/niger-delta-oil-spills-shell-ruled-responsible-in-landmark-verdict/?sh=134c674a465e [https://perma.cc/3RRJ-NJ5N]; Julia Payne & Kirstin Ridley, *Nigerians Win UK Court OK to Sue Shell over Oil Spills*, REUTERS (Feb. 12, 2021), https://www.reuters.com/article/us-britain-shell-nigeria-judgement/nigerians-win-uk-court-ok-to-sue-shell-over-oil-spills-idUSKBN2AC16A [https://perma.cc/M9TM-SR5B].

123. *Id.*

in due diligence to ensure that there are not human rights violations taking place in their supply chain.[124]

Human rights violations could also be enforced through courts in the countries where they occur. The problem, however, is that courts in the places where the human rights violations are happening are generally not particularly friendly to cases being brought by the victims.[125] The government often has some complicity or role in the violations and is not eager to allow these cases to proceed. And courts are often not entirely independent. Bringing a case against human rights violators can also be dangerous. So often the only real option is for the case to proceed outside of the country where the violations have taken place. Nonetheless, there could be efforts at local rule-of-law reform to make local courts more available to those who have suffered.[126]

In short, we need to invest in making human rights protections more effective. That is the next goal of the human rights revolution.

Global Governance and Geopolitical Competitors

Now that our chief geopolitical competitors have joined global governance organizations like the World Trade Organization, one might ask whether it is really in our best interests to participate in them as well. One might wonder if being a member of these global institutions really helps us all that much if it allows our competitors to take advantage of the same rules and regulations that we enjoy.[127]

A prominent theory of political science, Realism, once endorsed the view that global institutions are incompatible with geopolitical competition. Realists argued that there could not be a robust and

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124. *See* Gabriela R. Da Costa et al., *European Union Moves Towards Mandatory Supply Chain Due Diligence: Start Gearing up for New Directive*, NAT'L L. REVIEW (Apr. 29, 2021), https://www.natlawreview.com/article/european-union-moves-towards-mandatory-supply-chain-due-diligence-start-gearing-new [https://perma.cc/339G-AXH2].

125. *The Alien Tort Statute*, *supra* note 110.

126. For more on the Alien Tort Statute, see Oona A. Hathaway et al., *Has the Alien Tort Statute Made a Difference?*, CORNELL L. REV. (forthcoming 2022).

127. HATHAWAY & SHAPIRO, *supra* note 61, at 345.

successful free trade regime between states because although all states will benefit from a free trade regime, some will inevitably benefit more than the others. Some states will grow faster than their competitors, which will change the balance of power among the parties in a way that is disadvantageous to states that, although rising, are not rising as fast. Therefore, this theory went, free trade arrangements are ultimately going to break down because the states that are not benefitting as much as others are going to want to pull out of the agreement even though they, too, are doing better because of it.[128]

The modern era has disproved that theory. A key reason is the emergence of the prohibition on war, now embodied in Article 2(4) of the UN Charter.[129] This prohibition helps overcome the problem outlined above, because states need not be constantly afraid that if other states makes relative gains, they will use those gains to go to war against those who, while gaining, gain relatively less.[130] For lots of human history, that was a real concern.

Moreover, in this era, the reality is that if a state is not in the World Trade Organization and benefitting from it, other states *are* going to be in it and benefitting from it. So simply pulling out is not going to do a state any good if it is concerned with relative gains. All a state will succeed in doing is harming itself and excluding itself from the benefits of a regime that is serving the best interests of its members. At the same time, being a part of these global institutions along with its competitors—for instance, with China—allows the United States to hold those competitors to account when they fail to follow the rules. Being in the WTO with China is advantageous, ultimately, to the United States because when China breaks the rules, which it sometimes does, there is a mechanism under the WTO for the United States to bring a case against it.[131] The United

128. *See id.* at 343.

129. *Id.*; U.N. Charter art. 2(4).

130. HATHAWAY & SHAPIRO, *supra* note 61, at 344.

131. *See* Jeffrey J. Schott & Euijin Jung, *In US-China Trade Disputes, the WTO Usually Sides with the United States*, PETERSON INST. FOR INT'L ECON. (Mar. 12, 2019, 3:15 PM),

States has done that several times[132] and, when it wins, the United States is allowed to put in place countermeasures in response to those violations unless they are corrected.[133] So the institutions offer a way for the United States to peacefully police the bad behavior of its competitors so that they do not take an unfair advantage.

Ultimately, in this world, states have to be a part of global institutions because the party is going to go on with or without them. As a result, they are going to lose out if they opt out. Being a part of these global institutions gives a state tools to enforce the rules, whereas if they stay out of the system, they cannot police the rules as effectively. The United States is better off for having those institutions, and participating in them, even—or perhaps especially—when competitors are a part of them.

Conclusion

A challenge that we face in the United States at this moment is that the United States' relative influence compared to other countries is in decline. When you look at share of global GDP, for example, the United States is declining and others are rising.[134] In 1960, the United States' GDP made up 40% of global GDP.[135] In 2014, it was roughly half that, and projections are that it will be under 15% in 2026.[136] As a result, the ability of the United States to shape the global rules is going to be reduced in the future.

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https://www.piie.com/blogs/trade-and-investment-policy-watch/us-china-trade-disputes-wto-usually-sides-united-states [https://perma.cc/P3F8-WA2S].

132. *Id.*

133. *Countermeasures by the Prevailing Member (Suspensions of Obligations)*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm [https://perma.cc/79an-c9f4] (last visited Aug. 29, 2021).

134. Mike Patton, *US Role in Global Economy Declines Nearly 50%*, FORBES (Feb. 29, 2016), https://www.forbes.com/sites/mikepatton/2016/02/29/u-s-role-in-global-economy-declines-nearly-50/?sh=6498c7e75e9e [perma.cc/Q9W9-STSA].

135. *Id.*

136. *Id.*; Aaron O'Neill, *United States Share of Global Gross Domestic Product (GDP) 2026*, STATISTA (Nov. 23, 2021), https://www.statista.com/statistics/270267/united-states-share-of-global-gross-domestic-product-gdp/ [https://perma.cc/U3CL-ZWG6].

One reason it is in our interest to create and invest in global institutions and global rules of the road now is to shape them while we still have the capacity to do so. Creating these institutions and structures to enforce them, structures and institutions that are consistent with our values and our view about the proper way of running the world, is in our best long–term interests. Pulling out now is the most disastrous thing we can do, because it leaves it to others to define those rules—rules that we will ultimately have to live by.

The robustness of the norm against using military force has, for example, helped preserve the independence of Taiwan. I was concerned, particularly in the period after Trump's defeat and before Biden's inauguration, that China might take advantage of the difficult political transition. The fact that it did not makes me hopeful that those rules still mean something. China understands that there would be a massive price to pay for violating them. I think it is in our best interests to continue to make it clear that those are the rules that we intend to abide by, that other states are with us in believing that those are the right rules to govern the global system, and that others will join us in rejecting any effort to violate them.

Global governance serves our interests and our values. It is the way in which the United States can ensure that its values continue to govern the global order, even as we look to a future in which the United States' relative economic and military strength will not be as dominant as it historically has been. And that is why it is so important, now more than ever, that we continue to invest in creating, strengthening, and growing institutions for global governance.

THE DEMOCRATIC LIMITS OF INTERNATIONAL HUMAN RIGHTS LAW

JOHN O. MCGINNIS*

We citizens of the United States have been handed a precious gift—the Constitution.[1] The importance of this gift lies not merely in the structures for government that the document details but also, more broadly, in the commitment to the rule of law. Some in the current generation of jurists have now asked the question: "Which law should rule us?" Some justices on the Supreme Court have been looking to international law and precedent to decide domestic cases.[2] But is this legitimate? Should decisions made in Geneva bind people in Grand Rapids?

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* George C. Dix Professor in Constitutional Law at Northwestern Pritzker School of Law.

1. This essay has been adapted from remarks delivered at the 2021 Federalist Society National Student Symposium in a debate entitled "How Beneficial is International Human Rights Law?" with Prof. Eugene Kontorovich, Prof. Michael Ramsey, Prof. Beth Simmons, and, as Moderator, Hon. Stephanos Bibas of the United States Court of Appeals for the Third Circuit. The original debate can be viewed at The Federalist Society, *Panel IV: How Beneficial is International Human Rights Law?*, YOUTUBE (Mar. 20, 2021), https://www.youtube.com/watch?v=yu7NyFwFlP8 [https://perma.cc/YX9U-HQGY]. It reflects some of the substance of the longer, joint work presented by John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739 (2009). Thanks to Jack Ramler for research assistance.

2. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 81–82 (2010) (explaining that imposing life sentences without the possibility of parole on juvenile offenders is "inconsistent with basic principles of decency" and noting that the United States is one of only two nations not to prohibit the practice by ratifying the United Nations Convention on the Rights of the Child); Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (internal quotation marks and citation omitted) (Ginsburg, J., concurring) ("The Court's observation that race-conscious programs must have a logical endpoint accords with the international understanding of the office of affirmative action.").

In this brief essay, I will argue that international law should not be applied against United States officials or others in the United States except when Congress has made it part of our law by either treaty or statute. Our structure for creating norms applied to Americans is better than the structure for creating international norms. Far from harming the cause of international human rights, this limitation to their application will advance it.

Currently, many Americans, particularly conservatives, are suspicious of international human rights because they fear such rights will be used to attack American practices and actions, despite our functioning democracy and the benefits we provide the world in keeping the international peace. But if the only international norms that are applied to the United States are those to which we actually consent, that limitation will put to rest these fears. Under that regime, Americans will have more credibility to attack the worse abuses of international human rights that occur not in well-functioning democracies but in authoritarian regimes, like Iran, and in communist regimes, like China, North Korea, and Cuba.

The United States should not generally feel bound by international human rights law unless it has agreed to be bound through its own domestic law—either by treaty or congressional executive agreement. The democratic processes for legislating in the United States are superior to the often-flawed processes that create modern human rights law. While other well-functioning democracies should also not feel bound by international law to which their domestic systems have not consented, the United States has particular reasons for its refusal because of its constitutional structure of federalism, its common law style of judging, and its unique international responsibilities as a world superpower.

America's need for screening human rights claims through its own democratic processes has become much more important in recent times because of the vast, continuing expansion of human rights law since World War II[3] and because of the more uncertain

3. Frans Viljoen, *International Human Rights Law: A Short History*, UN CHRONICLE, https://www.un.org/en/chronicle/article/international-human-rights-law-short-history [https://perma.cc/F26A-2CFL] (last visited Aug. 12, 2021).

processes by which the international community generates that law.[4] Participatory nations used to share a consensus on what constituted a legitimate international human rights claim—rights involving a fairly definable core, like "freedom of opinion and expression."[5] Now, however, human rights claims like "sustainable development" are more difficult to define. International human rights claims have also moved from rights that have claim to universality, such as freedom from arbitrary detention, to ones whose content might plausibly vary with time and place, like rights to housing and medical care.[6] Both the scope and vagueness of modern human rights claims call for a domestic process that will keep them within precise bounds.

The broader problem is that by their very nature, some of the positive rights to government-provided resources for which modern international human rights policymakers argue can conflict with the United States' negative individual rights traditions, like rights to liberty and to private property. The ever-expanding range of norms that international human rights advocates now accept or espouse is breathtaking. For example, many now claim the right to healthcare or the right to affirmative action as an accepted norm.[7]

While democratic processes for resolving policy conflicts possess many advantages, two are particularly pertinent. First, if the governed have no meaningful control over their rulers, then the rulers' inherent right to rule is far from clear. Second, citizens are likely to be better off under a government that is subject to democratic

4. *See generally* Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523 (2004) (discussing the complex and fluid nature of the development of customary international law).

5. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 4 (Dec. 10, 1948).

6. Comm. on Econ., Soc., & Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), ¶ 11, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

7. *See id.*; Ruth Bader Ginsburg, *Affirmative Action as an International Human Rights Dialogue: Considered Opinion*, BROOKINGS INST. (Dec. 1, 2000), https://www.brookings.edu/articles/affirmative-action-as-an-international-human-rights-dialogue-considered-opinion/ [https://perma.cc/R2YX-KUQX].

checks because that accountability makes the government's right to rule dependent on the citizens' continuing preferences.

Many of the processes for generating international human rights laws are inferior to a beneficent democracy because they do not provide citizens as much control over those that frame international human rights. The three primary sources of modern international human rights law—multilateral international human rights treaties, customary international law, and "soft law," all of which are norms emerging from international courts and interpretive bodies—merit specific consideration in comparing them to domestic democracy.

First, there is a variety of international human rights treaties, which many nations have signed and ratified.[8] The range of these treaties covers many subjects. Some are general, such as the Covenant on Civil and Political Rights,[9] as well as the Covenant on Economic, Social and Cultural Rights,[10] which addresses some positive claim rights. Some treaties are much more specific, like the Rights of the Child Convention.[11] The United States has signed many of these multilateral conventions but has ratified relatively few of them. For example, the Senate gave its advice and consent to the Covenant on Political and Civil Rights, which the President subsequently ratified.[12] In contrast, the United States has not ratified the

8. *Universal Human Rights Instruments*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., https://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx [https://perma.cc/NYW7-A8T5] (last visited Aug. 13, 2021).

9. International Covenant on Civil and Political Rights, Dec. 19, 1966, T.I.A.S. 92–908, 999 U.N.T.S. 171.

10. *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, No. 14531, 993 U.N.T.S. 4 (listing the State Parties' dates of ratification to the covenant, which does not include the United States).

11. *See* Convention on the Rights of the Child, November 20, 1989, No. 27531, 1577 U.N.T.S 3, 44 (listing the State Parties' dates of ratification or accession, which does not include the United States).

12. International Covenant on Civil and Political Rights, December 16, 1966 T.I.A.S. No. 92 908 (entered into force for the U.S. September 8, 1992). The treaty was signed by the U.S. on October 5, 1977, the Senate gave its advice in consent to ratification on April 2, 1992, and the President ratified it on June 1, 1992.

Covenant on Economic, Social and Cultural Rights or the Rights of the Child Convention.[13]

Even with most of the treaties the United States has ratified, the government has registered substantial reservations, often in the form of statements that the United States will not follow the treaties in some particulars, such as when some kinds of international human rights endanger First Amendment freedoms.[14] Moreover, the ratifying bodies almost universally make these ratified treaties non-self-executing.[15] A non-self-executing treaty requires the United States Congress to pass legislation to make the treaty judicially enforceable in the United States.[16] In the absence of such legislation—and certainly, in the absence of ratification of treaty —regarding the United States to be bound as a matter of our domestic law to follow these treaties is problematic for several reasons.

The democratic deficits of these treaties for the United States are multiple. First, the basic multilateral human rights treaties were negotiated at a time when the totalitarian communist nations had veto power at the negotiating table.[17] As a result, no one could really be certain that the same provisions would have emerged through a process in which the important players were all democracies.

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13. *See* Convention on the Rights of the Child, *supra* note 11, at 44.

14. *See* S. EXEC. REP. NO. 102-23, at 1, 6 (1992), *as reprinted in* 31 I.L.M. 645 (making reservations to the International Covenant on Civil and Political Rights accommodate the First Amendment); Frederic L. Kirgis, *Reservations to Treaties and United States Practice*, AM. SOC'Y INT'L L. (May 4, 2003), https://www.asil.org/insights/volume/8/issue/11/reservations-treaties-and-united-states-practice [https://perma.cc/5HFB-9K85] (describing the practice of treaty reservations and explaining that the United States has declined to sign some treaties that do not allow reservations).

15. *See* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW, at Summary (2018).

16. *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995) (internal quotation marks omitted) ("[A] non-self-executing treaty . . . [may be defined as] a treaty that may not be enforced in the courts without prior legislative implementation.").

17. *See* Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309, 310–11 (1998) (describing various reasons the U.S. was wary of signing human rights treaties).

Second, the United States often agrees to these treaties only as a matter of international law, making them self-executing and not incorporating them into domestic law. The lack of domestic assent makes the assent to these treaties less politically salient than the assent required in domestic systems.

The next source of international human rights law—custom—is harder to describe because observers disagree about the mechanism for generating its content. "Classicists" in customary international law believe that customary international law must be rooted in the widespread consensus of the practice of nation-states.[18] In their view, a practice will be deemed a rule of customary international law only if nation states generally engage in a practice and do so from a sense of legal obligation.[19] The sense of obligation is called *opinio juris*, which is measured objectively.[20]

Under this classical view, the question for *opinio juris* is not whether the practice is morally right and should be observed out of a sense of moral obligation but whether the practice is actually undertaken from a sense of legal obligation.[21] Although the metric for classical customary international law is objective, the objectivity does not mean that determining the content of custom is straightforward. State practices are multifarious and often obscure.[22]

Because catalyzing practices requires specialized expertise, customary international law has long looked to the authority of experts in customary international law—the so-called publicists[23]—to make

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18. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. L. INST. 1987); *see also* David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERMAN Y.B. INT'L L. 198, 201 (1996) (referencing the Restatement definition of customary international law as the classic model).

19. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (AM. L. INST. 1987).

20. *Id.* § 102 cmt. c.

21. *Id.*

22. *See* David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L.J. 469, 486 (2001) (discussing criticism of *opinio juris* as an elaborate ruse to give the appearance of consent to customary international law).

23. *See* Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, U.S.T.S. 993 (instructing courts to apply the "teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law"); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L.

such assessments. The term "publicist" may be an unfamiliar one. This essay was written by one. They are generally professors of international law.[24] Now, as any law student has undoubtedly learned in law school, professors have many virtues, but they are not actually representative of the general public on any dimension at all. In particular, their inferences are skewed by the overwhelmingly left liberal ideology of legal academia.[25] This process of determining international law through publicists or international courts contrasts unfavorably with domestic democracy where regular elections assure representation and accountability.

Many human rights scholars now take a more expansive view of how to generate custom, increasing the democratic deficit.[26] The scholars relaxed the classical standards in several ways to capture a more morality-centered view of what international human rights law should be.[27] For instance, instead of requiring that nation-states actually engage in a practice, these scholars substitute statements by nation-states that give the norm mere verbal assent.[28] These nominal sources can include resolutions of the General Assembly of the United Nations.[29] This method, of course, expands the scope

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449, 475 (2000) ("A knowledge of CIL [customary international law] requires detailed study of I.C.J. decisions and those of its League of Nations predecessor, the Permanent Court of International Justice, a willingness to examine old and venerable treatises, and familiarity with difficult to obtain materials, such as international arbitral findings and individual state practices. This has become the work of a highly specialized group of experts, not the residue of customary norms understood and accepted by members of a society.").

24. *See Teachings of Publicists*, NW. PRITZKER SCH. OF L.: PRITZKER LEGAL RSCH. CTR., https://library.law.northwestern.edu/InternationalResearch/Teachings [https://perma.cc/M5LQ-5LEH] (last visited Aug. 24, 2021) ("A publicist is an international law scholar . . . .").

25. *See* Adam Bonica et al., *The Legal Academy's Ideological Uniformity*, 47 J. LEG. STUD. 1, 3 (2018) ("Approximately 15 percent of law professors are conservative compared with 35 percent of lawyers.").

26. *See* Kelly, *supra* note 23, at 484–85.

27. *See id.*; *see also* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001) (noting that "modern custom is derived by a *deductive* process that begins with general statements of rules rather than particular instances of practice") (emphasis in original).

28. *See* Kelly, *supra* note 23, at 484–85.

29. *Id.*

of international human rights law. But in expanding the scope, the method also increases its democratic deficit because much of these materials represent rather cheap talk.

A particular problem for the United States is that the process of generating customary international law renders the contours of that law uncertain. Such uncertainty enables judges—at least judges in a common law system—to engage in further decision-making that can further expand these principles.

Another problem particular to America is that the controversial nature of some of these rights claims also create serious difficulties for a federalist system like the United States. Federalism creates a market for governance where a bundle of rights should, to some extent, map on to the diverse preferences of the citizens of diverse states.[30] International human rights impositions can prevent that process of competition from working. The federal government may through the treaty process limit the authority of the states, but the two-thirds requirement for treaty ratification[31] imposes a very high bar on interfering with the process of interstate competition.

A third source of international human rights law, generally considered "soft law," may be growing in importance, but still suffers from a comparable democratic deficit. The norms that generally constitute soft law stem from the deliberations of international organizations.[32] Some of these international organizations are actually set up under the multilateral commissions.[33]

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30. *See* G. Patrick Lynch, *Protecting Individual Rights Through a Federal System: James Buchanan's View of Federalism*, 34 PUBLIUS 153, 153 (2004) (explaining that economist James Buchanan supported federalism as an alternative to a large federal government because federalism "protect[s] individual liberty, promote[s] democratic efficiency, and help[s] foster community values").

31. Herbert Wright, *The Two-Thirds Vote of the Senate in Treaty-Making*, 38 AM. J. INT'L L. 643, 644 (1944).

32. Jaye Ellis, *Shades of Grey: Soft Law and the Validity of Public International Law*, 25 LEIDEN J. INT'L L. 313, 321 (2012).

33. *See, e.g.*, *International Relations and Analysis*, EUR. CENT. BANK, https://www.ecb.europa.eu/ecb/tasks/international/institutions/html/index.en.html [https://perma.cc/5X96-K5MQ] (last visited Aug. 8, 2021).

Other kinds of commissions, like the International Committee of the Red Cross (ICRC),[34] have unique features contributing to a democratic deficit, illustrating the problem of an international organization generating soft law. The ICRC purports to give authority to interpretations of humanitarian law, which is the part of human rights law that regulates the treatments of combatants and property in war.[35] While the ICRC may be a worthy body in many ways, the organization is peculiarly unrepresentative. While the name of the organization is the International Committee of the Red Cross (ICRC), the committee, in fact, is a self-perpetuating body composed entirely of citizens of Switzerland, the world's most famously neutral nation.[36] This history of neutrality gives Swiss citizens a markedly distinctive perspective on humanitarian law. Consequently, given this neutral perspective, the ICRC's use of materials to expand the ambit of humanitarian law is not surprising.[37] But the idea that the United States should be bound by decisions of a small group of people from a particular foreign nation offers a *reductio ad absurdum* of the notion of applying international law without domestic consent.

Indeed, the ICRC is often in express disagreement with the United States on the law of war.[38] For instance, the United States

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34. *International Committee of the Red Cross (ICRC)*, U.N. REFUGEE AGENCY: REFWORLD, https://www.refworld.org/publisher,ICRC,COMMENTARY,,,,0.html [https://perma.cc/58PM-F4QP] (last visited Aug. 8, 2021).

35. Geneva Convention for the Amelioration of the Condition of the Wounded & Sick in Armed Forces in the Field, Introduction, Aug. 12, 1949, 75 U.N.T.S 16 [hereinafter Geneva Convention of 1949].

36. *Id.* at 105; *see also* Jennifer Latson, *Switzerland Takes a Side for Neutrality*, TIME (Feb. 13, 2015, 10:30 AM), https://time.com/3695334/switzerland-neutrality-history/ [https://perma.cc/ZL5F-DEFZ] (outlining the history of Switzerland's policy of neutrality).

37. Geneva Convention of 1949, *supra* note 35, at 10.

38. For example, the ICRC's recently updated guidelines proscribe various means of warfare that degrade the environment. INT'L COMM. OF THE RED CROSS, GUIDELINES ON THE PROTECTION OF THE NATURAL ENVIRONMENT IN ARMED CONFLICT 29–47 (2020), https://www.icrc.org/en/download/file/141079/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf [https://perma.cc/8JK6-4F7Z]. The ICRC acknowledged the importance of "soft law in-

has objected to environmental degradation becoming a predicate for war crimes.[39] The disagreement between the ICRC and the United States shows the third particular problem for the United States in having international human rights norms foisted upon its law books without full domestic deliberation. As the world's superpower, the United States has particular responsibilities for keeping world peace that require tradeoffs between the use of force and other values. Bodies like the ICRC may well be indifferent to such tradeoffs. Thus, many nondemocratic adversaries of the United States will doubtless want to use international human rights law as a weapon of asymmetric warfare against the famously non-neutral superpower.

It may be useful to end by giving an example of what I fear regarding the effect of international law not implemented as domestic law by our constitutional processes. Some Supreme Court Justices have cited international human rights law to defend affirmative action.[40] I am not here to debate about whether we should have affirmative action or not. My point is that international law is not a legitimate source for resolving the question. We should look to our own statutes and the Constitution to make such a decision.

There is a particular danger of such international law being used in a jurisdiction with common law heritage. Common law judges

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struments" to the drafting process, including the 1972 Declaration of the UN Conference on the Human Environment, the 1982 World Charter for Nature, and the 1992 Declaration on Environment and Development. *Id.* at 21.

39. At the United Nations, the United States expressed concern that environmental degradation in relation to armed conflict "encompasses broad and potentially controversial issues" with "ramifications far beyond the topic of environmental protection," and as such, its position was that "this topic is not well-suited to a draft convention." Protection of the Environment in Relation to Armed Conflict, Rep. of the Int'l L. Comm'n on the Work of Its Sixty-Third and Sixty-Fifth Session, U.N. Doc. GA/L/3469 (Nov. 4, 2013) (Statement by Mark Simonoff, Minister Counsel for Legal Affairs, United States Mission to the United Nations), available at https://www.un.org/en/ga/sixth/68/ILC.shtml [https://perma.cc/X5NM-8MMK].

40. *See* Grutter v. Bollinger, 539 U.S. 306, 344 (Ginsburg, J., concurring) (citing to the International Convention on the Elimination of All Forms of Racial Discrimination to appraise the international understanding of the purpose of affirmative action).

often take principles and extend them to new circumstances.[41] In other words, if international law is accepted as part of our law, it may become generative, and that generative power sits uneasily with democratic consent.

Moreover, even if one thinks that a right like affirmative action should be a universal right, there remains the question of how far and in what circumstances it will apply. As Professor Eugene Kontorovich notes, we are far more likely to take guidance on its precise application from the political branches than from international law sources, which tend to the abstract.[42] In the process of compromise, legislatures have to get specific.

Thus, unlike some scholars, I do believe that there is a risk that these international agreements that are not ratified or not executed into domestic law are going to come over the transom and be used as part of our law. There have been statements by Supreme Court justices that suggest that customary international law is part of our law.[43] And many international human rights advocates argue that international human rights law that has not been domesticated in our law may be used to constrain the United States.[44] Those claims disregard the structure of the Constitution. The Supremacy Clause

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41. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 5–7 (Amy Gutmann ed., Princeton Univ. Press 1997) (noting the generative nature of common law judging).

42. *See* Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1675 (2012) ("[T]he Framers understood international law to be vague and intertwined with foreign policy considerations. Thus, courts reviewing congressional definitions should give them considerable deference.").

43. *See, e.g.*, The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination.").

44. *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 56 (2004) ("[T]ransnationalists suggest that particular provisions of our Constitution should be construed with decent respect for international and foreign comparative law.").

makes only treaties and statutes the supreme law of the land, not international human rights.[45]

By respecting the United States Constitution and shutting down these kinds of claims, we will advance international human rights around the world. The most important reason that there is skepticism about international human rights among conservatives is fear that international human rights law will result in blowback of extravagant claims against the United States, claims that have no foundation from the laws or constitution in our own democratic republic.[46] Once this fear is eliminated, conservatives are more likely join others in pressing human rights claims where the abuses are worse—in nations that are not well functioning democracies. Moreover, quite rightly, the focus on abuses in these undemocratic nations are on well-established rights that have a persuasive claim to universality, such as freedom of speech, freedom from arbitrary arrest, and due process before property is taken.[47] Such core rights are not under substantial threat in the United States or other well-functioning democracies. Here, conservatives and liberals can make common cause in seeing that core rights are respected abroad.

Thus, I do not argue that all international human rights law is without value. Some international human rights laws undoubtedly are beneficial, including those that reinforce democratic processes allowing nations to make good decisions in their particular circumstances. But given the current infirmities in the structure of generating international human rights, the United States should employ

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45. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . .").

46. *See, e.g.*, Mark P. Lagon & William F. Schulz, *Conservatives, Liberals, and Human Rights*, HOOVER INST.: POL'Y REV. (Feb. 1, 2012) https://www.hoover.org/research/conservatives-liberals-and-human-rights [https://perma.cc/72VJ-ZXZ4].

47. *See, e.g.*, *North Korea: Events of 2020*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2021/country-chapters/north-korea [https://perma.cc/65BH-C86R] (last visited Aug. 24, 2021) (explaining that in 2020, North Korea's government "continued to sharply curtail all basic liberties, including freedom of expression, religion and conscience, assembly, and association, and ban political opposition, independent media, civil society, and trade unions").

its own internal democratic processes to determine which are beneficial enough to bind our own country.

ON UNILATERAL PRESIDENTIAL WAR POWERS

JOHN YOO*

Thanks to the Penn Federalist Society for inviting me to participate on this great panel.[1] The only regret I have is that I, a Philadelphia native, could not speak in person, nor join all of you at Pat's or Geno's and teach all of you how to eat cheesesteaks gracefully without letting the Cheez Whiz dribble.

I hope to touch on several ideas today, ranging from the delegation of war powers to the role of international treaties. But they all stem from the powers enshrined in the Constitution, so that is where we should begin too.

Constitutional War Powers

First, I should thank President Joe Biden who, once again, has made a Federalist Society convention a rousing success, this time by bombing Syria just in time for us to talk about its constitutionality.[2]

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* Emanuel S. Heller Professor of Law, University of California at Berkeley; Nonresident Senior Fellow, American Enterprise Institute; Visiting Fellow, Hoover Institution. I thank Francis Adams for excellent research assistance.

1. This essay has been adapted from remarks delivered at the 2021 Federalist Society National Student Symposium in a debate on "Unilateral Presidential War Powers" with John B. Bellinger III, Prof. Claire Finkelstein, Prof. Saikrishna Prakash, Prof. Ingrid Wuerth, and, as Moderator, Hon. Neomi Rao of the United States Court of Appeals for the District of Columbia. The original debate can be viewed at The Federalist Society, *Panel III: Unilateral Presidential War Powers*, YOUTUBE (Mar. 20, 2021), https://www.youtube.com/watch?v=RpFlUEQizco [https://perma.cc/N55M-4QAD].

2. Ellen Knickmeyer, *Rivals Seeking to Gain as Biden Mulls Approach to Syrian War*, AP NEWS (Mar. 23, 2021), https://apnews.com/article/joe-biden-us-approach-syria-war-8025c05507326d7e896b85802119f0f4 [https://perma.cc/M5W7-YWCY].

Let me just briefly explain my position that President Biden's February 26, 2021 attack on Syria,[3] like President Trump's attack on Syria[4] and President Obama's attack on Syria,[5] was constitutional.

Liberals and conservatives often have problems with consistency on war powers. Senator Bernie Sanders, for example, heavily criticized President Trump's attack on Syria, calling it unconstitutional.[6] He did not criticize President Obama's attack on Syria as unconstitutional, and I do not think he has criticized President Biden's attack on Syria.

Inconsistency on war powers has afflicted both originalists and those in favor of a living Constitution. For a long time, conservatives who tend to be originalists were somehow functionalists when it came to war powers. Judge Robert Bork, for example, gave a speech at the Federalist Society many years ago arguing on functionalist grounds that Congress did not have to declare war before the President could launch hostilities under his or her commander–in–chief power.[7] Meanwhile, progressives or liberals, most notably Professor John Hart Ely, were strong originalists when it came to war powers.[8] Professor Ely famously said that all wars, big or small,

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3. David Martin & Margaret Brennan, *U.S. Airstrikes Target Iran–backed Militias in Syria in Biden's 1st Military Action,* CBS NEWS (Feb. 26, 2021, 7:06 PM), https://www.cbsnews.com/news/syria-us-airstrikes-iranian-militia-target [https://perma.cc/C6TQ-WGDM].

4. Daniel Arkin et al., *Trump Announces Strikes on Syria Following Suspected Chemical Weapons Attack by Assad Forces,* NBC NEWS, (Apr. 14, 2018, 8:56 AM), https://www.nbcnews.com/news/world/trump-announces-strikes-syria-following-suspected-chemical-weapons-attack-assad-n865966 [https://perma.cc/8GPZ-SM3N].

5. David Greenberg, *Syria Will Stain Obama's Legacy Forever,* FOREIGN POL'Y (Dec. 29, 2016), https://foreignpolicy.com/2016/12/29/obama-never-understood-how-history-works [https://perma.cc/PQC9-NUSH].

6. Max Greenwood, *Bernie Sanders: Trump Has No Authority to Broaden War in Syria,* THE HILL (Apr. 11, 2018, 12:23 PM), https://thehill.com/homenews/senate/382665-bernie-sanders-trump-has-no-authority-to-broaden-war-in-syria [https://perma.cc/LT9W-U3EW].

7. Robert H. Bork, Judge, U.S. Ct. of App. for the D.C. Cir., Speech at the University of San Diego Law School: The Great Debate (Nov. 18, 1985), *available at* https://fedsoc.org/commentary/publications/the-great-debate-judge-robert-h-bork-november-18-1985 [https://perma.cc/UX8G-VSGW].

8. *See* Philip Bobbitt, *War Powers: An Essay on John Hart Ely's* War and Responsibility:

had to be approved by Congress first, except for cases of self–defense.[9]

I believe that originalism or constitutional interpretation, if properly conducted, shows there is a different system for warmaking policy, one quite different than the domestic legal system where Congress undeniably sets policy that the President carries out under the Take Care Clause.

The Constitution divided what had been a combined set of powers under the British Crown[10] and gave some to Congress—like the power to declare war, the power to raise troops, the power to fund the military[11]—and gave others to the President—like the executive power[12] and, of course, the role of commander in chief.[13] Rather than create a singular process, as with the passage of legislation,[14] the Constitution armed each branch with different powers and decided to let politics sort it out. That is how the practice of war powers has worked out historically.[15]

Let me also say, I have always thought one of the most compelling approaches to the Constitution is that of Chief Justice Marshall in *McCulloch v. Maryland*.[16] In *McCulloch*, Chief Justice Marshall reads the clauses of the Constitution in harmony with each other.[17]

Constitutional Lessons of Vietnam and Its Aftermath, 92 MICH. L. REV. 1364, 1374 (1994) ("Ely is firmly in the congressional camp on this question of constitutional foundations [of the power to declare war].").

9. *Id.* at 1385.

10. *Royal Prerogative*, The Magna Carta of Edward 1 (1297), 25 Edw. 1.

11. U.S. CONST. art. I, § 8.

12. U.S. CONST. art. II, § 1.

13. U.S. CONST. art. II, § 2.

14. U.S. CONST. art. I, § 1.

15. *Power to Declare War*, U.S. HOUSE OF REPS.: HIST., ART & ARCHIVES, https://history.house.gov/Institution/Origins-Development/War-Powers/ [https://perma.cc/LU9A-DGTR] (last visited Aug. 20, 2021).

16. 17 U.S. (4 Wheat.) 316 (1819).

17. *See id.*; *see also* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580, 2596 (2006) (comparing *Chevron* to *McCulloch* because both cases grant the executive "discretion to choose its own preferred means to promote statutory ends").

If you adopt Chief Justice Marshall's approach, you will see that the Declare War Clause does not create a system that requires Congress to pre–approve the use of force abroad.[18] Take a look at Article I, section 10 of the Constitution.[19] This is the prohibition on states waging war. Notice that, at the end of Article I, section 10, the Constitution says, "No state shall, without the consent of Congress"—paralleling the declare war view of the Constitution—"engage in war"—not declare war—"unless actually invaded, or in such imminent danger as will not admit of delay."[20] Article I, section 10 includes the exceptions in writing that many scholars who think Congress has the dominant hand in war concede must exist, but since they do not appear in the Declare War Clause, they must read it in.

If the Constitution is so clear, so careful in dividing the war powers between the federal government and the States, why did the Framers not use the exact same language to achieve the exact same result when it came to the difference between the President and Congress? Instead, the Framers use very different language. It seems evident that the Framers created a political process rather than a legal process for bringing the United States into war.

Delegating War Powers

The Supreme Court has said that the nondelegation doctrine does not apply to foreign affairs. That is the point of *United States v. Curtiss–Wright Export Corp.*,[21] which is probably the most famous and criticized decision by the Supreme Court on foreign affairs. In *Curtiss–Wright*, the Court said regardless of whether the nondelegation doctrine applies domestically, it does not apply when it

18. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 245 (1996) (arguing that a declaration of war was an instrument of setting international relationships, not of initiating hostilities).

19. U.S. CONST. art. I, § 10.

20. U.S. CONST. art. I, § 10, cl. 3.

21. 299 U.S. 304 (1936).

comes to foreign affairs.[22] Justice Sutherland further held that the President had a broad sole organ power to set foreign policy.[23]

That is the current doctrine. In terms of the original understanding, I do not think it would have occurred to the Framers as a question of delegation. What they had in mind was what they had seen in the 100 years of British constitutional history before the Founding.[24] They saw that the Crown and the Parliament fought over war through, primarily, Parliament's power to cut off funds for the Crown's wars.[25]

The Crown would often start a war.[26] Sometimes the king himself would lead the battles without any declaration of war.[27] You would not see Parliament getting upset because there was no declaration of war. Instead, Parliament would control the war through its authority over funds.[28] It would not pass legislation or declarations of war to control warmaking. Instead, Parliament used the harder tool of funding.

For what it is worth, my view on the nondelegation doctrine domestically is that if Congress wants to stop anything that an agency does, it knows how to do it quite easily, which is to attach a funding rider here and there. When funding is at issue, the agencies snap to it. I think that tool works well in constraining executive action in both domestic and foreign affairs.

Interpretive Consistency and Separation of Powers

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22. *Id.* at 315–16.

23. *Id.* at 319 (quoting 10 ANNALS OF CONG. 613 (1800)).

24. *See generally* Yoo, *supra* note 18, at 196–217 (discussing English historical practice regarding declaration of wars in the eighteenth century).

25. *Id.* at 213.

26. *See* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 51 (2005).

27. *See* Yoo, *supra* note 18, at 216 ("[T]he entire Empire celebrated the battle of Dettingen, in which King George II himself led British troops to victory over the French.").

28. *See id.* at 211–13 (detailing Parliament's influencing in warmaking through its powers over the purse).

I think we still are suffering from a case of what we sometimes call "foreign affairs exceptionalism," whereby the law on particular foreign affairs is just different than domestic affairs. Many people think Congress ought to have the same power over war that it has over domestic affairs. That leads people to ask: why does Congress not have the right to use the same tools to control the President in war that it would normally use when it comes to building a power plant or shutting down a pipeline?

For judges, the answer has to rest on what the Constitution says, which should turn on original meaning. Are originalists, however, going to be consistent? Are critics willing to be originalist in foreign affairs or on the war powers and then apply those same commitments to all other questions of constitutional interpretation? Are they willing to be originalists on the question of the administrative state or the role of the courts in the expansion of individual liberties? Why is it that originalism is only applied in foreign affairs but not to questions of the Due Process Clause or questions of deference to the agencies under *Chevron*?[29]

The second point I would make in particular about the role of the courts is that if several of the other speakers on the panel are to be believed and the practice of war powers for the last sixty or seventy years has been unconstitutional, are they calling for courts to intervene and strike down all of these wars? If that is the case, do they also believe that courts should be equally interventionist in the decisions of the executive branch, and particularly the administrative state, on domestic questions?

Why is it that we see progressives urge such enormous deference to agencies domestically but not in foreign affairs?[30] Look at the

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

30. *See, e.g.*, Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2378 (2006) (arguing that the President should be constrained in his decision to send troops to engage in hostilities); Shoba Sivaprasad Wadhia, Response, *In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59, 67 (2013) (arguing that the President has the authority to exercise prosecutorial discretion to grant temporary reprieve from deportation to a large class of illegal aliens).

enormous demands for judicial deference to the decisions of agencies and executives on the question of the COVID–19 pandemic and lockdowns.[31] I often find some of the same people demanding intrusive judicial review in foreign affairs would not adopt the same posture toward the workings of the executive branch on domestic affairs.[32]

I do not expect President Biden to be consistent on these questions. President Biden has already flip–flopped on this. He wrote a law review article where he called for more changes to the War Powers Resolution to make it stronger and tougher to stop presidential adventurism in military affairs.[33] This is the same Joe Biden who just attacked Syria without seeking permission beforehand from Congress.[34]

I expect President Biden, like many Presidents, will have taken one position before he was President, such as granting Congress the premier role in foreign affairs. But then once in office, Biden will

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31. *See, e.g.*, Lawrence Gostin, *The Supreme Court's New Majority Threatens 115 Years of Deference to Public Officials Handling Health Emergencies*, FORBES (Dec. 11, 2020, 11:00 AM), https://www.forbes.com/sites/coronavirusfrontlines/2020/12/11/the-supreme-courts-new-majority-threatens-115-years-of-deference-to-public-officials-handling-health-emergencies/ [https://perma.cc/C58P-DUUJ].

32. *Compare* Ian Millhiser, *The Only Remaining Check on Trump Is the 2020 Election*, VOX (Jan. 7, 2020, 8:10 AM), https://www.vox.com/2020/1/7/21048243/trump-2020-election-iran-soleimani-no-law [https://perma.cc/8U5K-FZLQ] ("The federal judiciary frequently defers to the president's decisions on national security, even when those decisions shock the conscience . . . . As a practical matter, the U.S. has few enforceable checks against a reckless commander in chief."), *with* Ian Millhiser, *Yes, Covid–19 Vaccine Mandates Are Legal*, VOX (July 30, 2021, 7:30 AM), https://www.vox.com/22599791/covid-vaccine-mandate-legal-joe-biden-supreme-court-jacobson-massachusetts-boss-employer [https://perma.cc/YLT5-5A8B] (explaining that Congress could get around the Supreme Court's case law and use its commerce and taxation powers to effectively require U.S. residents to receive a COVID–19 vaccine).

33. *See* Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367, 394–99 (1988).

34. JOSEPH R. BIDEN, JR., NOTIFICATION OF A TARGETED MILITARY STRIKE, H.R. DOC. NO. 117–19, at 1 (2021).

use traditional presidential powers over war just as his predecessors have.

It is very easy for Congress to respond if it wants to. Professor John Bellinger and I worked on the negotiations over the Authorization for Use of Military Force (AUMF) in 2001.[35] Congress was heavily involved in both the 2001 and 2002 AUMFs, and its negotiators asserted the constitutional right to approve wars beforehand. They also raised questions about how long the AUMF should run, what would happen if Al Qaeda morphed into different organizations, should the authority be limited to a single region, or a certain kind of conflict.

But when it came time to vote on the AUMF, nobody in Congress actually wanted to impose those limitations. The problem is not that Congress lacks powers. Congress ended the Mexican–American War.[36] Congress ended the Vietnam War.[37] The problem is that Congress does not want to use the ample powers it has.

I do not think the Constitution has a defect. It is just that Congress does not want to, for political reasons, take responsibility and accountability for war decisions. Congress is happy to fund an enormous, offensive army. Our military is not designed for homeland defense; it is designed to carry out wars in other people's countries. Congress has created a military that is designed for offensive operations. But it does not want to take responsibility for how that army is used. I do not think we should reread the Constitution in different ways to force Congress to take accountability when it is going to do everything it can to escape it.

Defining Powers and the Office of Legal Counsel

Some people suggest that the Office of Legal Counsel (OLC) should be an impartial arbiter of interpreting the Constitution in

35. *See* Authorization for Use of Military Force, 115 Stat. 224, Pub. L. No. 107–40 (2001), *codified at* 50 U.S.C. § 1541.

36. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, art. XIII, 9 Stat. 922 (1848).

37. Pub. L. No. 93–52, § 108 (1973).

order to provide a check on what the executive officials want to do. I disagree. OLC's role flows from the President's authority in constitutional interpretation, which is all the authority OLC could, at its maximum, ever exercise. OLC is just exercising the delegation to the Attorney General from the President or the President's ultimate authority to interpret the Constitution for the executive branch.

I would not say the President is supposed to be an impartial arbiter of constitutional disputes among the branches. The President interprets the Constitution because he has the Article II authority to take care that the laws are faithfully executed.[38] As part of that responsibility, he or she must interpret the law. The President should come to the interpretation that he or she thinks is best, but that does not mean that the President is a neutral arbiter.

Some say that the courts should be a neutral arbiter, but sometimes I do not think that they are. I do not think Congress is neutral either. I think the Constitution creates a departmental system where each branch interprets the Constitution for itself within its area of competence. The Constitution expects the branches to fight over its interpretation as over other subjects. Out of that fighting emerges a practice or consensus about what the Constitution means. But this does not create a system where any one branch has any supreme authority, including the courts. No branch has supreme authority over the final meaning of the Constitution.

I think that is what OLC has come to be, but I do not think that was what it originally was. Historically, it was an offshoot of the Solicitor General's department,[39] and the Solicitor General's job was to represent the interests of the executive branch in Supreme Court litigation.[40] The OLC split off from the Solicitor General's office when its job of adjudicating disputes among the agencies became

38. U.S. CONST. art. II, § 3.

39. Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 ALB. L. REV. 217, 234–35 (2013).

40. Todd Lochner, *The Relationship Between the Office of Solicitor General and the Independent Agencies: A Reevaluation*, 79 VA. L. REV. 549, 554 (1993).

too significant and distracted from the advocacy function of the Solicitor General's office.[41]

I disagree with OLC's work product on war. Since the Clinton years, OLC has taken the view that wars that were small, short, and not too dangerous to U.S. personnel did not need congressional approval.[42] I just do not think that is the correct answer. If that test were right, then the United States could drop a nuclear bomb on an enemy, and that would not be a war because no U.S. ground troops would be involved. By dropping a nuclear weapon, the ability of the enemy to attack us would be zero. Yet that is the test that OLC essentially adopted: no ground troops, no chance of American casualties, so therefore, no war.

Consider Libya—we tried to kill the head of state of another country, Muammar Gaddafi.[43] I happen to disagree with the OLC test in that case, but I do not think it means OLC itself has to be reformed or changed. And I do not think President Biden and Merrick Garland are going to change the OLC. They will act just like White Houses and Justice Departments in the past when it comes to war.

Treaty Obligations and War Powers

It is not the subject of our discussion today, but I am sure everybody is familiar with the question of self– executing and non–self–executing treaties. There is a debate over whether we are a country

41. Note, *The Immunity–Conferring Power of the Office of Legal Counsel*, 121 HARV. L. REV. 2086, 2087 (2008).

42. *See* Deployment of U.S. Armed Forces into Haiti, 18 Op. O.L.C. 173 at 173, 177, 179 (1994). Though not listed in the cited opinion, the proposition is in volume 18, per other citations to the opinion and the OLC website.

43. Bernard Weinraub, *U.S. Jets Hit Terrorist Centers in Libya; Reagan Warns of New Attacks if Needed*, N.Y. TIMES (Apr. 15, 1986), https://www.nytimes.com/1986/04/15/politics/us-jets-hit-terrorist-centers-in-libya-reagan-warns-of-new-attacks.html [https://perma.cc/DMX3-PZN3]; *Timeline: Libya's Choppy Relations with the U.S.*, REUTERS (Jan. 3, 2008, 1:23 AM), https://www.reuters.com/article/us-libya-usa-timeline/timeline-libyas-choppy-relations-with-the-u-s-idUSGOR32651420080103 [https://perma.cc/SU2M-G3AB].

where most treaty obligations must be carried out by statute or by administrative regulation in the same way that those same policies would be carried out domestically, or whether treaties are self–executing and courts can enforce them directly without implementation by the political branches.[44] I have written that these treaties are non – self–executing and require statutory or regulatory enactment.[45] But if all treaties are presumptively self–executing, which is the majority view among international law scholars, then why is the NATO treaty obligation not automatically legally binding in domestic law?

This was the constitutional issue that killed the Treaty of Versailles.[46] People may remember that one of the arguments that Senator Henry Cabot Lodge made was that the United States could not join the League of Nations because Congress would be delegating its war powers to an international organization.[47]

My point is a little different. It is that a treaty cannot create a new domestic legal obligation to go to war. A treaty is just a promise, but then we still have to go through the normal domestic process—however you think the Constitution distributes war powers—in deciding whether to live up to the treaty obligation or not. The treaty itself cannot change the Constitution's allocation of power between the President and Congress. Those who believe most treaties are self–executing must take a different view. It must be that the treaty's existence creates a domestic legal obligation, and we must

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44. *See* William M. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 350 (2010).

45. *See* John C. Yoo, Rejoinder, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non–Self–Execution*, 99 COLUM. L. REV. 2218, 2219 (1999); John C. Yoo, *Globalism and the Constitution: Treaties, Non–Self–Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1962 (1999).

46. S. COMM. ON FOREIGN REL., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 3, 37, 110 (Comm. Print 2001); *see* John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional–Executive Agreements*, 99 MICH. L. REV. 757, 758 (2001) (explaining that the Treaty of Versailles failed because it did not meet the constitutional threshold and was not passed as a statute).

47. *The Struggle Over the Reservations*, 68 CURRENT OP. 139, 141–44 (1920).

carry it out, unless the President terminates the treaty.

Concluding Thoughts

The topic of the President's war powers will continue to inspire worthwhile debate. You might remember Arthur Schlesinger, Jr. He wrote the book *The Imperial Presidency* after the Vietnam War, which was a long critique of the slow, gradual presidential accumulation of powers over war.[48] But before the Vietnam War, Schlesinger argued that nuclear weapons rendered domestic war powers obsolete because a nuclear missile made war too quick.[49] It removed the time frame for Congress to deliberate about war. There were a number of scholars in the period between the end of World War II and Vietnam who thought that the Constitution had to be interpreted differently because of the challenge of new military technologies.[50]

This is a phenomenon that we will face again. I predict that ultimately, our application of the Constitution to new technology –- as in, say, cyber warfare—will enhance presidential power. Cyber warfare shows again the weakness of Congress as an institution to exercise the war powers that some people are calling for, especially given the difficulty in attributing the origins of an attack and how quick and easy attacks are to wage. It seems to me that, regardless

48. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973).

49. *See* Arthur Schlesinger, Jr., *Congress and the Making of American Foreign Policy*, FOREIGN AFFS. (Oct. 1972), https://www.foreignaffairs.com/articles/united-states/1972-10-01/congress-and-making-american-foreign-policy [https://perma.cc/5UKT-WP7Z] ("[I]f foreign policy becomes the property of the executive, what happens to democratic control? . . . [T]he invention of nuclear weapons has transformed the power to make war into the power to blow up the world. And for the United States the question of the control of foreign policy is, at least in its constitutional aspect, the question of the distribution of powers between the presidency and the Congress.").

50. Yonkel Goldstein, *The Failure of Constitutional Controls Over War Powers in the Nuclear Age: The Argument for a Constitutional Amendment*, 40 STAN. L. REV. 1543, 1543–44, 1582 (1988); William C. Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 J. LEGIS. 1, 1, 4–5 (1986); Stephen L. Carter, *The Constitution and the Prevention of Nuclear Holocaust: A Reaction to Professor Banks*, 13 J. LEGIS. 206, 206–08 (1986).

of how you think the Constitution originally should be read to allocate war powers, cyber warfare is going to lead to more authority by the executive branch over how to conduct war.

Do you think Congress would ever really vote, or want to vote, on whether to conduct a campaign in cyber against another country or against a non–state actor beforehand? I doubt it. I would be shocked, actually, if it did.

The President's unilateral war powers are strong, both constitutionally and, with increasing frequency as time passes, in practice.

REMARKS TO THE 2020 FEDERALIST SOCIETY NATIONAL LAWYERS CONVENTION

JUSTICE SAMUEL A. ALITO JR.*

INTRODUCTION

Good evening, everyone. I am very pleased to have this opportunity to speak to all of you who are attending the Federalist Society's Annual Lawyers Convention via the internet. I have given the Convention's keynote speech several times before, but on all those occasions, I spoke to a live audience at the big Convention dinner. By the time I got up to speak, there had been a cocktail hour. Everybody had had the chance to enjoy a glass of wine—or two—with dinner. And people were in a good mood. Those are optimal circumstances for a speaker. They tend to make the audience more receptive to any weak attempts at humor and generally more forgiving in its assessment of the speech.

Tonight, I am speaking to a camera, and that feels strange. And I wondered if anything could to be done to alleviate that. If any of you watched any regular season baseball games this year, you will have seen that there were no real fans in attendance. But in an effort to make the atmosphere seem a bit more normal, teams placed cardboard cutouts of fans in the seats and piped in recorded cheers. I thought about asking the organizers of the Convention to do something similar, but that would only make the setting more surreal. However, if any of you watching this would like to enjoy a beverage in the comfort of your homes, I hope you will feel free to

*Associate Justice of the Supreme Court of the United States. This Essay is a lightly edited version of Justice Alito's remarks at the Federalist Society's 2020 National Lawyers Convention on November 12, 2020, which was held virtually.

do so. And I guess the upside of this set up is that if you feel the urge to throw rotten tomatoes, you will only damage your own screen.

THE FEDERALIST SOCIETY

If you have watched some of the events of this year's Convention, I hope you have found them informative and thought provoking. As in the past, they have featured speakers with a variety of views on important topics. Some of those watching tonight may be new to Federalist Society events and may have heard a lot of misinformation about the Society. So let me say a word at the outset about what the Society is, what it is not, and why I have been a member for many years.

Let me start with what it is not. It is not an advocacy group. Unlike other bar groups, it does not take a position on any issue. It does not propose legislation or lobby or testify before Congress or file briefs in the Supreme Court or any other court. It holds events, like this Convention, at which issues are debated and discussed, openly and civilly.

Anybody can join the Society, and anybody can attend events like this Convention. Most members of the Society are conservative in the sense that they want to conserve our Constitution and the rule of law. But members disagree about many important things.

The Society started in law schools in the 1980s and now has 200 law school chapters.[1] And the best law school deans have expressed appreciation of the Society's contribution to free and open debate. My colleague Elena Kagan is a prime example. When she was the dean of Harvard Law School, she spoke at a Federalist Society event

1. *See About Us*, FEDERALIST SOC'Y, http://www.fedsoc.org/about-us [https://perma.cc/V79S-NENU].

and reportedly began with these words: "I love the Federalist Society!"[2] And after some applause, she repeated: "I love the Federalist Society! [pause] But you are not my people."[3] That is a true expression of the freedom of speech that our Constitution guarantees and that we need to preserve. We should welcome rational, civil speech on important subjects even if we do not agree with what the speaker has to say.

Unfortunately, tolerance for opposing views is now in very short supply in law schools and in the broader academic community. When I speak with recent law school graduates, what I hear over and over is that they face harassment and retaliation if they say anything that departs from the law school orthodoxy. And many law school administrators and faculty members do little to prevent this. Under these circumstances, Federalist Society law school events are more important than ever.

I will have more to say about freedom of speech later, but at this point I want to express appreciation to the many judges and lawyers who stood up to an attempt to hobble the debate that the Federalist Society fosters. A move was afoot to bar federal judges from membership in the Society.[4] And if that had succeeded, the next logical step would have been to forbid them from speaking at law school events and other events sponsored by the Society. Four court of appeals judges—Amul Thapar, Andy Oldham, Bill Pryor, and Greg Katsas—prepared a letter that devastated the arguments of

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2. Jim Lindgren, *Elena Kagan: "I LOVE the Federalist Society! I LOVE the Federalist Society!"*, VOLOKH CONSPIRACY (May 10, 2010, 12:10 AM), http://volokh.com/2010/05/10/elena-kagan-i-love-the-federalist-society-i-love-the-federalist-society/ [https://perma.cc/X6XD-7RW4].

3. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 33 (2010) (statement of Sen. Richard Durbin, Member, S. Comm. on the Judiciary).

4. *See* COMM. ON CODES OF CONDUCT, JUD. CONF. OF THE U.S., DRAFT ADVISORY OP. NO. 117 (Jan. 2020).

those who wanted to ban membership.[5] The letter was signed by more than 200 federal judges[6]—including judges appointed by every President going back to President Ford—and at least for now, the proposal is on hold. We should all express our thanks to these defenders of free speech.

TONIGHT'S TOPIC

The topic of this year's Convention is "The Rule of Law and the Current Crisis." And I take it that the title is intended primarily to refer to the COVID-19 crisis that has transformed life for the past eight months. The pandemic has obviously taken a heavy human toll—thousands dead, many more hospitalized, millions unemployed, the dreams of many small business owners dashed. But what has it meant for the rule of law?

I am now going to say something that I hope will not be twisted or misunderstood—but having spent more than twenty years in Washington, I am not overly optimistic. In any event, here goes: The pandemic has resulted in previously unimaginable restrictions on individual liberty. Now notice what I am not saying or even implying. I am not diminishing the severity of the virus's threat to public health. And putting aside what I will say in a few minutes about a few Supreme Court cases, I am not saying anything about the legality of COVID restrictions. Nor am I saying anything about whether any of these restrictions represent good public policy. I am a judge, not a policymaker.

All that I am saying is this, and I think it is an indisputable statement of fact: We have never before seen restrictions as severe, extensive, and prolonged as those experienced for most of 2020. Think of events that would otherwise be protected by the right to freedom of speech—live speeches, conferences, lectures, and meetings.

5. *See* Letter from Federal Judges to Robert P. Deyling, Assistant Gen. Counsel, Admin. Off. of the U.S. Cts. (Mar. 18, 2020), https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf [https://perma.cc/PY64-TP2P].

6. *See id.* at 8–23.

Think of worship services: churches closed on Easter Sunday, synagogues shuttered for Passover and Yom Kippur. Think about access to the courts. Or the constitutional right to a speedy trial. Trials in federal courts have virtually disappeared in many places. Who could have imagined that?

The COVID crisis has served as a sort of constitutional stress test. And in doing so, it has highlighted disturbing trends that were already present before the virus struck, trends that we must resist and reverse when the crisis is over.

THE ADMINISTRATIVE STATE

One of these trends is the dominance of lawmaking by executive fiat rather than legislation. The vision of early 20th century Progressives and the New Dealers of the 1930s was that policymaking would shift from narrow-minded elected legislators to an elite group of experts—in a word, that policymaking would become more "scientific." That dream has been realized to a large extent. Every year, administrative agencies, acting under broad delegations of authority, churn out huge volumes of regulations that dwarf the statutes enacted by the people's elected representatives.

And what have we seen in the pandemic? Sweeping restrictions imposed, for the most part, under statutes that confer enormous executive discretion. We had a COVID-related case from Nevada, so I will take the Nevada law as an example. Under that law, if the governor finds that there is "a natural, technological or man-made emergency or disaster of major proportions," the governor can "perform and exercise such . . . functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population."[7] To say that this provision confers broad discretion would be an understatement.

Now, again, let me be clear. I am not disputing that broad wording may be appropriate in statutes designed to address a wide

7. NEV. REV. STAT. § 414.070 (2019).

range of emergencies, the nature of which may be hard to anticipate. And I am not passing judgment on this particular statute. I want to make two different points. First, what we see in this statute and in what was done under it is a particularly developed example of where the law in general has been going for some time—in the direction of government by executive officials who are thought to implement policies based on expertise and, in the purest form, scientific expertise. Second, laws giving an official so much discretion can be abused. And whatever one may think about the COVID restrictions, we surely do not want them to become a recurring feature after the pandemic has passed. All sorts of things can be called an emergency or disaster of major proportions. Simply slapping on that label cannot provide the ground for abrogating our most fundamental rights. And whenever fundamental rights are restricted, the Supreme Court and other courts cannot close their eyes.

JACOBSON V. MASSACHUSETTS

So what have the courts done in this crisis? When the constitutionality of COVID restrictions has been challenged in court, the leading authority cited in their defense is a 1905 Supreme Court decision called *Jacobson v. Massachusetts*.[8] The case concerned an outbreak of smallpox in Cambridge, and the Court upheld the constitutionality of an ordinance that required vaccinations to prevent the disease from spreading.[9]

Now, I am all in favor of preventing dangerous things from issuing out of Cambridge and infecting the rest of the country and the world. It would be good if what originates in Cambridge stayed in Cambridge. But to return to the serious point: it is important to keep *Jacobson* in perspective. Its primary holding rejected a substan-

8. 197 U.S. 11 (1905).
9. *See id.* at 12–13, 31.

tive due process challenge to a local measure that targeted a problem of limited scope.[10] It did not involve sweeping restrictions imposed across the country for an extended period. And it does not mean that whenever there is an emergency, executive officials have unlimited, unreviewable discretion.[11]

A HIERARCHY OF RIGHTS

Just as the COVID restrictions have highlighted the movement toward rule by experts, litigation about COVID restrictions has pointed up emerging trends in the assessment of particular individual rights. This is especially evident with respect to religious liberty. It pains me to say this, but in certain quarters, religious liberty is fast becoming a disfavored right. And that marks a surprising turn of events.

Consider where things stood in the 1990s. To me at least, that does not seem like the Jurassic Age. When a Supreme Court decision called *Employment Division v. Smith*[12] cut back sharply on the protection provided by the Free Exercise Clause of the First Amendment,[13] Congress was quick to respond. It passed the Religious Freedom Restoration Act[14] to ensure broad protection for religious liberty. The law had almost universal support. In the House, the vote was unanimous.[15] In the Senate, it was merely 97-3.[16] And the bill was enthusiastically signed by President Clinton.[17] Today, that wide support has vanished. Some of our cases illustrate this same trend.

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10. *See id.* at 12, 24, 26–28, 38–39.

11. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting from denial of application for injunctive relief).

12. 494 U.S. 872 (1990).

13. *See id.* at 878, 881–85.

14. Pub. L. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4).

15. *See* 139 CONG. REC. 9,687 (1993) (House voice vote).

16. *See* 139 CONG. REC. 26,416 (1993) (Senate vote).

17. *See* Remarks on Signing the Religious Freedom Restoration Act of 1993, 1 PUB. PAPERS 2000 (Nov. 16, 1993).

THE LITTLE SISTERS OF THE POOR

Take the protracted campaign against the Little Sisters of the Poor, a religious institute of Catholic nuns. The Little Sisters are women who have dedicated their lives to caring for the elderly poor, regardless of religion.[18] They run homes that have won high praise. Here are some of the testimonials filed in our Court by residents of their homes:

> Carl Bergquist: The Little Sisters "do everything to make us happy . . . . I feel I'm part of the family and that's a great feeling . . . . They will keep you alive ten years longer than anyplace else because they love you."[19]
>
> Carol Hassell: "In a nutshell I would say this about the Little Sisters: a little bit of heaven fell from . . . the sky one day and landed in my apartment."[20]

Despite this inspiring work, the Little Sisters have been under unrelenting attack for the better part of a decade. Why? Because they refuse to allow their health insurance plan to provide contraceptives to their employees.[21] If they did not knuckle under and violate a tenet of their faith, they faced crippling fines, fines that would likely have forced them to shut down their homes.[22]

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18. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2375 (2020).

19. Brief for Residents and Families of Residents at Homes of the Little Sisters of the Poor as Amici Curiae Supporting Petitioners at 1–2, *Little Sisters of the Poor*, 140 S. Ct. 2367 (Nos. 19-431 & 19-454) (first omission in original).

20. *Id.* at 3.

21. *See Little Sisters of the Poor*, 140 S. Ct. at 2376.

22. *See* Little Sisters of the Poor Home for the Aged v. Burwell, 794 F.3d 1151, 1167 (10th Cir. 2015), *vacated sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016); 26 U.S.C. § 4980D(b)(1) (imposing fine of $100 per employee per day for employers offering health plans that do not meet statutory and regulatory requirements); Complaint at 32 ¶ 150, Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F. Supp. 3d 1225 (D.

The Trump Administration tried to prevent that by adopting a new rule.[23] But the States of Pennsylvania and New Jersey, supported by twenty other states and the District of Columbia, challenged that new rule.[24] The Little Sisters won their most recent battle in the Supreme Court last summer—I should add by a vote of 7 to 2.[25] But the case was sent back to the Court of Appeals.[26] Not only that, the rule adopted by the Trump Administration may be rescinded. And the Little Sisters' legal fight goes on and on.

STORMANS, INC. V. WIESMAN

Here is another example from our cases: The State of Washington adopted rules requiring every pharmacy to carry every form of contraceptive approved by the U.S. Food and Drug Administration and requested by customers, including so-called morning-after pills, which can destroy an embryo after fertilization.[27] A pharmacy called Ralph's was owned by a Christian family.[28] Opposed to abortion, they refused to carry abortifacients.[29] If a woman came to the store with a prescription for such a drug, the pharmacy referred her to a nearby store that was happy to provide it.[30] And there were more than thirty such stores within five miles of Ralph's.[31] But to the State of Washington, that was not good enough. Ralph's had to provide the drugs itself or get out of the State.[32]

Colo. 2013) (No. 1:13-cv-02611-WJM-BNB), ECF No.1 (describing fines under § 4980D as "financially ruinous" for the Little Sisters Homes).

23. *See Little Sisters of the Poor*, 140 S. Ct. at 2377–78.

24. *See* Brief for Massachusetts et al. as Amici Curiae Supporting Respondents, *Little Sisters of the Poor*, 140 S. Ct. 2367 (Nos. 19-431 & 19-454).

25. *See Little Sisters of the Poor*, 140 S. Ct. at 2372–73.

26. *See id.* at 2386.

27. *See* Stormans, Inc. v. Wiesman, 136 S. Ct. 2433, 2433, 2435–36 (2016) (Alito, J., dissenting from the denial of certiorari).

28. *See id.* at 2433.

29. *See id.*

30. *See id.*

31. *See id.* (citation omitted).

32. *See id.* at 2434.

MASTERPIECE CAKESHOP

One more example. Consider what a member of the Colorado Civil Rights Commission said to Jack Phillips, the owner of Masterpiece Cakeshop, when he refused to create a cake celebrating a same-sex wedding.[33] She said that freedom of religion had

> "been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, . . . we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use . . . to use their religion to hurt others."[34]

You can easily see the point. For many today, religious liberty is not a cherished freedom. In their view, it is often just an excuse for bigotry, and it cannot be tolerated even when there is no evidence that anyone has been harmed. And the cases I just mentioned illustrate the point. As far as I am aware, not one employee of the Little Sisters has come forward and demanded contraceptives under the Little Sisters' plan.[35] There was no risk that Ralph's referral practice would have deprived any woman of the drugs she sought—and no reason to think that Jack Phillips' stance would deprive any same-sex couple of a wedding cake. The couple that came to his shop was given a free cake by another bakery,[36] and celebrity chefs have jumped to the couple's defense.[37]

A great many Americans disagree with the religious beliefs of the Little Sisters, the owners of Ralph's, and Jack Phillips, and of course that is their right. The question we face is whether our society will

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33. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).

34. *Id.* at 1729 (citation omitted).

35. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2387 (2020) (Alito, J., concurring).

36. *See* Appendix to Petition for a Writ of Certiorari at 291a, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); *id.* at 6.

37. *See* Brief for Chefs, Bakers, and Restaurateurs as Amici Curiae Supporting Respondents at 1–2, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

be inclusive enough to tolerate people with unpopular religious beliefs. Over the years, I have sat on cases involving the rights of members of many religious minorities—Muslim police officers whose religion required them to have beards,[38] a Native American who wanted to keep a bear for religious reasons,[39] a Jewish prisoner who tried to organize a Torah study group.[40] Catholic nuns and other traditional Christians deserve no less protection.

A Harvard law professor provided a different vision of a future America. He candidly wrote:

> "The culture wars are over; they lost, we won. . . . [T]he question now is how to deal with the losers in the culture wars. . . . My own judgment is that taking a hard line ('You lost, live with it') is better than trying to accommodate the losers . . . . [T]aking a hard line seemed to work reasonably well in Germany and Japan after 1945."[41]

Is our country going to follow that course? To quote a popular Nobel laureate, "It's not dark yet, but it's getting there."[42] And COVID restrictions have highlighted this trend.

SOUTH BAY AND *CALVARY CHAPEL*

Over the summer, the Supreme Court received two applications to stay COVID restrictions that blatantly discriminated against houses of worship.[43] One was from California and one was from Nevada. In both cases, the Court allowed the discrimination to

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38. *See* Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 360 (3d Cir. 1999).

39. *See* Blackhawk v. Pennsylvania, 381 F.3d 202, 204–05 (3d Cir. 2004).

40. *See* Ben-Levi v. Brown, 136 S. Ct. 930, 930 (2016) (Alito, J., dissenting from the denial of certiorari).

41. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016) (emphasis omitted), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html [https://perma.cc/RJG4-74VK].

42. BOB DYLAN, *Not Dark Yet*, *on* TIME OUT OF MIND (Columbia Records 1997).

43. *See* Petition for Writ of Certiorari Before Judgment, Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (No. 19A1070); Emergency Application for Writ of Injunction, S. Bay United Pentecostal Church et al. v. Newsom, 140 S. Ct. 1613 (2020) (No. 19A1044).

stand.[44] The only justification given was that we should defer to the judgment of governors because they have the responsibility to safeguard the public health.[45]

Consider what that deference meant in the Nevada case. After initially closing the State's casinos for a time, the Governor opened them up and allowed them to admit 50% of their normal occupancy limit.[46] And since many casinos are enormous, that is a lot of people. Not only did the Governor open up the casinos, he made a point of inviting people from all over the country to visit them.[47] So if you go to Nevada, you can gamble, drink, and attend all sorts of shows to your heart's content. But here is what you cannot do: If you want to worship at a church, synagogue, or mosque and you are the fifty-first person in line, sorry, you are out of luck. Houses of worship are limited to fifty attendees.[48] The size of the building does not matter. Nor does it matter if you wear a mask and keep more than six feet away from everybody else. And it does not matter if the building is carefully sanitized before and after a service. The State's message is this: Forget about worship and head for the slot machines or maybe a Cirque du Soleil show.

Deciding whether to allow this disparate treatment should not have been a tough call. Take a quick look at the Constitution. You will see the Free Exercise Clause of the First Amendment.[49] You will not find a Craps Clause or a Blackjack Clause or a Slot Machine

44. *See* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.) (denying application for injunctive relief); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.) (denying application for injunctive relief).

45. *See S. Bay*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring in denial of application for injunctive relief).

46. *See Calvary Chapel*, 140 S. Ct. at 2605–07 (Alito, J., dissenting from denial of application for injunctive relief).

47. *See* John Sadler, *Nevada Gyms, Movie Theaters, Churches Can Reopen Friday; Casinos Get OK for June 4*, LAS VEGAS SUN (May 26, 2020), https://lasvegas-sun.com/news/2020/may/26/nevada-gyms-movie-theaters-churches-reopen-casinos/ [https://perma.cc/8U4D-KUSP].

48. *See Calvary Chapel*, 140 S. Ct. at 2604 (Alito, J., dissenting from denial of application for injunctive relief).

49. U.S. CONST. amend. I.

Clause. Nevada was unable to provide any plausible justification for treating casinos more favorably than houses of worship. But the Court nevertheless deferred to the Governor's judgment, which just so happened to favor the State's biggest industry and the many voters it employs.

FDA v. ACOG

If what I have said so far does not convince you that religious liberty is in danger of becoming a second-class right, consider a case that came shortly after the Nevada case.[50] The FDA has long had a rule providing that a woman who wants a medication abortion must go to a clinic to pick up the drug. The idea is that it is important for the woman to receive instruction about the drug at that time. This rule was first adopted in 2000 during the Clinton Administration, and it has been on the books ever since.[51]

A few weeks ago, a federal district judge in Maryland issued an order prohibiting the FDA from enforcing this rule any place in the country.[52] Enforcement, he found, would interfere with the right of women to obtain abortions. Why? Because some women, fearful of contracting COVID if they left their homes, would hesitate about making the trip to a clinic.[53] Now, when the judge made this decision, the governor of Maryland, presumably advised by public health experts, had apparently concluded that Marylanders could safely engage in all sorts of activities outside the home—such as visiting an indoor exercise facility, a hair or nail salon, and the State's casinos.[54] If deference was appropriate in the California and Nevada cases, then surely we should have deferred to the federal

50. Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578, 578 (2021).

51. *See* Am. Coll. of Obstetricians & Gynecologists v. Food & Drug Admin., 472 F. Supp. 3d 183, 190 (D. Md. 2020).

52. *See* Am. Coll. of Obstetricians and Gynecologists v. Food & Drug Admin., No. 8:20-cv-01320-TDC, Doc. No. 92 at 2 (D. Md. July 13, 2020).

53. *See* 472 F. Supp. 3d at 211–17.

54. *See* Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 10, 12–13 & n.* (2020) (Alito, J., dissenting).

Food and Drug Administration on an issue of *drug* safety. But no, in this instance, the right in question was the abortion right, not the right to religious liberty, and the abortion right prevailed.

FREE SPEECH

The right to the free exercise of religion is not the only once-cherished freedom that is falling in the estimation of some segments of the population. Support for freedom of speech is also in danger, and COVID rules have restricted speech in unprecedented ways. As I mentioned, attendance at speeches, lectures, conferences, conventions, rallies, and other similar events has been banned or limited. And some of these restrictions are alleged to have included discrimination based on the viewpoint of the speaker.

Even before the pandemic, there was growing hostility to the expression of unfashionable views. And that, too, was a surprising development. Here is a marker: In 1972, the comedian George Carlin began to perform a routine called "Seven Words You Can Never Say on Television."[55] Today, you can see shows on your TV screen in which the dialog seems at times to consist almost entirely of those words. Carlin's list seems like a quaint relic.

But it would be easy to put together a new list called "Things You Can Never Say If You Are a Student or Professor at a College or University or an Employee at Many Big Corporations." And there would not be just seven items on that list. Seventy times seven would be closer to the mark. I will not go down the list, but I will mention one that I have discussed in a published opinion. You cannot say that marriage is a union between one man and one woman.[56] Until very recently, that is what the vast majority of Americans thought. Now, it is considered bigotry.

That this would happen after our decision in *Obergefell* should not have come as a surprise. The opinion of the Court included words

55. GEORGE CARLIN, *Seven Words You Can Never Say on Television*, *on* CLASS CLOWN (Little David/Atlantic Records 1972).

56. Obergefell v. Hodges, 576 U.S. 644, 741–42 (2015) (Alito, J., dissenting).

meant to calm the fears of those who cling to traditional views on marriage. But I could see—and so did the other Justices in dissent—where the decision would lead. I wrote the following: "I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[57] That is just what is coming to pass. One of the great challenges for the Supreme Court going forward will be to protect freedom of speech. Although that freedom is falling out of favor in some circles, we need to do whatever we can to prevent it from becoming a second-tier constitutional right.

THE SECOND AMENDMENT

Of course, the ultimate second-tier constitutional right in the minds of some is the Second Amendment right to keep and bear arms. From 2010, when we decided *McDonald v. City of Chicago*,[58] until last term, the Supreme Court denied every single petition asking us to review a lower court decision that rejected a Second Amendment claim. Last year, we finally took another Second Amendment case, and what happened after is interesting.[59]

The case involved a New York City ordinance. The City makes it very inconvenient for a law-abiding resident to get a license to keep a gun in the home for self-defense.[60] But the Second Amendment protects that right, and if a person is going to have a gun in the home, there is broad agreement that the gun owner should know how to use the gun safely, and that the best way to acquire and maintain that skill is to go to a range every now and then. The New York City ordinance, however, prohibited a lawful gun owner from

57. *Id.* at 741.

58. 561 U.S. 742 (2010).

59. *See* N.Y. State Rifle & Pistol Ass'n, Inc., v. City of New York, 140 S. Ct. 1525 (2020).

60. *See id.* at 1529-30 (Alito, J., dissenting).

going to any range outside city limits.[61] There were only seven ranges in the entire city, and all but one were largely restricted to members and their guests.[62] There were other ranges that lay just outside the City.[63] So why could a city resident not go to one of those ranges? The City had no plausible explanation.

But that did not stop it from vigorously defending its rule.[64] Nor did it stop the district court or the Second Circuit from upholding it.[65] Once we granted review, however, the City suddenly saw things differently. It quickly repealed the ordinance and said that doing so did not make the city any less safe.[66] In the place of the old ordinance, it adopted a new, vaguer one that still did not give gun owners what they wanted.[67] But the City nevertheless asked us to dismiss the case before it was even briefed or argued.[68]

And when we refused to do that, the City was miffed.[69] Five United States Senators who filed a brief in support of the city went further.[70] They wrote that the Supreme Court is a sick institution and that if the Court did not mend its ways, well, it might have to be "restructured."[71] After receiving this warning, the Court did exactly what the City and the Senators wanted. It held that the case was moot and said nothing about the Second Amendment.[72] Three of us protested—but to no avail.[73] Now, let me be clear. I am not

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61. *See id.* at 1530.
62. *See id.*
63. *See id.* at 1530–31.
64. *See id.* at 1531.
65. *See id.* at 1532.
66. *See id.* at 1532–33.
67. *See id.* at 1532–35.
68. *See id.* at 1532.
69. *See id.* at 1532–33.
70. *See id.* at 1528; Brief for Senators Sheldon Whitehouse, Mazie Hirono, Richard Blumenthal, Richard Durbin, and Kirsten Gillibrand as Amici Curiae Supporting Respondents, *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. 1525 (No. 18-280).
71. Brief for Senator Sheldon Whitehouse et al., *supra* note 70, at 18.
72. *See N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1533 (Alito, J., dissenting).
73. *See id.* at 1527 (Alito, J., dissenting, joined in full by Gorsuch, J., and in part by Thomas, J.).

suggesting that the Court's decision was influenced by the Senators' threat. But I am concerned that the outcome might be viewed that way by those with thoughts of bullying the Court.

THREATS TO THE COURT

This little episode, I am afraid, may provide a foretaste of what the Supreme Court will face in the future. And therefore, it cannot simply be brushed aside. The Senators' brief was extraordinary. I could say something about standards of professional conduct. But the brief involved something even more important. It was an affront to the Constitution and the rule of law. Let us go back to some basics. The Supreme Court was created by the Constitution, not by Congress.[74] Under the Constitution, we exercise "the judicial Power of the United States."[75] Congress has no right to interfere with that work any more than we have the right to legislate.[76] Our obligation is to decide cases based on the law. And it is therefore wrong for anybody, including members of Congress, to try to influence our decisions by anything other than legal argumentation.

That sort of thing has often happened in countries governed by power, not law. I will mention a story I was told about a supreme court justice from one such place recounted. The court in question was considering a case that was very important to those in power. When the justice looked out the window, he saw a tank pull up and point its gun toward the court. The message was clear: Decide the right way or the courthouse might be—shall we say—restructured. That was a crude threat, but all threats and inducements are intolerable. Judges dedicated to the rule of law have a clear duty. They

74. *See* U.S. CONST. art. III, § 1.

75. *Id.*

76. *See* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) ("The separation of powers, among other things, prevents Congress from exercising the judicial power."); Kilbourn v. Thompson, 103 U.S. 168, 191 (1880) ("It is . . . essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.").

cannot compromise principle or rationalize any departure from what they are obligated to do. And I am confident that the Supreme Court will not do so in the years ahead.

CONCLUSION

When we look back at the history of the American judiciary, we can easily recall many judges who were fierce in their dedication to principle. And one who is especially dear to the Federalist Society springs immediately to mind. I am referring to Justice Antonin Scalia. Nino was one of the law professors who helped the Society get started. And during his long judicial career, his thinking influenced generations of young lawyers. He left his mark in many ways. Perhaps above all else, he is renowned for his advocacy of two theories of interpretation: "originalism," the idea that the Constitution should be interpreted in accordance with its public meaning at the time of adoption—and "textualism," which is essentially originalism applied to statutes.

To see the extent of his influence, consider these two statements by Justice Kagan: "We are all originalists."[77] And "We're all textualists now."[78] These statements do not mean that all jurists are in complete agreement about how the Constitution and statutes should be interpreted. But what they mean is that a lot of the debate about constitutional and statutory interpretation now takes place *within* the framework of originalism and textualism, or at least using the language of those two theories. And going forward, a lot of the debate among Justice Scalia's admirers will probe his understanding of these theories.

I wish he were still with us for this next exciting phase, but he is not. So we will have to do this on our own. I will not go deeply into this subject now, but I will say that we have seen the emergence of

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77. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010).

78. Justice Elena Kagan, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes* (Nov. 17, 2015).

what I believe are erroneous elaborations of Justice Scalia's theories. And I look forward to friendly and fruitful debate about what originalism and textualism should be understood to mean.

As I discussed tonight, the COVID crisis has highlighted constitutional fault lines. I have criticized some of what the Supreme Court has done, but I do not want to leave you with a distorted picture. During my 15 years on the Court, a lot of good work has been done to protect freedom of speech, religious liberty, and the structure of government created by the Constitution. All of this is important. But in the end, there is only so much that the judiciary can do to preserve our Constitution and the liberty it was adopted to protect. As Learned Hand famously wrote: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can . . . do much to help it."[79] For all Americans, standing up for our Constitution and our freedom is work that lies ahead. It will not be easy work. But when we meet next year, I hope we will be able to say that progress was made. At that time, I trust, we will be back together in the flesh. Until then, I wish you all the best.

79. Learned Hand, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 189, 190 (Irving Dilliard ed., 3d ed. 1960).

MYTHS OF COMMON GOOD CONSTITUTIONALISM

CONOR CASEY* & ADRIAN VERMEULE†

> "[I]f the goal of any society is the common good of its members, it necessarily follows that the purpose of every right is the common good."
>
> DANTE ALIGHIERI, DE MONARCHIA 40 (Prue Shaw trans. & ed., 1996).

> "[T]o govern is to lead the thing governed in a suitable way towards its proper end."
>
> THOMAS AQUINAS, DE REGNO (Gerald B. Phelan trans. 2012).

In this Essay, we take stock of the debate over common good constitutionalism and the revival of the classical legal tradition. In doing so, we suggest that several of the most common critiques of that revival are based on serious misconceptions and tendentious, question-begging claims, especially for the superiority of originalism.

The past eighteen months or so have seen an outpouring of remarkable claims, from both originalist and progressive legal scholars, about the classical legal tradition and its emphasis on the common good. They include the following, or minor variants of the following:

- Legal and constitutional interpretation in the classical tradition substitutes morality for law and reduces legal questions to all-things-considered moral decision-making from first principles.

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*Assistant Professor of Law, University of Liverpool School of Law & Social Justice.

† Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School. Some of the text in this post is adapted from Professor Vermeule's book *Common Good Constitutionalism* (2022). A much shorter version of this article was published at the *Ius et Iustitium* blog. *See* Conor Casey & Adrian Vermeule, *Myths of Common-Good Constitutionalism*, IUS ET IUSTITIUM (Sept. 9, 2021), https://iusetiustitium.com/myths-of-common-good-constitutionalism/ [https://perma.cc/VZQ6-M4K6]. The authors would like to thank Ethan Harper for excellent research assistance. The authors would also like to thank John Acton, Sean Coyle, George Duke, Michael Foran and Grégoire Webber for their very helpful comments.

- The classical tradition ignores the text and has no respect for posited law.
- An official oath to respect the Constitution and laws requires an originalist approach to constitutional interpretation.
- The classical tradition licenses judges to rule as they see fit for the common good; common good constitutionalism is thus synonymous with judicial supremacy.
- Alternatively, common good constitutionalism is synonymous with executive supremacy and an absence of checks and balances on executive power.
- Common good constitutionalism has no respect for human rights.
- Common good constitutionalism is fatally undermined by the fact that there is and will be disagreement between classical lawyers over the content of the natural law in hard cases.

In what follows, we argue that these claims do not even rise to the level of being either true or false, for they actually fail to join issue with the classical legal tradition; they transparently beg all the critical questions at issue. In other words, they assume their conclusions, assume away the premises of the classical legal tradition, and generally fail to meet the classical arguments on their own terms. They are best understood, not as serious arguments, but instead as myths offered to define and enforce the boundaries of particular socio-legal communities, such as the originalist legal movement, and to comfort its members. Our hope is to clear away these myths so that actual engagement may occur. We hope to inaugurate a new phase of discussion, one in which critics of the classical legal tradition begin with a baseline comprehension of what it is they are criticizing. In a sense, despite all the *sturm und drang*, the real debate over common good constitutionalism has yet to begin.

Part I sketches the largely ersatz debate so far. Part II introduces the essentials of the classical theory of law and of common good constitutionalism, which is nothing more than the core precepts of the classic legal tradition translated, adapted

and applied to current constitutional debates. We do not purport to provide a comprehensive statement of the classical theory, but merely offer an introductory mini-primer, with references to more comprehensive literature. As we will see, the myths we will discuss beg even the elementary questions. Part III explains how the myths are incorrect—or, more precisely, beg the questions in controversy. In the conclusion, we invite genuine engagement with the classical legal tradition.

I. THE DEBATE SO FAR

The hallmark of the classical legal tradition is that law, to be law in the focal sense of that term,[1] must be rationally ordered to the common good of the political community. We have argued, as do others, that the classical legal tradition should be explicitly revived, adapted, and readopted as the intellectual underpinning upon which officials and jurists understand the purpose and ends of political authority, law, and constitutions. The foundation and rapid success of legal theory blogs like *Ius*

1. Use of the "focal case" or "central case" methodology used by Aristotle, and more recently deployed by Finnis, allows us to distinguish and pick out explanatorily rich expressions of a social phenomenon or practice and contrast them with poor or diluted expressions. For example, distinguishing between rich examples of social practices like friendship, medicine, or argumentation from their impoverished or less rich imitations: "so-called friends," unscientific quackery, and illogical ramblings. Focal cases help to shed light on the good reasons people have for engaging in a social practice—the *purpose* motivating it and sustaining it over time. These reasons can then be used to probe why and how some forms of a practice can be seen as diluted or borderline versions. For example, quack medicine hinders, or at least fails to promote, the good reasons (to secure life and health) people have for engaging in the practice of medicine in the first place, and this sheds light on why quack medicine can be considered an impoverished version of medical practice. Picking out the central or focal case of a phenomenon, including law or constitutionalism, therefore requires the theorist to engage with the question of *why* practices like law and constitutionalism are a good thing to have and what kind of *reasons* would warrant bringing a legal system into being and sustaining it over time, as opposed to opting for other forms of social ordering. In the classical legal tradition, this "why" and these "reasons" are supplied by reference to the need to secure the common good of each and all—the sources of man's highest temporal happiness. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS Chapter 1 (2d ed. 2011).

& Iustitium[2] and of research projects like the *Common Good Project*[3] based at Oxford University are a testament to renewed interest in these questions.

In April 2020, one of us published a short essay in *The Atlantic*[4] critiquing the dominance of originalist and progressive approaches to law and constitutional interpretation in contemporary legal thought. The essay called for an embrace of 'common-good constitutionalism' in its place—the application of core precepts of the classical legal tradition to questions of public law and constitutionalism. It is fair to say the essay did not go unnoticed. Certain responses ranged from hostile to apoplectic. In a rare joint-defense alliance, both originalist-libertarians and progressives condemned the idea as "dangerous"—as subversive of the United States' important founding principles[5] and an

2. *Ius et Iustitium* is a legal theory blog which aims to demonstrate "that the classical legal tradition provides powerful justifications for the rule of law, morality, and social order." *About Us*, IUS ET IUSTITIUM, https://iusetiustitium.com/about-us/ [https://perma.cc/KT2Z-9JQU] (last visited Dec. 31, 2021).

3. The *Common Good Project* is a joint initiative of Blackfriars College and the Aquinas Institute at the University of Oxford. Its main aim is to "foster a discussion of the relationship between law and the common good. The Project explores the notion of common good in law and society from an array of perspectives." *The Common Good Project*, UNIV. OF OXFORD, FAC. OF L., https://www.law.ox.ac.uk/research/common-good-project [https://perma.cc/GN4X-DASY] (last visited Dec. 31, 2021). For our contributions to the project, see The Common Good Project, *Toward a Common Good Approach to Constitutionalism. A Conversation with Conor Casey*, YOUTUBE (Mar. 18, 2021), https://www.youtube.com/watch?v=MpZCKrpE5gw; The Common Good Project, *What is the Common Good? A Conversation with Adrian Vermeule*, YOUTUBE (Feb. 25, 2021), https://www.youtube.com/watch?v=K89_3Wdi7BA.

4. *See* Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ [https://perma.cc/KWB5-DMJH].

5. *See, e.g.*, Randy Barnett, *Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution*, THE ATLANTIC, (Apr. 3, 2020), https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-nonoriginalist-approach-constitution/609382/ [https://perma.cc/NTU7-XDQR]; Richard Epstein, *The Problem with "Common Good Constitutionalism"*, HOOVER INST. (Apr. 6 2020), https://www.hoover.org/research/problem-common-good-constitutionalism [https://perma.cc/PQ88-UXDY]; Jack Balkin, *Common Good Versus Public Good*, BALKINIZATION (Apr. 3, 2020), https://balkin.blogspot.com/2020/04/common-good-versus-public-good.html [https://perma.cc/QA6P-YRBB].

extended apologia for authoritarianism.[6] Rarely have so many advocates of unbridled liberty of thought and discussion encountered an idea that they immediately aimed to stamp as beyond the pale.

Over time, however, the situation has become quite different. The other present author wrote an article in *Public Law* defending common good constitutionalism from the misguided critique that it is an intellectual apologia for authoritarianism. Instead, this piece argued that it is an approach to constitutionalism steeped in the classical legal tradition, due to its identification of the primacy of the common good and human flourishing as the justification for political authority and its close linkage of legal interpretation to principles of legal morality conducive to this end.[7] Since then, a series of works, many by younger scholars, has started to draw upon the common good framework, either explicating it as a matter of theory,[8] or applying it in diverse areas of law.[9]

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6. *See, e.g.*, Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come,* THE ATLANTIC (Apr. 3, 2020), https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/ [https://perma.cc/L69D-CCVP]; David Dyzenhaus, *Schmitten in the USA,* VERFASSUNGSBLOG: ON MATTERS CONST. (Apr. 4, 2020), https://verfassungsblog.de/schmitten-in-the-usa/; Blake Emerson, *Progressive Democracy and Legislative Form*, L. & POL. ECON. PROJECT (Apr. 15, 2020), https://lpeproject.org/blog/progressive-democracy-and-legislative-form/ [https://perma.cc/S4FP-M3A5].

7. *See* Conor Casey, *"Common-Good Constitutionalism" and the New Battle Over Constitutional Interpretation in the United States*, 4 PUB. L. 765 (2021).

8. *See, e.g.*, Stéphane Sérafin et al., *The Common Good and Legal Interpretation, A Response to Leonid Sirota and Mark Mancini*, 30 CONST. F. CONSTITUTIONNEL 39 (2021).

9. *See* Michael Foran, *Rights and the Common Good,* IUS ET IUSTITIUM (Sept. 20, 2021), https://iusetiustitium.com/rights-and-the-common-good/ [https://perma.cc/H684-BNGZ]; Jamie McGowan, *The Tyranny of Rights,* IUS ET IUSTITIUM (Sept. 20, 2021), https://iusetiustitium.com/on-the-tyranny-of-rights/ [https://perma.cc/58N6-FMSD]; José Ignacio Hernández G., *Common-Good Constitutionalism and the "Ius Constitutionale Commune" in Latin America*, IUS ET IUSTITIUM (Sept. 28, 2020), https://iusetiustitium.com/common-good-constitutionalism-and-the-ius-constitutionale-commune-in-latin-america/ [https://perma.cc/M3AE-PYM4]; Jamie McGowan, *Against Judicial Dyarchy*, IUS ET IUSTITIUM (July 16, 2020), https://iusetiustitium.com/against-judicial-dyarchy/ [https://perma.cc/YXT8-MALJ].

We, of course, fully anticipate and welcome robust debate both within and about the conceptual paradigm we are sketching. Common good constitutionalism is a theoretical and conceptual framework, not a laundry list of positions, and thus supports as much internal debate and dissension as occurs within, for example, legal positivism. (Consider the interesting debate between Michael Foran and Jamie McGowan, conducted within common good premises, over the scope of judicial review).[10] We therefore stress that our goal here is to outline the core precepts of a rich jurisprudential tradition and how they relate to broad issues of public law theory; it is not to set out a checklist of how these precepts would impact specific legal disputes or the interpretation of contested constitutional provisions in a particular legal system. We also anticipate many will disagree with a constitutionalism informed by the classical legal tradition even when some prevalent myths are dispelled. But disagreement about the classical legal tradition and its relationship to constitutionalism should, at a minimum, be grounded in a sound understanding of the concepts at play.

II. THE CLASSICAL LEGAL TRADITION: A MINI-PRIMER

To understand the mistakes and tautologies that underpin the critics' views, we need some basics. Accordingly, we begin our response by sketching the foundational premises of the classical legal tradition, whose precepts underpin the operative principles of common good constitutionalism.

Law in this tradition is understood, as Aquinas famously framed it, as an ordinance of reason promulgated by political authorities for the common good.[11] Law is not the product of the arbitrary will of a ruler, nor is it simply whatever is identified by social convention as law. To count as law in the fullest sense, an ordinance of public authority must rationally conduce to the good of the community for which the lawmaker has a duty and privilege of care.

But what exactly is the common good? Given its central status in the classical tradition, we begin our sketch with it. Many of

10. *See id.*

11. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE pt. Ia-IIae, q. 90, art. 4.

the critics seem desperately unaware that the common good is not simply a blank, or a placeholder for whatever subjective preferences any particular official might desire to impose, but rather shorthand for a millennia-old legal framework, worked out over time by a succession of the greatest lawyers in Europe, the British Isles, and the Americas, and absolutely central to Western law as a whole. The claim that the common good is an undefined notion is both spatially and temporally parochial in the extreme.

Nor is it some sort of recondite theoretical concept, one that workaday lawyering can ignore. Legal texts are full of constitutional, statutory and regulatory phrases like "common good," "social justice" "general welfare," "public interest," "public good," "peace, order, and good government" and other cognates.[12] Such texts must be given some construction or other; it is not as though the issue can simply be avoided. We suggest here that the common good approach worked out in the law over two millennia is the best such construction—and, ironically, the one that is by far the most likely to capture the so-called "original understanding" of the Constitution.

The Common Good in Politics and Law

In the classical account, a genuinely *common* good is a good that is unitary ("one in number") and capable of being shared without being diminished.[13] Thus it is inherently non-aggregative; it is not the summation of a number of private goods, no matter how great that number or how intense the preference for those goods may be.[14] Consider the aim of a football team for victory, a unitary aim for all that requires the cooperation of all and that is not diminished by being shared. The victory of the

12. *See, e.g.*, The Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151 *et seq.*) (1934); MASS. CONST. art. VII, pt. I; Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) at 5 U.S.C. § 553(b)(3)(B).

13. *See* John Goyette, *On the Transcendence of the Political Common Good,* 13 NAT'L CATH. BIOETHICS Q. 133, 137 (2013); Louis Dupré, *The Common Good and the Open Society,* 55 REV. POL. 687 (1993).

14. *See* Paul Brady, *Coercion, Political Authority and the Common Good*, 62 AM. J. OF JURIS. 75, 82–84 (2017).

team, as a team, cannot be reduced to the individual success of the players, even summed across all the players.

In the classical theory, the ultimate genuinely common good of political life is the happiness or flourishing of the community, the well-ordered life in the *polis*.[15] It is not that "private" happiness, or even the happiness of family life, is the real aim and the public realm is merely what supplies the lawful peace, justice, and stability needed to guarantee that private happiness. Rather, the highest felicity in the temporal sphere is itself the common life of the well-ordered community, which includes those other foundational goods but transcends them as well.[16] Nor is this the same as the good of the state. The good of the community is itself the highest good for individuals and a critical element of their flourishing.

To put it differently, human flourishing, including the flourishing of individuals, is itself essentially, not merely contingently, dependent upon the flourishing of the political communities (including ruling authorities) within which humans are always born, found, and embedded. This is not at all to say, of course, that the individual should be absorbed into the political community or subjected to it. The end of the community is ultimately to promote the good of individuals and families, but common goods are real as such and are themselves the highest goods for individuals.[17] No subordinate goods can be fully enjoyed in a dysfunctional community.

The common good, at least the civil or temporal common good,[18] can be described in substantive terms in this way: (1) it

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15. *See* Donald Morrison, *The Common Good*, *in* THE CAMBRIDGE COMPANION TO ARISTOTLE'S *POLITICS* 176 (Marguerite Deslauriers & Pierre Destrée eds., 2013); *see also* GEORGE DUKE, ARISTOTLE AND LAW: THE POLITICS OF NOMOS (2019).

16. *See* Goyette, *supra* note 15, at 140–41.

17. *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM at Chapter 1 (2022).

18. We speak here only of the natural goods of the temporal order, so as to remain within our competence as civil lawyers. *Cf.* WALTER FARRELL, O.P., THE NATURAL LAW ACCORDING TO AQUINAS AND SUÁREZ 13 (Cajetan Cuddy, O.P. ed., Cluny Media 2019) ("The final end of man is his happiness; a supernatural happiness, it is true, but not all communities have to do with leading man to his supernatural end directly. Nevertheless they have at least to do with the attainment of his secondary ends of natural or temporal happiness, which are a means to the supernatural final ends.") Just as not every community within the larger polity

is the structural political, economic and social conditions that allow communities to live in accordance with the precepts of justice, yielding (2) the injunction that all official action should be ordered to the community's attainment of those precepts, subject to the understanding that (3) the common good is not the sum of individual goods, but the indivisible good of a community, a good that belongs jointly to all and severally to each. The conditions that allow communities to live in accordance with justice and secure the flourishing of citizens define the legitimate ends of civil government.[19]

Some might argue there is a tension between these components of the common good—for example, a tension between focusing on the structural preconditions of justice versus focusing on the legitimate ends of government. Is the political common good *instrumental* in the sense that it creates the sum of conditions where individuals and families and associations can truly flourish and pursue the good life? Or is it *distinctive* (or, in an equivalent formulation, *transcendent*) in that it is a good of unity, justice, and peace that is distinct from any singular individual's good yet at the same time not alien to his individual good, but indeed his highest good? Here there are competing views.

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need concern itself directly with leading man to his supernatural end, not all articles need do so; a scholarly and professional division of labor is perfectly appropriate, and does not entail denying that a comprehensive treatment would examine such questions.

19. HEINRICH A. ROMMEN, THE STATE IN CATHOLIC THOUGHT: A TREATISE ON POLITICAL PHILOSOPHY 274 (2016).

One view, defended by John Finnis[20] and Robert P. George,[21] is that the common good at the level of the community is ultimately instrumental. The point of a flourishing political community is to make possible the pursuit of basic goods at the level of the individual and the family. On a competing view, ably captured by Pater Edmund Waldstein[22] and John Goyotte,[23] drawing upon the work of Charles de Koninck,[24] the political common good transcends private and individual goods and forms the highest good for individuals. To be a citizen of a flourishing polity is not a means to some other good, or a mere precondition for private or family life; it is itself the highest felicity in matters of temporal government. On a third view, advanced by George Duke, there is no reason to see an irreconcilable conceptual tension here; rather, the two formulations just address different and compatible aspects of the same problem—different facets of a unitary conception.[25] The common good *is* instru-

20. *See* George Duke, *Finnis on the Authority of Law and the Common Good*, 19 LEGAL THEORY 44-62 (2013); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 154–155 (2d ed. 2011). For the sake of completeness, we note that Professor Finnis has appeared to refine his position on the nature of the common good since *Natural Law and Natural Rights.* More recently, he has suggested that the common good of a political community participates in the good of friendship and is, as such, an "intrinsically valuable" and not merely instrumentally good pursuit. *See* John Finnis, *Reflections and Responses*, *in* REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 510–15 (John Keown & Robert P. George eds., 2013). We thank Grégoire Webber for bringing this to our attention.

21. *See* Robert P. George, *The Common Good: Instrumental but Not Just Contractual,* PUB. DISCOURSE (May 17, 2013), https://www.thepublicdiscourse.com/2013/05/10166/ [https://perma.cc/7P58-UVVX].

22. *See* Edmund Waldstein, *The Good, the Common Good, and the Highest Good*, THE JOSIAS (Feb. 3, 2015), https://thejosias.com/2015/02/03/the-good-the-highest-good-and-the-common-good [https://perma.cc/7Z9N-9C63]; Edmund Waldstein, *Racial Justice and Social Order*, SANCRUCENSIS (June 2, 2020), https://sancrucensis.wordpress.com/2020/06/02/racial-justice-and-social-order [https://perma.cc/9Z8Z-YZC3].

23. *See* Goyette, *supra* note 15.

24. *See* CHARLES DE KONINCK, *The Primacy of the Common Good Against the Personalists: The Principle of the New Order*, *in* 2 THE WRITINGS OF CHARLES DE KONINCK 63 (Ralph McInerny ed. & trans., 2016).

25. *See* George Duke, *The Common Good*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 382 (George Duke & Robert P. George eds., 2017);

mental in the strictly limited sense that it requires a set of structural conditions where individuals, families, and associations can flourish and pursue the good life in community. But it *is* also still a distinctive and supreme good in that the flourishing of the polity itself, as a form of civic friendship dedicated to the happiness of all its members, is truly distinct from the good of individuals and subsidiary associations within it. At the same time, the good of a polity dedicated to acting for the perfection of its members is an aspect of the good of each and every individual who is part of it, indeed their highest temporal good.[26]

For present purposes, we need not arbitrate among these accounts; all are inconsistent with the myths and misconceptions we discuss. It is common ground among all theorists of the common good to condemn a serious misconception, prevalent particularly amongst libertarian critics, that the common good pertains to the political community viewed as some sort of organic whole, where individual persons exist for the good of the State, as one might say bees relate to the hive.[27] That is, critics implicitly read "the common good" as "the good of the collective" or, even worse, "the good of the state apparatus" and then oppose that to the good of individuals. In a utilitarian variant, they interpret the common good as the aggregate utility of individuals summed up according to some social welfare function, and then oppose this aggregate good to the rights of individuals.

None of this gets at the truly *common* good of happiness in a flourishing political community, which (to repeat) is unitary, ca-

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George Duke, *The Distinctive Common Good*, 78 REV. POL. 227, 228–33 (2016). A similar observation is made by JONATHAN CROWE, NATURAL LAW AND THE NATURE OF LAW 90 (2019).

26. *See* BRIAN M. MCCALL, THE ARCHITECTURE OF LAW: REBUILDING LAW IN THE CLASSICAL TRADITION 34 (2018); HEINRICH ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 214 (Thomas R. Hanley trans., 1998).

27. *See* JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD 47–49 (Univ. of Notre Dame Press 2015). In reality, for the record, the classical trope that envisions the bees and the hive as a centralized absolute monarchy is an entirely erroneous picture of how bees and other social insects operate. *See* Christian List & Adrian Vermeule, *Independence and interdependence: Lessons from the Hive*, 26 RATIONALITY & SOC'Y 170 (2014).

pable of being shared without being diminished, and the highest good for individuals as such.[28] On the classical account, the state is merely one part of the larger political community, and the good of the community is itself the good for individuals and is not alien to them or imposed on them—a crucial point emphasized by the great theorist of the common good, de Koninck.[29] The good of the society in which one lives is part of the perfection of each individual as a social *and* political animal.[30]

On Human Flourishing

What does human flourishing consist of here? There is an extremely rich and extensive philosophical debate in the natural law tradition over this question that we cannot do justice to here—our aim being to elucidate the classical legal underpinnings of common good constitutionalism within the terms of our professional competence as public lawyers. But suffice to say there is clear agreement in this tradition that it approaches human flourishing with fundamentally different assumptions than those underpinning some contemporary liberal and progressive jurisprudence.[31]

Human flourishing as conceived in the classical legal tradition is based on the premise there are ends and goods objectively constitutive of human *eudaimonia* or *felicitas*—happiness.[32] These goods and ends are instantiated by acting consistently with the precepts of the *ius naturale* (natural law), whose most basic and self-evident injunction is that good is to be done and evil to be avoided.[33] Broadly speaking, the goods central to human flourishing in this tradition include life and component aspects of its fullness: health; bodily integrity; vigor; safety; the creation and education of new life; friendship in its various

28. *See* Adrian Vermeule, *Echoes of the* Ius Commune, 66 AM. J. JURIS. 85, 93–94 (2021).

29. *See generally* KONINCK, *supra* note 26.

30. *See* MCCALL, *supra* note 28, at 34; ROMMEN, THE NATURAL LAW, *supra* note 28.

31. *See* PATRICK DENEEN, WHY LIBERALISM FAILED 34–35 (2019).

32. *See* AQUINAS, *supra* note 13, at pt. Ia–IIae, q. 90, art. 2.; ROMMEN, THE NATURAL LAW, *supra* note 28, at 170.

33. *See* CICERO, THE REPUBLIC AND THE LAWS 103 (Niall Rudd trans., Oxford Univ. Press 2008); AQUINAS, *supra* note 13, at pt. Ia-IIae, q. 94, art. 2.

forms ranging from neighborliness to its richest sense in marriage; and living in a well-ordered, peaceful, and just polity.[34] Our instantiation and participation in these ends and goods constitute the completion or fulfillment of our nature as rational animals.[35] While the tradition is emphatic that there are countless ways a people can organize themselves in community to secure the common good—the flourishing of each and all—consistent with different cultural practices and contexts, it is equally emphatic in its rejection of the premise that human flourishing is an ultimately subjective assessment, or the mere satisfaction of preferences.[36]

The Role of Law and Political Authority in Securing the Common Good

The pursuit of human flourishing in a community involves securing a wide range of goals and conditions. The *ragion di stato* tradition of early modern Europe speaks of the *bonum commune* as comprising a triptych of "abundance, peace, and justice."[37] This became the standard list of both the legitimate ends of government and an idealized description of the polity in which it is possible—as famously framed in the precepts of legal justice laid down in *Justinian's Institutes*: "to live honestly, to injure no one, and to give every man his due."[38] (Note that under certain

34. *See* VERMEULE, *supra* note 19 (drawing on and developing the tradition to identify goods of peace, justice, abundance, health, safety, and a right relationship to the natural environment); *see also* Steven A. Long, *Understanding the Common Good*, 16 NOVA ET VETERA 1135 (2018).

35. *See* MCCALL *supra* note 28, at 119–20; RICHARD BERQUIST, FROM HUMAN DIGNITY TO NATURAL LAW: AN INTRODUCTION 82 (2019); Steven J. Jensen, *Aquinas*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW ETHICS 31 (Tom Angier ed., 2019).

36. The fact that the classical legal tradition is built on a conception of the meaning of the nature of man and his good is, of course, not unique to it. As Kahn notes, political theories invariably differ more on their "radically different understandings of the nature of man" than on "different visions of programmatic reform or institutional organization." *See* PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 124 (2011).

37. *See* GIOVANNI BOTERO, THE REASON OF STATE 71 (Robert Bireley ed. & trans., 2017).

38. THE INSTITUTES OF JUSTINIAN, BOOK I TITLE I (J.B. Moyle ed. & trans., 5th ed. 1915).

prominent liberal conceptions of law, the second precept is made the exclusive condition of political and social interaction.)

This account encompasses the fostering of structural social, economic, and moral conditions that respect human life and health; furnish a healthy environment; promote familial formation, marriage, and stable family life; uphold economic justice and just provision of public goods; and foster a healthy culture oriented to pursuit of truth, civic friendship, and respect for human dignity, and to curbing vices damaging to these ends.[39] These conditions are not possible for individuals, families, or associations to achieve solely by their own initiative—solely through decentralized action or "spontaneous order."[40]

The tradition makes clear, however, that the common good does *not* require the law declare all vices illegal, nor use law to enforce all possible virtues – a common misconception. To be sure, there neither is nor even can be any barrier in principle to "legislating morality." Any law code assumes some conception or other of morality, if only a libertarian conception. But the prudent lawmaker takes into account that the game is sometimes not worth the candle, and limits the rough engine of the law to addressing serious harms or grave vices.[41] While St. Thomas Aquinas, for example, thought that law's purpose is to lead people to virtue, he also argued that the lawmaker's use of imprudent means to suppress vice and promote virtue could create new or greater evils that themselves threaten the common good.[42]

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39. *See* Sean Coyle, *Natural Law and Goodness in Thomistic Ethics*, 30 CANADIAN J.L. & JURIS. 77, 89 (2017).

40. THOMAS AQUINAS, DE REGNO: AD REGEM CYPRI 6–13 (Gerald Phelan ed. & trans., Divine Providence Press 2014); J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 125 (2013).

41. *See* JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY (Stuart D. Warner ed., 1993); Sherif Girgis & Robert P. George, *Civil Rights and Liberties*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 311-12 (John Tasioulas ed., 2020).

42. *See* THOMAS AQUINAS, SUMMA THEOLOGIAE pt. Ia-IIae, q. 96, art. 3; J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS'S TREATISE ON LAW 368–79 (2014).

Making concrete the demanding and open-ended objectives of the *ragion di stato* tradition in a community requires the authoritative co-ordination and ordering of persons, families, and associations to ensure they are pursued efficaciously and harmoniously, and not in a chaotic, disordered manner.[43] Posited ordinances, promulgated by political authorities with the capacity to ensure this ordering, are therefore critical to authoritatively securing the conditions just mentioned, where there is the "peace, prosperity, and training in virtue" required to live the good life in a flourishing political community.[44] The common good requires authoritative institutions and rulers able to specify, apply, and enforce rules which govern and guide our pursuit of the goods of justice, peace, and abundance.[45] As Timothy Endicott notes, it is the "systematic and authoritative aspects of law [that] secure regulation in the distinctively transparent, stable, prospective, and reflexive fashion that distinguishes the rule of law from military rule, and from gangsterism, and from other forms of arbitrary rule" that do not conduce to the common good.[46]

Legal ordinances also have a critical educative function in the classical tradition, as they can encourage citizens subject to the law to form desires, habits, and beliefs that better track and promote communal, indeed their own, well-being.[47] Despite outrage from libertarians on this point, it is a routine feature of policymaking. Consider sin taxes; waiting or cooling-off periods for marriage, divorce, gun purchases, and other important transactions; and institutions for instruction and education in civic responsibility, such as jury duty, mandatory public education, and mandatory national service or military duty. Public

43. Legal authority "address[es] one of the pervasive needs of human life, since without a whole range of shared activities, we as rational, social animals could not live—fully, or perhaps at all—in the way characteristic to us as a specific kind of living creature." JEAN PORTER, MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY 82 (2010).

44. MCCALL, *supra* note 28.

45. *See* AQUINAS, *supra* note 13; Maris Köpcke Tinturé, *Positive Law's Moral Purpose(s): Towards a New Consensus?*, 56 AM. J. JURIS. 183, 193 (2011).

46. Timothy Endicott, *The Irony of Law*, *in* REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 337 (John Keown and Robert P. George eds., 2013).

47. *See* AQUINAS, *supra* note 13, at pt. Ia–IIae, q. 95, art. 1.

ordinances are, says Pink, invariably "concerned with education—with inducing change in the direction of ethically important truth at the level of citizens' belief. The state is a coercive teacher." [48] In the classical tradition, this is an important but subsidiary role complementary to the primary role played by the family, churches, civic associations, and local communities.[49]

Posited law is also critical to the common good, as it is needed to give specific content to the law where background principles of the *ius naturale* need specificity or leave relevant issues to discretionary choice within reasonable bounds. The need for posited law to make the broad precepts of the natural law reasonably concrete is a central feature of the classical tradition. As Richard Ekins frames it, while the "reason and action" of political authority is at all times cabined and framed by "general moral truths," its duty is very often to specify these truths by "choosing in what specific forms they shall be given effect in the law" of this or that community and its particular context.[50]

Ekins is, in effect, recapitulating the classical theory of determination. In a famous passage, Aquinas distinguished two ways in which positive law might be derived from the natural law:

> It must be noted, however, that something may be derived from the natural law in two ways: in one way, *as a general conclusion derived from its principles*; in another way, as a *specific application of that which is expressed in general terms*. The first way is similar to that by which, in the sciences, demonstrated conclusions are derived from first principles; while *the second way is like that by which, in the arts, general ideas are made particular as to details: for example, the craftsman needs to turn the general idea of a house into the shape of this or that house*. Some things are therefore derived from the principles of the natural law as general conclusions: for example, that 'one ought not to kill' may be derived as a conclusion from the principle that 'one ought not to harm anyone'; whereas *some are derived from*

48. Thomas Pink, *Law and the Normativity of Obligation*, 5 JURIS. 1, 28 (2014).

49. *See* MARY M. KEYS, AQUINAS, ARISTOTLE, AND THE PROMISE OF THE COMMON GOOD 80–82 (Cambridge Univ. Press 2006).

50. RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 130–31 (Oxford Univ. Press 2012).

> *it as specific applications: for example, the law of nature has it that he who does evil should be punished; but that he should be punished with this or that penalty is a specific application of the law of nature. Both modes of derivation, then, are found in the human law*. Those things which are derived in the first way are not contained in human law simply as belonging to it alone; rather, they have some of their force from the law of nature. But those things which are derived in the second way have their force from human law alone.[51]

The first way mentioned by Aquinas is that some precepts of the natural law can be concretized in positive law via a straightforward deductive process.[52] For example, the preservation of life is an aspect of human good and principle of the natural law. This yields the conclusive precept against the intentional taking of innocent life that is easily posited through laws prohibiting homicide and providing for self-defense.[53]

But Aquinas says that that concretization of the principles of natural law is typically much less simple than this, as natural law's first precepts are broad and vague and leave only a few principles that can be straightforwardly given force in posited law.[54] In many circumstances, the principles of natural law require specification in light of the context of a given political community, as they are too vague to co-ordinate conduct to allow persons to flourish. For example, the political common good may demand organizing a just economy able to provide the necessities of life, provision for sound education and

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51. THOMAS AQUINAS, SUMMA THEOLOGIAE pt. Ia–IIae, q. 95, art. II *in* POLITICAL WRITINGS 130 (R.W. Dyson ed. & trans., 2002) (emphasis added).

52. *See* Coyle, *supra* note 41, at 90.

53. However, we note that even these examples may be only superficially straightforward. For example, even after concretizing a natural law prohibition against the intentional destruction of life, decisions must still be made on a myriad of closely related questions the answers to which are not dictated by the natural law, like whether there are different degrees of culpability that affect the gravity of homicide, the precise bounds of self-defense, and when lethal force may be permissible or impermissibly used, or the appropriate sentence for those convicted of such an offense. These are all intimately related to the natural law injunction to safeguard innocent life, but respecting it through posited law inescapably involves large degrees of prudential choice.

54. *See* AQUINAS, *supra* note 53.

healthcare, respect for subsidiary units like the family, the promotion of virtue, and ensuring peaceful relations with other nations; but there will be countless ways to proceed along all these fronts consistent with the natural law and common good. The "greater part of a community's positive settlement of right relations between persons" will always, notes Webber, "confront true choice, where conformity to practical reason will leave matters open for evaluation and decision."[55]

This is where the concept of prudential *determination* comes into the picture and why it is so important to the classic legal tradition. Determination is the prudential process of giving content to a general principle drawn from a higher source of law, making it concrete in prudential application to local circumstances or problems. The need for determination arises when principles of justice are general and thus do not specifically dictate particular legal rules or when those principles seem to conflict and must be mutually accommodated or balanced. Such general principles must be given further determinate content by positive civil lawmaking intelligently cabined, directed, and guided—but not dictated—by reason.[56] There are typically multiple ways to make concrete determinations in posited law which instantiate, respect, reconcile or trade off general principles of the natural law while remaining within the boundaries of the basic charge to act to promote the common good—the basis of public authority.

As Finnis puts it:

> The kind of rational connection that holds even where the architect has wide freedom to choose amongst indefinitely many alternatives is called by Aquinas a *determinatio* of principle(s)—a kind of concretization of the general, a particularization yoking the rational necessity of the principle with a freedom (of the law-maker) to choose between

55. GRÉGOIRE WEBBER ET AL., LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION 49 (Cambridge Univ. Press 2018).

56. *See* JOHN FINNIS, *Critical Legal Studies*, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS VOLUME IV 301 (Oxford Univ. Press 2011).

> alternative concretizations, a freedom which includes even elements of (in a benign sense) arbitrariness.[57]

A well-worn example is that of the need for a community to make determinations governing road traffic. Given the need to secure and respect life and health, there is a requirement to authoritatively specify which side of the road persons and vehicles should travel on, even if there is no basis in reason for deciding whether it ought to be on the right or left side. In this case, *not choosing* but instead relying on a policy of laissez-faire would be contrary to the need to respect life and health, and thus out of bounds as a reasonable determination oriented to the common good. But at the same time, reason does not *settle* which choice is to be made;[58] and a determination in this context instead involves a rich intermingling of reason and willed human choice by those wielding political authority.[59]

Leaving aside cases of intrinsic evils, which place deontological side constraints on all public and private action, the common good must be applied to a set of particular circumstances by means of determination using the faculty of prudential judgment.[60] Determination is a demanding process, one which involves attending to the craft of legislating well, including the need to prudentially capture the "practical choice as to what should be done in a form that both changes the law to this effect and is fit to be adopted by officials and citizens . . . to introduce the state of affairs the legislator seeks"[61] in a world subject to often rapid socio-economic change. But room for prudential judgment is by no means equivalent to unstructured discretion. It is always given shape by an account of the ends for which discretion must be used, that of promoting the good of the

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57. John Finnis, *Natural Law Theories*, STAN. ENCYCLOPEDIA OF PHIL. (June 3, 2020), https://plato.stanford.edu/entries/natural-law-theories [https://perma.cc/KG3R-SNBX].

58. *See* WEBBER ET AL., *supra* note 57. MARITAIN, *supra* note 29.

59. *See* MCCALL, *supra* note 28.

60. For the connections between prudence and natural law, *see generally* FERENC HÖRCHER, PRUDENTIA IURIS: TOWARDS A PRAGMATIC THEORY OF NATURAL LAW (Akademiai Kiado 2000).

61. EKINS, *supra* note 52, at 132.

whole community as a community—not merely as an aggregation of individual preferences. In other words, discretion may never transgress the intrinsic limitations of legal justice. The obligation of the public authority is to act according to law, meaning that the public authority must act through rational ordinances oriented to the common good.[62]

While discharging all these interlocking functions—making determinations of the principles of natural law via positive law; pursuing conditions of peace, justice, and abundance; or performing the educative function of promoting virtue and suppressing vice—political authority must also have regard to the principle of subsidiarity. That is, the need to respect the authority and integrity of part-wholes of the polity like individuals, families, and associations. This principle can be seen as empowering and constraining of public authority. It does the former by giving it a power and duty to preserve, protect, and restore the functions of subsidiary authorities, and the latter by putting a duty on it not to interfere where unnecessary when subsidiary groups are working as they normatively should.[63]

Posited law, or *lex*, is therefore in its focal sense not regarded as an expression of the will of the sovereign or its officials, but as intrinsically reasoned and purposive, and ordered to the common good of the whole polity and that of mankind.[64] *Lex*'s critical role in specifying the temporal requirements of natural law precepts and securing the conditions required for the common good is how it generates normative obligations and secures the normative legitimacy of political authority. Compared to the focal sense of *lex*, posited ordinances which are not rationally ordered to the common good, or which are corrosive to it, are considered radically deficient and diluted examples of law and may not generate the same normative obligations.[65]

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62. This ensures respect for rule of law values is an important aspect of constitutionalism oriented to the common good. *See* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (Harv. Univ. Press 2020).

63. *See* Vermeule, *Echoes*, *supra* note 30.

64. *See* ROMMEN, THE NATURAL LAW, *supra* note 28, at 172.

65. To be sure, the fact that deeply unjust laws contrary to the natural law may not be law in the focal sense of that word does not at all warrant the conclusion

Different Senses of 'Law'

The classical tradition distinguishes, as many European languages do, between two senses of "law": *lex* and *ius*.[66] *Lex* is the enacted positive law, such as a statute or executive order. *Ius* is the overall body of law generally, including and subsuming *lex* but transcending it, and containing general principles of jurisprudence and legal justice. In the classical tradition, then, both natural and positive law are, in somewhat different ways, themselves included within law's larger ordering to the common good.

In the classical conception, then, "law" can take various forms. Among them are *ius civile*, the positive civil law of a particular jurisdiction; *ius naturale*, or the universal law founded on right reason; and *ius gentium*, the law of nations. The classical conception of law emphatically recognizes the existence and value of positive law but does not analytically stipulate that law can ultimately rest only on descriptive conventions recognized in equilibrium within a particular jurisdiction. The classical conception of *ius civile*, in other words, can be summed up as *positive law without jurisprudential positivism*.

The classical legal tradition thus treats enacted texts as products of the reasoned determination of public authorities. In contrast to the classical conception, both progressives and originalists attempt, in different ways, to reduce all law to positive law adopted by officials; for them, all law is in this sense *lex*. The usual progressive view is to deny the existence of the natural law altogether, while the usual originalist view is to deny its relevance to law except in strictly historical terms, as background for the framers' and ratifiers' beliefs underpinning constitutional and legislative enactments.

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that citizens are morally entitled to disobey them or that judges *must* have authority to invalidate them as part of their jurisdiction. Citizens may still be obliged to follow deficient commands if not doing so would cause greater harm to the common good. Likewise, how officials in a constitutional system deal with deeply unjust laws is, at an institutional level, a matter for prudential determination.

66. In Spanish, *ley* and *derecho;* in French, *loi* and *droit;* and so on. English, to its misfortune, has no stable version of this distinction and instead uses "law" and "right(s)" in confusing ways.

PART III – COMMON GOOD CONSTITUTIONALISM AS CLASSICAL CONSTITUTIONALISM

We are now better able to outline how common good constitutionalism is effectively classical constitutionalism and to dispel the myths outlined in Part I. Common good constitutionalism at its core is an approach to generating, sustaining, channeling, and constraining public power[67] oriented to the common good and human flourishing. To paraphrase Barber, the operative principles of common good constitutionalism are directed towards ensuring the state has an institutional structure that has the capacity to effectively advance the common good.[68]

Common good constitutionalism respects posited law and does not "substitute moral decision making for law."

It is entirely question-begging to say that interpretation in the classical tradition "departs from the text" or "substitutes morality for law." Rather the classical tradition, in appropriate cases, looks to general principles of law and the *ius naturale* precisely *in order to understand the meaning* of *lex*, as a mode of interpretation that puts *lex* in its best light. The law (*ius*) itself includes considerations beyond the enacted text (*lex*). Positive civil lawmakers are strongly presumed not to wantonly violate background principles of *ius* and norms of reason that are constitutive of the nature of law. The background principles of *ius* themselves enter into and help to determine the meaning to be attributed to *lex*. This does not at all mean that the classical tradition "ignores the text" or anything of that sort. Enacted texts deserve great respect as a determination of the legitimate public authority, but the law is broader than their temporary and local commands, and it is presumed that those commands can be and

67. *See* MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW 11–12 (Oxford Univ. Press 2010). Loughlin correctly notes how public law and constitutionalism are profoundly power-generating practices and cannot myopically be regarded as only acting as a *fetter* on political power.

68. N. W. BARBER, THE PRINCIPLES OF CONSTITUTIONALISM 12 (Oxford Univ. Press 2018).

will be harmonized with *ius*, the background general principles of the legal order.

Some argue that even if positive law is a determination of background legal principles, including natural law, it should be interpreted independently of that background in the interests of stability, settlement and durability.[69] This is a sort of half-truth. As we discuss shortly, the classical approach itself recognizes that interpreters of law typically should not venture an all-things-considered assessment of political morality from first principles. Role morality is itself a fundamental component of law's morality. Interpretation is always limited and conditioned by institutional roles, legal presumptions and standards of review, default rules, and other legal mechanisms for promoting institutional settlement and stability. Moreover, the very nature of determination is that background principles do not fully specify the content of positive law.

Conversely, however, no account of the value of settlement and stability can fully exclude interpretive discretion at the point of application, at least in some subset of hard cases. Those who apply the enacted law (*lex*) must inevitably, in some domain of cases, have recourse to general background principles of law (*ius*), including the *ius naturale* and the *ius gentium*. Aquinas and, much later, modern legal theorists such as H.L.A. Hart[70] show that the limits of foresight on the part of the lawmaker inevitably give rise to hard cases, in which enacted *lex* contains ambiguities or gaps, or in which the rule the lawmaker prescribed for the general run of ordinary cases misfires—fails to track the common good—due to unusual circumstances.[71]

Let us expand upon this point somewhat. In easy cases, where all relevant legal sources point in the same direction and the law's commands neatly track the common good, any version of

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69. *See generally* Jeffrey A. Pojanowski, *Why Should Anyone Be An Originalist?*, 31 DPCE ONLINE 583 (2017); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016). Similar arguments are advanced by LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (Cambridge Univ. Press 2019). Vermeule's forthcoming book provides an extended critique of this view; here, we limit ourselves to a few points.

70. *See* H.L.A. HART, THE CONCEPT OF LAW 124–46 (Oxford Univ. Press 2d ed. 1997).

71. *See* AQUINAS, *supra* note 13, pt. Ia-IIae, q. 96, art. 6.

originalism or textualism or positivist interpretation generally will reach the same result as classical legal interpretation. We are not to imagine that classical interpreters are constantly invoking higher law or claiming that cases are extraordinary; in the great bulk of ordinary cases, they proceed on the basis of a respect for text, albeit justified on different grounds than modern positivism. In easy cases, then, there is no difference between originalist and classical interpretation from the standpoint of considerations of legal predictability, settlement, durability and stability. Classical theory builds in a form of textualism in easy cases, which is to say most cases.

However, when due to the limits of the lawmakers' foresight legal texts (*lex*) are irreducibly ambiguous, can be read at multiple levels of generality, conflict with powerful principles and background norms of the legal system (*ius*), obviously misfire with respect to uncontroversial conceptions of the common good, or otherwise seem absurd as applied to unusual circumstances, a question inevitably arises about how the legal sources are to be applied and reconciled. (For more specific comments on the problem for originalism of levels of generality, see our discussion in the next section). Where the specified determinations are ambiguous or in which the core cases they are intended to address encounter an exceptional situation, the relevant determinations must be interpreted—and in our own legal tradition, historically speaking, have in fact been interpreted—in light of background principles of the *ius naturale* and the *ius gentium*, the ends of rightly ordered law, and the larger ends of temporal government. In such cases, crucially, the justification of originalism by reference to certainty and stability loses all force; there is no escape from normative argument, internal to law, to determine what the law provides. When hard cases arise, justifications sounding in legal predictability, settlement, stability, durability, and the like have *already* failed.

Finally, institutional settlement and stability, however important, are hardly the only common goods. This sort of second-order consideration is important, but so too are first-order ones. The classical tradition emphasizes that justice is the ultimate aim of law, and that peace and justice are both fundamental aims of law. If the originalist regime yields "stability" of a sort

by producing a steady, predictable stream of deeply unjust first-order results, or merely fails to prevent such results, then the common good condemns rather than supports originalism. At a minimum there should be some reflective equilibrium between the second-order goods of settlement and durability, on the one hand, and evaluation of the justice of first-order outcomes, on the other. Otherwise the praise of second-order goods threatens to become a kind of sacred fetish, overriding all first-order considerations in the name of a partial and myopic account of what justice requires.

The sting in this dilemma, of course, is that if (and to the extent that) the view we are discussing *ever* allows interpreters to consider broader principles of legal morality (*ius*) in hard cases, then the game is up. At that point, one is merely arguing over the precise scope of discretion for interpreters in what is essentially a regime of common-good constitutionalism. The theoretical distinctiveness of the originalist view grounded in stability has already been forfeited. To the extent it tries to exclude consideration of principles of law's morality, originalism tries to banish what cannot be banished.[72] But to the extent forms of originalism explicitly do not seek to do this, they become half-measures—originalism in name and rhetoric only—and conceptually indistinguishable from frameworks within which historical modes of interpretation are given serious, but not decisive, weight. If the name of "originalism" is retained as merely an empty statement of sociological identity, but all the content is classical, our view will have prevailed.

The constitutional oath poses, rather than resolves, the question how "the Constitution and laws" should be interpreted.

The argument for positivism and originalism from the constitutional oath is transparently circular, despite elaborate efforts to infuse it with methodological content.[73] In itself, swearing to

72. *See* Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 664 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (MacMillan 1990)).

73. *See, e.g.*, Josh Hammer, *Common Good Originalism*, THE AM. MIND (May 6, 2020), https://americanmind.org/features/waiting-for-charlemagne/common-

respect "the Constitution and laws," or any similar vow, says nothing at all about how the Constitution should be interpreted.[74] Any such argument is always parasitic on independent assumptions. It is immaterial whether those assumptions are made explicit or, as is usually the case, left implicit and smuggled in. In either case, it remains true that the oath by itself is simply incapable of doing the work that originalist proponents hope to force it to do.

An amazing amount of ink has been spilled in attempts to avoid this obvious conclusion. A remarkable example is an effort by one John Ehrett, who argues that:

> [W]hen the political leader pledges to "support and defend the Constitution of the United States" the most natural (and historical) understanding of that commitment is that "support and "defen[se]" entails allegiance to the original public meaning of the Constitution. Put more straightforwardly: a judge embracing the stable textual meaning principle, when she takes the oath of office, *vows before God* that she will uphold the Constitution's original public meaning.[75]

This comes close to suggesting that it is both a sin and treason not to adopt an originalist mode of interpretation—a fascinating stance, if only at the level of rhetoric and legal sociology. As a matter of interpretive theory and legal history, however, Ehrett's view that attempts to ground originalism in a "stable textual meaning" principle is silly, for two reasons (in addition to the reasons given above).

First, the vast majority of the world's legal systems are not originalist,[76] and our own legal system was not originalist, at least in anything like the modern sense, for much of the greater

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good-originalism/ [https://perma.cc/2FP7-BWTT]; John Ehrett, *"Common Good Constitutionalism" and the Oath Breaking Problem*, PATHEOS (Mar. 31, 2020) https://www.patheos.com/blogs/betweentwokingdoms/2020/03/common-good-constitutionalism-and-the-oath-breaking-problem/ [https://perma.cc/JE4S-QWY4].

74. *See* Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193 (2015).

75. Ehrett, *supra* note 75 (second alteration in original).

76. Including one of the authors' home jurisdiction of Ireland, where originalism has virtually no proponents but the country has a robust and stable constitutional order.

part of its history. Neither has had any real difficulty maintaining "stable meanings" for legal texts over time; the constitutional oath argument is both spatially and temporally parochial in the extreme. In the vast majority of cases, there is no divergence between supposedly fixed "original meaning" and the meaning at the time of application. Most cases are, in this sense, easy cases. Second, originalism itself fails utterly in protecting the stability of meaning, because it cannot, by itself, answer the question at what level of generality meaning should be read.[77] When progressive originalists like Professor Jack Balkin read constitutional texts at a sufficiently high level of generality to encompass abortion,[78] and when libertarian originalists like Professor Steven Calabresi read constitutional texts at a sufficiently high level of generality to encompass same-sex marriage,[79] it should be clear that the stabilizing effect of originalism is illusory.[80] Importantly, neither Professor Balkin nor Professor Calabresi argues for a "change in meaning." Rather they are offering arguments about what the original meaning has always been; they argue that the meaning has always embodied principles cast at such a high level of abstraction that they encompass any moral novelties the legal professoriate can dream up today. But perhaps Ehrett means to exclude the most-cited originalist scholar (Balkin)[81] and a founding member of the Federalist Society (Calabresi)[82] from his account of originalism, in which case his argument is also eccentric.

Indeed, and more broadly, the constitutional oath argument for originalism is self-refuting, for the same reason originalism

77. *See* David Kenny, *Politics All the Way Down: Originalism as Rhetoric*, 31 DPCE ONLINE 661, 662 (2017).

78. *See* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007).

79. *See* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648, 651–53 (2016).

80. As argued at length in VERMEULE, *supra* note 19.

81. *See* Michael Ramsey, *Top 20 Most-Cited Originalism Scholars, 2016–2020*, ORIGINALISM BLOG (Sept. 22, 2021), https://originalismblog.typepad.com/the-originalism-blog/2021/09/top-15-most-cited-originalism-scholarsmichael-ramsey.html [https://perma.cc/8LVV-PT2N].

82. *Steven G. Calabresi*, YALE L. SCH., https://law.yale.edu/steven-g-calabresi [https://perma.cc/B7YB-BWUE] (last accessed Nov. 10, 2021).

generally is self-refuting: as has been made indisputably clear by recent scholarship, the lawyers and politicians of the founding generation, and for a long time afterwards, were themselves *not* originalists.[83] Whether or not the framers and ratifiers had any legal training, their fundamental legal assumptions were those of the classical law. They believed that the law (*ius*) had objective, discernible content beyond, or above, that specified in particular positive texts (*lex*). They did not share the modern positivist assumption that the *ius naturale* is "nothing more than subjective preferences" or is somehow riven by fatal and intractable disagreements.[84]

It is no answer to this that the Reconstruction Amendments were enacted later. Even if the framers and ratifiers of those amendments were not classical lawyers, the point would remain untouched for large and critical stretches of the written Constitution, involving its central structural and institutional provisions and the Bill of Rights (at least as applied to the federal government). In any event, the point is wrong; the classical legal world did not begin to break down until well after the Civil War, with the flowering of legal positivism.[85]

As for originalism, in its theoretically elaborated form it is a creation of the post-WWII era, and indeed did not fully flower as a theory until the 1970s and after. In one account, its genesis lies in the desire of political actors for a constitutional tool to fight desegregation.[86] In a somewhat different but compatible account, it was theoretically elaborated by jurists like Robert

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83. *See* Jonathan Gienapp, *Written Constitutionalism, Past and Present*, 39 L. & HIST. REV. 321, 355–56 (2021). The point resurfaces periodically, as every generation rediscovers that the founding generation inhabited a very different legal world than we do. *See, e.g.*, H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

84. *Id.*

85. *See* STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED 167 (Oxford Univ. Press 2021); Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 529–30 (2019); *see, e.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

86. *See* Calvin Terbeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism,* 115 AM. POL. SCI. REV. 821 (2021).

Bork[87] in the 1970s who needed a tool to appeal over the heads of the Warren Court.[88] On either view, the claim of originalism to represent the original approach to interpretation, as it were, is bogus; originalism has instead invented a tradition[89] projecting itself back onto the past.

To be sure, originalism has its precursors in caselaw and commentary. The law is vast and messy, and never speaks entirely with a single voice, in a single note. Perhaps the clearest and most prominent originalist precursor is *Dred Scott v. Sanford*,[90] the decision that excluded persons of African descent from citizenship. Later decisions in an originalist register relied heavily upon *Dred Scott*.[91] But this 19th Century proto-originalism does not closely resemble the current, theoretically elaborated version, and was never an established approach. It was at most merely one modality among others, and did not claim to be inconsistent with the classical legal framework or to represent the exclusive method of interpretation.[92] "Unlike their ideological descendants . . . [19th Century originalists] did not understand themselves as self-consciously setting forth a 'theory.' Such as it was, the intent construct was invoked at a high level of generality." [93] Those examples, as a class, are thus unlike modern originalism,[94] an elaborate body of theory allied to a particular, legal-political movement with distinctive commitments.[95]

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87. *See* Randolph J. May, Book Review, 1990 B.Y.U. L. REV. 665, 666–67 (1990) (reviewing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990)).

88. *See* Vermeule, *Beyond Originalism*, *supra* note 6.

89. *Cf.* Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* THE INVENTION OF TRADITION 1–2 (Eric Hobsbawm & Terence Ranger eds., Cambridge Univ. Press 2012).

90. 60 U.S. (19 How.) 393 (1857).

91. *See, e.g.*, South Carolina v. United States, 199 U.S. 437, 448–49 (1905).

92. Professors Philip Bobbitt and Richard Fallon have persuasively demonstrated how U.S. constitutional practice has long recognized several legitimate modes of argumentation, including doctrinal, ethical, textual, structural, as well as historical. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 26 (Oxford Univ. Press 1984); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244, 1254 (1987).

93. Terbeek, *supra* note 88, at 825.

94. *See id*. at 824 n.10.

95. *See* Jamal Greene, *Selling Originalism*, 97 GEO L.J. 657, 708–14 (2009).

Common good constitutionalism does not equate to judicial or executive supremacy.

There is one argument against common good constitutionalism that has lingered on despite being clearly and utterly rejected and refuted. This is argument that common good constitutionalism is somehow synonymous with judicial supremacy or executive authoritarianism.[96] There is simply no substance to these kinds of arguments. The simple fact is that advocacy of common good constitutionalism, and the classic legal tradition underpinning it, is emphatically not the same as advocating a particular allocation of institutional and interpretive power among different branches of government.

As noted above, the concept of *determination* is critical to the classic legal tradition, and this includes determination at the level of institutional design, indeed the specification of the whole constitutional order. The common good in its capacity as the fundamental end of temporal government shapes and constrains, but does not fully determine, the nature of institutions and the allocation of lawmaking authority between and among them in any given polity. But aside from the loose constraints imposed by this conceptual frame, the design of institutions and allocation of authority between and among them in any given polity will be within a wide scope of reasonable determination. A range of regime types can be ordered to the common good, or not. If they are, then they are just, and if they are not, they are tyrannical, but their justice is not defined by or inherent in any particular set of institutional forms.[97] Thus, parliamentary, semi-presidential, and presidential systems, monarchies and republics—all these and more can in principle be ordered to the common good.

Likewise, the common good does not, by itself, entail any particular scheme of (for example) judicial review of constitutional

96. *See, e.g.*, Yuval Levin, *The Future of Conservative Constitutionalism,* NAT'L REV. (Sept. 17, 2021, 6:30 AM), https://www.nationalreview.com/2021/09/the-future-of-conservative-constitutionalism/ [https://perma.cc/UR44-VPYY]; Anthony Sanders, *The No Good Constitution*, INST. FOR JUST., https://ij.org/cje-post/the-no-good-constitution/ [https://perma.cc/98UZ-Y2GV] (last visited Nov. 11, 2021).

97. *See* Richard Ekins, *The State and Its People*, 66 AM. J. JURIS. 49 (2021); RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 143–44 (Oxford Univ. Press 2012).

questions. The common good takes no stand, *a priori*, on the well-known and worn debate over political constitutionalism *versus* legal constitutionalism,[98] so long as the polity is ordered to the good of the community through rational principles of legality. A constitutional order in which judges are bound to respect reasonable determinations in the public interest by the legislature and executive (perhaps under legislative delegation) can be entirely conducive to the common good,[99] as can similar distributions of interpretive authority like Thayerian deference[100] or departmentalism of various stripes.[101]

Promotion of the common good is a duty incumbent upon all officials in the system: on legislators, executive, and bureaucratic officers, as well as judges. As a logical matter, however, it does not follow that each official or institution in the system, taken separately, must make unfettered judgments about the common good for itself. The legal morality of the common good itself includes role morality and division of functions.[102] How a constitution should be interpreted and how judges should decide cases are not necessarily the same question. A system that conduces to promoting the common good overall may do so precisely *because* there is a division of roles across institutions, such that not every institution aims directly to promote the common good. Indeed, many deferential frameworks suppose that judicial deference is itself conducive to the common good, because public authorities make better judgments of determination, within reasonable boundaries, than do courts.[103] All of which is to say it takes serious illiteracy about the classical legal

98. For an excellent overview of that many-faceted debate, *see generally* Aileen Kavanagh, *Recasting the Political Constitution: From Rivals to Relationships*, 30 KING'S L.J. 43 (2019). For a debate within the classical legal framework about the merits of political constitutionalism, see Foran, *supra* note 11; McGowan, *supra* note 11.

99. *See* Adrian Vermeule, *Deference and Determination,* IUS & IUSTITIUM (Dec. 2, 2020), https://iusetiustitium.com/deference-and-determination/ [https://perma.cc/U9CB-R4RB].

100. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

101. *See* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 495–97 (2018).

102. *See* Oran Doyle, *Legal Positivism, Natural Law, and the Constitution*, 31 DUBLIN U. L.J. 206, 226 (2009).

103. *See* Vermeule, *Deference and Determination*, *supra* note 101.

tradition to suggest it mandates a form of strong judicial supremacy where judges can overturn legislative determinations as inconsistent with the Court's *de novo* understanding of the *ius naturale*.[104]

This broad agnosticism does not mean that there are no boundaries whatsoever; it just means that the boundaries are set by the nature of law itself, as an ordination of reason to the common good. Certain institutional arrangements, mostly science-fictional and horrific, will be clearly ruled out even if no one set of arrangements is uniquely specified. But they will be ruled out because they are arbitrary and unreasoned, and thus do not participate in the nature of law, not because the common good directly commands particular institutional forms. Likewise, strictly aggregative-utilitarian arrangements will be ruled out by the non-aggregative nature of the common good, an example being a substantial class of invisible-hand arrangements justified as an indirect way of maximizing aggregate utility.[105] But the ruling out of certain arrangements, and the need to put concern for the common good at the heart of determinations of institutional design, still leaves a very wide scope for choice that adapts institutional forms to local circumstances.

As it is for Large-C Constitutional design, so it is equally the case for small-c unwritten constitutional ordering.[106] Many dif-

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104. Some may argue that allowing judges to review whether an ordinance is a "reasonable determination in the public interest" will inevitably lead to judicial supremacy. This is based on the fear judges may apply their own standards of reasonableness in light of their understanding of the natural law to displace legislative ones. There are several responses to this concern. One response is simply to reiterate that providing for judicial review – whether of a "hard" or "soft" variety – is not mandated by the tradition, which is entirely compatible with a system of political constitutionalism. Another response is that to accept judicial overreach or error is always a risk inherent in a constitutional system providing for judicial review. There will always be a risk a judge may misapply doctrine requiring they generally defer to reasonable legislative determinations, for example by engaging in overly intrusive judicial scrutiny beyond a judge's competence that veers into a correctness standard of review. But it simply does not follow that the risk of judicial error or overreach under a classical legal framework means that judicial supremacy is an inevitable part of the tradition.

105. *See* Vermeule, *Beyond Originalism*, *supra* note 6.

106. By small-c constitution we refer to the "amorphous and ever-changing body of constitutional norms, customs, and traditions—'constitutional conventions''

ferent evolving institutional allocations of decision-making authority are consistent with the common good. To be sure, both[107] of us[108] are sympathetic to the view that there are forms of constitutional ordering—centered on robust executive government—that are likely to be particularly conducive to pursuing the common good under contemporary socio-economic conditions. We do not take this position because the executive has claim to be the "most accountable and democratic" branch due to its national constituency,[109] or for the sheer fact it can act with more expedition and flexibility than the legislature.[110] Instead, we agree with the premise that—unlike diffuse and procedurally cumbersome legislative assemblies, or low-capacity judicial bodies—hierarchical bureaucracies with very wide regulatory reach, when commanded by an energetic and motivated political executive, are better suited to promoting the integration of substantive and valuable moral precepts into legal ordinances.[111] From the perspective of common good constitutionalism, then, a core advantage of an executive-led separation of powers above other ways of allocating authority is that it can allow the executive to better infuse the technocratic work of the administrative state with an explicit political vision oriented to

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which suffuse and give concrete effect to the Large-C codified Constitution. *See* Adrian Vermeule, *The Small-C Constitution, Circa 1925*, JOTWELL (October 2010) (reviewing HERBERT W. HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION (1925)), https://classic.jotwell.com/the-small-c-constitution-circa-1925/ [https://perma.cc/7HZ4-KRR3].

107. *See* ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE (Harv. Univ. Press 2016).

108. *See* Conor Casey, *Between Dominance and Subservience: A Comparative Study of Executive Power* (Ph.D. Thesis, Trinity College Dublin) (on file with author).

109. This is a normative argument which in many constitutional systems frequently undergirds textual and structural arguments for a strong political executive delegated broad authority and given robust discretion over how to organize and direct the permanent bureaucracy. *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, and Future*, 2021 SUP. CT. REV. 83 (2021); *see also* Max Weber, *The Reich President*, 53 SOC. RES. 125, 125–32 (1986).

110. *See* THE FEDERALIST NO. 70 (Alexander Hamilton) (Clinton Rossiter ed. 2003) justifying a robust executive branch; Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS 1, 21–22 (1994).

111. *See* Adrian Vermeule, *Bureaucracy and Mystery*, MIRROR OF JUST. (Mar. 22, 2019), https://mirrorofjustice.blogs.com/mirrorofjustice/2019/03/bureaucracy-and-mystery-.html [https://perma.cc/P7BZ-HDQD]; Casey, *supra* note 9, at 781.

the common good, aligning its extensive regulatory outputs to goals conducive to this end.[112]

Crucially, this sort of view is not itself dictated by the classical legal tradition and certainly not by myopic appeals to "democracy" or "efficiency." It is an independent, constructive interpretation of the path of the law in some particular polity or other. The critics miss that questions of institutional design are largely prudential ones, guided by the concept of determination *after* careful consideration of which form of institutional structure is most suited to securing the common good in a particular polity in light of its socio-economic conditions. Institutional forms are not settled *a priori* but involve determination, ideally following painstaking and non-myopic analysis of the trade-offs between different political risks[113]—the "dangers on all sides" which invariably attend institutional design, of which thinkers like Aquinas were clearly cognizant.[114]

Rights (properly understood) are critical to common good constitutionalism.

Rights are critically important to common good constitutionalism. The crucial distinction, however, between classical legal and modern juristic conceptions involves the question of the *justification* of rights.[115] Even where rights may be held and asserted by individuals, such rights may be justified in strictly individualist terms or instead in terms of the common good, which is also the good of individuals, their highest good.[116] Property or speech rights, for example, may be justified either on individualist and autonomy-based grounds, or instead on

112. *See* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463 (2017); Conor Casey, *Political Executive Control of the Administrative State: How Much is Too Much?*, 81 MD. L. REV. 257 (2021); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2339–42 (2001).

113. ADRIAN VERMEULE, THE CONSTITUTION OF RISK (Cambridge Univ. Press 2014). For the importance of being non-myopic in the design and interpretation of the scope of executive power, see Adrian Vermeule, *The Publius Paradox*, 82 MOD. L. REV. 1 (2019).

114. *See* AQUINAS, *supra* note 42, at para. 35.

115. *See* JAVIER HERVADA, CRITICAL INTRODUCTION TO NATURAL LAW 9–16 (Mindy Emmons trans., Wilson & Lafleur 2006).

116. *See* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW, 1150–1625 (1997).

grounds that emphasize their contribution to the flourishing of the community.[117]

The latter sort of justification for rights is the ordinary case for the classical account of law. Contemporary accounts of constitutional rights and of rights adjudication differ from the classical account "primarily because they have lost sight of the truth that justice, law, and *ius* all depend on, and are facets of, a wise or reasoned ordering of individuals to the good."[118] On the classical conception, rights are *iura* (the plural of *ius*) because *ius* is justice—affording to each what is due to each. Crucially, what is due to each—to individuals, families, associations—on the classical view, is itself determined by the common good, right from the ground up. Rights are due to persons as they are states of affairs and arrangements within a polity that are "just, in the right"[119] and help conduce to the flourishing of each and all.

Here the contrast with prominent strands of liberal theory is critical. In mainstream liberal accounts, respect for personal autonomy is the conceptual anchor of individual rights, powers, and liberties.[120] The need to respect autonomy on this account often ensures the scope of these rights is interpreted in an expansive and open-ended manner,[121] even if they appear to be prima facie claims to engage in activities which clearly "threaten the social fabric."[122] For Webber, it is only a "partial

117. *See* Rachael Walsh, *Property, Human Flourishing and St. Thomas Aquinas: Assessing a Contemporary Revival*, 31 CANADIAN J.L. & JURIS. 197 (2018).

118. Dominic Legge, O.P., *Do Thomists Have Rights?*, 17 NOVA ET VETERA 127, 137 (2019).

119. WEBBER ET AL., *supra* note 57.

120. *See* Kai Moller, *Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights*, 29 OXFORD J. LEG. STUD. 757, 765–86 (2009) (identifying and defending an emerging trend for constitutional courts to move toward "an autonomy-based understanding of constitutional rights: increasingly, rights are interpreted as being about enabling people to live autonomous lives").

121. *See* WEBBER ET AL., *supra* note 57, at 33; *see also* KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 76 (2012); Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341 (2006).

122. *See* R.H. Helmholz, *Natural Human Rights: The Perspective of the* Ius Commune, 52 CATH. U. L. REV 301, 325 (2003); *see also* Michel Villey, *Epitome of Classical Natural Law (Part II)*, 10 GRIFFITH L. REV. 153, 171 (2001); Petar Popovic, *The Concept of "Right" and the Focal Point of Juridicity in Debate Between Villey, Tierney, Finnis and Hervada*, 78 PERSONA Y DERECHO 65, 68 (2018).

exaggeration" to say that some jurists and courts approach rights from the premise that "each and everyone has the right to do whatever each and everyone wishes to do"[123] under broad headings like liberty, privacy, property, speech, and association.[124]

This does not, of course, mean that rights claims are absolute. Once the scope of a right is ascertained,[125] courts will proceed to probe whether their exercise has been subject to justifiable "interference" by the State to "balance" conflicting rights, or to advance collective goals in the "public interest."[126] In practice, Greene notes that in many systems a "certain promiscuity in declaring rights to exist is accompanied by a certain austerity in elevating interference with rights into violations of them."[127]

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123. *See* WEBBER ET AL., *supra* note 57, at 34; *see also* Dimitrios Kyritsis, *Whatever Works: Proportionality as a Constitutional Doctrine*, 34 OXFORD J. LEG. STUD. 395, 403 (2014) (explaining that "constitutional rights practice" in Germany, Canada, South Africa and in the Council of Europe "tends to include a very wide range of activities, even trivial ones, within the ambit of prima facie rights"); MARK TUSHNET, ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW 85 (2d ed. 2018) ("Many courts tend to take the position that liberal constitutions guarantee a general right to liberty, that is, a right to do whatever one wants unless some law prohibits the action.").

124. Webber outlines some examples of the kind of prima facie rights claims apex constitutional or human rights courts have been prepared to recognize following an exceptionally wide and amorphous interpretation of the scope of a right. Take *Regina v. Sharpe*, 1 S.C.R. 45 (Can. 2001), where the Canadian Supreme Court held that a provision of the Criminal Code which banned child pornography, as applied to Mr. Sharpe, violated his freedom of expression but was justified as a proportional measure designed to protect children from "exploitation." Another odd example cited is the ECtHR case of *Stübing v. Germany*, App. No. 433547/08 (ECtHR, Apr. 12, 2012), para. 55 where the Court found that the applicant's criminal conviction for incest "possibly" fell within the scope of his Article 8 right to respect for private life, as he "was forbidden to have sexual intercourse with the mother of his four children." The UK House of Lords judgment in *Belfast City Council v. Miss Behavin' Limited* [2007] UKHL 19, para 10 saw the Law Lords prepared to casually "assume, without deciding, that freedom of expression includes the right to use particular premises to distribute pornographic books, videos and other articles."

125. A small number of rights in the liberal constitutional tradition are considered inviolable and not subject to override in the interests of the public interest or collective good. Prominent examples include categorical prohibitions on torture and slavery common to human rights instruments. *See* European Convention on Human Rights art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

126. WEBBER ET AL., *supra* note 57, at 35–36.

127. Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 58 (2018).

In American law, the courts say—roughly speaking, but in a typical formulation—that individual rights can be trumped or overridden when there is a "compelling governmental interest" and the government can show that the law at issue is the "least restrictive alternative."[128] The implicit premise of this framework is that the interests of "government" as representative of the political collective, on the one hand, and the rights of individuals on the other are opposed and must be balanced against each other. It is, implicitly but unmistakably, an aggregative conception of rights.

A similar point can be made about the proportionality test that is broadly characteristic of European constitutional and human rights law.[129] At root the test is designed to provide a rigorous analytical tool for judges and officials to probe whether the "interests of society as a whole" justifiably "override the interests of the individual."[130] Under most formulations of the proportionality test, roughly speaking, an acknowledged right can be overridden and an interference "justified" when but only when the government acts in accordance with law, for a legitimate public or democratic aim, in the least intrusive manner necessary, and without imposing gratuitous or disproportionate harm on individuals. At the heart of proportionality is a concern for balance: whether the cost of an "interference with the right is justified in light of the gain in the protection for the competing right or interest"[131] at stake. Here too, talk of "balancing" collective and individual interests already betrays a departure from the classical conception.

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128. *See*, *e.g.*, The Religious Freedom Restoration Act's standard for burdening free exercise rights at 42 U.S.C. § 2000bb-1.

129. The proportionality test, as Kenny puts it, is now a "worldwide principle of human rights protection." David Kenny, *Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland*, 66 AM. J. COMP. L. 537, 538 (2018).

130. BERNADETTE RAINEY ET AL., JACOBS, WHITE, AND OVEY: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 342 (7th ed. 2017).

131. Kai Möller, *Proportionality: Challenging the Critics,* 10 INT'L J. CONST. LAW. 709, 715 (2012); *see also* Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 75–76 (2008); WEBBER ET AL., *supra* note 57, at 198–99.

It is not true, therefore, that liberal legalism takes no account of collective interests. But—at least in actually-existing liberalism, reflected in the practice and argument of constitutional courts in liberal regimes,[132] as opposed to the recondite nth-decimal liberal theory of the academies[133]—it takes account of them (1) aggregatively, as a summation of individual interests ("weighing the greater good the 'interfering' measure is purporting to achieve against the harm done to the individual right at issue") or (2) as a collective override to rights justified in individualist terms, as when liberal jurisprudence talks of a "public order" override to rights whose scope is determined elsewhere.[134] As Yowell surmises, this approach works from the premise that "sufficiently strong general or 'state' interests can override human rights."[135] A striking aspect of this way of conceiving of rights and their limits, is that it puts rights squarely in tension with the common good, and the good of individuals in opposition to the common good of the polity.[136]

The classical conception is entirely different. The common good enters into the very definition of rights themselves, from the beginning. There is no question of "overriding" or "interfering" with the rights of individuals and families—what is due to

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132. Throughout *Legislated Rights*, Webber et al. identify Germany, Canada, the European Convention on Human Rights, and the United Kingdom as legal systems where this approach to rights is prominent. *See* WEBBER ET AL., *supra* note 57.

133. To quote Kahn, it is possible to distinguish between analysis and critique of the "liberal state . . . liberal theory, or . . . something in-between that might be characterized as the self-understanding of those who operate in the liberal state, that is, the ethos of liberal constitutionalism." KAHN, *supra* note 38, at 148. Here we are more concerned with the latter. Whether liberal constitutionalism as practiced in apex constitutional courts and understood by officials and jurists, does not faithfully reflect some particular (and perhaps obscure) stripe of ideal-type liberal theory, is not our concern.

134. *Id.*

135. WEBBER ET AL., *supra* note 57, at 130.

136. As Webber puts it, by "reading the "limitation' of a right as synonymous with the 'infringement' or 'overriding' of a right," the contemporary approach to rights adjudication "characterizes a limitation clause as akin to . . . 'savings clause' or a 'defence', whereby the infringement of a right may be saved or defended in the name of the public interest . . . . The result is an expansive reading of all rights" and "the frequent infringement of rights by the State in pursuit of the public interest." GRÉGOIRE C. N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS 56 (2009).

them—for the common good. Rather it is a question of tailoring the scope of rights to the common good because that is the justification that already animates those rights, at every stage. The issue is not balancing, but reasonable specification and reasonable determination of the right's proper ends and, therefore, its boundaries or limits.[137] Deference to the political authority within reasonable limits—analogous to the "margin of appreciation" of human rights law—is built into this conception from the start, rather than tacked on as a controversial addition.[138] The common good of family, city, and the nation, as determined (in a strict sense) by legitimate political authority, is itself the good of individuals, and rights must be ordered accordingly.

But the fact that rights must be ordered to the common good of each and all also means that they act as real limits on legitimate exercises of State power, limits stemming from the need to give to each what is their due in order to have a well-ordered and just polity.[139] Intrinsic evils are intrinsic evils, and no government may command them, which includes absolute prohibitions on evils such as intentional killing of the innocent, torture, rape, or slavery. As already discussed, there are also limits on the scope of reasonable determination that stem from a need to respect more open-ended, but still important principles, like the

137. Finnis puts this well when he argues that the "language of 'interference' with exercises" of human rights provisions often "carries an inappropriate implication: that when I am arrested in my cellar for making drugs, bombs, or freeze-proofed wines down there, the unwelcome irruption is not merely into my privacy but also into my exercise of my right. Would it not be more accurate to say that in such use of my cellar, I take myself outside the true ambit of my right? The limitations indicated by . . . references to public health, prevention of crime, and so on, are limitations which specify the limits of my right; they are in fact a part—or at least a compendious reference to an intrinsic part—of the right's own definition." JOHN FINNIS, *Human Rights and Their Enforcement*, *in* HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS VOLUME III 40 (2011).

138. *See* George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J.L. STUD. 705, 709–710 (2006).

139. A polity that governs without concern for justice, Augustine famously remarked, is akin to rule by robber bands or "criminal gangs" on a grander scale. *See* AUGUSTINE, CITY OF GOD 139 (Henry Bettenson trans., Penguin Classics 2003); ROMMEN, THE STATE IN CATHOLIC THOUGHT, *supra* note 21, at 21.

need to respect subsidiarity[140] and the fact families and associations have "partial ends of their own which cannot be permanently absorbed by the higher community."[141] For example, it is not within the legitimate scope of State power to usurp the primary role of parents as the natural educators and guardians of their children, even if the political authority has the duty to intervene where they are delinquent in this duty.[142] A more general formulation, with a great deal of support in the classical caselaw,[143] is that (1) the public authority acting within its jurisdiction as a matter of *ius*, and its constitutional sphere of competence (2) may act on a reasonable conception of the common good (defined by reference to the legitimate ends of government we have discussed) by (3) making reasonable, non-arbitrary determinations about the means to promote its stated public purposes.[144]

Far from being hostile to the concept of rights then, common good constitutionalism provides a sounder conceptual grasp of their source and a more intelligible account of their point than liberal constitutionalist approaches—their contribution to the flourishing of each and all and the political community as a whole. Liberal constitutionalist accounts, in contrast, are prone in practice to place the good of the individual and the community in constant tension,[145] and risk carrying the concept of rights to the "point where one's being in community is the *source* of the infringement of one's right."[146]

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140. *See* Vermeule, *Echoes*, *supra* note 30, at 90–92.

141. ROMMEN, THE NATURAL LAW, *supra* note 28, at 210.

142. *See id.* at 212.

143. *See* Adrian Vermeule, *Common-Good Constitutionalism: A Model Opinion*, IUS & IUSTITIUM (June 17, 2020), https://iusetiustitium.com/common-good-constitutionalism-a-model-opinion/ [https://perma.cc/B7EB-UN3H]; Adrian Vermeule, *A* Euclid *for Civil Liberties*, IUS & IUSTITIUM (Oct. 30, 2020), https://iusetiustitium.com/a-euclid-for-civil-liberties/ [https://perma.cc/Y75H-XCSQ].

144. *Id.*

145. *See* Grégoire Webber, *Human Goods and Human Rights Law: Two Modes of Derivation from Natural Law*, *in* THE CAMBRIDGE HANDBOOK OF NATURAL LAW AND HUMAN RIGHTS 12 (Tom Angier et al. eds., Cambridge Univ. Press forthcoming 2022), available at SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3930249.

146. WEBBER ET AL., *supra* note 57, at 36.

Common good constitutionalism is not fatally indeterminate.

It is irrelevant that there was, is and will be disagreement between classical lawyers over the content of the common good and *ius* in hard cases. The same is chronically true of the positive civil law, indeed of any body of law (whether *lex* or *ius* or both) that is more than trivial. Disagreement, by itself, is neither here nor there, and it is hardly unique to *ius* or the common good. Every year apex courts across the world give ample illustration that a body of lawyers may split almost down the middle as to the meaning of positive laws, yet without undermining the belief of any of those judges that there is nonetheless a right answer. Ironically, critics who propound the claim that the common good and *ius* are fatally indeterminate rarely ask whether the same claim might be made about abstract constitutional texts such as "liberty" and "equality," or abstract statutory texts such as the Administrative Procedure Act's injunction to overturn agency action that is "arbitrary and capricious." In those settings, the critics generally trust jurists and public authorities to work out legal principles and doctrines over time, determining the constitutional abstractions in reasonable and attractive ways. In some contexts, in other words, the critics take preliminary indeterminacy as a project to be worked out through jurisprudence, rather than a conclusive objection to any such project. But their concerns are conspicuously selective.

As Richard Helmholz puts it, partial indeterminacy "is true of virtually all fundamental statements of law—Magna Carta, the Bible, the United States Constitution, for instance. They have not lost their value or forfeited their respect among lawyers despite long-continued variations in the conclusions to be drawn from their contents."[147] And, Helmholz continues, "natural law itself did not claim to provide definitive answers to most legal questions that arose in practice."[148] Rather it provides general principles that must be rendered concrete by determination.

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147. R. H. Helmholz, *What Explains the Disappearance of Natural Law?*, SYNDICATE (Mar. 17, 2021), https://syndicate.network/symposia/theology/common-law-and-natural-law-in-america/ [https://perma.cc/G9TJ-6PQA] (responding as part of a symposium about ANDREW FORSYTH, COMMON LAW AND NATURAL LAW IN AMERICA: FROM THE PURITANS TO THE LEGAL REALISTS (2019)).

148. *Id.*

In short, the possibility of "disagreement" is a typical nirvana fallacy. It implicitly compares an idealized, even fantastic, image of determinate positive text that yields stable meaning, on the one hand, with an exaggerated image of *ius* as "a sea of competing, unentrenched norms"[149] on the other. It is almost always cast as an objection to classical constitutionalism by those who ignore profound and systematic disagreements over the positive constitutional law, and over the best interpretive conception of abstract constitutional concepts embodied in that law, such as "liberty" and "equality," which are ambiguous or can be read at multiple levels of generality. This arbitrarily selective emphasis on disagreement is an infallible sign of ideology.

CONCLUSION

Our hope is that critics of common-good constitutionalism will begin to engage more substantively, forswearing the transparently circular and unsuccessful slogans that have appeared so far. Despite almost two years and an enormous outpouring of words, much of the debate has been ersatz. In any real sense, the debate has yet to begin. We hope it will do so.

149. Pojanowski, *supra* note 71, 586.

OVERBROAD INJUNCTIONS AGAINST SPEECH (ESPECIALLY IN LIBEL AND HARASSMENT CASES)

EUGENE VOLOKH*

* Gary T. Schwartz Professor of Law, UCLA School of Law (volokh@law.ucla.edu). Many thanks to Adam Holland and Wendy Seltzer (Lumen Database); Amy Atchison and Jodi Kruger (UCLA Law Library); Paul Alan Levy (Public Citizen); Tom Kamenick; and Haley Aufill.

Disclosure: I have participated as a lawyer in several cases cited below, on behalf of amici. Chan v. Ellis, 770 S.E.2d 851 (Ga. 2015); Bey v. Rasawehr, 161 N.E.3d 529 (Ohio 2020); McCauley v. Phillips, No. C083588, 2018 WL 3031765 (Cal. Ct. App. June 19, 2018); Quinn v. Gjoni, 50 N.E.3d 448 (Mass. Ct. App. 2016); State v. Burkert, 174 A.3d 987 (N.J. 2017); TM v. MZ, 926 N.W.2d 900 (Mich. Ct. App. 2018); Ferguson v. Waid, 798 F. App'x 986, 987 (9th Cir. 2020); Brummer v. Wey, 166 A.D.3d 475 (N.Y. App. Div. 2018); United States v. Alvarez, 567 U.S. 709 (2012); Snyder v. Phelps, 562 U.S. 443 (2011); Stark v. Stark, No. W201900650COAR3CV, 2020 WL 507644, *2 (Tenn. Ct. App. Jan. 31, 2020); State v. Turner, 864 N.W.2d 204, 209 (Minn. Ct. App. 2015); Keyes v. Biro, No. B271768, 2018 WL 272849 (Cal. Ct. App. Jan. 2, 2018); People v. Relerford, 104 N.E.3d 341, 352 (Ill. 2017); Littleton v. Grover, 2019 WL 1150759, No. 51217-3-II, *11 (Wash. Ct. App. Mar. 12, 2019); Siegle v. Martin, No. BUR-L-2674-18 (N.J. Super. Ct. Burlington Cty. Jan. 23, 2019); Catlett v. Teel, 477 P.3d 50 (Wash. Ct. App. 2020); United States v. Waggy, 936 F.3d 1014 (9th Cir. 2019); Mashaud v. Boone, No. 16–FM–383 (D.C. review en banc granted Dec. 30, 2021). I have also represented the defendants in three of the cases cited below. Moriwaki v. Rynearson, No. 17–2–01463–1, 2018 WL 733811 (Wash. Super. Ct. Kitsap Cty. Jan. 10, 2018), *reconsideration denied*, 2018 WL 73381 (Feb. 5, 2018); Obsidian Finance LLC v. Cox, 740 F.3d 1284 (9th Cir. 2014); State v. Drahota, 788 N.W.2d 796, 798, 804 (Neb. 2010). And I filed a motion to unseal court documents in another case cited below, United States v. Gabueva, No. 3:20–mj–70917–MAG (N.D. Cal. July 8, 2020).

INTRODUCTION

Donna is publicly criticizing Paul. So Paul sues her, and gets an injunction such as this: "[Defendant] is permanently enjoined from publishing . . . any statements whatsoever with regard to the plaintiff."[1]

It's hard to reconcile such an injunction (whether entered in a libel case or as a "personal protective order") with First Amendment precedents. The injunction isn't limited to speech within a First Amendment exception, such as libel or true threats.[2] It is far from "narrowly tailored," which is often set forth as a requirement for the rare content–based anti–speech injunctions that are indeed permitted.[3] Yet I have found over 200 such injunctions (almost all in the last ten years)—some as broad as that one, and others narrower but still overbroad—entered either in libel cases or in cases involving petitions to stop harassment or cyberstalking.[4] And these 200 are likely just the tip of the iceberg, since such injunctions rarely

1. Saadian v. Avenger213, No. BC 502285 (Cal. Super. Ct. L.A. Cty. July 28, 2014); *see also* Appendix (collecting many more such cases).

2. For more on injunctions that are indeed limited to libel (or to some related constitutionally valid tort causes of action), see Eugene Volokh, *Anti–Libel Injunctions*, 168 U. PA. L. REV. 73 (2019).

3. *See* Same Condition, LLC v. Codal, Inc., No. 1–20–1187, 2021 WL 2525659, at ¶ 36 (Ill. App. Ct. June 21, 2021); Coleman v. Razete, 137 N.E.3d 639, 647 (Ohio Ct. App. 2019); Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 347 (Cal. 2007); Auburn Police Union v. Carpenter, 8 F.3d 886, 903 (1st Cir. 1993).

4. "Harassment" here refers to criminal harassment or harassment that might be targeted by harassment prevention orders, not hostile environment workplace harassment, *see* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992), or quid pro quo workplace harassment.

None of the injunctions I discuss in this Article are stipulated injunctions, or otherwise agreed to as a matter of contract. They therefore can't be justified as involving voluntary waivers of First Amendment rights, as in *Perricone v. Perricone*, 972 A.2d 666, 681–83 (Conn. 2009).

lead to appeals, and thus are rarely made visible in searchable Internet databases.

Some injunctions have restricted speech criticizing exes and other family members.[5] Others have restricted criticisms of businesses or professionals (lawyers, doctors, real estate agents, financial advisers) with whom speakers say they had a bad experience. Still others have restricted criticism of police officers, judges, and other government officials.

Some have banned all speech about the plaintiff, or all online speech about the plaintiff. Others have been narrower—for instance, banning all "derogatory" speech or all posting of photographs of the plaintiff—but were still not limited to speech that First Amendment law recognizes to be restrictable (such as libel or true threats or unwanted speech said to the plaintiff).[6]

Many of these injunctions have focused on online speech. But the Court has made clear that online speech, and in particular speech on social media, is fully protected by the First Amendment, as much as is speech in newspapers or books or leaflets.[7]

Unsurprisingly, most such injunctions involve either a defendant who was not represented by a lawyer, or a default judgment against a defendant who did not appear, so the First Amendment arguments against the injunctions were likely not effectively presented to the judge. Part I lays out the evidence on the injunctions that I've found.

When these injunctions do go up on appeal, they almost always get reversed, because they violate the First Amendment.[8] Part II discusses the precedents on this, both from the U.S. Supreme Court and from state and federal appellate courts. I hope this Part (and

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5. *See* Appendix. From what I've seen, such orders don't exhibit any particular gender pattern; men sometimes get them against ex-wives and ex-girlfriends, women sometimes get them against ex-husbands and ex-boyfriends, and some stem from same-sex relationships.

6. *See, e.g.*, *infra* notes 215–217.

7. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 877–79 (1997); Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017).

8. *See infra* Part C.

the Article more broadly) will be especially useful to judges, lawyers, and even pro se litigants dealing with such cases, as well as to legal academics. I discuss state and federal appellate precedents there in more detail than is common for a law review article, so that it will be more useful for practical litigation.

But some courts have upheld such injunctions, based on two related theories. First, some courts have concluded that the First Amendment doesn't protect harassment, and that otherwise protected speech becomes unprotected harassment when it is said (especially when it is said often) with an intent to offend, embarrass, or harass.[9] Second, some courts have concluded that the First Amendment doesn't protect such speech when it is on a matter of merely "private concern."[10] I think these theories are inconsistent with First Amendment precedents, and Part III will discuss that.

Finally, Part IV will speculate why courts are doing this, and how it bears on broader debates about how the "cheap speech" created by the Internet has affected public discussion; how some judges might perceive their role in pragmatically resolving disputes; and how judges deal with litigants whom they see as irrational, and therefore as uncontrollable using normal tools such as civil damages liability.

Our legal system offers many remedies, however imperfect, for damaging speech about a person. One is the libel lawsuit, which may allow even a narrowly tailored injunction forbidding the defendant from repeating specific statements that have been found to libelous at trial.[11] Another, in some states, is criminal libel law.[12] A third, in other states and under federal law, is criminal harassment law or cyberstalking law, though that may raise its own First

9. *See infra* Part F.

10. *See infra* Part E.

11. *See* Volokh, *Anti–Libel Injunctions*, *supra* note 2.

12. *See* Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2313–17 (2021); Eugene Volokh, *Criminal Libel: Survival and Revival* (in progress).

Amendment problems.[13] And if Donna is writing derogatory things *to* Paul, rather than just *about* him, he may able to get a restraining order to make that stop.[14]

But the injunctions I describe in this Article are not a permissible remedy: they restrict constitutionally protected opinions and constitutionally protected true statements of fact. Sometimes, they interfere with speech about government officials and other important figures.[15] Sometimes, they interfere with speech on matters of public concern, such as business treatment of consumers or alleged criminal conduct.[16] And even when they deal with what appear to be private disputes, they interfere with speech on what I call "daily life matters," which is likewise constitutionally protected.[17]

Of course, persistent criticism, which may often be unfair and insulting, may understandably distress its targets. But, as the Supreme Court and lower courts have made clear, such speech cannot be suppressed even by damages awards, and certainly not by injunctions.

I. WHAT SOME TRIAL COURTS ARE DOING

Let me begin by laying out the injunctions that some trial courts have been issuing. I start with the broadest and continue to ones that are narrower but still not narrow enough.

A. "Stop talking about plaintiff" injunctions

Some injunctions in libel cases categorically ban defendant from speaking about plaintiff (or at least from doing so online or on some

13. *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 NW. U. L. REV. 731 (2013).

14. *See, e.g.*, Chan v. Ellis, 770 S.E.2d 851, 853–84 (Ga. 2015); cases cited *infra* note 157.

15. *See infra* Part A.

16. *See infra* Part I.

17. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1092–94 (2000).

particular site), for instance, "Defendant Leo Joseph is hereby permanently restrained from publishing future communications to any third-parties concerning or regarding the Plaintiffs in either their professional, personal or political lives."[18] I collect many such cases in the Appendix; they include injunctions entered restricting speech about the Prime Minister of Haiti (the one I just quoted), a controversial billionaire Chinese businessman,[19] local professionals,[20] businesspeople,[21] and more.

Similar injunctions are sometimes entered in claims brought under statutes that authorize injunctions against "harassment" or "stalking" (sometimes called "harassment prevention orders" or "personal protection orders").[22] Those statutes are usually used to require the defendant to stay away from the plaintiff, or to stop talking *to* the plaintiff rather than *about* the plaintiff.[23] And the statutes generally call on courts to focus on whether the defendant has annoyed, harassed, or substantially distressed the plaintiff, not on whether the defendant has published defamatory statements.[24] But

18. Baker v. Haiti–Observateur Group, No. 1:12-cv-23300-UU, at 3 (S.D. Fla. Feb. 6, 2013), *vacated sub nom.* Baker v. Joseph, 938 F. Supp. 2d 1265 (S.D. Fla. Apr. 9, 2013).

19. Jia v. Gu, No. 17-2-27517-4 KNT, at ¶ C (Wash. Super. Ct. King Cty. Nov. 9, 2017). The plaintiff founded startup electric car manufacturer Faraday Future, and later turned out to have been on his way to filing for bankruptcy to deal with $3.6 billion in debt. Sean O'Kane, *Faraday Future Founder Files for Chapter 11 Bankruptcy*, THE VERGE (Oct. 14, 2019, 1:44 PM), https://www.theverge.com/2019/10/14/20913519/faraday-future-jia-yueting-china-chapter-11-bankruptcy-leeco [https://perma.cc/REZ8-TLAR].

20. Saadian v. Avenger213, No. BC 502285 (Cal. Super. Ct. L.A. Cty. July 28, 2014) (lawyer); Streeter v. Visor, No. CV2014093311, 2014 WL 8106739, at *1–2 (Ariz. Super. Ct. Maricopa Cty. Aug. 1, 2014) (doctor and his assistant), *rev'd*, No. 1 CA–CV 14–0595, 2015 WL 7736866 (Ariz. Ct. App. Dec. 1, 2015).

21. Wendle Motors, Inc. v. Honkala, No. CV–06–0334–FVS, 2006 WL 3842146, at *1 (E.D. Wash. Dec. 29, 2006).

22. *See, e.g.*, CAL. CIV. PROC. CODE § 527.6 (West 2022); FLA. STAT. ANN. § 784.048 (West 2021); MICH. COMP. LAWS ANN. § 600.2950a (West 2018).

23. *See, e.g.*, *id.*

24. *Id.*

the laws are increasingly used to order a defendant to stop speaking about the plaintiff, based on speech that is likely annoying, distressing, or harassing precisely because it "damages [the plaintiff's] reputation."[25]

Here are a few examples; because such orders may be less familiar than libel cases, I offer a few more details on each:

- *The state senator:* Florida state senator Lauren Book got an injunction "prohibit[ing]" a persistent critic, Derek Logue, "from posting *anything* related to [Senator Book], even statements that would unquestionably constitute pure political speech."[26] Logue is an advocate for the rights of released sex offenders (and himself a released

25. *See, e.g.*, Order & Findings of Fact & Conclusions of Law, Moriwaki v. Rynearson, No. 12–17, at Conclusions of Law ¶ 5 (Wash. Mun. Ct. Bainbridge Island July 17, 2017) [https://perma.cc/VJ9K-AYDW] (justifying a "stalking protection order" against a critic of a local community activist in part on the grounds that the activist "has experienced extreme stress, anxiety, and fear that [the critic] will damage his reputation," and in part on the grounds that the critic would "continue to stalk" the activist, which in context referred to continued criticism, not physical following), *rev'd*, No. 17–2–01463–1, 2018 WL 733811 (Wash. Super. Ct. Kitsap Cty. Jan. 10, 2018), *reconsideration denied*, 2018 WL 733810 (Wash. Super. Ct. Kitsap Cty. Feb. 5, 2018); E.D.H. v. T.J., 559 S.W.3d 60, 63, 65 (Mo. Ct. App. 2018) (discussing and reversing anti–harassment order that barred a woman "from 'post[ing], plac[ing] or includ[ing] any derogatory, demeaning, disparaging, degrading, and/or belitt[l]ing, comments, remarks, pictures or similar 'postings' about [her ex-boyfriend] . . . that would reveal [the ex–boyfriend's] identity' through [the woman's] social media pages or the pages of others," and noting that the ex–boyfriend's testimony at the harassment order hearing focused on the statements allegedly "defam[ing] his character"); Dahdah v. Zabaneh, No. 14-15-00889-CV, 2017 WL 61836, at *1 (Tex. App. Jan. 5, 2017) (discussing trial court order banning "harassing" defendants and "besmirching their reputations").

26. Logue v. Book, 297 So. 3d 605, 620 (Fla. Ct. App. 2020) (en banc) (interpreting effect of trial court order, which had banned all "direct or indirect contact" by Logue with Book, including through "use of social media"); *id.* at 612 (interpreting the phrase "indirect contact" as covering online posts "that are not sent directly to an individual" but nonetheless, for instance, "sufficiently describ[e] the person in such a way as to make their specific identification possible" and are therefore "designed so as to be reasonably likely to come to the attention of the targeted person, even if indirectly").

sex offender); Book is a prominent backer of sex offender registration laws.[27] The injunction was based on Logue's having protested against a march that Book had organized, having asked an aggressive question at a screening of a documentary in which both Book and Logue were featured, and having set up a web site that sharply criticized Book (and posted a picture of her home, together with its address and purchase price, drawn from public records).[28]

- *The judge:* Michigan state trial judge Cheryl Matthews got an injunction apparently barring Richard Heit from making any online statements about her.[29] Heit, whose fiancée had earlier lost a case before Judge Matthews, had harshly criticized the judge online, saying things like, "They are all liars," "We will take [Judge] Matthews [Petitioner] out. She has had it in for you from the start. She is only one step over a traffic cop. She will be in jail," "We will get this to appeals and take them all down," "A farce! A mockery! A FUCKING JOKE! Dishonest Judge," and "DO NOT VOTE FOR JUDGE CHERYL MATTHEWS."[30]

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27. *Id.* at 607; *see also Legislative Advocacy*, LAUREN'S KIDS, https://laurenskids.org/advocacy/legislation/ [https://perma.cc/TDU4-TAR8].

28. *Id.* at 608–09; see also FLORIDIANS FOR FREEDOM: RON AND LAUREN BOOK EXPOSED!, http://ronandlaurenbook.blogspot.com/ [https://perma.cc/E4BA-NZGZ]; Francisco Alvarado, *State Sen. Lauren Book Seeks Restraining Order to Silence Protestor*, FLA. BULLDOG (Aug. 15, 2017), https://www.floridabulldog.org/2017/08/state-sen-lauren-book-seeks-restraining-order-to-silence-protester/ [https://perma.cc/E74E-CT22].

29. The order barred defendant from "posting a message through the use of any medium of communication, including the Internet or a computer or any electronic medium, pursuant to MCL 750.411s," which on its face forbids all posts by defendant about anyone or anything; but in context, it likely refers to posts about plaintiff. Matthews v. Heit, No. 14–817732–PH (Mich. Cir. Ct. Oakland Cty. Mar. 11, 2014); Petition for Personal Protection Order, *id.* (Mar. 10, 2014).

30. Attachment to Petition for Personal Protection Order, *id.* at ¶¶ 5-6 (Mar. 10, 2014).

- *The forensics expert and former state board member:* Stacy David Bernstein was a prominent forensic psychology expert, a sometime instructor for the FBI, and a gubernatorially appointed member of the Connecticut Board of Firearms Permit Examiners.[31] Bernstein got an order forbidding Robert Serafinowicz from posting "any information, whether adverse or otherwise, pertaining to [Bernstein] on any website for any purpose."[32] Serafinowicz had earlier criticized Bernstein online, and pointed to a past abuse prevention order entered against Bernstein, a past judgment apparently entered against Bernstein for unpaid debts, and a possible arrest of Bernstein 30 years before.[33] Serafinowicz had also sent letters to various government agencies that had dealings with Bernstein.[34]
- *The planning board member:* Planning board member Colleen Stansfield got an order forbidding Ronald Van Liew from, among other things, mentioning Stansfield's "name in any 'email, blog, [T]witter or any document.'"[35] Van Liew had earlier run for town council member against Stansfield, and had called Stansfield "a liar and corrupt"; he had also had some personal run–

31. Serafinowicz v. Bernstein, No. CV154034547S, 2015 WL 3875108, at *2, *4 (Conn. Super. Ct. May 28, 2015), *aff'd sub nom.* Stacy B. v. Robert S., 140 A.3d 1004, 1007 (Conn. App. Ct. 2016).

32. *Serafinowicz*, 2015 WL 3875108, at *6.

33. *Id.* at *2–4.

34. *Id.*

35. Eugene Volokh, *Critic May Not Mention Planning Board Member's "Name in Any 'Email, Blog, [T]witter or Any Document'"*, WASH. POST (Apr. 1, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/01/critic-may-not-mention-planning-board-members-name-in-any-email-blog-twitter-or-any-document [https://perma.cc/PK6W-5L3M]. This temporary restraining order was reversed by another judge at the hearing for the permanent order ten days later, and the Massachusetts Supreme Judicial Court eventually held that Stansfield's restraining order petition might have constituted malicious prosecution on her part. Van Liew v. Stansfield, 2014 Mass. App. Div. 69 (Mar. 28, 2014), *aff'd*, 47 N.E.3d 411 (Mass. 2016).

ins with her, though the injunction wasn't limited to personal communications.[36]

- *The commission member (and her brother the mayor):* Norma Kleem, a town commission member and the sister of mayor Cyrus Kleem got an order barring Johanna Hamrick—who runs a local blog and had been candidate for town mayor and city council president—from "posting any information/comments/threats/or any other data on any internet site, regarding the petitioner and any member of her immediate or extended family,"[37] which would have barred comments about the mayor as well.
- *The police officer:* Police officer Philip Lanoue got a court order barring Patrick Neptune from, among other things, "posting anything on the Internet regarding the officer."[38] Neptune had earlier criticized Lanoue on the site copblock.org[39] based on what Neptune thought was

36. Both of the run-ins stemmed from Stansfield approaching Van Liew. First, Stansfield "challenged various positions taken by Van Liew" at a "public 'meet and greet' event at the town library in connection with [Van Liew's town selectman] candidacy . . . . At the close of the event, Stansfield approached Van Liew and asked whether he was going to take part in upcoming debates. According to Stansfield, Van Liew responded loudly, '[O]f course . . . and I know what you do . . . . [Y]ou sent an anonymous letter to my wife and I'm coming after you.'" *Van Liew*, 47 N.E.3d at 413–14 (Mass. 2016). Second, "during their first interaction in a two–hour telephone call initiated by Stansfield (that took place at some point prior to 2009) Van Liew screamed at her and called her 'terrible names.'" *Id.* at 414.

37. Order of Protection at 3, Kleem v. Hamrick, No. cv–11–761954 (Ohio Ct. Com. Pl. Cuyahoga Cty. Aug. 15, 2011), available at http://www.volokh.com/wp-content/uploads/2012/07/KleemvHamrickOrder.pdf [https://perma.cc/7GLK-JASW]. A week later, the court changed its mind. *See* Journal Entry, *Kleem*, No. cv–11–761954, available at http://www.volokh.com/wp-content/uploads/2012/07/KleemvHamrickOrder.pdf [https://perma.cc/7GLK-JASW].

38. Neptune v. Lanoue, 178 So. 3d 520, 521 (Fla. Dist. Ct. App. 2015).

39. Kelly W. Patterson, *Florida Cop Tells His Mommy on Seat Belt Scofflaw Who Criticized Him on CopBlock*, COPBLOCK (Jan. 15, 2016), http://www.copblock.org/150994/florida-cop-tells-mommy-seat-belt-scofflaw/ [https://perma.cc/KY8B-BQBW].

an improper traffic stop; sent public officials several letters criticizing Lanoue; and sent three letters to Lanoue's home address.[40]

- *The anti–vaccination activist:* Kimberly McCauley got a court order providing that fellow anti–vaccination activist Matthew Phillips "[n]ot post photographs, videos, or information about [McCauley] to any internet site."[41] Phillips had argued that McCauley had sold out to pro–vaccination forces, and included photographs of McCauley's daughter (which McCauley had earlier posted herself), apparently to suggest that McCauley was endangering her own daughter by vaccinating her;[42] but the injunction covered any information about McCauley, not just material on her daughter.
- *The fake immigration lawyer:* Nelly Gabueva got a restraining order requiring lawyer Andrei Romanenko to "take down all harassment material on website related to Nelly A. Gabueva."[43] The "harassment material," according to the petition for the restraining order, consisted of Romanenko's allegations that Gabueva was practicing immigration law without a license.[44] Several months later, the California Bar seized Gabueva's practice on the grounds that she "led clients to believe that

40. *See Neptune*, 178 So. 3d at 521; *see also* Gaddis v. Lannom, No. 5–20–0327, 2021 Ill. App. Unpub. LEXIS 1222, at *2, *4 n.1 (2021) (mentioning an order banning a citizen from "posting anything on social media concerning" a police officer, and noting that it was unconstitutional).

41. McCauley v. Phillips, No. 2016–70000487 (Cal. Super. Ct. Sacramento Cty. Sept. 8, 2016), *appeal dismissed on procedural grounds*, No. C083588, 2018 WL 3031765 (Cal. Ct. App. June 19, 2018); Request for Civil Harassment Restraining Orders, *id.* (June 16, 2016).

42. Request for Civil Harassment Restraining Orders, *id.* (June 16, 2016).

43. Civil Harassment Restraining Order, Gabueva v. Romanenko, No. CCH–19–581819, at 2 ¶ 6.a.4 (Cal. Super. Ct. S.F. Cty. July 26, 2019).

44. Request for Civil Harassment Restraining Orders, *id.* (July 2, 2019).

she was an attorney and qualified to practice immigration law," even though she had "never been admitted to the State Bar of California";[45] and a federal criminal complaint was filed against her on similar grounds, though that case was later dismissed.[46]

- *The copyright owner:* Poet Linda Ellis got a court order requiring Matthew Chan to remove "all posts relating to Ms. Ellis" from a site that he ran.[47] There were about 2000 posts on the site mentioning Ellis; the posts generally criticized her practice of demanding thousands of dollars from people who had posted copies of one of Ellis's poems.[48]
- *The ex–girlfriend and successful video game developer:* Prominent video game developer Zoë Quinn got a court order forbidding her ex–boyfriend Eron Gjoni from "post[ing] any further information about [Quinn] or her personal life on line or . . . encourag[ing] 'hate mobs.'"[49] Gjoni had created a Web page describing his romantic relationship with Quinn, and claiming that she had emotionally mistreated him.[50] This led to a torrent of

45. *State Bar Seizes the Practice of a San Francisco Nonattorney Who Victimized Russian and Mongolian Immigrants*, STATE BAR OF CAL. (May 4, 2020), http://www.calbar.ca.gov/About-Us/News/News-Releases/state-bar-seizes-the-practice-of-a-san-francisco-nonattorney-who-victimized-russian-and-mongolian-immigrants [https://perma.cc/36VW-5XD5].

46. Nate Gartrell, *Bay Area Woman Accused of Posing as Attorney to 'Victimize' Immigrants Charged with a Federal Crime*, SAN JOSE MERCURY NEWS (July 21, 2020, 1:48 PM), https://www.mercurynews.com/2020/07/21/bay-area-woman-accused-of-posing-as-attorney-to-victimize-immigrants-charged-with-a-federal-crime/ [https://perma.cc/BM73-EMLA]; Criminal Complaint, United States v. Gabueva, No. 3:20–mj–70917 MAG (N.D. Cal. July 8, 2020).

47. Chan v. Ellis, 770 S.E.2d 851, 853 (Ga. 2015) (reversing that order).

48. *Id.* at 852.

49. Van Valkerburg v. Gjoni, No. 1407RO1169, at 1 ¶ 14 (Mass. Boston Mun. Ct. Sept. 16, 2014).

50. S*ee id.* at 4.

online criticism of Quinn by others, including some threats of violence (though never by Gjoni himself), partly because Gjoni's post was interpreted as suggesting that some of the favorable reviews of Quinn's games were written by reviewers who were themselves romantically involved with Quinn. That in turn led to an ongoing debate between Quinn's supporters and opponents, labeled the Gamergate controversy.[51]

- *The condominium association*: The Hamptons Metrowest Condominium Association got an order barring resident Howard Fox from "post[ing] anything related to The Hamptons [condo complex],"[52] and requiring him to "take down all such information" from his existing blogs.[53] Fox had "utilized the internet to voice his displeasure over the quality of life at the Hamptons."[54]
- *The businessman with an arrest record:* Christopher Fuller got a court order "prohibit[ing] [Frank] Craft from posting anything about Fuller on the internet" for five years.[55] Fuller had been arrested for caller ID spoofing

51. For accounts of this from different perspectives, see Zachary Jason, *Game of Fear*, BOSTON MAG. (Apr. 28, 2015, 5:45 AM), http://www.bostonmagazine.com/news/article/2015/04/28/gamergate/ [https://perma.cc/N7GS-3MBR]; Cathy Young, *Gamergate: Part I: Sex, Lies, and Gender Games*, REASON (Oct 12, 2014, 10:00 AM), http://reason.com/archives/2014/10/12/gamergate-part-i-sex-lies-and-gender-gam [https://perma.cc/3EL5-HN4A]; Cathy Young, *Gamergate: Part 2: Videogames Meet Feminism*, REASON (Oct. 22, 2014, 8:30 AM), http://reason.com/archives/2014/10/22/gamergate-part-2-videogames-meet-feminis [https://perma.cc/R3SQ-XR2P].

52. Transcript of Proceedings, Hamptons at Metrowest Condo Ass'n v. Fox, No. 2015–CA–007283–O, at 88 (Fla. Cir. Ct. Orange Cty. Apr. 28, 2016); *see also* TM v. MZ, 926 N.W.2d 900 (Mich. Ct. App. 2018); Appellant's Supplemental Brief, TM v. MZ, 926 N.W.2d 900 (Mich. Ct. App. 2018) (No. 329190), 2017 WL 6519842 (stating that the case involved a dispute between local elected officials).

53. Fox v. Hamptons at Metrowest Condo. Ass'n, Inc., 223 So. 3d 453, 455–56 (Fla. Dist. Ct. App. 2017).

54. *Id.* at 456 n.1.

55. Initial Brief of Appellant, Craft v. Fuller, No. 2D19–2891, 2019 WL 5778472, at *7 (Fla. Ct. App. Oct. 11, 2019).

several times; Craft, his former business associate, then posted a dozen tweets with the hashtag ("#spoofing-schmuck") but without using Fuller's name.[56] Fuller claimed the posts would be understood to be about him, and sought a restraining order—which a judge granted.[57]

- *The political consultant*: A court issued an order forbidding Jason Miller's ex–girlfriend Arlene Delgado, with whom he had a child, from "engag[ing] in any social media . . . which comments . . . on [Miller's] emotional or mental health or personal behavior."[58] Miller was an adviser to the 2016 and 2020 Trump campaigns, and was slated to be President Trump's White House Communications Director but withdrew when his affair with Delgado (a political commentator and also a former Trump campaign advisor) came to light.[59]

All these, then, were broad injunctions that categorically banned all speech (or at least all online speech or all social media speech) by one person about another. I'll explain in Part II why they are unconstitutionally overbroad, but for now I want to establish that such injunctions are indeed being issued.

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56. Craft v. Fuller, 298 So. 3d 99, 101–02 (Fla Ct. App. 2020).

57. Initial Brief of Appellant, Craft v. Fuller, No. 2D19-2891, 2019 WL 5778472 (Fla. Ct. App. Oct. 11, 2019). The order was reversed by *Craft v. Fuller*, 298 So. 3d 99 (Fla. Ct. App. 2020).

58. Delgado v. Miller, 314 So. 3d 515, 518 (Fla. Ct. App. 2020) (reversing the order). The order also imposed a reciprocal obligation on Miller with respect to Delgado.

59. *See* Murray Waas, *Trump Aide Concealed Work for PR Firm and Misled Court to Dodge Child Support*, THE GUARDIAN (Mar. 25, 2021, 5:47 PM), https://www.theguardian.com/us-news/2021/mar/25/jason-miller-trump-aide-teneo-secret-deal-pr-firm [https://perma.cc/78QF-PCLA].

B. Injunctions that are narrower but still too broad

Some injunctions are narrower, but still restrict protected speech because they aren't limited to speech that falls within recognized First Amendment exceptions (such as libel or true threats).[60]

1. Negative/derogatory/disparaging speech

Some injunctions ban "negative," "critical," "derogatory," "degrading," "demean[ing]," "offensive," or "disparag[ing]" material, without limiting that to defamation.[61] Yet such negative but not defamatory material is fully protected by the First Amendment, as cases such as *Hustler Magazine, Inc. v. Falwell*[62] and *Snyder v. Phelps*[63] make clear.[64]

2. Speech interfering with business relationships

One injunction banned a disgruntled ex–tenant from "directly or indirectly interfering . . . via any . . . material posted . . . in any me-

60. *See, e.g.*, *infra* notes 215–17.

61. *See* Appendix.

62. 485 U.S. 46 (1988).

63. 562 U.S. 443 (2011).

64. *See, e.g.*, Shak v. Shak, 144 N.E.3d 274, 277 (Mass. 2020) ("Nondisparagement orders are, by definition, a prior restraint on speech."); Healey v. Healey, 529 S.W.3d 124, 129 (Tex. App. 2017) ("Expressions of opinion may be derogatory and disparaging but nevertheless be constitutionally protected."); Wolfe Financial Inc. v. Rodgers, No. 1:17cv896, 2018 WL 1870464, at *17 (M.D.N.C. Apr. 17, 2018) (rejecting a proposed injunction on the grounds that it "would subject [defendant] to imprisonment and fines . . . for truthful, non–defamatory statements that a judge later deems 'derogatory'"); Shoemaker v. Gianopoulos, No. H038576, 2014 WL 320061, at *9 (Cal. Ct. App. Jan. 29, 2014) ("[P]osting disparaging comments about people on internet sites is constitutionally protected activity."); Pickrell v. Verio Pac., Inc., No. B144327, 2002 WL 220650, at *6 (Cal. Ct. App. Feb. 11, 2002) (invalidating injunction against "disparaging statements," on the grounds that "[v]igorous criticism, even if amounting to a 'disparaging statement,' is at the heart of constitutionally protected freedom of speech"); Same Condition, LLC v. Codal, Inc., 2021 IL App (1st) 201187, ¶ 36 (Ill. App. Ct. June 21, 2021) ("[A] court may not enjoin a party from criticizing others 'even though they find that criticism distressing.'" (internal punctuation omitted)); Flood v. Wilk, 125 N.E.3d 1114, 1129 (Ill. App. Ct. 2019).

dia with [the ex–landlord's] advantageous or contractual and business relationships."[65] This provision deliberately went beyond defamation; indeed, a separate provision of the injunction already banned speech "calculated to defame."[66] Other courts have issued similar injunctions.[67] Several more injunctions have barred disgruntled ex–clients from posting reviews of particular businesses or professionals, again without any limitation to false and defamatory factual claims.[68]

Yet speech that interferes with business relationships, for instance by urging someone not to deal with a company, is generally fully protected unless it's defamatory. The tort of intentional interference with business relations is subject to the same First Amendment constraints as is the tort of defamation,[69] which would include the requirement that liability only be imposed on a finding that the speaker's statements included factual falsehoods.

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65. Chevaldina v. R.K./FL Management, Inc., 133 So. 3d 1086, 1090–91 (Fla. Ct. App. 2014) (holding this injunction was unconstitutional).

66. *Id*. at 1091.

67. Hutul v. Maher, No. 1:12–cv–01811, 2012 WL 13075673, at *8 (N.D. Ill. Dec. 10, 2012); DeJager v. Burgess, No. 112CV219299, at 3 ¶ 6 (Cal. Super. Ct. Santa Clara Cty. Aug. 1, 2012); Comp. Sci. Rsch. Ed. & Apps. v. Prasad, No. 2013 CA 582, at 5 (Fla. Cir. Ct. Leon Cty. May 5, 2017); Peretti v. Ellis, No. CV 60CV–18–2524 (Ark. Dist. Ct. Pulaski Cty. Sept. 11, 2018); Izzet Gunbil, L.L.C. v. Estrada, No. 46D01–1908–CT–001985, 2019 WL 11278771, at *3 (Ind. Super. Ct. Laporte Cty. Dec. 16, 2019).

68. Etehad Law v. Anner, No. BC625332 (Cal. Super. Ct. L.A. Cty. Jan. 31, 2017) (barring "posting . . . any future reviews . . . regarding any and all [past] interaction" between her and her ex–lawyer); *see also* Swinyard v. Johnson, No. 190906886 (Utah Dist. Ct. Salt Lake Cty. Jan. 15, 2020) ("Defendant shall immediately remove any reviews he has posted online about Plaintiffs [a divorce lawyer and his firm] and Defendant is further restrained from posting reviews of Plaintiffs in the future."); William Noble Rare Jewels, L.P. v. Doe, No. DC–14–14740 (Tex. Dist. Ct. Dallas Cty. Jan. 15, 2005) (likewise, as to jeweler).

69. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Moore v. Hoff, 821 N.W.2d 591 (Minn. Ct. App. 2012); Beverly Hills Foodland, Inc. v. United Food & Com. Workers Union Local 655, 39 F.3d 191, 196 (8th Cir. 1994); A & B–Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council, 651 N.E.2d 1283, 1295 (Ohio 1995); Unelko Corp. v. Rooney, 912 F.2d 1049, 1058 (9th Cir. 1990); Fendler v. Phx. Newspapers, 636 P.2d 1257, 1262–63 (Ariz. Ct. App. 1981); Blatty v. N.Y. Times Co., 728

Other injunctions have barred a defendant from contacting a plaintiff's clients or prospective clients. The injunctions applied to all statements, whether false and defamatory, true, or expressions of opinion.[70] These too are unconstitutional: An injunction "which prohibits [Defendant] generally 'from contacting past or present clients of [Plaintiff]'" is overbroad to the extent that it "is not supported by the district court's findings of fact or conclusions of law regarding defamation."[71]

A similar injunction barred a defendant from contacting a plaintiff's employer or prospective employers.[72] Indeed, a Tennessee statute requires courts in all divorce cases to issue orders "restraining both parties . . . from making disparaging remarks about the other . . . to either party's employer."[73] But that too is unconstitutional, for the reasons given above.

P.2d 1177, 1182, 1184 (Cal. 1986); Thompson v. Armstrong, 134 A.3d 305, 310 (D.C. 2016); Farah v. Esquire Magazine, 736 F.3d 528, 540 (D.C. Cir. 2013); Dairy Stores, Inc. v. Sentinel Pub. Co., 465 A.2d 953, 961 (N.J. Super. Ct. 1983); Evans v. Dolfecino, 986 S.W.2d 69, 79 (Tex. App. 1999); Jefferson Cty. School Dist. No. R–1 v. Moody's Investor's Services, Inc., 175 F.3d 848, 856–58 (10th Cir. 1999); Lakeshore Community Hosp., Inc. v. Perry, 538 N.W.2d 24, 28 (Mich. Ct. App. 1995); Ward v. Triple Canopy, Inc., No. 8:17–cv–802–T–24 MAP, 2017 WL 3149431, at *5 (M.D. Fla. July 25, 2017) ("Ward's request that Triple Canopy be 'enjoined from taking any further action which harms or attempts to harm the career' of Ward is overbroad because it would prohibit more speech than just that found to be defamatory, and Ward needs to narrow this request.").

70. *See, e.g.*, Fortas v. Gervais Group, L.L.C., No. 20CV3585 (Ga. Super. Ct. DeKalb Cty. Apr. 2, 2020) (barring "harassing Plaintiff by contacting . . . Plaintiff's clients[] or Plaintiff's potential clients"); Emergency Motion for Contempt, *id.* (Ga. Super. Ct. DeKalb Cty. May 21, 2020); Adili v. Yarnell, No. 2017–CP–08–552, at 2 ¶ B (S.C. Ct. Com. Pl. 9th Jud. Cir. Feb. 27, 2017); Group for Horizon Ent., Inc. v. Branham, No. 2016–60729, at 1 ¶ 3 (Tex. Dist. Ct. Harris Cty. Sept. 9, 2016).

71. Ferguson v. Waid, 798 F. App'x 986, 989 (9th Cir. 2020).

72. Hagele v. Burch, No. 07 CVS 19854, at 4 (N.C. Super. Ct. Wake Cty. Aug. 15, 2013).

73. TENN. CODE ANN. § 36–4–106(d)(1)(C).

3. Specific accusations of misconduct (but with no finding of libel)

Still other injunctions forbid a speaker from making specific allegations of misconduct against a plaintiff—but without any finding that the allegations are libelous, or even that they are false:

- In *Stark v. Stark*,[74] for instance, Memphis Police Department Sergeant Joe Stark got a court order requiring his ex–wife, Pamela Stark, to take down a Facebook post that criticized him (she had accused him of abusing her) and of the Police Department (which she had accused of not suitably investigating her claims of abuse).[75]
- Another order restrained a newspaper, the *Daily Iberian*, "from publishing or posting on its website any article or story in which plaintiff David W. Groner is accused of dishonesty, fraud or deceit in connection with a Louisiana Supreme Court decision or similar matter."[76] The Louisiana Supreme Court had indeed disciplined Groner, a lawyer, after he entered into a consent agreement admitting, among other things, that he had knowingly engaged in "misrepresentation" to a client.[77]
- A plaintiff got a pretrial injunction against defendant's "[c]ontacting or communicating with people or entities in Idaho or on the internet concerning the criminal history of

74. Stark v. Stark, No. W2019–00650–COA–R3–CV, 2020 WL 507644 (Tenn. Ct. App. Jan. 31, 2020).

75. *Id.* at *2.

76. Groner v. Wick Commc'ns Co., No. 00126863 (La. Dist. Ct. Iberia Parish Aug. 25, 2015); *see also* Eugene Volokh, *Judge to Newspaper: Don't Publish Any Article in Which a Lawyer 'Is Accused of Dishonesty, Fraud or Deceit' in Connection with His Discipline by the State Supreme Court*, REASON (Sept. 1, 2015, 9:22 AM), https://reason.com/volokh/2015/09/01/judge-to-newspaper-dont-publis/ [https://perma.cc/T58C-YUM3].

77. *In re* Groner, 984 So.2d 707 (La. 2008) (mem.); *see also* Joint Memorandum in Support of Consent Discipline, at 3, available at https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2015/08/GronerMemoRedacted.pdf [https://perma.cc/TB8M-8GAQ].

the Plaintiff(s)" or "any allegations of wrongdoing by Plaintiffs."[78]

- Another speaker was barred from "characteriz[ing] Plaintiffs as unfit in their business and profession, cast[ing] serious doubt upon their honesty and integrity, and stat[ing] that Plaintiffs have committed or are currently committing a crime or other defamatory allegation."[79] This was not limited to false and defamatory future allegations; it applied even if defendants learned things that did cast serious doubt on plaintiffs' honesty and integrity.[80]
- Another speaker was barred from making statements "suggesting that Plaintiff was not deployed overseas, was not in combat, was not injured while serving in the United States Military, and/or did not earn the medals he claims to have earned," though the court expressly held that the evidence does "not confirm, one way, or another, without further investigation," the accuracy or inaccuracy of those statements.[81]
- A parent whose child's body had been prepared at a funeral home, and who was upset that a convicted sex offender was working there, was "restrained from speaking, delivering, publishing, emailing or disseminating information in any manner regarding [the employee's] sex offender status, his address and employment status to anyone anywhere."[82]

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78. Parker v. Casady, No. CV–16–4844 (Idaho Dist. Ct. Bonneville Cty. Jan. 18, 2017). *But see* DiTanna v. Edwards, 323 So. 3d 194, 203 (Fla. Dist. Ct. App. June 30, 2021) (striking down, on First Amendment grounds, an injunction that barred the defendant from contacting "anyone connected with Petitioner's employment or school to inquire about Petitioner").

79. Adili v. Yarnell, No. 2017–CP–08–552, at 2 ¶ A (S.C. Ct. Com. Pl. 9th Jud. Cir. Feb. 27, 2017).

80. *Id.*

81. Davis v. Leung, No. 15–1610–CC4, at 2, 3 (Tex. Cty. Ct. Williamson Cty. May 18, 2017).

82. Redmond v. Heller, No. 347505, 2020 WL 2781719, at *3 (Mich. Ct. App. May 28, 2020) (reversing this order on First Amendment grounds).

- Some speakers have been enjoined from accusing plaintiffs of crimes, even without a finding that such accusations are false.[83]
- Some speakers have been enjoined from expressing pejorative opinions about plaintiffs, including ones that would be seen under libel law as pure opinions and therefore as constitutionally protected (e.g., that a plaintiff is a "bully" or "unprofessional").[84]

To be sure, I don't know whether any of these factual allegations were true. But the point is that the judges in these cases made no factual findings on the matter—they restrained the speech *regardless* of whether it was true.

4. Accusations of misconduct sent to government authorities

Some courts have barred defendants from submitting complaints about plaintiffs to the police or to government agencies.[85] Indeed, a

83. *See, e.g.*, Pearson v. Pearson, No. 417–00143–2017 (Tex. Dist. Ct. Collin Cty. Jan. 24, 2017) (barring "reporting any alleged act regarding the treatment of children of which he does not have direct personal knowledge in any public forum in reference to" Plaintiff); Bey v. Rasawehr, 161 N.E.3d 529, 533 (Ohio 2020) (reversing order that had barred "posting about the deaths of Petitioners' husbands in any manner that expresses, implies, or suggests that the Petitioners are culpable in those deaths").

84. Murphy v. Gump, No. 2016–CC–002126–O (Fla. Cty. Ct. Orange Cty. July 18, 2016); *see also* DCS Real Estate Investments, LLC v. Juravin, No. 2017–CA–0667 (Fla. 5th Cir. Ct. Feb. 28, 2018) (injunction against using the term "[b]ullying" "to describe the plaintiffs' businesses or relationships").

85. *See, e.g.*, *In re* Marriage of Meredith, 201 P.3d 1056, 1062 (Wash. Ct. App. 2009) (reversing such an order); Ruffino v. Lokosky, No. CV 2015–009252, 2017 WL 10487365, at *1 (Ariz. Super. Ct. Maricopa Cty. Apr. 4, 2017), *rev'd sub nom.*, Lokosky v. Gass, No. 1 CA–SA 18–0101, 2018 WL 3150499, ¶12 (Ariz. Ct. App. 2018) (likewise); Portofino Towers Condo. Ass'n, Inc. v. Wohlfeld, No. 2018–041933–CA–01 (08), at 2 ¶ 4 (Fla. 11th Cir. Ct. Feb. 11, 2019) (requiring court approval for reports to government agencies), *modified*, *id.* at ¶ 4.a (Feb. 28, 2019) (removing the preapproval provision); Hagele v. Burch, No. 07 CVS 19854, at 4 (N.C. Super. Ct. Wake Cty. Aug. 15, 2013) (barring Defendant from communicating with National Institutes of Health or National Institute of Environmental Health Sciences about plaintiff doctor).

Tennessee statute, noted above, requires courts in all divorce cases to issue orders "restraining both parties . . . from making disparaging remarks about the other . . . or to either party's employer."[86] When one spouse works for the police department, these orders forbid the other spouse from filing a complaint with the police, or with higher–ups in local government.[87]

5. Information about the underlying lawsuit

Some cases have barred the parties from speaking about the court order itself, or about filings in the case.[88] These courts did not purport to seal the court records (a process that generally requires a powerful showing of a need for confidentiality that overcomes the common–law and constitutional rights of access to court records[89]). Rather, they left the records unsealed but forbade the party from speaking about the case, including about features of the case that would not generally be seen as confidential.

6. Pictures of the plaintiff

Some other injunctions ban posts that include pictures of the plaintiff: Businessman John Textor, for instance, got a court order barring his billionaire business rival Alki David from "posting any tweets" or "any images . . . directed at John Textor without a legitimate purpose."[90] Community activist Clarence Moriwaki got an order barring a political critic, Richard Rynearson, from "us[ing] the

86. TENN. CODE ANN. § 36–4–106(d)(3).

87. *See* Stark v. Stark, No. W2019–00650–COA–R3–CV, 2020 WL 507644, at *1 (Tenn. Ct. App. Jan. 31, 2020).

88. Absolute Pediatric Servs., Inc. v. Humphrey, No. 04CV–18–2961, at 4 ¶ D (Ark. Cir. Ct. Benton Cty. Nov. 9, 2018) ("All parties are enjoined from disseminating this order to the public . . . ."); Group for Horizon Ent., Inc. v. Branham, No. 2016–60729, at 2 ¶ 7 (Tex. Dist. Ct. Harris Cty. Sept. 9, 2016) (forbidding "[p]ubliciz[ing] this law suit, its exhibits, or this Temporary Restraining Order to Plaintiffs' family, friends, or to their clients and business colleagues").

89. *See, e.g.*, Bernstein v. Bernstein Litowitz Berger & Grossmann, 814 F.3d 132 (2d Cir. 2016).

90. David v. Textor, 189 So. 3d 871, 874 (Fla. Dist. Ct. App. 2016).

photograph of [Moriwaki] to create memes, posters, or other online uses."[91] I cite several more such cases in the Appendix.

Yet the First Amendment includes the right to illustrate one's criticisms or comments about people using their photographs. Newspapers and TV stations routinely exercise that right, and other speakers are entitled to do the same.[92]

7. Other speech

- *Use of names in title or domain name:* The *Moriwaki v. Rynearson* injunction barred Rynearson from posting sites or pages "that use the name or personal identifying information of [Moriwaki] in the title or domain name," even when the pages made clear that they were criticizing Moriwaki rather than being authored or endorsed by him.[93]
- *Accusations of figurative lynching:* In *Brummer v. Wey*,[94] the plaintiff—a prominent law professor who had been unsuccessfully nominated by President Obama to be on the Commodities Futures Trading Commission—got an injunction restricting an online tabloid from displaying any pictures of lynchings associated with his name.[95] The tabloid had ac-

91. Order for Protection, Moriwaki v. Rynearson, No. 12–17, at 2 (Wash. Mun. Ct. Bainbridge Island July 17, 2017), *rev'd*, Moriwaki v. Rynearson, No. 17–2–01463–1, 2018 WL 733811 (Wash. Super. Ct. Kitsap Cty. Jan. 10, 2018); *see also* Appendix (citing more such cases). The *Moriwaki* injunction covered even pages that made clear that they weren't put up by Plaintiff, such as Defendant's page that he renamed "Not Clarence Moriwaki" precisely to alleviate any possible confusion.

92. *See* Kelley v. Post Publ'g Co., 98 N.E.2d 286 (Mass. 1951); Bremmer v. J.–Trib. Publ'g Co., 76 N.W.2d 762 (Iowa 1956); Howell v. N.Y. Post Co., Inc., 612 N.E.2d 699 (N.Y. 1993); Bement v. N.Y.P. Holdings, Inc., 760 N.Y.S.2d 133 (N.Y. App. Div. 2003); Four Navy Seals v. Associated Press, 413 F. Supp. 2d 1136 (S.D. Cal. 2005).

93. Order for Protection, Moriwaki v. Rynearson, No. 12–17, at 2 (Wash. Mun. Ct. Bainbridge Island July 17, 2017), *rev'd*, Moriwaki v. Rynearson, No. 17–2–01463–1, 2018 WL 733811 (Wash. Super. Ct. Kitsap Cty. Jan. 10, 2018).

94. 166 A.D.3d 475, 476–77 (2018) (reversing this order).

95. *Id*. at 477.

cused Professor Brummer (who was himself black) of having perpetrated a figurative "lynching" of two black stockbrokers by being on an arbitration panel that permanently banned them from their profession.[96] The images were accusations that Brummer was the lyncher, not threats that Brummer would himself be lynched, but the order nonetheless banned such images.[97]

- *Public records:* In *Catlett v. Teel*,[98] the plaintiff got an injunction barring her ex–boyfriend from posting public records that he had obtained about her, including ones that had mentioned her past arrests for harassment and domestic assault.[99]

* * *

All the injunctions in this subpart (B) are thus narrower than the categorical "stop talking about plaintiff" injunctions in Part A. But they still enjoin speech that falls outside any existing First Amendment exceptions.

II. WHY SUCH BROAD INJUNCTIONS ARE UNCONSTITUTIONAL

A. Supreme Court precedent generally

All these injunctions violate the First Amendment, which generally protects the right to criticize people, including private figures. False, defamatory statements of fact about people can lead to liability, and might even be enjoinable.[100] But that can't justify bans

96. *Id.* at 476.

97. *See id.* at 478.

98. 477 P.3d 50 (Wash. Ct. App. 2020) (reversing this order).

99. *Id.*; *see also* Wells v. Fischbach, No. A21–0108, 2021 WL 3716677, at *4 (Minn. Ct. App. Aug. 23, 2021) (affirming denial of harassment restraining order that was based on publishing information about a person's past convictions, because "speech that communicates readily available public information is protected speech").

100. *See* Volokh, *Anti–Libel Injunctions*, *supra* note 11, at 90.

(broad or narrow) on future speech about a person that would cover protected opinion and protected factually accurate allegations, and not just false factual assertions.

Courts must "look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down."[101] A statute banning someone from saying anything online about a particular person would be unconstitutional; same with the injunction.

Indeed, the Supreme Court struck down such an injunction in *Organization for a Better Austin v. Keefe*.[102] In *Keefe*, local civil rights activists decided that Keefe's real estate sales practices were improper,[103] so they began distributing leaflets in Keefe's home town, including to people going to and from Keefe's church.[104] Some of the leaflets even included Keefe's home phone number, and urged readers to call Keefe and express their disapproval.[105] The leafletters would do this every few weeks, and threatened to continue until Keefe stopped doing what the leafletters condemned.[106]

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101. United Transp. Union v. State Bar of Mich., 401 U.S. 576, 581 (1971). This logic applies to content–neutral injunctions as well as content–based ones; to the extent some such injunctions have been upheld, for instance in cases such as *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), they have been upheld under a test similar to (though "somewhat more stringent" than) the one for content–neutral statutes. *See id.* at 765.

102. 402 U.S. 415 (1971).

103. *See id.* at 416–17; *see also* Keefe v. Org. for a Better Austin, 253 N.E.2d 76, 77 (Ill. App. Ct. 1969), *rev'd*, 402 U.S. 415 (1971). ("The Austin area is undergoing racial change, and the [activist group], an integrated community organization, has been working to keep white residents in the community. In its efforts to stabilize the community and to deal rationally with integration, the OBA is attempting to stop 'panic peddling' by those brokers who exploit residents of racially changing areas by fomenting panic among them.") The Organization for a Better Austin believed Keefe was one such "panic peddl[er]." *Id.*

104. *Keefe*, 402 U.S. at 417.

105. *Id.*

106. *Id.*

The Illinois courts enjoined the leafletting, but the Supreme Court reversed on First Amendment grounds.[107] The Court concluded that even the "inten[t] to exercise a coercive impact . . . does not remove [the speech] from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper."[108] And the Court held that "[d]esignating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of [such] informational literature," when the plaintiff "is not attempting to stop the flow of information into his own household, but to the public."[109]

Of course, no one wants to be the target of persistent criticism, especially criticism that one sees as unfair or disproportionate. Even if the criticism doesn't include actionable falsehoods, it can still lead to rejection by prospective employers, customers, social acquaintances, or romantic partners. Indeed, it can be distressing just to know that there is such harsh criticism out there, even if one is confident that almost all readers would recognize that the criticism is unfounded. But courts cannot suppress harsh opinions about people, just as they cannot suppress even foolish or evil opinions about other matters.

To be sure, the Supreme Court has been open to some restrictions on sending unwanted speech *to* people. In *Rowan v. U.S. Post Office Department*,[110] for instance, the Court upheld a law that let householders demand that particular senders stop sending them mail, and made it a crime to violate such a demand.[111] "[N]o one," the Court held, "has a right to press even 'good' ideas on an unwilling

107. *See id*. at 417–20.
108. *Id.* at 419.
109. *Id.* at 419–20.
110. 397 U.S. 728 (1970).
111. *Id.* at 737.

recipient."[112] Likewise, the Court has seemed open to the constitutionality of properly crafted telephone harassment laws.[113] This principle could also apply to unwanted email, unwanted comments on others' Facebook pages, or perhaps even unwanted "tagging" that one knows generally yields automatic notification to the target (as @ mentioning does on Twitter).[114] But when it comes to speech *about* people, which may reach willing listeners (even if it's about an unwilling subject), *Keefe* makes clear that this speech is generally constitutionally protected.[115]

B. Protection for photographs and other information about people

Restrictions on all speech about a person are thus unconstitutional; but so are narrower restrictions, so long as they focus on speech that falls outside a First Amendment exception. Take, for instance, *NAACP v. Claiborne Hardware Co.*, in which the organizers of a boycott of white–owned stores demanded that black customers

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112. *Id.* at 738.

113. FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978) (lead opin.); Frisby v. Schultz, 487 U.S. 474, 484 (1988). Note that unwanted speech to government officials may often be constitutionally protected. *See, e.g.*, State v. Fratzke, 446 N.W.2d 781, 782, 785 (Iowa 1989); State v. Drahota, 788 N.W.2d 796, 798, 804 (Neb. 2010); Commonwealth v. Bigelow, 59 N.E.3d 1105, 1108, 1112 (Mass. 2016); United States v. Popa, 187 F.3d 672, 673 (D.C. Cir. 1999). *But see* United States v. Waggy, 936 F.3d 1014, 1015 (9th Cir. 2019).

114. *See, e.g.*, Polinsky v. Bolton, No. A16–1544, 2017 WL 2224391, at *4 (Minn. Ct. App. May 22, 2017); Nancy Leong & Joanne Morando, *Communication in Cyberspace*, 94 N.C. L. REV. 105, 120, 123–24 (2015) ("[B]y tagging the target of a message, the speaker has taken affirmative steps to ensure that the target receives the message.").

115. Several opinions have expressly recognized this distinction, using this very language. David v. Textor, 189 So. 3d 871, 874 (Fla. Dist. Ct. App. 2016) (expressly recognizing this distinction); Krapacs v. Bacchus, 301 So. 3d 976, 980 (Fla. Dist. Ct. App. 2020) (likewise); McCurdy v. Maine, No. 2:19–CV–00511–LEW, 2020 WL 1286206, at *8 (D. Me. Mar. 18, 2020); *see also* State v. Shackelford, 825 S.E.2d 689, 703 & n.7 (N.C. Ct. App. 2019) (Murphy, J., concurring); State v. Kimball, 8 Wash. App. 2d 1021, 2019 WL 1488879, at *4 (2019); *see also* A.S.R. v. A.K.A., 84 N.E.3d 1276, 1285 (Mass. App. Ct. 2017) (distinguishing speech to the plaintiff from "political speech directed to the public at large," though it's not clear what result the court would have reached as to speech that was directed to the public at large but was nonpolitical).

stop shopping at those stores.[116] The organizers stationed "store watchers" outside the stores to take down the names of black shoppers who were not complying with the boycott.[117] Those names were then read aloud at meetings at a local black church, and printed and distributed to other black residents.[118] Some of the noncomplying shoppers were physically attacked for refusing to go along with the boycott.[119]

But the Court held that the First Amendment protected publishing the fact that the noncomplying shoppers were not complying with the boycott, despite the backdrop of violence and the attempt to use social ostracism to pressure black shoppers to forgo their legal rights to shop at white–owned stores.[120] Though "[p]etitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism," the Court held, "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[121] Both financial liability for such speech and an injunction against such speech was unconstitutional, the Court concluded.[122]

Likewise, *Florida Star v. B.J.F.*[123] makes clear that there is a First Amendment right to publish the lawfully obtained fact that a particular named person had been the victim of a crime (there, rape).[124] And publishing people's photographs, so long as it isn't done for purposes of advertising or merchandising, is constitutionally protected as well.[125]

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116. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 887 (1982).

117. *Id.* at 897.

118. *Id.* at 903–04.

119. *Id.* at 894.

120. *Id.* at 888.

121. *Id.* at 909–10.

122. *Id.* at 924 & n.67.

123. Fla. Star v. B.J.F., 491 U.S. 524 (1989).

124. *Id.* at 526, 541.

125. *See, e.g.*, Pott v. Lazarin, 260 Cal. Rptr. 3d 631, 638–39 (Ct. App. 2020); Montana v. San Jose Mercury News, Inc., 40 Cal. Rptr. 2d 639, 640 (Ct. App. 1995); Foster v. Svenson, 7 N.Y.S.3d 96, 100 (N.Y. App. Div. 2015); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1183–84 (9th Cir. 2001).

Of course, repeated criticism, even if it consists of opinions and accurate factual statements (and is thus not limited to actionable, enjoinable libel) is undoubtedly disquieting:

1. It can damage reputation, often using claims that a judge may view as unfair, even though not libelous. That is especially so if the criticism becomes prominent in Google searches for one's name, and defines one to strangers or casual acquaintances.
2. Such criticism can be perceived as intruding on privacy, by making its targets feel that they have become the object of others' condemnation, or even just curiosity or amusement. The law does not generally treat that as actionable invasion of privacy (outside the narrow zone of the disclosure of private facts), but I suspect many people perceive it as an intrusion, and some judges may agree.

(If the criticism gets more of a direct readership, for instance if it gets redistributed via Twitter or Facebook, it can lead to threats against the person being criticized, or even physical attacks;[126] but I leave that matter for another article, and focus here on perceived harm to reputation and privacy.)

Yet equally clearly, our legal system takes the view that such effects on reputation and privacy cannot themselves justify restricting speech. *Near v. Minnesota*,[127] one of the two earliest cases in which the Court struck down government action on free speech or free press grounds, involved a newspaper's repeated, unfair, anti–

126. Christina Capecchi & Katie Rogers, *Killer of Cecil the Lion Finds out That He Is a Target Now, of Internet Vigilantism*, N.Y. TIMES (July 29, 2015), https://www.nytimes.com/2015/07/30/us/cecil-the-lion-walter-palmer.html [https://perma.cc/CW32-25XU]. *Cf.* NAACP v. Claiborne Hardware Co., 458 U.S. at 933 (holding that speech identifying people who aren't complying with a boycott was constitutionally protected, even when there was evidence that some people criminally attacked those people as a result of the speech).

127. 283 U.S. 697 (1931).

Semitic criticisms of various people.[128] *Organization for a Better Austin v. Keefe* (noted in the previous section) and *NAACP v. Claiborne Hardware Co.* similarly involved speech that was personalized, offensive to its subjects, and indeed potentially coercive.[129] But the cases held that such speech could not be broadly restricted up front—only damages liability and perhaps prosecutions for specific constitutionally unprotected libelous statements would be allowed.[130]

C. State and federal appellate precedents

Unsurprisingly, when the injunctions that I describe are appealed, they are generally struck down. We see that with regard to unduly broad injunctions issued in libel cases, such as:

1. In *Puruczky v. Corsi*,[131] the Ohio Court of Appeals held that an order that "Corsi cannot contact anyone *about or in relation to Puruczky*" was an unconstitutional prior restraint,[132] because "the trial court did not make a specific

128. *Id.* at 703–04, 722–23.

129. NAACP v. Claiborne Hardware Co., 458 U.S. at 909–10. *Claiborne Hardware* did stress that the speech there was aimed at promoting equal rights, and was thus "designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." *Id.* at 914. But the Court had long made clear that the First Amendment rules are the same for pro–civil–rights speech and for other speech. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 444 (1963) ("That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner."). And courts have naturally relied on *Claiborne Hardware* far outside the context of pro–civil–rights speech. *See, e.g.*, Bey v. Rasawehr, 161 N.E.3d 529, 544 (Ohio 2020).

130. *See Near*, 283 U.S. at 736.

131. 110 N.E.3d 73 (Ohio Ct. App. 2018).

132. *Id.* at 81.

finding that speech which had already taken place constituted libel or defamation and cannot assume that future speech will fall into such a category."[133]

2. In *Ellerbee v. Mills*,[134] the Georgia Supreme Court "reverse[d] the injunction" that barred the defendant from making 27 specific statements about the plaintiff, "because the jury did not find all of those statements defamatory in its verdict and because the order sweeps more broadly than necessary."[135]
3. In *McCarthy v. Fuller*,[136] the Seventh Circuit reversed an injunction on the grounds that it "forb[ade] statements not yet determined to be defamatory," and thus "could restrict lawful expression"; for example, the injunction "order[ed] Hartman to take down his website, which would prevent him from posting any nondefamatory messages on his blog; it would thus enjoin lawful speech."[137]
4. In *Ferguson v. Waid*,[138] the Ninth Circuit reversed an injunction barring Ferguson—who had been found to have libeled Waid—"from contacting past or present clients of Brian J. Waid, either in person, via telephone, or by electronic communications."[139] (The lawsuit was brought by Waid, who didn't want to be spoken about, not by clients of his saying that they didn't want to be

133. *Id.* at 82.
134. 422 S.E.2d 539 (Ga. 1992).
135. *Id.* at 540–41.
136. 810 F.3d 456 (7th Cir. 2015).
137. *Id.* at 462.
138. 798 F. App'x 986 (9th Cir. 2020).
139. *Id.* at 989.

spoken to.) The injunction, the court held, was "overbroad," because it wasn't limited to "statements found to be defamatory."[140]

5. Appellate opinions in California, Illinois, Minnesota, Nebraska, Nevada, and (in a nonprecedential decision) Tennessee have likewise struck down, on overbreadth grounds, injunctions in libel cases that weren't limited to banning repetition of the specific statements found to be libelous.[141]

And courts have held the same with regard to broad injunctions entered in harassment or cyberstalking cases—unsurprising, because the First Amendment protects speech about people regardless of the state law cause of action that purports to restrict the speech:[142]

1. In *Evans v. Evans*,[143] the California Court of Appeal struck down a preliminary injunction prohibiting an ex–wife from posting "false and defamatory statements"

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140. *Id.*

141. *See* Wallace v. Cass, No. G036490, 2008 WL 626475, at *8–*9 (Cal. Ct. App. 2008) ("[Defendant] may be enjoined from posting signs repeating the kinds of statements about the Plaintiffs that have already been adjudicated as defamatory, but paragraph 4(a) sweeps up any nondefamatory statements she makes about them as well and is too broad."); *see also* Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339, 352 (Cal. 2007) (setting aside a provision of an injunction that banned defendant from "initiating contact with individuals known to Defendant to be employees of Plaintiff"); Same Condition, LLC v. Codal, Inc., No. 1–20–1187, 2021 WL 2525659, ¶49 (Ill. App. Ct. June 21, 2021); Griffis v. Luban, No. CX–01–1350, 2002 WL 338139, at *6 (Minn. Ct. App. Mar. 5, 2002); Gillespie v. Council, No. 67421, 2016 WL 5616589, at *5 (Nev. Ct. App. Sept. 27, 2016); Nolan v. Campbell, 690 N.W.2d 638, 652–53 (Neb. 2004); *see also* Kauffman v. Forsythe, No. E2019–02196–COA–R3–CV, 2021 WL 2102910, at *6 (Tenn. Ct. App. May 25, 2021).

142. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (constitutional protection does not turn on "'mere labels' of state law"); *see supra* cases cited in note 69 (concluding that interference with business relations claims are subject to the same First Amendment constraints as libel claims); *see also* Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 905–06 (Utah 1992) (same as to the intentional infliction of emotional distress); Nelson v. Pagan, 377 S.W.3d 824, 837 (Tex. App. 2012) (same).

143. 76 Cal. Rptr. 3d 859 (Ct. App. 2008).

and "confidential personal information" about her ex–husband online.[144] The injunction, the court noted, was not limited to statements that had been found to be constitutionally unprotected.[145]

2. In *David v. Textor*, the Florida Court of Appeal struck down an injunction barring "text messages, emails, . . . tweets[, or] . . . any images or other forms of communication directed at John Textor without a legitimate purpose."[146] This injunction, the court held, was a forbidden "prior restraint" because it prevented "not only communications *to* Textor, but also communications *about* Textor."[147] Several other Florida appellate decisions have taken the same view.[148]

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144. *Id.* at 869.

145. *Id.* at 863; *see also* Altinawi v. Salman, No. B284071, 2018 WL 5920276, at *6 (Cal. Ct. App. Nov. 13, 2018) (finding that "the restraining order," which "required Salman to remove *all* comments about Altinawi and Altinawi's job from social media and blogs, and barred Salman from future posting of similar material," was "clearly overbroad, as it encompassed speech the court itself recognized as constitutionally protected (such as reviews of the nightclub and Altinawi's behavior as an employee there)"); Molinaro v. Molinaro, 245 Cal. Rptr. 3d 402, 408 (Ct. App. 2019) ("[T]he part of the order prohibiting Michael from posting 'anything about the case on Facebook' is overbroad and impermissibly infringes upon his constitutionally protected right of free speech.").

146. 189 So. 3d 871, 874 (Fla. Ct. App. 2016).

147. *Id.* at 876 (emphasis in original).

148. *See, e.g.*, DiTanna v. Edwards, 323 So. 3d 194 (Fla. Dist. Ct. App. 2021); Krapacs v. Bacchus, 301 So. 3d 976 (Fla. Dist. Ct. App. 2020); Logue v. Book, 297 So. 3d 605 (Fla. Dist. Ct. App. 2020) (en banc); Fox v. Hamptons at Metrowest Condominium Ass'n, Inc., 223 So.3d 453, 457 n.3 (Fla. Dist. Ct. App. 2017); O'Neill v. Goodwin, 195 So.3d 411, 414 (Fla. Dist. Ct. App. 2016). All these injunctions barred defendants from posting anything about plaintiffs on the Internet. *See also* Chevaldina v. R.K./FL Mgmt., Inc., 133 So. 3d 1086, 1091 (Fla. Dist. Ct. App. 2014) (striking down an injunction that barred "directly or indirectly interfering in person, orally, in written form or via any blogs or other material posted on the internet or in any media with Plaintiffs' advantageous or contractual and business relationships" or "directly or indirectly publishing any blogs or any other written or spoken matter calculated to defame, tortuously interfere with, invade the privacy of, or otherwise cause harm to Plaintiffs").

3. In *Flood v. Wilk*, the Appellate Court of Illinois struck down as unconstitutional an order prohibiting the respondent from "communicating in any form any writing naming or regarding [petitioner], his family or any employee, staff or member of [the petitioner's congregation]."[149]
4. In *TM v. MZ*,[150] the Michigan Court of Appeals reversed a protective order aimed at forbidding the defendant from reposting "highly inflammatory and negative . . . comments" about petitioner and her family online, including allegations that she was involved in a kidnapping.[151] The order, the court held, was an unconstitutional prior restraint, even if the defendant's words "amounted to harassment or obnoxiousness."[152]
5. In *In re Marriage of Suggs*,[153] the Washington Supreme Court set aside a civil harassment restraining order that barred "knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties . . . for the purpose of annoying, harassing, vexing, or otherwise harming" her ex–husband, who was a police officer, "and for no lawful purpose."[154] The order, the court held, was an "unconstitutional prior restraint," in part because it "chill[ed] all of [the ex–wife's] speech about [the ex–husband], including that which would be constitutionally protected, because it is unclear what she can and cannot say."[155]

149. 125 N.E.3d 1114, 1116 (Ill. App. Ct. 2019).

150. 926 N.W.2d 900 (Mich. Ct. App. 2018).

151. *Id.* at 904.

152. *Id.* at 910; *see also* Redmond v. Heller, 957 N.W.2d 357, 376 (Mich. Ct. App. May 28, 2020) (striking down injunction on First Amendment grounds because it "potentially covers much more than the specific four statements found to be defamatory").

153. 93 P.3d 161 (Wash. 2004).

154. Id. at 162; *see also* In re Marriage of Meredith, 201 P.3d 1056, 1062 (Wash. Ct. App. 2009); Catlett v. Teel, 477 P.3d 50 (Wash. Ct. App. 2020).

155. *In re Marriage of Suggs*, 93 P.3d at 166.

The upshot of these cases is consistent and simple: Injunctions against speech about a person are unconstitutional if they bar speech about people (and not just to them) and go beyond constitutionally unprotected categories of speech (such as defamation or true threats).

III. THE DOCTRINAL DEFENSES OF THE BROAD INJUNCTIONS

I suspect the legal framework in Part II will not be controversial among First Amendment lawyers and academics.[156] And, as Part C notes, most appellate courts that have considered the issue have rejected these sorts of orders. But some courts have nonetheless upheld them; let me turn here to discussing the doctrinal reasons they have given.

A. Content neutrality

Some courts have reasoned that stop – speaking – about–plaintiff injunctions are content–neutral, and therefore subject to much less demanding First Amendment scrutiny than content–based restrictions would be:

> [The order] is limited to social and electronic network remarks "regarding Plaintiff." As written, therefore, the proscription is not concerned with the *content* of Appellant's speech but with, instead, the *target* of his speech, namely, Plaintiff, whom the court has already deemed the victim of his abusive conduct.[157]

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156. *See, e.g.*, David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 52–53 (2013) (concluding that stop–speaking–about–plaintiff injunctions "are plainly overbroad and therefore unconstitutional"); Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 822–24 (2013).

157. Commonwealth v. Lambert, 147 A.3d 1221, 1229 (Pa. Super. Ct. 2016); *see also* S.B. v. S.S., 243 A.3d 90, 106 (Pa. 2020). Some injunctions, for instance ones banning coming near plaintiff or speaking to plaintiff, may indeed be content–neutral. *See, e.g.*, PLT v. JBP, No. 346948, 2019 WL 7206134, at *5 (Mich. Ct. App. Dec. 26, 2019); Scott v. Steiner, No. B258400, 2015 WL 9311734, at *6 (Cal. Ct. App. Dec. 22, 2015); Arnold v.

But that is mistaken, for reasons the Ohio Supreme Court recognized in *Bey v. Rasawehr*:

> [T]he "target" of such speech necessarily concerns the subject matter of the speech. [An injunction against such speech about a person] "cannot be justified without reference to the content of the prohibited communication." It requires an examination of its content, i.e, the person(s) being discussed, to determine whether a violation has occurred and is concerned with undesirable effects that arise from "the direct impact of speech on its audience or listeners' reactions to speech." We therefore cannot accept appellees' attempt to characterize the order banning all posted speech about them as merely a content–neutral regulation.[158]

The injunctions we're discussing "on [their] face" draw distinctions based on the "communicative content" of what a speaker conveys.[159] They define the forbidden speech based on "the topic discussed" (the plaintiffs).[160] They were "adopted by the government because of disagreement with the message [the speech] conveys," a

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Toole, No. D067317, 2015 WL 6746572, at *3 (Cal. Ct. App. Nov. 5, 2015); Rew v. Bergstrom, 845 N.W.2d 764, 777 (Minn. 2014); R.D. v. P.M., 135 Cal. Rptr. 3d 791, 799 (Ct. App. 2011); State v. Noah, 9 P.3d 858, 867 (Wash. Ct. App. 2000). This Article, though, focuses on injunctions against speech about the plaintiff.

158. Bey v. Rasawehr, 161 N.E.3d 529, 539 (Ohio 2020) (partly cleaned up). *See also* Same Condition, LLC v. Codal, Inc., 2021 IL App (1st) 201187, ¶ 34 (2021) (holding that order banning defendants "from making any additional posts online regarding Codal" is content–based, because it "clearly intended to regulate the content of [defendants'] speech, namely any online speech involving Codal," and "in order to determine whether [defendants] violated the court's order, one would have to examine the content of their online posting"); Lo v. Chan, 2015 WL 9589351 (Cal. Ct. App. Dec. 30, 2015) (holding that order "prohibiting appellants from approaching, yelling out, or calling out to parishioners concerning respondent or other church officials from the Cerritos College parking lot on any day church services are held is, on its face, an impermissible content–based prior restraint of speech"); Sarver v. Chartier, 813 F.3d 891, 903 (9th Cir. 2016) (recognizing that a state right of publicity law, which bars commercial uses of a plaintiff's name, likeness, or other attributes of identity, is content–based).

159. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

160. *Id.*

"separate and additional" basis for finding the restriction to be content–based.[161] Determining whether the defendant is violating the order requires "'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred,"[162] and in particular whether the defendant's new speech contains a reference to plaintiffs.

Nor does it matter that the speech may be covered by a stalking or harassment statute that applies generally to "a pattern of conduct."[163] Speech does not lose its First Amendment protection simply because it's restricted as part of a broader conduct restriction, at least when the conduct restriction applies to the speech precisely because of what it communicates.

The leading case on such conduct restrictions—ones that include speech because of what it says—is *Holder v. Humanitarian Law Project*,[164] where a federal statute forbade providing "material support" to foreign terrorist organizations.[165] The statute restricted providing money, goods, or soldiers to such organizations, but also swept in speech such as training the organizations in international law or advising them on petitioning the United Nations.[166] The government sought to categorize the speech restriction as merely incidental, because it was part of a restriction on a broad course of conduct.[167] But the Court disagreed: "The law here may be described as directed at conduct, . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a

161. *Id.* (citation omitted).
162. McCullen v. Coakley, 573 U.S. 464, 479 (2014) (citation omitted).
163. *See, e.g.*, FLA. STAT. §§ 784.048–.0485.
164. 561 U.S. 1 (2010).
165. *Id.* at 28.
166. *Id.* at 27.
167. *Id.* at 27–28.

message."[168] The law therefore had to be treated as a speech restriction, not merely a conduct restriction.[169]

The same was true in *Cohen v. California*,[170] the main precedent on which *Humanitarian Law Project* relied on this point. "*Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace."[171] "But when Cohen was convicted for wearing a jacket bearing an epithet," "we recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message."[172]

Likewise, even if a defendant's speech that violates a stop – talking – about–plaintiff injunction also violates a stalking or harassment statute, it does so because of what the speech communicated. The injunction must therefore be treated as a content–based speech restriction.

B. "Speech integral to criminal conduct"

Some litigants have argued that broad "anti–harassment" injunctions are constitutional under the First Amendment exception for "speech integral to criminal conduct": The enjoined speech, the theory goes, is integral to criminal harassment or stalking.[173]

The speech integral to criminal conduct exception generally applies to speech that's closely connected to a nonspeech crime (or a crime involving unprotected speech, such as child pornography).

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168. *Id.* at 28.

169. The Court ultimately upheld this "content–based regulation of speech," but only because it was "carefully drawn to cover only a narrow category of speech" that implicated "the Government's interest in combating terrorism[, which] is an urgent objective of the highest order." *Id.* at 26–28.

170. 403 U.S. 15 (1971).

171. *Holder*, 561 U.S. at 28.

172. *Id.* For many more examples, *see* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation–Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005).

173. Merit Brief of Appellees, Bey v. Rasawehr, No. 2019–0295, at 7–14 (Ohio Aug. 20, 2019).

Speech that threatens illegal conduct might qualify.[174] So might speech that solicits illegal conduct.[175] An injunction against such threats or solicitation might thus fit within the exception—but an injunction against all speech about a person is not thus limited.

Some courts have upheld *criminal prosecutions* under a federal stalking statute that criminalizes (among other things) repeated speech that "causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress" and is said "with the intent to . . . harass,"[176] reasoning that this speech is integral to the criminal conduct that the statute itself bans.[177]

One such case, *Petrovic*, involved speech that genuinely was integral to a *separate* crime (extortion). Petrovic threatened to publish nude photos of M.B. and other personal information about her if she ended their relationship; when she did end it, he mailed postcards to her family and workplace, as well as local businesses, with a link to a website where he posted the photos and information.[178] A jury found Petrovic guilty of extortion (in violation of 18 U.S.C. § 875(d)), as well as violating the interstate stalking statute (18 U.S.C. § 2261A(2)(A)).[179] The Eighth Circuit held that "[t]he communications for which Petrovic was convicted under § 2261A(2)(A) were integral to this criminal conduct as they constituted the *means of carrying out his extortionate threats*."[180]

Another case, *Osinger*, did appear to involve speech that was punished without a connection to a separate crime; the court concluded that the speech there—posting revenge porn of an ex–girlfriend—

174. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1003–07 (2016).

175. *Id.* at 989–97.

176. 18 U.S.C. § 2261A(2)(B).

177. United States v. Petrovic, 701 F.3d 849 (8th Cir. 2012); United States v. Osinger, 753 F.3d 939 (9th Cir. 2014); United States v. Gonzalez, 905 F.3d 165 (3d Cir. 2018).

178. *See* 701 F.3d at 852–53.

179. *See id.* at 854.

180. *Id.* at 855 (emphasis added).

was integral to his criminal conduct "in intentionally harassing, intimidating or causing substantial emotional distress to V.B."[181] One more case, *Gonzalez*, followed the same approach.[182] But I think that *Osinger* and *Gonzalez* are unsound applications of the "speech integral to criminal conduct" doctrine, even in the context of criminal cyberstalking prosecutions.[183] Perhaps the results in some such cases might be defended on some other theory, for instance that revenge porn (*Osinger*) is a constitutionally unprotected invasion of privacy,[184] or that the speech in *Gonzalez* was libelous and thus constitutionally unprotected.[185] The "speech integral to criminal conduct" rationale, though, cannot itself justify criminal harassment statutes; and several state appellate decisions agree.

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181. 753 F.3d at 947. Two of the cases *Osinger* cited to support its holding, *Petrovic* and *United States v. Meredith*, 685 F.3d 814 (9th Cir. 2012), involved speech integral to the commission of a separate crime (extortion in *Petrovic*, fraud in *Meredith*). One other case, *United States v. Shrader*, did not address the "speech integral to criminal conduct" exception, but dealt only with a vagueness challenge. 675 F.3d 300, 311 (4th Cir. 2012).

I think Judge Watford had the better approach to *Osinger*; he concurred because he saw the speech as continuing a course of harassment that began with Osinger physically stalking his victim, 753 F.3d at 952 (Watford, J., concurring), and he noted that "[c]ases in which the defendant's harassing 'course of conduct' consists entirely of speech that would otherwise be entitled to First Amendment protection" raise "a question whose resolution we wisely leave for another day." *Id.* at 954.

182. In *Gonzalez*, the Third Circuit made a similar mistake to that in *Osinger*, applying the "integral to criminal conduct" exception to speech that was not connected to a separate crime. 905 F.3d 165, 193 (3d Cir. 2018). *See also* Commonwealth v. Johnson, 21 N.E.3d 937 (Mass. 2014); United States v. Sergentakis, 2015 WL 3763988, at *4–*7 (S.D.N.Y. 2015).

183. For much more on my disagreement with those cases, see Volokh, *The "Speech Integral to Criminal Conduct" Exception*, at 1036–43; what follows in the text is a quick summary of my argument, coupled with material from cases decided after that article was written.

184. *See, e.g.*, Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, *supra* note 12, at 2303; Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 100 UCLA L. REV. 1366, 1378 (2016); State v. VanBuren, 214 A.3d 791 (Vt. 2019); *cf.* Borzych v. Hart, No. 2019CV008976 (Wisc. Cir. Ct. Milwaukee Cty. Dec. 5, 2019) (docket entry, available on Westlaw Dockets) (harassment order enjoining the posting or emailing of "any explicit images of the petitioner").

185. 905 F.3d at 192–93.

Thus, in *People v. Relerford*,[186] the Illinois Supreme Court held that an Illinois stalking law could not be justified under the "speech integral to criminal conduct" exception, because it was not limited to speech "'proximate[ly] link[ed]'" to "some other criminal act."[187] Instead, the court concluded, "[i]n light of the fact that a course of conduct [under the Illinois law] can be premised exclusively on two communications to or about a person," the stalking law "is a direct limitation on speech that does not require any relationship—integral or otherwise—to unlawful conduct."[188]

Under the Illinois law, "the speech [was] the criminal act," and the speech integral to criminal conduct exception therefore did not apply.[189] As an Illinois appellate case later held, "without this link between the unprotected speech and a separate crime, the exception would swallow the first amendment whole: it would give the legislature free rein to criminalize protected speech, then permit the courts to find that speech unprotected simply because the legislature criminalized it."[190]

Similarly, in *Matter of Welfare of A.J.B.*,[191] the Minnesota Supreme Court rejected the government's argument that a stalking by mail statute was valid under the "speech integral to criminal conduct" exception.[192] The court held the argument was "circular," since "the speech covered by the statute is integral to criminal conduct because the statute itself makes the conduct illegal."[193] Thus, the statute was unconstitutional, because it was not limited to speech aimed "to induce or commence a separate crime."[194]

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186. 104 N.E.3d 341 (Ill. 2017).

187. *Id.* at 352.

188. *Id.*

189. *Id.*

190. Flood v. Wilk, 125 N.E.3d 1114, 1128 (Ill. App. Ct. 2019).

191. 929 N.W.2d 840 (Minn. 2019).

192. *Id.* at 859.

193. *Id.*

194. *Id.* at 852. *See also* Burroughs v. Corey, 92 F. Supp. 3d 1201, 1209 n.16 (M.D. Fla. 2015) ("Burroughs asserts that an argument for the 'speech integral to criminal conduct'

In *State v. Doyal*,[195] the Texas Court of Criminal Appeals (Texas' highest court for criminal cases) likewise wrote:

> The State also contends that any speech that is implicated by the statute is unprotected because it constitutes "speech integral to criminal conduct." But the cases that involve this form of unprotected speech involve speech that furthers *some other activity* that is a crime.[196]

And in *State v. Shackelford*, the North Carolina Court of Appeals held that a stalking statute was unconstitutional as applied to the defendant's social media posts because,

> Defendant's indictments were premised . . . upon social media posts . . . that he wrote *about* Mary but did not send directly *to* her (or, for that matter, to anyone else). . . . [H]is speech itself was the crime.
>
> For this reason, the First Amendment is directly implicated by Defendant's prosecution . . . . We therefore reject the State's argument that Defendant's posts fall within the "speech integral to criminal conduct" exception. . . . ("[The statute] does not incidentally punish speech that is integral to a criminal violation; the speech itself is the criminal violation.")[197]

Legislatures are free to punish nonspeech conduct, as well as narrow categories of constitutionally unprotected speech, such as true threats. But they cannot label speech that mentally distresses people "stalking" and then punish all such speech.[198]

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exception is circular with respect to this statute because the speech is only integral to criminal conduct because this statute criminalizes the conduct. Burroughs is right that speech cannot be unprotected only because it is criminal in the challenged statute. However, speech is unprotected where it is integral to criminal *conduct* forbidden under another statute, such as where the speech constitutes the crime of extortion."), *aff'd*, 647 F. App'x 967 (11th Cir. 2016).

195. 589 S.W.3d 136 (Tex. Crim. App. 2019).

196. *Id.* at 143 (emphasis added).

197. 825 S.E.2d 689, 698–99 (N.C. Ct. App. 2019).

198. *Mashaud v. Boone*, 256 A.3d 235 (D.C. Aug. 12, 2021), *review en banc granted*, noted the tension between *A.J.B.* and some of the federal stalking cases, such as *Osinger*, but

But in any event, for our purposes we need not resolve whether the *Osinger* view or the *Relerford* view is right as to criminal punishments for *specific past speech* designed to cause substantial emotional distress. None of those cases offers support to categorical injunctions against *all future speech* about the plaintiff; to quote the Ohio Supreme Court in *Bey v. Rasawehr*,

> Even if past speech that an offender [engaged in] . . . could be considered speech that was integral to the criminal conduct of menacing by stalking, we do not believe that this principle may be applied categorically to future speech—that is by its nature uncertain and unknowable—directed to others.
>
> Because of the uncertainty inherent in evaluating future speech that has yet to be expressed, the record here cannot justify a content–based prior restraint on speech when there has been no valid judicial determination that such speech will be integral to criminal conduct, defamatory, or otherwise subject to lawful regulation based on its content.[199]

C. "Harassment is not protected speech"

A few courts have upheld broad injunctions on the grounds that "harassment is not protected speech." This has been especially common in California, under the theory that "speech that consti-

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didn't resolve it. *See id.* at 240–42. A dissenting judge would have followed the *A.J.B.* approach. *Id.* at 246 (Beckwith, J., dissenting).

199. 161 N.E.3d 529, 542 (Ohio 2020); *see also* Buchanan v. Crisler, 922 N.W.2d 886, 901–02 (Mich. Ct. App. 2018) (explaining that "to enjoin an individual from posting a message in violation of MCL 750.411s," a criminal harassment statute, "there must first be a finding that a prior posting violates that statute," and "the trial court should then consider the nature of the postings that will be restricted to ensure that constitutionally protected speech will not be inhibited by enjoining an individual's online postings").

tutes 'harassment' within the meaning of section 527.6 [of the California Code of Civil Procedure] is not constitutionally protected, and the victim of the harassment may obtain injunctive relief."[200]

Like many broad assertions, this one originated in a case where it made sense—that case involved "[v]iolence and threats of violence,"[201] and such conduct and speech is indeed constitutionally unprotected.[202] Some other courts have likewise asserted that "free speech does not include the right to cause substantial emotional distress by harassment or intimidation," specifically in the context of unprotected true threats or unwanted speech to a person.[203]

But the application of the assertion grew, as these things do. By its terms, § 527.6 allows injunctions not just based on "violence" or "a credible threat of violence," but also

- "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person,"
- "that serves no legitimate purpose,"
- "which would cause a reasonable person to suffer substantial emotional distress," and
- which "actually cause[s] substantial emotional distress to the petitioner."[204]

And later cases have read this provision to cover nonthreatening speech about a person, for instance,

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200. Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc., 129 Cal. App. 4th 1228, 1250 (Ct. App. 2005); *see also* Guiffrida v. Glick, 2017 WL 2439511, at *2 (Mont. 2017).

201. *Huntingdon*, 129 Cal. App. at 1250.

202. *See, e.g.*, Virginia v. Black, 538 U.S. 343 (2003).

203. *See* Purifoy v. Mafa, 556 S.W.3d 170, 190, 192 (Tenn. Ct. App. 2017) (citation omitted); State v. Cooney, 894 P.2d 303, 307 (Mont. 1995); State v. Goldberg, No. M2017–02215–CCA–R3–CD, 2019 WL 1304109 (Tenn. Ct. Crim. App. Mar. 20, 2019); Erickson v. Earley, 878 N.W.2d 631, 635 (S.D. 2016); Bd. of Dirs. for Glastonbury Landowners Ass'n, Inc. v. O'Connell, 396 Mont. 548 (2019); *see also* State v. Nye, 943 P.2d 96, 101 (Mont. 1997) (making such a statement as to speech posted on others' property without their permission).

204. CAL. CODE CIV. PROC. § 527.6.

- a woman's emails to the Marine Corps making various complaints about her neighbor, a marine;[205]
- a man's complaints to the police department about the alleged behavior of his neighbor, a police officer;[206]
- a man's "statement on his blog suggesting [another man] committed sexual assault";[207]
- a man's posting any "photographs, videos, or information about [a friend whom he had earlier pursued romantically] to any internet site";[208]
- a man's engaging in "social media harassment with family names" of a fellow church member's family—which apparently seemed to refer to any social media commentary (or at least critical commentary) about the family.[209]

But, in the words of then–Judge Alito, "There is no categorical 'harassment exception' to the First Amendment's free speech clause."[210] The Ninth Circuit, the New Jersey Supreme Court, and the Michigan and Washington Courts of Appeals have adopted the

205. Parnell v. Shih, No. D074805, 2020 WL 1451931, at *5 (Cal. Ct. App. Mar. 25, 2020).

206. Hunley v. Hardin, No. B210918, 2010 WL 297759, at *4 (Cal. Ct. App. Jan. 27, 2010) (upholding the injunction based in part on findings that defendant had "made false complaints designed to damage [plaintiff's] professional career," but the injunction barred all future complaints, absent court permission, and not just false complaints).

207. Altinawi v. Salman, No. B284071, 2018 WL 5920276, at *6 n.8 (Cal. Ct. App. Nov. 13, 2018) (describing trial court's conclusion, but not reaching its validity on appeal because defendant had not appealed it).

208. Phillips v. Campbell, 206 Cal. Rptr. 3d 492, 500 (Ct. App. 2016).

209. Burrett v. Rogers, No. G047412, 2014 WL 411240, at *2 (Cal. Ct. App. Feb. 4, 2014).

210. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001); *see also* DeJohn v. Temple Univ., 537 F.3d 301, 316 (3d Cir. 2008).

same view, quoting Justice Alito's statement.[211] None of the Supreme Court's lists of First Amendment exceptions have included a harassment exception.[212] Indeed, as one California decision noted, harassment under California law is not protected speech "only because the definition of harassment *carves out* constitutionally protected activity":[213]

> Thus, even if the defendant's conduct meets the statutory definition of harassment in every other way—i.e., it evidences a continuity of purpose, it is directed at a specific person, it causes the plaintiff to suffer substantial emotional distress, and it would cause a reasonable person to suffer substantial emotional distress—we still must determine whether it is constitutionally protected.[214]

As I noted above, some alleged harassment might indeed be constitutionally unprotected: for instance, true threats of criminal conduct, which are criminalized as "harassment" in many states.[215] Likewise, traditional "telephone harassment" and its modern analogs—again, unwanted speech said *to* a person, rather than publicly accessible speech *about* a person[216]—are likely constitutionally unprotected under the principle that "no one has a right to press even

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211. Catlett v. Teel, 477 P.3d 50, 59 (Wash. Ct. App. 2020); TM v. MZ, 926 N.W.2d 900, 909 (Mich. Ct. App. 2018); State v. Burkert, 174 A.3d 987, 1000 (N.J. 2017); Rodriguez v. Maricopa Cty. Cmty. Coll. Dist., 605 F.3d 703, 708 (9th Cir. 2010); *see also* Falossi v. Koenig, No. E048400, 2010 WL 4380112, at *13 (Cal. Ct. App. Nov. 5, 2010).

212. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality op.); United States v. Stevens, 559 U.S. 460, 462 (2010); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

213. Falossi v. Koenig, No. E048400, 2010 WL 4380112, at *13 (Cal. Ct. App. Nov. 5, 2010).

214. *Id.*

215. *See, e.g.*, IDAHO CODE ANN. § 18–7902(c); NEV. REV. STAT. ANN. § 200.571(1)(a)(1)–(3). *State v. D.R.C.*, 467 P.3d 994 (Wash. Ct. App. 2020), is thus correct when it says, "When it comes to the crime of harassment, speech is not protected if it constitutes a true threat, as opposed to mere bluster or hyperbole." *Id.* at 998.

216. *See supra* note 114 and accompanying text for some discussion of borderline cases, such as "@" references on Twitter.

'good' ideas on an unwilling recipient."[217] (That latter line is from a case that upheld a ban on unwanted mailings to a person's home.) But all the injunctions we are discussing here go far beyond that.

D. Restrictions based on past speech or conduct

Most injunctions against speech follow some past improper speech by the defendant—for instance, some past libels. The logic seems to be that such defendants have proved themselves to be irrational or malicious, and the only way to prevent similar misbehavior is through a categorical ban. At least one appellate case, *Best v. Marino*,[218] makes that explicit:

> The state has broad power to limit a person's liberty interests based on that person's prior [criminal] conduct . . . . The rationale underlying such statutes [which mandate imprisonment, loss of the right to vote, loss of the right to keep and bear arms, or registration of sex offenders] is that the public interest is served by limiting a convicted felon's ability to engage in certain activity—even though that limitation burdens the exercise of the person's inherent rights. [Footnote: Although Respondent was not convicted of "stalking," we conclude that the district court's finding [of stalking in a civil case] is analogous to a conviction for the purposes of this opinion.]
>
> Orders of protection are essentially justified by the same rationale. The purpose of an order of protection is to prevent future harm to a protected party by a restrained party. To achieve this result, it is constitutionally permissible to limit a restrained party's ability to engage in certain activity—including the exercise of his or her right to free speech.

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217. Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 730 (1970); *see* McCurdy v. Maine, No. 2:19–cv–00511, 2020 WL 1286206, at *8 (D. Me. Mar. 18, 2020) (approving of state court's view that "harassment is not protected under the First Amendment" on the grounds that the state court order was limited to unwanted speech to a person), *recommended decision affirmed*, *id.* (May 19, 2020).

218. 404 P.3d 450 (N.M. Ct. App. 2017).

> The Order of Protection limited Respondent's right to speak and publish freely only inasmuch as it restrained her from (1) directly contacting Petitioner, and (2) causing Petitioner to suffer severe emotional distress [even in the absence of direct contact]. Placing such limitations on Respondent—as the restrained party under the Order of Protection—is not an unconstitutional limitation on her First Amendment rights.[219]

This, though, is inconsistent with the Supreme Court's First Amendment precedents. Indeed, *Near v. Minnesota* struck down a statute that allowed a court to enjoin future distribution of "a malicious, scandalous and defamatory newspaper," so long as the court found that the defendant had regularly published such a newspaper in the past.[220] Near's past misconduct couldn't justify such an injunction, the Court held, even though the state had alleged that Near had published nine "malicious, scandalous and defamatory" editions.[221]

Likewise, *Packingham v. North Carolina* made clear that, whatever rights convicted sex offenders may lose, once they are released from prison and probation, they retain full First Amendment rights.[222] (Repeated frivolous litigation can indeed lead to limits on future lawsuits,[223] but the filing of a lawsuit invokes the legal system in a way that imposes legal burdens on the court system and the defendant.[224] A vexatious litigant designation only keeps the court system from being used to inflict such burdens, and doesn't limit the litigant's out – of–court speech.)

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219. *Id.* at 458–59.

220. 283 U.S. 697, 701 (1931).

221. *Id.* at 703.

222. 137 S. Ct. 1730 (2017).

223. *See, e.g.*, CAL. CODE CIV. PROC. §§ 391.1, 391.3, 391.7; TEX. CIV. PRAC. & REMEDIES CODE §§ 11.001–.101.

224. *See, e.g.*, Tokerud v. Capitolbank Sacramento, 38 Cal. App. 4th 775, 779 (1995) (upholding vexatious litigant finding based on plaintiff's "repeatedly fil[ing] baseless actions" because such actions are "a burden on the target of the litigation and the judicial system").

Again, the Ohio Supreme Court's analysis in *Bey v. Rasawehr* is correct:

> Because of the uncertainty inherent in evaluating *future* speech that has yet to be expressed, the record here cannot justify a content–based prior restraint on speech when there has been no valid judicial determination that such speech will be integral to criminal conduct, defamatory, or otherwise subject to lawful regulation based on its content.
>
> When it comes to speech, the application of a criminal law should generally occur after the contested speech takes place, not before it is even uttered. As observed by the United States Supreme Court in *Carroll v. President & Commissioners of Princess Anne*,
>
> "Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached. The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement."[225]

To be sure, a criminal conviction does reduce the defendants' free speech rights while they are imprisoned, and while they are out on probation. In particular, restrictions on probationers' speech about a crime victim have sometimes been upheld, on the theory that they "encourag[e] the defendant's acceptance of responsibility for the crime and protect[] the victim, as a member of the public, from further harm, whether emotional, physical, or financial."[226]

But those are restrictions that follow a criminal trial, which offers many important procedural protections:

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225. 161 N.E.3d 529, 542 (Ohio 2020).

226. *See, e.g.*, Commonwealth v. Pereira, 99 N.E.3d 835, 842 & n.10 (Mass. App. Ct. 2018).

1. Defendants can't be sentenced to prison or even to probation unless they can either afford a lawyer or are offered a court–appointed defense lawyer.[227]
2. A criminal sentence can only be imposed based on proof of guilt beyond a reasonable doubt.[228]
3. For all crimes where the maximum sentence is over six months (whether or not a sentence that long is imposed), the defendant is entitled to a trial by jury.[229]
4. In nearly all jurisdictions, the criminal proceeding cannot be authorized unless the prosecutor concludes that a prosecution is merited.[230]

A civil restraining order, based on a judge's finding of "stalking" or libel, lacks all these protections.[231] Most significantly, such orders are often entered when the defendant lacks a lawyer, and there is therefore no "meaningful adversarial testing" of the defendant's contentions.[232] Whatever merit speech–restrictive probation conditions might have, they can't justify similar conditions in civil cases. And the cases discussed in Part C reaffirm that: Courts have indeed generally stressed that even a finding at trial that certain speech is libelous only justifies restrictions against repeating that particular speech.

E. Private concern

Some intermediate appellate courts have upheld injunctions on the grounds that they were focused on speech on matters of purely

227. Alabama v. Shelton, 535 U.S. 654, 667, 674 (2002).

228. *In re* Winship, 397 U.S. 358 (1970).

229. Lewis v. United States, 518 U.S. 322 (1996).

230. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 529 & nn.71–72 (1994) (discussing this general rule and some rare exceptions).

231. In some cases, an overbroad injunction may be issued following a jury finding of guilt, so protection 3 in the above list would be present; but the others would still be absent.

232. *Shelton*, 535 U.S. at 667 (cleaned up).

"private concern," and that such speech is less constitutionally protected than speech on matters of public concern.[233] I think this is generally a mistake.

To begin with, let's distinguish two possible senses of "private" when it comes to speech, especially speech that is said to be harassment:[234]

1. Speech that is seen as *intruding on the subject's privacy*.
2. Speech that is seen as being about *matters that aren't of public importance*, and are therefore seen as less constitutionally valuable.

The "private concern" argument in favor of such injunctions emerged as to matters that intruded on the subject's privacy. The earliest such cases involved unwanted speech sent to an unwilling listener, for instance by email, phone, or mail.[235] Such speech may indeed be more regulable, because it is likely only to offend, and not to persuade or enlighten.[236] But beyond being less valuable, the speech is also generally seen as an intrusion on the listeners' rights

233. *See* Buchanan v. Crisler, 922 N.W.2d 886, 901–02 (Mich. Ct. App. 2018); Neptune v. Lanoue, 178 So. 3d 520, 523 (Fla. Ct. App. 2015); Guiffrida v. Glick, 403 P.3d 1245 (Mont. 2017).

234. There are other possible senses, but these are the ones I want to focus on here.

235. The origin of the California "private concern" orders (and the earliest such case I found in any state) is *Brekke v. Wills*, 23 Cal. Rptr. 3d 609, 616–17 (Ct. App. 2005), which involved a letter addressed by a 16–year–old boy to his 15–year–old girlfriend's mother; while defendant delivered it to his girlfriend, he "intended that plaintiff would read and be annoyed by [it]." *Id.* at 618. *See also* State v. Nguyen, 450 P.3d 630, 640 (Wash. Ct. App. 2019) (upholding stalking conviction based in part on the theory that the statute targets speech on matters of purely private concern; the speech in that case consisted of threats and statements made directly to the victim); Wagner v. State, 539 S.W.3d 298, 310–11 (Tex. Crim. App. 2018) (likewise); Edwards v. Rose, No. C086490, 2019 WL 4051878, at *3 (Cal. Ct. App. Aug. 28, 2019) (citing *Brekke v. Wills* as to private matters, but using it to uphold injunction limited to speech to plaintiff); Scott v. Steiner, No. B258400, 2015 WL 9311734 (Cal. Ct. App. Dec. 22, 2015) (likewise); Moore v. Fox, No. B233657, 2013 WL 953995, at *15 (Cal. Ct. App. Mar. 13, 2013) (likewise); Mitchell v. Mitchell, No. A131632, 2012 WL 2510051 (Cal. Ct. App. June 28, 2012) (likewise).

236. *See* Volokh, *One–to–One Speech vs. One–to–Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, *supra* note 13, at 743.

"to be let alone" in their own homes or at least their own communications devices and accounts.[237]

Following those cases, the California Court of Appeal upheld an injunction against distributing information improperly downloaded from petitioner's cell phone, and that case (*Evilsizor*) has often been cited since.[238] Such publication of illegally intercepted material is one area where the Supreme Court has indeed looked to whether the material is on matters of public concern (see the discussion of *Bartnicki v. Vopper* below). And such publication implicates the subject's right of privacy in personal communications.

The "private concern" rationale has also been applied to broader restrictions on information that might loosely be seen as covered by the disclosure of private facts tort—embarrassing information (such as the details of a divorce[239]) or information about a person's location or contact information (such as home addresses[240] and personal phone numbers[241]). I discuss elsewhere injunctions that genuinely do focus on such highly personal information.[242]

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237. *See, e.g.*, Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 736 (1970).

238. *In re* Marriage of Evilsizor & Sweeney, 189 Cal. Rptr. 3d 1, 11 (Ct. App. 2015); *see also* Littleton v. Grover, 2019 WL 1150759, at *2 (Wash. Ct. App. Mar. 12, 2019) (involving communication of private emails); *In re* Marriage of Nadkarni, 93 Cal. Rptr. 3d 723, 734 (Ct. App. 2009) (involving similar facts to *Evilsizor*, but without a First Amendment defense).

239. Wedding v. Harmon, 492 S.W.3d 150, 153, 155 (Ky. Ct. App. 2016) (concerning "private email communications between themselves" and "comments regarding the interaction of the parties, the communication between the parties, the details of the parties' divorce, or any arrangements to be made through the parties"); *see also* Lewis v. Rehkow, No. 1 CA–CV 19–0075 FC, 2020 WL 950215, *2 (Ariz. Ct. App. Feb. 27, 2020) (discussing, without a First Amendment analysis, a December 2006 order barring parties from publicly discussing their divorce case).

240. Santsche v. Hopkins, No. A154559, 2019 WL 1353295, at *6 (Cal. Ct. App. Mar. 26, 2019).

241. Westbrooke Condo. Ass'n v. Pittel, No. A14–0198, 2015 WL 133874, at *2 (Minn. Ct. App. Jan. 12, 2015); Polinsky v. Bolton, No. A16–1544, 2017 WL 2224391, at *2 (Minn. Ct. App. May 22, 2017) (concerning "addresses, telephone numbers, photographs or any other form of information by which a reader may contact, identify or locate").

242. *See* Eugene Volokh, *Injunctions Against Disclosure of Private Facts* (in progress).

But since *Evilsizor*, the "private concern" rationale has also been applied to cases where the speech isn't generally seen as an invasion of privacy, except in the loosest sense that all unwanted speech about someone might be seen as qualifying. Some injunctions, for instance, forbid

- any references to plaintiff "under an identity or auspices other than [defendant's] true name,"[243]
- speech accusing plaintiffs of committing crimes,[244]
- any "disparaging comments" about plaintiffs,[245] and
- all speech on social media about plaintiffs.[246]

The rationale there, it seems to me, is simply that speech on matters of private concern is not valuable enough to be protected.[247] And I think this rationale is mistaken.

To begin with, speech on matters far removed from politics, religion, science, art, or other big topics remains covered by the First Amendment:

> *Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation. Even "'[w]holly neutral futilities . . . come under the

243. *Polinsky*, 2017 WL 2224391, at *2.

244. *Westbrooke Condo. Ass'n*, 2015 WL 133874, at *2–*3 (upholding a broad order in part because it was based on defendant's having posted claims "that the [plaintiff] condominium association was run by criminals and was engaged in criminal activity"); Guiffrida v. Glick, 2017 MT 136N, 388 Mont. 556, ¶¶ 2, 6 (2017) (likewise, as to claims that "accused [plaintiff] of murder").

245. *Westbrooke Condo. Ass'n*, 2015 WL 133874, at *1.

246. Narian v. Sanducci, No. B286152, 2018 WL 5919462, at *1 (Cal. Ct. App. Nov. 13, 2018); SLA v. SZ, No. 349341, 2020 WL 3022755, at *7–*8 (Mich. Ct. App. June 4, 2020) (describing order as banning all "posting [of] a message through the use of any medium of communication, including the internet or a computer or any electronic medium, pursuant to MCL 750.411s," but presumably implicitly limited to posting material about the plaintiffs).

247. *See, e.g.*, Buchanan v. Crisler, 922 N.W.2d 886, 901 (Mich. Ct. App. 2018); Parisi v. Mazzaferro, 210 Cal. Rptr. 3d 574, 583 (Ct. App. 2016), *disapproved of on other grounds by* Conservatorship of O.B., 470 P.3d 41 (Cal. 2020).

> protection of free speech as fully as do Keats' poems or Donne's sermons.'"[248]

And that is particularly true of speech about people who are important to our private lives. When we talk to our friends about our lives, we also talk about those with whom we have shared those lives. Telling a woman, for instance, that she can't mention her ex–boyfriend (or even just that she can't criticize him) on her Facebook page keeps her from explaining her own life story to her friends. Why is she single again? Why is she upset? Why is she hesitant about future relationships?

People often can't answer such questions honestly, and in a way that their friends recognize as honest, without talking about their exes. Compare, for instance, *Bonome v. Kaysen*,[249] where a woman's published book that discussed the sexual details of a past relationship was seen as being enough on a matter of public concern to defeat a disclosure of private facts lawsuit.[250] Explaining how one feels, and who made one feel that way, is an important facet of self–expression, whether in a memoir or on a blog post:

> [I]f [a writer] wishes to tell what she described as "the ongoing story of my life" by announcing to the world that "this is what I did," or "this is what happened to me," it should be her right to do so. It is disturbing and constitutionally suspect to give anyone, including the government or her ex–boyfriend empowered by the government, censorship power over [such speech].[251]

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248. United States v. Stevens, 559 U.S. 460, 479 (2010) (citations omitted).

249. No. 032767, 2004 WL 1194731 (Mass. Super. Ct. 2004).

250. The lover's name wasn't mentioned in the book, but he plausibly alleged that he could be easily identified by those who knew the couple. *Id.* at *2; *see also* Anonsen v. Donahue, 857 S.W.2d 700 (Tex. Ct. App. 1993); Campbell v. Seabury Press, 614 F.2d 395 (5th Cir. 1980).

251. Sonja R. West, *The Story of Us: Resolving the Face–Off Between Autobiographical Speech and Information Privacy*, 67 WASH. & LEE L. REV. 589, 594 (2010); *see also* Sonja R. West, *The Story of Me: The Underprotection of Autobiographical Speech*, 84 WASH. U. L. REV. 905, 907–11 (2006).

To be sure, the Supreme Court has at times upheld certain kinds of restrictions on the grounds that they were limited to speech on matters of private concern. But the Court's reasoning in those cases was deliberately narrow.

1. In *Connick v. Myers*,[252] the Court first expressly set forth the public concern/private concern distinction, in limiting First Amendment claims brought by government employees who had been fired for their speech.[253] But the Court stressed that this stemmed from the government's role as employer, which was deciding only whether to continue employing an employee.[254] Because "government offices could not function if every employment decision became a constitutional matter," "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[255]

Indeed, the Court in *Connick* stressed that speech on matters of private concern remained protected against the government as sovereign:

> We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.'" We in no sense suggest that speech on private matters falls into one of the narrow and well–defined classes of expression which carries so little social value, such as obscenity,

252. 461 U.S. 138 (1983).
253. *Id.* at 143.
254. *Id.*
255. *Id.* at 143, 147.

> that the State can prohibit and punish such expression by all persons in its jurisdiction.[256]

Connick thus concludes that speech on matters of private concern *is* protected against injunctions, criminal punishment, and the like (though not against firing from a government job, the matter in *Connick* itself).

2. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[257] the Court held that false and defamatory statements of fact on matters of private concern could lead to presumed and punitive damages in libel cases, even without the showing of "actual malice" generally required for statements on matters of public concern.[258] As in *Connick*, the Court recognized that "such speech is not totally unprotected

256. *Id.* at 147 (citation omitted). *See also* Garcia v. State Univ. of N.Y. Health Scis. Ctr., 280 F.3d 98, 106 (2d Cir. 2001) ("[T]he public concern doctrine does not apply to student speech in the university setting."); Yano v. City Colls. of Chi., No. 08 CV 4492, 2013 WL 3791616, at *8 (N.D. Ill. July 19, 2013) (same), *aff'd sub nom*. Yano v. El–Maazawi, 651 F. App'x 543 (7th Cir. 2016); Deegan v. Moore, No. 7:16–CV–00260, 2017 WL 1194718, at *5 (W.D. Va. Mar. 30, 2017) (same); Guse v. Univ. of S.D., No. 08–4119, 2011 WL 1256727, at *16 (D.S.D. Mar. 30, 2011) (same); Qvyjt v. Lin, 932 F. Supp. 1100, 1108–09 (N.D. Ill. 1996) (same); Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 766 (9th Cir. 2006) (likewise for high school student speech); Jamshidnejad v. Cent. Curry Sch. Dist., 108 P.3d 671, 674–75 (Or. Ct. App. 2005) (likewise for junior high school student speech); Bridges v. Gilbert, 557 F.3d 541, 551 (7th Cir. 2009) (likewise for prisoner speech); Startzell v. City of Phila., No. CIV.A.05–05287, 2007 WL 172400, at *5 n.6 (E.D. Pa. Jan. 18, 2007) (likewise for speech on government property), *aff'd*, 533 F.3d 183 (3d Cir. 2008); Van Dyke v. Barnes, No. 13–CV–5971, 2015 WL 148977, at *5–*6 (N.D. Ill. Jan. 12, 2015) (likewise when government is accused of retaliating against foster parents); Eichenlaub v. Twp. of Ind., 385 F.3d 274, 284 (3d Cir. 2004) (likewise when government is accused of retaliating against speakers in zoning disputes); Nolan v. Vill. of Dolton, No. 10 CV 7357, 2011 WL 1548343, at *2 (N.D. Ill. Apr. 21, 2011) (likewise when government is accused of filing retaliatory criminal charges). The one case I have found that applies *Connick* to government action in programs outside government employment, *Landstrom v. Illinois Dep't of Child. & Fam. Servs.*, 892 F.2d 670, 679 (7th Cir. 1990), appears to have been abrogated by *Bridges*. *See Van Dyke*, 2015 WL 148977, *5–*6; *Nolan*, 2011 WL 1548343, at *2.

257. 472 U.S. 749 (1985).

258. *Id.* at 759–60 (lead opin.).

by the First Amendment," though it concluded that "its protections are less stringent."[259]

But *Dun & Bradstreet* was dealing solely with liability for false and defamatory statements of fact—statements that the Court had already held lack "constitutional value" (whether they are "intentional lie[s]" or "careless error[s]").[260] The question was just how much protection such valueless statements should get to prevent an undue chilling effect on true statements.[261] The Court's holding thus doesn't justify outright prohibitions on true statements (or opinions) on matters of private concern—categories of speech that the Court has never labeled as having "no constitutional value."

3. In *Bartnicki v. Vopper*,[262] the Court held that third parties that receive copies of illegally intercepted cell phone calls may publish them, without fear of liability, if the calls contain "truthful information of public concern."[263] But the Court said that it "need not decide whether" liability could be imposed for "disclosures of trade secrets or domestic gossip or other information of purely private concern" that stem from illegally intercepted calls.[264]

4. In *Snyder v. Phelps*, the Court held that expressions of opinion on matters of public concern generally cannot lead to liability for intentional infliction of emotional distress, and concluded that the question "turns largely on whether that speech is of public or private concern."[265] "[W]here matters of purely private significance are at issue," the Court concluded, "First Amendment protections are often less rigorous."[266] This suggests that the emotional distress tort might be applicable to "intentionally or recklessly engaged in

259. *Id.* at 760.
260. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).
261. *Dun & Bradstreet*, 472 U.S. at 760.
262. 532 U.S. 514 (2001).
263. *Id.* at 534.
264. *Id.* at 533.
265. 562 U.S. 443, 451 (2011).
266. *Id.* at 452.

extreme and outrageous conduct [consisting of speech on matters of private concern] that caused the plaintiff to suffer severe emotional distress."[267]

But even if speech on matters of private concern is treated as a somewhat less protected category of speech—perhaps like commercial speech is a somewhat less protected category[268]—that can only justify certain kinds of restrictions, not categorical bans. Commercial speech, for instance, can be specially restricted when it's misleading, or when it proposes illegal transactions.[269] But it doesn't follow that a defendant can be entirely banned from engaging in commercial speech about some particular subject.

Likewise for bans on a defendant talking about a plaintiff. Such bans involve the government acting as sovereign, threatening jail time (for contempt of court) when someone says certain things. They are not limited to speech found to have "no constitutional value," such as true threats or false and defamatory statements of fact. They are not limited to constrained areas such as illegally intercepted conversations, or speech that a jury has found to be "outrageous" (a deliberately narrow zone[270]). So long as speech on matters of private concern is somewhat protected—and the Court has assured us that it is—it cannot be restricted through such categorical injunctions.[271]

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267. *Id.* at 451.

268. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

269. Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).

270. *See Snyder*, 562 U.S. at 458; Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 57 (1988); Zuger v. State, 673 N.W.2d 615, 622 (N.D. 2004).

271. *Parnell v. Shih*, No. D074805, 2020 WL 1451931 (Cal. Ct. App. Mar. 25, 2020), upheld an order barring a woman from future communications about her neighbor to the Marine Corps, the neighbor's employer. The court concluded that such speech was on a matter of private concern, lacked a "legitimate purpose," and could thus be banned. *Id.* at *3–*4. I think this was mistaken, but at least the order was narrow, and indeed the Court of Appeal narrowed the order from its original version (which had banned all communications to the Marine Corps by the defendant, not limited to communications about plaintiff).

Likewise, *Parisi v. Mazzaferro*, 210 Cal. Rptr. 3d 574 (Ct. App. 2016), *disapproved of as to other matters by Conservatorship of O.B.*, 470 P.3d 41 (Cal. 2020), concluded that speech

Moreover, some injunctions against speech about a person haven't been facially limited to speech on particular topics of private concern, or even to speech on matters of private concern generally (a test that would in any event likely be unconstitutionally vague in an injunction). For instance, they have applied to future speech

- accusing the plaintiff of criminal misconduct, which "generally [is] speech on a matter of public concern";[272]
- accusing government authorities of not properly investigating the plaintiff's alleged misconduct, which definitely would be speech on matters of public concern;[273]
- discussing a broad social problem and giving the plaintiff's alleged behavior as an example, which likewise would be speech on matters of public concern;[274]
- accusing a businessperson or a professional of providing poor service, which may likewise be speech on matters of public concern;[275]

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on matters of private concern could sometimes be enjoined, but held that an injunction against such speech had to be suitably narrow: The injunction could not ban all speech about plaintiff that "could be interpreted as a pattern of conduct with the intent to harass," but had to be limited to restricting the "repetition" of "specific defamatory statements made by [defendant] in his prior correspondence"—*i.e.*, speech that already fit within the defamation exception to the First Amendment. *Id.* at 586. And the *Parisi* court also invalidated a provision of the injunction that required prior court approval before defendant could write anything about one of the plaintiffs "to any government agency"; the defendant, the court ruled, "may not be constitutionally restrained from true petitioning activity to government officials." *Id.*

272. Obsidian Finance Group, LLC v. Cox, 740 F.3d 1284, 1292 (9th Cir. 2014); *see also* Adventure Outdoors, Inc. v. Bloomberg, 552 F.3d 1290, 1298 (11th Cir. 2008); Boule v. Hutton, 328 F.3d 84, 91 (2d Cir. 2003).

273. For examples of such speech that was indeed enjoined, see Bey v. Rasawehr, 161 N.E.3d 529 (Ohio 2020); Stark v. Stark, No. W201900650COAR3CV, 2020 WL 507644, at *1 (Tenn. Ct. App. Jan. 31, 2020).

274. *See* Florida Star v. B.J.F., 491 U.S. 524, 536–37 (1989) (holding that an article about a violent crime is speech on a matter of public concern, and this includes the name of the specific person—there, the victim—mentioned in the article).

275. Gardner v. Martino, 563 F.3d 981, 989 (9th Cir. 2009); Manufactured Home Cmtys., Inc. v. County of San Diego, 544 F.3d 959, 965 (9th Cir. 2008).

- discussing the court order itself, and the process that led to the court order,[276] which definitely would be speech on matters of public concern as well.

For all the reasons given above, I think the Ohio Supreme Court was right in expressly rejecting a "private concern" defense of an injunction:

> [O]ur role here is not to pass judgment on the . . . First Amendment value of Rasawehr's allegations. To the extent his statements involve matters of both private and public concern, we cannot discount the First Amendment protection afforded to that expression. We most assuredly have no license to recognize some new category of unprotected speech based on its supposed value. Rejecting such a "free–floating test for First Amendment coverage," the United States Supreme Court declared in *Stevens* that the First Amendment's guarantee of free speech "does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." "Our decisions * * * cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[277]

Likewise, the Vermont Supreme Court rejected the view that otherwise protected speech could be punished as "abusive . . . language" when it was on a matter of private concern:

> The U.S. Supreme Court has consistently interpreted the First Amendment to shield a broad and expansive array of speech. Of bedrock importance is the principle that the First Amendment's protections extend beyond expressions "touching upon a matter of public concern." *Connick*, 461 U.S. at 147 ("The First Amendment does not protect speech and assembly only to the extent it can be characterized as political . . . . We in no sense suggest that speech on private matters . . . carries so little social value . . . that the State can prohibit and punish such expression . . . ." . . .

276. *See supra* Part B.5.

277. Bey v. Rasawehr, 161 N.E.3d 529, 545–46 (Ohio 2020).

> Equally fundamental is the principle that "the Constitution protects expression . . . without regard . . . to the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 444–45 (1963).[278]

Similarly, in the words of the Third Circuit,

> [Many] cases point to the principle that outside the employment context the First Amendment forbids retaliation for speech even about private matters. . . . [W]hile speech on topics of public concern may stand on the "highest rung" on the ladder of the First Amendment, private speech (unless obscene or fighting words or the like) is still protected on the First Amendment ladder. The rationale for a public/private concern distinction that applies to public employees simply does not apply to citizens outside the employment context. By the same token, the decisions of the Supreme Court and of our court have not established a public concern threshold to the protection of citizen private speech. We decline to fashion one now.[279]

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278. State v. Tracy, 130 A.3d 196, 201 (Vt. 2015). The D.C. Court of Appeals has likewise vacated a speech–restrictive injunction on the grounds that "a communication does not lose First Amendment protection merely because it discusses matters of private rather than public concern." Mashaud v. Boone, 256 A.3d 235 (D.C. Aug. 12, 2021), *review en banc granted*. But it left open the possibility that an injunction might be justified if it was focused on information of a "very personal nature." *Id.*

279. Eichenlaub v. Twp. of Ind., 385 F.3d 274, 284 (3d Cir. 2004) (paragraph break omitted) (dealing with government retaliation against citizen speech on matters of private concern); *see also* McCraw v. City of Okla. City, 973 F.3d 1057 (10th Cir. 2020) (holding that even casual conversations with friends are protected by the First Amendment, even when they are not on matters of public concern: "while speech on topics of public concern may stand on the 'highest rung' on the ladder of the First Amendment, private speech (unless obscene or fighting words or the like) is still protected on the First Amendment ladder" (quoting *Eichenlaub*, 385 F.3d at 284)); Trusz v. UBS Realty Invs., LLC, 123 A.3d 1212, 1219 (Conn. 2015) (explaining that "workplace speech on private matters is protected by the first amendment to the same extent that it is protected elsewhere insofar that it cannot be punished or prohibited by the government acting in its role as a *lawmaker*," even though government employee speech on such matters can be restricted "in [the government's] role as an employer"); Falossi v. Koenig, No. E048400, 2010 WL 4380112, at *13 (Cal. Ct. App. Nov. 5, 2010) ("Falossi argues that Koenig's

Those cases, it seems to me, are correct in concluding that speech is protected even when it is on matters of "private concern"; and the lower court cases authorizing broad injunctions on a "private concern" theory are mistaken.

F. Bad intentions

Some courts have defended the broad injunctions on the grounds that the defendant's speech was ill–motivated. In *Bey v. Rasawehr*, for instance, the Ohio appellate court upheld an injunction, reasoning that Rasawehr's speech was "for an illegitimate reason born out of a vendetta seeking to cause mental distress."[280] (The Ohio Supreme Court later reversed the injunction, without discussing Rasawehr's intentions.) Some other courts have taken a similar view to that of the Ohio appellate court,[281] and some of the statutes that authorize anti–harassment orders specifically turn on whether the defendant's past speech lacked a "legitimate purpose" or was intended to "harass," "annoy," "inflict mental distress," and the like.[282] This justification for anti–speech injunctions is mistaken, though, for several related reasons:

1. The broad injunctions discussed in this Article are not limited to speech said with a particular motive. The judges might have felt

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photography was not protected because it did not relate to any matter of public concern. Recently, however, the United States Supreme Court reminded us that 'serious value' is not 'a general precondition to protecting . . . speech.'") (citing *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010)).

280. Bey v. Rasawehr, 2019–Ohio–57, 2019 WL 182418, at *8 ¶ 42 (Ohio Ct. App. 2019), *rev'd in part*, 161 N.E.3d 529 (Ohio 2020).

281. *See also Mashaud*, 256 A.3d at 238 (vacating a similar injunction that a trial court had justified on the grounds that the speaker "acted with a 'vindictive motive'").

282. IND. CODE ANN. § 35–45–2–2 (West, Westlaw through 2020 Reg. Sess.); IOWA CODE ANN. § 708.7 (West, Westlaw through 2020 Reg. Sess.); N.J. STAT. ANN. § 2C:33–4 (West, Westlaw through L.2020, c. 109 & J.R. No. 2.); OR. REV. STAT. ANN. § 166.065 (West, Westlaw through 2020 Reg. Sess.); 18 PA. STAT. & CONSOL. STAT. ANN. § 2709 (West, Westlaw through 2020 Reg. Sess.); MD. CRIM LAW CODE ANN. § 3–803 (West, Westlaw through 2020 Reg. Sess.); WASH REV. CODE ANN. § 9.61.260 (West, Westlaw through 2020 Reg. Sess.); WIS. STATE. ANN. § 813.125 (West, Westlaw through 2019 Act 186).

that they could predict the defendants' future motives based on the defendants' past speech, but people's intentions change.

Say, for instance, that someone has been sharply criticizing his former lawyer; a judge concludes that the criticism was intended to harass, and therefore forbids all future speech by the defendant about the lawyer (or even just all "derogatory" speech). The defendant might well want to criticize the injunction, out of a genuine desire to inform the public about what he sees as an injustice. In the process of doing this, he would need to mention the lawyer in describing how the injunction came about. But the injunction would restrict even such mentions.

2. The motives in these cases can be difficult to disentangle. Someone who feels mistreated by a professional or a business might be motivated both by hostility and a desire to warn others. Even complaints about exes might stem both from a desire for revenge and a desire to explain oneself to friends and acquaintances, or to warn them about what one sees as the ex's dangerous proclivities.

3. Partly because of this difficulty, judges' inferences about a speaker's intentions are likely to stem from the judges' reactions to the speaker's viewpoint or identity. Is the defendant a woman who is just trying to ruin a man who left her? Or is she someone who sincerely wants to warn her friends—including other women who might date him in the future—about what she sees as the man's deceitfulness, abusiveness, or psychological cruelty? Or could she have both motives, and if so, what should be the legal consequence of that?

Is the defendant seeking revenge on a company that fired him, or is he genuinely trying to blow the whistle on its alleged misconduct? Is the defendant just trying to subtly extort a settlement from a business (assume there is no concrete proof of extortion, but just a pattern of criticism that could be used for that purpose), or is he honestly trying to alert other consumers?

It's human nature to assume the best intentions of people whose views, experiences, or identities are like yours, and the worst of

people who are different from you. That danger is especially exacerbated if the decision is made by a single judge rather than by a jury that contains a mix of people, who would have to justify their views to each other. And the danger is further exacerbated when the case involves a default judgment (as many of the libel injunctions do[283]), an unrepresented litigant (as many of the libel injunction and harassment cases do[284]), and a busy judge who is trying to get through case after case.

4. Perhaps because of all this, "under well–accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection."[285] At one point, American criminal libel law did forbid reputation–damaging speech (whether true, false, or opinion) if it lacked "good motives" or "justifiable ends."[286] But the Court has expressly rejected that as to speech on matters of public concern;[287] again, recall that the broad injunctions discussed in this Article generally forbid all future speech about plaintiff, whether or not the speech is on matters of public concern or of private concern. And other courts have recognized the same principle as to speech on matters of private concern as well.[288]

Indeed, in *Near v. Minnesota*, the Court made clear that a speaker's past libelous speech cannot justify broad restrictions on nonlibelous speech in the future, even when the injunction is limited to speech said without "good motives."[289] *Hustler Magazine, Inc. v. Falwell*

283. *See, e.g.*, Baker v. Kuritzky, 95 F. Supp. 3d 52, 59 (D. Mass. 2015).

284. *See, e.g.*, Capital Resorts Group, Inc. v. Emmons, No. 3:15–CV–368–PLR–HBG, at 6 ¶ 2 (E.D. Tenn. Mar. 4, 2016).

285. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468 (2007) (opinion of Roberts, C.J., joined by Alito, J.) (alteration and internal quotation marks omitted); *id.* at 492 (Scalia, J., concurring in part and in the judgment, joined by Kennedy and Thomas, JJ.) (taking the same view); *see* Volokh, *Freedom of Speech and Bad Purposes*, *supra* note 184.

286. Volokh, *Freedom of Speech and Bad Purposes*, *supra* note 184, at 1390. Speech on matters of public concern was evaluated under the same test. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 265 (1952).

287. Garrison v. Louisiana, 379 U.S. 64 (1964).

288. State v. Turner, 864 N.W.2d 204, 209 (Minn. Ct. App. 2015).

289. 283 U.S. 697, 713 (1931).

similarly upheld Hustler's right to criticize Jerry Falwell in a harsh, vulgar, and deeply emotionally distressing way,[290] even though the attack there stemmed from Larry Flynt's personal hostility towards Falwell.[291]

Likewise, in *Tory v. Cochran*,[292] the Court considered a case challenging the constitutionality of an injunction barring a disgruntled litigant from picketing outside his former lawyer's office "holding up signs containing various insults and obscenities" (apparently as a means of pressuring the lawyer to pay the litigant money).[293] The Court ultimately vacated the injunction on narrow grounds: The lawyer (the famous Johnny Cochran) had died while the case was pending, so "the grounds for the injunction [were] much diminished, if they have not disappeared altogether."[294] But the Court agreed to hear the case despite the defendant's likely bad intentions or his "vendetta" against the lawyer; it vacated the injunction rather than just dismissing the case as improvidently granted; and it never suggested that Tory's bad intentions would strip the speech of First Amendment protection.

G. Too much?

Some of the injunctions might be motivated by the sense that the speaker's speech is just too frequent. Saying something once or a few times is fine, but more than that is too distressing for the victim, and no longer valuable to public debate—after someone repeats his criticisms too often, "enough is enough," and "at some point . . . it . . . becomes a personal vendetta to just upset the subject."[295]

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290. 485 U.S. 46, 57 (1988).

291. *See* RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 59–60 (1988).

292. 544 U.S. 734 (2005).

293. *Id.* at 735.

294. *Id.* at 738.

295. Oral Arg., Keyes v. Biro, No. B271768, at 4:00, 9:45 (Cal. Ct. App. Oct. 24, 2017) (Rothschild, J.). The court ultimately held that the injunction should be read narrowly, as limited to unwanted speech to the plaintiff—a doctor who the defendant thought committed malpractice—and not public speech about the plaintiff.

Libel law doesn't focus on the frequency of libelous statements, but harassment statutes often require "repeated" communications; the term "harassment" itself often connotes excessive repetition. And unwanted speech to an unwilling listener may indeed sharply decline in value when it's repeated, especially after the listener has demanded that it stop: Presumably the listener has heard and rejected the message, and repeating it is unlikely to persuade or enlighten.

Yet speech to the public can't lose its constitutional protection simply because of its frequency. Repetition is often needed to reach new listeners, to get the attention of listeners who might have ignored the statements before, or to offer new information even to listeners who have heard the past criticism.

This is why political and ideological advertisers don't assume that one ad run once is enough (whether that ad praises a candidate or a cause, or criticizes the other side). It's also why labor picketers and leafletters generally show up repeatedly, though this costs a great deal in time and effort. Newspapers sometimes satisfy themselves with one story about a person, but newspapers have to worry about turning off some paying readers who might be annoyed by what they see as repetition (even when the repetition successfully reaches other readers). Even so, newspapers may engage in a drumbeat of criticism, if they think it's warranted.

Unsurprisingly, the Supreme Court has often protected campaigns of criticism and not just individual statements. The leaflets criticizing Keefe were distributed on four days over the span of six weeks.[296] In *NAACP v. Claiborne Hardware Co.*, the names of black residents who chose not to go along with the boycott were apparently read in church and distributed on leaflets, so long as they

296. Keefe v. Org. for a Better Austin, 253 N.E.2d 76, 78 (Ill. App. Ct. 1969).

were not complying.[297] The speech in many picketing cases criticizing particular businesses has also been repeated.[298] Yet the Court has never suggested that such repetition would make the speech less protected.

IV. WHY THOSE COURTS ARE DOING IT

The principles I mentioned above—that a court may not enjoin speech that falls outside the First Amendment exceptions—are well–established; why then do at least some trial court judges depart from them?

A. Speech by private individuals as less respectable than speech by media outlets

As Part A made clear, even repeated vilification in newspapers or by organizations cannot be enjoined. Very few, if any, courts today would be inclined to enjoin alleged harassment or stalking—in the form of publications, whether in print or online—by a newspaper or by a familiar–looking, traditionally organized advocacy group. Yet for some reason some judges are willing to enjoin such speech by individuals. Why?

I suspect this willingness to restrain private speakers flows from two related reasons. First, precisely because newspapers cost money to publish, and try to make money from subscribers or advertisers, they tend to be accountable to their readers and tend to publish what their readers want, in the style the readers want. That a newspaper is printing something itself tends to indicate the likely value of the speech. Even a judge who found the speech loathsome or pointless might have thought twice about substituting his own

297. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909 (1982).

298. *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 493 (2014) (anti–abortion counselors speaking outside one clinic "once a week"); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Const. Trades Council, 485 U.S. 568, 571 (1988) (leafletting going on "for about three weeks").

views for those of editors and readers.[299] Likewise, if an established political advocacy group thought some speech worth saying, judges may have seen that as evidence that the speech had value to public debate.

Second, newspaper speech can have many motives, but the most plausible ones tend to be public–regarding. Perhaps the publisher, editor, reporter, or columnist has a political agenda. Perhaps they are just pandering to readers' tastes, but even that means that they want to entertain or inform readers about something that many readers care about. It's possible that newspaper writers are just trying to wreak private vengeance, or are irrationally obsessed—but that seems unlikely, especially since such motivations (at least if transparent enough) are likely to lead to market pushback from readers.

And the same is likely true for speech by advocacy groups, even relatively little–known ones such as the Organization for a Better Austin: Whatever a judge might think of their ideology, it seems likely that the speech was indeed motivated by ideology. Even a judge who suspects that base motives are at play (for example, that a rich publisher is trying to get revenge against a politician or business leader who had frustrated the publisher's business plans)

299. Occasional cases did conclude that speech in newspapers wasn't "newsworthy" and thus could lead to liability for disclosure of private facts. *See, e.g.*, Briscoe v. Reader's Digest, 483 P.2d 34 (Cal. 1971), *overruled by* Gates v. Discovery Commc'ns Inc., 101 P.3d 552 (Cal. 2004); Diaz v. Oakland Trib., Inc., 188 Cal. Rptr. 762 (Ct. App. 1983). But I don't know of any recent incidents of an outright injunction against a newspaper's publishing anything further about a person; and I know of only one recent case that issued a narrower but still overbroad injunction against a newspaper on libel or harassment grounds: *Groner v. Wick Communications, Inc.*, No. 00126863 (La. Dist. Ct. Aug. 25, 2015), discussed at notes 76–77 and accompanying text. A few rare recent injunctions against newspapers have stemmed from other theories. *See, e.g.*, *In re* Emma F., 107 A.3d 947, 952 (Conn. 2015) (discussing a trial court injunction against publishing a court document that should have been filed under seal but wasn't, and declining to review the injunction because it had been vacated by the court nine days later); Las Vegas Rev.–J. v. Eighth Jud. Dist. Ct., 412 P.3d 23 (Nev. 2018) (reversing a trial court injunction against publishing autopsy photos).

might be reluctant to enjoin such mainstream speech based on speculation about motive.

But once individuals can easily speak, without having to persuade any intermediary about the worth of their speech, judges are likely to see much more speech by libel defendants that seems pointless and ill–motivated. Motive turns out to be critical under many harassment or stalking statutes, which condemn speech that is said with "the intent to annoy" or with "no legitimate purpose."[300] (I have argued that such motive is generally irrelevant to the value of the speech, and should thus not be used to justify restricting speech that has presumptively valuable content;[301] but the statutes are premised on a different view.) Indeed, some courts have taken the view that government employee speech motivated by purely personal motives is to be treated as on a matter of "private concern," even when its content would suggest that it's on a matter of public concern.[302]

Of course, the speakers in all these cases would likely take a different view of the value of their speech, and of their own motives. I suspect that most think they really do have valuable things to say, and that their motives are to inform the public.

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300. IND. CODE ANN. § 35–45–2–2 (West, Westlaw through 2020 Reg. Sess.); IOWA CODE ANN. § 708.7 (West, Westlaw through 2020 Reg. Sess.); N.J. STAT. ANN. § 2C:33–4 (West, Westlaw through L.2020, c. 109 & J.R. No. 2.); OR. REV. STAT. ANN. § 166.065 (West, Westlaw through 2020 Reg. Sess.); 18 PA. STAT. & CONSOL. STAT. ANN. § 2709 (West, Westlaw through 2020 Reg. Sess.); MD. CRIM LAW CODE ANN. § 3–803 (West, Westlaw through 2020 Reg. Sess.); TEX. PENAL CODE ANN. § 42.07 (West, Westlaw through 2019 Reg. Sess.); WASH REV. CODE ANN. § 9.61.260 (West, Westlaw through 2020 Reg. Sess.); WIS. STATE. ANN. § 813.125 (West, Westlaw through 2019 Act 186).

301. *See* Volokh, *Freedom of Speech and Bad Purposes*, *supra* note 184; Volokh, *One–to–One Speech vs. One–to–Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, *supra* note 13, at 737–94.

302. *See, e.g.*, Workman v. Jordan, 32 F.3d 475, 482–83 (10th Cir. 1994); Foley v. Univ. of Hous. Sys., 355 F.3d 333, 341 (5th Cir. 2003); Schalk v. Gallemore, 906 F.2d 491, 495 (10th Cir. 1990).

If I'm right, then judges just aren't trusting individual speakers in the newly democratized mass communications system to define what is worth talking about, and to talk about it without being second–guessed about their motivations. Media organizations and political organizations are given latitude to say even things that judges may view as unfair or cruel.[303] But private speakers are often not given such latitude—and the judges think that an injunction, with its accompanying threat of criminal contempt punishment if it is violated, is the necessary means for stopping such speech.

As I mentioned, I think that such a view is wrong, and that speech that's outside the traditional First Amendment exceptions (speech that isn't, for instance, libel or true threats) should remain free even if judges think it's worthless or ill – intentioned. But I think these injunctions come about because judges see that everyone can speak the way that established media and political organizations have long spoken—and judges often don't like it.

B. Speech by private individuals, without the money and power of media outlets

Private individuals are also less likely to fight back in court than are media outlets. They are less likely to appear to defend themselves; many of the injunctions I mention here followed default judgments.[304] They are less likely to know the First Amendment arguments to make when they do appear. They are less likely to appeal an injunction.

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303. For a similar argument about why courts are more likely to find actionable invasion of privacy in speech of non–mainstream–media sources, see Jeffrey Toobin, *Gawker's Demise and the Trump–Era Threat to the First Amendment*, NEW YORKER (Dec. 19, 2016), https://www.newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment [https://perma.cc/G9ZT-T7V8] ("This kind of deference to journalistic judgment about what constitutes 'truthful information of public concern' may be a vestige of a more orderly period in journalistic history. The implicit trust in the news media reflected in these rulings may not extend today to the operators of Web sites, a change that could also have ramifications for traditional news organizations.").

304. *See* Appendix.

Media outlets may also fight back in the media. A judge, especially an elected state court judge, might be especially reluctant to issue an injunction that will likely be covered in the press, and criticized by the press—both by the newspaper that's being enjoined, and by other media outlets that will likely take the newspaper's side. A judge may be less reluctant to issue an injunction against private citizens, who will at most rant about it on their Facebook pages.

C. Judges as flexible problem–solvers

I also suspect that many of the trial judges who entered these injunctions operated with a particular attitude: Our job is to solve problems stemming from human relationships—deal with petty personal hostility that can damage people's lives and cause potentially violent friction—and the injunction is a useful, flexible tool for such problem–solving.[305]

First Amendment doctrine sometimes views injunctions against speech as comparable to statutory speech restrictions—to repeat Justice Black's formulation, "we look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down."[306] Other times, the doctrine views injunctions against speech as "prior restraints" that are even more constitutionally troublesome than statutory speech restrictions, in part because of the discretion they vest in a judge.[307]

But the problem–solving attitude takes a different view, though usually just implicitly: An injunction, the theory goes, is a sensible approach because it can be well tailored to the particular problems

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305. In a related context, *cf.* Mandeep Talwar, *Improving the Enforcement of Restraining Orders After* Castle Rock v. Gonzales, 45 FAM. CT. REV. 322, 330–31 (2007) (praising judges who "act as problem–solving, proactive participants in combating domestic violence").

306. United Transp. Union v. State Bar of Mich., 401 U.S. 576, 581 (1971).

307. *See, e.g.*, Madsen v. Women's Health Center, Inc., 512 U.S. 753, 793 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part).

of the relationship. Of course a statute banning anyone from mentioning anyone else online would be unconstitutional. Of course a statute banning anyone from disparaging anyone else would be unconstitutional. Even a narrower statute, such as a ban on disparaging one's ex–spouse on social media, would be unconstitutional. An injunction, though, can both focus on speech about a particular person and take into account the likely harm of the speech, the likely value of the speech, and the likely availability of narrower speech restrictions.

For instance, say a judge is facing a defendant who seems bent on disparaging a family member or an ex–lover or a former business partner.

1. The judge may look at the past statements, conclude that they are likely false and defamatory, and therefore conclude that future criticisms by this defendant of this plaintiff are likely to be harmful (because they will likely be libelous, perhaps as demonstrated by a finding that some past statements were libelous) and valueless (because they will likely be false).
2. The judge may observe that the statements are about purely personal grievances, and therefore conclude that even future statements that wouldn't be false (they might be true, or opinions) are likewise likely to be of modest First Amendment value (because they will almost certainly be speech on matters of purely private concern).
3. The judge may conclude that the defendant is obsessed, so restrictions on repeating only particular statements found to be defamatory would lead the defendant to just make up more falsehoods.[308]

308. Thomas v. Wray, No. CV19WD05, at 1–2 (Ark. Cir. Ct. Benton Cty. May 24, 2018); Appellee's Brief, Stutz Artiano Shinoff & Holtz, APC v. Larkins, No. D057190, 2011 WL 863341, at *6 (Cal. Ct. App. Jan. 25, 2011) (quoting trial transcript):

4. Or the judge may conclude that the defendant is irrational, so restrictions on all false and defamatory statements would be futile, because the defendant will sincerely (but unreasonably) believe that those statements aren't false.

Justice Stevens expressed some similar thoughts, though as to much narrower injunctions. In *Madsen v. Women's Health Center, Inc.*, Justice Stevens voted to uphold an injunction setting up bubble zones outside abortion clinics, but with language that would have applied even more broadly:

> Unlike the Court, . . . I believe that injunctive relief should be judged by a more lenient standard than legislation. . . .
>
> [L]egislation is imposed on an entire community, regardless of individual culpability. By contrast, injunctions apply solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty—the normal consequence of illegal activity. Given this distinction, a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment, but an injunction directed at a limited group of persons who have engaged in unlawful conduct in a similar zone might well be constitutional. . . .

In formulating this injunction, it was the court's intention to eliminate reference to accusations of illegal, unethical, incompetent or intimidating conduct on the part of Plaintiff from any website maintained by Defendant.

We've been back in court several times on the language that still appears on the website. And, unfortunately, I feel like I'm chasing something that I can't get my hands around, because every time I rule that Defendant shouldn't use one phraseology, she simply switches to another in an . . . apparent attempt to circumvent the Court's order. . . .

So what I intend to do is modify the injunction to prevent any mention of Stutz, Artiano, Shinoff on Defendant's websites.

And *I'm doing that not in an attempt to foreclose or eliminate the Defendant's right to free speech, but because it is crystal clear to me at this point that she is unable or unwilling to modify her website in any good–faith attempt to remove reference to that law firm*. . . . [W]hat I'm trying to do is to make a bright–line rule that there's no way anybody can misinterpret. . . .

> In a First Amendment context, as in any other, the propriety of the remedy depends almost entirely on the character of the violation and the likelihood of its recurrence. For this reason, standards fashioned to determine the constitutionality of statutes should not be used to evaluate injunctions.
>
> On the other hand, even when an injunction impinges on constitutional rights, more than "a simple proscription against the precise conduct previously pursued" may be required; the remedy must include appropriate restraints on "future activities both to avoid a recurrence of the violation and to eliminate its consequences." Moreover, "[t]he judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large." As such, repeated violations may justify sanctions that might be invalid if applied to a first offender or if enacted by the legislature.
>
> In this case, the trial judge heard three days of testimony and found that petitioners not only had engaged in tortious conduct, but also had repeatedly violated an earlier injunction. The injunction is thus twice removed from a legislative proscription applicable to the general public and should be judged by a standard that gives appropriate deference to the judge's unique familiarity with the facts.[309]

Of course, Justice Stevens was talking about narrow injunctions on speech in a particular place, aimed at causing harms unrelated to the content of speech (such as blocked abortion clinic entrances). There is a large gap between these narrow injunctions and categorical "stop talking about the plaintiff" restrictions. Still, there is a logical link: Justice Stevens is arguing that,

1. Injunctions should be viewed *more favorably* than normal criminal or civil prohibitions, rather than as presumptively less defensible prior restraints.
2. Judicial discretion should likewise be viewed positively, as a tool for better tailoring, rather than negatively, because of the fear of excessive discretion.

309. *Madsen*, 512 U.S. at 778–79 (Stevens, J., concurring in part and dissenting in part).

3. As a result, even if a categorical prohibition (for instance, no protesting within 36 feet of an abortion clinic) is invalid,[310] an injunction entered against a particular set of defendants is proper.

Justice Stevens's view, it seems to me, was rightly rejected by all the other Justices in *Madsen*.[311] But I think it nonetheless appeals to many trial court judges, and may explain why they issue orders that would be clearly unconstitutional under the orthodox view—"we look at the injunction as we look at a statute, and if upon its face it abridges rights guaranteed by the First Amendment, it should be struck down."[312]

D. Getting "all the craziness . . . to stop totally"

Finally, one aspect of an injunction's flexibility is that it can take account of the judge's evaluation of the qualities of the particular speaker. One particularly vivid illustration came in a case where a judge ordered a woman "to cease posting any information about your parents on social media referencing indirectly or directly reference either one of them,"[313] and added, "Court informs the respondent that all the craziness described in these petitions needs to stop totally."[314]

That sentiment, I think, implicitly lurks in some (though by no means all) of the cases I describe. The speakers there seem to come across as weird, perhaps even mentally unbalanced. They seem obsessed with their subjects' supposed misdeeds, far beyond what most of us would see as proportionate. Some might label them "cyberstalkers," reflecting the excessive attention we associate with stalkers.

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310. *Id.* at 778.

311. *Id.* at 766 (majority opin.); *id.* at 794 n.1 (Scalia, J., concurring in the judgment in part and dissenting in part).

312. United Transp. Union v. State Bar of Mich., 401 U.S. 576, 581 (1971).

313. Raatz v. Raatz, Nos. 2019CV000123 & 2019CV000124 (Wis. Cir. Ct. Portage Cty. May 21, 2019) (docket entry, available in Westlaw Dockets).

314. *Id.*

Judges may easily get a sense that the speakers' criticisms are unfounded—or even if well–founded, are repeated at unreasonable length or with unreasonable enmity. And judges may get a sense that a narrow injunction (e.g., "you may not say recklessly or knowingly false and defamatory things about the plaintiff" or "you may not repeat [certain specified charges] about the plaintiff") just won't do any good: The obsessed, irrational speaker might claim that her allegations are actually true, or might subtly change the allegations and then claim that they are different. The only way to make "all the craziness" stop, the judge might be thinking, is just to categorically tell her to stop saying *anything* about the plaintiffs, leaving no room to wiggle out.[315]

Such a prohibition can't be implemented using a general statute. "No person shall engage in crazy, excessive, irrational speech about others" is too vague to be constitutional (even apart from its overbreadth)—it doesn't adequately notify speakers about what they can't say. But judges may think they know crazy when they see it,[316] and should be allowed to enjoin it. In a sense, this may be connected to the rules related to "vexatious litigants": When a plaintiff has filed many lawsuits that appear frivolous, seemingly driven by "obsess[ion]" more than by rational evaluation of the merits of a case, courts will often limit the plaintiff's ability to file future lawsuits.[317]

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315. *See, e.g.*, Stutz Artiano Shinoff & Holtz v. Larkins, No. D057190, 2011 WL 3425629, at *3–*4, *9 (Cal. Ct. App. Aug. 5, 2011) (describing but ultimately reversing a broad injunction banning the defendant from speaking about the plaintiff, which the court entered following the defendant's refusal to comply with an earlier, narrower stipulated injunction).

316. "I know crazy when I see it / I see that look in your eyes again / I know crazy when I see it / Your disguise is way too thin / I've seen it all before / And I know what's in store / And I'm not playing your crazy game no more." ANDREW THOMAS WALTON, *I Know Crazy When I See It*, *on* the aptly titled LOVE AND LITIGATION (2015). Also, "crazy has places to hide in / that are deeper than any goodbye." LEONARD COHEN, *Crazy to Love You*, *on* OLD IDEAS (2012).

317. *See, e.g.*, Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1295 & n.15, 1299 (11th Cir. 2002); Lichtman v. Zelenkofske Axelrod & Co., No. 978 EDA 2013, 2014 WL 10896825,

Yet while this is an understandable human reaction, the First Amendment cannot allow it when it comes to speech rather than to litigation. We can't be stripped of our constitutional rights to speak simply because a judge unilaterally concludes that we're irrational or obsessed. Whatever the rule might be for filing lawsuits, an act that triggers expensive legal obligations on the part of defendants, such a prohibition can't apply to ordinary speech, press, petitioning, or assembly.

Many political or religious zealots throughout the history of First Amendment law may have come across as obsessed or irrational or lacking a sense of proportion. Indeed, the willingness to fight a case up to the Supreme Court, often at considerable personal cost and peril, may itself be evidence of such obsession, especially to those of us who sharply disagree with the speaker's views. The defendant in *Cantwell v. Connecticut*, for instance, went to a mostly Catholic part of town to urge passersby to listen to a record that stridently attacked Catholicism.[318] Besides being unusually rude, even by the standards of those who dislike Catholics, this had to have been a dangerous thing to do.

The near–funeral picketers from Westboro Baptist Church, of *Snyder v. Phelps* infamy, seem not just offensive and bigoted but unhinged.[319] The 1965 *Henry v. Collins*[320] case, a follow–up to *New York Times Co. v. Sullivan*,[321] protected the rights of someone who tried to get wire services to publish his conspiracy theories about "a diabolical plot" against him.[322] The 2005 *Tory v. Cochran* case protected the

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at *2 (Pa. Super. Ct. July 14, 2014) (quoting trial court as concluding that "it is highly unlikely that any sanction [short of an order banning future filings] would be either collectable or meaningful, give[n] Ms. Lichtman's insatiable desire to pursue wasteful, vexatious, baseless, and harassing litigation").

318. 310 U.S. 296, 301 (1940).

319. 562 U.S. 443 (2011).

320. 380 U.S. 356 (1965).

321. 376 U.S. 254 (1964).

322. *Collins*, 380 U.S. at 356; for the factual details, see Henry v. Pearson, 158 So. 2d 695, 696 (Miss. 1963).

rights of a disgruntled litigant who came across as obsessed, an extortionist, or both.[323]

Understandably, in all these cases the Supreme Court has declined to give trial judges the power to decide who is too irrational to speak. And that is especially so because it's human nature for people to view people who are far on their own side of various topics as impassioned and dedicated, but comparable people far on the other side as crazy or obsessed, especially if they are going after targets who seem like pillars of the community (judges, police officers, elected or appointed government officials, and the like).[324]

Indeed, remedies law sometimes allows injunctions that go further than the initial violation, and even that forbid behavior that, absent the initial misdeed, would not be tortious.[325] But First Amendment law does not allow such preventative measures that ban otherwise protected speech[326] (as opposed to narrow content–neutral time, place, and manner restrictions).[327]

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323. 544 U.S. 734 (2005).

324. *See supra* the first several cases discussed in Part A.

325. *See, e.g.*, People v. Conrad, 64 Cal. Rptr. 2d 248, 250 (Ct. App. 1997).

326. *See, e.g.*, McCarthy v. Fuller, 810 F.3d 456 (7th Cir. 2015); Balboa Island Vill. Inn, Inc. v. Lemen, 156 P.3d 339 (Cal. 2007); Gillespie v. Council, No. 67421, 2016 WL 5616589 (Nev. Ct. App. Sep. 27, 2016); Tory v. Cochran, 544 U.S. 734 (2005).

327. For an example of a permissible prophylactic content–neutral injunction, see, e.g., Schenck v. Pro–Choice Network of W. N.Y., 519 U.S. 357, 381–82 (1997):

> Based on defendants' past conduct, the District Court was entitled to conclude that some of the defendants who were allowed within 5 to 10 feet of clinic entrances would not merely engage in stationary, nonobstructive demonstrations but would continue to do what they had done before: aggressively follow and crowd individuals right up to the clinic door and then refuse to move, or purposefully mill around parking lot entrances in an effort to impede or block the progress of cars. And because defendants' harassment of police hampered the ability of the police to respond quickly to a problem, a prophylactic measure was even more appropriate.

Yet note the narrowness of the injunction: The defendants could continue to say anything they wanted; they only had to do this from 15 feet away from driveways and parking lot entrances.

CONCLUSION

I hope this Article has done two things.

First, I hope it has given practical users of the legal system—judges, lawyers, and unrepresented litigants—a guide to dealing with these broad injunctions against speech under existing First Amendment rules. I think those rules, as set forth by the U.S. Supreme Court and many of the appellate courts I quote, are generally wise, and generally forbid such injunctions. As I noted in the Introduction, libel can be restricted. Unwanted speech to a person can be restricted. A few other categories of speech, such as true threats of illegal conduct, can be restricted. But offensive speech about a person—distressing and disturbing as it may be—generally cannot be restricted.

Second, I hope it has given more theoretical readers, whether academics or others who might want to reform the law, a perspective on something that has been happening in trial courts. It has been happening almost entirely without public notice. It has often been happening in cases where the defendants were unrepresented, or had outright defaulted. It has been happening largely contrary to binding precedent—but precedent that defendants often lack the knowledge or legal assistance to cite.

And it has, I think, reflected a set of powerful impulses on judges' parts to try to protect people against what they understandably perceived as serious harms. Perhaps those judges' efforts just cannot be reconciled with our constitutional rules; indeed, I think they can't be. But scholars can benefit, I think, from considering this more, and considering what it says about the virtues and limitations of our legal system.

APPENDIX

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
"Any allegations of wrongdoing"	L			Parker v. Casady	No. CV-16-4844, at 1 (Idaho Dist. Ct. Bonneville Cnty. Jan. 18, 2017)
"Badmouthing, disparaging or ... denigrating"	F			Mackney v. Mackney	No. CL 2008-013103, at 5 ¶ 16 (Va. Cir. Ct. Fairfax Cnty. July 26, 2010)
"Contacting past or present clients of [P]"	LH		A	Ferguson v. Waid	No. C17-1685RSM, at 1-2 ¶ 3 (W.D. Wash. Nov. 19, 2018), *rev'd in relevant part*, 798 F. App'x 986 (9th Cir. 2020)
"Contact[ing] anyone about plaintiff"	H	Roommates	P	Y.P. v. K.V.	No. 2010-RO-0041, at 1 ¶ 14 (Mass. Dist. Ct. Somerville Feb. 20, 2020), *aff'd*, 99 Mass. App. Ct. 1130 (First Amendment arguments held to have been waived), *appeal denied*, 173 N.E.3d 1099 (Mass. 2021)

[328] L (libel), H (harassment), H+ (harassment where the speech was treated as harassing in part because it damaged reputation), I (interference with business relations), P (Privacy), F (family law cases, involving divorce or child custody), ? (some uncertainty).

[329] "%" indicates that the parties had been romantically involved, or at least that one had been romantically interested in the other. "Lawyer" indicates that the lawsuit appeared to be a lawyer suing an ex-client or ex-adversary. Some of the entries in the column refer to the nature of the allegations and not just the relationship of the parties.

[330] A (adversarial lawsuit where both parties were present and defendant was represented by counsel), D (default judgment), E (ex parte), or P (defendant was pro se). Blanks, in this column and in others, indicate that the situation was unclear.

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
"Disparaging comments" to P's business contacts or potential business contacts	LI		P	Filsoof v. Cole	No. 1:21-cv-01791-NRB, at 1-2 (S.D.N.Y. Apr. 6, 2021)
"Derogatory"	H	%	P	Holton v. Holton	No. 2019-DR-963, at 5 ¶ 6 (Fla. Cir. Ct. Duval Cnty. July 31, 2019), *rev'd*, No. 1D19-2849, 297 So.3d 707 (Fla. Ct. App. 2020)
"Derogatory"	LF	%	D	Wang v. Lee	No. BC573818, at Att. 7a (Ohio Ct. Com. Pl. Franklin Cnty. July 15, 2016)
"Derogatory, disparaging, negative, unfavorable, uncomplimentary, ... or critical"	L		D	Selakovic v. Greenway Nutrients	No. 2014-CA-002578XXXXMB, at 2 (Fla. Cir. Ct. Palm Beach Cnty. Aug. 14, 2020)
"Disparag-[ing]"	L		P	Sulla v. Horowitz	No. 12-1-0417, at 2 ¶ 3 a.-b. (Haw. Cir. Ct. 3d Cir. June 17, 2013), *aff'd*, 366 P.3d 1086 (Haw. Ct. App. 2016)
"Disparaging comments on ... website relating to [P's] employment"	L			Barette v. Houston Forensic Science Center, Inc.	No. 2018-81317, at 1 ¶ 1 (Tex. Dist. Ct. Harris Cnty. Dec. 6, 2018), *vacated*, No. 01-19-00129-CV, 2019 WL 5792194 (Tex. App.—Houston [1st Dist.] Nov. 7, 2019)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
"Disparaging"	H+	%	A	Gary M. v. Crystal S.	No. BD555480, at *7 (Cal. Super. Ct. L.A. Cnty. Feb. 25, 2020), *aff'd on procedural grounds*, No. B301773, 2020 WL 5050650, *7 (Cal. Ct. App. Aug. 27, 2020)
"Disparaging"	L		D	Madwire Media, LLC v. Niemann	No. 2014CV030182, at 2 ¶ E.1 (Colo. Dist. Ct. Larimer Cnty. May 6, 2014)
"Disparaging"	H+	Lawyer		Furman v. Horton	No. 502019DR003547XXXXSB, at 2 ¶ E (Fla. Cir. Ct. Palm Beach Cnty. July 28, 2020)
"Disparaging"	L		P	Oxendine v. Ramirez	No. 502017CA011274XXXXMB, at 1 (Fla. Cir. Ct. Palm Beach Cnty. Nov. 9, 2017)
"Disparaging"	L		A	Turofsky v. Bliok	No. 12319/13, at 2 (N.Y. Sup. Ct. Nassau Cnty. Apr. 8, 2015)
"Disparaging"	L		A	CK Creations v. Pease	No. 2019-CI-13562, at 3 ¶ e (Tex. Dist. Ct. Bexar Cnty. Aug. 12, 2019)
"Disparaging"	L		D	Pearson Roofing v. Kot	No. 2012-50879-367, at 5 (Tex. Dist. Ct. Denton Cnty. Dec. 18, 2012)
"Disparaging"	L	%	A	Davis v. Leung	No. 15-1610-CC4, at 3 (Tex. Cnty. Ct. Williamson Cnty. May 18, 2017)
"Disparaging"	L	Ex-employee	A	TitleMax of S.C., Inc. v. Crowley	No. 4:20-cv-02938-JD-TER, at 3 (D.S.C. Apr. 28, 2021), *dismissed*, No. 4:20-cv-2938-JD, 2021 BL 485577 (D.S.C. Dec. 21, 2021)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
"Disparaging" / discouraging future customers	LH	Ex-customer	P	Izzet Gunbil, L.L.C. v. Estrada	No. 46D01-1908-CT-001985, 2019 WL 11278771, *3 (Ind. Super. Ct. Laporte Cnty. Dec. 16, 2019),
"Disparaging" + all contact with investors	L		D	Sedona Oil & Gas Corp. v. Lowder	No. DC-14-12548, at 2 (Tex. Dist. Ct. Dallas Cnty. June 23, 2015)
"Harmful, malicious and disparaging"	LI		P	Transportation Firm, LLC v. Enoble, Inc.	No. 16-cv-2186-SHL-dkv, at 6 (Tenn. Cir. Ct. Memphis Cnty. June 3, 2016), available at 2016 WL 8738240
"Malicious"	L		D	Guo v. Li	No. PWG-18-259, 2019 WL 2288348, at *4 ¶ 3 (D. Md. May 29, 2019), *vacated*, 2020 WL 2563184 (D. Md. May 29, 2019)
"Negative or derogatory"	L		D	Empire Dev. Corp. v. Campbell	No. LC105389, at 2 ¶ 7 (Cal. Super. Ct. L.A. Cnty. Jan. 19, 2018)
"Negative"	L	Doctor v. ex-patient	D	Arzate v. Mohammed	No. CV2013-016874, at ¶¶ 7–9 (Ariz. Super. Ct. Maricopa Cnty. Jan. 14, 2015)
"Negative"	L	Lawyer	D	Berd v. Brutus Caligula	No. CV2012-094656, at ¶¶ 5–6 (Ariz. Super. Ct. Maricopa Cnty. Feb. 1, 2013)
"Negative"	L		D	Flippa Pty LTD v. Quinones	No. CV2012-095192, at ¶¶ 4--5 (Ariz. Super. Ct. Maricopa Cnty. Apr. 8, 2013)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
"Negative"	L		D	Katz v. Digirolamo	No. CV2013-003905, at ¶¶ 7–8 (Ariz. Super. Ct. Maricopa Cnty. June 11, 2014)
"Negative"	L	Lawyer	D	Mehta v. Oslova	No. CV2011-054721, at ¶¶ 4–5 (Ariz. Super. Ct. Maricopa Cnty. Dec. 20, 2012)
"Negative"	L	Alleged patron v. prostitute over allegations of sexual assault	D	Meisenbach v. Castillo	No. CV2014-001528, at 8 ¶ 12 (Ariz. Super. Ct. Maricopa Cnty. Mar. 1, 2016)
"Negative"	L		D	Precise Auto Care, LLC v. Pabrezis	No. CV2013-003594, at 4 ¶ 8 (Ariz. Super. Ct. Maricopa Cnty. Mar. 3, 2014)
"Negative"	L		D	Profinity LLC v. Shipley	No. CV2012-013904, at ¶¶ 6–7 (Ariz. Super. Ct. Maricopa Cnty. Feb. 14, 2014)
"Negative"	L		D	Ramsthel v. Penny	No. CV2014-093104, at 2 ¶ 1, 22 ¶ 7 (Ariz. Super. Ct. Maricopa Cnty. Sept. 24, 2014)
Online	L		D	Ruffino v. Lokosky	No. CV2015-009252, 2017 WL 10487368, at ¶¶ 11–13 (Ariz. Super. Ct. Maricopa Cnty. June 29, 2016), *default judgment set aside, setting aside aff'd*, 425 P.3d 1108 (Ariz. Ct. App. 2018)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
"Negative"	LI		D	Walter Arnstein, Inc. v. Transpacific Software PVT Ltd.	No. 11-CV-5079, at 1–2 ¶ 1 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 26, 2016)
"Negative"	L		P	McLean v. Walters	No. CJ-2014-3185, at 2 (Okla. Dist. Ct. Oklahoma Cnty. Sept. 28, 2014)
"Negative, critical, derogatory, disparaging, or discrediting"	L		D	Shannon v. Ghosh	No. 15:cv-13010-PBS, 8:18-CV-00259, at 2 ¶ b (Mass. Super. Ct. Greenbelt Cnty. Aug. 10, 2015)
"Offensive"	L		D	Enovative Techs., LLC v. Leor	86 F. Supp.3d 445, 446 (D. Md. 2015)
"Personal," including from public records	H		P	In re Guardianship of Janzen	No. 33272-1-III (Wash. Super. Ct. Spokane Cnty. 2008), *aff'd in part, rev'd in relevant part*, No. 33272-1-III, 190 Wash. App. 1041 (2015)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
"Posting anything on any social media forums regarding the Petitioner, his parenting ..., or any other negative comments about the Petitioner"	H	%	P	Henkel v. Henkel	No. 2020CV000049, at Lexis docket (Wisc. Cir. Ct. Jefferson Cnty. Feb. 10, 2020)
"Social media harassment with family names"	H			Burrett v. Rogers	No. 30-2012-0058389 (Cal. Super. Ct. Orange Cnty. Sept. 7, 2012), *aff'd*, No. G047412, 2014 WL 411240 (Cal. Ct. App. Feb. 4, 2014)
Accessing any social media site	H	%		Jacobson v. Webb	No. 48-2014-DR-015747-O (Fla. Cir. Ct. Orange Cnty. Nov. 2014), *rev'd*, No. 5D14-4426, 175 So. 3d 938 (Fla. Ct. App. 2015)
Accurate allegations of fraud	L	Newspaper D		Groner v. Wick Communications Co.	No. 00126863, at 1 (La. Dist. Ct. Iberia Parish Aug. 25, 2015)
Accurate allegations of sex offender status	LH			Redmond v. Heller	No. 2017-000364-NO (Mich. Cir. Ct. Kalamazoo Cnty. Aug. 29, 2017), *rev'd*, No. 347505, 2020 WL 2781719 (Mich. Ct. App. May 28, 2020)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Accusations of misconduct that hadn't been found defamatory	L		A	McCarthy v. Fuller	No. 1:08-cv-00994-WTL-DM (S.D. Ind. Mar. 19, 2014), *rev'd in relevant part*, 810 F.3d 456 (7th Cir. 2015)
Accusations of mistreatment of children based on hearsay + contacting P's patients	L	Family		Pearson v. Pearson	No. 417-00143-2017, at 1 (Tex. Dist. Ct. Collin Cnty. Jan. 24, 2017)
All	H	Doctor v. ex-patient	P	Streeter v. Visor	No. CV2014093311, at 2 ¶ 11 (Ariz. Super. Ct. Maricopa Cnty. Dec. 1, 2015), *rev'd*, 2015 WL 7736866 (Ariz. Ct. App. Dec. 1, 2015)
All	H	%		Bredfeldt v. Greene	No. C20131650, at 4–5 (Ariz. Super. Ct. Pima Cnty. May 20, 2013), *aff'd on procedural grounds*, No. 2 CA-CV 2016-0198, 2017 WL 6422341 (Ariz. Ct. App. Dec. 18, 2017)
All	I+	Doctor v. ex-patient	D	Peretti v. Ellis	No. CV 60CV-18-2524, at 1-2 (Ark. Cir. Ct. Pulaski Cnty. Sept. 11, 2018)
All	L	Lawyer	D	Naso v. Silva	No. 30-2013-00679547-CU-DF-CJC, at 2 (Cal. Super. Ct. Orange Cnty. July 27, 2015)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
All	H	Minister P	P	Flood v. Wilk	No. 2017 OP 020404 (Ill. Cir. Ct. Cook Cnty. Oct. 3, 2017), *rev'd*, 125 N.E.3d 1114 (Ill. App. Ct. 2019)
All	H			Bryant v. Hutchison	No. 19-OP-180 & -181 (Ill. Cir. Ct. Saline Cnty. Nov. 18, 2019), *rev'd*, No. 5-19-0508, 2020 WL 7694319 (Ill. App. Ct. Dec. 28, 2020)
All	H	Lawyer	E	Buchanan v. Crisler	No. 337720 (Mich. Dist. Ct. Ingham Cnty. Nov. 9, 2016), *rev'd*, 922 N.W.2d 886 (Mich. Ct. App. 2018)
All	F	Religious leader P %	P	Jones v. Jones	No. 27-FA-08-5921, at 3 ¶ 5 (Minn. Dist. Ct. Hennepin Cnty. May 11, 2015)
All	LI		E	Puruczky v. Corsi	No. 2017 P 000046 (Ohio Ct. Com. Pl. Geauga Cnty. Feb. 15, 2017), *rev'd*, 110 N.E.3d 73 (Ohio Ct. App. 2018)
All	H			Ackerman v. Adams	No. 14ST08-0272, at 2 (Ohio Ct. Com. Pl. Knox Cnty. Nov. 2, 2015)
All	H	Family		Rasawehr v. Rasawehr	No. 17-CV-014, at 4 ¶ 9 (Ohio Ct. Com. Pl. Mercer Cnty. Jan. 18, 2018), *rev'd sub nom.* Bey v. Rasawehr, 161 N.E.3d 529 (Ohio 2020)

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Repre-senta-tion**[330]	**Name**	**Citation**
All	L	Political dispute; one plaintiff was Prime Minister of Haiti	D	Baker v. Haiti-Observateur Group, Inc.	No. 1:12-cv-23300-JJO, at 3 ¶ 6 (S.D. Fla. Feb. 6, 2013), *vacated*, 938 F. Supp. 2d 1265 (S.D. Fla. Apr. 9, 2013)
All	L		A	Powers v. Connerth	No. No. CC-17-CV-902, at 3 ¶ 1 (Tenn. Cir. Ct. Montgomery Cnty. Feb. 14, 2019)
All	L			Lowry v. Fiorani	No. 2007-12907, at 1 (Va. Cir. Ct. Fairfax Cnty. Nov. 16, 2007)
All	H			Harper v. Fleck	No. 16S-35, at 3 (Va. Cir. Ct. Monongalia Cnty. May 5, 2016)
All	H	Doctor v. ex-patient	A	Petitioner v. Brandon	No. 2010CV014072, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. Sept. 8, 2010)
All	LI	Lawyer		Baldinger v. Ferri	No. 3:10-cv-03122-PGS-DEA, at 2 ¶ 2 A., ¶ 3 A. (D.N.J. July 10, 2012)
All	L	Lawyer		Littman v. Mann	No. 13-00498 CA 23, at 2 ¶ 1 (Fla. Cir. Ct. Miami Dade Cnty. Jan. 24, 2013)
All	H?			Ulmer v. Scoville	No. 602785, at 1 (La. Dist. Ct. East Baton Rouge Parish Aug. 31, 2012)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
All	L	Religious leader P		West v. Watson	No. DV-10-317A, at 4 ¶ 7 (Mo. Cir. Ct. Flathead Cnty. Aug. 10, 2010)
All	L			Regional Waterproofing, Inc. v. Hickman	No. 19 CVS 13073, at 2 ¶ 2 (N.C. Super. Ct. Wake Cnty. Oct. 25, 2019)
All	FH	%	D	Draghici v. Johnson	No. D-14-506304-D, at 3 (Nev. Dist. Ct. Clark Cnty. Aug. 10, 2015)
All	L	Lawyer	A	Stutz Artiano Shinoff & Holtz v. Larkins	No. 37-2007-00076218-CU-DF-CTL, at 2 (Cal. Super. Ct. San Diego Cnty. Dec. 11, 2009), *rev'd*, No. D057190, 2011 WL 3425629, *3–*4, *9 (Cal. Ct. App. Aug. 5,
All	H			Schliepp v. Raabe	No. 2020CV001844 (Wisc. Cir. Ct. Milwaukee Cnty. Mar. 18, 2020)
All "sharing of her opinion on this matter"	L			Howell-Wright v. Hoover	No. CJ-20-141, at 1 (Okla. Dist. Ct. Cherokee Cnty. Nov. 12, 2020)
All contact with business associates	L		P	Coppinger v. Ramsey	No. CC-12-00349-E, at 25 c (Tex. Dist. Ct. Dallas Cnty. Cnty. Feb. 22, 2013)
All public comments	L	Neighbors	A	Kauffman v. Forsythe	No. E2019-02196-COA-R3-CV (Tenn. Cir. Ct. Rhea Cnty. Dec. 6, 2019), *rev'd*, No. 2019-CV-49 (Tenn. Ct. App. May 25, 2021)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Anonymous e-mails about P, speech about order	L		A	Absolute Pediatric Servs., Inc. v. Humphrey	No. 04CV-18-2961, at 3 ¶ 2(a) (Ark. Cir. Ct. Benton Cnty. Nov. 1, 2019)
Anonymous references + photos	H			Polinsky v. Bolton	No. 27-CV-15-15467 (Minn. Dist. Ct. Hennepin Cnty. Sept. 2015), *aff'd*, No. A16-1544, 2017 WL 2224391 (Minn. Ct. App. May 22, 2017)
Anonymous references + photos	H	Lawyer	A	Fredin v. Middlecamp	No. 62-HR-CV-19-621 (Minn. Dist. Ct. Ramsey Cnt. Mar. 9, 2020), *aff'd*, No. A20-0539, 2021 WL 417017 (Minn. Ct. App. Feb. 8, 2021)
Any accusations of dishonesty, unfitness in business, or crime	L			Adili v. Yarnell	No. 2017-CP-08-552, at 2 ¶ B (S.C. Ct. Com. Pl. 9th Jud. Cir. Feb. 27, 2017)
Calling P "bully" or "unprofessional"	LP			Murphy v. Gump	No. 2016-CC-002126-O, at 2 (Fla. Cnty. Ct. Orange Cnty. July 18, 2016)
Complaining to government agencies about doctor	L		A	Hagele v. Burch	No. 07 CVS 1985 (N.C. Super. Ct. Wake Cnty. Aug. 15, 2013)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Complaining to government agencies about P without court permission	H	Condo. ass'n P	A	Portofino Towers Condo Ass'n, Inc. v. Wohlfeld	No. 2018-041933-CA-01 (08) (Fla. Cir. Ct. Miami-Dade Cnty. Feb. 11, 2019), modified (Feb. 28, 2019)
Complaining to immigration enforcement about P	F	%		Meredith v. Meredith	No. 063024566 (Wash. Super. Ct. Pierce Cnty. Nov. 9, 2007), *rev'd*, 201 P.3d 1056 (Wash. Ct. App. 2009)
Complaining to police department about police officer P without court permission	H	Police officer P		Hunley v. Hardin	No. GS011027 (Cal. Super. Ct. L.A. Cnty. Aug. 20, 2008), *aff'd*, No. B210918, 2010 WL 297759 (Cal. Ct. App. Jan. 27, 2010)
Complaining to government agencies	H	Family	P	Parisi v. Mazzaferro	No. SCV 257142 (Cal. Super. Ct. Sonoma Cnty. 2015), *rev'd in part*, 210 Cal. Rptr. 3d 574 (Ct. App. 2016)
"[D]iscussing Petitioner or this case with anyone familiar with Petitioner"	H	Family		Sophia M. v. James M.	No. O14503/17 (N.Y. Fam. Ct. N.Y. Cnty. Feb. 27, 2020), *rev'd*, No. 2020-03046 (N.Y. App. Div. June 22, 2021)
Interference with business	LIP		A	R.K./FL Mgmt., Inc. v. Chevaldina	No. 2011-017842-CA-01, 2012 WL 12887238 (Fla. Cir. Ct. Miami-Dade Cnty. Nov. 26, 2012), *rev'd*, 133 So. 3d 1086 (Fla. Ct. App. 2014)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online, but only on Complaints-Board.com	L			Stockton v. Smith	No. 12C162, at 2 ¶ 2 (Colo. Dist. Ct. Douglas Cnty. Oct. 14, 2014)
Online	L		D	ALS Guardian Angel Found. v. Nicoletti	No. CV2016-004857, at 4 ¶¶ 8–10 (Ariz. Super. Ct. Maricopa Cnty. Jan. 11, 2017)
Online	H	Lawyer %		Castillo v. Ormandy	No. 5483462, at 2 (Ariz. Super. Ct. Maricopa Cnty. Oct. 17, 2019)
Online	L	Alleged patron v. prostitute over allegations of sexual assault	D	Meisenbach v. Riva	No. CV2014-000834, at 13 ¶ 9 (Ariz. Super. Ct. Maricopa Cnty. Apr. 30, 2014)
Online	LH			Thomas v. Wray	No. CV19WD05, at 2 (Ark. Cir. Ct. Benton Cnty. May 24, 2018)
Online	H	%		Hanlon v. Toro	No. D18-01483, at 4 ¶ 23 (Cal. Super. Ct. Contra Costa Cnty. Aug. 22, 2018)
Online	H		D	Batsalkin v. Hedden	No. 18VERO01811, at 2 ¶ 6.a.4 (Cal. Super. Ct. L.A. Cnty. Nov. 9, 2018)
Online	L	Doctor v. ex-patient	A	Bradley v. Stefani	No. YC070821, 2019 WL 4899177, * 2 (Cal. Super. Ct. L.A. Cnty. Sep. 11, 2019)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online	H	%	P	Erikson v. Caleb	No. 18STR001127, at 4 ¶ 23 (Cal. Super. Ct. L.A. Cnty. Mar. 9, 2018)
Online	L	Lawyer	D	Etehad Law v. Anner	No. BC625332, at 3 (Att.) (Cal. Super. Ct. L.A. Cnty. Jan. 31, 2017)
Online	H	Lawyer	A	Mercado v. Castanedo	No. BS118244, at 3 ¶ 5 (Cal. Super. Ct. L.A. Cnty. Feb. 4, 2009)
Online	H	Friends	A	Narain v. Sanducci	No. 17TRRO00279 (Cal. Super. Ct. L.A. Cnty. Sept. 26, 2017), *aff'd*, No. B286152, 2018 WL 5919462 (Cal. Ct. App. Nov. 13, 2018)
Online	H	Friend of ex-husband	P	Appel v. Zona	No. 1802924, at 3 ¶ 11 (Cal. Super. Ct. Riverside Cnty. July 25, 2018)
Online	H			Liebich v. Phillips	No. 2016-70000487, at 1 (Cal. Super. Ct. Sacramento Cnty. Sept. 8, 2016)
Online	H	Political activist P	A	McCauley v. Phillips	No. 2016-70000487, at 1 (Cal. Super. Ct. Sacramento Cnty. Sept. 8, 2016), *appeal dismissed on procedural grounds*, No. C083588, 2018 WL 3031765 (Cal. Ct. App. June 19, 2018
Online	L		D	SNA Transp., Inc. v. Columbus Freight, Inc.	No. CIVDS 1620113, at 2 ¶ 3 (Cal. Super. Ct. San Bernardino Cnty. Sep. 22, 2017)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online	H		A	Wannebo v. Ewing	No. 37-2016-00026279-CU-HR-CTL, at 6 ¶ 6.a.4 (Att.) (Cal. Super. Ct. San Diego Cnty. Oct. 25, 2016)
Online	H+			Leka v. Pochari	No. 20CH009145, at 2 ¶ 5.a.4 (Cal. Super. Ct. Santa Clara Cnty. Jan. 16, 2020)
Online	H	State official P	A	Serafinowicz v. Bernstein	No. CV154034547S, 2015 WL 3875108, *6 (Conn. Dist. Ct. Waterbury Jud. Dist. May 28, 2015), *aff'd sub nom.* Stacy B. v. Robert S., 140 A.3d 1004 (Conn. App. Ct. 2016
Online	H	Revenge porn %		Faustina v. Hulick	No. 2012 CPO 000388, at 2 (D.C. Super. Ct. Mar. 9, 2012)
Online	H	State senator P		Book v. Logue	No. DVCE-17-5746 (Fla. Dist. Ct. Broward Cnty. Mar. 9, 2018), *rev'd*, 297 So. 3d 605 (Fla. Ct. App. 2020) (en banc)
Online	H	Police officer P	P	Lanoue v. Neptune	No. DVCE 14-4939 (Fla. Cir. Ct. Broward Cnty. Aug. 22, 2014), *rev'd*, 178 So. 3d 520 (Fla. Ct. App. 2015)
Online	L		D	Flushcash, Inc. v. Bladis	No. 3D12-1287, at 2 ¶ 6 (Fla. Cir. Ct. Miami Dade Cnty. Apr. 17, 2012), *appeal dismissed*, 92 So.3d 834 (Fla. Ct. App. July 24, 2012)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online	H	Political consultant P	A	Delgado v. Miller	No. 17-16674 (Fla. Cir. Ct. Miami-Dade Cnty. Feb. 27, 2020), *rev'd*, 2020 WL 7050217 (Fla. Ct. App. Dec. 2, 2020)
Online	H	Condo. ass'n P	P	Hamptons at Metrowest Condo. Ass'n v. Fox	No. 2015-CA-007283-O (Fla. Cir. Ct. Orange Cnty. Apr. 18, 2016), *rev'd*, 223 So. 3d 453 (Fla. Ct. App. 2017)
Online	H	Lawyer		Mazariego v. Seoane	No. 2020DR004974DRAXES, at 3 ¶ 2.g (Fla. Cir. Ct. Pasco Cnty. Oct. 15, 2020)
Online	H	Friends and business partners	A	Craft v. Fuller	No. 2019DR005604XXFDFD (Fla. Cir. Ct. Pinellas Cnty. June 28, 2019), *rev'd*, 298 So. 3d 99 (Fla. Ct. App. 2020)
Online	L	Lawyer		Schaefer v. Gerrish	No. 12-CA-4135-16-W, at 3 (Fla. Cir. Ct. Seminole Cnty. Nov. 12, 2019)
Online	H	Dissatisfied customer D	A	Siegal v. Barnett	No. 16 OP 20356 (Ill. Cir. Ct. Cook Cnty. Sept. 21, 2016), *aff'd*, No. 1-16-3073, 2018 WL 3746460 (Ill. App. Ct. Aug. 3, 2018)
Online	H		A	Quinn v. Gjoni	No. 1407RO1169, at 1 ¶ 14 (Mass. Muni. Ct. Boston Sept. 16, 2014)
Online	L			Muzani v. Trankle	No. 02-C-13-182491, at 1 (Md. Cir. Ct. Anne Arundel Cnty. Nov. 15, 2013)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online	H	Neighbors	Originally ex parte then pro se.	Zlatkin v. Roggow	No. 19-010012-PH (Mich. Dist. Ct. Gladwin Cnty. 2018), *aff'd sub nom.* SLA v. SZ, No. 349341, 2020 WL 3022755 (Mich. Ct. App. June 4, 2020)
Online	H	Judge P	E	Matthews v. Heit	No. 14-817732-PH, at 1 ¶ 5 (Mich. Cir. Ct. Oakland Cnty. Mar. 11, 2014)
Online	LI		D	Thermolife Int'l, LLC v. Connors	No. C-266-15, at 3 ¶ 3 (N.J. Super. Ct. Bergen Cnty. Apr. 11, 2016)
Online	H+		A	Siegle v. Martin	No. BUR-L-2674-18, at 2 (N.J. Super. Ct. Burlington Cnty. Jan. 23, 2019)
Online	H	%		Davino v. Hochman	No. FV-14-000536-16, at 4 (N.J. Super. Ct. Morris Cnty. Feb. 3, 2016)
Online	L	Revenge porn %		Nahra v. Maliska	No. CV-15-852649, at 2 ¶ 5(iv) (Ohio Ct. Com. Pl. Cuyahoga Cnty. June 2, 2016)
Online	H	Local official P	E	Kleem v. Hamrick	No. CV 11 761954, at 3 (Ohio Ct. Com. Pl. Cuyahoga Cnty. Aug. 15, 2011), *vacated*, Aug. 22, 2011
Online	H	Public speaker P %	A	Coleman v. Razete	No. SK1701382 (Ohio Ct. Com. Pl. Hamilton Cnty. Jan. 25, 2018), *rev'd*, 137 N.E.3d 639 (Ohio Ct. App. 2019)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online	L		D	Clearpath Lending v. JTRepper	No. A1500104, at 3 (Ohio Ct. Com. Pl. Hamilton Cnty. Sept. 28, 2015)
Online	L		D	Indivijual Custom Eyewear v Jodie J	No. A1407004, at 3 (Ohio Ct. Com. Pl. Hamilton Cnty. July 9, 2015)
Online	L		A	Smith v. Jennings	No. CJ-2019-5832, at 1 ¶ 2 (Okla. Dist. Ct. Oklahoma Cnty. Aug. 19, 2020)
Online	F	%	A	Seachrist v. Seachrist	No. CI-15-06447, at 1 (Pa. Ct. Com. Pl. Lancaster Cnty. Oct. 15, 2015)
Online	H+	%	A	Davis v. Ellis	No. DC-19-14291, at 4 ¶ d. (Tex. Dist. Ct. Dallas Cnty. Sept. 12, 2019)
Online	L			Fischer v. Owens	No. 13-2-00996-3, at 2 (Wash. Super. Ct. Clark Cnty. June 24, 2014)
Online	L	Prominent businessman P	A	Jia v. Gu	No. 17-2-27517-4 KNT, at 4–5 ¶ C (Wash. Super. Ct. Washington Cnty. Nov. 9, 2017)
Online	H	%	P	Pawlowicz v. Galkin	No. BQ040101, at 3 ¶ 8 & 10 (Cal. Super. Ct. L.A. Cnty. Nov. 25, 2013)
Online	HLI	Lawyer	D	PrismXKB, Inc. v. Benaissa	No. 17PSR000329, at 44198 (Cal. Super. Ct. L.A. Cnty. Aug. 15, 2017)
Online	L	Lawyer		Saadian v. Avenger213	No. BC 502285, at 1 (Cal. Super. Ct. L.A. Cnty. July 28, 2014)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online	FH+	%	A	People v. Velyvis	No. CR211376A, 2020 WL 4698811, *1 (Cal. Super. Ct. Marin Cnty. July 27, 2020)
Online	L		D	Rainek v. Honsinger	No. 2014CV30018, at 2 (Colo. Dist. Ct. Conejos Cnty. Oct. 2, 2015)
Online	L	Doctor v. ex-patient	D	Noble v. Matevosyan	No. 17CV8129-3, at 10 (Ga. Super. Ct. DeKalb Cnty. Jan. 4, 2019)
Online	L	Doctor v. ex-patient		Blom v. Callan	No. CV-OC-2011-16232, at 2 ¶ 3 (Idaho Dist. Ct. Ada Cnty. Apr. 9, 2012)
Online	H		A	Siegal v. Barnett	No. 163073-U, at ¶ 11 (Ill. Cir. Ct. Cook Cnty. Aug. 3, 2018), *aff'd*, 2018 IL App (1st) 163073-U, ¶ 11
Online	H			Oprisiu v. Leblanc	No. [unclear], at 1 ¶ 5 (Mich. Cir. Ct. Grand Traverse Cnty. Mar. 7, 2012)
Online	L	Lawyer	D	Revision Legal, PLLC v. Oskouie	No. 17-32312-CZ, at ¶ 7.d (Mich. Cir. Ct. Grand Traverse Cnty. Mar. 2018)
Online	H			Brilar, LLC v. DeAngelis	No. 19-173448-C2, at 1 (Mich. Cir. Ct. Oakland Cnty. June 5, 2019)
Online	L	Lawyer		Robiner v. Cooper	No. 13-133770-C2, at 1 (Mich. Cir. Ct. Oakland Cnty. Feb. 27, 2014)
Online	H		D	Rucki v. Evavold	No. DV-10-317A, at 1 ¶ 1. (Minn. Dist. Ct. Dakota Cnty. Mar. 1, 2018)

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Representation**[330]	**Name**	**Citation**
Online	H	%		Baker v. Krecl	No. CV-515-2018-378, at 2 ¶ 5 (Mont. Dist. Ct. Lewis & Clark Cnty. May 2, 2008)
Online	L			Yanik v. Simple	No. 16 CV 11482, at 2 ¶ 7 (N.C. Super. Ct. Wake Cnty. Dec. 2, 2019)
Online	F	%	P	Fantozzi v. Bigler	No. FD-16-1725-05, at 2 ¶ 6 (N.J. Super. Ct. Passaic Cnty. July 25, 2008)
Online	H		P	Woodward v. Price & Adrian v. Price	No. D-1329-CV-2020-00854, -00855, at ¶ 7.B(3) (N.M. Dist. Ct. Sandoval Cnty. July 9, 2020)
Online	H			Heim v. Clark	No. 2018CV002381, at Westlaw docket (Wisc. Cir. Ct. Dane Cnty. Sept. 12, 2018)
Online	H	Lawyer		Peterson v. Tease	No. 2012CV000569, at Westlaw docket (Wisc. Cir. Ct. Manitowoc Cnty. Oct. 1, 2012)
Online	H			Elias v. Aguilar	No. 2018CV005181, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. July 2, 2018)
Online	H			Lyons v. Simonis	No. 2019CV002587, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. Apr. 12, 2019)
Online	H	Family		Raatz v. Raatz	No. 2019CV000123, at Westlaw docket (Wisc. Cir. Ct. Portage Cnty. May 21, 2019)

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Representation**[330]	**Name**	**Citation**
Online	L	Lawyer	A	Picazio v. Holmseth	No. DVCE11005919, at 2 (Fla. Cir. Ct. Broward Cnty. Sept. 19, 2011)
Online	H	Ex-client	D	Mazor v. Leys	No. 20STCV47187 (Cal. Super. Ct. L.A. Cnty. Aug. 24, 2021)
Online	L	Lawyer	P	Bacchus v. Krapacs	No. 4D19-641, at 4 ¶ 6 (Fla. Cir. Ct. Broward Cnty. Aug. 12, 2020), rev'd, 301 So.3d 976, 980 (Fla. Ct. App. 2020)
Online "disparaging"	L		D	Nationwide Biweekly Admin., Inc. v. John Doe et al.	No. 2014-CV-0061, at 3 ¶ 2 b.-c. (Ohio Ct. Com. Pl. Greene Cnty. Apr. 10, 2014)
Online	H	%	A	B.M. v. M.M.	No. 14P001222 (Cal. Super. Ct. Orange Cnty. Jul 30, 2017), *aff'd on procedural grounds*, No. G05508, 2019 WL 4594776 (Cal. Ct. App. Sept. 23, 2019)
Online	H		D	Childers v. Renoir	No. CIVDS1937150 (Cal. Super. Ct. San Bernardino Cnty. Dec. 20, 2019)
Online	L		A	Same Condition, LLC v. Codal, Inc.	No. 19-L-5407, at ¶ 6 (Ill. Cir. Ct. Cook Cnty. Oct. 2, 2020), *rev'd*, 2021 IL App (1st) 201187

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online	H	Husband v. wife's ex-lover	A	Boone v. Mashaud	No. CPO-739-14, at 2 (D.C. Super. Ct. July 11, 2014), *vacated*, No. 16-FM-383, 256 A.3d 235 (D.C. Ct. App. 2021), *rehearing en banc granted* (Dec. 30, 2021)
Online (social media)	H		A	O'Neill v. Goodwin	No. 4D152055, at App. 413 (Fla. Cir. Ct. Broward Cnty. June 29, 2016), *rev'd*, 195 So. 3d 411, 413 (Fla. Ct. App. 2016)
Online + "offensive posts"	H	Revenge porn %		Fahrenback v. Jensen	No. 13-DR-010094, at 3 ¶ 6 (Fla. Cir. Ct. Hillsborough Cnty. July 16, 2013)
Online + "submitting ... to any news outlets"	L			Net Element Inc. v. Zell	No. 2014-015763-CA-01, at 4 ¶ 2 (Fla. Cir. Ct. Miami-Dade Cnty. Oct. 22, 2014)
Online + photos	H+	Family court evaluator v. ex-adversary		Kiffmeyer v. Boyer	No. CV2017-090072, at 2 (Ariz. Super. Ct. Maricopa Cnty. Jan. 31, 2017)
Online + photos	H			Watson v. Gugerty	No. J-802-CV-20170995, at 2 (Ariz. Super. Ct. Mohave Cnty. June 3, 2013)
Online + photos	H	Revenge porn		Derrig v. Alexander	No. DV20191766, at 2 (Ariz. Super. Ct. Pima Cnty. Sept. 9, 2019)
Online + photos	H	%	P	Gomez v. Carrasco	No. 18CEFL05380, at LEXIS docket (Cal. Super. Ct. Fresno Cnty. Jan. 31, 2019)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online + photos	H	%		Montanari v. Barren	No. SS 024853, at ¶ 6.a.4 (Cal. Super. Ct. L.A. Cnty. Sept. 11, 2014)
Online + photos	H	%		Weber v. Bland	No. 13D002025, at 4 ¶ 21 (Cal. Super. Ct. Orange Cnty. Mar. 7, 2013)
Online + photos	H	%		Czodor v. Luo	No. 18V002374, at 8 (Att.), item 23 (Cal. Super. Ct. Orange Cnty. Oct. 19, 2018)
Online + photos	H	%		Cardoza v. Ortiz	No. FAMSS 1707719, at 7 (Cal. Super. Ct. San Bernardino Cnty. Sept. 28, 2017)
Online + photos	H			Geldart v. Christner	No. 2014-33246-FMCI, at 2 ¶ 2.d (Fla. Cir. Ct. Volusia Cnty. Dec. 10, 2015)
Online + photos	H+	%		Benenson v. Hightower	No. 2017-3442, at 1 (La. Dist. Ct. New Orleans Parish Sept. 11, 2017)
Online + photos	LH	Lawyer	D	Hutul v. Maher	No. 1:12-cv-01811, 2012 WL 13075673, at *9 ¶ 6 (N.D. Ill. Dec. 10, 2012)
Online + photos	H	%	A	Strickler v. Cappetto	No. 2018CV000107, at Westlaw docket (Wisc. Cir. Ct. Marathon Cnty. Feb. 23, 2018)
Online + photos	H	Prominent businessman P	A	David v. Textor	No. 14-267DV (Fla. Cir. Ct. Martin Cnty. Oct. 17, 2014), *rev'd*, 189 So. 3d 871 (2016)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online + tagged photos	H+	%	A	Dennis v. Napoli	No. 4885340, at 13 (N.Y. Sup. Ct. N.Y. Cnty. Aug. 12, 2015), *aff'd*, 49 N.Y.S.3d 652 (App. Div. 2017)
Online comments that "impair Plaintiff's ... Reputation and ability to find work"	H+I		A	Svancara v. Castillo	No. 201419907-7, at 2 ¶ 3.a.iii (Tex. Dist. Ct. Harris Cnty. Apr. 10, 2014)
Online materials that "disparage" or "vilify"	L	School P	A	Hargrave Military Academy v. Guyles	No. 7:06-cv-00283-JCT-mfu, at 2 (W.D. Va. May 8, 2006)
Online on D's site	H+	Former federal nominee P	A	Brummer v. Wey	No. 153583/2015, at 3 (N.Y. Sup. Ct. N.Y. Cnty. June 5, 2017), *rev'd*, 166 A.D.3d 475 (2018)
Online reviews + social media	H			Pereira v. Dormena	No. 2025RO 0081, at 1 ¶ 6 (Mass. Super. Ct. Barnstable Cnty. Feb. 12, 2020)
Online speech causing emotional distress	H+			Best v. Marino	No. [unknown] (N.M. Dist. Ct. Doña Ana Cnty. Oct. 26, 2012), *aff'd*, 404 P.3d 450 (N.M. Ct. App. 2017)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Online statements "that express[] or impl[y] that [D] is the natural, biological or adopted daughter of [P's relative]"	L		D	Armesto v. Rosolino	No. 70424-9-I, at 5 (Wash. Super. Ct. King Cnty. July 7, 2014), *vacated*, 2014 WL 3360238
Photos	HL	"Online mugshot extortion[]"		Gugerty v. Watson	No. C20172678, at 2 ¶ 6 (Ariz. Super. Ct. Pima Cnty. June 8, 2017)
Photos	H			Petitioner v. Terpstra	No. 2020CV005018 (Wis. Cir. Ct. Milwaukee Cnty. Sept. 8, 2020)
Photos	H			Marais v. Bravo	No. 17CHRO0186, at 3 ¶ 11 (Cal. Super. Ct. L.A. Cnty. July 17, 2017)
Photos	F	%	P	Marquez v. Flores	No. FAMSS1909109, at LEXIS docket (Cal. Super. Ct. San Bernardino Cnty. Nov. 12, 2019)
Photos	F	%	P	Rashid v. Sarwat	No. HHDFA155040511S, 2016 WL 3391543, at *3 under "personal property" (Conn. Dist. Ct. Hartford Jud. Dist. June 1, 2016)
Photos	P	Revenge porn %		Sotiropoulos v. Blue Star Media	No. 2013CV225702, at 2 (Ga. Super. Ct. Fulton Cnty. May 8, 2013)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Photos	H			Coby v. Jones	No. 2018CV004811, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. June 20, 2018)
Photos	H		A	Petitioner v. Scmidt	No. 2019CV004213, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. June 13, 2019)
Photos + "derogatory"	H+	Religious leader P %		Bond v. Thomas	No. 155440/2017, at 1 (N.Y. Sup. Ct. N.Y. Cnty. July 28, 2017), *cf.* 2018 WL 1226050 (N.Y. Sup. Mar. 8, 2018) (related case)
Photos + e-mails about P	H		A	Littleton v. Grover	No. 51217-3-II, at *9-10 (Wash. Super. Ct. Pierce Cnty. Mar. 12, 2019), *rev'd in part*, 2019 WL 1150759 (Wash. Ct. App.)
Photos + name in title of pages	H	Civic activist P	A	Moriwaki v. Rynearson	No. 12-17, at 2 (Wash. Mun. Ct. Kitsap Cnty. July 17, 2017), *rev'd*, No. 17-2-01463-1, 2018 WL 733810 (Wash. Super. Ct. Feb. 5, 2018)
Public records related to P's arrest	H	%	A	Catlett v. Teel	No. 19-2-00086-9 (Wash. Super. Ct. Island Cnty. Mar. 26, 2019), *rev'd*, 477 P.3d 50 (Wash. Ct. App. 2020)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Removal of web site	L	Judge P, lawsuit over campaign video	A	Concerned Citizens for Judicial Fairness, Inc. v. Yacucci	No. 562014CA001711 (Fla. Cir. Ct. St. Lucie Cnty. Aug. 8, 2014), *rev'd*, 162 So. 3d 68 (Fla. Ct. App. 2014)
Remove accurate allegations from site	H	Lawyer	A	Gabueva v. Romanenko	No. CCH-19-581819, at 2 ¶ 6.a.4 (Cal. Super. Ct. S.F. Cnty. July 26, 2019)
Remove all posts about P	H		P	Ellis v. Chan	No. SU13DM409 (Ga. Super. Ct. Muscogee Cnty. Mar. 6, 2013), *rev'd*, 770 S.E.2d 851 (Ga. 2015)
Remove allegation of domestic abuse from Facebook	F	Police officer P %	A	Stark v. Stark	No. CT-002958-18 (Tenn. Cir. Ct. Shelby Cnty. Feb. 7, 2019), *aff'd on procedural grounds*, No. W201900650COAR3CV, 2020 WL 507644 (Tenn. Ct. App. Jan. 31, 2020)
Remove allegations of crime	H+	Local official P		McGuire v. Zoran	No. T15-1798PH (Mich. Cir. Ct. St. Clair Cnty. July 28, 2015), *rev'd sub nom.* T.M. v. M.Z., 926 N.W.2d 900 (Mich. Ct. App. 2018)
Referring to P's customers in discussing P, using terms "mafia" & "bullying" about P	L		A	DCS Real Estate Investments, LLC v. Juravin	No. 2017-CA-0667, at 4 ¶ 10 (Fla. Cir. Ct. Lake Cnty. Feb. 28, 2018), *aff'd*, No. 5D21-451, 2021 WL 4438553, 325 So 3d 1289 (Fla. Ct. App. Sept. 28, 2021)

Speech restricted	**Type**[328]	**Relation-ship**[329]	**Representation**[330]	**Name**	**Citation**
Shutdown of site	L	Local official P	A	Fremgen v. Fullofbolognа.com	No. 2006CV000372, at 2 ¶ 1 (Wisc. Cir. Ct. Winnebago Cnty. Mar. 30, 2006)
Social media	H	Former schoolmates	A	Altinawi v. Salman	No. YS029942 (Cal. Super. Ct. L.A. Cnty. June 15, 2017), *rev'd*, No. B284071, 2018 WL 5920276 (Cal. Ct. App. Nov. 13, 2018)
Social media	H	%		Curcio v. Pels	No. 18STRO07928 (Cal. Super. Ct. L.A. Cnty. Nov. 26, 2018), *rev'd*, 47 Cal. App. 5th 1 (2020)
Social media	H		A	Mullins v. Prater	No. 2012-cv-336 (Ohio Ct. Com. Pl. Auglaize Cnty. Jan. 4, 2013), *rev'd*, No. 2-13-04, 2013 WL 5230272 (Ohio Ct. App. Sept. 16, 2013)
Social media	H	%		Shirk v. Lambert	No. CP-14-MD-0008149-2015 (Pa. Ct. Com. Pl. Centre Cnty. Oct. 26, 2015), *aff'd*, 147 A.3d 1221 (Pa. Super. Ct. 2016)
Social media	H	%	P	A.P. v. A.S.	No. 51C01-2004-PO-67 & -68 (Ind. Cir. Ct. Martin Cnty. May 14, 2020), *aff'd*, No. 20A-PO-1486, 2021 WL 631648 (Ind. Ct. App. Feb. 18, 2021)
Social media	H	%		Matter of Bundza	No. [unknown] (N.H. Cir. Ct. Feb. 14, 2018), *rev'd on other grounds*, No. 2018-0173, 2019 WL 1787457 (N.H. Apr. 24, 2019)

Speech restricted	**Type**[328]	**Rela-tion-ship**[329]	**Repre-senta-tion**[330]	**Name**	**Citation**
Social media	H	%		Bannerton v. Banner-ton	No. 2020-007820-PP, at 2 ¶ 6.l (Mich. Cir. Ct. Macomb Cnty. Nov. 2, 2020)
Social media	H			Perkins v. McAfee	No. 2020CV002121, at Westlaw docket (Wisc. Cir. Ct. Milwaukee Cnty. Mar. 23, 2020)
Social media	H		E	Lannom v. Gaddis	No. 2018OP108 (Ill. Cir. Ct. Williamson Cnty. Mar. 28, 2018), *rev'd*, 2021 IL App (5th) 200327-U
Social media	H	%	P	Roberts v. Garrett	No. FAMVS1803240, at LEXIS docket (Cal. Super. Ct. San Bernardino Cnty. Oct. 23, 2018)
Social media speech about divorce	H/F	%	P	Molinaro v. Molinaro	No. BD643016 (Cal. Super. Ct. L.A. Cnty. Feb. 15, 2017), *rev'd*, 245 Cal. Rptr. 3d 402 (Ct. App. 2019)
Speech about order to Ps' "family, friends, or to their clients and business associates"	LP			Group for Horizon Entm't, Inc. v. Branham	No. 2016-60729, at 2 ¶ 6 (Tex. Dist. Ct. Harris Cnty. Sept. 9, 2016)
Speech near church and to church mem-bers	H	Minister P		Lo v. Chan	No. VS023928 (Cal. Super Ct. L.A. Cnty. Feb. 5, 2015), *rev'd*, 2015 WL 9589351 (Cal. Ct. App. Dec. 30)

Speech restricted	**Type**[328]	**Relationship**[329]	**Representation**[330]	**Name**	**Citation**
Speech that causes "reputational damage"	L		D	Meathe v. Wezensky	No. CACE14-012425, at 2 (Fla. Cir. Ct. Broward Cnty. Apr. 23, 2015)
Speech to people connected with P's "employment or school to inquire about" plaintiff	H	%	A	DiTanna v. Edwards	No. 50-2020-DR-004435-XXXX-SB (Fla. Cir. Ct. Palm Beach Cnty. June 22, 2020), *rev'd*, 323 So. 3d 194 (Fla. Ct. App. 2021)
Statements that "tend to expose [P] to public contempt, ridicule, aversion or disgrace," with no limitation to false statements	L		D	Torati v. Simpson	No. 502696/2012, at 2 ¶ 5 (N.Y. Sup. Ct. Kings Cnty. Dec. 2, 2013)

LOWER COURT ORIGINALISM

RYAN C. WILLIAMS*

Originalism is among the most significant and contentious topics in all of constitutional law and has generated a massive literature addressing almost every aspect of the theory. But curiously absent from this literature is any sustained consideration of the distinctive role of lower courts as expositors of constitutional meaning and the particular challenges that such courts may confront in attempting to incorporate originalist interpretive methods into their own decisionmaking. Like most constitutional theories, originalism has tended to focus myopically on a select handful of decisionmakers—paradigmatically, the Justices of the Supreme Court—as the principal expositors of constitutional meaning. While this perspective unquestionably has value, it ignores the adjudicative context in which the vast majority of litigated constitutional questions are finally resolved.

The question of whether and to what extent lower courts should use originalism in their own decisionmaking is hardly an insignificant one. Although lower courts are strictly bound to follow controlling Supreme Court precedent, these strictures leave open a wide domain in which the choice between originalism and other modes of decisionmaking might plausibly affect the content of lower courts' decisions. But lower courts face a number of institutional limitations and challenges that do not directly confront the Supreme Court, including greater time and resource constraints and the inability to overrule directly controlling nonoriginalist precedents.

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*Assistant Professor, Boston College Law School. My thanks to Josh Blackman, Aaron–Andrew Bruhl, Tara Leigh Grove, Lawrence Rosenthal, and Seth Barrett Tillman for helpful comments and suggestions. This paper also benefited from feedback received at the Twenty–Second Annual Federalist Society Faculty Conference as well as at workshops held at Boston College Law School, the University of Houston Law Center, and the Antonin Scalia Law School at George Mason University.

This Article aims to examine lower court originalism by looking to a set of values commonly associated with our system of vertical stare decisis—including uniformity, accuracy, efficiency, percolation, and legitimacy—as well as a set of values commonly associated with originalism itself—including popular sovereignty, judicial restraint, desirable results, and positive law. In general, the use of originalism by lower court judges is likely to be more costly and error–prone than similar decisionmaking by the Supreme Court, while being less likely to directly further certain of the values most closely associated with originalism. This assessment does not necessarily suggest that lower courts should never seek to incorporate originalist methods into their own decisionmaking. But it does suggest the need for a cautious and thoughtful approach that takes proper account of the institutional limitations of lower court decisionmaking.

These challenges are hardly unique to originalism. Similar challenges confront virtually all constitutional theories, particularly those that, like originalism, ask lower courts to look beyond the relatively familiar tools of case-focused, doctrinal reasoning.

INTRODUCTION

"[W]e are all originalists" now.[1] Or so we've been told—repeatedly.[2] But despite such assurances, "originalism" remains one of the most controversial and polarizing terms in contemporary constitutional discourse.[3] Originalist approaches to constitutional decisionmaking have been the focus of an expansive scholarly literature, both supportive and critical, spanning more than four decades.[4] But

1. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) [hereinafter *Kagan Hearings*] (statement of Elena Kagan, Solicitor Gen. of the United States) ("And I think that [the Framers] laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.").

2. *See, e.g.*, Lawrence B. Solum, *We Are All Originalists Now*, *in* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1–77 (2011); Jamal Greene, *How Constitutional Theory Matters*, 72 OHIO ST. L.J. 1183, 1184 (2011) ("We are all originalists now."); Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 495 (1996) ("[A]t some suitably abstract level almost everyone is an originalist in at least some limited sense.").

3. *See, e.g.*, Donald L. Drakeman, *What's the Point of Originalism?*, 37 HARV. J.L. & PUB. POL'Y 1123, 1133 (2014) ("Recent surveys have consistently shown that the American public divides roughly evenly when they are asked to pick between originalism and a 'living' or 'modern' constitutional interpretation."); Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 364–70 (2011) (reporting survey results to that effect).

4. Even an illustrative list of such sources would run many pages while omitting

despite the massive scholarly attention that has been lavished on the originalism debate, there remain some aspects of this debate that have somehow managed to escape close attention.

For the most part, the originalism debate has focused on a set of well-trod questions that have been turned over repeatedly from differing perspectives. One major set of debates focuses on the teleological purposes that originalist methods might serve—the "*why*?" of originalism[5]—or on critiques of originalism as a theory of interpretation—the "*why not*?".[6] A second, significant set of debates focuses on the proper object of originalist interpretation and particularly the choice between framers' intent, ratifiers' understandings, and objective public meaning as the appropriate target of originalist concern—originalism as to "*what*?"[7] Finally, a closely related set of debates has centered on methodological questions regarding the extent to which originalist interpreters can recover the actual original meaning of a constitutional text and the appropriate methods

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numerous key contributions. The following historical accounts from a diverse range of viewpoints provide a useful starting point for identifying some of the most relevant developments in the debate. *See, e.g.*, JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY (2005); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 750–51 (2011); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113 (2003).

5. *See, e.g.*, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV 849 (1989).

6. *See, e.g.*, CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT–WING COURTS ARE WRONG FOR AMERICA 74–76 (2005); Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 5 (2009); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

7. *See, e.g.*, Kesavan & Paulsen, *supra* note 4, at 1134–48 (discussing predominance of original intentions in early versions of originalist theory and emergence of competing theories that focus on original public meaning).

for attempting to do so—the "*how*?" of originalism.[8]

But despite all the attention devoted to these questions of why, what, and how, an equally important set of questions regarding the identities of the individuals for whom originalist interpretive methods are appropriate—the "*who*?" of originalism—has remained largely unexplored.[9] With the exception of a handful of works examining whether members of the political branches should embrace originalism's interpretive premises,[10] nearly all originalist scholarship has focused on the role of the judiciary, and the Supreme Court in particular, as the principal expositor of constitutional meaning.[11] Nearly absent from such accounts is any sustained consideration of the possibility that distinctions between

8. *See, e.g.*, Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017) (outlining a theory of originalist methodology informed by ideas from linguistic philosophy); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 828 (2009) (considering extent to which originalism can be reconciled with the use of judicial precedent); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 549–50 (2003) (considering role of background interpretive principles and conventions in constitutional interpretation); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 421–28 (1996) (considering role of burdens and standards of proof in originalist interpretation).

9. *See, e.g.*, Berman, *supra* note 6, at 14 & n.30 (identifying this potential for variability in the "subjects" to whom originalist interpretive theses might apply while noting the issue has been "generally overlooked").

10. *See, e.g.*, Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 3–4 (2016) (concluding that members of Congress are presumptively bound by the original meaning of the Constitution but may recognize "super precedents" that have gained widespread assent); Michael D. Ramsey, *Presidential Originalism?*, 88 B.U. L. REV. 353, 358–62 (2008) (contending that leading arguments for judicial originalism do not necessarily extend to constitutional interpretation by the President); Jose Joel Alicea, *Originalism and the Legislature*, 56 LOY. L. REV. 513 (2010) (arguing that the leading justifications for originalism require that the members of Congress interpret the Constitution in an originalist manner).

11. *See, e.g.*, WHITTINGTON, *supra* note 5, at 39 ("Originalists have been particularly concerned about the discretion available to judges and therefore have been careful to clarify and emphasize the limits placed on them by the adoption of their interpretive method."); Berman, *supra* note 6, at 14 ("Many originalist theses concern only how judges should act; they are agnostic regarding how other readers should interpret the Constitution.").

different courts—and particularly the distinction between the Supreme Court and hierarchically inferior courts—might matter to the interpretive prescriptions offered by originalist theory.[12]

The virtual invisibility of lower courts in the originalism debate is both unsurprising and unfortunate. Unsurprising insofar as lower courts have historically been ignored by virtually all theories of constitutional interpretation, which have myopically focused on Supreme Court decisionmaking as the only subject worthy of academic attention.[13] And unfortunate given that the overwhelming majority of constitutional litigation in the United States is resolved at the lower court level without any meaningful involvement by the Supreme Court.[14]

The present moment seems a particularly auspicious time to consider the relationship between originalism and lower court decisionmaking. A majority of the Supreme Court's current members

12. An important first effort toward filling this gap is provided by a recent short essay authored by Professor Josh Blackman, which surveys certain of the challenges an originalist lower court judge might face, including the constraints of binding Supreme Court precedent and the lack of originalist briefing from the parties. *See* Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44 (2019).

Apart from Professor Blackman's essay, the only other meaningful efforts to engage the originalism debate from the specific perspective of the lower courts consist of a handful of works examining the implications of originalism for the interpretation of state constitutions by state courts. *See*, *e.g.*, Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341, 344 (2017) (contending that originalism is the "ubiquitous" interpretive method used by state courts interpreting state constitutions); Troy L. Booher, *Utah Originalism*, 25 UTAH B.J. 22 (2012) (considering implications of originalism for interpretation of the Utah state constitution).

13. *See* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 459 (2012) (describing lower courts as "the forgotten stepchildren of constitutional theory"); Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CIN. L. REV. 771, 772–73 (1993) ("[I]n their focus on what happens 'upstairs' at the Supreme Court, observers often fail to recognize the efforts 'downstairs' in the lower federal courts and state courts.").

14. *See infra* note 39.

have expressed some degree of support for originalism,[15] suggesting that originalism is likely to remain a prominent feature of constitutional jurisprudence for some time to come. And given the previous administration's pronounced commitment to appointing textualist and originalist judges,[16] originalist theories seem likely to find a receptive audience among at least a significant portion of lower court judiciary.

Part I of this Article clarifies some terminology surrounding the use of the term "originalism," particularly the potential distinction between originalism as a theory of constitutional interpretation or legal obligation versus originalism as a theory of adjudication.

Part II examines the role of originalism in lower courts, summarizing some important institutional differences between the Supreme Court and lower courts that bear upon the present inquiry, including disparities in docket size and discretion, institutional resources, advocacy, precedential constraint, and influence over

15. *See Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 242, 262 (2017) (statement of Hon. Neil M. Gorsuch, Judge, U.S. Ct. of App. for the 10th Cir.); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 465 (2006) (statement of Hon. Samuel A. Alito, Jr., Judge, U.S. Ct. of App. for the 3d Cir.); *Confirmation Hearing on Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 182 (2005) (statement of Hon. John G. Roberts, Jr. Judge, U.S. Ct. of App. for the D.C. Cir.); *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 196 (2018) (statement of Hon. Brett M. Kavanaugh, Judge, U.S. Ct. of App. for the D.C. Cir.); Brian Naylor, *Barrett, An Originalist, Says Meaning Of Constitution 'Doesn't Change Over Time'*, NPR (Oct. 13, 2020, 10:08 AM), https://www.npr.org/sections/live-amy-coney-barrett-supreme-court-confirmation/2020/10/13/923215778/barrett-an-originalist-says-meaning-of-constitution-doesnt-change-over-time [https://perma.cc/VCH4-M955] (reporting statement of Hon. Amy Coney Barrett, Judge, U.S. Ct. of App. for the 7th Cir.); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 6 (1996) ("[W]hen interpreting the Constitution, judges should seek the original understanding of the provision's text . . . ."); *see also Kagan Hearings*, *supra* note 1 (statement of then–Solicitor General Elena Kagan).

16. *See generally* Leslie H. Southwick, *A Survivor's Perspective: Federal Judicial Selection from George Bush to Donald Trump*, 95 NOTRE DAME L. REV. 1847, 1914–17 (2020) (describing Trump Administration's commitment to appointing originalist judges).

other constitutional decision-makers. Part II also examines the potential practical significance of originalist interpretation for lower courts' decisionmaking, demonstrating that consideration of originalist evidence may be permissible and potentially significant for lower court decisionmaking across a broad range of cases.

Part III considers several important systemic values undergirding the hierarchical structure of the federal judiciary and the doctrine of vertical stare decisis, including uniformity, proficiency, judicial economy, percolation, and legitimacy. As Part III shows, the widespread embrace of originalism by lower court judges could plausibly further certain of these values, such as percolation and legitimacy, while potentially impeding or threatening others, such as uniformity and judicial economy. The precise balance of such comparative benefits and burdens is likely to depend on the particular ways in which originalist reasoning factors into lower courts' decisionmaking and the circumstances in which such decisionmaking occurs.

Part IV shifts the focus from the values undergirding vertical stare decisis toward a consideration of the values most commonly associated with originalism itself. Although originalists have asserted numerous theoretical arguments in support of their preferred theory, Part IV focuses on four of the most prominent—popular sovereignty, judicial constraint, desirable results, and originalism's purported claim to represent "our law" of constitutional interpretation. Although each of these normative justifications might be consistent with the use of originalism by lower courts, none seems to clearly and definitively require a practice of lower court originalism.

Part V seeks to draw some tentative conclusions regarding lower court originalism as an adjudicative practice. In general, the use of originalism by lower court judges is likely to involve higher costs and greater risk of interpretive error than would use of similar methods by the Justices of the Supreme Court. Lower court originalism is also considerably less likely to deliver the sorts of practical benefits typically associated with originalism. These ob-

servations suggest that the Supreme Court is institutionally best situated to shoulder the burdens of originalist decisionmaking and should strive to minimize the interpretive burdens on lower courts. Consequently, lower courts should exercise a cautious approach in seeking to integrate originalism into their own decisionmaking, particularly in those situations where the parties have chosen not to raise or brief originalist arguments and where a particular issue seems to fall within the scope of controlling Supreme Court precedent.

Part VII extends the frame of analysis to briefly consider the potential implications for nonoriginalist theories of constitutional interpretation. Many of the institutional concerns that could be implicated by the lower courts' use of originalism may apply with equal force to a variety of nonoriginalist arguments that expect or demand interpreters to look beyond the confines of familiar doctrinal reasoning of the sort that typifies existing lower court practices. To the extent a particular nonoriginalist theory requires consideration of such nontraditional sources—be they foreign legal materials, post-enactment historical practice, the requirements of moral philosophy, or contemporary public opinion—similar questions may arise regarding the competence of lower courts and their ability to further the relevant values at stake.

I. UNPACKING "ORIGINALISM": INTERPRETATION AND ADJUDICATION

Before proceeding further, it will be useful to explain briefly the particular sense of "originalism" explored in this Article. Originalism is a famously multi-faceted concept that can be used to describe a range of loosely connected interpretive theories sharing a core set of foundational premises.[17] Further complexity is added by the fact

17. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013) (observing that the term originalism describes "a family of constitutional theories" united by the commitment to the idea that the meaning of constitutional provisions is fixed at the time of framing and enactment and to the idea that this meaning should constrain officials in the performance of their constitutional functions).

that the term "originalism" can be used to describe both a set of postulates about the nature of the Constitution's meaning and authority—originalism as a theory of interpretation—as well as a more specific set of prescriptions about the way in which public officials (paradigmatically judges) should exercise their adjudicative responsibilities—originalism as a theory of adjudication.[18]

The primary sense of "originalism" this Article examines involves originalism as a theory of adjudication—that is, as a theory about *how* the postulates of originalist interpretive theory should inform judicial decisionmaking rather than a theory about *what* makes a claim about constitutional meaning ontologically true or false. In principle at least, one could embrace originalism as a theory of interpretation without believing that the interpretively determined meaning should make *any* meaningful contribution to the practice of constitutional adjudication.[19] But even if one believes that originalism should guide and constrain judicial practice to some extent, further questions will inevitably remain regarding how judges should go about translating the Constitution's interpretively determined meaning into a set of judicially manageable prescriptions that are capable of resolving concrete cases and controversies.

Sometimes, for example, the applicable rules of adjudication may require a judge to apply something other than what she believes to be the "best" understanding of constitutional meaning. Doctrines

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18. *See, e.g.*, Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823 (1997) (distinguishing "[t]heories of interpretation," which "concern the meaning of the Constitution," from "[t]heories of adjudication," which "concern the manner in which decisionmakers (paradigmatically public officials, such as judges) resolve disputes"); *cf.* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 546 (2013) (drawing a similar distinction between originalism as a theory of adjudication and originalism as "a theory of law").

19. *See* Lawson, *supra* note 18, at 1835 ("[I]nterpreting the Constitution and applying the Constitution are two different enterprises. Once one knows what the Constitution means, there remains the (open) question whether to apply that meaning in any given case in which it might be thought potentially applicable.").

requiring courts to give preclusive effect to prior judgments premised on incorrect understandings of constitutional meaning or to reject valid constitutional arguments that a party has waived or forfeited are not generally regarded, even by originalists, as inconsistent with a judge's duty to follow the Constitution.[20] Likewise, rules of precedent and stare decisis may sometimes require lower courts to act "as if" the legal meaning of the Constitution is something other than what a "pure" theory of originalist interpretation might otherwise suggest.[21] The Supreme Court has asserted a strong conception of its own authority to bind lower courts, insisting that lower courts must always follow directly controlling Supreme Court precedents until the Supreme Court itself decides to overrule them.[22] And though originalists have expressed differing views regarding the extent to which stare decisis should guide the Supreme Court's own decisionmaking,[23] most originalists accept the legitimacy of inferior courts according strong stare decisis effect to the Supreme Court's rulings.[24]

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20. *See, e.g.*, William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1472–73 (2019) (discussing the example of preclusion); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2359–60 (2015) (identifying waiver as an "obvious and uncontroversial example of . . . a common–law rule" that sometimes requires decisionmakers to apply something besides the correct constitutional meaning) [hereinafter Baude, *Our Law*].

21. Baude & Sachs, *supra* note 20, at 1473.

22. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

23. *Compare, e.g.*, Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 3–4 (2007) (arguing that the Supreme Court should "mostly never" "choose precedent over direct examination of constitutional meaning" (internal quotation marks omitted)), *with, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 823–24 (2009) (arguing that the "judicial power" referred to in Article III "can be understood as requiring judges to deploy a minimal concept of precedent" and empowering judges to deploy stronger precedential rules subject to Congressional regulation).

24. *See, e.g.*, Baude, *Our Law*, *supra* note 20, at 2370 (observing that "there is a shared consensus under almost every theory (including originalism) that lower courts are

A theory of adjudication must also grapple with the problem of interpretive uncertainty in a way that "pure" theories of interpretation need not. Those engaging in the interpretive enterprise for purely academic reasons might plausibly insist on a much lower threshold of interpretive proof and be much more comfortable with a conclusion of interpretive uncertainty than public officials whose decisions carry practical legal consequences.[25] Those engaged in adjudication, however, must make decisions about how to allocate scarce time and decisional resources among competing cases and the systemic consequences of their decisions for parties whose claims may be brought before judges with different interpretive philosophies.[26]

In practice, the questions that will typically confront lower court judges will rarely appear so straightforward as a decision to either "follow" or "reject" the Constitution's original meaning as such. More often, lower courts will find themselves confronted with competing claims about what original meaning requires or with conflicting arguments about the best way to reconcile arguments from original meaning with arguments from precedent or post-enactment historical practice. In such circumstances, determining what originalism demands as a theory of adjudication may require difficult judgments about, among other things, the credence to give claims asserted by the parties or by outside experts, the weight to

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bound by 'vertical precedent'"). Some scholars contend that the original meaning of Article III itself requires such deference to hierarchical precedent. *See, e.g.*, JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES 1–2, 38–44 (2009) (surveying historical evidence suggesting that "inferior tribunals must generally follow the precedents of their judicial superior"). *But see* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 82–84 (1989) (arguing that Article III does not compel lower court judges to follow erroneous Supreme Court precedent).

25. *See, e.g.*, Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 879 (1992) ("The degree of certainty, and hence the standard of proof, that people require before accepting propositions as true for particular purposes varies with the consequences of that acceptance.").

26. *See infra* Part III.B (discussing concerns regarding the decision costs of originalist interpretive methods).

be accorded different sources of originalist evidence, and the constraints imposed by existing precedent.

In weighing such considerations, the lower court judge is likely to possess a substantial degree of practical discretion.[27] This discretion is, of course, shaped and constrained to some extent by the requirements of existing case law and the postulates of the interpretive theory the judge believes to be correct.[28] But even acknowledging the existence of such constraints, lower court judges—including those committed to originalism as an abstract theory of constitutional obligation—are likely to face a range of practical questions about how to integrate such abstract commitments into their own practical obligations to adjudicate the concrete disputes that are brought before them.

II. ORIGINALISM IN THE LOWER COURTS

A. Institutional Differences Between the Supreme Court and Lower Courts

In thinking about the role of originalism in the lower courts, it is important to keep in mind two potential fallacies that might lead to faulty conclusions. First, observers should take care to avoid the *fallacy of composition*—the assumption that what is true of the individual component members of an aggregate must necessarily be true of the aggregate itself.[29] Second, observers should be cognizant of the closely related *fallacy of division*—the assumption that what is

27. *See, e.g.*, Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 378 (1975) ("[W]hen more than one result will widely be regarded as a satisfactory fulfillment of his judicial responsibilities then it does not make good sense to say that a judge is under a duty to reach one result rather than another; as far as the law is concerned, he has discretion to decide between them.").

28. *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1977) ("Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.").

29. *See generally* ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 15–16 (2011) (discussing the fallacies of division and composition).

true of the aggregate is necessarily true of the component members.[30] Thus, for example, a firm belief that a particular mode of constitutional interpretation—such as originalism, or doctrinalism—is appropriate for the Supreme Court should not necessarily lead one to conclude that the same mode of interpretation would work equally well if used by all other U.S. courts—a fallacy of composition. Likewise, a conclusion that originalism constitutes the appropriate interpretive target of our judicial system as a whole would not necessarily warrant the further conclusion that every court within that system must be originalist—a fallacy of division.

To some extent, our existing practices already reflect a recognition of these potential fallacies by dividing the powers and responsibilities of courts at differing levels of the judicial hierarchy in various ways. These differences are most clearly visible with respect to the law of precedent. The power to create precedent, for example, is lodged in the federal courts of appeals and the Supreme Court but is denied to federal district courts.[31] Federal courts of appeals possess authority to create binding precedent for federal district courts over which they possess appellate jurisdiction but do not bind other federal courts or even the state courts that exercise jurisdiction over the same territory.[32] The Supreme Court possesses the power to create binding precedential obligations for all other U.S. courts—both federal and state—and has claimed for itself the exclusive authority to overrule its own prior precedents.[33]

It is conceivable that the interpretive responsibilities of courts at the differing levels of the judicial hierarchy might be divided in a

30. *See generally id.*

31. *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (quoting 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d] (3d ed. 2011)).

32. *Cf.* Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation.").

33. *See supra* note 22.

similar way, and scholars have explored the conceptual possibility of such interpretive divergence in other interpretive contexts.[34] To date, however, such interpretive specialization has found little formal recognition in the judiciary's discourse.[35]

In the constitutional realm, however, an informal practice of interpretive specialization seems to have emerged organically. Unlike the Supreme Court, which deploys a variety of recognized "modalities" of constitutional reasoning in reaching its decisions—including arguments from text, original understanding, structure, precedent, and ethical commitments[36]—lower courts tend to focus much more centrally on Supreme Court precedent.[37]

There may be sound practical reasons for this informal divergence to have emerged in the manner it has. Although the Constitution does not draw any clear distinction between the judicial officers who compose the "one Supreme" Court and the "inferior"

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34. *See, e.g.*, Aaron–Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012) (suggesting potential for different approaches to statutory interpretation methodology depending on the level of the judicial hierarchy in which a particular question is presented); Evan H. Caminker, *Precedent and Prediction: The Forward–Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 5–8 (1994) (suggesting that lower courts should adopt a prediction or "proxy" model of precedent that focuses on attempting to predict how the Supreme Court would decide the particular issue if presented with the opportunity) [hereinafter Caminker, *Precedent and Prediction*].

35. *See, e.g.*, Caminker, *Precedent and Prediction*, *supra* note 34, at 5–6 (noting that "the overwhelming consensus reflected by judicial and academic discourse holds that lower courts ought to" decide cases in essentially the same manner as they would "if they were courts of last resort.").

36. *See generally* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (providing a well–known typology of six recognized "modalities" of constitutional argument).

37. *See, e.g.*, Aaron–Andrew P. Bruhl, *Following Lower–Court Precedent*, 81 U. CHI. L. REV. 851, 888 (2014) ("Lower–court decisionmaking in constitutional cases is . . . especially doctrinal in character, focusing largely on parsing the holdings (and dicta) of prior Supreme Court cases."); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 849 (1993) (observing that, in the lower courts, "constitutional discourse . . . consist[s] almost entirely of the analysis of (usually recent) cases of the United States Supreme Court that ostensibly serve as dispositive 'precedents' to resolve issues under discussion").

federal courts,[38] the ways in which these institutions have been structured in practice leads to significant differences in their respective institutional capacities.

Under current law, the Supreme Court—unlike the lower federal courts—enjoys virtually plenary control over its own docket.[39] And because the Court chooses to hear and decide only a tiny fraction of the cases that reach the circuit courts each year,[40] it is able to devote substantially more time and decisional resources to the resolution of each case.[41] The Supreme Court may also have other institutional advantages vis–à–vis the lower courts that render it better suited to resolve complex legal issues, such as its larger size, its ability to reframe and modify the legal questions presented by the parties, its ability to draw on the experiences and decisions of the lower courts, and its greater access to amicus briefing by interested third parties.[42]

Additionally, the Supreme Court's role as the apex court in the

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38. U.S. CONST. art. III, § 1; *see also, e.g.*, Akhil Reed Amar, *A Neo–Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 221 (1985) (noting "the structural parity of all Article III judicial officers", including identical treatment with regard to tenure in office, salary protection, and selection and confirmation processes).

39. *Compare* 28 U.S.C. § 1254(1) (2006) (providing the Supreme Court with discretionary certiorari jurisdiction over most cases), *with* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.").

40. *See* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 405 n.22 (2013) (noting that more than 55,000 cases were filed in the federal courts of appeals each year from 2009 to 2011 while the Supreme Court had considered only eighty–six cases in its October 2010 term).

41. *See, e.g.*, Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 22 (2009) (emphasizing the Supreme Court's docket control and smaller caseload as indicia of its relative decisionmaking competence).

42. *See, e.g.*, *id.* at 23 (identifying control over question presentation, ability to await developments in the lower courts and access to amicus briefing as additional informational resources available to the Supreme Court that lower courts typically lack); Caminker, *Precedent and Prediction*, *supra* note 34, at 42 (arguing that larger number of participating jurists confers advantages on Supreme Court as compared to most lower court deliberations).

federal judicial system tends to render its decisions uniquely salient for purposes of coordinating official action. In addition to the tendency of lower courts to fall in line behind authoritative Supreme Court pronouncements,[43] both Congress and the President typically abide by authoritative Supreme Court interpretations, as do (in most circumstances) officials at the state and local levels.[44] The massive number of lower court rulings, their relative lack of public visibility, and the potential for lower courts to reach divergent interpretations make the opinions of lower courts a much less plausible focal point for coordinating official action and thereby attaining the types of settlement and stability benefits that Supreme Court opinions might plausibly achieve.[45]

Furthermore, as a practical matter, the Supreme Court is much less constrained by its own prior rulings than are lower court judges. Whatever claims might be made for the interpretive freedom of lower courts as a theoretical matter, the practical reality is

43. *Cf.* David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2036–42 (2013) (noting willingness of many lower court judges to accord binding effect to even explicitly recognized Supreme Court dicta).

44. *See* KEITH E. WHITTINGTON, THE POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY xii (2009) (observing that while "[d]epartmentalism has enjoyed moments of prominence in American political thought and practice, . . . most political leaders have eschewed this kind of independent responsibility for reading the Constitution," preferring instead to let the Supreme Court "take the responsibility for securing constitutional fidelity"); *but see, e.g.*, ANDREW JACKSON, VETO MESSAGE (July 10, 1832), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576–91 (James Richardson ed., 1897) (explaining veto of statute re–chartering the Bank of the United States on constitutional grounds despite earlier Supreme Court decision, concluding legislation was within Congress's constitutional authority).

45. *Cf.* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 943–44 (2013) (describing the incentives driving political actors to accept the Supreme Court's rulings as a focal point of coordination and observing that while "[l]ower courts . . . can specify the boundaries of permissible conduct within their respective jurisdictions" "only the Supreme Court can provide a definitive and nationally uniform resolution of federal law").

that our current institutional and professional norms strongly impel lower court judges to follow Supreme Court precedents.[46] Given the Supreme Court's strong assertion of interpretive supremacy,[47] it is almost certain that a lower court judge who attempted to assert her own interpretive freedom from controlling Supreme Court precedent would routinely find her efforts thwarted by either the Supreme Court itself or by resistance from her colleagues in the inferior courts. Thus, as a practical matter, lower court judges lack the capacity to implement an originalist jurisprudence in its "ideal" form; rather, they will inevitably be limited to choosing between a set of "second–best" options, constrained by their inability to displace controlling Supreme Court precedent.[48]

B. The Practical Significance of Lower Court Originalism

The prevalence of doctrinalism and stare decisis in lower court decisionmaking might plausibly lead one to question the practical significance of originalism for lower court judges. Professor Eric Posner, for example, has argued that the judges of the lower courts "don't care about originalism," leaving "the justices of the Supreme Court" as the only practically significant "audience for" originalist scholarship.[49] Other scholars have made similar observations regarding the assumedly limited relevance and utility of originalism

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46. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 820 (1994) (observing that "the doctrine of hierarchical precedent appears deeply ingrained in judicial discourse—so much so that it constitutes a virtually undiscussed axiom of adjudication") [hereinafter Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*].

47. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (asserting that "the federal judiciary is supreme in the exposition of the law of the Constitution" and that the Supreme Court's opinions interpreting the Constitution are thus "the supreme law of the land" binding on all other public officials).

48. *See* Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 311–12 (2008) (discussing the idea of a "constitutional second best" in which decisionmakers are prevented from changing some variable necessary to the attainment of an ideal state of affairs and are thus constrained to choosing from among a more limited set of possible outcomes).

49. Eric Posner, *Why Originalism Will Fade*, ERIC POSNER (Feb. 18, 2016), http://ericposner.com/why-originalism-will-fade/ [https://perma.cc/P8GD-EGB7] (last visited Jan.

to lower courts' decisionmaking.[50]

But while doctrinalism certainly plays a far more prominent role in lower court decisionmaking than it does at the Supreme Court, the question of whether and when originalist reasoning should be used is far from inconsequential for lower court judges. As this Part will show, lower court judges often have the option of invoking originalist modes of reasoning in a variety of circumstances, including: (A) in addressing constitutional questions of first impression, (B) in dealing with originalist–oriented doctrinal frameworks established by the Supreme Court itself, (C) in filling out gaps and ambiguities left open by existing Supreme Court precedent, and (D) in critiquing binding Supreme Court precedent in the course of urging the Court to revisit or reverse particular nonoriginalist decisions.

1. Issues of Judicial First Impression

One fairly obvious domain in which originalist interpretation might feature prominently in lower court decisionmaking involves issues of judicial first impression that are not already the subject of authoritative Supreme Court pronouncements. Because virtually all interpretive theories acknowledge at least some role for evidence of original meaning,[51] even jurists who recoil at the "originalist" label might find it useful to consider evidence of original meaning as a starting point for interpretation.

16, 2019).

50. *See, e.g.*, Darrell A.H. Miller, *Romanticism Meets Realism in Second Amendment Adjudication*, 68 DUKE L.J. ONLINE 33, 34 (2018) (suggesting that "originalism is a method of reasoning that only the nine Justices of the Supreme Court can apply with any regularity"); Gewirtzman, *supra* note 13, at 498 (concluding that the "practical significance" of originalism "to lower court judges is often negligible").

51. *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) ("Even opponents of originalism generally agree that the historical understanding is relevant, even if not dispositive.").

Of course, when dealing with a more than two–century–old document comprising a total of only 7,591 words,[52] issues of true constitutional first impression may be few and far between.[53] Although many significant constitutional provisions have not come before the Supreme Court in any meaningful fashion,[54] the considerations that have prevented the Supreme Court from weighing in on such provisions—such as the relative clarity of their language (think, for instance, of the age limits for federal officeholders)[55] or their lack of practical contemporary significance (think, for instance, of the Third Amendment)[56]—are likely to pose similar barriers to their meaningful elaboration in the lower courts as well.[57]

Nonetheless, questions of first impression are worth keeping in mind for at least three reasons. First, the fact that particular constitutional provisions are not now, and have not historically been, prominent subjects of litigation does not mean that they will never come before the courts. Changes in social or political conditions may lend new and unexpected salience to heretofore neglected constitutional provisions. Consider, for example, the Foreign Emoluments Clause of Article I, Section 9.[58] Although this provision has

52. *See* Jefferson A. Holt, *Reading Our Written Constitution*, 45 CUMB. L. REV. 487, 487 (2015) (noting that the original Constitution, as enacted in 1788, contained 4,543 words (including signatures) and that the twenty–seven subsequent amendments adopted pursuant to Article V have added a combined total of 3,048 words).

53. *See* Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 340 (2009) (noting that important cases of first impression are likely to be rare).

54. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 400–07 (1985) (observing that many constitutional clauses are rarely or never litigated).

55. *See* U.S. CONST. art. I, § 2, cl. 2 (minimum age limit for members of the House of Representatives); *id*. § 3, cl. 3 (minimum age limit for Senators); *id.* art. II, § 1, cl. 5 (minimum age limit for President).

56. U.S. CONST. amend. III. *But see* Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982) (indicating that Third Amendment may limit authority to evict striking state employees from state–operated apartment housing in order to provide lodging for National Guard troops).

57. *See* Schauer, *supra* note 54, at 401 n.6 (noting that the same factors that render particular clauses insignificant for purposes of Supreme Court decisionmaking are likely to render them insignificant for lower courts as well).

58. *See* U.S. CONST. art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any

been part of the Constitution since its adoption in 1788, it has never been authoritatively construed by the Supreme Court and has not been a particularly prominent focus of litigation in the lower courts.[59] But the 2016 election of President Donald Trump thrust the Emoluments Clause into a new position of prominence.[60] This new prominence spurred litigation brought against the President in the lower federal courts seeking judicial enforcement of the provision's requirements.[61] Unsurprisingly, the provision's original meaning featured prominently in those proceedings.[62]

Second, changes in Supreme Court doctrine may render heretofore overlooked or underenforced constitutional provisions newly relevant to the lower courts' institutional responsibilities. The Court has rendered some provisions effectively off limits to the lower courts by either declaring them inappropriate subjects for judicial enforcement[63] or interpreting them so narrowly as to render

present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."); *cf.* U.S. CONST. art. II, § 1, cl. 7 ("The President shall, at stated Times, receive for his Services a Compensation . . . and he shall not receive within that Period any other Emolument from the United States, or any of them.").

59. *See, e.g.*, United States ex rel. New v. Rumsfeld, 350 F. Supp. 2d 80, 102 (D.D.C. 2004) (observing that there appears to be "no Supreme Court precedent defining the scope and application of the" Foreign Emoluments Clause), *aff'd* 448 F.3d 403 (D.C. Cir. 2006).

60. *See, e.g.*, Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 MINN. L. REV. 639, 639–40 (2017) (observing that President Trump's "successful election has ignited public and scholarly interest in the Foreign Emoluments Clause").

61. *See, e.g.*, District of Columbia v. Trump, 315 F. Supp. 3d 875 (D. Md. 2018); Blumenthal v. Trump, 335 F. Supp. 3d 45 (D.D.C. 2018); Citizens for Resp. & Ethics in Wash. v. Trump, 276 F. Supp. 3d 174 (S.D.N.Y. 2017).

62. *See, e.g.*, *District of Columbia v. Trump*, 315 F. Supp. at 881 ("Both sides embrace a blend of original meaning and purposive analysis . . . in support of their view that the Emoluments Clauses should or should not apply to the President and, if applicable, to which of his actions they should apply.").

63. *See, e.g.*, Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569 (1916) (recognizing the "settled rule that the question of whether [the Guarantee Clause of Article IV] has been disregarded presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution") (internal citations omitted).

them practically insignificant.[64] If the Supreme Court were to reverse its course with respect to the interpretation of one or more of these provisions, evidence of their respective original meanings would likely be an important source of guidance for the lower courts.[65]

A third consideration that might lend significance to cases of judicial first impression stems from the fact that the category of "cases of first impression" can sometimes be a contested one. The line of lower court decisions leading up to the Supreme Court's 2008 decision in *District of Columbia v. Heller*[66] provides an illustration. The Supreme Court majority in *Heller* viewed itself as unencumbered by prior precedent and free to consider the question of whether the Second Amendment protected an individual right to keep and bear arms as one of judicial first impression.[67] But the large majority of lower courts that had considered the issue prior to *Heller* viewed the question as settled by an earlier Supreme Court decision, *United States v. Miller*,[68] from 1939.[69] Because such lower courts understood the *Miller* decision as rejecting the "individual rights" interpreta-

64. *See, e.g.*, Slaughter–House Cases, 83 U.S. (16 Wall.) 36 (1873) (narrowly construing the Privileges or Immunities Clause of the Fourteenth Amendment's first section); Veix v. Sixth Ward Bldg. & Loan Ass'n of Newark, 310 U.S. 32, 38–40 (1940) (noting that state regulations adopted to further some legitimate public interest may alter obligations arising from private contracts without violating the Contracts Clause of Article I, Section 10).

65. *Cf.* Kerr v. Hickenlooper, 744 F.3d 1156, 1178–79 (10th Cir. 2014) (suggesting that lower courts could obtain "judicially manageable guidance" regarding the meaning of the Guarantee Clause by looking to Founding–era evidence such as "the Federalist Papers, founding–era dictionaries, records of the Constitutional Convention, and other papers of the founders"), *vacated*, 576 U.S. 1079 (2015).

66. 554 U.S. 570 (2008).

67. *Id.* at 625 (concluding that the nature of the Second Amendment's protection remained "judicially unresolved" and that "nothing in our precedents forecloses our adoption of the original understanding of the Second Amendment").

68. 307 U.S. 174 (1939).

69. *Heller*, 554 U.S. at 638 (Stevens, J., dissenting) (observing that "hundreds of judges" in the lower courts had "relied on the view of the [Second] Amendment" expressed in *Miller*).

tion of the Second Amendment in favor of a "collective rights" interpretation, they saw no need to consider evidence of the Amendment's original meaning that might bear on that question.[70]

But *Miller* was hardly a model of analytic clarity. Although the Supreme Court's opinion could be read to support the broad collective–rights interpretation endorsed by numerous lower court decisions, it was also susceptible to a much narrower reading that focused specifically on the particular weapon at issue in that case (a sawed–off shotgun) and its presumed unsuitability for use in military settings.[71] Beginning in the late 1990s, a handful of lower courts, influenced by a new wave of scholarship arguing that the individual rights interpretation was more consistent with the Second Amendment's original meaning,[72] began to read the *Miller* decision more narrowly.[73] This line of revisionist decisions culminated in the overtly originalist opinion of the United States Court of Appeals for the District of Columbia Circuit in *Parker v. District of Columbia*,[74] which rejected the precedential conclusiveness of *Miller* and em-

70. *See, e.g.*, Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995) ("Since [*Miller*], the lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right."); United States v. Hale, 978 F.2d 1016, 1020 (8th Cir. 1992) ("Since the *Miller* decision, no federal court has found any individual's possession of a military weapon to be reasonably related to a well regulated militia.") (internal quotation marks omitted).

71. *See, e.g.*, Brian L. Frye, *The Peculiar Story of* United States v. Miller, 3 N.Y.U. J. L. & LIBERTY 48, 50–52 (2008) (surveying various proposed readings of *Miller*).

72. *See, e.g.*, United States v. Emerson, 270 F.3d 203, 220 (5th Cir. 2001) (observing that "[t]he individual rights view" had "enjoyed considerable academic endorsement, especially in the . . . two decades" prior to 2001) (internal citations omitted); *see also* Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.–KENT L. REV. 3, 8–12 (2000) (discussing emergence of academic scholarship defending the individual rights interpretation of the Second Amendment in the 1970s and 1980s).

73. The first lower court decision to explicitly endorse the individual rights interpretation was issued by a federal district court in Texas. United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd and remanded*, 270 F.3d 203 (5th Cir. 2001). On appeal, the Fifth Circuit too embraced the individual rights interpretation, though it reversed and remanded the district court's decision on other grounds. 270 F.3d at 260.

74. 478 F.3d 370 (D.C. Cir. 2007).

braced the individual rights interpretation based principally on evidence of the Amendment's original meaning.[75] The following year in *Heller*, a five–Justice majority affirmed the D.C. Circuit's *Parker* decision on originalist grounds.[76]

2. Originalist–Oriented Supreme Court Frameworks

A second important category of cases in which originalism might feature prominently in lower court decisionmaking involves doctrinal areas where the Supreme Court itself has either explicitly or implicitly embraced an originalist framework for interpreting a particular constitutional provision.

The Seventh Amendment provides a prominent illustration of one such originalist-oriented framework.[77] In expounding the meaning of the Amendment's command that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,"[78] the Supreme Court has long looked to Founding–era practices—particularly the practices of English common law courts at the time of the Amendment's adoption in 1791—as the principal source of interpretive guidance.[79] In applying this "historical test" for determining the Amendment's proper application, the Court has sought "to preserve the substance of the common–law right as it existed in 1791" by asking "whether we are dealing with a cause of action that either

75. *Id.* at 395.

76. 554 U.S. 570, 625 (2008) (noting that its holding that there is an individual right to bear arms for defensive purposes reflects "the original understanding of the Second Amendment").

77. *See, e.g.*, Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1324 (2008) ("The Court's analytical framework for triggering a jury trial right in federal court typically includes a significant originalist element.") (internal citations omitted) [hereinafter Samaha, *Expiration Date*].

78. U.S. CONST. amend. VII.

79. *See, e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) ("Since Justice Story's day . . . we have understood that 'the right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.'") (quoting Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935)).

was tried at law at the time of the founding or is at least analogous to one that was."[80]

The Seventh Amendment is hardly the only area in which the Supreme Court has looked to enactment–era history as a principal source of interpretive guidance. For example, in determining the scope of the federal courts' equitable powers, the Supreme Court has looked to "the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution" as a principal source of guidance.[81] The Court has also looked to Founding–era history as a key factor in assessing the scope of various constitutional guarantees regarding criminal procedure, such as the Sixth Amendment's Jury Trial and Confrontation Clauses.[82] And in recent years, the Court has shown increasing interest in incorporating some form of historically focused test into its Fourth Amendment jurisprudence as well.[83]

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80. *Id.* at 376.

81. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (quoting ARMSTRONG M. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928)); *see also, e.g.*, Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563, 568 (1939) ("The 'jurisdiction' . . . conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the principles of the system of judicial remedies which . . . was being administered by the English Court of Chancery at the time of the separation of the two countries.") (internal citations omitted).

82. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . [and] to be confronted with the witnesses against him . . . ."); *see also, e.g.*, Crawford v. Washington, 541 U.S. 36, 42–50 (2004) (relying on evidence of the Sixth Amendment's original meaning to establish new rule requiring that all testimonial evidence against a criminal defendant be subject to cross examination).

83. *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 168 (2008) ("We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."); Atwater v. City of Lago Vista, 532 U.S. 318, 326–40 (2001) (considering extensive evidence of pre–founding and Founding–era understandings of peace officers' authority to make warrantless arrests). Some Justices have urged that enactment–era history should guide legal rules across a much broader swath of constitutional doctrine. *See, e.g.*, Gamble v. United States, 139 S.Ct. 1960, 1980–89 (2019) (Thomas, J., concurring) (contending that the Court should generally be willing to overrule modern precedents that are demonstrably inconsistent with the original meaning of the Constitution).

The case for lower court originalism might seem most straightforward when dealing with such clearly endorsed Supreme Court frameworks. But even in this category, complications can arise. For example, it may not always be clear whether or not the Supreme Court has, in fact, prescribed an originalist oriented framework for addressing a particular doctrinal area. Once again, the Supreme Court's decision in *Heller* provides an illustration. The majority opinion in *Heller*, which relied heavily on historical evidence regarding the Second Amendment's original meaning, has been described as a "triumph of originalism."[84] But the *Heller* majority stopped short of explicitly directing lower courts to apply the type of historical test for implementing the Amendment that applies in the Seventh Amendment context. And some portions of the opinion seem to cut against such a strictly historical approach. For example, in describing the scope of the right to "keep and bear arms," the *Heller* opinion seemed to declare certain commonplace modern limits on gun ownership to be presumptively valid without making any effort to demonstrate their historical pedigree.[85]

These competing strains within the *Heller* decision have left lower courts without clear guidance regarding their responsibilities in implementing the Second Amendment.[86] Some have interpreted the

84. *See, e.g.*, Adam Winkler, Heller*'s Catch 22*, 56 UCLA L. REV. 1551, 1557, & n.30 (2009) (collecting sources describing *Heller* as a "triumph of originalism"). The Court's follow–up decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which interpreted the Fourteenth Amendment to incorporate the right to keep and bear arms against state governments, also focused heavily on historical evidence regarding original understanding. *See* 561 U.S. at 770–78.

85. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008) ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."); *cf.* Rory K. Little, Heller *and Constitutional Interpretation: Originalism's Last Gasp*, 60 HASTINGS L.J. 1415, 1427 (2009) (noting that while these exceptions "draw[] on commonsense and modern–day experience," the Court made no effort to ground them in the enactment–era history or background of the Second Amendment).

86. *See* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment*

Court's historically oriented decision as demanding that lower courts use a similarly historically focused approach in determining the Amendment's scope and requirements.[87] But enactment–era history has not been the sole or even primary reference point lower courts have looked to in implementing the decision. Instead, most lower courts have relied primarily on other methods, such as closely parsing the language of the *Heller* decision itself (including portions that were arguably dicta),[88] or borrowing preexisting doctrinal tests and frameworks developed in other areas (particularly the First Amendment).[89] These approaches have drawn criticism from those who believe *Heller* commands a more historically rigorous inquiry, including Justice Thomas, a member of the *Heller* majority.[90]

Can Teach Us About the Second, 122 YALE L.J. 852, 866 (2013) (claiming the *Heller* decision "left lower court judges at sea").

87. *See, e.g.*, Peruta v. Cnty. of San Diego, 824 F.3d 919, 929 (9th Cir. 2016) ("In determining whether the Second Amendment protects the right to carry a concealed weapon in public, we engage in the same historical inquiry as *Heller* and *McDonald*."); United States v. Masciandaro, 638 F.3d 458, 470 (4th Cir. 2011) ("[H]istorical meaning enjoys a privileged interpretative role in the Second Amendment context.").

88. *See* Miller, *supra* note 86, at 855 ("Some judges have answered [*Heller*'s challenge] by mechanically citing broad dicta in *Heller* and *McDonald* . . . rather than conducting the historical inquiry the Court ostensibly demands."); *see also, e.g.*, United States v. Scroggins, 599 F.3d 433, 451 (5th Cir. 2010) (looking to "[d]icta in *Heller*" as confirming that prohibitions on weapon possession by convicted felons did not violate the Second Amendment).

89. *See* United States v. Marzzarella, 614 F.3d 85, 89 & n.4 (3d Cir. 2010) (looking to First Amendment jurisprudence to assert that analysis under *Heller* should first examine whether the law in question imposes a burden on protected conduct); *see also* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 212 (2017) ("Almost every circuit court has adopted the Two–Part Test, which was created by the Third Circuit in *Marzzarella*.").

90. Silvester v. Becerra, 138 S.Ct. 945, 950–51 (2018) (Thomas, J., dissenting from denial of certiorari); *see also, e.g.*, Friedman v. City of Highland Park, 136 S. Ct. 447, 448–49 (2015) (Thomas, J., dissenting from denial of certiorari) (arguing that "[i]nstead of adhering to our reasoning in *Heller*," the lower court "limited *Heller* to its facts"); *see also, e.g.*, Tyler v. Hillsdale County Sheriff's Dep't, 837 F.3d 678, 702–703 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment) (writing that both *Heller* and *McDonald* "put the historical inquiry at the center of the analysis, not at the margin" and "conspicuously refrain from engaging in anything resembling heightened scrutiny

3. Doctrinal Gaps and Discretionary Space

The Supreme Court's ongoing failure to provide further clarifying guidance regarding its *Heller* decision illustrates a further way in which an embrace of originalism by lower courts might affect their decisionmaking across a range of constitutional cases. Even in the absence of an issue of first impression or an originalist–oriented doctrinal framework, lower courts often have substantial freedom to look to originalist interpretive methods where existing Supreme Court case law does not fully settle a particular interpretive question.

The Tenth Circuit's decision in *Vogt v. City of Hays*[91] provides an illustration. *Vogt* involved a question regarding the scope of the Fifth Amendment's Self Incrimination Clause, which provides that no person shall be "compelled in any criminal case to be a witness against himself."[92] The question before the court was whether the introduction of compelled testimony in preliminary hearings triggers this right or whether the Amendment's reference to "a criminal case" limits its application to situations where the compelled testimony is introduced at trial.[93] This question was not one of clear first impression. The Self Incrimination Clause is the subject of a voluminous body of Supreme Court precedent and questions very close to the issue presented to the Tenth Circuit had reached the Supreme Court on at least three prior occasions.[94] But in each of those cases, the Supreme Court had stopped short of definitively answering the

review").

91. 844 F.3d 1235 (10th Cir. 2017).

92. U.S. CONST. amend. V.

93. *Vogt*, 844 F.3d at 1237–38.

94. *See, e.g.*, Chavez v. Martinez, 538 U.S. 760, 766–67 (2003) (concluding that Self Incrimination right is not triggered by the mere compulsion of testimony that was never introduced at trial); Mitchell v. United States, 526 U.S. 314, 320–21, 327 (1999) (holding that Self Incrimination Clause applies to post–trial sentencing hearings); United States v. Verdugo–Urquidez, 494 U.S. 259, 264 (1990) (stating in dicta that the Self Incrimination Clause is only a "trial right").

specific question presented to the Tenth Circuit in *Vogt*.[95] In the absence of specific guidance from the Supreme Court, other circuit courts had divided on the question, with some concluding that the introduction of testimony in pre–trial proceedings was sufficient to trigger the Self Incrimination Clause[96] and others reaching the opposite conclusion.[97] For the most part, courts on both sides of this divide based their conclusions on fairly traditional modes of doctrinal reasoning, relying on analogous Supreme Court case law,[98] persuasive dicta,[99] prior circuit precedent,[100] and functionalist considerations regarding the perceived purposes of the Self-Incrimination Clause.[101]

The unanimous three–judge panel in *Vogt* joined those circuits that had held "the right against self–incrimination is more than a trial right."[102] But it reached that conclusion for significantly different reasons. While the *Vogt* court did not ignore existing Supreme Court case law or the reasoning of other lower courts, it placed principal emphasis on the "text of the Fifth Amendment," which the court interpreted "in light of the common understanding of the

95. *Vogt*, 844 F.3d at 1237–38.

96. *See, e.g.*, Higazy v. Templeton, 505 F.3d 161, 171, 173 (2d Cir. 2007); Stoot v. City of Everett, 582 F.3d 910, 925 (9th Cir. 2009); Sornberger v. City of Knoxville, 434 F.3d 1006, 1027 (7th Cir. 2006).

97. *See, e.g.*, Renda v. King, 347 F.3d 550, 552 (3d Cir. 2003); Burrell v. Virginia, 395 F.3d 508, 514 (4th Cir. 2005); Murray v. Earle, 405 F.3d 278, 285 (5th Cir. 2005).

98. *See, e.g.*, *Higazy*, 505 F.3d at 172–73 (concluding that a bail hearing constituted a "criminal case" for purposes of the Self–Incrimination Clause based in part on treatment of such hearings in Supreme Court cases involving the Sixth and Eighth Amendments).

99. *See, e.g.*, *Murray*, 405 F.3d at 285 & n.12 (citing Supreme Court dicta from *Verdugo–Urquidez* and Justice Thomas's non–majority opinion in *Chavez* as support for the proposition that the "privilege against self–incrimination is a fundamental trial right which can be violated only *at* trial").

100. *See, e.g. Renda*, 347 F.3d at 558–59 (following earlier circuit case limiting self–incrimination privilege to testimony introduced at trial).

101. *See, e.g. Stoot*, 582 F.3d at 925 (including that the protection should extend to uses of evidence in pre–trial court proceedings because "[s]uch uses impose precisely the burden precluded by the Fifth Amendment: namely, they make the declarant a witness against himself in a criminal proceeding").

102. *Vogt*, 844 F.3d at 1242.

phrase 'criminal case'" at the time of enactment and "the Framers' understanding of the right against self–incrimination."[103] The Court consulted a broad range of textual and extratextual evidence bearing on these issues, including Founding–era dictionaries and the Fifth Amendment's drafting history.[104] The majority opinion also relied on a number of scholarly works that examined the Fifth Amendment's original meaning[105] as well as originalist–oriented scholarship that addressed broader points of interpretive methodology.[106]

The strikingly originalist opinion in *Vogt* demonstrates the potential ability of lower courts to incorporate originalist reasoning when filling out doctrinal gaps and ambiguities in controlling Supreme Court case law. Because no two cases are ever precisely identical and the Supreme Court cannot foresee every possible application of the rules it hands down, lower courts will often possess a substantial degree of discretion in applying the Court's doctrines to a given set of facts.[107] Several features of the federal judicial system

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103. *Id*.

104. *Id.* at 1241–46.

105. *See id.* at 1242–46 (citing, among other works, LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 423–27 (1968); David Rossman, *Conditional Rules in Criminal Procedure: Alice in Wonderland Meets the Constitution*, 26 GA. ST. U.L. REV. 417, 488 (2010); Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self–Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 1009–13, 1017 (2003); and Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again"*, 74 N.C. L. REV. 1559, 1627 (1996)).

106. *See, e.g.*, *Vogt*, 844 F.3d at 1242 (citing Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 365 (2014) and William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1338 n.99 (2007) as support for the use of contemporaneous dictionaries as evidence of original meaning); *id.* at 1243 n.3 (citing Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 534 (2003) for the proposition that "[t]he Founders recognized that a word's meaning often changes over time").

107. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 412 (2007) ("Discretion is inevitable in judicial decisionmaking, not only because of the indeterminacy of language, but also because of the difficulty of anticipating future scenarios in which a rule of decision might be required.").

combine to magnify the discretion available to lower courts, including the Supreme Court's comparatively miniscule case load,[108] its frequent practice of handing down vague, open–ended, or fact–bound rulings,[109] and the lack of any clear legal consensus regarding how to determine the scope of Supreme Court precedent.[110] Taken in combination, these factors tend to produce a substantial domain of discretionary space in which lower courts are free to reach any of multiple possible resolutions without clearly defying or ignoring binding precedent.[111] Even in the absence of an issue of first impression or a clear instruction from the Supreme Court to decide cases in an originalist fashion, lower courts will thus often possess substantial freedom to incorporate originalism into their decisionmaking if they are inclined to do so.[112]

Of course, the precise boundaries of the discretionary space left open by Supreme Court precedent may sometimes be uncertain or contestable. Consider, for example, the Eleventh Circuit's 2019 en banc decision in *United States v. Johnson*,[113] which involved a motion to suppress evidence obtained through a warrantless "pat down" of a suspect that detected ammunition but no accompanying

108. *See supra* note 39.

109. *See, e.g.*, Frederick Schauer, *Abandoning the Guidance Function:* Morse v Frederick, 2007 SUP. CT. REV. 205, 207 (lamenting "a growing tendency on the part of the [Supreme] Court to avoid issuing a clear, general, and subsequently usable statement of the Court's reasoning or the Court's view of the implications of its decision").

110. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 181–84 (2014) (discussing ambiguities in determining the scope of Supreme Court precedent).

111. *See* Kim, *supra* note 107, at 413–14.

112. *See, e.g.*, Holland v. Rosen, 895 F.3d 272, 288–91 (3d Cir. 2018) (surveying Founding–era evidence of the Excessive Bail Clause of the Eighth Amendment to determine whether the provision guarantees a right to cash bail); New Doe Child #1 v. United States, 901 F.3d 1015, 1021–23 (8th Cir. 2018) (considering evidence regarding the original understanding of the Establishment Clause to determine the constitutionality of reference to "God" on U.S. currency); United States v. Phillips, 834 F.3d 1176, 1179–83 (11th Cir. 2016) (looking to evidence of original meaning to determine whether an unpaid child support warrant constitutes a "warrant" within the meaning of the Fourth Amendment).

113. 921 F.3d 991 (11th Cir. 2019).

weapon.[114] The majority opinion authored by Judge Pryor concluded that the search was permissible under the Supreme Court's decision in *Terry v. Ohio*,[115] which interpreted the Fourth Amendment to authorize seizure of weapons and contraband discovered through such warrantless pat downs. Judge Pryor—who himself has embraced originalist methods in other cases[116]—rejected the defendant's argument, which was that *Terry* should be construed narrowly because it was "inconsistent with the original meaning of the Fourth Amendment."[117]

Writing in dissent, Judge Jordan displayed much greater sympathy toward the defendant's originalist argument for narrowly construing *Terry*.[118] Drawing on originalist scholarship and a concurring opinion by Justice Scalia that had criticized *Terry* as inconsistent with the Fourth Amendment's original meaning,[119] Judge Jordan agreed with the defendant that the decision should not be "expand[ed] . . . beyond its 'narrow scope.'"[120]

The dispute between Judge Jordan and Judge Pryor—two self–described originalists—illustrates the tensions that lower court judges can face in attempting to reconcile their interpretive commitments with the obligation to follow seemingly nonoriginalist Supreme Court precedent. Although Judge Jordan acknowledged his obligation to follow directly controlling Supreme Court decisions, he insisted that *Terry* was distinguishable because that case had not spoken to the specific issue before the court—namely, the

114. *Id.* at 995–97.

115. 392 U.S. 1 (1968).

116. *See, e.g.*, United States v. Touset, 890 F.3d 1227, 1232 (11th Cir. 2018) (opinion of Pryor, J.) (looking to practices of the First Congress as evidence of original understanding of the Fourth Amendment); United States v. Bellaizac–Hurtado, 700 F.3d 1245, 1249–51, 1254 (11th Cir. 2012) (opinion of Pryor, J.) (examining evidence of Founding–era understandings to determine the scope of Congress's power to define and punish violations of the law of nations).

117. *Johnson*, 921 F.3d at 1001.

118. *Id.* at 1010 (Jordan, J., dissenting).

119. Minnesota v. Dickerson, 508 U.S. 366, 381 (1993) (Scalia, J., concurring).

120. *Johnson*, 921 F.3d at 1009–10 (Jordan, J., dissenting) (quoting Dunaway v. New York, 442 U.S. 200, 210 (1979)).

permissibility of seizing ammunition where no weapon or other contraband was discovered on a suspect's person.[121] And given what he viewed as *Terry*'s "shaky originalist foundation," Judge Jordan contended that lower courts should exercise "the option of declining to broaden it—of 'refus[ing] to extend it one inch beyond its previous contours.'"[122] Judge Jordan's approach can be viewed as an example of what Professor Richard Re has described as "narrowing" precedent—that is, "interpret[ing] [a] precedent in a way that is more limited in scope than what [one] think[s] is the best available reading."[123] Narrowing provides a mechanism through which lower courts might seek to limit the effects of nonoriginalist Supreme Court rulings without directly challenging the institutional authority of the Court itself. But as Judge Pryor's majority opinion demonstrates, the technique is not without controversy. Judge Pryor insisted that it was the duty of lower courts to "apply Supreme Court precedent neither narrowly nor liberally—only faithfully" and asserted that "[w]e cannot use originalism as a makeweight when applying" a directly controlling "analytic framework."[124]

4. Originalist Critique

A final category of cases in which originalist modes of reasoning may feature prominently in lower court opinion writing involves situations in which a lower court judge believes a particular line of Supreme Court precedent conflicts with the actual original meaning of a constitutional provision. Although the lower court is bound

121. Id. at 1010.

122. *Id.* (alterations in original) (quoting Richard Epstein, *The Classical Liberal Alternative to Progressive and Conservative Constitutionalism*, 77 U. CHI. L. REV. 887, 903 (2010)).

123. Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863 (2014) [hereinafter Re, *Narrowing Precedent*]; *see also* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016) (examining the phenomenon of "narrowing from below" through which lower courts might limit the effect of Supreme Court rulings through narrow interpretation) [hereinafter Re, *Narrowing From Below*].

124. *Johnson*, 921 F.3d at 1001–02 (majority opinion).

to follow such erroneous precedents, the deciding judges, or some portion of them, may sometimes choose to use their opinions to call attention to what they see as the inconsistency between the binding Supreme Court precedent and the correct understanding of the Constitution.

Consider, for example, Sixth Circuit Judge Bush's opinion concurring *dubitante* in the en banc decision in *Turner v. United States*, a case involving the Sixth Amendment's application to preindictment plea negotiations.[125] Though Judge Bush agreed with the majority of the en banc panel that the court was "bound to affirm because of Supreme Court precedents holding that the Sixth Amendment right to counsel attaches only 'at or after the initiation of criminal proceedings,'"[126] he wrote separately, and at length, to articulate his reservations about those precedents. Specifically, Judge Bush expressed concern that the "the original understanding of the Sixth Amendment gave larger meaning to the words 'accused' and 'criminal prosecution' than" the controlling Supreme Court cases had acknowledged.[127] Judge Bush explained his motivation for calling attention to what he perceived to be the inconsistency between the controlling Supreme Court doctrine and "the original meaning of the Sixth Amendment text" by suggesting that the history surveyed in his concurrence might cause the Court "to reconsider its right–to–counsel jurisprudence."[128]

Judge Bush's opinion is hardly aberrational. Several other lower court judges have chosen to voice their concerns regarding the historical legitimacy of particular Supreme Court frameworks while simultaneously acknowledging their obligation to adhere to those frameworks as a matter of vertical stare decisis.[129] The Supreme

125. Turner v. United States, 885 F.3d 949, 955 (6th Cir. 2018) (Bush, J., concurring *dubitante*).

126. *Id.* at 956 (quoting United States v. Moody, 206 F.3d 609, 614 (6th Cir. 2000)).

127. *Id.*

128. *Id.*

129. *See, e.g.*, Morgan v. Fairfield Cnty., 903 F.3d 553, 567, 575 (6th Cir. 2018) (Thapar, J., concurring in part and dissenting in part) (criticizing the Supreme Court's current

Court has taken a relatively tolerant view of such critiques. Although the Court has repeatedly insisted that the prerogative of overruling a directly controlling precedent is reserved to the Court alone,[130] it has not attempted to shut down mere criticism by lower court judges. To the contrary, the Court has occasionally signaled its receptiveness to invitations from lower courts calling for it to reconsider some earlier precedential holding.[131]

III. ORIGINALISM AND THE VALUES OF VERTICAL STARE DECISIS

The potential significance of originalist modes of decisionmaking to the functions of lower courts raises the question of whether and to what extent lower courts should strive to integrate originalist interpretation into their own decisionmaking. One way of approaching this inquiry is to focus on the values undergirding our system of vertical stare decisis. This Part focuses on five such values: (A) uniformity, (B) accuracy, (C) efficiency, (D) percolation, and (E) legitimacy—and explores their implications for lower courts' use of originalism.

Fourth Amendment jurisprudence as "a morass of legal precedent that is often confusing, contradictory, and incomplete" and urging the adoption of a more originalist approach, while acknowledging that existing doctrine remains binding until the Supreme Court chooses to revisit it); Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1113 (5th Cir. 1997) (Garza, J., concurring specially) (criticizing the Supreme Court's modern substantive due process jurisprudence as "inimical to the Constitution" while acknowledging that he was "forced to follow" the Court's decisions), *overruled by* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001).

130. *See supra* note 22.

131. *See, e.g.*, United States v. Hatter, 532 U.S. 557, 567 (2001) (noting lower court was correct to follow controlling Supreme Court precedent while accepting that court's "invit[ation] [for] us to reconsider" and overrule the relevant precedent); State Oil Co. v. Khan, 522 U.S. 3, 19–20 (1997) (acknowledging the legitimacy of lower court's critique of controlling Supreme Court precedent while approving of that court's decision to adhere to the precedent as controlling).

A. Uniformity

One of the most important systemic values that vertical stare decisis is thought to serve is that of ensuring the national uniformity of federal law.[132] By ensuing that the geographically dispersed inferior courts adhere to a single set of authoritative interpretations, vertical stare decisis enables individuals and entities engaged in multistate activities to conform their behavior to a single set of legal requirements[133] and ensures that enforcement officials will apply consistent standards across jurisdictional boundaries.[134] In this way, uniformity may also contribute to equality by ensuring that similarly situated litigants in different forums will have their claims adjudicated under consistent interpretations of federal law.[135]

In contrast, the potential uniformity objection to lower court originalism can be broken down into multiple subsidiary concerns. Some critics contend that originalism is intrinsically less constraining than a more precedent–focused interpretive practice.[136] A further uniformity concern arises from the near certainty that any shift toward a more widespread embrace of originalism by lower courts will be neither immediate nor universal. Rather, such a shift will

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132. *See, e.g.*, Caminker, *Precedent and Prediction*, *supra* note 34, at 38 (identifying uniformity of federal law as "an important objective of the federal adjudicatory process"); *see also* Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 427–28 (2011) ("[V]ertical stare decisis provides 'maximal rule of law benefits,' in that lower court adherence to Supreme Court precedent enables a uniform interpretation of federal statutory and constitutional provisions, making the law more predictable, stable, and certain.") (quoting Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1454 (2007)).

133. *But see, e.g.*, Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1597 (2008) ("Uniformity is claimed to be especially important to multi–state actors, who will be forced to comply with multiple, possibly even conflicting, legal rules when courts differ over the meaning of federal law.").

134. *See*, *e.g.*, Caminker, *Precedent and Prediction*, *supra* note 34, at 39.

135. *Id.* ("[N]ational uniformity of federal law ensures that similarly situated litigants are treated equally . . . .").

136. *See also*, *e.g.*, Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 215 (2008) (noting possibility that "increasing the number of indicators could . . . increase net discretion, because different indicators might sometimes point to wholly different results").

almost certainly proceed in a more gradual and piecemeal fashion, with some originalist judges interspersed among their many nonoriginalist cohorts. The mixture of originalist and nonoriginalist jurists at the lower court level poses at least a near–term uniformity challenge—one that is likely to persist until there is either a comprehensive turnover in judicial personnel at the lower court level or a dramatic shift in jurisprudential attitudes among judges.[137] And while this particular concern might theoretically be resolved either by inducing would–be originalist judges to stick to doctrinalism *or* by inducing nonoriginalist jurists to adopt originalism, the predominance of nonoriginalist modes of reasoning in existing lower court practices suggests that the former option would be considerably less burdensome and costly than the latter.[138]

While these potential uniformity concerns are hardly trivial, such concerns should not be overstated. Although uniformity is certainly an important value in the federal judicial system, it is far from the only relevant consideration.[139] The practices of the Supreme Court, the practices of the inferior federal courts and state courts, and the allocation of jurisdictional authority by Congress all suggest a willingness to tolerate a fairly wide degree of disuniformity at the lower court level.[140] Courts applying traditional doctrinal methods routinely disagree with one another regarding the proper interpretation of particular constitutional provisions and Supreme Court precedents, and such disagreements are routinely allowed to persist for years at the lower court level.[141]

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137. *Cf.* Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 55 (2009) (observing that "[e]ven if it would be best . . . for all judges to be originalist, it is not best for only some judges to be originalist in a partially nonoriginalist world") [hereinafter Vermeule, *System Effects*].

138. *Cf. id.* at 55 (observing that "most judges most of the time have not been originalist, with episodic exceptions, a fact that originalists explicitly lament") (citing BORK, *supra* note 5).

139. *See generally* Frost, *supra* note 133 (suggesting grounds for believing that the value of uniformity may be overstated in federal courts scholarship).

140. *See, e.g.*, *id.* at 1610 (noting Congress's failure to take available steps to foster more uniform interpretive practices in the lower courts).

141. *See, e.g.*, Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the*

Nor is disuniformity an inevitable consequence of lower court originalism. In many situations, the results to which an originalist interpretation points may overlap with those produced by non-originalist methods, allowing judges of diverse methodological perspectives to converge on a set of mutually agreed–upon outcomes.[142] Indeed, the use of originalism by lower courts might sometimes be most conducive to fostering uniformity. For example, in cases of first impression, original meaning might provide a useful focal point around which lower courts might plausibly converge.[143] And where the Supreme Court itself has clearly prescribed an originalist-oriented framework, faithful application of that framework by lower courts would seem most conducive to fostering uniformity.[144]

B. Accuracy

As discussed above, many of the values associated with uniformity cluster around the value our legal system places on the desire that the law be settled and predictable. But such settlement is not the only relevant consideration. Our legal system also emphasizes the importance of having the law be settled correctly.[145] Any assessment of vertical stare decisis must therefore be attentive not only to the desire that lower courts converge on the same answer

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Fourth Amendment, 65 VAND. L. REV. 1137, 1139–40 (2012) (noting "the existence of over three dozen extant circuit splits" regarding proper application of the Fourth Amendment and observing that such splits are often allowed to persist "for extended periods of time").

142. *See* Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1679 (2018) (observing that, in some contexts, "the line between originalism and nonoriginalism becomes blurry in practice").

143. *See id.* at 1686–87 (observing that originalism may sometimes provide a useful focal point for coordination in situations when alternative options, such as judicial precedent or longstanding tradition, are unavailable).

144. *Cf. infra* notes 312–314 and accompanying text (discussing potential uniformity concerns associated with "narrowing" of Supreme Court precedent by lower courts).

145. *See generally* Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1845–47 (2013) (identifying the tension between legal settlement and legal correctness as central when assessing the role of precedent within any particular theory of constitutional interpretation).

to a given legal question but also to the concern that such courts converge on the *correct* answer. This concern, in turn, requires consideration of the comparative proficiency of courts at different levels of the judicial hierarchy. Other things being equal, it seems reasonable to conclude that courts that are more proficient at working with a particular interpretive methodology will be less likely to apply that methodology erroneously than comparatively less proficient courts.

Such proficiency concerns might apply with particular force to originalist interpretive theories. For one thing, originalism is closely associated with the idea that there exist objectively "right" answers to contested constitutional questions that are external to the views or practices of the judiciary.[146] Originalism also seeks answers to such questions in historical materials that will often be unfamiliar to most members of the legal profession.[147] As observers on both sides of the originalism debate have observed, doing originalism well may require specialized knowledge and capabilities that are beyond the professional training and experience of most judges.[148]

A competent originalist interpreter must not only identify the relevant universe of historical sources—a task which may itself require difficult and contestable judgments[149]—but must also be able

146. *See, e.g.*, Randy E. Barnett, *The Misconceived Assumptions About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 660 (2009) ("The intuitive appeal of originalism rests on the proposition that the original public meaning is an objective fact that can be established by reference to historical materials.") [hereinafter Barnett, *Misconceived Assumptions*].

147. *See, e.g.*, Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 281–82 (2005).

148. *See, e.g.*, *id.* at 281 ("Originalism . . . if it is to be done well, requires a skill set that is beyond the ken of most lawyers and judges."); *cf.* Scalia, *supra* note 5, at 856–57 (describing the "greatest defect" of originalism as "the difficulty of applying it correctly").

149. *See, e.g.*, Kesavan & Paulsen, *supra* note 4, at 1183–96 (considering whether originalist interpreters should look to private records of the Philadelphia Convention as evidence of constitutional meaning and acknowledging existence of academic disagreements regarding their relevance).

to understand such sources,[150] identify any limitations that may affect their accuracy or reliability,[151] and situate such sources within their relevant historical, political, legal, and linguistic context.[152] Such an interpreter may also face the difficult task of translating language, rules, and background principles that were addressed to a particular set of historical circumstances into a much different context presented by subsequent developments.[153] In view of these complexities, even Justice Scalia, one of originalism's most well–known proponents, felt compelled to acknowledge that originalism might be "a task sometimes better suited to the historian than the lawyer."[154]

While such proficiency concerns could be (and have been) raised with regard to the qualifications of all jurists (including the Justices of the Supreme Court),[155] there are reasons to believe that they apply with particular force to judges in the lower courts. As noted above, the Supreme Court has certain institutional advantages that may render it better equipped to accurately resolve difficult legal

150. *Cf.* Solum, *supra* note 8, at 281–82 (noting that modern linguistic intuitions may sometimes mislead interpreters regarding the meanings of writings prepared in the past).

151. *See, e.g.*, MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (questioning the reliability of James Madison's notes of the Philadelphia Convention); James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 1–2 (1986) (noting concerns about the reliability of Founding–era records of the state ratification conventions).

152. Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1761–62 (2015).

153. *See, e.g.*, Nelson, *supra* note 8, at 588–98 (noting challenges of applying language to new facts and circumstances that were not anticipated at the time the language was written); *cf.* Kyllo v. United States, 533 U.S. 27 (2001) (concluding that a thermal imaging scan of a private home constituted a "search" for purposes of the Fourth Amendment's prohibition on "unreasonable searches and seizures").

154. Scalia, *supra* note 5, at 857.

155. *See, e.g.*, Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587, 1588 (1997) ("[T]here is good historical evidence that jurists rarely make good historians, and that a theory of interpretation which requires judges to master the ambiguities of history demands a measure of faith that we, as citizens and scholars alike, should be reluctant to profess.").

questions.[156] For example, the Court's ability to control its own docket may allow it to focus on addressing constitutional questions to a greater extent than lower court judges, which may, in turn allow it to gain a deeper familiarity with the relevant universe of originalist interpretive sources.[157] The Court can also devote much more time and attention to each case it considers and can benefit from the amicus participation of experts in history, linguistics, and others who may assist the Court in understanding and contextualizing the relevant historical sources.[158]

The Supreme Court's high profile and the salience of its decisions may also give it a unique capacity to influence the development of interpretive evidence that is brought before it. Because the Court consists of only nine members, and because all nine typically deliberate on each case that comes before the Court, repeat players in the Court—including the Solicitor General, prominent members of the Supreme Court bar, and public interest organizations—have strong incentives to closely scrutinize the views and attitudes of each Justice.[159] Such entities may be particularly attentive to any "signals" the Justices might convey regarding their openness to considering certain types of evidence and arguments in future cases and may shape their litigation strategies accordingly.[160]

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156. *See supra* notes 39–42 and accompanying text.

157. Even nonoriginalist Justices may find it useful to develop some felicity with originalist sources and modes of argument in order to competently respond to originalist–oriented arguments of their fellow Justices or the parties. *See, e.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 44, 132–68 (1996) (Souter, J., dissenting) (contending that the majority's extension of state sovereign immunity principles was inconsistent with the original understanding of the Constitution).

158. Josh Blackman, *Orginalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J.L. & LIBERTY 44, 57–58 (2019) (contrasting the "phalanx of originalist amicus briefs on both sides of the 'v.'" at the Supreme Court with the lack of originalist arguments at lower court level).

159. *See, e.g.*, Re, *Narrowing From Below*, *supra* note 123, at 943–44 (describing "the growing culture of Court–watching," which has been facilitated both by technological advancements and by the increasing specialization of the Supreme Court bar).

160. *See id.* (noting the Justices' occasional efforts to use quasi-formal means to "signal" their views and preferences to a wider audience); *cf.* Carpenter v. United States,

By contrast, the judges of the lower courts have far less capacity to shape the evidence and arguments presented to them in any particular case. Judges on the federal courts of appeals, for instance, typically decide cases as part of randomly assigned three–judge panels and the parties may have little or no advance knowledge of the panel members' identities until shortly before oral argument occurs.[161] And the far larger number of judges who serve on the lower courts means that the jurisprudential views of any particular lower court judge have a drastically smaller likelihood of shaping the content of arguments that are presented to the courts, let alone the broader scholarly agendas of academics and other experts who may be able to make meaningful contributions to the subject. Lower court judges will thus typically have far less assistance from outside sources in sorting through the mass of potentially relevant enactment–era sources that may be relevant to an originalist inquiry.

The potential proficiency gap between the lower courts and the Supreme Court seems significant for most theories of originalism. Although it is certainly possible to imagine versions of originalism that can tolerate a high degree of interpretive error,[162] most of the more familiar variants insist not merely on originalism being done but that it be done correctly.[163] Indeed, a chief selling point of originalism in the eyes of many proponents is its putatively superior capacity to deliver objectively "right" answers (or, at least, a more limited universe of potentially right answers) as compared to

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138 S. Ct. 2206, 2267–68 (2018) (Gorsuch, J., dissenting) (expressing potential willingness to reconsider "reasonable expectations of privacy" test in Fourth Amendment jurisprudence but noting that "[m]uch work" needs to be done to determine how a historically faithful doctrinal test should apply in practice).

161. *See, e.g.*, Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 BYU L. REV. 55, 67 n.45 & 71 (noting that all courts of appeals use some form of random assignment practice and observing that "most circuits do not announce panel composition to litigants until shortly before the oral argument is scheduled").

162. *Cf.* Samaha, *Expiration Date*, *supra* note 77, at 1358–61 (suggesting a "randomization" analogy for originalism but suggesting that this version of originalism should aspire to be "economical and unsophisticated," prioritizing the value of settlement over historical correctness).

163. *See infra* Section V (discussing arguments for originalism).

leading alternatives.[164]

But while such proficiency concerns certainly provide grounds for caution in considering originalism's role in lower court decisionmaking, they do not provide a conclusive argument against lower court originalism. Even if the Supreme Court might be better situated to assess claims regarding original meaning, lower courts might still perform the task tolerably well to make the practice worthwhile. Moreover, any assessment of the risks of error involved in lower courts' determinations should also take into account the fact that such errors are, at least in principle, correctable by the Supreme Court at a later time. Furthermore, as will be discussed in further detail below, it is possible that the Supreme Court's own decisionmaking may benefit from affording lower courts the freedom to take originalist evidence into account in making their own rulings.[165]

C. Efficiency

In addition to balancing the sometimes competing values of having the law be settled, stable, and uniform, on the one hand, and having it be decided correctly, on the other, our system of vertical stare decisis also reflects concern for the *costs* involved in reaching a "correct" decision.[166] The doctrine of vertical stare decisis tends to

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164. *See, e.g.*, Barnett, *Misconceived Assumptions*, *supra* note 146, at 660 ("The intuitive appeal of originalism rests on the proposition that the original public meaning is an objective fact that can be established by reference to historical materials."); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) ("The point is that *in principle* the textualist–originalist approach supplies an objective basis for judgment that does not merely reflect the judge's own ideological stance. And when errors are made, they can be identified as such, on the basis of professional, and not merely ideological, criteria.").

165. *See infra* Part III.D (discussing potential "percolation" effects of lower court decision–making).

166. *See, e.g.*, Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1968 (2019) ("Besides promoting correct outcomes, the law of precedent aims to be efficient, in the sense of avoiding wasteful expenditures of resources.").

reduce decision costs by allowing some questions to be conclusively settled by authoritative pronouncements of superior courts, thereby eliminating the need for continued litigation and deliberation over those issues in the lower courts.[167]

By expanding the range of sources to which courts must look in order to determine the content of constitutional meaning, originalism threatens to raise decision costs substantially. Unlike conventional forms of lower court decisionmaking, which involve relatively low–cost strategies such as analogical comparisons to prior cases, invoking dicta, or abstract moral or policy–based reasoning, originalism demands that courts look to historical evidence, which is typically far less accessible and more challenging for non–expert judges to work with.[168] Justice Scalia once observed that if "done perfectly," resolving a constitutional question on originalist grounds might require "thirty years" of historical investigation "and 7,000 pages" of explanation.[169] And even allowing for a certain level of hyperbole on the Justice's part, his observation reflects the reality that originalism seems to demand considerably more investment of time and decisionmaking resources on the part of interpreters than other plausible alternatives. Indeed, some have gone so far as to claim that "[o]riginalism is plausibly the most costly approach to constitutional adjudication in terms of time and effort."[170]

To be sure, such concerns do not apply with unique force to the use of originalism by lower courts. Similar concerns plausibly can be (and have been) raised with regard to the use of originalism by

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167. *See, e.g.*, Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, *supra* note 46, at 840 (observing that "the doctrine of hierarchical precedent promotes administrative efficiency"); Serota, *supra* note 132, at 428–29 (identifying judicial economy as a principal value underlying vertical stare decisis).

168. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. REV. 313, 319 (2007) ("Instead of relying upon moral intuitions, or low–cost analogies to precedents . . . , originalist judges do massive amounts of historical and archival research . . . ."); *see also, e.g.*, Samaha, *Expiration Date*, *supra* note 77, at 1358 (noting that "originalism can be costly when performed conscientiously").

169. Scalia, *supra* note 5, at 852.

170. Posner & Vermeule, *supra* note 168, at 319.

the Supreme Court as well.[171] Nevertheless, institutional differences between the Supreme Court and the lower courts—including the far greater number of lower courts and the greater decisional resources available at the Supreme Court level—suggest that the time and effort that originalism requires might be most efficiently invested at the Supreme Court level.[172]

But while a broader embrace of originalism by the lower courts seems likely to enhance the aggregate costs of constitutional decisionmaking, such an assessment comes with several caveats. First, it might be argued that the enhanced decision costs will be justified by the enhanced accuracy of the lower courts' resulting rulings or by the information such rulings generate for the Supreme Court's own deliberations.[173] Such an assessment would, of course, require some account of the anticipated benefits a practice of originalist interpretation might be thought to produce.[174] For present purposes, it is sufficient to recognize that the minimization of decision costs should not necessarily be viewed as an overriding objective in choosing an interpretive theory.[175]

Second, lower court judges and litigants may be able to econo-

171. *See, e.g.*, Berman, *supra* note 6, at 78–79 (expressing concern that investing the level of time and effort insisted upon by some versions of originalism "might well translate into a yet greater reduction in the Supreme Court caseload, which itself would translate into less clarity and less uniformity in our law").

172. *See, e.g.*, Grove, *supra* note 41, at 22 ("[T]he Supreme Court has various institutional advantages over the inferior federal and state courts that may make it more efficient for the Court to incur . . . decision costs itself."); Bruhl, *Hierarchy and Heterogeneity*, *supra* note 34, at 475 ("To the extent resource constraints pose a problem, they pose a far more serious problem for courts other than the Supreme Court.").

173. *Cf.* Samaha, *Expiration Date*, *supra* note 77, at 1330 n.124 ("It seems likely that originalism's proponents are willing to accept substantial decision costs to achieve relatively high degrees of certainty about public meaning and its limits . . . ").

174. *See infra* Section IV (discussing various normative arguments in favor of originalism).

175. *See, e.g.*, Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 88–89 (2000) (contending that interpretive theory should aim to achieve the "best mix of error costs and decision costs," while acknowledging that "the concept of 'error' has meaning only in relation to some interpretive goal given by the underlying theory of . . . authority").

mize decision costs to some extent by relying on third–party research performed by historians, law professors, and other academics rather than undertaking their own, independent research. Because many of the questions that originalism might require jurists to answer may also be of independent interest to academic researchers, lower courts may sometimes find the relevant historical sources have already been thoroughly vetted by outside experts. A wider embrace of originalism by the judiciary may further drive academic research toward efforts to recover original meaning, which may, in turn, further limit the direct costs imposed upon the judiciary itself.[176]

Of course, relying on such third–party research raises its own complications, including the challenges of verifying the accuracy and reliability of such researchers' conclusions and the difficulties of reaching a reliable determination when the academic research does not point to a single, unambiguous conclusion.[177] Absent the availability of credible, low–cost proxies for determining the accuracy of particular researchers' historical conclusions, judges may have no choice but to invest their own time and resources to ensure that the history on which they rely is, in fact, reliable.

Third, the costs of originalist decisionmaking for lower courts may be mitigated to a significant extent by the force of stare decisis. As discussed above in Part I, the practical ability of lower courts to engage in originalism is likely to be constrained to a significant extent by the contours of Supreme Court precedent.[178] The horizontal and vertical effect of circuit precedent in the federal system and of

176. It might be argued that even such third–party research costs should be counted as part of the overall decision costs of originalism to the extent it diverts academics' resources away from other endeavors. *Cf.* Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications, and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 47–48 (2015) (questioning the extent to which the benefits of legal scholarship in general outweigh the costs of its production).

177. *See, e.g.*, William J. Novak, *Constitutional Theology: The Revival of Whig History in American Public Law*, 2010 MICH. ST. L. REV. 623, 642 (2010) (observing that "if one does not have any previous independent experience with a substantial range of primary sources in a given field," it may be challenging to decide which of various alternative secondary sources "gives a more accurate, convincing, and authoritative account").

178. *See supra* notes 107–112 and accompanying text.

appellate court rulings at the state level adds additional layers of constraint on the decisional freedom of lower courts. A practice of lower court originalism thus likely would not entail forcing lower courts to thoroughly engage with originalist evidence in each and every constitutional case that might come before them. Rather, once a constitutional question has been "settled" by precedent—whether originalist or nonoriginalist, horizontal or vertical—the lower court is unlikely to face substantial decision costs in implementing that precedent, at least in those cases where the precedent directly and unambiguously applies. Thus, even if a wider embrace of originalism by lower court judges may increase lower courts' decision costs in those cases where originalism might plausibly inform their decisionmaking, the constraints of precedent may limit the magnitude of such cost increases to tolerable levels.

D. Percolation

The general tension referred to above between the competing values associated with settlement, on the one hand, and correctness, on the other,[179] takes on particular salience in the vertical stare decisis context in debates between proponents of strong uniformity and those who advocate allowing issues to "percolate" in the lower courts.[180]

Proponents of percolation contend that "allow[ing] a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule" will tend to improve the quality of Supreme Court decisionmaking.[181] Those who take a more skeptical view of percolation

179. *See supra* note 145 and accompanying text.

180. *See, e.g.*, Caminker, *Precedent and Prediction*, *supra* note 34, at 54–61 (discussing tradeoff between institutional values served by a "centralizing" model of hierarchical precedent versus the values thought to be served by "issue percolation" in the lower courts); Gewirtzman, *supra* note 13, at 481–92 (surveying various arguments for and against "percolation" in the lower courts).

181. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984); *see also, e.g.*, Gewirtzman, *supra* note 13, at 482–83 (discussing potential benefits of percolation).

have criticized the practice on various grounds, including the costs involved in repeated adjudications of the same legal issue in multiple forums, the potential for uncertainty and confusion prior to Supreme Court resolution, and the potential for unfairness to disappointed litigants.[182] Many critics have also taken a skeptical view of the extent to which lower court deliberations can truly benefit or inform the Supreme Court's ultimate resolution of a contested legal issue.[183]

The potential for originalist reasoning by lower courts to benefit the Supreme Court's decisionmaking may not be immediately obvious, even to those who endorse percolation in other contexts. Unlike interpretive theories that prioritize experimentation and practical results as guides to determining the "best" interpretation of particular constitutional provisions, originalists tend to look principally to a set of historical and linguistic facts that are unaffected by the practical realities or consequences of a particular line of jurisprudential reasoning. Originalist jurists on the Supreme Court may thus find far less to value in the kinds of practical experimentation that are often asserted as one of percolation's chief benefits.[184]

Nonetheless, there are reasons to believe that originalist decisionmaking by lower courts could benefit the Supreme Court's deliberations in at least some circumstances. For one thing, at least

182. *See, e.g.*, Gewirtzman, *supra* note 13, at 489–92 (summarizing objections to percolation).

183. *See, e.g.*, Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 690 (1990) (expressing skepticism that lower court opinions provide important insights for the Supreme Court); Caminker, *Precedent and Prediction*, *supra* note 34, at 60 ("Only infrequently will inferior courts develop unique analytical approaches or doctrinal constructs that would otherwise escape the Supreme Court's attention.").

184. *See, e.g.*, Gewirtzman, *supra* note 13, at 492 (observing that "the data collected by lower court rulings may be irrelevant to judges that adopt interpretive modalities—like originalism—that purport to ignore the real–world impact of constitutional rules"); Caminker, *Precedent and Prediction*, *supra* note 34, at 58–59 (questioning the usefulness of lower court deliberations to Justices' "interpretive methodologies, such as plain–language interpretation or originalism, for which contextual assessments concerning how a rule will play out in a given region or how it will affect particular persons have little if any relevance").

some originalist theories may not be so impervious to the practical consequences of interpretive outcomes as is sometimes assumed. Although few originalists may be willing to concede that the practical consequences of a given interpretation could ever warrant departing from very clear evidence of original meaning, consequentialist evidence may nonetheless be relevant to determining how best to flesh out vague or underspecified constitutional language,[185] how persuasive a given set of evidence must be in order to warrant giving legal force or effect to a particular interpretation,[186] or whether some existing nonoriginalist precedent should be overruled.[187]

Moreover, a practice of lower court originalism may benefit Supreme Court decisionmaking in other ways, such as by helping to generate useful information relevant to assessing original meaning. Even though lower courts lack many of the decisional advantages available to the Supreme Court, the sheer numerical superiority of the lower court judiciary may contribute some informational benefit to the Supreme Court by allowing the Court to harness the benefits of having many minds deliberate on the same subject.[188]

A practice of lower court originalism may also benefit the Supreme Court's deliberations due to the different time horizons on which lower court decisionmaking occurs. Because issues typically

185. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469–73 (2013) (discussing role of normative considerations in the process of "construction," which involves giving legal effect to constitutional language and is most visible "when the meaning of the constitutional text is unclear, or the implications of that meaning are contested").

186. *See, e.g.*, GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS 119–22 (2017) (discussing the problem of selecting a standard of proof by which to assess claims about original meaning).

187. *See, e.g.*, Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 59–60 (2001) (observing that later courts possess "more information about how the rule chosen by their predecessors has worked in practice" and that this "additional experience" may, in some circumstances, "help expose an error" the prior court overlooked).

188. *See* Bruhl, *Following Lower–Court Precedent*, *supra* note 37, at 862–64 (discussing potential epistemic advantages of increasing the number of decisionmakers on a given question).

reach the lower courts long before they arrive at the Supreme Court—whether out of a deliberate practice of fostering percolation or simply out of capacity constraints on Supreme Court decisionmaking[189]—lower court judges may have some ability to shape and influence the trajectory of the arguments that will eventually reach the Supreme Court. A lower court judge who employs an originalist mode of reasoning might call the attention of other prospective litigants to important historical evidence or scholarship relevant to the underlying constitutional question. Such decisions may also spur further historical research by other interested parties and their attorneys or by third–party scholars and organizations who are able to approach such questions with a broader time horizon that extends beyond the briefing schedule that can feasibly be met in the context of a single litigated appeal.

Conversely, lower courts may also sometimes encounter constitutional questions many years or even decades after the Supreme Court has stepped in with an authoritative pronouncement on the issue. A lower court judge inclined to look to evidence of original meaning may identify new evidence or scholarship that was developed or came to light after the Court handed down its original pronouncement and which the Justices may not have been aware of at the time of their original decision. Such a judge might then be able to identify possible distinctions that would not necessarily be apparent had the originalist inquiry not been conducted. Such distinctions may, in turn, suggest that the Court's existing precedents may speak to the issue less clearly or definitively than they might appear at first glance.[190] Even if the judge concludes that the only faithful

189. *Cf.* William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986) (asserting that arguments in favor of percolation may simply reflect an effort to make "a virtue of necessity").

190. For example, the lower courts that first embraced the "individual rights" interpretation of the Second Amendment in the late 1990s and early 2000s, *see supra* notes 73–74 and accompanying text (discussing United States v. Emerson, 46 F. Supp. 2d 598 (N.D. Tex. 1999), *rev'd and remanded*, 270 F.3d 203 (5th Cir. 2001) and Parker v. District of Columbia, 478 F.3d 370, 395 (D.C. Cir. 2007)), were able to draw upon a substantial body of originalist scholarship examining that interpretation, nearly all of which was

reading of precedent forecloses the best originalist reading, she might at least be well situated to call the Supreme Court's attention to the inconsistency, allowing the Court to decide for itself whether it wishes to revisit the issue.[191]

Finally, and relatedly, to the extent originalism acts as at least a partial counterweight to the authority of Supreme Court precedent, a practice of lower court originalism may call the Court's attention to a broader range of possible issues than would be true in its absence. Lower court judges sometimes adopt expansive readings of Supreme Court precedents, choosing to follow even statements that the lower courts themselves recognize to be nonbinding.[192] Such courts may have strong incentives to extend Supreme Court precedent in this way, including to minimize their own decision costs, insulate themselves against possible reversal, and offload some of the rhetorical responsibility for decisions over which they may have some meaningful degree of practical discretion.[193] Over time, the accretive effect of such a practice may result in the ossification of lower court doctrine around a mutually agreed–upon reading of existing precedent that may be disputable in theory but uncontested in practice.[194]

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generated decades after the Supreme Court's decision in *United States v. Miller*, 307 U.S. 174 (1939)—its last decision addressing a Second Amendment challenge. *See* Bogus, *supra* note 72, at 5–8 (identifying a student note written in 1960 as the first academic defense of the individual rights interpretation to appear in a law review and noting that twenty–seven more defenses were published in law reviews between 1970 and 1989).

191. *See supra* Part III.D (discussing originalist–oriented critiques of Supreme Court precedents by lower courts).

192. *See* Re, *Narrowing From Below*, *supra* note 123, at 949 (observing that "[i]n some cases of precedential ambiguity . . . [lower court] judges may feel tempted to exaggerate the degree to which higher court precedent supports their position," either for strategic reasons or due to "the psychological tendency to view neutral evidence as supportive of one's own views").

193. *Cf.* Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 69 (1988) (noting concern that "[a] system of unalterable judicial precedent, on the other hand, with an ever–growing body of decisions, would gradually choke off all opportunity for growth and reexamination").

194. *Cf.* notes 68–76 and accompanying text (discussing lower courts' coalescence

A practice of originalism by some lower court judges—even if less than universally embraced—may help to counteract these ossifying tendencies. By providing a theoretical spur to narrower readings of Supreme Court precedent than are embraced by other judges at the same level of the judicial hierarchy, originalism may reveal lingering ambiguities in the law and issues that the Court has not felt it necessary to address but that could benefit from its further intervention. By fostering some level of interpretive disagreement at the lower court level, originalism may generate useful interventions by the Supreme Court that may, in turn, generate new authoritative settlements that could be superior to the lower courts' earlier consensus reading of Supreme Court precedent.

E. Legitimacy

A final value that is typically invoked in support of the doctrine of stare decisis in general, and vertical stare decisis in particular, is legitimacy.[195] Supporters of stare decisis claim that adherence to past decisions enhances the perceived legitimacy of constitutional decisionmaking by preserving a sense of continuity in legal doctrine, preserving doctrines that have attained widespread social acceptance, and presenting to the public an image of judicial decisionmaking constrained by law.[196] Vertical stare decisis can serve a

around a contestable interpretation of the Supreme Court's decision in *United States v. Miller* that was eventually rejected by the Supreme Court in *Heller*).

195. Legitimacy is a famously multi–faceted concept, embracing sociological, legal, and moral dimensions. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21–36 (2018) (distinguishing "sociological legitimacy" from "legal legitimacy" and "moral legitimacy" and discussing the relationship between the three). For present purposes, the most salient dimension of analysis is sociological legitimacy—that is, what the relevant public regards as "justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward." Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005).

196. *See, e.g.*, RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 42 (2017) ("Fidelity to precedent ensures that the law is not reduced to the preferences and personalities of a particular group of justices assembled at a particular moment in time.") Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) (plurality opinion) ("[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious

similar function by ensuring that lower court judges adhere to settled precedent rather than following their own personal preferences.[197]

In the federal judicial system, the legitimating effects of Supreme Court and lower court decisions can also interact with one another in complex ways. The Supreme Court sometimes invokes the lower courts' reactions to its own precedents as a basis for standing by or extending those precedents.[198] An enthusiastic lower court reaction to a doctrinal innovation by the Supreme Court may also help to solidify the doctrine's sociological legitimacy by presenting to the public the appearance of a united front, supported by all levels of the geographically dispersed judicial hierarchy.[199] Conversely, widespread lower court disagreement with, or resistance to, Supreme Court decisions may limit their jurisprudential significance and may, in extreme cases, even contribute to their reconsideration by the Supreme Court itself.[200]

Assessing the potential legitimacy effects of lower court originalism is complicated by the fact that original meaning provides an alternative and, in some cases, competing source of legitimation for

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question.").

197. *See, e.g.*, Gewirtzman, *supra* note 13, at 470 (contending vertical stare decisis helps to legitimate constitutional judicial review); David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 75 (2003) (arguing that by correcting lower courts' errors and ensuring that such courts "obey the law," appellate courts "thereby promot[e] the perception of legitimacy by ensuring that the ultimate outcome of litigation is based on impersonal and reasoned judgments").

198. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 662–63 (2015) (referring to the near unanimity of appellate court rulings recognizing a constitutional right to same–sex marriage in the aftermath of the Supreme Court's earlier, more narrowly framed opinion in *United States v. Windsor*, 570 U.S. 744 (2013) as support for recognizing such a right).

199. *See, e.g.*, Gewirtzman, *supra* note 13, at 483 (noting that "[w]hen judges on multiple diverse courts converge on the same outcome, the rule is more likely to be seen as the correct one," bringing "added legitimacy to judge–made constitutional law").

200. *Cf.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539–40 (1985) (pointing to lower courts' challenges in applying the standard articulated in *National League of Cities v. Usery*, 426 U.S. 833 (1976) as a basis for reconsidering, and overruling, that decision).

judicial decisionmaking. Consider, for example, a case of true constitutional first impression such as the recent Emoluments Clause litigation described above in Part I.A.[201] A lower court judge tasked with resolving such a case might seek to resolve the dispute by asking what interpretation of the Clause would yield the most desirable public policy. But approaching the question in this way might raise significant legitimacy concerns because the resulting decision would reflect nothing more than the deciding judge's own personal views without the guiding constraints that are often seen as essential to judicial legitimacy.[202] Because reference to original meaning is generally recognized as one legitimate form of reasoning about the Constitution (even if not the only one),[203] a decision premised on the original meaning of the relevant constitutional text might plausibly be seen by many as more legitimate.

In the far more typical case where a lower court acts against a framework of preexisting Supreme Court case law, the legitimation concern becomes more complicated. In some cases, the two sources may be mutually supporting, as where the Supreme Court itself has adopted an originalist–oriented doctrinal framework.[204] Precedent perceived by the deciding judge as inconsistent with the original meaning, however, can give rise to a tension between competing sources of legitimacy. Unquestioningly following or extending a nonoriginalist precedent may be perceived as illegitimate by those who view original meaning as the sole legitimate source of constitutional decisionmaking.[205] But questioning or narrowing Supreme

201. *See supra* notes 58–62 and accompanying text.

202. *See, e.g.*, Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 127 (2011) (describing the "widely accepted proposition that judges commit the cardinal sin of their profession when they decide cases based upon their own biases or personal policy preferences, rather than upon democratically legitimate sources of law"). *But see, e.g.*, DAVID STRAUSS, THE LIVING CONSTITUTION 44–45 (2010) (arguing that "it is legitimate to make judgments about fairness and policy" when they are not constrained by precedent).

203. *See supra* note 51 (noting that even many nonoriginalists accord some interpretive significance to evidence of original meaning).

204. *See supra* Part III.B (discussing such frameworks).

205. *See, e.g.*, BORK, *supra* note 5, at 119–20 ("When constitutional law is judge–made

Court precedent on originalist grounds may raise competing legitimacy concerns among those who reject originalism's interpretive premises.[206]

Shifting the focus of the legitimacy inquiry away from specific judicial decisions and toward a consideration of the legitimacy of the courts and the broader legal system reveals additional layers of complexity. As noted above, the legitimacy effects of Supreme Court rulings and lower court decisions can interact with one another in complex ways.[207] Where the Supreme Court and the lower courts are closely aligned with one another, their respective decisions can exert a kind of force–multiplying effect, with lower court rulings providing legitimating force to the Supreme Court's rulings and vice versa.[208]

But it is not difficult to imagine scenarios in which an ideological mismatch between the Supreme Court and the inferior courts can short circuit this mutual legitimation process. For example, if lower courts were to shift toward a decidedly more originalist approach, without a corresponding shift by the Supreme Court, the resulting conflicts over interpretive method could undermine the perceived legitimacy of not only individual decisions but also the broader judicial system.[209] Of course, the same kinds of legitimacy concerns

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and not rooted in the text or structure of the Constitution, it does not approach illegitimacy, it *is* illegitimate . . . ."); Kesavan & Paulsen, *supra* note 4, at 1128 (contending that originalist textualism is "the sole, legitimate method for interpreting and applying the Constitution as authoritative, controlling law").

206. *See* Reva B. Siegel, Heller *and Originalism's Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1404 (2009) (observing that originalism's critics have "objected that interpreting the Constitution in accordance with originalist methods would undermine the Constitution's democratic legitimacy").

207. *See supra* notes 195–197 and accompanying text.

208. Professor Neil Siegel has recently suggested that the Supreme Court may sometimes attempt to trigger this feedback mechanism deliberately by "signaling" to lower courts its preferred doctrinal direction without handing down a ruling that directly compels them to do so. *See* Neil Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1186–87, 1215 (2017).

209. *See, e.g.*, Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 WM. & MARY L. REV. 1, 40 (2018) ("Outright resistance of Supreme Court decisions thought to be

could be raised if the Supreme Court were the institution that shifted in a decidedly more originalist direction while the lower courts refused to follow suit.

IV. VERTICAL STARE DECISIS AND THE VALUES OF ORIGINALISM

The foregoing section focused on assessing the practice of lower court originalism by looking to the values that undergird our system of vertical stare decisis. But this is hardly the only perspective from which to view the phenomenon. Another way of interrogating the practice might start from the perspective of originalist theory and inquire whether, and to what extent, the practice of lower court originalism may further the values typically associated with originalism. Such an assessment assumes that originalism as an interpretive theory must be justified on pragmatic grounds, an assumption that may be rejected by some originalists who see originalism as intrinsically obligatory without regard to consequences.[210] But for those willing to adopt a more empirical perspective about interpretive method,[211] the extent to which the use of originalism by lower courts may tend to advance (or detract from) the types of values that are typically associated with originalism more broadly may be quite relevant to the perceived desirability of

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wrong–headed is understood in our system as illegitimate and lawless."); Re, *Narrowing from Below*, *supra* note 123, at 960 (observing that "lower court resistance can . . . threaten disruption and undermine the Court's authority").

210. *See, e.g.*, Berman, *supra* note 6, at 12 (observing that some versions of originalism may stake out the strong position that originalism is either "conceptually necessary," such that "matters could not be otherwise" or, alternatively, that the theory is "logically necessary given a set of premises that, while not themselves necessary, are in fact noncontroversial"); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 635 (1999) ("[A] proper respect for the writtenness of the text means that those committed to this Constitution have no choice but to respect the original meaning of its text until it is formally amended in writing.") [hereinafter Barnett, *Originalism for Nonoriginalists*].

211. *Cf.* Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. CHI. L. REV. 636, 641 (1999) (contending, "[w]ith some qualifications," that formalist methods of statutory interpretation require empirical defense).

such a practice.[212] This Part considers four of the most prominent arguments offered in support of originalism—(A) popular sovereignty, (B) judicial constraint, (C) desirable results, and (D) positive law—and examines the potential significance of lower court decisionmaking with respect to each.

A. Popular Sovereignty

One of the most commonly expressed justifications for originalism as an interpretive theory involves the principle of popular sovereignty—the idea that a written Constitution reflects "a people's highest expression of its consent to the government" and, as such, reflects a superior source of legal obligation over any and all forms of nonconstitutional lawmaking.[213] Because the superior authority of the written Constitution derives from a decision by a historically situated supermajority to entrench their commitments against change by ordinary majoritarian processes,[214] popular sovereignty theorists argue that fidelity to the expressed will of the sovereign people requires interpreting the constitutional text as it was understood by the enacting generation.[215]

But this argument is subject to a set of well–known objections that question the legitimacy of allowing contemporary majoritarian

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212. *Cf.* Lash, *supra* note 132, at 1440 ("[D]ifferent originalists advance different normative grounds for their interpretive approach.").

213. WHITTINGTON, *supra* note 5, at 128; *see also*, *e.g.*, Lash, *supra* note 132, at 1440 (describing popular sovereignty as "the most common and most influential justification for originalism").

214. *See* Lash, *supra* note 132, at 1444 ("As the product of a more deeply democratic process, constitutional rules have earned the right to be treated as the will of the people and accordingly trump those laws passed through the ordinary political process.").

215. *See, e.g.*, Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1279 n.45 (1997) ("The theory of judicial review is not based on any claim that judges are superior to the people, but on the claim that in enforcing the Constitution they are carrying out the will of the people. It follows, then, that judges act legitimately under the Constitution only when they are faithfully enforcing those collective decisions.").

lawmaking to be controlled by the "dead hand" of past generations.[216] No living member of the current U.S. population was alive at the time of the original Constitution's enactment in 1788, nor at the time of the adoption of any of its most significant amendments.[217] It is thus not possible to speak of the contemporary majority of living Americans (let alone a supermajority) of having "chosen" to bind itself to a set of enactments adopted in the distant past in anything other than a metaphorical sense.[218]

In response to such objections, some proponents of popular sovereignty have pointed to the Constitution's revisability and the absence of contemporary amendments as evidence of current acceptance.[219] But such arguments must grapple with both the high barriers to constitutional amendment in the United States[220] as well as more general skepticism of "tacit consent" arguments in general.[221]

A more innovative twist on the popular sovereignty argument focuses not on the democratic authority of past supermajorities or

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216. *See generally* Adam M. Samaha, *Dead Hand Arguments and Constitutional Theory*, 108 COLUM. L. REV. 606, 609–10 (2008) (summarizing the "dead hand" objection to according legal force to a document enacted by prior generations) [hereinafter Samaha, *Dead Hand Arguments*].

217. *See, e.g.*, Samaha, *Expiration Date*, *supra* note 77, at 1344–45 ("No one alive in 2008 witnessed any constitutional text–making earlier than the ratification of the Sixteenth or Seventeenth Amendments in 1913.").

218. *See, e.g.*, Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1757–61 (2003) (describing the descriptive inadequacy of precommitment analogies as applied to an intergenerational society).

219. *See, e.g.*, Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1131 (1998); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1072–73 (1988).

220. Primus, *supra* note 136, at 195 (contending that the difficulty of amending the U.S. Constitution provides a "well–known rejoinder to the revisability argument").

221. *See, e.g.*, Barnett, *Originalism for Nonoriginalists*, *supra* note 210, at 636–37 (denying that "consent"—either overt or tacit—can legitimate an obligation to follow the Constitution unless such consent is unanimous); *see also, e.g.*, Primus, *supra* note 136, at 196–97 ("[I]mplied consent to the Constitution as it is does not justify originalist decisionmaking in a world where the existing constitutional arrangements do not reliably correspond to the Constitution's original meanings.").

the implicit consent of the current population but rather on the forward–looking effects of interpretive method as a means of preserving the lawmaking authority of *future* enactors.[222] Professor Keith Whittington suggests such a justification as part of a lengthy and sophisticated defense of originalist interpretation that draws heavily on popular sovereignty as a source of legitimation.[223]

Whittington argues that in addition to preserving the sovereign authority of past enactors, originalism can also "secure[] the effectiveness of a future expression of the popular will." By "maintaining the principle that constitutional meaning is determined by its authors, originalism provides the basis for future constitutional deliberation by the people."[224] According to Whittington, the only way to reliably reassure future enactors that their understandings and intentions will be honored in the future is for the current generation to give similar effect to the authoritative pronouncements laid down in the past.[225]

While the forward–looking nature of such justifications avoids the objection that originalism fetishizes dead hand control for its own sake,[226] it raises its own distinctive set of empirical and normative questions.[227] But even if the incentive effects argument succeeds on its own terms, the implications for the interpretive practices of lower courts are far from obvious. As discussed above,

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222. *See, e.g.*, Samaha, *Dead Hand Arguments*, *supra* note 216, at 660–61.

223. *See* WHITTINGTON, *supra* note 5, at 155–59.

224. *Id.* at 156.

225. *Id.*; *see also id.* at 207 (suggesting that judicial updating can make "[t]he asserted impossibility of constitutional amendment . . . a self–fulfilling prophecy"); Jeffrey Goldsworthy, *Interpreting the* Constitution *in Its Second Century*, 24 MELB. U. L. REV. 677, 683–84 (2000) (contending that originalism is not primarily motivated by "[a]ncestor worship" but rather by a desire to ensure that the lawmaking authority of contemporary majorities "is not usurped by a small group of unelected judges, who are authorised only to interpret the *Constitution*, and not to change it").

226. *See* Samaha, *Expiration Date*, *supra* note 77, at 1350.

227. *See, e.g.*, Berman, *supra* note 6, at 74–75 (questioning the empirical premises of Whittington's claim); Samaha, *Expiration Date*, *supra* note 77, at 1350–51 (noting the forward–looking argument raises both empirical questions about the relationship between interpretive method and incentive effects and normative questions regarding the relative desirability of Article V amendment as compared to judicial updating).

lower court rulings tend to be far less publicly visible and salient than are rulings of the Supreme Court.[228] As such, lower courts' rulings are likely to be far less relevant in forming and reinforcing the incentives of prospective constitutional amenders than are the rulings of the Supreme Court.

The history of the Article V amendment process bears out this observation. Although the machinery of Article V has been successfully invoked on a handful of occasions to reverse particular rulings by the Supreme Court,[229] no similar successful effort has ever been provoked in response to the rulings of the lower courts alone. Given the multiplicity of lower courts, the relative obscurity of their rulings to those outside the legal profession, and the potential for their decisions to be overridden by the Supreme Court, it seems doubtful that any but the rarest of lower court rulings could be sufficient to spur successful efforts to invoke Article V.[230]

It does not necessarily follow, however, that the interpretive practices of lower courts are wholly irrelevant to the forward–looking argument for originalism. Even if lower court rulings are unlikely to spur amendment efforts directly, they may contribute to the shaping of amendment incentives in other, more subtle ways. For

228. *See supra* notes 44–45 & 160 and accompanying text.

229. *See* JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES 20–24 (1994) (identifying four occasions on which the amendment process was successfully invoked to override a ruling of the Supreme Court: (1.) the Eleventh Amendment (overriding the holding of Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); (2.) the first sentence of the Fourteenth Amendment (overriding the citizenship holding of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856)); (3.) the Sixteenth Amendment (overriding the holding of Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895)); (4.) the Twenty-Sixth Amendment (overriding the holding of Oregon v. Mitchell, 400 U.S. 112 (1970)).

230. *But see* Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 535–71 (2008) (discussing unsuccessful Congressional efforts in the early 2000s to amend the Constitution in response to lower court rulings recognizing a constitutional right to same–sex marriage).

example, to the extent lower court deliberations improve the quality of originalist rulings by the Supreme Court,[231] the resulting Supreme Court decisions may establish a more reliable baseline for the exercise of lawmaking authority by the sovereign people. Improved accuracy of originalist reasoning by the Supreme Court might avoid both "false negatives"—the delusive impression that the existing constitutional order is sufficiently tolerable that there is no need to invoke the machinery of Article V[232]—as well as "false positives"—the impression that an Article V amendment is needed when, in fact, a proper interpretation of the Constitution's original meaning would have achieved the desired result.[233]

A consistent practice of lower court originalism might also contribute to the perceived legitimacy of the Supreme Court's originalist rulings.[234] Such legitimating effects might be particularly important to the formation of desirable amendment incentives because the onerous requirements of Article V suggest that the amendment process will only be successfully invoked in cases where the existing constitutional order produces results that substantial majorities consider intolerable. If such undesirable effects are attributed to the Supreme Court's rulings, the Court's institutional legitimacy may be critical to enabling it to withstand public pressure to reverse course.[235] The Court's perceived legitimacy may

231. *See supra* Part IV.D (discussing "percolation" effects of lower court deliberations).

232. *Cf.* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1746–48 (2010) (positing that nonoriginalist Supreme Court rulings extending heightened scrutiny to sex–based classifications may have sapped popular support for ratification of the proposed Equal Rights Amendment in the 1970s).

233. *Cf.* Kurt T. Lash, *Leaving the* Chisholm *Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1695–96 (2009) (noting the Eleventh Amendment was spurred by what many of its supporters believed to be an erroneous constitutional interpretation in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)).

234. *See* Part III.E (discussing the relationship between vertical stare decisis and legitimacy).

235. *See, e.g.*, Fallon, *supra* note 195, at 1833 ("Justices who defy aroused public opinion risk, and know that they risk, provoking a political backlash that ultimately could

also be a key factor limiting the ability of political actors to effectively force the Court's hand through unorthodox measures such as impeachment or Court–packing.[236]

B. Judicial Constraint

Another frequently invoked justification for originalism focuses on judicial constraint. Many proponents of originalism have argued that requiring judges to interpret the Constitution in accordance with its original meaning promotes rule–of–law values by requiring judges to ground their rulings in a source of law external to their own beliefs, preferences, and values.[237]

But originalism is hardly the only mechanism capable of constraining judicial discretion. Indeed, virtually all plausible theories of interpretation constrain judicial discretion in some way.[238] Many skeptics of originalism have pressed the claim that judicial precedent is a more effective means of constraining judicial discretion than reliance on historical evidence of original meaning.[239]

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cause their doctrinal handiwork to collapse.").

236. For example, in the aftermath of the Supreme Court's decision in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), President Taft played a significant role in channeling public hostility to the decision away from efforts to seek a direct overruling from the Supreme Court and toward what would eventually become the Sixteenth Amendment, based in substantial part on his concerns over the potential effect of the former strategy on the Court's institutional legitimacy. *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776–1995 199–203 (1996).

237. *See, e.g.*, WHITTINGTON, *supra* note 5, at 39 ("Originalism is said to offer at least a comparative advantage in being able to constrain judges by providing fairly objective and specific criteria by which to evaluate judicial performance."); Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1019–22 (1992) (contending that "[o]riginalism is . . . necessary to distinguish the judicial from the legislative function").

238. *See* WHITTINGTON, *supra* note 5, at 40 ("[M]ost interpretive approaches can at least constrain judges within bounds and in all likelihood could provide greater constraints over time as techniques of application are worked out in practice."); Primus, *supra* note 136, at 213–14 ("[*A*]*ny* decisionmaking theory creates constraints.").

239. *See, e.g.*, Primus, *supra* note 136, at 214 ("[I]t would be extravagant to claim that attention to original meanings alone would yield less discretionary decisionmaking than, say, a jurisprudence that looked only at judicial precedents."); David A. Strauss,

Originalists generally reject the claim that stare decisis constitutes a more effective means of constraining judges.[240] The Supreme Court has emphasized repeatedly that it does not view stare decisis as an "inexorable command."[241] And because its rulings are not reviewable by any higher court and are subject to, at best, weak political constraints, the Justices possess significant practical discretion to reconsider and reverse those earlier rulings with which they disagree.[242] Indeed, some have gone so far as to claim that, at least at the Supreme Court level, "*stare decisis* in constitutional law is pretty much of a sham."[243]

In view of the relatively weak constraints of precedent on Supreme Court decisionmaking, interpretive methodology might plausibly be seen as one of the few tools available to limit the influence of a Justice's own personal preferences and biases in the formation of constitutional doctrine. Even if it isn't perfect, originalism might be thought to go some way toward ameliorating such concerns.[244]

Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877, 927 (1996) ("[I]t is implausible to say that adherence to the Framers' intentions, by itself . . . limits judges more than precedent.").

240. *See, e.g.*, David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 300 (2005) (observing that "[o]riginalists often criticize precedent–based approaches on the ground that they impose only a nominal limit, not a real limit, on the use of the judge's moral and policy judgments").

241. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.").

242. *See, e.g.*, Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 399 (2007) ("[P]recedent has rarely genuinely mattered in the Supreme Court.").

243. JOHN A. JENKINS, THE PARTISAN: THE LIFE OF WILLIAM REHNQUIST 250 (2012) (quoting a private writing of Chief Justice William Rehnquist); *see also, e.g.*, Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 130–31 (2019) (contending that "history strongly suggests . . . that cases in which either the Court as a whole or individual justices are inclined . . . to make a particular decision, the presence of an opposed precedent is rarely a barrier to reaching the precedent–independent outcome").

244. *See* Scalia, *supra* note 5, at 864 (analogizing originalism to a librarian who talks too softly).

Such arguments from judicial constraint apply with considerably less force to judges of the lower courts. Unlike Supreme Court Justices, lower court judges cannot plausibly expect to have the last word on contested questions of constitutional meaning. Their decisions on questions of federal law are almost always reviewable, at least potentially, by a hierarchically superior court. And because they must work within the confines of existing precedent, they have far less ability to pursue their own policy preferences or desires in resolving contested questions.

It might be argued that originalism will add extra constraints over and above the requirements of precedent and the threat of reversal and that such additional constraint is therefore a good thing. But it is not entirely clear that a combination of originalism and stare decisis is necessarily more constraining than stare decisis alone.[245] As noted above, originalism may sometimes operate as a partial counterweight to stare decisis, providing lower courts with reasons for questioning the applicability of particular Supreme Court precedents or to read them more narrowly than they otherwise would.[246] To the extent originalism opens up such interpretive possibilities, it is possible that lower court judges who embrace originalism may occasionally find themselves with a broader range of interpretive options than their nonoriginalist peers who view precedent as a more stringent constraint.

But as was also noted above, stare decisis is unlikely to answer definitively all of the constitutional questions that might be brought before the lower courts.[247] In filling out doctrinal gaps and ambiguities left open by existing precedent, and in applying the Supreme Court's decisions to new and unanticipated contexts, lower courts will inevitably possess some degree of meaningful discretion in

245. *See* Primus, *supra* note 136, at 215 (observing that it is not clear "that a jurisprudence that used originalist reasoning as one method among several—say, alongside text and precedent—would always yield less discretionary decisionmaking than a jurisprudence that consulted text and precedent but not original meanings").

246. *See supra* notes 113–124 and accompanying text.

247. *See supra* notes 107–111 and accompanying text.

choosing between differing rationales that fit within the broad constraints imposed by the Court's decisions. Given the practical inevitability of lower court discretion in fleshing out the meaning of unsettled areas of constitutional doctrine, it might plausibly be argued that originalism provides an additional desirable constraint on the exercise of such decisionmaking.[248] A disciplined form of originalism that is willing to work within the confines of existing Supreme Court precedent might thus plausibly contribute to the value of judicial constraint in a way that outright rejection of originalism might not.

C. Desirable Results

A third prominent argument that has been offered in support of originalism focuses on its claimed capacity to produce desirable results. One particularly prominent version of this justification has been developed by Professors John McGinnis and Michael Rappaport, who contend that the supermajoritarian enactment processes prescribed by the Constitution are likely to produce desirable results.[249] By adhering to the original meaning of the rules that passed through those processes, McGinnis and Rappaport claim that modern decisionmakers are more likely to achieve desirable outcomes than would otherwise be possible.[250]

The implications of the desirable results justification for lower court originalism are somewhat ambiguous. Because the argument hinges on the presumptively superior quality of rules that have

248. *See, e.g.*, William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2223–27 (2018) (arguing that originalism can provide a desirable internal constraint on judicial decisionmaking that can help minimize the influence of the judge's personal preferences and attitudes).

249. MCGINNIS & RAPPAPORT, *supra* note 5, at 19 ("[P]assing a constitution through a strict supermajoritarian process provides the best method for discovering and enacting a good constitution.").

250. *Id.* at 13 (contending that "beneficial judicial review requires a form of originalism" because "[f]ollowing a meaning that was not endorsed by the enactors would sever the Constitution from the process responsible for its beneficence").

passed through the rigorous supermajoritarian enactment processes, the theory seems particularly sensitive to accuracy concerns. Mistaken interpretations—even those that a particular originalist judge believes in good faith to be correct—have not passed through the stringent enactment processes and thus have no greater claim to producing desirable results than any other judge-made rule.[251] The role of lower courts in the interpretive process is thus likely to depend, in large part, on an empirical assessment of whether lower court originalism is likely to enhance the overall accuracy of the interpretive enterprise.[252]

Moreover, because the desirable results justification is explicitly consequentialist in nature, its proponents must be attentive to the relative costs and benefits that may be involved in any attempt to move the law in a more originalist direction. McGinnis and Rappaport acknowledge as much in their approach to horizontal stare decisis. Although their theory is generally skeptical of nonoriginalist precedent,[253] it allows courts to adhere to certain nonoriginalist precedents where the net benefits of doing so outweigh those that would be produced by restoring the original meaning.[254] Similarly, on the vertical plane, the theory would seem to advise shifting lower court practices in a more originalist direction only in those circumstances where the net benefits of doing so are greater than

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251. By contrast, theories of originalism that emphasize judicial constraint might be much less concerned with the possibility of judicial mistakes. A judge who endeavors in good faith to identify the original meaning will be constrained in much the same way regardless of whether or not the particular outcome of the interpretive process matches the actual original meaning of the relevant provision. *Cf.* Scalia, *supra* note 5, at 862–63 (conceding that judges are unlikely to achieve perfect adherence to the original meaning but responding that "nothing is flawless" and that "a thing worth doing is worth doing badly").

252. *Compare, e.g.*, *supra* Part III.B.2 (noting potential proficiency concerns surrounding the use of originalism by lower courts), *with, e.g.*, Part II.B.4 (discussing the countervailing argument that originalist interpretation by the lower courts might contribute to and inform the Supreme Court's own originalist decisionmaking).

253. MCGINNIS & RAPPAPORT, *supra* note 5, at 189 ("[T]he strong reasons for following the original meaning generally preclude a presumption in favor of precedent.").

254. *Id.* at 181–82.

those that would be produced by maintaining current practices. As such, proponents of the desirable results justification should be particularly attentive to the types of accuracy, efficiency, and uniformity concerns outlined above in Part IV.

A further complication with grounding a practice of lower court originalism in a theory premised on desirable consequences relates to the continuing influence of nonoriginalist precedent and nonoriginalist judges. As Professor Adrian Vermeule has observed, even if one concludes that "it would be best, in the rule–consequentialist sense, for all judges to be originalist," one should not necessarily assume that it would be "best for only some judges to be originalist in a partially nonoriginalist world."[255] The Constitution and its amendments reflect a series of carefully wrought and interrelated compromises.[256] It is thus conceivable that the desirable features of at least some rules enacted through the supermajoritarian processes prescribed by the Constitution may have been contingent on their interoperation with other rules enacted through those same processes. Restoring the original meaning of some constitutional provisions but not others may thus lead to less desirable aggregate consequences than would interpreting both in a nonoriginalist manner.[257]

For the Supreme Court, one possible solution to the objection identified by Professor Vermeule is simply to reverse a broader

255. Vermeule, *System Effects*, *supra* note 137, at 55.

256. *See, e.g.*, John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2040 (2009) ("[N]o less than is true in the case of modern statutes, the original Constitution in fact reflects the end result of hard–fought compromise.").

257. Professor Vermeule suggests the example of the legislative veto procedure declared unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). Even if that procedure was not consistent with the original understanding of Article I, § 7, Vermeule contends it might nonetheless have been justified as a desirable accommodation if (as some have argued) current doctrine allows Congress to delegate significantly more of its legislative power to the Executive than would be allowable under a proper originalist interpretation. Vermeule, *System Effects*, *supra* note 137, at 56.

swath of nonoriginalist precedent.[258] But for reasons already discussed, this option is practically unavailable to judges of the lower courts. Lower court judges must work within the confines of existing Supreme Court precedent and therefore their efforts to move the law in a more originalist direction will necessarily be circumscribed by the existing body of Supreme Court precedent. Such judges must also acknowledge the reality that their rulings will inevitably be integrated into a broader body of lower court case law that has been generated in part by, and that will be further elaborated and developed in part by, their nonoriginalist peers at the lower court level. Against this backdrop, lower court judges may have little basis for confidence that any particular originalist decision they hand down will move the law appreciably closer to achieving the types of desirable results that McGinnis and Rappaport posit.

But even if originalist lower court judges face such constraints, proponents of the desirable-results justification might plausibly see some use for lower court originalism as part of the broader system of constitutional interpretation. For example, even if one grants the premise that institutional constraints render lower court judges less proficient at correctly identifying the original meaning than the Supreme Court is, it may nonetheless be the case that lower courts' assessments are sufficiently accurate to provide useful information to the Supreme Court's own decisionmaking. Lower court support may also help to legitimate the Supreme Court's originalist decisions, making it somewhat easier for the Court to withstand public pressure to deviate from original meaning in those circumstances where its results prove controversial or politically unpopular.[259]

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258. McGinnis and Rappaport acknowledge a limited role for stare decisis in the Supreme Court where special circumstances are present—for example, where the precedent has itself attained supermajoritarian consensus or where overruling would prove exceedingly costly. MCGINNIS & RAPPAPORT, *supra* note 5, at 179–83. But they generally view nonoriginalist precedent as suspect because the legal rules reflected in those precedents have not passed through the (presumptively desirable) supermajoritarian enactment processes. *Id.* at 155.

259. McGinnis and Rappaport's theory encompasses a forward–looking dimension

D. The "Positive Turn"

In recent years, a new defense of originalism grounded in positivist jurisprudential theory has gained prominence in the academic literature. This "positive turn"[260] is premised on the idea that an "inclusive" version of originalism—one that allows some role for precedent and acknowledges the legitimacy of judicial gap filling in cases where constitutional meaning is vague, ambiguous, or otherwise underdeterminate[261]—constitutes "our law" of constitutional interpretation.[262] Proponents assert that the widespread acceptance of this inclusive version of originalism should obligate judges to practice inclusive originalism themselves.[263]

The positivist nature of this particular justification for originalism

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similar to the one described above in connection with the popular sovereignty justification. *See supra* notes 221–224 and accompanying text (describing the forward–looking dimension of popular sovereignty theory). In brief, McGinnis and Rappaport argue that judicial updating may sap public support for constitutional amendments, thereby depriving proposed amendments of the necessary support they need to clear the high supermajoritarian thresholds established by Article V and locking in judge–made rules that are presumptively inferior to the rules that would have been enacted through the amendment process. MCGINNIS & RAPPAPORT, *supra* note 5, at 88. The institutional legitimacy of the Supreme Court and the lower courts may thus be essential to enabling the Court to withstand pressure to engage in informal updating for reasons discussed above. *See supra* notes 230–235 and accompanying text (discussing connection between legitimacy and amendment incentives).

260. *See* Baude, *Our Law*, *supra* note 20, at 2351 n.5 ("The 'positive turn' evokes the basic tenets of legal positivism: that the content of the law is determined by certain present social facts and that moral considerations do not necessarily play a role in making legal statements true or false.").

261. *See id.* at 2352 (describing "inclusive version of originalism" as "a version that allows for some precedent," and "for some evolving construction of broad or vague language" to the extent the original meaning of the Constitution itself permits such methods).

262. *Id.* at 2391 ("[W]hen you look at our current legal commitments, as a whole, they can be reconciled with originalism. Indeed, not only can they be reconciled, but originalism seems to best describe our current law."); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 874 (2015) (contending that originalism is "plausibly true as a description of our law").

263. Baude, *Our Law*, *supra* note 20, at 2392–95 (contending that "if . . . some form of originalism is the law," then judges act properly in using originalism, "and indeed judges would be required to use it").

makes it particularly sensitive to the content of our existing interpretive practices.[264] In general, the theory posits the existence of a presumptive obligation on the part of judges to continue adhering to originalist interpretive practices to the extent the relevant social facts support recognizing those practices as part of "our law" of constitutional interpretation.[265] But the theory provides little support for shifting current interpretive practices in a direction that is more self-consciously originalist than current practices support.[266]

As discussed above, lower courts' existing interpretive practices are characterized primarily by doctrinal analysis of Supreme Court case law and other forms of judicial precedent.[267] Such precedent–based reasoning is fully consistent with the interpretive premises of the "inclusive originalism" described by proponents of the positive turn, who recognize the legitimacy of stare decisis as a permissible exception to the presumptive obligation of courts to follow the Constitution's original meaning.[268] Indeed, Professor William Baude, one of the leading proponents of the positive turn, has gone so far as to claim that lower courts' decisions are relatively "uninformative" to the question of whether our legal system's interpretive commitments are, in fact, originalist in nature because virtually all theories (including originalism) assume the legitimacy of vertical stare decisis.[269] It thus seems doubtful that the positivist argument, standing alone, provides much support for shifting lower courts' interpretive practices in a more originalist direction.

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264. *See, e.g.*, *id.* at 2364 ("To ask whether the written Constitution and the original interpretive rules are the law today is to ask a question about *modern social facts*."); Sachs, *supra* note 262, at 835–36.

265. *See* Baude, *Our Law*, *supra* note 20, at 2399–2400 (discussing contrasting scenarios in which judges may—or may not—be obliged to apply originalism).

266. *See id.* at 2398 (concluding that the positivist argument may "exclude[] some strong forms of originalism," such as those that reject the legitimacy of stare decisis because "[t]hey probably cannot be derived from our current practices").

267. *See supra* note 37 and accompanying text.

268. *See* Baude, *Our Law*, *supra* note 20, at 2358–61.

269. *Id.* at 2370.

At the same time, our existing practices do not foreclose the option of originalism to lower court judges. Notwithstanding the prevalence of doctrinalism in the lower courts and the acknowledged force of vertical stare decisis, lower courts often have the option of incorporating originalist reasoning into their decisionmaking without fear of being seen to violate any widely accepted social understanding or professional norm.[270] Indeed, it is plausible that our existing practices might affirmatively *require* lower courts to engage in originalism in certain discrete areas, such as in cases of true first impression.[271]

In short, the positivist case for originalism, like the other justifications surveyed in this Section, may *permit* lower court judges to engage in originalist reasoning but does not seem to affirmatively *require* them to do so, at least in the vast majority of cases.

V. TOWARD A PRACTICE OF LOWER COURT ORIGINALISM

The diversity of considerations relevant to assessing lower court originalism, combined with the multiplicity of empirical, predictive, and normative judgments that such assessments require, renders it difficult to draw broad conclusions regarding the normative desirability of the practice. Nonetheless, the foregoing discussion does support a few conclusions that may help to guide thinking about the distinctive role of lower courts within a broader framework of originalist–oriented jurisprudence.

Because lower court judges face considerable institutional constraints on their capacity to further the broader values typically associated with originalism, their use of originalism is likely to deliver fewer potential benefits than would similar decisionmaking by the Justices of the Supreme Court.[272] And because their decisions are always subject to review and possible reversal by the Supreme Court, the risk of entrenching significant interpretive error also

270. *See supra* Part III.

271. *But cf.* Samaha, *Expiration Date*, *supra* note 77, at 1318–23 (discussing methodological diversity displayed in Supreme Court opinions reflecting the Court's first interpretation of particular constitutional provisions).

272. *See supra* Part V.

seems considerably less significant at the lower court level. As a result, it seems reasonable to conclude that the choice between originalism and non–originalism at the lower court level involves considerably lower interpretive stakes than those at issue in the context of decisionmaking by the Supreme Court. These lowered stakes might carry potential implications for how lower courts should approach the task of constitutional adjudication. Professor Adam Samaha argues that lowering the stakes surrounding interpretive questions might lead decision makers to strike a different balance between error costs and decision costs, leading to lower cost decisionmaking strategies that tolerate a higher risk of interpretive error.[273] This observation seems to fit with existing lower court interpretive practices, which tend to emphasize comparatively low-cost strategies associated with doctrinalism.[274]

This assessment is complicated, however, by two additional considerations. First, lower stakes are not the same as no stakes.[275] At least some lower court judges may conclude that the increased costs required by originalism are worth bearing in order to reach more accurate results in the particular cases before them. A second complication with exclusive reliance on low–cost decisionmaking strategies relates to the possibility that lower courts' decisions might function as a useful input to the Supreme Court's own decisionmaking. To the extent lower court decisionmaking can inform and improve the Supreme Court's decisionmaking in the manner suggested by proponents of percolation,[276] higher investments in originalist decisionmaking by lower courts might be justified.

The Supreme Court, which seems institutionally best situated to determine whether and to what extent its own decisionmaking would benefit from further deliberations in the lower courts, possesses at least some degree of practical control over the lower

273. Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305, 322 (2010) [hereinafter Samaha, *Low Stakes*].

274. *See supra* note 37 and accompanying text (discussing the prevalence of doctrinalism in lower court decisionmaking).

275. *See* Samaha, *Low Stakes*, *supra* note 273, at 319–20.

276. *See supra* Part IV.D (discussing arguments in favor of "percolation" as a mechanism of informing Supreme Court decisionmaking).

courts' interpretive processes. As discussed above in Part III, the precedential backdrop against which lower courts act reflects something of a continuum. At one end of this continuum stand cases of pure constitutional first impression, in which the Supreme Court has not spoken to a particular issue at all. At the opposite end stand cases in which a particular issue is clearly and directly controlled by a precedential holding of the Court. In between stand a range of cases in which the Supreme Court may have spoken to the issue in some way but has done so in a manner that leaves lower courts with a degree of discretion in fleshing out the Court's ruling.

The nature and extent of this "discretionary space" left open to lower courts is shaped to a significant extent by the Supreme Court's own decisionmaking. In the absence of Supreme Court guidance, lower courts are largely unconstrained in their ability to resolve constitutional questions according to their preferred interpretive approach.[277] Even when the Supreme Court does intervene, the Justices may fail to provide complete guidance by choosing to leave particular questions unanswered or by deciding cases on narrow grounds that are difficult to generalize beyond the facts of the particular cases before them.[278] Some of the Court's originalist decisions have taken this tack, announcing a case–specific outcome grounded in text and historical context but without much concrete guidance regarding how the resulting standard should apply to future cases.[279]

But the interpretive freedom thus conferred on lower courts does not come without costs. By leaving questions unanswered or providing only limited guidance, the Supreme Court forces lower courts to invest their own time and resources into answering such

277. *See* Randy J. Kozel & Jeffrey A. Pojanowski, *Discretionary Dockets*, 31 CONST. COMMENT. 221, 227 (2016); Grove, *supra* note 41, at 28.

278. *See id.*, at 227; Grove, *supra* note 41, at 28.

279. *See, e.g.*, Kozel & Pojanowski, *supra* note 277, at 228–29 (discussing the Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) as an example of such a decision).

questions.[280] In addition to reallocating decision costs to lower levels of the judicial hierarchy, such "minimalist" Supreme Court decisions also increase the possibility of national disuniformity.[281]

One response to such cost and disuniformity concerns might be for the Supreme Court to embrace its role as the "cheapest precedent creator" by providing clearer and more determinate guidance to the lower courts.[282] An obvious path to providing such enhanced guidance might be to expand the number of cases the Court decides each term.[283] But an increased caseload could burden the Supreme Court's own decisionmaking by shrinking the time and resources the Court can devote to each individual case. And even if the Court were inclined to expand its docket to some extent, it would still be capable of addressing only a tiny fraction of the cases and issues that lower courts must resolve.[284]

Another way the Court could enhance the guidance it provides to lower courts might be to embrace broader grounds of decision in the cases they do choose to decide. Consider, for example, the

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280. *See* Grove, *supra* note 41, at 28–29 ("[A] minimalist Supreme Court opinion serves to delegate substantial decision–making responsibility to the Court's judicial inferiors.").

281. Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left–Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2216 n.15 (2006) (reviewing CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT WING COURTS ARE WRONG FOR AMERICA (2005)) (cautioning that the Supreme Court often grants certiorari to resolve contested questions and that "[i]ssuing a narrow opinion in this scenario may only continue the confusion and nonuniformity plaguing the lower federal courts").

282. *See* Re, *Beyond the* Marks *Rule*, *supra* note 166, at 1969 (arguing that "the law of precedent should place burdens on the 'cheapest precedent creator'—that is, the decisionmaker who can most clearly and inexpensively form precedent that reflects the views of most Justices").

283. *See, e.g.*, Kozel & Pojanowski, *supra* note 277, at 224 ("[A] court that decides a greater number of cases will have more opportunities to clarify the law through incremental interventions.").

284. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 268 (2006) (suggesting that the Supreme Court's "peak capacity" would only enable it to decide around 200 cases per year) [hereinafter VERMEULE, UNCERTAINTY]; Grove, *supra* note 41, at 57 ("[E]ven if the Court decided 150 or 200 cases per year . . . it would dispose of only a fraction of its 9,000–case docket and could not possibly correct every error in lower court interpretations of federal law.").

Court's 2014 decision in *National Labor Relations Board v. Noel Canning*,[285] which raised several issues of first impression regarding the scope of the President's power under the Recess Appointments Clause.[286] All nine Justices agreed that the case could be disposed of on a narrow ground—namely, that the particular appointments challenged in that case did not fall within the provision's scope because the three–day intrasession adjournment during which they occurred was not a "Recess" for constitutional purposes.[287] Had the Justices chosen to limit their decision to this specific ground, they could have reached unanimity on the specific case, while leaving the broader interpretive questions for a later date.

But the majority chose to place its opinion on broader grounds, addressing (and rejecting) the respondent's arguments that the provision did not authorize appointments during intrasession breaks at all and that it did not authorize appointments to fill vacancies that occurred while Congress was in session.[288] Four Justices joined in a concurrence in the judgment disagreeing with the majority on both of these points.[289] Both opinions defended the interpretations

285. 573 U.S. 513 (2014).

286. U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

287. *Noel Canning*, 573 U.S. at 519 ("Three days is too short a time to bring a recess within the scope of the Clause."); *id.* at 569 (Scalia, J., concurring in the judgment) ("The Court of Appeals correctly held that the appointments here at issue are invalid because they did not meet" the conditions specified by the Recess Appointments Clause.).

288. *Id.* at 526–49 (majority opinion).

289. *Id.* at 575–613 (Scalia, J., concurring in the judgment).

they respectively embraced as consistent with the provision's original meaning.[290] But while the original meaning of the Recess Appointments Clause remains a topic of scholarly debate,[291] this debate need no longer occupy the time and attention of the lower courts. Rather, going forward, such courts can simply rely on the broad rationale supplied by the majority opinion to resolve any future case in which that rationale applies.[292]

Such a strategy may not be appealing in every context. If originalist Justices are genuinely uncertain about the original meaning of a particular provision or about how the provision should apply to modern circumstances, they may prefer to avoid broad pronouncements and thereby allow for a period of continued percolation in

290. The focus of disagreement between the competing opinions focused primarily on the degree of clarity of the constitutional language. Justice Breyer insisted that the provision was ambiguous with respect to the relevant questions and that this ambiguity should be resolved by looking to post-enactment practices of the political branches. *See id.* at 528 (majority opinion); *see also id.* at 540 ("[T]he linguistic question here is not whether the phrase can be, but whether it must be, read more narrowly. The question is whether the Clause is ambiguous. . . . And the broader reading, we believe, is at least a permissible reading of a '"doubtful"' phrase."). Justice Scalia, by contrast, denied that the provision was ambiguous and insisted that post–enactment practices were therefore irrelevant. *See id.* at 584 (Scalia, J., concurring in the judgment) (asserting that "the Constitution's text and structure unambiguously refute the majority's" interpretation); *see also* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1265 (2015) (observing that "no Justice in *Noel Canning* suggested that [historical] practice (or any other considerations) could prevail over clear [constitutional] text").

291. *Compare, e.g.*, Michael B. Rappaport, *Why Non–Originalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause*, 38 HARV. J.L. & PUB. POL'Y 889, 892–94 (2014) (criticizing the majority's textual arguments and contending the opinion is better understood "as a form of non–originalism"), *with, e.g.*, David J. Arkush, *The Original Meaning of Recess*, 17 U. PA. J. CONST. L. 161, 248 (2014) (contending that Justice Breyer's majority opinion "comes much closer than the concurrence to respecting the original meaning of 'recess' because . . . [i]t recognizes that the meaning of 'recess' is broad and that it does not rule out any particular type of break").

292. *See, e.g.*, Gestamp S.C., L.L.C. v. NLRB, 769 F.3d 254, 257–58 (4th Cir. 2014) (determining that an official was validly appointed under the standard prescribed by *Noel Canning* majority despite earlier circuit precedent holding that the provision only authorized appointments during the intersession recess of Congress).

the lower courts.[293]

But if the goal of such percolation is to foster specifically originalist deliberations among the lower courts, leaving such courts to their own devices may not achieve the desired result. *Heller* provides a cautionary example. Despite the strongly originalist tenor of the majority's opinion in that case, nearly all lower courts chose not to use originalist methods to flesh out the gaps and ambiguities left open by the Court's decision.[294] And while it is possible that ideological disagreements may have played some role in driving this disconnect,[295] such factors may not provide a complete explanation. Given a choice between the relatively familiar and low–cost decisionmaking techniques associated with doctrinal reasoning and the more time-consuming and burdensome methods associated with originalism, it would hardly be surprising to see resource–constrained lower court judges gravitate toward the former.[296] To the extent Justices wish to encourage lower courts to base their rulings on originalist interpretive evidence, they may need to make such expectations explicit, such as by prescribing an explicitly originalist–oriented doctrinal framework.[297]

The judges of the lower courts also have an obvious role to play in determining whether and how originalist methods should factor into their decisionmaking. One factor that will likely influence this decision is the extent to which originalist considerations feature in the arguments presented by the parties. If the parties choose to

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293. *See supra* notes 181–193 and accompanying text (discussing arguments for percolation).

294. *See supra* notes 87–91 and accompanying text (discussing lower courts' reaction to *Heller*).

295. *See* Adam M. Samaha & Roy Germano, *Judicial Ideology Emerges, At Last, in Second Amendment Cases*, 13 CHARLESTON L. REV. 315, 317–19 (2018) (discussing evidence suggesting possible ideological influence on lower court decisions in civil cases addressing Second Amendment rights).

296. *Cf.* Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 903 (2015) ("Judges may be motivated to resist legal changes that increase their decision costs by increasing the time and effort necessary to address a legal issue or by increasing the cognitive difficulty of decisionmaking.").

297. *See supra* Part III.C (discussing originalist–oriented Supreme Court frameworks).

frame their arguments solely in originalist terms, the judges may feel constrained by the norms of judicial behavior to address those arguments in at least some form.[298] More challenging questions may arise if the parties fail to address originalist arguments that the judges believe may be relevant. A staunch advocate of the adversarial process might insist that courts should limit themselves to the legal arguments presented by the parties.[299] But it is hardly unusual for courts to insert new legal issues, arguments, or evidence into proceedings that were not raised by the parties.[300]

In the absence of originalist briefing, some lower court judges might be tempted to raise originalist arguments themselves, relying on their own independent research and that of their law clerks.[301] But in addition to the extra time and effort required of courts and judicial staff, such independent investigation is likely to magnify proficiency concerns and heighten the risk of interpretive error.[302] Professor Josh Blackman argues that lower courts should seek to address such proficiency concerns by requesting originalist briefing from the parties.[303] But this proposed solution merely shifts the

298. *Cf.* Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 125 (2005) (contending that "adjudicative legitimacy depends" on the generation of "decisions that squarely confront [the parties'] proofs and arguments, even if the court determines that they do not ultimately supply an appropriate basis for resolution").

299. *See, e.g.*, Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) ("The premise of our adversarial system is that appellate courts do not sit as self–directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."); Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1218–19 (2011) ("If courts exist to resolve disputes, there is no necessary reason other than lack of jurisdiction why they should do anything other than resolve *precisely* the disputes brought to them by the parties when the parties agree on the character of those disputes.").

300. *See, e.g.*, Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 516 (2009) ("Despite the strong norm in favor of party presentation, in practice judges regularly engage in judicial issue creation.").

301. *See* Blackman, *supra* note 12, at 58 ("An absence of originalist briefing will invariably lead circuit judges to perform their own research, likely aided by law clerks.").

302. *See id.* at 58–59 (noting that in the absence of originalist briefing, lower courts' opinions may be plagued by "*law office history*" and erroneous interpretations).

303. *Id.* at 59–64.

costs associated with originalist research (or at least some of them) from the courts to private litigants.[304] The costs of such a shift are likely to be substantial, particularly if, as Professor Blackman suggests, lower courts were to demand originalist briefing in *all* constitutional cases.[305]

Nor is it obvious that the additional burdens imposed on the parties or the courts would be worth the effort. For one thing, private litigants and their attorneys are likely to labor under similar resource and competency constraints as lower court judges. Like lower court judges, most lawyers representing clients in the lower courts are unlikely to have specialized training or expertise in dealing with historical materials or the methods associated with originalist interpretation.[306] Lower courts should also keep in mind Professor Jefferson Powell's admonition that "[h]istory answers—and declines to answer—its own issues, rather than the concerns of the interpreter."[307] Thus, the mere fact that modern decisionmakers may find the answer to a particular interpretive question useful for resolving some present controversy is no guarantee that the relevant historical materials will provide any clear guidance in answering that question.[308]

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304. Even if private litigants shoulder some of the burden of originalist research, lower court judges would still need to familiarize themselves with the relevant historical sources, background context, and methodologies to a sufficient extent to determine which side has the better of the argument. *See supra* note 177 and accompanying text (discussing the unavoidable need for judges to invest time and effort to be able to assess third–party research).

305. Blackman, *supra* note 12, at 62.

306. *See id.* at 58 ("Most attorneys—from judges to law clerks—simply lack the training to develop originalist research.").

307. H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 669 (1987).

308. *Id.* at 669–71. An illustration of the limitations of party briefing is provided by a notable order from a panel of the U.S. Court of Appeals for the Sixth Circuit inviting the parties to submit supplemental briefing in an argued case addressing "the original meaning of the Article III Cases or Controversies requirement." Letter, Wright v. Spaulding, No. 17-4257, *1 (6th Cir. filed May 28, 2019), ECF No. 44, archived at https://perma.cc/C6K7-ZGWF. The panel specifically invited the parties to address the question of whether a corpus of Founding–era writings could help inform that determination and whether such findings could inform the court's decision regarding the

The institutional constraints on lower court decisionmaking and the limitations of party briefing suggest that lower courts should exercise a fair degree of epistemic humility with regard to their own competence as originalist interpreters.[309] Such humility need not (and should not) cause lower court judges to foreswear originalist considerations entirely. But it should lead to a healthy degree of skepticism regarding their own capacity to single out the "correct" original meaning of a provision in the face of conflicting evidence or divided opinion among subject matter experts.[310]

Such skepticism seems particularly appropriate in considering the relationship between original meaning and prior precedent. As discussed above, originalist judges may sometimes feel tempted to push back against or "narrow" seemingly controlling decisions that they view as inconsistent with the Constitution's original meaning.[311] But such tactics raise additional concerns beyond the proficiency and cost concerns discussed above. In particular, narrowing precedent may also threaten both the national uniformity of federal law and the perceived legitimacy of the broader judicial system.[312]

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particular interpretive question that confronted them, which involved parsing the distinction between holdings and dicta with regard to one of the circuit's own prior precedents. *Id.*; *see also* Blackman, *supra* note 12, at 60–62 (summarizing the court's order and the supplemental briefing submitted by the parties in response). After considering the briefing submitted by the parties as well as two briefs from third–party *amici* addressing the panel's inquiry, the judges ultimately determined that the corpus analysis the court had requested "turned out not to be the most helpful tool in the toolkit." Wright v. Spaulding, 939 F.3d 695, 700 n.1 (6th Cir. 2019).

309. *Cf.* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 498 (2016) (discussing need for epistemic humility in originalist analysis more generally).

310. *See id*. at 500.

311. *See supra* notes 114–124 and accompanying text (discussing concept of originalist "narrowing"); *see generally* Re, *Narrowing From Below*, *supra* note 123 (discussing the concept of "narrowing" Supreme Court precedent more generally). Such "narrowing" tactics are hardly unique to originalism. *See id.* at 924 ("[N]arrowing from below happens all the time.") (footnote omitted); *see also id.* at 960–61 (identifying the lower courts' resistance to the Supreme Court's originalist decision in *Heller* as an example of narrowing from below).

312. *See id.* at 924 (acknowledging that lower court narrowing "can undermine the authority of higher courts and generate legal disuniformity as varying jurisdictions construe higher court precedent in divergent ways").

It thus seems advisable for lower court judges to be particularly cautious about departing from the most natural or consensus reading of judicial precedent based on their own perceptions of what original meaning requires. At a minimum, such judges should insist on a particularly high threshold of interpretive certainty about the content of the original meaning before using originalism to narrow controlling precedent.[313]

By contrast, in cases of true constitutional first impression or cases in which the Supreme Court itself has endorsed a doctrinal framework that prescribes the use of originalism, lower courts should be somewhat more confident in relying on their own best understanding of what original meaning requires. Such cases are not likely to raise the types of disuniformity or legitimacy concerns associated with narrowing. To the contrary, the use of originalism may actually help to foster uniformity to the extent lower courts are able to converge on a consensus understanding of what original meaning requires.[314] Moreover, because the Supreme Court itself seems particularly likely to look to evidence of original meaning in addressing cases of this type, the prospect that originalist research and exposition by lower court judges might provide useful information to the Court is higher than it might be in other circumstances.

A final relevant consideration that lower courts should take into account in determining how much time and effort to devote to originalist decisionmaking is their respective position in the judicial hierarchy. In general, the case for lower court originalism seems considerably stronger when applied to the intermediate federal courts of appeals and state appellate courts than to federal or state trial–level courts. For one thing, trial courts typically face far

313. *Cf.* Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 155–56 (2015) (observing that courts might reasonably insist on a higher threshold of interpretive certainty before departing from precedent than they would in the absence of precedential constraints).

314. *Cf.* Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 273 (2018) (arguing that originalism can contribute to uniformity and other rule–of–law values by directing interpreters to a common interpretive object).

greater docket pressures and resource constraints than do appellate-level courts.[315] And unlike appellate courts, which can largely specialize in legal interpretation, trial courts must shoulder significant responsibilities relating to case management and the fact-finding process.[316] Moreover, because trial court rulings typically lack precedential effect, such rulings may have less practical capacity to further certain benefits associated with originalism, such as preserving principles of popular sovereignty or attaining desirable results.[317]

Such considerations do not necessarily exclude the possibility that trial courts might sometimes make useful contributions to identifying originalist evidence and arguments—particularly in cases of first impression or where a particular line of originalist argument has been persistently ignored by appellate courts. But they do suggest that, as a general matter, courts of appeals are better situated to shoulder the interpretive burdens of originalist research and to achieve the potential benefits associated with originalism than will courts at the trial level.

A comparison of federal courts of appeals with state appellate courts yields more ambiguous conclusions. On the one hand, there are fewer obvious structural differences between federal courts of

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315. In 2018, there were 167 authorized judgeships in the regional federal circuit courts of appeals and 663 authorized federal district court judgeships. Admin. Office of the U.S. Courts, Authorised Judgeships 7–8 (2020), uscourts.gov/sites/default/files/allauth.pdf [https://perma.cc/CE5L-DUTG]. During that same year, there were 49,363 filings in the regional courts of appeals—a little more than 295 per judge—versus 358,563 filings in the district courts—more than 540 per judge. Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 2018, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 [https://perma.cc/K3VZ-M448].

316. *See* Salve Regina College v. Russell, 499 U.S. 225, 231–232 (1991) (identifying absence of case management and evidentiary responsibilities as among the comparative advantages appeals courts possess over trial courts with respect to legal interpretation).

317. *See supra* notes 230–235 and accompanying text (discussing connection between adherence to originalist precedent and popular sovereignty arguments for originalism); *supra* note 258 and accompanying text (discussing connection between adherence to originalist precedent and desirable results arguments).

appeals and state appellate courts than between appellate courts and trial courts within either system. There is, however, at least one important dissimilarity between the two—namely, that federal courts are likely to face a higher proportion of cases implicating questions of federal law, including federal constitutional law. Given their more frequent exposure to federal constitutional questions, federal judges might be expected to more efficiently invest the time and effort to develop proficiency in the specific historical periods and interpretive questions that are relevant to interpreting the federal Constitution.[318] Rather than attempting to develop similar levels of proficiency themselves, state courts might plausibly defer to the interpretations adopted by federal courts and invest greater interpretive resources in examining the original meaning of their own respective state constitutions.[319] Dividing interpretive responsibility in this way might also yield other potential benefits, such as avoiding disagreements between the state courts and the federal courts of appeals possessing jurisdiction over the same territory.[320] Such a division of interpretive responsibility might also discourage needless forum shopping, reinforce public confidence in the rule of law, and conserve scarce judicial resources.[321]

But notwithstanding the surface–level appeal of dividing inter-

318. *See, e.g.*, Amanda Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 97 (2015) ("[T]here are good reasons to think that federal judges are simply better at interpreting federal law than state judges."); Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 329–30 (1976) (contending that federal courts are more likely than state courts to be proficient at interpreting federal law).

319. *Cf.* Christiansen, *supra* note 12, at 357 (contending that most state courts tend to use originalist methods in interpreting their own state constitutions).

320. Such disagreements might be seen as even more problematic than other types of disuniform interpretation because they can "leave[] citizens in a single state subject to conflicting legal standards." Frost, *supra* note 318, at 93.

321. *Id.* at 95–96, 99 (identifying forum shopping, rule–of–law values, and conservation of judicial resources as among the potential benefits of avoiding intracircuit splits between state and federal courts).

pretive responsibilities in this manner, the argument for concentrating U.S. constitutional interpretation in the federal courts is not entirely clear cut. For one thing, to the extent allowing a question to percolate among the geographically dispersed federal courts of appeals is thought to yield informational benefits to the Supreme Court,[322] one might plausibly conclude that such benefits would be enhanced by expanding the scope of such percolation to encompass the fifty–plus state and territorial judicial systems as well.

Beyond sheer numbers, state–court deliberations might add useful perspectives that may be missed by concentrating decisionmaking authority in the federal courts alone. Among other things, state–court judges are selected through different mechanisms than federal judges, typically lack the protection of life tenure, and are generally more experienced with the workings of state government than are federal judges.[323] To the extent homogeneity of background and experience can exacerbate well–known decisionmaking pathologies, such as motivated reasoning and groupthink,[324] diversifying the pool of decisionmakers tasked with engaging in originalist inquiry might go some way toward achieving more accurate assessments of original meaning.[325]

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322. *See supra* notes 180–182 and accompanying text (discussing arguments in favor of percolation).

323. Frost, *supra* note 318, at 97–98, 100.

324. *See* Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011) ("Motivated reasoning refers to the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs." (emphasis omitted)); Irving L. Janis, *Groupthink*, PSYCHOLOGY TODAY, Nov. 1971, at 84 (describing "groupthink" as "the mode of thinking that persons engage in when concurrence–seeking becomes so dominant in a cohesive ingroup that it tends to override realistic appraisal of alternative courses of action").

325. *Cf.* Christina Mulligan, *Diverse Originalism*, 21 U. PA. J. CONST. L. 379, 391–92 (2018) (noting concern that lack of diversity among those engaged in originalist research may exacerbate problems of unconscious bias in the assessment of originalist evidence).

VI. BEYOND ORIGINALISM

Though originalism provides the principal focus of the present study, the concerns identified regarding the institutional differences between the Supreme Court and the lower courts are hardly unique to originalism. Rather, the different institutional context of lower court decisionmaking may have implications for a variety of nonoriginalist methods of constitutional decisionmaking as well.

Consider, for example, the controversial suggestion that U.S. constitutional interpretation should be informed by international law and foreign legal sources.[326] One prominent justification for this approach focuses on the claimed informational benefits of the practice. By drawing on the experiences and wisdom of decisionmakers in other legal systems, proponents claim that U.S. courts will reach more accurate, or at least better informed, constitutional decisions.[327] But such informational benefits are only possible if U.S. courts are able to correctly identify and understand the foreign legal decisions relevant to the particular issue before them. In addition to locating the potentially relevant foreign legal sources—many of which may not be available in English[328]—comparativists face the challenging task of assessing how those rules fit within an unfamiliar legal system that may be very different from our own.[329]

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326. *See generally* Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 647–49 (2007)(discussing academic debate over this practice).

327. *See, e.g.*, *id.* at 678–79 (defending the informational value of foreign legal sources); Stephen Breyer, *Keynote Address*, 97 AM. SOC'Y INT'L L. PROC. 265, 266 (2003) (asserting that there is "enormous value in any discipline of trying to learn from the similar experience of others").

328. *See* Ronald J. Krotoszynski, Jr., *The Heisenberg Uncertainty Principle and the Challenge of Resisting—or Engaging—Transnational Constitutional Law*, 66 ALA. L. REV. 105, 134–36 (2014) (noting that the prevalence of "monolinguism" in the United States presents challenges for comparativism).

329. *See, e.g.*, David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 1021 (2015) (footnotes omitted) ("Critics of comparativism and sophisticated comparativists alike have drawn attention to the perils of invoking foreign law without the knowledge needed to place that law in context."); Anthony Mason, *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human*

Like originalism, "[c]onstitutional comparativism is" thus "an extraordinarily difficult task to do well, even in the best of circumstances."[330] And as with originalism, it is a task for which most lower court judges lack professional training and for which they will typically receive limited assistance from the attorneys who appear before them.[331] Perhaps unsurprisingly and despite the Supreme Court's suggestion of its own potential openness to the practice,[332] lower courts "have displayed almost no interest in" incorporating constitutional comparativism into their own decisionmaking.[333]

A second prominent nonoriginalist approach that might raise similar questions about the institutional capacities of the lower courts is suggested by Justice William Brennan's theory of "contemporary ratification."[334] According to Brennan, "[w]hen Justices interpret the Constitution, they speak for their community, not for themselves alone" and "[t]he act of interpretation must" therefore "be undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is" being sought.[335] Brennan's theory bears some resemblance to theories of "popular

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Rights in Hong Kong, 37 H.K. L.J. 299, 305 (2007) (explaining that the public law of a foreign jurisdiction "cannot be understood or applied in the absence of a comprehensive understanding of its political, historical, social and cultural context").

330. Roger P. Alford, *Lower Courts and Constitutional Comparativism*, 77 FORDHAM L. REV. 647, 661 (2008); *see also, e.g.*, Law, *supra* note 329, at 1020 ("Comparativism is especially dependent upon institutional support because it is resource–intensive.").

331. *See* Alford, *supra* note 330, at 661 ("State and federal judges rarely have been trained to deal with foreign or international material, either on the job or prior to joining the bench."); *see also, e.g.*, Law, *supra* note 329, at 1015–18 (noting lack of focus on comparativism in U.S. legal training).

332. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (looking to practices of a variety of foreign nations as "instructive" on the question of whether the Eighth Amendment should be construed to prohibit capital punishment for crimes committed by individuals younger than eighteen); Lawrence v. Texas, 539 U.S. 558, 573 (2003).

333. Alford, *supra* note 330, at 659.

334. *See generally* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433 (1986).

335. *Id.* at 434.

constitutionalism,"[336] that seek to reconcile judicial enforcement of a "living Constitution" with majoritarian principles by connecting judicial interpretation to perceived majority-supported preferences.[337] But for this justification to work as anything more than a rhetorical fig leaf, [338] judges must have the ability to identify what a majority of the relevant public actually believes about relevant constitutional issues.

Although judges are themselves members of the contemporary public, the individuals who compose the judiciary hardly reflect a representative sample of the overall population. [339] One cannot merely assume, therefore, that the views and preferences endorsed by a majority of judges or Justices—let alone the view preferred by the particular majority whose votes are necessary to decide a particular case—will necessarily mirror those of the broader population.[340] Nor is it clear that judges have adequate resources to allow them to correctly identify the majority–supported position on any given constitutional question.[341]

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336. *Cf.* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053–60 (2010) (noting ambiguities surrounding the phrase "popular constitutionalism" but identifying common commitments that unite disparate popular constitutionalist theories).

337. *See, e.g.*, Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598 (2003) (noting that what popular constitutionalists "seem to share is a notion that—at least in specified circumstances—judicial review should mirror popular views about constitutional meaning").

338. *Cf.* James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 673 (2012) (observing that "[i]n many formulations, the idea of contemporary ratification seems hardly more than a metaphor or slogan").

339. *See, e.g.*, Michael W. McConnell, *What Are the Judiciary's Politics?*, 45 PEPP. L. REV. 455, 458 (2018) (the federal judiciary "has always been richer, older, whiter, maler, more secular, and more prominent and successful than the American population as a whole"); Alicia Bannon & Laila Robbins, *The Nation's Top State Courts Face a Crisis of Legitimacy*, N.Y. TIMES (July 23, 2019), https://www.nytimes.com/2019/07/23/opinion/states-courts-diversity.html [https://perma.cc/6GCG-QBR4] (discussing the lack of racial and gender diversity on state supreme courts).

340. *See, e.g.*, Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1226 (2010) (noting concern that "judges acting in good faith might mistake their own strongly held views for those of the public at large").

341. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 519 (1965) (Black, J., dissenting)

Some scholars have argued that the Supreme Court does a tolerably good job of responding to such informational challenges through various mechanisms, such as attentiveness to signals emanating from the political branches, participation by interested amici, media coverage of pending cases, and observing public reaction to lower court decisions.[342] But even if one accepts these accounts of the Supreme Court's responsiveness to public sentiment, lower courts seem far less capable of making such determinations due to resource constraints on their own decisionmaking and the comparatively low salience of their decisions to the broader public.[343]

Other constitutional theories that ask or expect courts to look beyond relatively straightforward doctrinal analysis to consider less traditional criteria such as moral philosophy,[344] pragmatic consequences,[345] or nontextually expressed commitments embraced by

("Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the '[collective] conscience of our people.'") (footnote omitted) (alteration in original); *cf.* NATHANIEL PERSILY, *Introduction*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 5 (Nathaniel Persily et al. eds., 2008) ("Curiously absent from the literature on popular constitutionalism or the countermajoritarian difficulty is any evaluation of what 'the people themselves' actually think about the issues the Supreme Court has considered.").

342. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 14 (2009) ("On issue after contentious issue . . . the Supreme Court has rendered decisions that meet with popular approval and find support in the latest Gallup Poll."); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 325 (2005) (identifying media coverage and amicus briefing as mechanisms through which the Court may keep itself apprised of public opinion).

343. *Cf.* Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J.F. 197, 217 (2013) (suggesting that lower courts may be less inclined than the Supreme Court "to respond to perceived shifts in public constitutional culture").

344. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE CONSTITUTION 2–3 (1996) (arguing that the best constitutional theory is one that "brings political morality into the heart of constitutional law"); JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS, 74–82 (2015) (defending theory of constitutional interpretation informed by principles of moral philosophy).

345. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 171–204 (1995) (endorsing a

politically mobilized supermajorities at particular "constitutional moments"[346] may pose similar challenges for nonexpert, lower court judges constrained by limited time and decisional resources and by the strictures of existing Supreme Court precedent.

Not all theories of constitutional interpretation will necessarily raise these same concerns. Consider, for example, Professor David Strauss's theory of "common law constitutionalism," which posits that constitutional interpretation both does and should reflect a process of common law reasoning through which constitutional understandings evolve through an incremental process of precedent–based comparisons, informed by judicial intuitions regarding fairness and good policy.[347] This methodology is not significantly different from the types of doctrinal reasoning that currently predominate in the lower courts.[348]

Of course, such interpretive theories may be found objectionable for other reasons. For example, some may question the institutional capacity of judges to steer constitutional interpretation in desirable

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pragmatic approach to constitutional decision–making in which judges strive to read the Constitution and other legal materials in the manner that will produce the best practical results); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1341–49 (1988) (defending pragmatic approach to constitutional interpretation).

346. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 8–31 (1998) (contending that courts should recognize and accord legal effect to unwritten constitutional amendments that have been informally ratified by the national people).

347. *See* STRAUSS, *supra* note 202, at 36–38; *see also* Strauss, *Common Law Constitutional Interpretation*, *supra* note 239. Other comparatively low–cost decisionmaking strategies, like deferring to decisions of the political branches, may likewise be less challenging for lower courts to implement. *See, e.g.*, VERMEULE, UNCERTAINTY, *supra* note 284, at 254–56 (noting low costs of adjudication under such a deferential system); *cf.* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 827–28 (2017) (considering, without endorsing, the possibility that "lower courts" should defer to political actors about the scope of constitutional rights, "leaving more aggressive review for the Supreme Court to apply in appropriate cases").

348. *See supra* note 37 and accompanying text (discussing centrality of doctrinalism to most lower court decisions).

directions in the manner that Strauss's theory of common law constitutionalism assumes[349] or may question the legitimacy of this form of constitutional reasoning.[350] But as with the case of originalism, it is important to assess such objections at a systemic level, keeping in mind the different institutional settings in which judicial decisionmaking occurs. Those who harbor concerns about common law constitutionalism's desirability as a method of Supreme Court decisionmaking should not automatically conclude that the use of doctrinal reasoning by lower courts is similarly objectionable. For example, one plausible concern with the use of common law reasoning as a guide to Supreme Court decisionmaking might be that horizontal stare decisis constitutes too weak of a constraint on doctrinal innovation, leaving the Justices with too much freedom to alter constitutional law to conform to their own personal policy preferences.[351] But the same concerns do not necessarily apply to lower courts due to the greater practical strictures that stare decisis—in particular, vertical stare decisis—places on the scope of such courts' discretion.

In short, just as one should resist the temptation to conclude that what works well for the Supreme Court will work equally well when carried over into the lower courts, one should also be cautious in assuming that methodologies that might work well in the

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349. *See, e.g.*, McGinnis & Rappaport, *supra* note 232, at 1737–41 (contending that judicial updating is likely to yield results that are less desirable than results achieved through the formal constitutional amendment process); *cf.* Adrian Vermeule, Essay, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1514–15 (2007) (questioning whether common law judges are better equipped to make constitutional decisions than historically situated framers or contemporary legislative majorities).

350. *See* Brannon P. Denning, *Common Law Constitutional Interpretation: A Critique*, 27 CONST. COMMENT. 621, 637–38 (2011) (reviewing STRAUSS, *supra* note 202) (noting implicit assumption of judicial supremacy inherent in Strauss's theory and possible democracy–centered objections to that assumption).

351. *See* Denning, *supra* note 350, at 632 (accusing Strauss of seeming to "downplay the significant discretion that judges have to interpret precedent" in order to make his theory appear more constraining than originalism); *see also supra* notes 241–242 and accompanying text (discussing relatively weak force of horizontal *stare decisis* in the Supreme Court).

lower courts are necessarily appropriate when cases ascend to the highest level of the judicial hierarchy.[352]

CONCLUSION

Constitutional theory is centrally concerned with what happens "upstairs" at the level of Supreme Court decisionmaking; what happens "downstairs" in the messier and more complicated domain of lower court adjudication remains largely invisible.[353] Originalism is no exception. But originalism, like nearly all constitutional theories, typically presents itself as a theory to guide all official interpreters of the Constitution, not only those privileged few engaged in the rarified enterprise of Supreme Court decisionmaking. As such, originalism, like nearly all constitutional theories, needs an account of how lower court decisionmaking fits within the broader framework of the interpretive prescriptions the theory provides.

By focusing on the distinctive challenges that confront lower court judges, including the strictures of Supreme Court precedent, the potential for national disuniformity of decisions, and the significantly greater time and resource constraints on their decisionmaking, this Article has sought to demonstrate that the seemingly simple prescriptions of originalist theory become much more complex and contestable when applied to courts at lower levels of the judicial hierarchy.

Nor should the potential challenges surveyed in this Article be of exclusive interest to originalists. Originalism provides a useful and highly salient framework for examining the challenges that confront constitutional theories as they descend to lower levels of the judicial hierarchy. But *all* theories of constitutional interpretation—originalist and nonoriginalist alike—must confront and engage with the question of whether the theory posits an approach that is

352. *See supra* note 30 and accompanying text (discussing the related fallacies of composition and division).

353. *See* Wald, *supra* note 13, at 772 ("[I]n their focus on what happens 'upstairs' at the Supreme Court, observers often fail to recognize the efforts 'downstairs' in the lower federal courts and state courts.").

appropriate for all courts or for the Supreme Court alone. And if the answer provided is the latter, the theory must also be prepared to consider the nature of the interpretive and adjudicative processes that are appropriate for judges at each level of the judicial hierarchy. Proponents of some constitutional theories may find this task more challenging than others. But it is a task that no theory that aspires to real-world significance can permanently avoid.

THE FUTURE OF JUDICIAL DEFERENCE TO THE COMMENTARY OF THE UNITED STATES SENTENCING GUIDELINES

JOHN S. ACTON*

The United States Sentencing Commission is responsible for authoring the United States Sentencing Guidelines and its commentary. Both the Guidelines and the commentary are heavily influential in the sentencing of federal criminal defendants. For nearly three decades, courts have deferred to the Commission's commentary by applying Stinson v. United States. Stinson *analogized the Sentencing Commission to an administrative agency and held that the commentary to the Guidelines should receive deference akin to* Seminole Rock *deference. But the future of* Stinson *deference has grown uncertain in recent years. Changes in other areas of law have rendered much of* Stinson*'s reasoning out-of-date, circuits have begun to dispute how deferential* Stinson *is on its own terms, and judges have begun to push back on deference doctrines that harm criminal defendants. The Supreme Court's decision in* Kisor v. Wilkie *complicated matters further, and there is now a burgeoning circuit split over whether* Kisor*'s conditions on* Seminole Rock *deference also apply to* Stinson *deference. This Note addresses four distinct issues. First, it documents the ways in which the* Stinson *Court's reasoning is no longer tethered to current law and practice, including identifying ways in which lower courts frequently mischaracterize the contemporary practices of the Sentencing*

* Harvard Law School Class of 2022. I am grateful to Matthew Stephenson for his supervision and guidance in drafting this Note, and to Jack Goldsmith, Paul J. Larkin Jr., Sarah Welch, and the JLPP Notes Editors for their invaluable comments on drafts of this Note. Any errors are my own.

*Commission. Second, it documents the pre-*Kisor *circuit split over* Stinson*'s scope. Third, it argues that* Kisor *does not modify* Stinson *deference, and that, for the time being, lower court judges are bound by vertical* stare decisis *to continue faithfully applying* Stinson*'s deferential standard even when* Kisor*'s preconditions for deference are not met. Fourth, it argues that, when presented with the appropriate case, the Supreme Court should overrule* Stinson *due to the weakness of* Stinson*'s claim to* stare decisis*, the inherent problems of deference doctrines in the criminal context, and the relative lack of policy justifications for deference to the Commission as opposed to a traditional administrative agency.*

INTRODUCTION

The Sentencing Reform Act of 1984[1] created the United States Sentencing Commission as "an independent commission in the judicial branch of the United States."[2] Among its other responsibilities, the Commission authors the United States Sentencing Guidelines. The Guidelines help federal judges determine the length of criminal sentences for federal crimes.[3] Based on factors such as the nature of a crime and a defendant's criminal history, the Guidelines suggest a range of potential sentences within which the defendant's sentence should presumptively fall. Until the early 2000s, the Guidelines range was treated as mandatory and binding on federal judges. But in *United States v. Booker*,[4] the Supreme Court determined that binding sentencing guidelines were unconstitutional and purported to excise the portions of the Sentencing Act that made the Guidelines range mandatory.[5] However, even in their ad-

1. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

2. *See* 28 U.S.C.A. § 991(a) (Westlaw current through Pub. L. No. 117-39).

3. *See* 28 U.S.C.A. § 994(a)(1)(B) (Westlaw current through Pub. L. No. 117-39).

4. 543 U.S. 220 (2005).

5. *See id.* at 265 ("We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system. But, we repeat, given to-

visory form, the Sentencing Guidelines remain an extremely important part of the federal sentencing process. Courts are required to begin sentencing by correctly calculating the range of potential sentences suggested by the Guidelines, and failure to calculate the correct range constitutes procedural error.[6] And while courts may—based on the totality of circumstances—give a sentence outside of the correct guidelines range, courts must always explain the length of their sentences and are expected to give "more significant justification[s]" for significant departures from the guideline range.[7] Even after *Booker*, the Supreme Court has referred to the Guidelines as "the lodestone of sentencing,"[8] and nearly three-quarters of all federal sentences either fall within the Guidelines' range or depart from the range in a manner justified by the Guidelines Manual.[9]

Amendments to the Guidelines thus significantly impact the length of criminal sentences. In order to amend the Guidelines, the Commission goes through a multi-step process. First, before proposing any changes to the Guidelines, the Commission consults with "authorities on . . . various aspects of the Federal criminal judicial system" including the Judicial Conference of the United States, the Criminal Division of the Department of Justice, and the

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day's constitutional holding, that is not a choice that remains open. . . . [W]e have concluded that today's holding is fundamentally inconsistent with the judge-based sentencing system that Congress enacted into law. In our view, it is more consistent with Congress' likely intent in enacting the Sentencing Reform Act (1) to preserve important elements of that system while severing and excising two provisions (§§ 3553(b)(1) and 3742(e)) than (2) to maintain all provisions of the Act and engraft today's constitutional requirement onto that statutory scheme." (internal citations omitted)). The Court had previously found that the Sentencing Commission did not violate the nondelegation doctrine or the separation of powers. *See* Mistretta v. United States, 488 U.S. 361, 412 (1989).

6. *See* Gall v. United States, 552 U.S. 38, 51 (2007).

7. *See id.* at 50, *cited in* Peugh v. United States, 569 U.S. 530, 537 (2013).

8. *Peugh*, 569 U.S. at 544.

9. *See* UNITED STATES SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 7 (2020).

Federal Public Defenders.[10] Then, the Commission follows the Administrative Procedure Act's notice and comment rulemaking procedures.[11] Finally, the Commission submits any proposed amendments to Congress between the "beginning of a regular [congressional] session" and "the first day of May."[12] The amendments may not go into effect for at least 180 days, giving Congress the opportunity to pass new legislation to stop the amendments.[13] The Sentencing Commission also authors policy statements (a process that is explicitly authorized by statute) and commentary to the Guidelines (a process that is not explicitly authorized by statute).[14] The commentary is varyingly stylized as application notes, background information, introductions, and conclusions.[15] The Sentencing Commission has explicitly reserved the right to adopt new commentary without notice and comment and without submitting the proposed changes in commentary to Congress.[16]

Some commentary provides straightforward interpretations of the underlying guidelines, while other commentary serves a more complicated role.[17] Consider, for instance, the frequently litigated

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10. 28 U.S.C.A. § 994(o) (Westlaw current through Pub. L. No. 117-39).

11. *See* 28 U.S.C.A. § 994(x) (Westlaw current through Pub. L. No. 117-39) (referring to 5 U.S.C. § 553).

12. *See* 28 USC § 994(p) (Westlaw current through Pub. L. No. 117-39).

13. *See id.*

14. *See* 28 U.S.C.A. § 994(a)(2)–(3) (Westlaw current through Pub. L. No. 117-39); *see also* Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.). Courts inconsistently capitalize when discussing the "commentary" and the "guidelines." For clarity's sake, this Note capitalizes "Guidelines" when referring to either the literal Guidelines Manual or the general category of "the Guidelines," but uses lower case when referring to individual provisions within the Guidelines. This Note does not capitalize "commentary" unless quoting a source that capitalized "commentary."

15. *See* U.S. SENT'G COMM'N, U.S. SENT'G GUIDELINES MANUAL ii (2021).

16. *See* U.S. SENT'G COMM'N, RULES OF PRACTICE & PROCEDURE § 4.3 (2016) ("The Commission may promulgate commentary and policy statements, and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x)."); *id.* § 4.1 ("Amendments to . . . commentary may be promulgated and put into effect at any time.")

17. Application notes are by far the most relevant form of commentary to this Note, and they are what the reader should generally have in mind when this Note refers to "the commentary."

Application Note 1 to Section 4B1.2 of the Guidelines. Section 4B1.2 of the Guidelines is the definitions section for Section 4B1.1 of the Guidelines.[18] Section 4B1.1 provides a sentencing enhancement for "career offenders" based on the defendant's criminal history.[19] Application Note 1 to Section 4B1.2 of the Guidelines is effectively a definitions section on top of a definitions section, clarifying and elaborating upon Section 4B1.2's definitions.[20] While controversial, this Application Note is relatively straightforward commentary in the sense that it is a series of one-to-three-sentence definitions that explain what the Sentencing Commission believes specific phrases in Sections 4B1.1 and 4B1.2 mean.[21]

In contrast, Application Note 3 to Section 2B1.1 of the Guidelines is only interpretive in the loosest sense of the term. Section 2B1.1 of the Guidelines determines the appropriate range of sentences for various economic crimes in part based on the "loss" that the crime caused.[22] Application Note 3 to Section 2B1.1 of the Guidelines is a seventeen-page-long "interpretation" of the word "loss" that is itself a complex scheme instructing courts to calculate loss differently for different types of crimes.[23] Application Note 3 may be intended to clarify the meaning of "loss," but it is filled with its own ambiguities that have divided lower courts.[24]

Still other commentary does not purport to interpret the Guidelines at all. For example, Application Note 1 to Section 2A1.2 of the Guidelines tells judges when *not* to follow the guidelines range. Section 2A1.2 unambiguously provides the baseline sentencing

18. *See* GUIDELINES, *supra* note 16, §4B1.2.

19. *See id.* § 4B1.1.

20. *See id*. § 4B1.2 cmt. n.1.

21. *See id.*

22. *See id.* § 2B1.1.

23. *See id.* § 2B1.1 cmt. n.3.

24. *See id.*; *see also e.g.*, United States v. Kozerski, 969 F.3d 310, 314–15 (6th Cir. 2020) (documenting a circuit split over whether Application Note 3 defines the "loss" for fraudulently receiving a government contract from a set-aside fund for disabled veterans as the total size of the contract or as the difference between the fraudulent winning bid and the next highest legitimate bid).

level for second degree murder,[25] but Application Note 1 instructs judges that an upward departure from that baseline may be appropriate if the murder was particularly heinous.[26]

In any of these cases, whether and how the judge consults the commentary could impact the sentence ultimately given to the defendant. This gives substantial significance to the following question: When a court interprets the Guidelines, how much weight should it give to the Commission's commentary?

In 1993, a unanimous Supreme Court answered this question in *Stinson v. United States*.[27] The Court held that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."[28] It reasoned that the commentary should be "treated as an agency's interpretation of its own legislative rule" while acknowledging that "the analogy is not precise because Congress has a role in promulgating the guidelines."[29] The Court quoted *Bowles v. Seminole Rock & Sand Co.*,[30] explaining that "[a]s we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"[31] The Court further determined that the commentary on the specific guidelines relevant to Stinson's case was "a binding interpretation of the" Guidelines.[32] Beyond this lone quote analogizing to *Seminole Rock*, the Court did not explain how lower

25. GUIDELINES, *supra* note 16, § 2A1.2.
26. *See id.* § 2A1.2 cmt. n.1.
27. 508 U.S. 36 (1993).
28. *Id.* at 38.
29. *Id.* at 44.
30. 325 U.S. 410 (1945).
31. *Stinson*, 508 U.S. at 45 (quoting *Seminole Rock*, 324 U.S. at 414).
32. *Id.* at 47.

courts should reconcile judicial deference to the Sentencing Guidelines commentary with *Seminole Rock* deference.[33]

In recent years, four discrete issues have complicated questions over *Stinson* deference's scope. First, jurisprudential developments have undermined *Stinson*'s reasoning. The Court's doctrinal evolutions, the Sentencing Commission's self-imposed procedures for amending commentary, and congressional enactments have made the *Stinson* Court's description of the Guidelines and their relationship to legislative rules inaccurate. Second, some circuit courts have argued that *Stinson* has been illegitimately used to justify commentary that expands the scope of the Sentencing Guideline's text. These courts have primarily advanced these arguments in cases about the application notes to United States Sentencing Guidelines Sections 4B1.1 and 4B1.2, and a circuit split has arisen over these provisions. Third, after the Supreme Court's holding in *Kisor v. Wilkie* clarified the level of deference due to administrative agencies' interpretations of their own regulations, lower courts have disagreed over whether *Kisor*'s limitations on judicial deference applied to the Sentencing Commission's commentary. This has exacerbated the pre-existing divides over *Stinson* deference. Lower courts now not only disagree about how broadly *Stinson* should be read on its on its own terms, but also over whether a set of preconditions for applying *Stinson* deference exists at all. Fourth, some lower court judges have called for limits to deference doctrines in the criminal context, arguing that any doctrine that requires deference to the government in cases that impact individual liberty violates the rule of lenity. This debate has largely centered on *Chevron* deference, but it has clear implications for *Stinson* deference as well.

These issues raise distinct questions for lower court judges and for the Supreme Court that, this Note argues, require different an-

33. *Seminole Rock* deference is the standard by which a court defers to an administrative agency's interpretation of its own legislative rules. For a sense of how the Supreme Court has understood *Seminole Rock* deference over the years, *see generally Seminole Rock*, 325 U.S. 410; Auer v. Robbins, 519 U.S. 452 (1997); Kisor v. Wilkie, 13 S.Ct. 2400 (2019).

swers. Part I provides general background. It explains how *Stinson*'s characterizations of the Guidelines and commentary amendment process are outdated and how some courts mischaracterize the contemporary procedures. Part II provides more specific background on the pre-*Kisor* disagreements over *Stinson*'s scope that created a circuit split over whether courts should follow Application Note 1 to Section 4B1.2 of the Guidelines. Parts III and IV address how lower court judges and the Supreme Court, respectively, should treat *Stinson* and *Kisor*. Part III argues that lower federal courts bound by vertical *stare decisis* must continue to take a deferential approach to the commentary under *Stinson* without first considering the preconditions for *Seminole Rock* deference articulated in *Kisor*. Part IV, however, argues that Supreme Court should eliminate *Stinson* deference when presented with an appropriate case. It maintains that the case for *stare decisis* for *Stinson* deference is relatively weak. It further argues that principles of lenity and relatively weak policy justifications for deference to the commentary counsel against *Stinson*.

I. UNDERSTANDING THE OUTDATED NATURE OF STINSON'S REASONING

Stinson's reasoning is as follows: The Sentencing Commission authors both the Sentencing Guidelines and commentary to the Guidelines.[34] Changes to the Guidelines must be submitted to Congress for approval, but "[a]mended commentary . . . is not reviewed by Congress."[35] The Guidelines and their commentary are not precisely analogous to administrative agencies' regulations and their subsequent interpretations of those regulations because "Congress has a role in promulgating the [G]uidelines."[36] Nevertheless, it is appropriate to treat the commentary "as an agency's interpretation

34. *See Stinson*, 508 U.S. at 41.
35. *See id.* at 41, 46.
36. *See id.* at 44.

of its own legislative rule."[37] As such, "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline"[38] and "[a]mended commentary is binding on the federal courts" even in the face of contrary prior judicial constructions.[39]

In the 28 years since *Stinson* was decided, the *Stinson* Court's reasoning has been undermined in at least three ways: (1) most amended commentary is now reviewed by Congress and subjected to the rigors of notice and comment; (2) the Congressional Review Act[40] has obviated the only distinction the *Stinson* Court made between the Guidelines and an agency's regulations; and (3) *United States v. Booker*'s holding that the Guidelines are not mandatory has severely undermined any sense in which the Guidelines or commentary can be thought of as truly "binding" on federal judges.

First, just like the Guidelines' text, most amended guideline commentary now undergoes notice and comment and submission to Congress.[41] Since at least 1997,[42] the Commission's policy has been to "endeavor to provide, to the extent practicable, comparable opportunities [to the notice and comment procedures of 28 U.S.C. § 994(x)] for public input on policy statements and commentary considered in conjunction with guideline amendments."[43] It has also

37. *Id.*

38. *Id.* at 38.

39. *Id.* at 46.

40. 5 U.S.C. §§ 801–08.

41. I am grateful to Sarah Welch for calling this to my attention.

42. The United States Sentencing Commission adopted its first Rules of Practice and Procedure on July 11, 1997. *See* Rules of Practice and Procedure, 62 Fed. Reg. 38,598 (July 18, 1997). The relevant policies have been unchanged since 1997. *Compare id.* at 38,599, *with* RULES, *supra* note 17, §§ 4.1, 4.3. However, there are at least some instances of amendments to the commentary being submitted to Congress before 1997, and even before *Stinson* was decided in 1993. *See, e.g.*, Amendments to the Sentencing Guidelines for United States Courts, 57 Fed. Reg. 20,148, 20,151 (May 11, 1992) (including amendments to the Application Notes to Section 1B1.8(b) in a submission to Congress with amendments to the text of the Guidelines).

43. RULES, *supra* note 17, § 4.3.

been the policy of the Commission "to the extent practicable" to "endeavor to include amendments to policy statements and commentary in any submission of guideline amendments to Congress and put them into effect on the same November 1 date as any guideline amendments issued in the same year."[44]

The Commission still explicitly reserves the right to change its commentary without the procedural hurdles of notice and comment and submission to Congress.[45] But, in general, the Commission submits its amendments to the Guidelines and the commentary together with the same effective date of November 1, after both have been subjected to notice and comment.[46] Even when the Commission has amended the commentary with an effective date other than November 1, it has still chosen to hold a public hearing and to submit the amendment to Congress.[47] The proceduralization of amendments to the commentary is not universal; the Commission has enacted some changes to commentary and policy statements without first submitting to Congress or conducting a public hearing. However, these instances appear to have been either for "technical and conforming" edits or where the Commission had an urgent need, such as clarifying whether a forthcoming amendment would have retroactive effect.[48] In other words, the procedures that

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44. *Id.* § 4.1. Rule 4.1 also provides that, unless otherwise stated, all amendments to the Guidelines themselves shall go into effect on November 1. *See id.* This creates uniformity between the effective dates of amendments to the commentary and amendments to the Guidelines in light of the statutorily required 180-day waiting period between the Commission's submission of the Guidelines to Congress and their effective date and the statutory requirement that the Guidelines be submitted to Congress no later than May 1.

45. *See id.* §§ 4.1, 4.3.

46. *See, e.g.*, Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective November 1, 2018, 83 Fed. Reg. 20,145, 20,145–60 (May 7, 2018) (including amendments to the commentary and the Guidelines side-by-side after describing the "public hearings" held on the amendments).

47. *See, e.g.*, Notice of Submission to Congress of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 Fed. Reg. 4,741, 4,741 (Jan. 27, 2016). This notably includes an amendment of the application notes for Sections 4B1.1 and 4B1.2. *See id.*

48. *See, e.g.*, Notice of Final Action Regarding Technical and Conforming Amendments to Federal Sentencing Guidelines Effective November 1, 2015, 80 Fed. Reg.

apply to guideline amendments usually—but not always—also apply to commentary amendments.

Lower courts have largely overlooked this change in practice and often mischaracterize the procedure that amendments to the commentary receive, citing *Stinson*'s now outdated language and the statutory text but failing to consult the Federal Register. For example, a unanimous en banc Sixth Circuit stated in 2019 that "[u]nlike the Guidelines themselves, however, commentary to the Guidelines never passes through the gauntlets of congressional review or notice and comment."[49] The Second Circuit and an en banc Third Circuit both later uncritically quoted the Sixth Circuit's characterization.[50] It is undoubtedly true that amendments to the commentary are not statutorily required to go through notice and comment and submission to Congress. It is also true that present-day procedures do not make *Stinson* any less binding on lower courts, and that some provisions of the Sentencing Guidelines may not have received congressional review and notice and comment. But *Havis*-style blanket statements that amendments to the commentary "never pass[] through" these procedural hurdles simply do not reflect current practice. Yet I am aware of only two judicial acknowledgments that commentary to the Guidelines typically undergoes notice and comment.[51]

49,312, 49,312–13 (Aug. 17, 2015); Notice of Final Action Regarding Amendment to Policy Statement § 1B1.10, Effective November 1, 2014, 79 Fed. Reg. 44,973, 44,973–74 (Aug. 1, 2014).

49. United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (per curiam).

50. United States v. Swinton, 797 Fed. Appx. 589, 602 (2d Cir. 2019); United States v. Nasir, 982 F.3d 144, 159 (3d Cir. 2020) (en banc), *vacated on other grounds*, 142 S. Ct. 56, 56 (2021). On remand, the en banc Third Circuit reissued an opinion in *Nasir*. United States v. Nasir, 17 F.4th 459, 471–72 (3d Cir. 2021) (en banc). The analysis of *Stinson* was nearly identical in the new opinion, but the new version notably omitted this discussion claiming that the commentary deserved less deference because it did not undergo notice and comment. *Compare Nasir*, 982 F.3d at 159–60, *with Nasir*, 17 F.4th at 471–72.

51. *See* United States v. Moses, 23 F.4th 347, 355 (4th Cir. 2022) ("[T]he formally published Guidelines Manual . . . includes not only Guidelines and policy statements but also official commentary, all three of which were, in practice, generally promulgated by the notice-and-comment and congressional-submission procedure[.]"); United States v. Henry, 1 F.4th 1315, 1336 (11th Cir. 2021) (Pryor, C.J., dissenting) ("[J]ust like

Second, the only distinction that the *Stinson* Court drew between the Sentencing Guidelines and an agency's regulations no longer actually differentiates the Guidelines from an agency's regulations. Three years after *Stinson* was decided, Congress increased its role in the regulatory process through the Congressional Review Act. The *Stinson* Court determined that the Sentencing Guidelines were an imperfect analogy to an agency's regulations because "Congress has a role in promulgating the Guidelines."[52] But the only "role" that Congress actually has in promulgating the Guidelines is a period of time in which Congress must see the Guidelines before they take effect.[53] If Congress wants to stop the new guidelines from taking effect, it must enact new legislation.[54] But under the Congressional Review Act, agencies also must submit their regulations to Congress and give Congress a chance to pass legislation overriding the regulations before they take effect.[55] In other words, after the Congressional Review Act, Congress's involvement in the promulgation of Sentencing Guidelines is not materially different than its role in the promulgation of agency regulations. The doctrinal distinction between the Sentencing Guidelines and agency rules upon which the *Stinson* Court actually relied is now toothless.

Third, *United States v. Booker* created a new, far more salient distinction between commentary to the Guidelines and an agency's interpretation of its own regulations. In *Booker*, the Supreme Court found that it was unconstitutional for a sentencing court to treat the Sentencing Guidelines as mandatory.[56] This fundamentally

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the guidelines themselves, amendments to the commentary are ordinarily subject to notice and comment and are submitted to Congress with other guidelines amendments. *See* U.S. Sent'g Comm'n, R. of Prac. & Proc. 4.1, 4.3 (2016); U.S. Sent'g Comm'n, R. of Prac. & Proc. 4.1, 4.3 (2007); U.S. Sent'g Comm'n, R. of Prac. & Proc. 4.1, 4.3 (1997).").

52. Stinson v. United States, 508 U.S. 36, 44 (1993).

53. *See* 28 USC § 994(p) (Westlaw current through Pub. L. 117-41).

54. *See id.*

55. *See* MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL RESEARCH ACT (CRA): FREQUENTLY ASKED QUESTIONS 1 (2020).

56. *See* United States v. Booker, 543 U.S. 220, 265 (2005) (Breyer, J., delivering the opinion of the Court in part).

changed the nature of the Sentencing Guidelines and, by extension, the commentary. While the Guidelines still greatly influence the sentencing process, they no longer speak with the force of law.[57] *Booker* clearly weakens *Stinson*'s analogy between the Sentencing Guidelines and agency regulations. Agency regulations still have the force of law.[58] However, after *Booker*, the Sentencing Guidelines do not.[59]

Booker calls into question elements of *Stinson*'s reasoning—as *Booker* itself implicitly acknowledges. *Booker* cited *Stinson* for the proposition that the Court had "consistently held that the Guidelines have the force and effect of laws" before finding that giving the Guidelines the force and effect of laws violated the Sixth Amendment.[60] Still, the Court has not addressed what if any impact *Booker* should have on *Stinson*'s analogy between the commentary to the Guidelines and an agency's interpretation of its own regulations.

These three changes do not, in and of themselves, necessarily impact *Stinson*'s legal force. Lower courts are bound to follow even outdated Supreme Court opinions, and, as detailed in Part IV, these developments have a mixed impact on the horizontal *stare decisis* analysis. But it is important to establish at the outset that *Stinson* does not accurately describe either the contemporary procedures through which the Guidelines and the commentary are actually

57. *See id.*; *id.* at 234 (Stevens, J., delivering the opinion of the Court in part).

58. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 295–96 (1979).

59. There is admittedly some debate over exactly how sweeping *Booker*'s holding is. *Compare*, *e.g.*, United States v. Henry, 1 F.4th 1315, 1320 (11th Cir. 2021) ("*Booker* told us that all guidelines are advisory."), *with id.* at 1331 (Pryor, C.J., dissenting) (calling the maxim "advisory guidelines" misleading and arguing that "some aspects of the Guidelines remain binding after *Booker*"). But this debate is not particularly important to *Stinson*; whatever *Booker* held, it clearly made the Guidelines range in some respect no longer "law" in the way that an agency's regulations are "law."

60. *See Booker*, 543 U.S. at 234 (Stevens, J., delivering the opinion of the Court in part); *see also* Brown v. United States, 139 S. Ct. 14, 14 & n.3 (2018) (Sotomayor, J., dissenting from denial of certiorari) (arguing that *Stinson*'s usage of "binding" language is an example of several pre-*Booker* characterizations of the authority of the Sentencing Guidelines that cannot survive *Booker*).

amended or the contemporary similarities and differences between the Sentencing Guidelines and a traditional agency's regulations.

II. UNDERSTANDING THE PRE-*KISOR* DISAGREEMENTS OVER *STINSON* IN LOWER COURTS

Today, the most important lower court disagreement over the future of *Stinson* deference is whether courts should apply *Kisor v. Wilkie*'s threshold inquiry before consulting commentary to the Sentencing Guidelines. However, before this debate arose, lower courts were already fracturing over exactly how deferentially lower courts should treat commentary that appeared to expand the Guidelines' text. This Part provides background understanding of the pre-*Kisor* circuit split over *Stinson*'s scope.

In 2018 and 2019, a circuit split developed concerning the outer limits of *Stinson* deference. The split arose when some courts began to reject the commentary's interpretation of United States Sentencing Guidelines Sections 4B1.1 and 4B1.2. Section 4B1.1 provides for enhanced sentences for career offenders.[61] Section 4B1.2 is the definitions section of Section 4B.1.[62] Section 4B1.2 defines "crime of violence" and "controlled substance offense."[63] Application Note 1 to Section 4B1.2 goes one step further and clarifies that "aiding and abetting, conspiring, and attempting to commit" any offense that is defined as a "crime of violence" or "controlled substance offense" is *also* a crime of violence or controlled substance offense.[64] In *United States v. Winstead*,[65] the D.C. Circuit refused to apply Application Note 1. The court determined that Application Note 1 was "inconsistent" with the text of the Guidelines because it expanded the

61. *See* GUIDELINES, *supra* note 16, § 4B1.1..
62. *See id.* § 4B1.2.
63. *Id.*
64. *See id.* cmt. n.1.
65. 890 F.3d 1082 (D.C. Cir. 2018).

scope of the Guidelines to cover inchoate offenses that were not included in the Guidelines' text.[66] A unanimous en banc Sixth Circuit soon followed suit in *United States v. Havis*,[67] overruling the circuit's prior construction of Section 4B1.2. The court reasoned that because Application Note 1 added a new category of offenses to those enumerated in the text of the Guidelines, "no term in [Section] 4B1.2(b) would bear" the Sentencing Commission's interpretation and that the commentary was not "really an 'interpretation' at all."[68] Other circuits have disagreed. For instance, the Tenth Circuit held that Application Note 1 is "reconcilable" with the text of Section 4B1.2 because it can be interpreted as a definitional provision, and because the Sentencing Commission could have reasonably concluded that attempted violent crimes create a sufficient risk of violence as to be violent crimes in and of themselves.[69] The Eleventh Circuit was more blunt, concluding with limited analysis that "[Application Note 1] does not run afoul of the Constitution, or . . . a federal statute; nor is it inconsistent with, or a plainly erroneous reading of, sections 4B1.1 or 4B1.2. As a result, the commentary constitutes 'a binding interpretation' of the term 'controlled substance offense.'"[70]

The pre-*Kisor* circuit split over Section 4B1.2 can be understood as a broader disagreement about exactly how much deference *Stinson* commanded lower courts to give to the commentary. Approaches like the Sixth Circuit's emphasize that the commentary must actu-

66. *See id.* at 1090–92; *see also id.* at 1091 (acknowledging that this created a circuit split with the First, Sixth, Eighth, Tenth, and Eleventh Circuits).

67. 927 F.3d 382 (6th Cir. 2019) (per curiam) (en banc).

68. *Id.* at 386. *Havis* technically dealt with an application of § 2K2.1 of the Guidelines. *Id.* at 384. But the commentary to § 2K2.1 incorporates the definitions of § 4B1.2(b) and of Application Note 1. *See* GUIDELINES, *supra* note 16, § 2K2.1 cmt. n.1.

69. United States v. Martinez, 602 F.3d 1166, 1173–75 (10th Cir. 2010).

70. United States v. Smith, 54 F.3d 690, 693 (11th Cir. 1995); *see also* United States v. Lange, 826 F.3d 1290, 1293 (11th Cir. 2017) (reaffirming *Smith* before holding that the Guidelines should be read to apply to attempted manufacture of a controlled substance).

ally interpret rather than add to the Guidelines, and that only interpretive commentary should receive deference. Meanwhile, approaches giving effect to the commentary's interpretation of Section 4B1.2 emphasize that guidelines and their commentary should be treated as a collective whole and reconciled with one another absent a clear, unavoidable conflict. For example, in a dispute over a different provision of the Guidelines, the Eleventh Circuit recently described its approach to the Guidelines by saying that:

> 'The guideline and the commentary must be read together,' because the commentary may 'interpret the guideline or explain how it is to be applied.' The commentary sometimes requires interpreting a guideline in a way that 'may not be compelled by the guideline text.' Yet the commentary for a guideline remains authoritative 'unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.' Courts should thus 'seek to harmonize' a guideline's text with its commentary. [71]

Predictably, these debates at times intersected with the debate about the scope of *Seminole Rock* deference. For example, in the original *Havis* panel opinion, Judge Thapar separately concurred to his own majority opinion to suggest that the Supreme Court should overrule both *Stinson* and *Auer v. Robbins*[72]—the 1997 case that reaffirmed the principle of deference to agency interpretations of their own regulations articulated in *Seminole Rock*[73]—without any distinction between the reasons why the two deference doctrines

71. United States v. Cingari, 952 F.3d 1301, 1308 (11th Cir. 2020) (first quoting United States v. Ferreira, 275 F.3d 1020, 1029 (11th Cir. 2001); then quoting *Stinson*, 508 U.S. at 41; then quoting *Stinson*, 508 U.S. at 47; then quoting *Stinson*, 508 U.S. at 38; and then quoting United States v. Genao, 343 F.3d 578, 584 n.8 (2d Cir. 2003)).

72. 519 U.S. 452 (1997).

73. Some have questioned whether *Seminole Rock* and *Auer* articulated the same standard. *See, e.g.*, Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy, Kisor, *and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 165 n.19 (2019). But the Supreme Court treats the two as interchangeable. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019) ("We call [the practice of deferring to agencies' reasonable interpretations of their own regulations] *Auer* deference, or sometimes *Seminole Rock* def-

should be overruled.[74] More pointedly, the D.C. Circuit's reasoning in *Winstead* completely collapsed any distinction between *Stinson* and *Seminole Rock*. Indeed, the court read *Stinson* to incorporate *Seminole Rock* deference and referred to the deference owed to the commentary as "*Seminole Rock* deference" throughout its opinion.[75] In other words, even before *Kisor v. Wilkie*, lower court arguments about *Stinson* deference were inextricably connected to debates over the future of *Seminole Rock*.

III. WHY LOWER COURTS MUST CONTINUE TO APPLY *STINSON* AND CONSULT THE COMMENTARY TO EVEN UNAMBIGUOUS GUIDELINES.

Having established this background knowledge about the Guidelines, their commentary, and pre-*Kisor* lower court disagreements about *Stinson* deference, this Note can now address how lower courts should think about *Stinson* after *Kisor*. This Part's argument is straightforward: *Kisor* does not impact *Stinson* deference. As such, lower courts must continue to apply *Stinson* faithfully unless and until the doctrine is modified by the Supreme Court.

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erence, after two cases in which we employed it."). This Note uses the two terms interchangeably, preferring *Seminole Rock* unless quoting a source that described the deference as *Auer* deference.

74. United States v. Havis, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring) ("If there was ever a case to question deference to administrative agencies under *Auer v. Robbins*, or more specifically to the Sentencing Commission under the *Auer*-like *Stinson v. United States*, this is it."), *vacated en banc*, 927 F.3d 382 (6th Cir. 2019) (per curiam); *id.* at 452 ("Fortunately, even under current precedent, this court is not obligated to check out of its constitutional role: the Sentencing Commission's 'interpretation' in this case is just an addition and receives no deference. But this case shows how far *Auer* and *Stinson* deference could go if left unchecked. Both precedents deserve renewed and much-needed scrutiny.").

75. United States v. Winstead, 890 F.3d 1082, 1090 (D.C. Cir. 2018) ("[T]he Supreme Court in *Stinson v. United States* held that the commentary should 'be treated as an agency's interpretation of its own legislative rule.' Thus, under this *Seminole Rock* deference . . . ."); *id.* at 1092 ("[S]urely *Seminole Rock* deference does not extend so far as to allow it to invoke its general interpretive authority via commentary . . . to impose such a massive impact on a defendant with no grounding in the guidelines themselves.").

A. Understanding Kisor v. Wilkie *and the stakes of the debate about whether* Kisor *applies to* Stinson *deference*

The already complex debate over the Sentencing Guidelines' scope was substantially complicated by *Kisor v. Wilkie*. The *Kisor* Court reexamined and refined *Seminole Rock* deference, and ultimately upheld *Seminole Rock* deference while "reinforc[ing] its limits."[76] In reinforcing *Seminole Rock*'s limits, the Court acknowledged that it had sent "mixed messages" on *Seminole Rock*'s scope.[77] It further conceded that, "in a vacuum," *Seminole Rock*'s requirement that courts defer to agencies' interpretations of their own guidelines unless they are "'plainly erroneous or inconsistent with the regulation,' may suggest a caricature of the doctrine, in which deference is 'reflexive.'"[78] To avoid this "reflexive" deference, the Court emphasized a variety of conditions that must be met to warrant deference to an agency's interpretation of its regulations: (1) the regulation must be "genuinely ambiguous" and the court must "exhaust all the 'traditional tools' of construction" (citing *Chevron* step-one analysis); (2) the interpretation must be the agency's "authoritative" or "official position[;]" (3) the agency's interpretation must "implicate its substantive expertise[;]" and (4) the interpretation must reflect the "fair and considered judgment" of the agency.[79] The extent to which the Court was actually "reinforcing" rather than just "creating" these preconditions for deference is controversial. In a concurrence in judgment that functions as a lead dissent, Justice Gorsuch argued that the *Kisor* majority did not just reinforce *Seminole Rock*'s limits, but rather "pretend[ed] to bow to *stare decisis*" while reshaping *Seminole Rock* in "new and experimental ways."[80] The question whether *Kisor* upheld or modified *Seminole*

76. *Kisor*, 139 S. Ct. at 2408. *See also id.* at 2415 (opinion of the Court) ("[W]e think it worth reinforcing some of the limits inherent in the *Auer* doctrine.").

77. *Id.* at 2414.

78. *Id.* at 2415 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) and Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).

79. *Id.* at 2415–18.

80. *Id.* at 2443 (Gorsuch, J., concurring in the judgment).

Rock—as well as the fractured nature of the lead opinion[81]—makes its precise holding somewhat difficult to articulate, leaving an ambiguous opinion ripe for commentary and scholarly analysis.[82]

On cursory review, it is not obvious whether *Kisor*'s limits apply to *Stinson* deference. On the one hand, *Kisor* does not directly address the Sentencing Guidelines. From the first sentence of the opinion on, *Kisor* purported to be about deference to agencies' "reasonable readings of genuinely ambiguous regulations."[83] The Guidelines are not "regulations" and *Kisor* never mentions the Sentencing Guidelines, suggesting *Kisor* has nothing to do with the Sentencing Guidelines and its commentary.[84] But on the other hand, as this Note has already established, *Stinson*'s reasoning is entirely grounded in *Seminole Rock*. *Seminole Rock* deference was explicitly impacted by *Kisor*—meaning that if nothing else *Stinson*'s *reasoning* is clearly impacted by *Kisor*. And some lower courts were already treating *Stinson* and *Seminole Rock* interchangeably before *Kisor* was decided.[85]

Given this background, it should be unsurprising that lower courts disagree about whether *Kisor*'s limits apply to *Stinson*. The Third and Sixth Circuits and one Fourth Circuit panel have unambiguously held that *Kisor*'s preconditions for deference apply to

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81. Much of the lead opinion was only for a plurality of the Court. Chief Justice Roberts only joined the overview of the opinion, the portion of the opinion articulating the limits on *Seminole Rock* deference, and the portion of the opinion discussing *stare decisis*. *See id.* at 2424 (Roberts, C.J., concurring in part).

82. *See, e.g.*, Bamzai, *supra* note 73, at 186–98 ("Before assessing whether *Kisor* correctly retained the forms of deference announced in *Seminole Rock* and *Auer*, it is necessary to try to understand what *Kisor* actually held."); Paul. J. Larkin, Jr., *Agency Deference after* Kisor v. Wilkie, 18 GEO. J.L. & PUB. POL'Y 105, 123 (2020) ("[T]he Kagan opinion completely rewrote the *Seminole Rock* and *Auer* rule without ever once saying that those decisions were mistaken, let alone admitting that they lacked any basis for holding that an agency should be able to say what one of its rules means.").

83. *Kisor*, 139 S. Ct. at 2408.

84. *See generally Kisor*, 139 S. Ct. 2400; *see also* United States v. Moses, 23 F.4th 347, 356 (4th Cir. 2022) ("It readily appears that *Kisor*, considered on its own terms, does not apply to the Sentencing Commission's official commentary in the Guidelines Manual.").

85. *See* Introduction and Part II, *supra*.

Stinson, and the First Circuit has heavily implied the same. In December 2020, an en banc Third Circuit became the first appellate court to hold that *Kisor* limited *Stinson*'s scope in *United States v. Nasir*.[86] The *Nasir* court overruled a past construction of the Sentencing Guidelines as overly deferential to the Sentencing Commission's commentary.[87] Soon after, in *United States v. Riccardi*,[88] a divided Sixth Circuit panel followed the Third Circuit's lead and held that *Kisor* modified the scope of *Stinson* and required a threshold inquiry into a guideline's ambiguity before deferring to its commentary.[89] In *United States v. Campbell*,[90] a Fourth Circuit panel held that *Kisor* limited *Stinson*'s scope because "*Stinson* relied on the *Seminole Rock*/*Auer* doctrine, a line of cases governing this type of deference."[91] And in *United States v. Lewis*,[92] a First Circuit panel implied that *Kisor*'s limits apply to *Stinson*. It called *Seminole Rock* "the foundation" of its applications of *Stinson* deference.[93] It then asked whether *Kisor* would have caused past panels to change their mind in the construction of a particular provision of the Sentencing Guidelines. It concluded that the panels in that case would have ruled the same way in light of *Kisor* because those past panels did

86. 982 F.3d 144 (3d Cir. 2020) (en banc). The Third Circuit's initial en banc *Nasir* opinion was vacated on other grounds by the Supreme Court. United States v. Nasir, 142 S. Ct. 56, 56 (2021). Just over a month later, the en banc Third Circuit reissued its opinion on the impact of *Kisor* on the Sentencing Guidelines. United States v. Nasir, 17 F.4th 459 (3d Cir. 2021). The opinions were nearly identical in relevant respects, with the notable exception of the Third Circuit omitting its discussion of the lack of notice and comment procedures for amendments to the guidelines discussed *supra* at note 50. *Compare* 982 F.3d at 156–60, *with* 17 F.4th at 468–72. For clarity's sake, this Note generally cites to the 2021 opinion that is good law in the Third Circuit, but it cites to both opinions if it is relevant to understanding the timeline of when the Third Circuit first announced this view.

87. *See Nasir*, 982 F.3d 144, 156–60 (3d Cir. 2020) (en banc); *see also Nasir*, 17 F.4th at 468–72 (3d Cir. 2021) (en banc).

88. 989 F.3d 476 (6th Cir. 2021).

89. *Id.* at 485.

90. 22 F.4th 438 (4th Cir. 2022).

91. *See id.* at 444–45.

92. 963 F.3d 16 (1st Cir. 2020).

93. *Id*. at 24.

not "suggest that they regarded *Auer* deference as limiting the rigor of their analysis of whether the guideline was ambiguous."[94] One Ninth Circuit judge has suggested that she also believes that *Kisor* applies to the Sentencing Guidelines.[95]

Other courts and judges have reached the opposite conclusion. Less than two weeks after *Campbell*, a different Fourth Circuit panel held in *United States v. Moses*[96] that "*Kisor* did not overrule *Stinson*'s standard for the deference owed to Guidelines commentary but instead applies in the context of an executive agency's interpretation of its own legislative rules. . . . *Stinson* continues to apply unaltered by *Kisor*."[97] Similarly, unpublished opinions in the Fifth, Eighth, and Ninth Circuits dismissed with little analysis arguments that *Kisor* provided the panel with any vehicle to reexamine past circuit constructions of commentary to the Sentencing Guidelines.[98] The Sixth Circuit's decision in *Riccardi* prompted Judge Nalbandian to write separately to argue that *Stinson* "established a free-standing

94. *Id.*

95. *See* United States v. Parlor, 2 F.4th 807, 819 n.2 (9th Cir. 2021) (Berzon, J., dissenting) ("*Stinson* treated Guidelines commentary 'as an agency's interpretation of its own legislative rule.' *Kisor* recently clarified that 'the possibility of [such] deference can arise only if a regulation is genuinely ambiguous.'" (citations omitted)).

96. 23 F.4th 347, 352 (4th Cir. 2022), *petition for reh'g en banc filed*, No. 21-4067 (4th Cir. Feb. 2, 2022). Judge Niemeyer's opinion for the panel did not cite *Campbell*. However, Judge King dissented in relevant part, arguing that the panel was bound by the circuit precedent. *See id.* at 359 (King, J., dissenting in part and concurring in the judgment). These two published opinions straightforwardly contradict each other; *Campbell* applied *Kisor* to *Stinson*, while *Moses* claims that *Kisor* does not apply to *Stinson*. That contradiction may make *Moses* an attractive case for the Fourth Circuit to rehear en banc.

97. *Id.* at 349.

98. *See* United States v. Pratt, No. 20-10328, 2021 WL 5918003, at *2 (9th Cir. Dec. 15, 2021) ("We have continued to follow *Stinson* after *Kisor v. Wilkie*."); United States v. Broadway, 815 Fed. Appx. 95, 96 n.2 (8th Cir. 2020) (acknowledging that *Kisor* was a "major development[]" but disclaiming any authority to reexamine the circuit's past construction of the sentencing guidelines), *cert. denied*, 141 S. Ct. 2792 (2021); United States v. Cruz-Flores, 799 Fed. Appx. 245, 246 (5th Cir. 2020) (emphasizing that "*Kisor* did not discuss the Sentencing Guidelines or [*Stinson*'s holding]" and that there is "currently no case law from the Supreme Court or this court addressing the effect of *Kisor* on the Sentencing Guidelines"); United States v. Vivar-Lopez, 788 Fed. Appx. 300, 301 (5th Cir. 2019).

deference standard" unaffected by *Kisor*.[99] And several other circuits have simply continued to apply *Stinson* deference without commenting on *Kisor* or conducting any sort of threshold analysis into whether consulting the commentary is appropriate.[100]

The question whether *Kisor* modifies *Stinson* deference has dramatic implications for how lower courts should apply *Stinson* going forward. The pre-*Kisor* circuit split over *Stinson*'s scope was a question of degree; some circuits treated "plainly erroneous" as a more deferential standard than other circuits, but they were engaged in the same fundamental inquiry. But the difference between a *Stinson* deference that is modified by *Kisor* and a *Stinson* deference that is not modified by *Kisor* is a difference in kind. Extending *Kisor* to *Stinson* fundamentally alters the methodological framework lower courts use to determine whether to even consult the commentary at all.

A recent Third Circuit decision demonstrated just how much the pre-*Kisor* status quo changes if *Kisor* applies to *Stinson*. Prior to consulting Application Note 14(B) to Section 2K2.1(b)(6)(B) of the Guidelines, the court first extensively analyzed whether each of *Kisor*'s preconditions for deference were satisfied.[101] Only then did the court determine that the Note was "entitled to *Auer* deference as a reasonable interpretation of an ambiguous Guideline."[102] The court's analysis in turn prompted Judge Bibas to concur in judgment and argue that Application Note 14(B) was outside of *Kisor*'s "zone of ambiguity" and should be ignored altogether.[103] This is a fundamentally different approach to the commentary than any circuit had prior to *Kisor*. Even in the Sixth Circuit under *Havis* (which was probably the least deferential pre-*Kisor* approach to *Stinson* deference), courts did not conduct this kind of threshold analysis

99. *Riccardi*, 989 F.3d at 490–93 (Nalbandian, J., concurring).

100. *See, e.g.*, United States v. Abrego, 997 F.3d 309, 312–13 (5th Cir. 2021); United States v. Platero, 996 F.3d 1060, 1063–67 (10th Cir. 2021); United States v. Zamora, 982 F.3d 1080, 1084–85 (7th Cir. 2020).

101. United States v. Perez, 5 F.4th 390, 395–400 (3d Cir. 2021).

102. *Id.* at 399.

103. *Id.* at 402–04 (Bibas, J., concurring).

prior to consulting the commentary. Instead, courts considered the commentary side-by-side with the Guidelines.[104] In other words, if *Kisor* applies to the Sentencing Guidelines, lower courts will apply a fundamentally different methodology when determining whether to consult the commentary.

B. Why lower courts must continue to apply Stinson *without* Kisor*'s preconditions for deference*

Lower courts must determine how *Kisor* impacts *Stinson* deference. There are three possible answers to this question: (1) *Kisor* modifies *Stinson* deference by imposing new preconditions that must be met before courts may consult the commentary to the Guidelines—in which case *Kisor* changed the way in which lower courts must interpret the Sentencing Guidelines, making all pre-*Kisor* constructions of the Guidelines that relied on the commentary presumptively suspect; (2) *Kisor* merely re-articulates limits that have always been inherent in *Stinson* deference—in which case lower courts should use *Kisor*'s framework when consulting the commentary going forward, but past constructions of the Guidelines and their commentary under *Stinson* should be presumed to have always contained *Kisor*'s limits; or (3) *Kisor* does not impact *Stinson* at all—in which case lower courts should continue to faithfully apply *Stinson* as if *Kisor* had never been decided.

Determining which of these three approaches binds lower courts is a pure question of vertical *stare decisis* that does not involve any reasoning from first principles about deference doctrines or administrative law. Lower courts are bound to follow the decisions of the

104. United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019); *see also, e.g.*, United States v. Kozerski, 969 F.3d 310, 313 (6th Cir. 2020) (a post-*Havis* Sixth Circuit case in which the court looked to principles of both "ordinary use" and "all seventeen pages" of the commentary side-by-side to interpret the meaning of the term "loss" in the Sentencing Guidelines, but did not conduct any threshold inquiry into whether consulting the commentary was warranted).

United States Supreme Court. They must follow "[their] best understanding of governing precedent" and apply precedent "neither narrowly nor liberally—only faithfully" even at the expense of a more coherent overall body of law.[105] This is presumptively as true for deference doctrines that prescribe a particular methodology for how lower courts should reconcile multiple categories of legal texts (like in *Stinson*, *Seminole Rock*, and *Chevron*) as it is for opinions that provide a substantive construction of law.[106] And it remains true even when the reasoning for old Supreme Court decisions is undermined by a different line of cases. As the Supreme Court has made clear, "if a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line

105. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 15–16 (1st Cir. 2012); United States v. Johnson, 921 F.3d 991, 1001 (11th Cir. 2019) (en banc). *But see* Richard Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 936–39, 949 (2016) (arguing lower courts should narrow Supreme Court precedent, even under an "authority model" of vertical *stare decisis*). While full engagement with this debate is beyond the scope of this Note, this Note takes the view that lower courts ought to consider themselves strictly bound by all Supreme Court precedent.

106. Determining exactly why deference doctrines bind lower courts admittedly raises difficult conceptual questions about the nature of vertical *stare decisis*. But whatever the theoretical difficulties, there appears to be no practical dispute as to whether deference doctrines bind lower courts. The Supreme Court clearly views its deference doctrines as binding on lower courts. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (opinion of the Court) ("[*Seminole Rock*] gives agencies their due, while also allowing—indeed *obligating*—courts to perform their reviewing and restraining functions.") (emphasis added). Lower courts appear to share this view, treating the Supreme Court's deference doctrines as binding on themselves. *See., e.g.*, Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302 (2018) (noting that all surveyed judges believed they were bound to apply *Chevron* deference). It is not obvious what would happen if the Supreme Court tried to push methodological vertical *stare decisis* to its outer limits. For example, could the Supreme Court issue an opinion directly instructing all lower court judges to take a side in the textualism vs. purposivism debate that would be binding in all future statutory interpretation cases? But such questions are beyond the scope of this Note, which treats the Supreme Court's self-asserted (and at least in practice uncontested) authority to bind lower courts to deference doctrines as valid.

of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[107]

The Supreme Court's clear command to lower courts to continue to apply the Court's binding precedents until directly instructed otherwise is critical to conversations about *Stinson* and *Kisor*. It does not matter that *Kisor* clearly impacts *Stinson*'s reasoning. What matters is whether, as a doctrinal matter, the Supreme Court has exercised its prerogative of modifying *Stinson*'s methodological instructions for lower courts.

On close reading, *Kisor* does not modify *Stinson*, and *Stinson*'s limits cannot be read to have always been in *Kisor* all along. As such, lower courts must continue to faithfully apply *Stinson* and consult the commentary without any threshold inquiry into whether the Guidelines are sufficiently ambiguous. The rest of this subpart will consider and rebut in turn the arguments that *Kisor* either (1) directly modified *Stinson* deference or (2) rearticulated limits that were always inherent in *Stinson*. The argument that *Kisor* directly modifies *Stinson* deference fails because the *Stinson* Court created a new deference doctrine that is analogous to, but distinct from, *Seminole Rock* deference. While *Kisor* modifies *Seminole Rock* deference, it did not purport to modify the distinct doctrine in *Stinson*. The argument that *Stinson* deference always contained *Kisor*'s preconditions for deference fails because the *Stinson* Court explicitly disavowed some of *Kisor*'s limits.

WHY KISOR *DOES NOT MODIFY* STINSON: *Kisor* did not modify *Stinson* directly because *Stinson* deference is a distinct doctrine from *Seminole Rock* that merely analogizes to *Seminole Rock*'s holding. This Note will now explain why some lower courts have nevertheless treated *Kisor* as modifying *Stinson* deference before explaining in more detail exactly why *Stinson* ought to be viewed as a distinct deference doctrine from *Seminole Rock* that is unaffected by *Kisor*.

107. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483–84 (1989).

The argument that *Kisor* modifies *Stinson* is as follows: *Stinson* stated that the Sentencing Commission's commentary should "be treated as an agency's interpretation of its own legislative rule."[108] It then explained what this meant by directly quoting *Seminole Rock*'s "plainly erroneous" formation.[109] Thus, if courts change the way that they treat "an agency's interpretation of its own legislative rule," then they should change the way that they treat the Sentencing Commission's commentary too. By this logic, it would not matter if *Kisor* had overruled *Seminole Rock*, expanded *Seminole Rock*, or limited *Seminole Rock*. All would automatically apply to *Stinson* deference because "*Seminole Rock* deference" and "*Stinson* deference" are the same doctrine.

This is the basic argument advanced by the en banc Third Circuit in *Nasir*.[110] In *Nasir*, the Third Circuit joined the D.C. Circuit and Sixth Circuit in rejecting Application Note 1 to Section 4B1.2.[111] The court quoted *Stinson*'s statement that the commentary should "be treated as an agency's interpretation of its own legislative rule" and its invocation of *Seminole Rock* before concluding that "so-called *Seminole Rock* deference . . . governs the effect to be given to the guidelines commentary."[112] It then determined that the circuit's past interpretation of Sections 4B1.1 and 4B1.2—which had deferred to Application Note 1—had been "informed by the then-prevailing understanding of the deference that should be given to agency interpretations" but that this level of deference "may have gone too far in affording deference to the guidelines' commentary under the standard set forth in *Stinson*" and that "after the Supreme Court's decision last year in *Kisor v. Wilkie*, it is clear that such an

108. Stinson v. United States, 508 U.S. 36, 44 (1993).

109. *Id.* at 45.

110. The Third Circuit granted an en banc rehearing of the case *sua sponte* after the panel heard oral argument but before any panel decision was announced. United States v. Nasir, No. 18-2888 (3d Cir. Mar. 4, 2020) (order *sua sponte* granting rehearing en banc).

111. *See* United States v. Nasir, 982 F.3d 144, 157–58 (3d Cir. 2020) (en banc); *see also* United States v. Nasir, 17 F.4th 495, 468–72 (3d Cir. 2021) (en banc).

112. *Nasir*, 982 F.3d at 157 (quoting *Stinson*, 508 U.S. at 44–45) (footnote omitted); *see also Nasir*, 17 F.4th at 470 (same).

interpretation is not warranted."[113] The court then listed the limitations articulated in *Kisor* before applying them to the interpretation of the commentary to the Guidelines without providing further analysis of the limitations' relevance to the Commission's commentary.[114] The Third Circuit has since doubled down on this approach and has unequivocally stated that "[t]he *Auer* deference framework applies to the Sentencing Guidelines Commentary" before applying each step of the *Kisor* framework to an interpretation of the Guidelines.[115]

The Third Circuit's reading of *Stinson* is understandable, but incorrect. *Stinson* created a new deference doctrine independent of *Seminole Rock*. *Stinson* did not treat Sentencing Guidelines as regulations subject to principles of administrative law. Instead, *Stinson* merely analogized between the commentary to the Sentencing Guidelines and interpretations of an agency's regulations, noting the differences between the two areas of law. Both in *Stinson* itself and in subsequent opinions, the Court has treated the Sentencing Guidelines as *sui generis* and discussed *Stinson* deference as distinct from *Seminole Rock* deference.

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113. *Nasir*, 982 F.3d at 158; *see also Nasir*, 17 F.4th at 470–71 (replacing "decision last year" with "recent decision" but otherwise providing the same quote).

114. *See Nasir*, 982 F.3d at 158–160; *see also Nasir*, 17 F.4th at 471. Judge Bibas also authored a separate concurrence in part that joined this analysis but concluded that it did not go far enough. *See Nasir*, 982 F.3d at 177–79 (Bibas, J., concurring in part). He reasoned that *Kisor* "awoke us from our slumber of reflexive deference" and that "[o]ld precedents that turned to the commentary rather than the text no longer hold." *Id.* at 177. He further reasoned that *Kisor*'s exhortation that courts must "exhaust all the 'traditional tools' of construction" before deferring to an agency's commentary meant that courts must apply the rule of lenity before deferring, meaning that courts should categorically decline to defer to harsher commentary in the face of textual ambiguity in the underlying guidelines. *See id.* at 178–79 (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019)). *See also Nasir*, 17 F.4th at 472–74 (Bibas, J., concurring) (reissuing Judge Bibas's first *Nasir* opinion). The first time Judge Bibas made this argument, he wrote alone. *See Nasir*, 982 F.3d at 177. The second time, he was joined by five of his colleagues. *See Nasir*, 17 F.4th at 472.

115. United States v. Perez, 5 F.4th 390, 394 (3d Cir. 2021).

The question presented in *Stinson* was "[w]hether a court's failure to follow Sentencing Guidelines commentary that gives specific direction that the offense of unlawful possession of a firearm by a felon is not a crime of violence under USSG Section 4B1.1 constitutes an 'incorrect application of the sentencing guidelines' under 18 U.S.C. Section 3742(f)(1)."[116] The first two sentences in *Stinson* are:

> In this case we review a decision of the Court of Appeals for the Eleventh Circuit holding that the commentary to the Sentencing Guidelines is not binding on the federal courts. We decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.[117]

The Court did not mention *Seminole Rock* or deference to agency regulations in its articulation of the standard for deference to commentary of the Guidelines. It was only later in the opinion, in the Court's *reasoning* for its holding, that the Court cited *Seminole Rock*.[118] Even here, the Court emphasized that *Seminole Rock* was merely an analogy. The Court noted that "[d]ifferent analogies have been suggested as helpful characterizations of the legal force of commentary" and considered alternative analogies before determining that "[a]lthough the analogy is not precise because Congress has a role in promulgating the guidelines, we think the Government is correct in suggesting that the commentary be treated as an agency's interpretation of its own legislative rule."[119] In other words, in the very sentence in which the Court ultimately described

116. Stinson v. United States, 506 U.S. 972 (1992) (citation omitted).
117. Stinson v. United States, 508 U.S 36, 37–38 (1993).
118. *See id.* at 45.
119. *Id.* at 43–44.

its new standard for analyzing the commentary as "an agency's interpretation of its own rule," it caveated that this standard was based on an analogy, and an imprecise one at that. The Court continued to use this analogizing language, and only referenced *Seminole Rock* after explaining that the Guidelines are "the equivalent" of legislative rules and that the Sentencing Commission's commentary is "akin" to an agency's interpretation of its own rules because it has the same "functional purpose."[120] When the Court quoted *Seminole Rock*, it did so only in the context of explaining what it had previously held for deference to administrative agencies' interpretation of its own regulations; it did not reword the standard to apply directly to the Sentencing Guidelines.[121] Even after quoting *Seminole Rock*, the Court went on to describe the commentary as having even more weight than had been given to agency interpretations under *Seminole Rock*, stating that they are "binding on federal courts" and that "prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation."[122]

Stinson's square holding that a prior judicial construction of the guideline is trumped by a new interpretation is probably the single best piece of evidence that *Stinson* created a new doctrine that was separate and distinct from the ordinary administrative law principles in *Seminole Rock*. This holding calls to mind the Court's later decision in *National Cable & Telecommunications Association v. Brand*

120. *Id.* at 45.

121. *Id.* ("As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 410 (1945)).

122. *Id.* at 46. As discussed in Part I of this Note, *Stinson*'s statement that the Sentencing commentary (as well as the underlying Guidelines) are "binding on federal courts" was arguably in some sense abrogated by the Court's later determination that the mandatory provisions in the Sentencing Guidelines violated the Sixth Amendment. *See generally United States v. Booker*, 543 U.S. 220 (2005); *see also id.* at 234 (specifically citing *Stinson* in support of the provision that the Court had "consistently held that the Guidelines have the force and effect of law" before determining this to violate the Sixth Amendment).

X Internet Services,[123] which held that an agency's new construction of a statute trumps a court's prior construction of that statute unless the court's original construction determined that the text of the underlying statute was unambiguous.[124] *Brand X* dealt with statutes, not regulations, but some lower courts have extended *Brand X*'s reasoning to agency interpretations of their own regulations.[125] Yet, *Brand X* and its extensions have been regarded as very controversial, not as a natural extension of *Stinson*[126]—indeed, *Brand X* did not even cite *Stinson* as a relevant precedent.[127] But if *Stinson* was merely applying well-settled administrative law doctrines rather than treading new ground, then one would expect *Stinson* to be core to the conversation about *Brand X*.

The Supreme Court's subsequent treatment of *Stinson* further indicates that it regards *Stinson* deference as a separate doctrine from *Seminole Rock*. In *Neal v. United States*,[128] a unanimous Supreme Court cited *Stinson* for the proposition that "[t]he commentary . . . is the authoritative construction of the Guidelines absent plain inconsistency or statutory or constitutional infirmity" without referring

123. 545 U.S. 967 (2005).

124. *Id.* at 982–86.

125. Kisor v. Wilkie, 139 S. Ct. 2400, 2433 & n.51 (2019) (Gorsuch, J., concurring in judgment) (citing In re Lovin, 652 F.3d 1349, 1353–54 (Fed. Cir. 2011); Levy v. Sterling Holding Co., 544 F.3d 493, 502–03 (3d Cir. 2008)). In *Levy*, the Third Circuit cited its willingness to change its construction of commentary to the Sentencing Guidelines and *Stinson*'s comparison of the commentary to agency's commentary on regulations as additional justification for extending *Brand X*'s reasoning to *Auer*. *Id.* at 502–03. But this is a foretaste of the Third Circuit's error in *Nasir*. *Stinson* has an explicit *Brand X*-style holding, while *Auer* and *Seminole Rock* do not, making *Stinson* an inapposite justification for resolving *Brand X*-style issues in the *Seminole Rock* context.

126. *See, e.g.*, *Brand X*, 545 U.S. at 1005–20 (Scalia, J., dissenting) (heavily criticizing *Brand X* as unprecedented and contrary to the Article III judicial power); Baldwin v. United States, 140 S. Ct. 690, 690–95 (Thomas, J., dissenting from denial of certiorari) (same); *Kisor*, 139 S. Ct. at 2433 (Gorsuch, J., concurring in judgment) (criticizing the implications of *Brand X*'s extension to *Auer*, but treating it solely as an extension of *Brand X* without any mention of *Stinson*).

127. *See generally Brand X*, 545 U.S. 967. *But see Levy*, 544 F.3d at 503 (basing its rationale for extending *Brand X* to regulations in part on *Stinson*).

128. 516 U.S. 284 (1996).

to *Seminole Rock* or broader administrative law principles.[129] Similarly, in *United States v. LaBonte*,[130] the Court characterized *Stinson*'s holding as "explaining that the Guidelines commentary 'is authoritative unless it violates the Constitution or a federal statute.'"[131] Once again, the Court neither cited *Seminole Rock* (or *Auer*) nor quoted *Stinson*'s characterization of *Seminole Rock* anywhere in the opinion.[132] It also explicitly declined to determine whether the Sentencing Commission should—like a traditional administrative agency—receive *Chevron* deference, suggesting that the Court thought of deference to the Commission and deference to administrative agencies as distinct questions.[133] Most other non-majority writings from Supreme Court Justices similarly treat the questions surrounding *Stinson* as distinct from *Seminole Rock*, either declining to invoke *Seminole Rock* when characterizing *Stinson*'s holding or else acknowledging *Stinson*'s status as an analogy to rather than an application of *Seminole Rock*.[134]

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129. *Id.* at 293.

130. 520 U.S. 751 (1997).

131. *Id.* at 757 (quoting Stinson v. United States, 508 U.S. 36, 38 (1993)).

132. *See id.* at 752–62.

133. *Id.* at 762 n.6. In dissent, Justice Breyer, joined by Justices Stevens and Ginsburg, argued that more general principles of administrative law, particularly *Chevron*, should apply to the Sentencing Commission. In so doing, he cited *Stinson* as an example of the court "previously impl[ying]" that the Sentencing Commission is "subject . . . to the kind of judicial supervision and review that courts would undertake were the Commission a typical administrative agency." *Id.* at 778 (Breyer, J., dissenting). This is probably best understood as an argument in favor of the Third Circuit's position that *Stinson* more broadly incorporated principles of administrative law to the Sentencing Commission. But as the rest of this paragraph and its accompanying notes show, it is outweighed by substantial additional authority, including the very majority opinion from which Justice Breyer was dissenting.

134. *See* Beckles v. United States, 137 S. Ct. 886, 897 (2017) (Ginsburg, J., concurring in the judgment) (citing *Stinson* for the proposition that commentary that is "[h]armonious with federal law and [the Guideline's text]" is "authoritative," with no invocation of *Seminole Rock*); Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 114 (2015) (Thomas, J., concurring) (stating that *Auer*'s "*reasoning* has . . . been extended . . . into the realm of criminal sentencing" (emphasis added) and characterizing *Stinson*'s holding as "concluding that the Sentencing Commission's commentary on its Guidelines is *analogous* to an agency interpretation of its own regulations, entitled to *Seminole Rock* deference"

The Supreme Court has treated the Guidelines differently from ordinary regulations, and it has characterized *Stinson* deference as a distinct doctrine from *Seminole Rock* deference. Because *Kisor* only purported to address *Seminole Rock* deference, *Kisor* did not directly modify *Stinson*.

WHY KISOR *DID NOT REARTICULATE LIMITS ALWAYS INHERENT IN* STINSON: *Stinson* has not always included *Kisor*'s preconditions for deference for an extremely straightforward reason: *Stinson* explicitly held that lower courts must consider the commentary even when the Guidelines themselves are unambiguous. That alone is dispositive. This Note will now describe how at least one lower court has nonetheless treated *Kisor*'s limits as always having been inherent in *Stinson* and explain why that is an inaccurate reading of both *Stinson* and *Kisor*.

The argument that *Kisor* reinforced limits that were always inherent in *Stinson* is as follows: *Kisor* did not change the law; it applied *stare decisis* to uphold *Seminole Rock* deference while "reinforcing" limits that were always inherent in *Seminole Rock*.[135] Thus, when *Stinson* analogized to *Seminole Rock*'s statement that an agency's interpretation of its own regulation must be given "controlling

(emphasis added)); Freeman v. United States, 564 U.S. 522, 529 (2011) (plurality opinion) (characterizing *Stinson* as holding that "Guidelines commentary is authoritative," without citation to *Seminole Rock*). *Cf. also* United States v. Riccardi, 989 F.3d 476, 491–92 (6th Cir. 2021) (Nalbandian, J., concurring in part and in the judgment) (conducting an analogous review of Sixth Circuit cases applying *Stinson*). *But see* Kisor v. Wilkie, 139 S. Ct. 2400, 2411 n.3 (2019) (plurality opinion) (including *Stinson* as one of sixteen cases in a list demonstrating that the Court's "pre-*Auer* cases *applying Seminole Rock* deference are legion" (emphasis added)); Morse v. Republican Party of Virginia, 517 U.S. 186, 200–01 (1996) (lead opinion) (citing both *Stinson* and *Seminole Rock* without any analysis or distinction between the cases to support the statement "We are satisfied that the Department[of Justice]'s interpretation of its own regulation is correct" when discussing a preclearance regulation enforcing § 5 of the Voting Rights Act; *Labonte*, 520 U.S. at 778 (Breyer, J., dissenting) (discussed *supra* at note 133).

135. *Kisor*, 139 S. Ct. at 2415 (opinion of the Court).

weight unless it is plainly erroneous or inconsistent with the regulation,"[136] it should be understood to have been analogizing to a standard that always included *Kisor*'s limits.[137]

This argument is implicit in the First Circuit's reasoning in *Lewis*.[138] Just like *Nasir*, *Lewis* dealt with Application Note 1 to Sections 4B1.1 and 4B1.2 of the Sentencing Guidelines.[139] And just like the Third Circuit, the First Circuit had previously interpreted these provisions in light of the Sentencing Commission's commentary.[140] But unlike the Third Circuit, the First Circuit found itself bound by the law of the circuit doctrine to apply its previous construction of Sections 4B1.1 and 4B1.2.[141] The court acknowledged that *Kisor* "sought to clarify the nuances of judicial deference," but emphasized that *Kisor* "considered, but rejected a challenge to the *Auer*/*Seminole Rock* doctrine" and instead aimed to "recall the limits 'inherent'" to the doctrine.[142] The court then determined that the

136. *Stinson*, 508 U.S. at 45 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 410 (1945)).

137. *Id.*

138. This is truer of the panel's unanimous opinion than of the two-judge concurrence. The concurring judges' reasoning is more similar to the Third Circuit's, arguing that *Kisor* "clarified" the appropriate standard of deference and discussing *Kisor* as if it directly applied to *Stinson* deference. *See* United States v. Lewis, 963 F.3d 16, 28–29 (1st Cir. 2020) (Torruella and Thompson, JJ., concurring). This suggests the two approaches may be less different than they initially seem, particularly if *Kisor* is framed as clarifying limits inherent in "plain error review" and *Stinson* is viewed as an application of "plain error review."

139. *Id*. at 18.

140. *Id.* at 22 (citing United States v. Piper, 35 F.3d 611 (1st Cir. 1994)).

141. *Id.* at 23. At least part of the difference between the First and Third Circuit's reasoning is due to the fact that the Third Circuit heard the case *en banc*—and was thus free to overrule its past construction of the Sentencing Guidelines with or without intervening Supreme Court authority—while the First Circuit heard the case as a panel. The First Circuit panel emphasized that it was not commenting on what holding it would make if it had "the option of an uncircumscribed review." *Id.* at 25. And two of the three judges on the panel stated that they would have construed the Guidelines differently, in spite of the commentary, had they not felt bound by existing circuit precedent. *Id.* at 27 (Torruella and Thompson, JJ., concurring). Nevertheless, as the rest of this subsection argues, the First Circuit's unanimous panel decision's reasoning was still distinct from the Third Circuit's reasoning.

142. *Id.* at 23–24.

circuit's prior application of *Stinson* deference to Application Note 1 was consistent with *Kisor*. It reasoned that "nothing" in past cases "indicate[d] that the prior panels viewed themselves as straying beyond the zone of ambiguity" and that those panels did not "suggest that they regarded *Auer* deference as limiting the rigor of their analysis of whether the guideline was ambiguous."[143] The court further stressed that *Kisor* "expressly denied any intent to 'cast doubt on many settled constructions of rules' and inject 'instability into so many areas of law.'"[144] Even though two members of the *Lewis* panel considered Application Note 1 to be a poor interpretation of the Sentencing Guidelines, the court declined to allow *Kisor* to unsettle its past constructions.[145]

The key benefit to this approach is that it takes the Supreme Court's own characterization of *Kisor* seriously: *Kisor* stylizes itself as an exercise of *stare decisis*. If *Kisor* really is just an exercise of *stare decisis* that reaffirms old principles of administrative law (and not, as the Third Circuit described it, a case that "cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations"[146]) then *Stinson*'s analogy to *Seminole Rock* really would have contained *Kisor*'s limitations on deference all along. In other words, under the First Circuit's approach, *Kisor* did not actually change anything about either *Seminole Rock* or *Stinson* deference; it just gave courts applying both deference doctrines clearer language for applying these longstanding doctrines.

Unfortunately, this approach pushes the legal fiction of *stare decisis* in *Kisor* beyond what either *Kisor* or *Stinson* can bear. As a wide variety of commentators argued from the moment *Kisor* was decided, *Kisor* clearly narrowed *Seminole Rock*'s scope.[147] Even the *Kisor* Court more or less acknowledged this; it conceded that: (1) the

143. *Id.* at 24.

144. *Id.* (quoting *Kisor*, 139 S. Ct. at 2422).

145. *Id.* at 27 (Torruella and Thompson, JJ., concurring).

146. United States v. Nasir, 17 F.4th 459, 471 (3d Cir. 2021) (en banc).

147. *See, e.g.*, Bamzai, *supra* note 72, at 186 (describing the "conventional" understanding of *Auer*/*Seminole Rock* as "allow[ing] agencies to fill in the gaps in the regulations they promulgated"); *id.* at 192 (arguing that *Kisor* articulates a form of deference

Supreme Court had previously sent "mixed messages" about how *Auer* deference should be applied, (2) the Supreme Court had in some instances too quickly deferred to an agency's commentary without sufficiently analyzing the underlying regulation; and (3) past excesses in *Auer*'s applications gave "a bit of grist" to Kisor's argument that "*Auer* 'bestows on agencies expansive, unreviewable' authority"—hence the need for new limitations on *Auer*'s scope.[148] The *Kisor* Court may have invoked *stare decisis* to justify its holding, but it treaded new ground. *Kisor* does not require lower courts to adopt the legal fiction that every reference to *Seminole Rock* contained *Kisor*'s limits all along.

More fundamentally, when formulating a deference framework for commentary to the Guidelines, the *Stinson* Court considered and explicitly rejected some of the preconditions for deference that ultimately became part of *Kisor*. *Kisor* cited *Chevron* to explain the

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similar to *Skidmore*); Larkin, *supra* note 81, at ("The [*Kisor*] Court completely reworked its doctrine regarding the deference that an agency's construction of one of its rules should receive."); Christopher J. Walker, *What* Kisor *Means for the Future of* Auer *Deference*: *The New Five-Step* Kisor *Deference Doctrine*, YALE J. ON REGUL.: NOTICE & COMMENT (June 26, 2019), https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/ [https://perma.cc/T7JZ-ED9V]; Deborah Malamud, Seila Law *and the Roberts Court*, 2020 U. CHI. REV. ONLINE i, i (2020) (quoting former DOJ official Jeff Wood as calling deference "more the exception than the rule" under *Kisor*); *A New Dawn for Challenges to FDA Actions? Kisor and the Tenuous Vitality of Administrative Deference*, ROPES & GRAY (Nov. 3, 2019), https://www.ropesgray.com/en/newsroom/alerts/2019/11/A-New-Dawn-for-Challenges-to-FDA-Actions-Kisor-and-the-Tenuous-Vitality-of-Administrative-Deference [https://perma.cc/DRY2-UTV6] (arguing that *Kisor* will lead to courts being significantly more careful than before in determining whether or not *Auer* deference will apply); *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J., concurring in judgment) (describing the majority as adding "new and nebulous qualifications" to *Auer* and accusing the majority of merely "pretend[ing] to abide by *stare decisis*"); *id.* at 2448 (Kavanaugh, J., concurring in judgment) (arguing that the majority's approach essentially adopted the Solicitor General's request to "clarify and limit *Auer*"); *cf. id.* at 2424–25 (emphasizing that the limits articulated by the Court mean that "the cases in which *Auer* deference is warranted largely overlap with" those in which *Skidmore* deference would be persuasive). *But see id.* at 2415 n.4 (opinion of court) ("The proper understanding of the scope and limits of the *Auer* doctrine is, of course, not set out in any of the opinions that concur only in the judgment.").

148. *Kisor*, 139 S. Ct. at 2415.

kind of exhaustive inquiry into meaning that must occur before courts consider an agency's interpretation of its own regulations.[149] That extension of *Chevron* step-one-style analysis to the *Seminole Rock* context is arguably the most consequential portion of *Kisor*.[150] But *Stinson* rejects any analogy between *Chevron* and the commentary because the "commentary explains the guidelines and provides concrete guidance as to *how even unambiguous guidelines are to be applied* in practice."[151] This instruction makes sense because many provisions of the commentary do not purport to be interpretations of the Guidelines. Consider Section 2A1.2 of the Guidelines and its application note. The guideline straightforwardly assigns a base offense level of 38 to second degree murder and the application note instructs judges that an upward departure from the Guidelines may be appropriate if a defendant's conduct in committing second degree murder was particularly heinous.[152] There is no plausible way to treat the text of the guideline as ambiguous, nor is there any plausible way to call the application note an "interpretation" of Section 2A1.2. Under *Kisor*, courts would have no business looking at the application note because there would be no ambiguity to resolve. But this is exactly the kind of note explaining "how even unambiguous guidelines are to be applied in practice" that the *Stinson* Court mandated lower courts to consider.[153]

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149. *Id*. (citing Chevron U.S.A. v. National Resource Defense Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

150. *Cf. id*. at 2448 (Kavanaugh, J., concurring in judgment) ("Importantly, the majority borrows from footnote 9 of this Court's opinion in *Chevron* to say that a reviewing court must 'exhaust all the "traditional tools" of construction' before concluding that an agency rule is ambiguous and deferring to an agency's reasonable interpretation.").

151. Stinson v. United States, 508 U.S. 36, 44 (1993) (emphasis added); *see also* United States v. Moses, 23 F.4th 347, 354–55 (4th Cir. 2022) ("Indeed, *Stinson* explicitly recognized that commentary can be useful even when a Guideline is 'unambiguous.'" (quoting *Stinson*, 508 U.S. at 44)).

152. GUIDELINES, *supra* note 16, § 2A1.2 & cmt. n.1.

153. This portion of *Stinson*'s reasoning strains the analogy between *Seminole Rock* and *Stinson*. When a Court "considers" commentary like the application note to Section 2A1.2, it is determining whether to "defer" to anything. It's merely considering whether other factors justify a departure from the Guidelines range. But the Supreme Court did not discuss this distinction.

Stinson's explicit applicability to even unambiguous guidelines is dispositive; *Stinson* did not always contain *Kisor*'s limits. *Kisor* considers agency interpretations of their own regulations to only be relevant after a threshold demonstration of ambiguity, while the *Stinson* Court considers the application notes to be more than just an "interpretation" of the text of the Guidelines and to not be dependent on any threshold ambiguity. In other words, *Stinson* squarely considered and disavowed *Kisor*'s most significant precondition for deference.[154]

In short, *Stinson* deference is a distinct doctrine from *Seminole Rock*, the Supreme Court has not extended *Kisor*'s preconditions for deference to *Stinson*, and the standards articulated in *Kisor* were not part of *Stinson* deference all along. Accordingly, until directed otherwise by the Supreme Court, lower courts should continue to faithfully apply *Stinson* and consult the application notes to even unambiguous guidelines without a *Kisor*-style threshold analysis.

154. *Stinson*'s explicit applicability to unambiguous Guidelines is not *Stinson*'s only contradiction of *Kisor*. *Kisor* says that comments to regulations are not "binding" on anyone, because they have no impact without the underlying text of the regulation. *Kisor*, 139 S. Ct. at 2420. But *Stinson* repeatedly described the commentary to the Sentencing Guidelines as "binding" on federal courts. *Stinson*, 508 U.S. at 42–43. *See also infra* Part IV (exploring the impact of *Booker v. United States* on this holding and *Booker*'s implications for the *stare decisis* effect that should be given to *Stinson*).

IV. WHY THE SUPREME COURT SHOULD OVERRULE *STINSON*

Lower courts are bound by the Supreme Court's decisions—you could go so far as to say that vertical *stare decisis* is "an inexorable command."[155] But, as controversial as horizontal *stare decisis* may be, everyone agrees that horizontal *stare decisis* is "not an inexorable command."[156] The Supreme Court is well within its power to modify or overrule *Stinson*.[157]

Regardless of one's view of the appropriate level of deference to the commentary, *Stinson* sorely needs updating and clarification. The Supreme Court, not the Courts of Appeals, has the prerogative of revising its precedents—and rightly so.[158] But the effectiveness of this hierarchical system depends on the Supreme Court's willingness to rectify incoherence in its decisions. The "correct" answer to the burgeoning circuit split over *Kisor*'s applicability to *Stinson*—a framework under which *Stinson* and *Kisor* are both good law and *Kisor*'s threshold inquiry is not applied to the Guidelines—is not internally coherent. It requires lower courts to simultaneously say that the commentary to the Guidelines is akin to an agency's interpretations of its own regulations even as they are subject to different methodological frameworks.

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155. *Cf. Kisor*, 139 S. Ct. at 2422 (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)) (emphasizing that horizontal *stare decisis* is "not an inexorable command").

156. *Id.*

157. This Note uses "overrule *Stinson*" to refer to what it would mean for the Supreme Court to clearly indicate that courts should no longer give deference to the commentary to the Sentencing Guidelines. *Stinson* is on its own terms a methodological holding; the *Stinson* Court did not give a binding construction for any particular provision of the Guidelines, but merely vacated the judgment of the lower court and remanded for the court to reinterpret the guideline in question while giving proper weight to the commentary. *See Stinson*, 508 U.S. at 37–38, 48. The Supreme Court discusses "overruling" cases that stand for methodological principles by discussing whether those principles should be abandoned. *See, e.g.*, *Kisor*, 139 S. Ct. at 2408 ("The only question presented here is whether we should overrule [*Seminole Rock* and *Auer*], discarding the deference they give to agencies.").

158. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 483–84 (1989).

There are three basic ways that the Supreme Court could modify *Stinson* in order to create a coherent overall system: (1) The Court could reaffirm the relationship between the commentary to the Guidelines and an agency's interpretation of its own regulations and extend *Kisor*'s preconditions to *Stinson*. This would reaffirm *Stinson*'s core analogy while repudiating some of its dicta and decreasing the actual level of deference given to the commentary. (2) The Court could reject the similarity between the commentary and an agency's interpretation of its own regulations and offer a new justification for *Stinson*'s deferential approach to the commentary. This would reaffirm the deferential standard announced in *Stinson* while providing a new rationale for the deference. Or (3) the Court could repudiate both the reasoning and the holding of *Stinson*, and instead instruct lower courts to treat the actual text of the Guidelines as controlling and to give no more than *Skidmore* respect to the commentary.

Some readers may think that all deference doctrines should be overruled, and that the Supreme Court should accordingly overrule *Stinson* and *Kisor*/*Seminole Rock* (and probably *Chevron* for good measure). While that is an understandable position, this Part will treat *Kisor* as good law.[159] If the Court decides to repudiate deference doctrines more broadly, then *Stinson*'s fate is obvious: it will be overturned because it is a deference doctrine, and there is nothing more to discuss. But even if the Court does not wish to revisit *Kisor* or comment more broadly on deference doctrines, lower courts still need guidance on how to treat the commentary to the Sentencing Guidelines. The Court can provide this guidance by either: (1) extending *Kisor* to *Stinson*; (2) finding a new justification

159. The arguments for and against *Seminole Rock* more broadly are well-trodden. *Compare, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996), *and Kisor*, 139 S. Ct. at 2425–48 (Gorsuch, J., concurring in the judgment), *with* Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297 (2017), *and Kisor*, 139 S. Ct. at 2410–14, 2418–23 (plurality opinion).

for *Stinson*'s deferential standard; or (3) overruling *Stinson* altogether. The question of which of these routes the Court should take, assuming it chooses *not* to revisit *Kisor*, is the focus of the remainder of this Note.

This Part argues that the Court can and should overrule *Stinson*, even while giving horizontal *stare decisis* to the holding and reasoning of *Kisor*. The case for *stare decisis* as applied to *Stinson* is far weaker than the case for *stare decisis* as applied to *Seminole Rock*. And while the developments that have weakened *Stinson*'s reasoning do not unambiguously counsel against deference, they do not unambiguously counsel in favor of deference either. Given *Stinson*'s weak claim to *stare decisis*, it is appropriate to ask as a matter of first principles whether deference to the Commission's commentary is justified—even assuming *arguendo* that the category of deference doctrines is legitimate. And as a matter of policy, both the principles of lenity necessarily implicated by criminal sentencing and the different policy rationales for deference to the Sentencing Commission and deference to traditional administrative agencies provide principled grounds to end deference to the Sentencing Guidelines commentary.

A. The case for stare decisis is weaker for Stinson *than it was for* Seminole Rock.

As a threshold matter, in order for the Court to justify overturning *Stinson* while treating the holding and reasoning of *Kisor* as good law, the Court must determine that *Stinson* has a weaker *stare decisis* justification than *Seminole Rock*.[160] If the Court overturned a

160. This Note will focus on the *stare decisis* factors proposed by the Court in *Kisor* itself. Although the three factors in *Kisor* are not a comprehensive framework for determining whether a precedent should be overturned, it is clearly relevant that a majority of the Court looked to those factors when deciding whether to abandon an analogous deference doctrine. This approach also has the advantage of not requiring a resolution to the incredibly complex and contested questions about the nature of horizontal *stare decisis* in the Supreme Court. *Compare, e.g.*, June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103, 2134–35 (2020) (Roberts, C.J., concurring in the judgment) (articulating a view of *stare decisis* that included an emphasis on a precedent's "administrability, its fit

deference doctrine that has an even better claim to *stare decisis* than *Seminole Rock* had, then it would be repudiating the reasoning of *Kisor*. Of course, just because a deference doctrine's claim to *stare decisis* is weaker than *Seminole Rock*'s, that does not necessarily mean that the doctrine should be overruled. But determining that *Stinson*'s case is weaker is still a necessary threshold inquiry for anyone who wishes to treat *Kisor* as fully legitimate.

The *Kisor* Court articulated three reasons for applying *stare decisis* and refusing to overturn *Seminole Rock*. First, overturning *Seminole Rock* would require rejecting a particularly long line of cases.[161] Second, it would disrupt many settled constructions in administrative law.[162] And third, *Kisor* failed to provide any "special justification"—such as demonstrated unworkability or legal developments that have made the doctrine a "doctrinal dinosaur"—and a special justification is necessary to justify overturning *Seminole Rock* because Congress could modify *Seminole Rock* deference at any time.[163]

To varying degrees, all three of these reasons apply with less force to *Stinson* than they do to *Seminole Rock*. In particular, *Stinson* is filled with "doctrinal dinosaurs" that undermine its continued vitality.

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with subsequent factual and legal developments, and the reliance interests that the precedent has engendered"), *with* Ramos v. Louisiana, 140 S. Ct. 1390, 1414–15 (2020) (Kavanaugh, J., concurring) (articulating a three-part test for when to overrule precedent that looks to whether a case is grievously wrong, has created real-world or jurisprudential negative effects, and would not unduly upset reliance interests); *with* Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it."). *Stinson* could of course be analyzed differently through any one of these frameworks (or any other possible framework for horizontal *stare decisis* for methodological decisions by the Supreme Court). But applying the factors in *Kisor* cabins the inquiry of this Note to the Court's most recent stated approach to *stare decisis* for a deference doctrine. That approach is consistent with this Part's *arguendo* assumption that *Kisor* should remain good law.

161. *Kisor*, 139 S. Ct. at 2422 (opinion of the Court).

162. *Id.*

163. *Id.* at 2422–23 (quoting Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2411 (2015)).

Unlike *Seminole Rock*, *Stinson* does not have a "long line of cases" reaffirming its holding. As the *Kisor* Court emphasized, *Seminole Rock* was decided in 1945, had been explicitly reaffirmed in *Auer*, had been applied by the Supreme Court in "dozens of cases,"[164] and had its origins in the nineteenth century.[165] *Stinson*, meanwhile, was decided in 1993, has never been explicitly reaffirmed, and has seemingly never meaningfully impacted another Supreme Court decision.[166]

The argument from upsetting settled constructions is the best *stare decisis* argument against rejecting *Stinson* deference. Rejecting *Stinson* deference would call into question any prior construction of a guideline that relies on commentary. But the potential for disruption is somewhat mitigated for two reasons. First, *Seminole Rock* is applied to a far greater body of law than *Stinson*. The complete 2018 Annotated Copy of the Sentencing Guidelines is a hefty but manageable 608 pages.[167] Meanwhile, the 2018 Code of Federal Regulations was a whopping 185,434 pages.[168] There are simply fewer provisions of the Sentencing Guidelines to be reconstrued than there are agency regulations, which could mean that upsetting past constructions would be less disruptive. Second, it is not obvious that *Kisor*'s attempt to avoid upsetting old constructions succeeded—as evidenced by the Third Circuit's decision to reexamine its construction of Sections 4B1.1 and 4B1.2 of the Guidelines in light of *Kisor*. Accordingly, while the argument against upsetting

164. *Id.* at 2422.

165. *Id.* at 2412.

166. *Stinson* has twice been invoked in determining that a portion of the commentary was inconsistent with a statute. *See* Neal v. United States, 516 U.S. 284, 294 (1996); United States v. Labonte, 520 U.S. 751, 752–53 (1997). But provisions of the commentary that are inconsistent with statutory law would be invalid under any level of deference.

167. *See* U.S. SENT'G COMM'N, U.S. SENT'G GUIDELINES MANUAL (2018).

168. *Code of Federal* Regulations, FED. REG. (2019), https://uploads.federalregister.gov/uploads/2020/04/01123111/cfrTotalPages2019.pdf [https://perma.cc/5RF4-RTPP]. The 2021 Sentencing Guidelines Manual also has 608 pages, because it is almost entirely a reprint of the 2018 manual due to the Commission's multiyear lack of quorum. *See* GUIDELINES, *supra* note 16. Statistics on the number of pages in the 2021 Code of Federal Regulations are not yet available.

past constructions is a reason to maintain the current, hyper-deferential *Stinson* doctrine (presumably while articulating a new rationale for why comments to the Sentencing Guidelines deserve more deference than an agency's interpretations of its own regulation), it probably is not a good reason to merely extend *Kisor*'s limits to *Stinson* rather than overrule *Stinson* altogether.

But the strongest case against giving significant *stare decisis* weight to *Stinson* comes from other developments in the doctrine. The three major changes discussed in Part I of this Note—the rise of notice and comment for commentary to the Guidelines, the enactment of the Congressional Review Act, and the non-binding nature of the Guidelines after *United States v. Booker*—mean that *Stinson*'s reasoning now relies on "doctrinal dinosaurs." *Stinson* assumes that changes to the commentary do not receive the procedural rigor that they now receive. *Stinson*'s only distinction between the Guidelines and an agency's regulations is no longer meaningful. And *Booker* raises real questions about how analogous the Guidelines are to regulations at all.

Furthermore, *Kisor* itself broke the relationship between *Stinson*'s analysis and its holding, forcing the Supreme Court to modify its precedent to at least some extent. The Court could theoretically extend *Kisor*'s limits to *Stinson* and call it an exercise of "*stare decisis*," but that would require ignoring *Stinson*'s straightforward disavowals of *Kisor*'s limits discussed in Part II.B of this Note. The Court must rework at least part of *Stinson*; it cannot simply "stand by things decided" even if it wants to.[169] This makes the *stare decisis* case for *Stinson* relatively weak.

*B. The post-*Stinson *developments do not give the Court a clear path forward, requiring the Court to turn to at least some first principles or policy analysis.*

169. *Cf.* June Medical Services L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in the judgment) ("*Stare decisis* ('to stand by things decided') is the legal term for fidelity to precedent.").

When an old Supreme Court decision has been eroded by changes in other areas of the law, the natural first question is what new rule would best account for the law's development. But while doctrinal developments weaken *Stinson*'s case for *stare decisis*, they do not establish what the actual level of deference to the commentary should be; the implications of the doctrinal developments cut both ways. Accordingly, the Court must turn elsewhere to determine the correct level of deference to the commentary.

At first glance, the post-*Stinson* developments in the law might seem to *bolster* the case for deference to the commentary. The enactment of the Congressional Review Act makes an analogy between the Sentencing Guidelines and an agency's regulations more apt, not less. And while *Booker* clearly makes the Guidelines less like an agency's regulations, it also makes the stakes of deference somewhat lower. One could argue that the post-*Booker* Commission simply needs to communicate its advisory view of sentencing lengths to judges, and whether the Commission does so via the Guidelines or via commentary is relatively unimportant given that neither has the force of law. And the proceduralization of amendments to the commentary creates a functionalist case for deference.

On closer examination, the first two changes do not actually meaningfully improve or undermine the case for deference to the commentary. The Congressional Review Act is only relevant insofar as it makes *Stinson*'s dicta outdated; it's not actually salient to the question whether the Guidelines ought to receive deference in their own right. And *Booker* may make the Guidelines advisory, but the Sentencing Commission still has a statutory obligation to advise courts via the Guidelines and no obligation to issue any commentary whatsoever. Even after *Booker*, there is a clear legal distinction between the Guidelines and the commentary.

The implications of the Sentencing Commission's proceduralization of amendments to the commentary demand more serious analysis. Any functionalist case against deference to the commentary is severely undermined by the fact that most of the commentary goes

through the same notice and comment procedures as the Guidelines themselves. The procedural rigor of notice and comment is often used as the justification for (and a precondition of) *Chevron* deference, under the presumption that Congress is only comfortable delegating the authority to resolve ambiguities to an agency when procedural rigor exists.[170] And *Seminole Rock* deference is justified even without the procedural rigor of notice and comment for an agency's interpretations of its own rules.[171] In light of this, one could easily imagine a "functionalist *Stinson*" where the commentary would receive deference commensurate with the procedure with which it was adopted.

But there are strong formalist reasons to ignore the Commission's self-imposed procedures. Once again, the commentary and the Guidelines are legally distinct. Congress commanded the Commission to promulgate the Guidelines. The Commission has voluntarily assumed the role of authoring the commentary even though it is not mentioned in the statutory text. This statutory difference is more fundamental than the real-world procedures through which the guidelines and commentary are amended.

Even focusing on the amendment procedures, amendments to the commentary do not legally receive the statutory procedures that apply to the Guidelines. The Commission *explicitly* foreswears the applicability of 28 U.S.C. § 994(x)'s notice and comment requirements to amendments to the commentary.[172] Rather, the Commission endeavors only to "the extent practicable" to ensure that "comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments."[173] The same can be said when the Commission submits amendments to the commentary to Congress. Thus, even when—as a matter of real-world practice—an amendment to the

170. *See, e.g.*, United States v. Mead Corp., 533 U.S. 218, 229 (2001).
171. *See, e.g.*, *Kisor*, 139 S. Ct. at 2420–21.
172. RULES, *supra* note 17, § 4.3.
173. *Id.*

commentary goes through the exact same procedures as an amendment to the underlying guidelines does, the amendment to the commentary is—as a matter of law—*not* being subjected to Section 994(x) by the Commission's own account.

A procedure-based approach to *Stinson* deference would also raise serious practical difficulties. A functionalist case for deference based on the Commission's procedural practices would presumably only argue for deference when the proper procedures have actually been used.[174] But the Commission retains flexibility to determine how much procedural rigor to give amendments to the commentary. This means that any given provision of the commentary is liable to be the product of a patchwork of procedure.

Piecing together this patchwork poses logistical and legal difficulties. For example, the much disputed Section 4B1.2 and its application notes were enacted in 1987, and they collectively have been amended thirteen times since.[175] Even identifying the level of procedure received for each of these thirteen amendments creates a substantial logistical burden, because the Sentencing Commission (1) does not identify the procedure with the amendment text and (2) only indicates the effective date of the amendment (rather than the date of the amendment's promulgation or of any notice and comment proceedings).[176] This means that a judge or law clerk concerned with the procedure that each amendment received must find and piece together every reference to the new amendment in the Federal Register to discern whether or not the amendments were subjected to notice and comment (or some analogous public

174. *Cf.* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1459–64 (2011) (describing the rise of a "pay me now or pay me later" approach to judicial deference to agencies where agencies are functionally presented with a choice between either "ex ante procedural safeguards or ex post judicial scrutiny").

175. *See* GUIDELINES, *supra* note 16, § 4B1.2 hist. n.

176. *See, e.g.*, *id.*

hearing) and submitted to Congress.[177] Even in the best of circumstances, that would be a time-consuming and error-prone process.

What judges would actually do with this information is even more unclear. Should the relevant question be the level of procedure given to the most recent amendment? Or the lowest level of procedure across all amendments? Or the procedure when the disputed language was entered into the commentary? What if the language received a stylistic change that may or may not have had substantive effect? A case-by-case functionalist approach to deference to the commentary raises more questions than answers.

That being said, many rhetorical attacks on *Stinson* cannot be justified in light of the real-world commentary amendment procedures. For example, Judge Thapar has argued that "[i]t is one thing to let the Commission . . . promulgate Guidelines that influence how long defendants remain in prison. It is entirely another to let the Commission interpret the Guidelines on the fly and without notice and comment."[178] This argument loses its force when applied to provisions of the commentary that went through notice and comment. Those calling for *Stinson* to be overruled cannot rely solely on the salutary effects of administrative procedure.

But the rhetorical implications of the contemporary amendment procedures cut both ways. Given that the Commission already ordinarily subjects its amendments to the commentary to the same procedures as its amendments to the Guidelines, the end of *Stinson* deference would be unlikely to seriously undermine Sentencing Commission's ability to do its job. If *Stinson* were overturned, the Sentencing Commission could simply follow 28 U.S.C. § 994's procedures and issue a new guideline formally incorporating all existing commentary into the Guidelines themselves, either as totally

177. To its credit, the Sentencing Commission maintains a list of its Federal Register notices on its website, somewhat easing this burden. *See Federal Register Notices*, U.S. SENT'G COMM'N, https://www.ussc.gov/amendment-process/federal-register-notices [https://perma.cc/X52D-93UE]. But even this list does not go back farther than 1996, omitting over a decade of amendments.

178. United States v. Havis, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring).

equal with all other guidelines or with the caveat that any portion of the Guidelines stylized as "commentary" would yield in the face of a truly irreconcilable conflict with a portion of the Guidelines not stylized as commentary. The Commission could then formally invoke Section 994's procedures every time it amends the commentary going forward. Even under the most formalist, deference-averse model of the judicial role, a court interpreting commentary that formally had been subjected to Section 994 would need to "'seek to harmonize' a guideline's text with its commentary"[179]—i.e., the most deferential existing articulation of *Stinson* deference—under the same basic principle by which judges seek to reconcile different provisions within a statute.[180] In other words, with minimal effort, the Commission has the authority to establish the practical effect of the most deferential understanding of *Stinson* deference even if *Stinson* is overturned. The Commission would still be free to issue commentary without these procedures should it so choose—such commentary simply would not receive deference from courts. Overturning *Stinson* deference would thus address the formal distinction between the Guidelines and the commentary without any obvious practical limitations on the Sentencing Commission.

The Sentencing Commission's contemporary practices undermine *Stinson*'s reasoning. Left with an outdated old precedent and no clear path forward, the Court may appropriately consider first principles and address the legal and policy arguments for varying levels of deference to the commentary. Looking to first principles, there are two additional arguments for declining to defer to the commentary that do not apply to agencies' interpretations of their own regulations: principles of lenity and the inapplicability of *Seminole Rock*'s traditional policy rationales in the sentencing context.

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179. United States v. Cingari, 952 F.3d 1301, 1308 (11th Cir. 2020) (quoting United States v. Genao, 343 F.3d 578, 584 n.8 (2d Cir. 2003)).

180. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180–82 (2012).

C. Principles of lenity counsel against Stinson *deference*

Outside of broader critiques against deference doctrines, the best argument for overruling *Stinson* is likely grounded in lenity. *Stinson* deference by definition impacts the liberty of criminal defendants. Naturally, this implicates lenity, both as a substantive canon that interacts with other substantive canons and as a broader policy principle. As a substantive canon, the rule of lenity arguably trumps *Stinson* deference—as Judge Bibas has suggested.[181] If the rule of lenity trumps *Stinson*, then *Stinson* deference does so little work that it is difficult to justify its continued existence. The relationship between the rule of lenity and deference doctrines is admittedly unclear; there are serious arguments against treating the rule of lenity as so robust as to override the Court's deference doctrines. But the very existence of these questions raises serious policy concerns about why judges should defer to the Commission's guidance to impose harsher penalties than the Guidelines themselves suggest. Whether as a substantive canon or as merely a point of policy, lenity counsels against *Stinson*.

Deference doctrines like *Stinson* and *Seminole Rock* can be conceived as substantive canons.[182] But substantive canons can conflict, in which case there needs to be a legal rule for how to reconcile them.[183] Another substantive canon is the rule of lenity. The rule of lenity states that ambiguities in the criminal law will be resolved in the favor of criminal defendants.[184] Lenity is associated with principles of due process (giving defendants fair notice), the separation

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181. *See* United States v. Nasir, 17 F.4th 459, 472–74 (3d Cir. 2021) (en banc) (Bibas, J., concurring).

182. *Cf.* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 1054 (3d. ed. St. Paul, MN: Foundation Press 2017) (arguing *Chevron* can be viewed as a substantive canon).

183. *Cf. id.* at 1054–87 (exploring how courts and scholars have treated conflicts between *Chevron* and substantive canons).

184. *See* SCALIA & GARNER, *supra* note 180, at 296. Note that Scalia and Garner more precisely define the rule of lenity as being that "[a]mbiguity in a *statute* defining a crime or imposing a penalty should be resolved in the defendant's favor." *Id.* (emphasis

of powers (ensuring only legislatures make conduct criminal), and a substantive preference for individuals' liberty, all of which are fundamental ideas in our legal system.[185] Because *Stinson* deference necessarily implicates sentencing, its interaction with the rule of lenity is particularly significant.

Several judges have forcefully argued that the rule of lenity should be understood to categorically trump all deference doctrines. As discussed, Judge Bibas has made this argument about *Stinson* deference in particular.[186] But other judges have made this same basic argument in the context of *Chevron*. For example, Judge Murphy—joined by seven other judges on an equally divided en banc Sixth Circuit—recently endorsed an argument long-made by Chief Judge Sutton that the rule of lenity forecloses the application of *Chevron* to statutes that contain criminal penalties. He reasoned that "*Chevron* sometimes allows agencies to interpret ambiguities in civil statutes subject to deferential judicial review. Yet an agency's law-interpreting power should likewise fall away in criminal matters," and that "if a canon of construction such as the rule of lenity 'resolves a statutory doubt in one direction, an agency may not reasonably resolve it in the opposite direction.'"[187] Justice Scalia

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added). The question whether the Guidelines are covered by the rule of lenity is contested, as discussed in more detail *infra* at notes 186–205 and accompanying text.

185. *See* United States v. Nasir, 17 F.4th 459, 472–73 (3d Cir. 2021) (Bibas, J., concurring).

186. *See, e.g.*, *id*. at 473–74 (Bibas, J., concurring) (arguing that the rule of lenity should trump *Stinson* deference); Gun Owners of America, Inc. v. Garland, 992 F.3d 446, 454–68 (6th Cir. 2021) (holding that the rule of lenity trumps *Chevron* deference), *vacated by* 2 F.4th 576 (6th Cir. 2021) (granting rehearing en banc). It is perhaps notable that the two circuits where lenity-based skepticism of deference doctrines has been most clearly articulated are also the two circuits that have most explicitly extended *Kisor*'s limits to *Stinson* deference. This is not doctrinally necessary; this Note critiques *Stinson* on lenity grounds while disagreeing with the extension of *Kisor* to *Stinson*. But it may indicate that some circuits are more open to limitations of *Stinson* than others, regardless of what form those limitations take.

187. Gun Owners of America v. Garland, 19 F.4th 890, 922, 927 (6th Cir. 2021) (en banc) (Murphy, J., dissenting, joined by Sutton, C.J., and Batchelder, Kethledge, Thapar, Bush, Larsen, Nalbandian, JJ.) (quoting Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring)) (citations omitted)).

and Justice Thomas also endorsed this approach, straightforwardly declaring that "[a] court owes no deference to the prosecution's interpretation of a criminal law. Criminal statutes 'are for the courts, not for the Government, to construe.'"[188] Still other judges have made similar arguments, with a recent uptick in arguments over the relationship between *Chevron* and the rule of lenity in litigation over the lawfulness of the federal government's recent ban on bump stocks.[189]

The argument that lenity trumps deference doctrines has sweeping implications, both as applied to *Stinson* and beyond. As applied to *Stinson*, it makes *Stinson* deference functionally obsolete as applied to interpretive commentary. If lenity trumps *Stinson*, then the commentary must be disregarded whenever it instructs judges to interpret ambiguous guidelines in a way that is unfavorable to the defendant. But if the commentary instructs judges to interpret a guideline in a way that is more favorable to the defendant than the alternative, then *Stinson* deference and the rule of lenity point to the same result, meaning that *Stinson* deference is doing no independent work. Only if a comment to an ambiguous regulation has "no consistent tilt" for or against defendants will it be deferred to in a way that has bite.[190] But given that the Guidelines exist in order to

188. Whitman v. United States, 574 U.S. 1003, 1003 (2014) (statement of Scalia, J., respecting the denial of certiorari, joined by Thomas, J.) (quoting Abramski v. United States, 573 U.S. 169, 191 (2014)).

189. *See, e.g.*, Aposhian v. Wilkinson, 989 F.3d 890, 898 (10th Cir. 2021) (Tymkovich, C.J., dissenting from vacatur of order to grant rehearing en banc, joined by Hartz, Holmes, Eid, and Carson, JJ.) ("*Chevron* . . . cannot and should not jump the line when courts interpret an ambiguous statute . . . . We still have one . . . [traditional tool of interpretation] left in our toolbox: the rule of lenity."); Guedes v. BATFE, 140 S.Ct. 789, 790 (2020) (Statement of Gorsuch, J., respecting the denial of certiorari) ("[W]hatever else one thinks about *Chevron*, it has no role to play when liberty is at stake."); Guedes v. BATFE, 920 F.3d 1, 41 (D.C. Cir. 2019) (Henderson, J., concurring in part and dissenting in part) ("*Chevron* does not apply to a regulation enforced both civilly and criminally unless the regulation gives fair warning sufficient to avoid posing a rule of lenity problem.").

190. *Nasir*, 17 F.4th 459, 472–73 (Bibas, J., concurring).

determine how long criminal defendants will be sentenced, relevant commentary that is neither harsh nor lenient to defendants will presumably be exceedingly rare. If the rule of lenity really trumps *Stinson*, then lenity is an exception that swallows up the rule, to the point where it is difficult to see what purpose *Stinson* serves. The only sensible paths are to either reject the idea that lenity trumps *Stinson* deference or to overrule *Stinson* deference altogether.

Two arguments against prioritizing lenity over *Stinson* deference are worth acknowledging. First, it is disputed whether the rule of lenity even applies to the Sentencing Guidelines in the first place. Some but not all of the traditional motivating principles of the rule of lenity are implicated by the Sentencing Guidelines. Two of the strongest rationales for lenity are ensuring that an individual who consults the law has fair notice of whether or not given conduct is criminal[191] and protecting the separation of powers by ensuring that only legislatures have the power to proscribe conduct.[192] But the Sentencing Guidelines do not proscribe any conduct, and because they are advisory, their interpretation does not *directly* impact anyone's liberty. Some judges have accordingly argued that the rule of lenity should not apply the Sentencing Guidelines at all.[193] That said, when a judge chooses to follow the Guidelines, words on a page determine how much time a person spends in prison. This

191. *See, e.g.* McBoyle v. United States, 283 U.S. 25, 27 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.")

192. *See, e.g.*, United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95 (1820) ("The rule that penal laws are to be construed strictly . . . is founded on . . . the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.")

193. *See, e.g.*, United States v. Wright, 607 F.3d 708, 716–20 (11th Cir. 2010) (Pryor, J., concurring) (arguing the rule of lenity does not apply to the Sentencing Guidelines post-*Booker*, because its two key purposes—fair notice and concern for the separation of powers—do not apply when interpreting advisory Guidelines that do not proscribe conduct).

clearly implicates some *principles* of lenity, which can also be thought of as a substantive preference for freedom over incarceration.[194] And the practical influence of the Guidelines means there's a strong argument that they "exert a law-like gravitational pull" on defendants' sentences in spite of their advisory status.[195] Accordingly, other judges have argued that lenity does in fact apply to the Guidelines.[196] The applicability of the rule of lenity to the Sentencing Guidelines is an unsettled area of law—and probably a question that is more important than *Stinson* deference itself.

Second, recently, in *Shular v. United States*,[197] the Supreme Court went out of its way to emphasize that the rule of lenity should only be applied when there is still ambiguity after applying "traditional canons of statutory construction."[198] This is conspicuously similar to the necessary level of ambiguity prior to applying *Chevron* or *Kisor* deference.[199] But if the Supreme Court has indicated that both deference doctrines and lenity are canons of last resort, then it is very unclear from existing Supreme Court precedent which type of canon a lower court should apply first. Indeed, the question whether the rule of lenity or *Chevron* deference should be applied first has itself divided lower courts. As discussed above, many judges have argued that the rule of lenity trumps deference doctrines.[200] But other judges (usually in the same cases) have argued

194. *See Nasir*, 17 F.4th at 473 (Bibas, J., concurring) (arguing that the rule of lenity does apply to the Sentencing Guidelines because the rule of lenity serves a third purpose of a substantive preference for liberty).

195. *Id* at 174 (citing U.S. SENT'G COMM'N, 2019 Annual Report and Sourcebook of Federal Sentencing Statistics 8 (2019)).

196. *See*, *e.g.*, *id*.

197. 140 S. Ct. 779 (2020).

198. *Id.* at 787 (quoting United States v. Shabani, 513 U.S. 10, 17 (1994)).

199. *Compare id.*, *with* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) ("And before concluding that a rule is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843, n. 9 . . . (1984) (adopting the same approach for ambiguous statutes). For again, only when that legal toolkit is empty and the interpretive question still has no single right answer . . . . Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference.").

200. *See supra* notes 173–175 and accompanying text.

the opposite, relying in part on footnote 18 in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*,[201] which they argue prioritized *Chevron* above the rule of lenity.[202] All of which is to say: the broader relationship between deference doctrines and the rule of lenity is still unsettled territory, and also likely a far more significant question than *Stinson* itself. This question would not be resolved even if the Supreme Court modified *Stinson* deference to contain *Kisor*'s limits, because *Kisor* adopts *Chevron*'s step-one analysis.[203]

But regardless of the formal doctrinal relationship between deference doctrines and the rule of lenity in other contexts, the very existence of these difficult problems is good reason to dispense with *Stinson* altogether. So long as *Stinson* is good law, lower courts will be forced to either suspend lenity's underlying values when calculating the guidelines range or to turn *Stinson* into a husk of a doctrine that never does any substantive work. If there is "tenderness [in] the law for the rights of individuals,"[204] then any "systematic judicial bias in favor of the federal government, the most powerful

201. 515 U.S. 687 (1995).

202. *See, e.g.*, Gun Owners of America v. Garland, 19 F.4th 890, 901 (6th Cir. 2021) (en banc) (White, J., writing in support of affirming the district court judgment) ("[T]he rule of lenity does not displace *Chevron* simply because an agency has interpreted a statute carrying criminal penalties. The Supreme Court considered this very question in *Babbitt*[.]"); Aposhian v. Barr, 958 F.3d 969, 982–83 (10th Cir. 2020) ("*Babbitt* suggests that *Chevron*, not the rule of lenity, should apply."); Guedes v. BATFE, 920 F.3d 1, 24 (D.C. Cir. 2019) (per curiam) ("[T]he Court engaged with . . . [whether the rule of lenity trumps *Chevron*] in *Babbitt*[.] . . . The Court . . . [held] that, notwithstanding the statute's criminal penalties, it would defer 'to the Secretary's reasonable interpretation' under *Chevron*.") (quoting *Babbitt*, 515 U.S. at 704 n.18)). Of course, those arguing that the rule of lenity trumps *Chevron* read *Babbitt* more narrowly. *See, e.g.*, *Gun Owners of America*, 19 F.4th at 924 (Murphy, J., dissenting) ("I disagree with the other circuit courts' competing interpretation of *Babbitt*."); Aposhian v. Wilkinson, 989 F.3d 890, 901 (10th Cir. 2021) (Tymkovich, C.J., dissenting from vacatur of order to grant rehearing en banc) ("The panel majority reads the *Babbitt* footnote for more than it is worth."); *Guedes*, 920 F.3d at 41 (Henderson, J., concurring in part and dissenting in part) ("[T]he majority may misread *Babbitt*[.]").

203. Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

204. United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 95 (1820).

of parties, and against anyone else"[205] is particularly hard to justify in the criminal context. And in order for *Stinson* deference to have independent bite from principles of lenity, it *must* create biases against criminal defendants in sentencing. This is sufficient reason to abandon *Stinson* deference.

D. Many of the policy arguments in favor of Seminole Rock *do not apply to* Stinson.

Although *Seminole Rock*'s continued existence may ultimately be a question of *stare decisis*, a plurality of the court in *Kisor* justified *Seminole Rock* on a presumption of congressional intent to delegate the ability to resolve ambiguities in an agency's regulation to the agency rather than to courts.[206] The reasonableness or lack thereof of this presumption of congressional intent largely turns on policy grounds. And many policy rationales for *Seminole Rock* either do not apply to the Sentencing Commission or apply with significantly less force.

The policy arguments for administrative deference that are common to both *Seminole Rock* and *Chevron* can be grouped into four categories: expertise, efficiency, flexibility, and accountability.[207] Each of these arguments is much weaker in the context of the Sentencing Commission than it is in the context of an agency. As for expertise, federal judges have as much expertise on criminal sentencing and the severity of different crimes as the Sentencing Commission does. Interpretation of the Guidelines is also highly unlikely to involve the kinds of hyper-technical questions that are often used to justify *Seminole Rock* deference.[208] As for efficiency and

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205. *Kisor*, 139 S. Ct. at 2425 (Gorsuch, J. concurring in the judgment) (quoting Paul J. Larkin & Elizabeth Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J.L. & PUB. POL'Y 625, 641 (2019)).

206. *Kisor*, 139 S. Ct. at 2412 (plurality opinion).

207. Stephenson & Pogoriler, *supra* note 174, at 1459–60.

208. *See, e.g.*, *Kisor*, 139 S. Ct. at 2410 (plurality opinion) (justifying *Seminole Rock* in part by appealing to a case where a court had to determine whether the joining of a moiety that had previously been approved by the FDA to lysine through a non-ester covalent bond was a creation of a new active moiety).

flexibility, the current proceduralization of amendments to the commentary suggests that the Sentencing Commission would in practice have just as much efficiency and flexibility without *Stinson*. Even insofar as the Sentencing Commission would lose efficiency or flexibility, a core argument for administrative efficiency flexibility comes from the fact that regulated entities will respond in unpredictable ways, and agencies need flexibility to quickly update their policies in response to unexpected behavior.[209] But the Commission is not implementing a regulatory scheme. Accordingly, it does not have to quickly respond to the unpredictable behavior of regulated entities. The only actors are the judges, who are engaging in the relatively straightforward task (at least compared to regulatory compliance) of interpreting legal texts. Even if Commissioners are sometimes surprised at how judges interpret their guidelines, they will almost certainly be surprised less frequently than regulators in a more dynamic regulatory system. And as for the accountability, the Guidelines are promulgated by an independent commission housed within the federal judiciary.[210] The Commission's members serve staggered six-year terms.[211] This is scarcely more political accountability than federal judges have.

This is not to say that *every* policy argument in favor of *Seminole Rock* does not apply to the Sentencing Commission. For instance, Justice Kagan's argument that if you "[w]ant to know what a rule means" you should "[a]sk its author" is exactly as salient in the context of an agency's regulation as it is in the context of the Commission's Guidelines[212]—as the *Stinson* Court itself argued.[213] Similarly,

209. *Cf.* Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 964–67 (2017) (discussing *Seminole Rock* and *Chenery II* as two means through which agencies who value flexibility are able to maintain it).

210. 28 U.S.C.A, § 991(a) (Westlaw current through Pub. L. No. 117-51).

211. 28 U.S.C.A. § 992 (Westlaw current through Pub. L. No. 117-51).

212. *Kisor*, 139 S. Ct. at 2412 (plurality opinion).

213. Stinson v. United States, 508 U.S. 36, 45 (1993) ("The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most

insofar as the goal of the Sentencing Commission is to ensure unity in federal sentencing, the commentary clearly has an advantage of giving one clear answer, while lower courts interpreting the Guidelines for themselves may disagree with each other.[214]

But whatever one thinks of the remaining arguments for deferring to the Commission's commentary, they are far weaker than the arguments for deferring to administrative agencies. And given the policy arguments *against* deference—both those that exist generally for all deference doctrines and the lenity-based arguments that are particularly salient in the context of the Sentencing Commission—the overall policy case for deference to the Commission is substantially weaker than the overall policy case for deference to agencies. The Supreme Court should overrule *Stinson* deference and require the Commission to fully subject any guidance to formal requirements of Section 994 should it wish judges to be legally required to consider that guidance.

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accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute.")

214. *See* United States v. Moses, 23 F.4th 347, 357 (4th Cir. 2022) ("[T]he application of *Kisor* to Guidelines commentary would undoubtedly lead to substantial litigation and divisions of authority regarding the extent to which each Guideline is 'genuinely ambiguous,' even after 'all the traditional tools of construction' have been 'exhaust[ed].' The surely resulting circuit splits would substantially increase the extent to which the advisory sentencing ranges for similarly situated offenders would be calculated differently — sometimes dramatically so — depending on the circuit in which they were convicted. Such a result would vitiate the core purpose of the Sentencing Reform Act." (quoting *Kisor*, 139 S. Ct. at 2415 (cleaned up in original))). With or without *Stinson*, circuit splits in the Sentencing Guidelines can theoretically be resolved by the Sentencing Commission promulgating new guidelines. The Supreme Court has even suggested that it hesitates to use its certiorari power to resolve circuit splits over the Guidelines, leaving that role to the Commission. *See* Braxton v. United States, 500 U.S. 344, 348 (1991). However, in recent years, that role has been frustrated by the Sentencing Commission's lack of quorum. *See, e.g.*, Guerrant v. United States, 142 S. Ct. 640, 640–41 (2022) (Sotomayor, J., statement respecting the denial of certiorari).

CONCLUSION

Stinson is outdated, and its datedness causes misunderstandings about how the Sentencing Guidelines work and divisions over how *Stinson* should be applied. A strict conception of vertical *stare decisis* does not allow lower courts to update *Stinson* deference just because it is doctrinally out-of-date. Updating out-of-date precedent is the prerogative of the Supreme Court—but our judicial system only works effectively when the Supreme Court actually exercises that prerogative. The Supreme Court should address *Stinson*'s scope. If and when the Supreme Court updates *Stinson*, the path of least resistance would probably be to extend *Kisor v. Wilkie* to *Stinson* and reunite the standards for the Sentencing Guidelines and administrative regulations. But because *Stinson's* reasoning has not survived doctrinal developments, the Court can and should return to first principles rather than reflexively extend *Kisor*. Most notably, principles of lenity counsel against *Stinson* deference, and there are insufficient countervailing policy reasons to maintain *Stinson*. When the opportunity arises, the Supreme Court should end *Stinson* deference and instruct courts to give no more than *Skidmore* respect to the Sentencing Commission's commentary.

ARBITRARY PROPERTY INTERFERENCE DURING A GLOBAL PANDEMIC AND BEYOND

BRETT RAFFISH*

ABSTRACT

To stymie COVID-19's spread, state and local governments imposed sweeping and burdensome lockdown measures that crushed American businesses and interfered with private property. Despite interfering with many Americans' property rights, state and local governments have consistently prevailed on pandemic-related regulatory takings claims in federal court. By forcing governments to pay for deprivations, the Takings Clause can thwart arbitrary interference with private property. However, the dispensation of regulatory takings claims arising out of pandemic-related regulations suggests that the Takings Clause may presently fail to adequately thwart arbitrary property interference in the partial regulatory takings context when the government claims that it is acting in the name of public health or safety.

This Note expands on existing literature and details how substantive due process may presently only protect property from extremely arbitrary or despotic interference. This Note then argues that when substantive due process fails to thwart arbitrary interference, the regulatory takings doctrine will also fail to shield property when interference is substantial but is made pursuant to states' police powers. Because both doctrines may simultaneously fail to stymie arbitrariness, this Note contends that our Republic may constitutionally tolerate arbitrary property interference, a phenomenon highly detrimental to the rule of law. To incentivize legitimate and principled decision-making, and to protect private property from arbitrary interference, this Note urges states to pass laws that resemble the Texas Private Real Property Rights Preservation Act. These laws should,

at a minimum: (1) require governments to compensate property owners for regulatory diminutions in property value that exceed a legislatively calibrated threshold; (2) excuse compensation when governments can satisfy a form of heightened scrutiny; and (3) permit governments to seek immunity from a law's requirements in exigent circumstances.

INTRODUCTION

"Where an excess of power prevails,
property of no sort is duly respected."[1]

Governments interfered with private property[2] and crushed

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* J.D. Candidate, Harvard Law School, Class of 2022. The author greatly thanks Joel Malkin, Ethan Harper, Cole Timmerwilke, and Eli Nachmany for their invaluable feedback and careful review of this Note. This Note is dedicated to my parents, Brian and Julie Raffish, and Jasmin Fashami, for, without their constant support, none of this would have been possible.

1. JAMES MADISON, *Property* (1792), *reprinted in* SELECTED WRITINGS OF JAMES MADISON 222, 223 (Ralph Ketcham ed., 2006).

2. *See* Ilya Somin, *Does the Takings Clause Require Compensation for Coronavirus Shutdowns?*, REASON: VOLOKH CONSPIRACY (Mar. 20, 2020), https://reason.com/volokh/2020/03/20/does-the-takings-clause-require-compensation-for-coronavirus-shutdowns/ [https://perma.cc/6LLM-SW59] ("[A] shutdown obviously imposes severe—sometimes even ruinous—limitations on the owner's use of their property."); Emilio R. Longoria, *The Case for the Rodeo: An Analysis of the Houston Livestock Show and Rodeo's Inverse Condemnation Case Against the City of Houston*, 52 ST. MARY'S L.J. 125, 138 (2021) (explaining how Houston "interfere[d] with the Rodeo's use and enjoyment of its property"); F.E. Guerra-Pujol, *Why COVID-19 Lockdown Orders Require Just Compensation*, DISCOURSE (Apr. 21, 2020), https://www.discoursemagazine.com/politics/2020/04/21/why-covid-19-lockdown-orders-require-just-compensation/ [https://perma.cc/48U2-NFRV]. For other examples of government interference, see Timothy M. Harris, *The Coronavirus Pandemic Shutdown and Distributive Justice: Why Courts Should Refocus the Fifth Amendment Takings Analysis*, 54 LOY. L.A. L. REV. 455, 458–61 (2021); Zach Weissmueller, *What Disney Can Teach Us About Covid-19: Lockdowns Fail*, REASON (Feb. 4, 2021), https://reason.com/video/2021/02/04/what-can-mickey-mouse-can-teach-us-about-covid-19-lockdowns-fail [https://perma.cc/GMJ6-UZDC]; Jim Epstein, *The Victims of the Eviction Moratorium*, REASON (Feb. 23, 2021), https://reason.com/video/2021/02/23/the-victims-of-the-eviction-moratorium/ [https://perma.cc/G4ZN-E985].

American businesses[3] to stymie COVID-19's spread. Despite interfering with many Americans' property rights, states and localities have consistently prevailed on Fifth Amendment takings claims arising out of pandemic-related public health orders.[4] In fact, *no* property owner appears to have prevailed on the merits of a pandemic-related regulatory takings claim in federal court through

3. *See* Christian Britschgi, *Another Wave of Business Closures Devastates the Suffering Restaurant Industry*, REASON (Nov. 17, 2020), https://reason.com/2020/11/17/another-wave-of-business-closures-devastates-the-suffering-restaurant-industry/ [https://perma.cc/LYE8-5TSP]; Emily Flitter, *'I Can't Keep Doing This:' Small-Business Owners Are Giving Up*, N.Y. TIMES (July 13, 2020), https://www.nytimes.com/2020/07/13/business/small-businesses-coronavirus.html [https://perma.cc/TF5B-SQYX]; Rachel Ramirez, *3 Small-business Owners on Life After Shutting Down*, VOX (Oct. 29, 2020), https://www.vox.com/first-person/21538961/coronavirus-covid-19-economy-small-businesses [https://perma.cc/G5Z7-EWPQ]; Ruth Simon, *For These Companies, Stimulus Was No Solution; 'We Decided to Cut Our Losses'*, WALL ST. J. (Apr. 15, 2020), https://www.wsj.com/articles/we-decided-to-cut-our-losses-why-some-small-firms-are-shutting-down-11586943002 [https://perma.cc/VXK9-9ST7]; Kelly McCarthy, *Nearly 16,000 Restaurants Have Closed Permanently Due to the Pandemic, Yelp Data Shows*, ABC NEWS (July 24, 2020), https://abcnews.go.com/Business/16000-restaurants-closed-permanently-due-pandemic-yelp-data/story?id=71943970 [https://perma.cc/6FU2-SVQT]; Marisa Kendall et al., *Shutting Down Again: New COVID Orders Pose a Major Threat to Bay Area Businesses*, TIMES-HERALD (Dec. 4, 2020), https://www.timesheraldonline.com/2020/12/04/shutting-down-again-new-covid-orders-pose-a-major-threat-to-bay-area-businesses [https://perma.cc/PA5E-RJJD]; Pamela N. Danziger, *Half of Small Retailers May Be Forced Out of Business with More Restrictions Threatening*, FORBES (Dec. 7, 2020), https://www.forbes.com/sites/pamdanziger/2020/12/07/half-of-small-retailers-may-be-forced-out-of-business-with-new-closures-threatening/?sh=5a097f01762a [https://perma.cc/6AS5-Y2PG]; Matthew Haag, *One-Third of New York's Small Businesses May Be Gone Forever*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/nyregion/nyc-small-businesses-closing-coronavirus.html [https://perma.cc/4YV2-V9MS]; Nellie Bowles, *Hurt by Lockdowns, California's Small Businesses Push to Recall Governor*, N.Y. TIMES (Feb. 19, 2021), https://www.nytimes.com/2021/02/19/business/newsom-coronavirus-california.html [https://perma.cc/2WZQ-RR29].

4. *See, e.g.*, Metroflex Oceanside LLC v. Newsom, No. 20-CV-2110-CAB-AGS, 2021 WL 1251225, at *3 (S.D. Cal. Apr. 5, 2021); Northland Baptist Church of St. Paul v. Walz, No. 20-CV-1100 (WMW/BRT), 2021 WL 1195821, at *15–16 (D. Minn. Mar. 30, 2021); Daugherty Speedway, Inc. v. Freeland, 520 F. Supp. 3d 1070, 1078 (N.D. Ind. 2021); Culinary Studios, Inc. v. Newsom, 517 F. Supp. 3d 1042, 1066 (E.D. Cal. 2021).

2021,[5] well over a year since California enacted the "first statewide

5. *See, e.g.*, Pro. Beauty Fed'n of California v. Newsom, No. 2:20-CV-04275-RGK-AS, 2020 WL 3056126, at *8 (C.D. Cal. June 8, 2020); McCarthy v. Cuomo, No. 20-CV-2124 (ARR), 2020 WL 3286530, at *5 (E.D.N.Y. June 18, 2020); PCG-SP Venture I LLC v. Newsom, No. EDCV201138JGBKKX, 2020 WL 4344631, at *10 (C.D. Cal. June 23, 2020); Elmsford Apartment Ass'ns, LLC v. Cuomo, 469 F. Supp. 3d 148, 168 (S.D.N.Y. 2020); TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 840 (W.D. Tenn. 2020); Xponential Fitness v. Arizona, No. CV-20-01310-PHX-DJH, 2020 WL 3971908, at *9 (D. Ariz. July 14, 2020); Savage v. Mills, 478 F. Supp. 3d 16, 32 (D. Me. 2020); HAPCO v. City of Philadelphia, 482 F. Supp. 3d 337, 358 (E.D. Pa. 2020); Lebanon Valley Auto Racing Corp. v. Cuomo, 478 F. Supp. 3d 389, 402 (N.D.N.Y. 2020); Luke's Catering Serv., LLC v. Cuomo, 485 F. Supp. 3d 369, 387 (W.D.N.Y. 2020); Blackburn v. Dare Cnty., 486 F. Supp. 3d 988, 1001 (E.D.N.C. 2020); Alsop v. DeSantis, No. 8:20-CV-1052-T-23SPF, 2020 WL 9071427, at *3 (M.D. Fla. Nov. 5, 2020); Heights Apartments, LLC v. Walz, 510 F. Supp. 3d 789, 812–15 (D. Minn. 2020); Peinhopf v. Guerrero, No. CV 20-00029, 2021 WL 218721, at *8 (D. Guam Jan. 21, 2021); Nowlin v. Pritzker, No. 1:20-CV-1229, 2021 WL 669333, at *7 (C.D. Ill. Feb. 17, 2021); Excel Fitness Fair Oaks, LLC v. Newsom, No. 220CV02153JAMCKD, 2021 WL 795670, at *5 (E.D. Cal. Mar. 2, 2021); Our Wicked Lady LLC v. Cuomo, No. 21CV0165 (DLC), 2021 WL 915033, at *6 (S.D.N.Y. Mar. 9, 2021); 1600 Walnut Corp. v. Cole Haan Co. Store, No. CV 20-4223, 2021 WL 1193100, at *3 (E.D. Pa. Mar. 30, 2021); Northland Baptist Church of St. Paul v. Walz, No. 20-CV-1100 (WMW/BRT), 2021 WL 1195821, at *16 (D. Minn. Mar. 30, 2021); Amato v. Elicker, No. 3:20CV464 (MPS), 2021 WL 1430918, at *11 (D. Conn. Apr. 15, 2021); Mission Fitness Ctr. v. Newsom, No. 220CV09824CASKSX, 2021 WL 1856552, at *3 (C.D. Cal. May 10, 2021); Underwood v. Cty. of Starkville, No. 120CV00085GHDDAS, 2021 WL 1894900, at *8 (N.D. Miss. May 11, 2021); Case v. Ivey, No. 2:20-CV-777-WKW, 2021 WL 2210589, at *23–24 (M.D. Ala. June 1, 2021); S. California Rental Hous. Ass'n v. Cty. of San Diego, No. 3:21CV912-L-DEB, 2021 WL 3171919, at *9 (S.D. Cal. July 26, 2021); Abshire v. Newsom, No. 221CV00198JAMKJN, 2021 WL 3418678, at *7 (E.D. Cal. Aug. 5, 2021); Skatemore, Inc. v. Whitmer, No. 1:21-CV-66, 2021 WL 3930808, at *5 (W.D. Mich. Sept. 2, 2021); El Papel LLC v. Durkan, No. 220CV01323RAJJRC, 2021 WL 4272323, at *17 (W.D. Wash. Sept. 15, 2021); Jevons v. Inslee, No. 1:20-CV-3182-SAB, 2021 WL 4443084, at *15 (E.D. Wash. Sept. 21, 2021); Willowbrook Apartment Assocs., LLC v. Mayor & City Council of Baltimore, No. 20-CV-01818-SAG, 2021 WL 4441192, at *7 (D. Md. Sept. 27, 2021); KI Fla. Properties, Inc. v. Walton Cty., No. 3:20CV5358-RH-HTC, 2021 WL 5456668, at *6 (N.D. Fla. Oct. 15, 2021); Heidel v. Hochul, No. 20-CV-10462 (PKC), 2021 WL 4942823, at *11 (S.D.N.Y. Oct. 21, 2021); Bojicic v. DeWine, No. 3:21-CV-00630-JGC, 2021 WL 4977018, at *13 (N.D. Ohio Oct. 27, 2021); Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi, No. 1:20-CV-103-GHD-DAS, 2021 WL 5225617, at *4 (N.D. Miss. Nov. 9, 2021); Helbachs Cafe, LLC v. City of Madison, No. 20-CV-758-WMC, 2021 WL 5327946, at *11 (W.D. Wis. Nov. 16, 2021); Madsen v. City of Lincoln, No. 4:21CV3075, 2021 WL 6201232, at *10 (D. Neb. Dec. 8, 2021). In *Bols v. Newsom*, the district court found that the plaintiffs had stated cognizable regulatory takings claims in connection with pandemic-related orders. *See* Bols v. Newsom, 515 F. Supp. 3d 1120, 1131–33 (S.D. Cal. 2021). However, the plaintiffs have not yet prevailed on the merits in court. *See Bols v.*

mandatory" closure order.[6]

Lower courts' treatment of pandemic-related takings claims disquietingly suggests that the Takings Clause may presently fail to adequately thwart *arbitrary* property interference in the partial regulatory takings context when the government claims that it is acting in the name of public health or safety.[7] Although courts and scholars have long considered due process a chief safeguard "against arbitrary [state] action[,]"[8] this Note expands on existing literature and details how due process may, in some cases and in conjunction with the regulatory takings doctrine, fail to prevent the government from arbitrarily interfering with private property.[9] Because the

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Newsom (3:20-cv-00873), COURT LISTENER, https://www.courtlistener.com/docket/17146362/bols-v-newsom/ [https://perma.cc/D7ZS-VAZ2] (last updated Dec. 13, 2021).

6. *See California Becomes First State to Order Lockdown*, KSLA NEWS 12 (Mar. 20, 2020), https://www.ksla.com/2020/03/20/california-becomes-first-state-order-lockdown/.

7. This argument flows from the well-argued proposition that mandated compensation for deprivations may guard against governmental arbitrariness. *See* Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 64 (1964); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 420 (1977); Daniel R. Cahoy, *Treating the Legal Side Effects of Cipro(r): A Reevaluation of Compensation Rules for Government Takings of Patent Rights*, 40 AM. BUS. L.J. 125, 142 (2002); *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 129 (1999) (statement of Nancie G. Marzulla, Pres. & Chief Legal Couns., Defs. of Prop. Rts.); Susan Eisenberg, Note, *Intangible Takings*, 60 VAND. L. REV. 667, 673 (2007); *cf.* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 860 (1995) (explaining that the Takings Clause "was . . . designed[, in part,] to teach the people that governmental actions that arbitrarily affected property interests (including the value of property) were illegitimate"); *see generally* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 613–14 (2014).

8. *See* Wolff v. McDonnell, 418 U.S 539, 558 (1974); Albright v. Oliver, 510 U.S. 266, 272 (1994); E. Enters. v. Apfel, 524 U.S. 498, 556–57 (1998) (Breyer, J., dissenting); Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1643–45 (2019); Craig W. Hillwig, *Giving Property All the Process That's Due: A "Fundamental" Misunderstanding About Due Process*, 41 CATH. U. L. REV. 703, 710 (1992).

9. *See* Erica Chee, Comment, *Property Rights: Substantive Due Process and the "Shocks the Conscience" Standard*, 31 U. HAW. L. REV. 577, 577, 590–92 (2009). Erica Chee first provided the idea that "[c]ombined with the difficulty of overcoming the ripeness barrier in a Fifth Amendment takings claim, . . . [present, heightened due process standards] ha[ve] . . . effectively preclude[ed] judicial review of unconstitutional takings of

Court has assumed that arbitrary interference is non-compensable,[10] it has not crafted a robust regulatory takings doctrine that might stymie arbitrary interference in situations in which a due process inquiry may not do so on its own;[11] namely, when the government claims that it is acting in the name of public health or safety. Finally, this Note contends that the aforementioned phenomenon is highly detrimental to "individual liberty" and "the rule of law."[12]

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private property." *See id.* at 577. However, Chee's emphasis on ripeness may no longer be as persuasive in light of the Court's recent decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), which affirmed that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Knick*, 139 S. Ct. at 2170; *see also* Robert H. Thomas, *After More than 30 Years, the Supreme Court Reopens the Door to Federal Takings Claims*, FEDERALIST SOC'Y BLOG (Aug. 13, 2019), https://fedsoc.org/commentary/fedsoc-blog/after-more-than-30-years-the-supreme-court-reopens-the-door-to-federal-takings-claims [https://perma.cc/MP6K-6HSG]. This Note expands on Chee's due process analysis by parsing out how, in addition to heightened standards, a deferential doctrine *and* application potentially contribute to arbitrary regulations surviving rational basis review. *See* Chee, *supra* note 9, at 577, 598–600. Importantly, this Note breathes life into Chee's broad statement that "[i]t is ultimately difficult to bring a takings case in federal court[,]" *see id.* at 580, by: (1) considering and crystallizing the Takings Clause's vital position as a powerful secondary deterrent against arbitrary property deprivations; (2) emphasizing how doctrinal flaws have evolved around a series of faulty assumptions; and (3) arguing that, at least within the regulatory takings context, the Clause's anti-arbitrariness mechanism is unavailable when it is needed most—namely, when courts analyze the permissibility of police power exercises. Finally, this Note distinguishes itself from Chee's Comment by offering a takings-type solution to the arbitrariness problem that is specifically designed with the COVID-19 pandemic and separation of powers principles in mind.

10. *See* Lingle v. Chevron, 544 U.S. 528, 543 (2005).

11. *See generally* AmeriSource Corp. v. United States, 525 F.3d 1149, 1154 (Fed. Cir. 2008) ("As expansive as the police power may be, it is not without limit. The limits, however, are largely imposed by the Due Process Clause."), *cited in* Lech v. Jackson, 791 F. App'x 711, 719 (10th Cir. 2019).

12. *See* PAUL STARR, FREEDOM'S POWER: THE TRUE FORCE OF LIBERALISM 15–16, 21 (2007); *see also* James S. Burling, Senior Counsel, Pacific Legal Found., Speech from Proceedings of the Third Annual New York Conference on Private Property Rights: Democracy, Property, and Land Use Regulation (1998); *cf.* Jeremy Waldron, *The Rule of Law*, STANFORD ENCYCLOPEDIA PHIL. (June 22, 2016), https://plato.stanford.edu/entries/rule-of-law/ [https://perma.cc/U9WK-9R7P] ("[T]he Rule of Law also comprises certain substantive ideals like a presumption of liberty and respect for private property rights."); *see generally* James Hankins, *Prudence Demands We Resist Arbitrary Government*,

To promote principled lawmaking, this Note urges state legislatures to adopt laws that resemble the Texas Private Real Property Rights Preservation Act ("the Texas Act").[13] Like the Texas Act, laws should:[14] (1) mandate compensation when a regulation produces a diminution in value that meets or exceeds a legislatively calibrated threshold;[15] and (2) excuse compensation for police power deprivations only when the government's actions satisfy a statutorily imposed form of heightened scrutiny.[16] To anticipatorily address concerns that the law may stifle government action in situations in which inaction may be catastrophic, this Note also proposes that laws should include provisions permitting the government to seek immunity from the law's stringent requirements if a

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L. & LIBERTY (Feb. 10, 2021), https://lawliberty.org/prudence-demands-we-resist-arbitrary-government/ [https://perma.cc/HX3F-SKF6]; Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J. L. PUB. POL'Y 283, 344–45 (2012); Michael J. Teter, *Letting Congress Vote: Judicial Review of Arbitrary Legislative Inaction*, 87 S. CAL. L. REV. 1435, 1442–43 (2014); Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2227–29 (2013); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 281–84 (2009); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 498–501 (2003); Andrew Grossman, *Protecting Property Rights to Preserve Freedom and Prosperity: A Memo to President-elect Obama*, HERITAGE FOUND. (Jan. 6, 2009), https://www.heritage.org/economic-and-property-rights/report/protecting-property-rights-preserve-freedom-and-prosperity-memo [https://perma.cc/KHM3-PJNL] (explaining, in part, that "property rights . . . protect us from unjust government action").

13. TEX. GOV'T CODE ANN. §§ 2007.001–2007.045 (West 2021).

14. The reader should note that the proposed provisions detailed in this Note are a suggested baseline.

15. This suggestion was derived from and inspired by the Texas Act and other works commenting on the mechanics of diminution in value laws. *See* TEX. GOV'T CODE ANN. § 2007.002(B)(ii) (Westlaw current through the 2021 Reg. and Second Called Sess.); *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 106–08 (1999) (statement of Harvey M. Jacobs, Professor, Univ. of Wisc. at Madison and Chair of the Dep't of Urb. and Reg'l Plan.) ("Compensation laws require that private property owners be compensated when governmental laws impose a burden on their property (reduce their property value) by a predetermined percentage."); Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 540, 544–47 (2000).

16. *See* TEX. GOV'T CODE ANN. § 2007.003(b)(13) (Westlaw current through the 2021 Reg. and Second Called Sess.).

government can demonstrate: (1) exigent circumstances; (2) that necessitate government action to avoid catastrophe; and (3) that the government possesses such limited information that would prevent it from carrying out its duty to the public without incurring potentially ruinous takings liability. By awarding compensation for deprivations, this solution may adequately incentivize principled lawmaking and thwart potentially arbitrary action.[17]

In Part I, this Note discusses the Founders' view of property rights and regulatory takings' doctrinal evolution. In Part II, this Note explains how the substantive due process and takings doctrines weakly thwart arbitrary governmental interference. In Part III, this Note recommends that states adopt laws that resemble the Texas Act.

I. THE PURPOSE AND FUNCTION OF THE TAKINGS CLAUSE

A. Property & Democracy

To John Locke, people inherited property rights from God,[18] meaning that when people voluntarily submitted to a sovereign, their property remained secure.[19] Many Founders felt similarly and

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17. Some have contended that, if properly calibrated, "[t]he Act should guard against the ability of local governments to arbitrarily devalue a citizen's private property." *See* Ryan Brennan et al., *Regulatory Takings: The Next Step in Protecting Property Rights in Texas*, POLICYPERSPECTIVE, July 2010, at 6. Another author has similarly noted that the Act "is intended to ensure that government entities take a 'hard look' at their actions that may affect the value of private real property." *See* George E. Grimes, Jr., *Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem*, 27 ST. MARY'S L.J. 557, 597 (1996); *see also State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 129 (1999) (statement of Nancie G. Marzulla, Pres. & Chief Legal Couns., Defs. of Prop. Rts.); Cahoy, *supra* note 7, at 142; Sax, *supra* note 7, at 64; *cf.* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 96–97 (1995) (noting that "enhanced compensation would deter governments from undertaking projects").

18. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1689), *reprinted in* 5 THE WORKS OF JOHN LOCKE 116–17 (1823); RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 10 (1985); David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 472 (1993).

19. *See* LOCKE, *supra* note 18, at 165–66; *see also* EPSTEIN, *supra* note 18, at 10–11, 14–15; Christian Brooks, Comment, *Political Bluff and Bluster: Six Years Later, a Comment on the Texas Private Real Property Rights Preservation Act*, 33 TEX. TECH L. REV. 59, 63 (2001)

believed that "civil society" depended on private property's preservation.[20] For example, Justice James Wilson held that "property ought to be inviolable" because "no one would toil to accumulate what he could not possess in security."[21] Like Locke, Wilson viewed property as "highly important to the existence . . . of civilized life."[22] John Adams shared Wilson's sentiment, and once remarked that "[p]roperty [wa]s surely a right of mankind as . . . liberty."[23] To Adams and Hamilton, like Wilson, property secured "republican government[.]"[24] James Madison felt similarly and boldly argued that "protect[ing] property" was "the end of government[.]"[25] He believed, like others, that property was "necessary" for "free government."[26]

If government failed to adequately protect or preserve property rights, some Founders postulated that "tyranny" and despotism would result and society would collapse.[27] John Adams once remarked that "[t]he moment the idea is admitted into society, that

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("Locke advocated that the purpose of organized society, by definition, is the protection of private property rights."); Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 533 (2007).

20. *See* PAUL J. LARKIN, JR., THE FRAMERS' UNDERSTANDING OF "PROPERTY" 3–6 (2020) (Heritage Found., Legal Memorandum No. 263, 2020) ("The Founders' generation saw the protection of property as vital to civil society."); Schultz, *supra* note 18, at 471–73, 475–76.

21. *See* JAMES WILSON, *Of Man, as a Member of Society.* (1791), *in* 1 THE WORKS OF THE HONOURABLE JAMES WILSON 283, 294 (1804).

22. *See* JAMES WILSON, *On the History of Property.*, *in* 2 THE WORKS OF JAMES WILSON 480, 494 (1896).

23. *See* JOHN ADAMS, A DEFENCE OF THE CONSTITUTION OF GOVERNMENT IN THE UNITED STATES OF AMERICA (1787), *reprinted in* THE POLITICAL WRITINGS OF JOHN ADAMS: REPRESENTATIVE SELECTIONS 148 (Leonard W. Levy & Alfred E. Young eds., 2003 ed.), *quoted in* LARKIN, *supra* note 20, at 5 n.38.

24. *See* Schultz, *supra* note 18, at 475–76.

25. *See* MADISON, *supra* note 1, at 223, *quoted in* LARKIN, *supra* note 20, at 6 n.40.

26. *See* Schultz, *supra* note 18, at 475–76; *see also* THE FEDERALIST NO. 10 (James Madison); THE FEDERALIST NO. 54 (Alexander Hamilton or James Madison) (charging that "[g]overnment [wa]s instituted no less for protection of the property, than of . . . individuals."), *cited in* LARKIN, *supra* note 20, at 6, 6 n.39.

27. *See* ADAMS, *supra* note 23, at 148; Letter from Thomas Jefferson to James Maury (Apr. 25, 1812); LARKIN, *supra* note 20, at 5; *see also* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 68 (1990) (suggesting that

property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[28] Madison appeared to share Adams' view and cautioned in *Federalist 10* that democratic governments that failed to respect or preserve property were "as short in their lives as they have been violent in their deaths."[29]

B. Arbitrarily Interfering with Private Property

Despite their steadfast positions concerning private property's position in a blossoming republic, the Founders declined to install a sweeping Constitutional guarantee that would place private property beyond a sovereign's reach. Indeed, the Fourth Amendment and Fifth Amendment Takings and Due Process clauses impliedly permit governments to deprive citizens of their property as long as the government meets certain procedural and substantive requirements. For example, the Takings Clause requires that deprivations be for "public use" and that the government "just[ly] compensat[e]" owners for losses.[30] Relatedly, the Fourth Amendment only proscribes "*unreasonable* . . . [property] seizures," not *all* deprivations.[31]

Although the government can interfere with private property, some Founders, Founding influencers, like Locke and Blackstone, and other "early writers[,]" like Samuel Pufendorf and Hugo Grotius, appeared to find *arbitrary* interference impermissible.[32] For example, Locke believed that people "would not quit the freedom of

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Gouverneur Morris subscribed to the idea that "[i]t was only for the sake of property that men gave up the greater freedom of the state of nature").

28. *See* ADAMS, *supra* note 23, at 148, *quoted in* LARKIN, *supra* note 20, at 5 n.38.

29. *See* THE FEDERALIST NO. 10 (James Madison).

30. *See* U.S. CONST. amend. V.

31. *See* U.S. CONST. amend. IV (emphasis added); *see also Fourth Amendment*, LEGAL INFO. INST. (last visited Feb. 15, 2022), https://www.law.cornell.edu/constitution/fourth_amendment [https://perma.cc/ZV9R-V8LU].

32. *See* Sax, *supra* note 7, at 54, 56–58; LARKIN, *supra* note 20, at 4; *cf.* Letter from Thomas Jefferson to Joseph Milligan (Apr. 16, 1816) ("To take from one, because it is thought that his own industry and that of his fathers has acquired too much, in order to spare to others, who, or whose fathers have not exercised equal industry and skill, is to violate arbitrarily the first principle of association[.]"); *see generally* RICHARD EPSTEIN,

. . . Nature" if they knew they would be subjected to "[a]bsolute arbitrary power" that left ambiguous "rules of right and property[.]"[33] James Madison also appeared to detest arbitrary deprivations, cautioning in an essay that "property [is in]secure . . . where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest."[34] Madison also warned that:

> property [is in]secure . . . where *arbitrary* restrictions . . . deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.[35]

Consistent with the concerns voiced by those above, some have suggested that the Takings Clause operates as a prophylactic against arbitrary state action.[36] William Blackstone recognized this principle, and argued that governments could only meddle with private property if they paid owners for losses.[37] Indeed, Blackstone reasoned that "full indemnification" was owed to avoid "[s]tripping the [s]ubject of his property in an arbitrary manner[.]"[38]

Blackstone's anti-arbitrariness theory is functionally identical to late Professor Joseph Sax's argument concerning compensation.

SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY 6 (2008) ("[T]he key writers who set the intellectual framework for our Constitution . . . all treated private property as a bulwark of the individual against the arbitrary power of the state.").

33. *See* LOCKE, *supra* note 18, at 164; *see also id.* at 163, 165–66; *see generally* EPSTEIN, *supra* note 18, at 12.

34. *See* MADISON, *supra* note 1, at 224, *quoted in* LARKIN, *supra* note 20, at 4.

35. *See* MADISON, *supra* note 1, at 224 (emphasis added), *quoted in* LARKIN, *supra* note 20, at 4.

36. *See* Sax, *supra* note 7, at 64; Cahoy, *supra* note 7, at 142; Ellickson, *supra* note 7, at 420; Eisenberg, *supra* note 7, at 673; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("Th[e] [Takings] Clause stands as a shield against the arbitrary use of governmental power."); *see also* Treanor, *supra* note 7, at 860, 880; *cf.* Eagle, *supra* note 7, at 614; Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 18–19 (2008).

37. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *139.

38. *See id.*

Professor Sax argued that "compensation . . . can satisfactorily serve . . . [the Takings Clause's anti-arbitrariness] function to the extent that it immunizes existing values against . . . risks by requiring the payment of compensation whenever loss is occasioned by exercise of the enterprise capacity."[39] Put differently, compensation guards against arbitrary deprivations by requiring the government to make property owners whole.[40] By requiring the government to indemnify owners, the government may only interfere with private property when "property . . . is worth more to the government [or the public] than . . . in the marketplace[.]"[41] Compensation thus provides the government with "[dis]incentive[s] to arbitrarily take the property of the populace by putting a price tag on it."[42]

Although compensation can shield property against arbitrary state action,[43] this Note argues below how the regulatory takings doctrine presently excuses the government's compensation obligations where compensation is needed most. This Note now turns to recount the doctrine's origins and gradual impairment.

C. Regulatory Takings, the Police Power, and Arbitrariness

The Takings Clause requires the government to compensate property owners when it deprives them of property "for public use[.]"[44] When the government "physical[ly]" seizes property, it

39. *See* Sax, *supra* note 7, at 64.

40. *See id.*; *see generally* EPSTEIN, *supra* note 18, at 15 ("There is . . . only a network of forced exchanges designed to leave everyone better off than before.").

41. *See* Eagle, *supra* note 7, at 613–14; *see also* Eisenberg, *supra* note 7, at 673; Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 62 (1988); *see generally* Grossman, *supra* note 12 (suggesting that a failure to compensate may provide the government with "perverse incentives").

42. *See* Cahoy, *supra* note 7, at 142; *see generally State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 129 (1999) (statement of Nancie G. Marzulla, Pres. & Chief Legal Couns., Defs. of Prop. Rts.).

43. *See supra* notes 37–42 and accompanying text.

44. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

cannot excuse its indemnification duties—no matter how compelling its interests might be.[45] However, the government's compensation obligations are more ambiguous in the regulatory takings context.[46] Where a regulation "denies [an owner of] all economically beneficial or productive use of land[,]" the government must compensate the owner for his loss.[47] Likewise, the government is usually on the hook when it "permanently occupies physical property[.]"[48]

Regulatory property interference that fails to trigger either of the aforementioned *per se* rules are often governed by a multi-factor test articulated in *Penn Central Transportation Co. v. New York City*,[49] which is notoriously deferential to government action.[50] As illustrated in this section, the inapposite logic that courts employ under *Penn Central* to excuse compensation transcends regulatory takings jurisprudence.

i. Early Regulatory Takings Jurisprudence

Inexplicitly arising out of the Tenth Amendment,[51] the police power vests states with "authority to protect the health, safety, and welfare of the public."[52] Courts and scholars have both narrowly

45. *See* SEAN M. STIFF, CONG. RSCH. SERV., LSB10434, COVID-19 RESPONSE: CONSTITUTIONAL PROTECTIONS FOR PRIVATE PROPERTY 2 (2020).

46. *Cf.* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENV'T L.J. 525, 528 (2009) (describing "doctrinal indeterminacy").

47. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992); Lynn E. Blais, *The Total Takings Myth*, 86 FORDHAM L. REV. 47, 56–57 (2017).

48. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982); *see also* Horne v. Dep't of Agric., 576 U.S. 350, 360 (2015); Blais, *supra* note 47, at 55–56.

49. *See* 438 U.S. 104, 124 (1978).

50. *See* Ilya Shapiro et al., *Destroying Property Value by Regulation Is Just as Bad as Using Eminent Domain*, CATO: CATO AT LIBERTY (July 25, 2018), https://www.cato.org/blog/destroying-property-value-regulation-just-bad-using-eminent-domain [https://perma.cc/QZK6-NJEG] ("[P]roperty owners almost always lose under *Penn Central*."); Blais, *supra* note 47, at 50 ("Landowners rarely prevail in takings claims evaluated under the *Penn Central* three-factor test.").

51. *See Police Powers*, LEGAL INFO. INST. (last visited Mar. 15, 2021), https://www.law.cornell.edu/wex/police_powers [https://perma.cc/SCH7-3A3T].

52. *See* Robin Kundis Craig, *Of Sea Level Rise and Superstorms: The Public Health Police Power as a Means of Defending Against "Takings" Challenges to Coastal Regulation*, 22

and broadly defined the police power's scope. One scholar has narrowly characterized the police power as the "power to regulate property."[53] Others, by contrast, have broadly defined the police power. For example, in *Thurlow v. Massachusetts*,[54] the Supreme Court explained that states' police powers "[we]re nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."[55] In *Stone v. Mississippi*,[56] the Supreme Court explained that the police power's scope "extend[ed] to all matters affecting the public health or the public morals."[57] Many have broadly defined the police power like the *Stone* court.[58]

Courts have spent over one hundred years defining the relationship between property and the police power and examining whether property deprivations made pursuant to states' police powers amount to compensable takings.[59] *Mugler v. Kansas*,[60] a prominent decision concerning a police power property deprivation,[61] involved a challenge to a Kansas law that proscribed liquor production.[62] Reasoning, in part, that the Fourteenth Amendment's[63] ratifiers could not have "intended . . . to impose restraints

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N.Y.U. ENV'T L.J. 84, 106–07 (2014); *see also* Gonzales v. Raich, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting).

53. *See* Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. ENERGY, NAT. RESOURCES, & ENV'T L. 9, 19 (1993).

54. 46 U.S. 504 (1847).

55. *See id.* at 583.

56. 101 U.S. 814 (1879).

57. *See id.* at 818.

58. *See, e.g.*, Craig, *supra* note 52, at 106–07; Buchanan v. Warley, 245 U.S. 60, 74 (1917); Engelage v. City of Warrenton, 378 S.W.3d 410, 414 (Mo. Ct. App. 2012); Massingill v. Dep't of Food & Agric., 102 Cal. App. 4th 498, 504 (2002); Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 676, 702 (2015).

59. *See* William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1059–69 (1980).

60. 123 U.S. 623 (1887).

61. *Cf.* Stoebuck, *supra* note 59, at 1060.

62. *See Mugler*, 123 U.S. at 661–62.

63. The Fourteenth Amendment Due Process Clause extended the Fifth Amendment's takings mandates to "the states." *See* Dennis J. Coyle, *Takings Clause: Fifth Amendment*, CTR. FOR THE STUDY OF FEDERALISM, https://encyclopedia.federalism.org/index.php/Takings_Clause:_Fifth_Amendment [https://perma.cc/Z8L2-M9L8] (last updated 2006).

upon the exercise of their powers for the protection of the safety, health, or morals of the community"[64] and that a law preventing public harm "does not disturb the owner in the control or use of his property for lawful purposes,"[65] the Court squarely rejected the challenger's takings argument.[66] Although the Court recognized that the Fourteenth Amendment did not protect government actions that were intended "to deprive the owner of his liberty and property, without due process of law[,]"[67] the Court also appeared to find the state's deprivation non-arbitrary because the government had used its police power to protect the public.[68]

In his *Mugler* dissent, Justice Field appeared to suggest that Kansas had chosen arbitrary means to enforce its law.[69] Prior to the Kansas law's enactment, the challenger lawfully operated his brewery.[70] Seemingly overnight, however, the challenger's brewery became "a common nuisance[,]"[71] permitting officials to destroy the challenger's property "merely because the legislature ha[d] so commanded." [72] Destroying property to enforce a manufacturing law appeared to Justice Field as excessive and unnecessary relative to the government's abatement objective, especially since the government was excused from making the owner whole.[73] Thus, Justice Field suggested that the Kansas law had violated "due process" and the Takings Clause's compensation requirement.[74]

Nearly thirty years after *Mugler*, the Court held in *Hadacheck v. Sebastian*[75] that a Los Angeles city ordinance proscribing brick manufacturing facilities was a lawful police power exercise.[76] The

64. *See Mugler*, 123 U.S. at 664.
65. *See id.* at 668–69.
66. *See id*.
67. *See id.* at 669.
68. *See id* at 662–63, 669.
69. *See id.* at 678 (Field, J., dissenting).
70. *See id.* at 677.
71. *See id.*
72. *See id*.
73. *See id.* at 678.
74. *See id.*
75. 239 U.S. 394 (1915).
76. *See id.* at 404–08.

Hadacheck challenger acquired land "for the purpose of manufacturing brick" and contended that the city ordinance would substantially diminish his property's value, effectively requiring him "to entirely abandon his business[.]"[77] Affirming the lower court's finding that the city's ordinance was a "good faith" police power exercise[78] and reasoning that the challenger, like other property owners, "must yield to the good of the community[,]"[79] the Court declined to entertain the challenger's due process and takings arguments.[80] The Court recognized that the "police power . . . cannot be arbitrarily exercised."[81] However, the Court found the ordinance a lawful, non-compensable police power exercise, even where "s[imilar] conditions [plausibly] exist[ed] [but] [we]re not regulated" or where "some other exercise would have [potentially] been better or less harsh."[82]

Pennsylvania Coal Co. v. Mahon[83] marked a doctrinal shift away from positions taken in *Mugler* and *Hadacheck*. Writing for the majority, Justice Holmes recognized that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[84] However, Justice Holmes also noted that if the police power perpetually immunized government action, then the "contract and due process clauses" would be rendered meaningless.[85] Thus, Justice Holmes held that regulations that deprive owners of property may amount to compensable takings if they "go[] too far[.]"[86]

Since *Mahon*, the Court has attempted to define when the police power "goes too far[.]"[87] Justice Holmes offered some guidance in

77. *See id.* at 405.
78. *See id.* at 409–10, 414.
79. *See id.* at 410.
80. *See id.* at 408–10.
81. *See id.* at 410.
82. *See id.* at 413–14.
83. 260 U.S. 393 (1922).
84. *See id.* at 413.
85. *See id.*
86. *See id.* at 415.
87. *See id.*

Mahon. For example, he opined that "[o]ne fact for consideration in determining such limits is the extent of the diminution" caused by the regulation.[88] When a regulation causes a significant diminution, "compensation . . . [must] sustain the act."[89] Finally, Justice Holmes advised that courts owed deference to "the legislature[,]"[90] but cautioned that uncompensated police power deprivations would obliterate property rights.[91]

Following *Mahon*, the Court decided two cases that resembled *Mugler* and *Hadachek*. In *Village of Euclid, Ohio v. Ambler Realty Co.*,[92] the Court held that a local zoning law was a lawful police power exercise and did not violate due process principles.[93] Although the zoning law was overinclusive because it captured "innocent" businesses that "[we]re neither offensive nor dangerous[,]" the Court reasoned that legislative imprecision was insufficient to invalidate the law.[94] The Court stipulated that "clearly arbitrary and unreasonable" laws that "ha[d] no substantial relation to the public health, safety, morals, or general welfare"[95] may violate the Due Process Clause.[96] However, the Court objected to any kind of close examination or "sentence by sentence" scrutiny[97] and ultimately found the imprecise local measure a lawful and non-arbitrary police power exercise.[98]

In *Miller v. Schoene*,[99] the Court declined to entertain Virginia tree owners' due process claim on the grounds that the state's order to destroy healthy trees to prevent a tree disease from spreading was

88. *See id.* at 413.
89. *See id.*
90. *See id.*
91. *See id.* at 415 ("When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.").
92. 272 U.S. 365 (1926).
93. *See id.* at 396–97.
94. *See id.* at 388–89.
95. *See id.* at 395.
96. *See id.*
97. *See id.*
98. *See id.* at 395–97.
99. 276 U.S. 272 (1928).

a lawful police power exercise.[100] The Court articulated that the state was capable of "deciding upon the destruction of one class of property in order to save another[,]"[101] and found that Virginia's actions were lawful,[102] in part, because the state's "determination [wa]s subject[ed] to judicial review" and because "[t]he property . . . in error [wa]s not subjected to the possibly arbitrary and irresponsible action of a group of private citizens."[103]

ii. The Modern Doctrine

Partial Regulatory Takings. In 1978, the Court revisited Holmes's "too far"[104] test. In *Penn Central*, a New York City "landmark law"[105] interfered with Grand Central Terminal's owners' ability to add to the terminal structure.[106] To determine whether the regulatory deprivation amounted to a compensable taking, the Court "identified several factors[,]" which included the: (1) "economic impact of the regulation on the claimant[;]" (2) "extent to which the regulation has interfered with [the challenger's] distinct investment-backed expectations[;]" and (3) "character of the governmental action."[107] The Court also made clear that a "physical invasion" may point toward a compensable taking,[108] whereas "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good" may weigh against a finding for compensation.[109]

Applying these principles to *Penn Central*'s facts, the Court held that New York's deprivation was a lawful police power exercise that did not amount to a compensable taking.[110] Importantly, Justice Brennan's majority opinion squarely rejected the owners' argument

100. *See id.* at 277–78, 280–81.
101. *See id.* at 279–80.
102. *See id.*
103. *See id.* at 281.
104. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
105. *See* Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 129 (1978).
106. *See id.* at 115–18.
107. *See id.* at 124.
108. *See id.*
109. *See id.*
110. *See id.* at 129, 138.

that New York had "singl[ed their property] out . . . for disparate and unfair treatment[,]"[111] in part because the owners were entitled "to judicial review" and that judges were capable of snuffing out governmental arbitrariness if necessary.[112]

In his dissent, then-Justice Rehnquist expressed discomfort with Justice Brennan's new test, noting that New York City's law would deprive the owners of a substantial portion of their property[113] and that *only* the owners would bear the brunt of complying with the City's regulation.[114] Justice Rehnquist recognized that "some may believe that the costs of landmark preservation will be more easily borne by corporations such as Penn Central than the overburdened individual taxpayers[.]"[115] Echoing *Mahon*, however, Justice Rehnquist countered that such "concerns do not allow us to ignore past precedents construing the Eminent Domain Clause to the end that the desire to improve the public condition is, indeed, achieved by a shorter cut than the constitutional way of paying for the change."[116]

Physical Occupations. *Loretto v. Teleprompter Manhattan CATV Corp*.[117] held that a "permanent physical occupation of property [wa]s a taking."[118] In dicta, the Court reasoned that although "the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest[,]" the Court has "long considered a physical intrusion by government to be a property restriction of an unusually serious

111. *See id.* at 132.

112. *See id.* at 132–33. Importantly, the Court recognized that the police power strongly justified non-compensation. *See id.* at 125 ("[I]n instances in which a state tribunal reasonably concluded that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.") (quoting Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)) (internal quotation marks omitted).

113. *See Penn Central Transp. Co.*, 438 U.S. at 146 (Rehnquist, J., dissenting).

114. *See id.* at 147.

115. *See id.* at 152.

116. *See id.* at 153.

117. 458 U.S. 419 (1982).

118. *See id.* at 441.

character for purposes of the Takings Clause."[119] In other words, the righteousness of the government's motives cannot excuse compensation when it "permanent[ly] physical[ly] occup[ies] . . . real property[.]"[120]

Complete Deprivations. In *Lucas v. South Carolina Coastal Council*,[121] the Court held that regulations that "deprive[] . . . landowner[s] of all economically beneficial uses" amount to compensable takings.[122] Writing for the majority, Justice Scalia reasoned that "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,'"[123] when a law "deprives land of all economically beneficial use[.]"[124] Justice Scalia also noted the risk involved in failing to compensate owners who have suffered complete losses, remarking that regulations that affect complete losses "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[125]

Temporary Regulatory Takings. In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*,[126] the Court held that a temporary deprivation may amount to a compensable taking.[127] To protect residents, Los Angeles County prohibited further building in a flooded area occupied by the First English Evangelical Lutheran Church.[128] Because the County "denied [the church] . . . all use of its property for a considerable period of years[,]" the Court found the County's ordinance unconstitutional to the extent that it did not compensate the church or other owners for losses.[129]

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119. *See id.* at 426.
120. *See id.* at 426–27.
121. 505 U.S. 1003 (1992).
122. *See id.* at 1018–19.
123. *See id.* at 1017 (quoting *Penn Central*, 438 U.S. at 124).
124. *See id.* at 1027.
125. *See id.* at 1018.
126. 482 U.S. 304 (1987).
127. *See id.* at 321.
128. *See id.* at 307–08.
129. *See id.* at 321–22.

In dicta, Chief Justice Rehnquist advised that a deprivation's temporary nature could not excuse the government's duty to compensate.[130] Indeed, he contended that "[i]nvalidation of the ordinance . . . converting the taking into a 'temporary' one . . . is not a sufficient remedy to meet the demands of the Just Compensation Clause."[131] Finally, the Chief Justice commented that the Court's holding would proscribe state power; he noted, however, that "many of the provisions of the Constitution are designed to limit the . . . freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them."[132] In other words, limiting government power indicates that the compensation requirement is properly functioning.[133]

Fifteen years after *First English*, the Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[134] which involved a challenge to two government "moratoria" that halted "virtually all development on a substantial portion of the [challenger's] property" for over two and half years.[135] The Court reasoned that extending liability for the deprivation "would transform government regulation into a luxury few governments could afford[,]"[136] and ultimately found the deprivation non-compensable.[137]

In his dissent, Chief Justice Rehnquist argued that "it has long been understood that moratoria on development exceeding . . . short time periods are not . . . legitimate planning device[s,]"[138] suggesting that the government's means were potentially arbitrary.[139] Although the Chief Justice believed that the government's "efforts at preventing further degradation of the lake were made in good

130. *See id.* at 319.
131. *See id.*
132. *See id.* at 321.
133. *See id.*
134. 535 U.S. 302 (2002).
135. *See id.* at 306.
136. *See id.* at 324.
137. *See id.* at 341–42.
138. *Id.* at 354 (Rehnquist, J., dissenting).
139. *See id.*

faith[,]" he suggested, as he had in *Penn Central*, that indemnification was owed to prevent the government from advancing "the public interest . . . [through] a few targeted citizens."[140]

iii. Disentangling the Doctrine

Prior to *Lingle v. Chevron U.S.A. Inc.*,[141] and separate from the doctrine detailed above, the Court employed a different takings test. In *Agins v. City of Tiburon*,[142] the Court held that government action "effects a taking if . . . [it] does not substantially advance legitimate state interests[.]"[143] Nearly twenty-five years later, however, the Court rejected *Agins* in *Lingle*.[144] Writing for the *Lingle* majority, Justice O'Connor articulated that *Agins* "prescribe[d] an inquiry in the nature of a due process, not a takings, test" and was improper "in our takings jurisprudence."[145] Justice O'Connor opined that the "Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."[146] In concluding, Justice O'Connor clarified that if a deprivation was "so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action."[147] In other words, the court will only reach the compensation question if the deprivation is permissible under the Due Process Clause.[148]

II. PERMISSIBLY ARBITRARY PROPERTY DEPRIVATIONS

Lingle brought to light a flawed assumption underlying modern regulatory takings jurisprudence. Indeed, the Court has repeatedly suggested that arbitrary property deprivations are constitutionally

140. *See id.*
141. 544 U.S. 528 (2005).
142. 447 U.S. 255 (1980).
143. *See id.* at 260.
144. *See Lingle*, 544 U.S. at 548.
145. *See id.* at 540.
146. *See id.* at 543.
147. *See id.*
148. *See id.*

impermissible,[149] and that arbitrary deprivations are non-compensable because they "violate due process[.]"[150] Thus, by the time courts reach the compensation question, the regulatory takings doctrine assumes that "what the government intends to do is otherwise constitutional[.]"[151] Below, this Note explains how this premise fails to recognize a modern jurisprudential phenomenon: namely, that constitutionally permissible deprivations may also be *arbitrary* because modern due process protections insufficiently capture arbitrary action.[152] Because the Court has assumed that arbitrary deprivations are non-compensable,[153] it has failed to craft a robust regulatory takings doctrine that might stymie arbitrary interference in cases in which a due process inquiry may not do so on its own; namely, when the government claims that it is acting in the name of public health or safety.

A. Arbitrariness: Defined and Underscored

What does it mean when the government acts *arbitrarily*? Arbi-

149. *See, e.g.*, Barbier v. Connolly, 113 U.S. 27, 31 (1884) (noting that the "[t]he fourteenth amendment" prohibited the "arbitrary spoliation of property"), *cited in* Mugler v. Kansas, 123 U.S. 623, 663 (1887); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707 (1884); Dobbins v. City of Los Angeles, 195 U.S. 223, 236 (1904); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915); Miller v. Schoene, 276 U.S. 272, 281 (1928) ("The property of plaintiffs in error is not subjected to the possibly arbitrary and irresponsible action of a group of private citizens."); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 133 (1978); *Lingle*, 544 U.S. at 543.

150. *See Lingle*, 544 U.S. at 543.

151. *See* E. Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring); *see id.* at 554, 556–57 (Breyer, J., dissenting); *Lingle*, 544 U.S. at 543; Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L.L. REV. 25, 68 n.232 (2013); Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 980 (2000) ("The Takings Clause is predicated, after all, on the requirement that the sovereign pay for that which it has *lawfully* acquired for its own use.") (emphasis in original); *cf.* Vizio, Inc. v. Klee, No. 3:15-CV-00929 (VAB), 2016 WL 1305116, at *18 (D. Conn. Mar. 31, 2016); Support Working Animals, Inc. v. DeSantis, 457 F. Supp. 3d 1193, 1224 (N.D. Fla. 2020).

152. *See* Chee, *supra* note 9, at 577, 580, 592.

153. *See Lingle*, 544 U.S. at 543.

trary laws are those "that ha[ve] no connection to a legitimate purpose or goal[.]"[154] Arbitrary enactments "may lack reasons to explain . . . [them], or . . . [are] supported by illegitimate reasons, or reasons that would, with equal plausibility, justify the opposite act."[155] Professor Michael Teter has "distill[ed] a working definition of arbitrariness" by drawing on case law and other scholarly work.[156] This Note adopts Professor Teter's definition of "arbitrary," which he describes as "a decision or action that is based on improper motivations, lacks a rational connection to a legitimate end, or is untethered to any controlling standards."[157]

So what if the government acts arbitrarily? Arbitrary law-making is antithetical to "the rule of law[,]"[158] impairs institutional "legitimacy[,]" and subverts the population's "liberty interests[.]"[159] By "appl[ying laws] consistently and with standards that are known and followed[,]"[160] the government "encourages confidence that the law will be fair and thereby increases the state's ability to secure cooperation without the imposition of force."[161]

The principles detailed above apply to arbitrary property deprivations. Put best by Justice Holmes in *International Postal Supply Co. v. Bruce*, the

> arbitrary destruction of the property rights of the citizen might be expected to occur under a despotic government, but it ought not to be tolerated under a

154. TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION: THE DECLARATION OF INDEPENDENCE AND THE RIGHT TO LIBERTY 73 (2013).

155. *See id.* at 73; *see generally* Barnett & Bernick, *supra* note 8, at 1643–66.

156. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1440–41.

157. *Id.* at 1441.

158. *See* STARR, *supra* note 12, at 16–17; Teter, *Letting Congress Vote*, *supra* note 12, at 1443; Waldron, *supra* note 12; *see generally* Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANN. REV. L. & SOC. SCI. 199, 203 (2016).

159. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1443; *see also* Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 4 (2003); James McClellan, *Rule of Law & U.S. Constitutionalism*, OLL (2000), https://oll.libertyfund.org/page/rule-of-law-us-constitutionalism [https://perma.cc/TSP6-AJRX]; STARR, *supra* note 12, at 15–17.

160. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1443.

161. *See* STARR, *supra* note 12, at 16.

> government whose fundamental law forbids all deprivation of property without due process of law, or the taking of private property for public use without compensation.[162]

As explained below, however, the Due Process and Takings Clauses may insufficiently stymie arbitrary interference.[163]

B. Substantive Due Process as an Ineffective Anti-Arbitrariness Mechanism

In early due process cases, the Court made clear that arbitrary actions or deprivations presumptively violated the Due Process Clause.[164] For example, in *Hagar v. Reclamation District No. 108*, the Court concluded that due process "is intended as additional security against . . . the arbitrary spoliation of property."[165] Similarly, in *Dobbins v. City of Los Angeles*, the Court held that courts must "determin[e] whether . . . under the guise of enforcing police regulations, there has been . . . arbitrary interference with the constitutional rights to . . . use and enjoy property."[166] More recently, in *Wolff v. McDonnell*, Justice White opined that "[t]he touchstone of due process is protection of the individual against arbitrary action of government[.]"[167] To the extent that regulations impact private property, however, this section demonstrates that due process may fail, in some cases, to thwart arbitrary action.[168]

a. Constitutionally Arbitrary Actions Are *Extremely* Arbitrary: *Lewis* & Progeny

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162. Int'l Postal Supply Co. v. Bruce, 194 U.S. 601, 613 (1904).

163. *See* Chee, *supra* note 9, at 577.

164. *See, e.g.*, Phillip Wagner, Inc. v. Leser, 239 U.S. 207, 215–16 (1915); Helvering v. City Bank Farmers Tr. Co., 296 U.S. 85, 89–90 (1935); Chicago, M. & St. P. Ry. Co. v. State of Minn. ex rel. R.R. & Warehouse Comm'n, 134 U.S. 418, 457 (1890); Gundling v. City of Chicago, 177 U.S. 183, 188 (1900); Goss v. Lopez, 419 U.S. 565, 574 (1975); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889)); Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring).

165. Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 707 (1884).

166. Dobbins v. City of Los Angeles, 195 U.S. 223, 236 (1904).

167. *See Wolff*, 418 U.S. at 558.

168. *See* Chee, *supra* note 9, at 577.

The Court has made clear that *constitutionally* arbitrary actions involve brazen conduct,[169] suggesting that less arbitrary actions may survive judicial review.[170] Indeed, the Court has acknowledged that, in the executive action context, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense[.]"[171] In *Lingle*, Justice O'Connor also recognized that substantive due process would only screen for government actions that were "*so arbitrary or irrational* that . . . [they would] [r]un afoul of the Due Process Clause[,]"[172] which might suggest that substantive due process may generally capture some but not all arbitrary actions.

Furthermore, due process protections may egregiously fail to capture arbitrary action in cases involving property deprivations.[173] Some circuits will only find a due process violation when a deprivation occurred under extraordinarily arbitrary auspices.[174] For example, the Tenth Circuit has "acknowledged that arbitrary deprivation of a property right may violate substantive due process if the arbitrariness is extreme[.]"[175] Several other circuits, including the Tenth Circuit, have followed *Lewis* and have applied a "shocks the

169. *See* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

170. *See* Chee, *supra* note 9, at 577.

171. *See Lewis*, 523 U.S. at 846 (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)) (internal quotation marks omitted).

172. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542 (2005) (emphasis added).

173. *See* Chee, *supra* note 9, at 577, 590–601.

174. *See* Brian W. Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior*, 3 WASH. U. J.L. & POL'Y 583, 594–95 (2000) ("Accordingly, for these circuits, only arbitrary action that is extreme in some form merits consideration under substantive due process."); Chee, *supra* note 9, at 577, 590; *see, e.g.*, George Washington Univ. v. District of Columbia, 318 F.3d 203, 209 (D.C. Cir. 2003) ("Once a property interest is found, however, the doctrine of substantive due process constrains only egregious government misconduct."), *cited in* Chee, *supra* note 9, at 596 n.180; Clayland Farm Enterprises, LLC v. Talbot County, 987 F.3d 346, 357 (4th Cir. 2021) (noting a highly stringent substantive due process threshold).

175. *See* Onyx Properties LLC v. Bd. of Cnty. Comm'rs of Elbert Cnty., 838 F.3d 1039, 1049 (10th Cir. 2016); *see generally* Chee, *supra* note 9, at 594–96.

conscience" test that captures "only the most egregious official conduct"[176] in cases involving property interests.[177] To illustrate the relationship between arbitrariness and stringent standards of review, consider due process claims concerning two states' COVID-19 public health orders.

In *World Gym, Inc. v. Baker*,[178] the U.S. District Court for the District of Massachusetts found that the Massachusetts' Governor's mandate that non-essential businesses shutter,[179] and subsequent orders that kept the challenger's business shuttered, did not "amount[] [to] conscience-shocking action."[180] In contrast, the U.S. District Court for the Western District of Pennsylvania (employing rational basis review,[181] a different standard detailed in greater depth below[182]) found in *County of Butler v. Wolf* that the state's "Order closing all 'non-life-sustaining' businesses was so arbitrary in its creation, scope and administration as to fail constitutional scrutiny."[183] In *Wolf*, the government appeared to lack "any controlling standard[]"[184] or principle that may have guided its decisions to

176. *See Lewis*, 523 U.S. at 846.

177. *See* Blaesser, *supra* note 174, at 594–95; Chee, *supra* note 9, at 577, 584–89, 596; *see, e.g.*, Najas Realty, LLC v. Seekonk Water Dist., 821 F.3d 134, 145 (1st Cir. 2016); GEFT Outdoors, LLC v. City of Westfield, 922 F.3d 357, 368 (7th Cir. 2019); Azam v. City of Columbia Heights, 865 F.3d 980, 986 (8th Cir. 2017); Knox v. Town of Se., 599 F. App'x 411, 413 (2d Cir. 2015); Thorpe v. Upper Makefield Twp., 758 F. App'x 258, 261–62 (3d Cir. 2018) (applying a mix of rational basis and a *Lewis*-type standard); Abdi v. Wray, 942 F.3d 1019, 1027–28 (10th Cir. 2019) (explaining that the circuit analyzes executive conduct under a *Lewis*-type standard); Siefert v. Hamilton Cnty., 951 F.3d 753, 766 (6th Cir. 2020); Siena Corp. v. Mayor & City Council of Rockville Maryland, 873 F.3d 456, 464 (4th Cir. 2017).

178. 474 F. Supp. 3d 426 (D. Mass. 2020).

179. *See id.* at 429; *see also* Massachusetts Covid-19 Order No. 13 (Mar. 23, 2020), https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download [https://perma.cc/B2DQ-77DZ].

180. *Baker,* 474 F. Supp. 3d at 434.

181. *See* County of Butler v. Wolf, 486 F. Supp. 3d 883, 922 (W.D. Pa. 2020).

182. *See infra* notes 191–241 and accompanying text.

183. *Wolf*, 486 F. Supp. 3d at 922 (quoting Order of the Governor of the Commonwealth of Pennsylvania Regarding the Closure of All Businesses That Are Not Life Sustaining (Mar. 19, 2020)).

184. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1441.

close some businesses and not others.[185] If we assume that Massachusetts authorities made similar closure determinations without relying on a "controlling standard[][,]"[186] which is plausible considering how some regulations appeared randomly and haphazardly constructed,[187] the Massachusetts law presented in *Baker* that distinguished between "essential" and "non-essential" businesses[188] was likely no less arbitrary than the Pennsylvania law in *Wolf* that drew a similar distinction. However, because the "shocks the conscience" test only captures the most *outrageously* arbitrary actions,[189] actions

185. *See Wolf*, 486 F. Supp. 3d at 922–25.

186. *See* Teter, *Letting Congress* Vote, *supra* note 12, at 1441.

187. *See* Hummy Song et al., *The Impact of the Non-Essential Business Closure Policy on COVID-19 Infection Rates*, 21 INT'L J. OF HEALTH ECON. & MANAGEMENT 387, 389 (2021), https://link.springer.com/content/pdf/10.1007/s10754-021-09302-9.pdf [https://perma.cc/95V3-ZLJF] ("The criteria for classifying businesses and their employees into essential and non-essential categories were somewhat arbitrary."); AMS. FOR PROSPERITY FOUND. KAN., KANSAS SHUT DOWN BUSINESSES THAT WERE WILLING AND ABLE TO COMPLY WITH SAFETY GUIDELINES 1, https://mk0xituxemauaaa56cm7.kinstacdn.com/wp-content/uploads/2020/07/2020_AFPF_ShutDownReport.pdf [https://perma.cc/3X69-M43U] ("There appears to be no rhyme or reason to Kansas's designations of essential businesses in this process. This arbitrary and capricious process serves only to pick winners and losers."); Elizabeth Wolstein, *We Now Know New York's Shut Down of "Non-Essential" Businesses Is Unconstitutional*, SCHLAM STONE & DOLAN: BLOG (Oct. 14, 2020), https://www.schlamstone.com/we-now-know-new-yorks-shut-down-of-non-essential-businesses-is-unconstitutional/ [https://perma.cc/M26M-DAQM]; Jeff Jacoby, *Courts Find Pandemic Orders Unlawful in Michigan and Pennsylvania. Will the SJC Do the Same?*, BOSTON GLOBE (Oct. 11, 2020), https://www.bostonglobe.com/2020/10/11/opinion/courts-find-pandemic-orders-unlawful-michigan-pennsylvania-will-sjc-do-same/ [https://perma.cc/9UFC-JRVC]; Andrew Keshner, *Closing Our Business to Stop the Coronavirus Violated Our Employees Rights, Lawsuit Claims*, MARKETWATCH (Mar. 30, 2020), https://www.marketwatch.com/story/closing-our-business-to-stop-the-coronavirus-violated-our-employees-rights-lawsuit-claims-2020-03-30 **[**https://perma.cc/W3NB-G9SB**];** Jacob Sullum, *Americans Are Sick of Arbitrary COVID-19 Restrictions*, REASON (Dec. 23, 2020), https://reason.com/2020/12/23/americans-are-sick-of-arbitrary-covid-19-restrictions/ [https://perma.cc/8D9P-JYSD].

188. *See* Massachusetts Covid-19 Order No. 13 (Mar. 23, 2020), https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download [https://perma.cc/8VQR-SDX7].

189. *See Lewis*, 523 U.S. at 846.

that are arbitrary, but are insufficiently arbitrary to violate due process, may survive review.[190]

b. Constitutionally Arbitrary Actions Are *Extremely* Arbitrary: Rational Basis

Arbitrary interference with property may also survive rational basis review,[191] which is a preferred standard in other circuits.[192] Rational basis review only requires courts to "determine whether the challenged legislation has a legitimate purpose" and "whether the

190. *See* Chee, *supra* note 9, at 577; *see generally* Entergy Ark., Inc. v. Nebraska, 241 F.3d 979, 991 (8th Cir. 2001) ("To assert a substantive due process violation . . . [the challenger] must establish a constitutionally protected property interest and that state officials used their power in *such an arbitrary and oppressive way*[.]" (emphasis added)). Other jurisdictions have upheld similar classifications and orders shuttering some businesses and not others. *See, e.g.*, Tandon v. Newsom, 517 F. Supp. 3d 922, 949–52 (N.D. Cal. 2021); Slidewaters LLC v. Wash. Dep't of Lab. & Indus., No. 2:20-CV-0210-TOR, 2020 WL 3130295, at *4 (E.D. Wash. June 12, 2020); Best Supplement Guide, LLC v. Newsom, No. 2:20-CV-00965-JAM-CKD, 2020 WL 2615022, at *6 (E.D. Cal. May 22, 2020); Six v. Newsom, 462 F. Supp. 3d 1060, 1069–1070 (C.D. Cal. 2020); Open Our Oregon v. Brown, No. 6:20-CV-773-MC, 2020 WL 2542861, at *2 (D. Or. May 19, 2020).

191. One scholar has remarked that "[t]he rational basis test as applied by the Supreme Court is such a permissive level of review that it is effectively not judicial review at all. It permits the most irrational of legislation to become the law of the land, no matter how needless, wasteful, unwise, or improvident it might be." James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty-Year Retrospective*, 55 SAN DIEGO L. REV. 751, 752–54 (2018). Others have also alluded to the permissiveness of rational basis. *See* Aaron Belzer, *Putting the "Review" Back in Rational Basis Review,* 41 W. ST. U. L. REV. 339, 355 (2014); *see generally* Chee, *supra* note 9, at 598–600; Joel Alicea & John D. Ohlendorf, *Against the Tiers of Const. Scrutiny*, NAT'L AFFS. (2019), https://www.nationalaffairs.com/publications/detail/against-the-tiers-of-constitutional-scrutiny [https://perma.cc/54YS-VT86] ("[E]ach step of the scrutiny process is marked by indeterminacy and manipulability.").

192. *See* Slidewaters LLC v. Washington State Dep't of Lab. & Indus., 4 F.4th 747, 758 (9th Cir. 2021) (citing Jackson Water Works, Inc. v. Pub. Utilities Comm'n of State of Cal., 793 F.2d 1090, 1093–94 (9th Cir. 1986)); Hackbelt 27 Partners, L.P. v. City of Coppell, 661 F. App'x 843, 846 (5th Cir. 2016); PBT Real Est., LLC v. Town of Palm Beach, 988 F.3d 1274, 1284 (11th Cir. 2021) (applying rational basis only in suits challenging legislative action); Abdi v. Wray, 942 F.3d 1019, 1027–28 (10th Cir. 2019) (explaining that rational basis is appropriate for analyzing non-executive, legislative action); *see also* Thorpe v. Upper Makefield Twp., 758 F. App'x 258, 261–62 (3d Cir. 2018); *cf.* League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 126–127 (6th Cir. 2020) (applying rational basis in connection with a public health regulation); *see generally* Chee, *supra* note 9, at 598.

challenged . . . [law] promotes that purpose."[193] Rational basis may fail to capture arbitrary action for two interrelated reasons.[194]

i. A Deferential Test

First, rational basis review doctrinally favors the government by forgiving pretext.[195] The government may offer "any valid reason for . . . [its] action[.]"[196] Because the government's claimed objective does not need to be its original or honest[197] objective,[198] government actors may further potentially illegitimate ends that *could* be justified or rationalized *ex post*.[199] Further exacerbating this shortcoming is the impossible evidentiary burden thrust on challengers who seek to invalidate the government's actions.[200] Indeed, "challenger[s] must negative every conceivable justification for . . . [a] challenged law or policy"[201] to demonstrate that the law is arbitrary and violates the Due Process Clause. These structural barriers "ha[ve] essentially made the rational basis test the equivalent to no test at all."[202]

Although local and state governments have acted in good faith when regulating to curb COVID-19's spread and protect the public, "governments" located around the world "have exploited [the]

193. *See Jackson Water Works, Inc.*, 793 F.2d at 1094.

194. *See generally* Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 492 (2011).

195. *See* Steven Menashi & Douglas H. Ginsburg, *Rational Basis with Economic Bite*, 8 N.Y.U. J.L. & LIBERTY 1055, 1059–60 (2014).

196. *See* Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79, 79 (2018); *see also* Randy E. Barnett, *Judicial Engagement Through the Lens of* Lee Optical, 19 GEO. MASON L. REV. 845, 856 (2012); Brendan Beery, *Rational Basis Loses its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal Protection Quiver*, 69 SYR. L. REV. 69, 78–79 (2019); *cf.* Belzer, *supra* note 191, at 355–56.

197. *See* Jackson, *supra* note 194, at 493.

198. *See* Barnett, *supra* note 196, at 856.

199. *See* Menashi & Ginsburg, *supra* note 195, at 1059–60.

200. *See* Beery, *supra* note 196, at 79.

201. *Id.* at 78; *see also* F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313–15 (1993).

202. *See* Jackson, *supra* note 194, at 493.

COVID-19"[203] pandemic to preserve and amass power and authority.[204] Indeed, governments have frequently abused their emergency powers and, in some cases, have enacted arbitrary "lockdown measures [that] have been applied in an openly discriminatory manner to specific segments of the population."[205] Because property interference is one way that self-interested government actors have attempted to preserve and consolidate authority during crises,[206] it is conceivable that a small contingent of government officials may interfere with property to advance ends that

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203. *See* David S. D'Amato, *The Real Threat Posed by COVID-19 Lockdowns*, HILL (Dec. 5, 2020), https://thehill.com/opinion/civil-rights/528892-the-real-threat-posed-by-covid-19-lockdowns [https://perma.cc/PT72-XZAH].

204. *See* Kenneth Roth, *How Authoritarians Are Exploiting the COVID-19 Crisis to Grab Power*, HUM. RTS. WATCH (Apr. 3, 2020), https://www.hrw.org/news/2020/04/03/how-authoritarians-are-exploiting-covid-19-crisis-grab-power [https://perma.cc/2GVT-2JBM]; Eric Boehm, *Rand Paul, Ron Wyden Want to End Endless National Emergencies*, REASON (Feb. 26, 2021), https://reason.com/2021/02/26/rand-paul-ron-wyden-want-to-end-endless-national-emergencies/ [https://perma.cc/JU2P-NXL2]; Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, N.Y. TIMES (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html [https://perma.cc/8MA4-EEVP]; Steven Erlanger, *Poland and Hungary Use Coronavirus to Punish Opposition*, N.Y. TIMES (Apr. 22, 2020), https://www.nytimes.com/2020/04/22/world/europe/poland-hungary-coronavirus.html [https://perma.cc/MR55-333J]; Roger Valdez, *Socialist Grabs for Power and Property in Virus Crisis*, FORBES (Mar. 12, 2020), https://www.forbes.com/sites/rogervaldez/2020/03/12/socialist-grabs-for-power-and-property-in-virus-crisis/?sh=38a100f24df3 [https://perma.cc/6VGQ-MJBW]; *cf.* Emma Green, *The Liberals Who Can't Quit Lockdown*, ATLANTIC (May 4, 2021), https://www.theatlantic.com/politics/archive/2021/05/liberals-covid-19-science-denial-lockdown/618780/ [https://perma.cc/5W95-SHRM] (suggesting that, "[f]or many progressives, extreme vigilance was in part about opposing Donald Trump.").

205. *See* SARAH REPUCCI & AMY SLIPOWITZ, DEMOCRACY UNDER LOCKDOWN 1, 3, 5 (2020), https://freedomhouse.org/sites/default/files/2020-10/COVID-19_Special_Report_Final_.pdf [https://perma.cc/ZE58-BKVT].

206. *See* Robert Henneke, *Government Power Grab Thwarted by 'Unconstitutional' Eviction Moratorium*, TEX. PUB. POL'Y FOUND. (Mar. 23, 2021), https://www.texaspolicy.com/government-power-grab-thwarted-by-unconstitutional-eviction-moratorium/ [https://perma.cc/M35B-QQ6A]; Ethan Yang, *The Constitutional Reckoning of State Lockdown Orders*, AM. INST. ECON. RSCH. (Oct. 7, 2020), https://www.aier.org/article/the-constitutional-reckoning-of-state-lockdown-orders/ [https://perma.cc/A2BF-Y6XW]; MICHAEL A. WEBER ET AL., CONG. RSCH. SERV., GLOBAL DEMOCRACY AND HUMAN RIGHTS IMPACTS OF COVID-19: IN BRIEF 5, 2020; *see generally Abuses of Power Amid Coronavirus*

are entirely impermissible or unrelated to "public health."[207] Rational basis is principally flawed because it permits the government to claim that it is acting in pursuit of valid and compelling public health ends, even if those objectives or ends are pretextual.[208]

When a deferential test is paired with a deferential review, a phenomenon explained in further depth below, an arbitrary regulation—one enacted in furtherance of some "improper" aim or goal or "untethered to any controlling standard[]"[209]—may plausibly survive.

ii. A Deferential Review

If rational basis is rigorously applied, it could conceivably thwart arbitrary action. For example, a court might scrutinize the government's objectives or require the government to "show its work," forcing the government to demonstrate how its means will materially advance its stated purpose. In practice, however, courts may apply rational basis in a highly deferential manner,[210] making it

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Pandemic, PROTECT DEM. (last visited Mar. 27, 2021), https://protectdemocracy.org/project/abuses-of-power-amid-coronavirus/ [https://perma.cc/F862-LDGE]; Ramya Vijaya et al., *Coronavirus Versus Democracy: 5 Countries Where Emergency Powers Risk Abuse*, CONVERSATION (Apr. 6, 2020), https://theconversation.com/coronavirus-versus-democracy-5-countries-where-emergency-powers-risk-abuse-135278 [https://perma.cc/CY8C-TVAL].

207. *See* Peter Suderman, *'Public Health' Has Become a Catchall Excuse for Bad Ideas*, REASON (Feb. 1, 2022), https://reason.com/2022/02/01/public-health-has-become-a-catchall-excuse-for-bad-ideas/ [https://perma.cc/24K2-UXF4]; Jacob Sullum, *Why Didn't COVID-19 Kill the Constitution*, REASON (Sept. 2021), https://reason.com/2021/07/03/why-didnt-covid-19-kill-the-constitution/ [https://perma.cc/LXB7-J5UL] (discussing the extension of eviction moratoria for reasons unrelated to stymying COVID); *see generally* REPUCCI & SLIPOWITZ, *supra* note 205, at 1; Kevin Penton, *NY Firm Sues Cuomo over COVID-19 Closure Orders*, LAW360 (May 14, 2020), https://www.law360.com/newyork/articles/1273623/ny-firm-sues-cuomo-over-covid-19-closure-orders?nl_pk=70bd2684-ae93-4b0e-98b3-b85850047d61 [https://perma.cc/6B6Z-4LTJ]; *Articles of Impeachment Officially Filed Against Ohio Gov. Mike DeWine, Claiming Abuse of Power During Pandemic*, 19 NEWS (Nov. 30, 2020), https://www.cleveland19.com/2020/11/30/articles-impeachment-officially-filed-against-ohio-gov-mike-dewine-claiming-abuse-power-during-pandemic/ [https://perma.cc/BP83-BZT4].

208. *See generally* Jackson, *supra* note 194, at 493; Beery, *supra* note 196, at 78–79.

209. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1441.

210. *See* Belzer, *supra* note 191, at 354–56; Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV.

even more likely that an arbitrary law might survive review.[211] In *FCC v. Beach Communications, Inc.*,[212] the Court stated that rational basis "review is a paradigm of judicial restraint[,]"[213] and made clear that "legislative choice is not subject to courtroom fact-finding and may be based on *rational speculation unsupported by evidence or empirical data*."[214] Even if the government struggles to find reasons for its actions, "court[s] will happily speculate as to what any of . . . [the government's] justifications *might* have been."[215] In other words, "if the state . . . is incapable of making its case, judges must help it do so."[216]

When coupled with an extremely deferential standard, deferential application may permit arbitrary regulations to survive judicial review. Take, for example, two cases arising out of COVID-19 public health orders. In *Bill & Ted's Riviera, Inc. v. Cuomo*, New York wedding venues sought to enjoin New York from enforcing the state's closure order on Equal Protection grounds.[217] New York law permitted restaurants to serve over 170 guests, but specified that wedding venues could only serve fifty or fewer.[218] The U.S. District Court for the Northern District of New York found the governor's classifications non-arbitrary,[219] reasoning, in part, that "New York

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357, 357 (1999); Robert H. Thomas, *Emergencies, Police Power, Commandeering, and Compensation: Essential Readings*, INVERSE CONDEMNATION (Mar. 18, 2020), https://www.inversecondemnation.com/inversecondemnation/2020/03/emergencies-police-power-commandeering-and-compensation-essential-readings.html [https://perma.cc/MB3L-KJXF]; Chee, *supra* note 9, at 598.

211. *See generally* Jackson, *supra* note 194, at 493.

212. 508 U.S. 307 (1993).

213. *Id.* at 314.

214. *Id.* at 315 (emphasis added); *see also* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring); Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 487 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.").

215. Beery, *supra* note 196, at 78–79 (emphasis in original).

216. Andrew Ward, Note, *The Rational-Basis Test Violates Due Process*, 8 N.Y.U. J. L. & LIBERTY 714, 724 (2014).

217. Bill & Ted's Riviera, Inc. v. Cuomo, 494 F. Supp. 3d 238, 242–43 (N.D.N.Y. 2020).

218. *See id.* at 243.

219. *Id.* at 248.

is not required to respond to COVID-19 in any particular way and scientific experts may differ about how best to prevent the transmission of the virus."[220] In a footnote, the court further detailed how:

> New York might react differently and impose different restrictions on social gatherings or on particular industries than other states for various reasons, including that the incidence of the virus may differ from state to state as may the density of population or other circumstances that are particular to some states and not others.[221]

Indeed, the court ironically emphasized that public health officials should be afforded deference during a public health crisis and that their "decisions, unless arbitrary and irrational[,] should not be subject to second guessing by unelected judges who are not accountable to the people and do not have the background, competence, and expertise to assess public health."[222] Finding the challengers unable to demonstrate how the regulation did not satisfy rational basis review, the court declined to award relief.[223]

In *TJM 64, Inc. v. Harris*,[224] the challengers, a cohort of restaurant owners, claimed that a Tennessee county's public health orders mandating that bars and "Limited Service Restaurants" close "for forty-five days" violated their due process rights and effected a *Penn Central* taking.[225] Citing testimony "that limited service restaurants pose[d] a greater risk for the spread of the COVID-19 virus than other restaurants" and "given the deferential review applicable to public health orders[,]" the court declined to entertain the

220. *Id.* at 247 (footnote omitted).

221. *Id.* at 247 n.2.

222. *Id.* at 248.

223. *Id.*

224. 475 F. Supp. 3d 828 (W.D. Tenn. 2020).

225. *See id.* at 832, 834, 837; Shelby County Health Order and Directive No. 8 (July 7, 2020), https://www.shelbytnhealth.com/DocumentCenter/View/1761/Health-Directive-No-8-7-7-20 [https://perma.cc/C6T9-F8YS].

challengers' substantive due process claim.[226] The court also rejected the challengers' allegations that "no scientific studies or data backed Defendants' decisions[,]" explaining that "the Fourteenth Amendment's arbitrary and capricious standard does not require such data-driven, scientifically rigorous decision-making from local officials."[227] Conversely, "rational speculation" was sufficient to pass muster under the Fourteenth Amendment.[228]

Neither the *Riviera* nor *Harris* courts meaningfully evaluated the government's objectives or means. Instead, both courts made clear that they were deferring to governments' public health regimes.[229] Failing to meaningfully inquire into governments' ends or means greatly impaired the courts' ability to snuff out "improper motivations" or determine whether the challenged laws were methodically or deliberately designed.[230] If courts are unwilling to peek behind the curtain, question the governments' motivations, and prod at governments' means, then carelessly and haphazardly crafted regulations and laws may plausibly survive review. Escape devices like "rational speculation"[231] further exacerbate this problem by permitting courts to abstractly explain away potentially arbitrary actions that are, in practice, random or "unsupported[,]"[232] or which do not materially advance the government's stated ends.[233] Thus, both *Harris* and *Riviera* demonstrate how an arbitrary law might plausibly survive rational basis review.[234]

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226. *Harris*, 475 F. Supp. 3d at 835.

227. *Id.* at 836.

228. *Id.*

229. *See id.* at 835–36; Bill & Ted's Riviera, Inc. v. Cuomo, 494 F. Supp. 3d 238, 243–48 (N.D.N.Y. 2020).

230. *See* Teter, *Letting Congress Vote, supra* note 12, at 1441.

231. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

232. *Id*.

233. *See* Teter, *Letting Congress Vote, supra* note 12, at 1441.

234. Whether the underlying regulations in the cases detailed above were, in fact, arbitrary is irrelevant to this analysis. The cases simply demonstrate that courts *cannot* snuff out arbitrariness when they exercise extreme deference. This proposition is further supported by cases in which courts within the same district have treated similar lockdown orders differently, possibly suggesting that varying levels of deference may yield different results. As in *Bill & Ted's Riviera*, *DiMartile v. Cuomo* involved an Equal Protection challenge against state-imposed gathering limitations. *See* DiMartile v.

Friction between trial and appellate courts on similar facts further supports the idea that varying levels of deference may influence courts' ability to effectively snuff out arbitrariness. For example, in *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*,[235] a district judge found Michigan's gym closure order arbitrary, reasoning that "when asked what data, science, or even rationale supports the continued closure of indoor gyms, . . . [the government] presented *nothing* beyond 'trust us, they're still dangerous.'"[236] On appeal, however, the Sixth Circuit reversed, positing that "[t]he idea that heavy breathing and sweating in an enclosed space containing many shared surfaces creates conditions likely to spread the virus is a paradigmatic example of 'rational speculation' that fairly supports the Governor's treatment of indoor fitness facilities[,]" and that imprecision would not prevent the government from satisfying rational basis review.[237] Similar to *Whitmer*, a California

Cuomo, 478 F. Supp. 3d 372, 386–87 (N.D.N.Y. 2020), *order vacated, appeal dismissed*, 834 F. App'x 677 (2d Cir. 2021). Reasoning that New York had "failed to adequately rebut Plaintiffs' argument that a 50-person limit on a social gathering is not consistent with Defendants' allowance of exemptions to the 50-person gathering restriction for activities such as dining at restaurants and participating in graduation ceremonies[,]" the Northern District of New York found the New York law arbitrary. *Id.* at 386–89. Put differently, New York's regulation was arbitrary because it failed to justify how exempting some entities from "gathering restriction[s]" and not others meaningfully advanced its public health goal. *See id.* New York's classification distinguishing wedding venues from restaurants in *Bill & Ted's Riviera* appears no less unwieldy and misguided than New York's gathering limitations highlighted in *DiMartile*. *Compare Bill & Ted's Riviera*, 494 F. Supp. 3d at 243–45 (N.D.N.Y. 2020), *with DiMartile*, 478 F. Supp. 3d at 386–87. Both cases appeared to lack "controlling" principles that might have guided the state's distinctions, yet two courts within the same district found differently as to whether the regulations were arbitrary. *See* Teter, *Letting Congress Vote, supra* note 12, at 1441.

235. 468 F. Supp. 3d 940 (W.D. Mich. 2020), *appeal dismissed*, 843 F. App'x. 707 (6th Cir. 2021).

236. *See id*. at 951.

237. *See* League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 129 (6th Cir. 2020) (quoting *Beach Commc'ns*, 508 U.S. at 315).

Court of Appeal reversed a lower court's finding[238] of arbitrariness,[239] and reasoned, in part, that it was inappropriate "to second-guess public health officials' actions in an 'area[] fraught with medical and scientific uncertainties.'"[240]

In both cases, the appellate courts reversed findings of arbitrariness, in part, on the grounds that governments should be afforded deference.[241] Too much deference, however, might lead courts to look beyond haphazardly constructed laws that crush individual rights and confer no social or public benefit. Because the lower courts in both cases above employed a less deferential review,[242] both cases might suggest that higher levels of judicial deference may stymie findings of arbitrariness.

c. Returning to *Lingle*'s Dangerous Assumption

Due process may plausibly fail, in some instances, to adequately protect against arbitrary interference.[243] This proposition gives context to the jurisprudential assumption that compensable regulatory takings flow from legally permissible regulations.[244] As demonstrated above, a subset of permissible actions may be arbitrary,[245] which not only appears to conflict with the Court's early conceptions of due process, but also elevates just compensation's role in

238. *See* California Restaurant Ass'n, Inc. v. California of Los Angeles Dept. of Pub. Health, No. 20STCP03881, 2020 WL 7356717, at *1 (Cal. Super. Ct. Dec. 08, 2020).

239. *See* Cnty. of Los Angeles Dep't of Pub. Health v. Superior Ct. of Los Angeles Cnty., 275 Cal. Rptr. 3d 752, 765 (Cal. App. 4th 2021).

240. *See id.* (quoting S. Bay Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring)). Notably, the Court of Appeal rejected the trial court's order that Los Angeles County perform a "risk-benefit" analysis. *See id.* at 764–65.

241. *See id.*; League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 814 F. App'x 125, 129 (6th Cir. 2020).

242. *See California Restaurant Ass'n*, 2020 WL 7356717, at *1 (Cal. Super. Ct. Dec. 08, 2020); League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 468 F. Supp. 3d 940, 949–50 (W.D. Mich. 2020).

243. *See* Chee, *supra* note 9, at 577, 590–601.

244. *See* Lingle v. Chevron, 544 U.S. 528, 543 (2005); E. Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring); *id.* at 556–57 (Breyer, J., dissenting); Durden, *supra* note 151, at 68 n.232; Eagle, *supra* note 151, at 980.

245. *Cf.* Chee, *supra* note 9, at 577.

thwarting arbitrary action.[246] However, for reasons described below, the regulatory takings doctrine may excuse compensation for regulatory interference where compensation's protections are needed—when the government claims that it is acting in the name of public health or safety.

C. Arbitrariness & Exceptions to the Compensation Requirement

In the eminent domain context, the government *cannot* excuse itself from compensating owners when it deprives them of property to advance some *affirmative* public health or safety end.[247] Likewise, compensation is usually owed, regardless of motive, when government action effects a *per se* regulatory taking.[248] Because the government is required to compensate owners for physical or *per se* regulatory deprivations, the government must determine whether a deprivation is worth the public expense, which, for reasons articulated in Part I, might guard against unwieldy, inefficient, and arbitrary action.[249] *Lucas*'s facts support this proposition. After the *Lucas* decision rendered South Carolina's deprivation a taking, the governing body "passed a special variance allowing development on [Lucas's land], and they sold it, because, the state concluded it couldn't stand to pay that kind of money for the property."[250] In other words, had South Carolina understood *ex ante* that it was obligated to compensate David Lucas, it (1) might not have deprived Lucas of his property or (2) may have conceived of more precise means to achieve its police power end.[251]

If arbitrary regulations survive due process review, the Takings

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246. *See* Sax, *supra* note 7, at 57–60, 64; Cahoy, *supra* note 7, at 142; *cf.* Ellickson, *supra* note 7, at 420; Eagle, *supra* note 7, at 614.

247. *See* STIFF, *supra* note 45, at 2.

248. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016–18, 1029 (1992); Horne v. Dep't of Agric., 576 U.S. 350, 360–61 (2015).

249. *See* Cahoy, *supra* note 7, at 142; Eisenberg, *supra* note 7, at 673; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420.

250. *See State Approaches to Protecting Private Property Rights: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 105th Cong. 33 (1999) (statement of Chip Campsen).

251. *See generally id.*

Clause may also fail to thwart arbitrary interference in the partial regulatory takings context when the government claims that it has acted pursuant to its police powers.[252] This Note now turns to analyze this proposition.

a. The Police Power Justification & Arbitrariness

As a general principle, the state may physically deprive someone of their property without compensating them when it abates a nuisance.[253] Courts have long upheld nuisance abatement as a valid police power exercise.[254] However, "modern [regulatory takings] jurisprudence authorizes [and excuses compensation for] police power land use regulations that preserve or protect the public health, safety, morals, or welfare[.]"[255] Courts have, both explicitly and inexplicitly, consistently invoked this justification to outright excuse compensation in regulatory takings actions arising out of COVID-19 public health orders or to further justify findings that

252. As articulated above, this argument is derivative of scholars' arguments detailing how compensation can deter arbitrary deprivations. If compensation is excused, then the clause cannot serve out its anti-arbitrariness functionality. *See generally* Cahoy, *supra* note 7, at 142; Eisenberg, *supra* note 7, at 673–74; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420; Eagle, *supra* note 7, at 613–14.

253. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

254. *See* Todd D. Brody, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After Lucas*, 4 FORDHAM ENV'T L. REV. 287, 287–88, 294–97 (1993); Charles H. Clarke, *Harmful Use and the Takings Clause in the Eye of the Beholder:* Lucas v. South Carolina Coastal Council, 41 CLEV. ST. L. REV. 31, 40–44 (1993); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 543–45 (2004).

255. *Id.* at 544–45; *see* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978); *see also* Lech v. Jackson, 791 F. App'x 711, 719 (10th Cir. 2019); Am. Sav. & Loan Ass'n v. Marin Cty., 653 F.2d 364, 368 (9th Cir. 1981); Naegele Outdoor Advert., Inc. v. City of Durham, 803 F. Supp. 1068, 1080 (M.D.N.C. 1992); Pharm. Care Mgmt. Ass'n v. Rowe, No. CIV. 03-153-B-H, 2005 WL 757608, at *18 (D. Me. Feb. 2, 2005); Britton v. Keller, No. 119CV01113KWRJHR, 2020 WL 1889017, at *3 (D.N.M. Apr. 16, 2020); Tirolerland, Inc. v. Lake Placid 1980 Olympic Games, Inc., 592 F. Supp. 304, 316 (N.D.N.Y. 1984); Holliday Amusement Co. of Charleston, Inc. v. South Carolina, No. 2:01 CV 210 CWH, 2006 WL 1285105, at *3 (D.S.C. May 5, 2006).

interference is not compensable.[256] If substantive due process fails to adequately protect owners from arbitrary action, then excusing compensation may fail to prevent the government from arbitrarily interfering with property.[257]

i. Arbitrary Ends & Means

Excusing compensation for police power exercises provides the

256. *See, e.g.*, Case v. Ivey, No. 2:20-CV-777-WKW, 2021 WL 2210589, at *23 (M.D. Ala. June 1, 2021) ("Ervin's and Farr's takings claim fails for another independent reason—the March 27 order represents a valid exercise of Alabama's police power."); Bojicic v. DeWine, No. 3:21-CV-00630-JGC, 2021 WL 4977018, at *13 (N.D. Ohio Oct. 27, 2021) ("Plaintiffs' takings claim fails on th[e police power] basis alone."); KI Fla. Properties, Inc. v. Walton Cty., No. 3:20CV5358-RH-HTC, 2021 WL 5456668, at *5 (N.D. Fla. Oct. 15, 2021) ("[T]he government was acting pursuant to its police power in a public-health emergency."); Dixon v. De Blasio, No. 21-CV-5090 (BMC), 2021 WL 4750187, at *12 (E.D.N.Y. Oct. 12, 2021); Abshire v. Newsom, No. 221CV00198JAMKJN, 2021 WL 3418678, at *7 (E.D. Cal. Aug. 5, 2021) ("[T]hat the government forbade certain property uses it determined to be injurious to public health does not constitute a taking."); Bimber's Delwood, Inc. v. James, 496 F. Supp. 3d 760, 784 (W.D.N.Y. 2020) ("[T]he character of the government action here is a temporary exercise of the police power to protect the health and safety of the community, which weighs against a taking."); Golden Glow Tanning Salon, Inc. v. City of Columbus, Mississippi, No. 1:20-CV-103-GHD-DAS, 2021 WL 5225617, at *4 (N.D. Miss. Nov. 9, 2021); Willowbrook Apartment Assocs., LLC v. Mayor & City Council of Baltimore, No. 20-CV-01818-SAG, 2021 WL 4441192, at *7 (D. Md. Sept. 27, 2021) ("The Supreme Court's precedents require substantial deference to government actions taken to protect the public."); Michael Amato v. Elicker, 534 F. Supp. 3d 196, 214 (D. Conn. 2021); Skatemore, Inc. v. Whitmer, No. 1:21-CV-66, 2021 WL 3930808, at *4 (W.D. Mich. Sept. 2, 2021); Luke's Catering Serv., LLC v. Cuomo, 485 F. Supp. 3d 369, 386 (W.D.N.Y. 2020); TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 839 (W.D. Tenn. 2020); Blackburn v. Dare Cnty., 486 F. Supp. 3d 988, 999 (E.D.N.C. 2020) ("Courts have long recognized that regulations that protect public health or prevent the spread of disease are not of such a character as to work a taking."); PCG-SP Venture I LLC v. Newsom, No. EDCV201138JGBKKX, 2020 WL 4344631, at *10 (C.D. Cal. June 23, 2020); Flint v. Cty. of Kauai, No. CV 19-00521 JMS-WRP, 2021 WL 640903, at *8 (D. Haw. Feb. 18, 2021); Our Wicked Lady LLC v. Cuomo, No. 21CV0165 (DLC), 2021 WL 915033, at *6 (S.D.N.Y. Mar. 9, 2021); Northland Baptist Church of St. Paul, Minnesota v. Walz, No. 20-CV-1100 (WMW/BRT), 2021 WL 1195821, at *16 (D. Minn. Mar. 30, 2021); Oregon Rest. & Lodging Ass'n v. Brown, No. 3:20-CV-02017-YY, 2020 WL 6905319, at *6 (D. Or. Nov. 24, 2020).

257. Again, this idea draws from the presupposition that compensation may deter arbitrary action. *See generally* Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 270.

government little incentive to craft regulations that address its desired ends without arbitrarily interfering with private property.[258] Consider two cases arising out of pandemic-related regulations.

Turning back to *TJM 64, Inc. v. Harris*, the U.S. District Court for the Western District of Tennessee held that *Penn Central*'s third prong — "the character of the governmental action"[259] — weighed heavily against a finding that the government's closure order amounted to a taking because the state had acted under its police power,[260] notwithstanding the order's potentially "significant, detrimental impact on the Plaintiffs' businesses . . . . [that] jeopardiz[ed] the[ir] short-term and long-term survival[.]"[261]

If the government is excused from compensating owners for substantial police-power deprivations, a government acting under arbitrary auspices may illegitimately interfere with property because its actions are costless.[262] Couched in a deterrence framework, if the government operates in a random, haphazard, or "unbridled"[263] fashion, "untethered to any controlling standards[,]"[264] the police power justification may underdeter future "unbridled"[265] action by eviscerating an important barrier (i.e. compensation) that may have otherwise incentivized deliberate and methodical behavior.[266] As demonstrated above, substantive due process protections woefully lack any meaningful review of the government's ends, especially in cases involving property interests.[267] Thus, if the government is ex-

258. *See generally* Eagle, *supra* note 7, at 614; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420.

259. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

260. *See* TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 839 (W.D. Tenn. 2020).

261. *Id*. at 838.

262. *See generally* Cahoy, *supra* note 7, at 142; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420.

263. Teter, *Letting Congress Vote*, *supra* note 12, at 1479.

264. *Id.* at 1441.

265. *Id.* at 1479.

266. *See* Cahoy, *supra* note 7, at 142; Eisenberg, *supra* note 7, at 673; Eagle, *supra* note 7, at 613; Grossman, *supra* note 12; Sax, *supra* note 7, at 57–60; Ellickson, *supra* note 7, at 420.

267. *See* Chee, *supra* note 9, at 580–82, 590–601.

cused from compensating owners for regulatory property deprivations, *Harris* illustrates how the doctrine may permit the government to significantly interfere with property without worrying whether its actions *actually* advance its ends. In other words, the government is inadequately incentivized to *not* indiscriminately or haphazardly interfere with private property.

A different illustration is useful. In *PCG-SP Venture I LLC v. Newsom*,[268] the challenger, a hotel owner, contested multiple California public health orders that "forced [the owner] to close its Hotel, cease operations, and terminate a majority of its employees[.]"[269] The district court found the public health orders constitutionally compliant, in part, because they advanced the government's public health ends by "requir[ing] residents of California to stay home and businesses to shutter to limit the public's movement and slow transmission of COVID-19."[270] In evaluating the challenger's *Penn Central* claim, the Court articulated that "[t]o the extent Plaintiff could provide evidence of lost profits or interference with investment-backed expectations, the character of the government action at issue would likely outweigh either factor."[271] Reasoning that the "[s]tate [wa]s entitled to prioritize the health of the public over the property rights of the individual[,]" the court held, among other grounds, that the challenger lacked a viable claim for compensation.[272]

Notably, the court explained that the regulations "[we]re strategically designed to progressively reopen low-risk businesses and reallow low-risk activities — businesses and activities that, through increased sanitization measures and limited human contact, can resume without overwhelming the State's healthcare system."[273] The closest the court came to explaining how the governments' sweeping measures—which included shuttering the hotel, closing "certain areas of . . . [the] Hotel[,]" and limiting the hotel's capacity—

268. No. EDCV201138JGBKKX, 2020 WL 4344631 (C.D. Cal. June 23, 2020).
269. *Id.* at *3.
270. *Id.* at *5.
271. *Id.* at *10.
272. *Id.*
273. *Id.* at *5.

were more than theoretically connected to the governments' public health ends, even several months after California had passed its first order affecting the hotel, was a passage speaking generally about the public health risks inherent in operating a hotel.[274] Were the regulations haphazardly created and "untethered to . . . controlling standards[,]"[275] or were they carefully constructed? This Note acknowledges that it is entirely plausible that the regulations *were* carefully crafted; however, if a careful ends-means inquiry is not performed, and the government is not required to compensate owners, it need not worry about *how* it makes decisions. Indeed, the government can shield haphazard actions by claiming that those decisions were made in the name of public health or safety. As suggested by Locke, arbitrary interference with private property rights may subvert a vital reason why people agree to be governed—to seek out stronger property protection.[276] Thus, when government actions impact private property, *how* governments make decisions is tremendously important.

Relatedly, both *Harris* and *PCG-SP Venture I LLC* raise the question: does the government pursue the most or least restrictive option if it cannot know whether either will materially advance its stated health or safety end? The regulatory takings and substantive due process doctrines both weakly incentivize principled decision-making. When the government is presented with the most or least extreme options but cannot know whether either will advance its objective, then its decision to pursue one and not the other is an unprincipled guess.[277] In the context of property deprivations, neither the regulatory takings nor substantive due process doctrines incentivize *inaction* or principled *action* in situations in which the government is poised to make an arbitrary decision with potentially great cost to society and no tangible benefit. Because the po-

274. *See id.* at *2–4, *5, *7.

275. *See* Teter, *Letting Congress Vote*, *supra* note 12, at 1441.

276. *See* LOCKE, *supra* note 18, at 164–66.

277. *See generally* 4 WILLIAM BLACKSTONE, COMMENTARIES *350 (remarking that "all arbitrary powers, well executed, are the most *convenient*[.]") (emphasis in original).

lice power may excuse the government from paying for its interference and, thus, internalizing the costs associated with its actions, the government need not consider alternatives and, instead, can wield its regulatory power haphazardly, carelessly, maliciously, and for no good reason at all.

ii. Reciprocity of Advantage & Public Benefit Analyses: Doctrinal Shields?

Courts have employed various forms of "reciprocity of advantage" to determine the validity of police power deprivations.[278] Namely, reciprocity of advantage has been employed to help courts "mak[e] the critical distinction between exercises of the eminent domain power and exercises of the police power."[279] In *Penn Central*, Justice Brennan invoked notions of reciprocity when contending that "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good" is unlikely compensable under the Takings Clause.[280]

Concepts of reciprocity might lead some to conclude that property is adequately protected from arbitrary interference because reciprocity ensures that the public, including the owner, benefits from the deprivation and that the government has not arbitrarily disadvantaged any group of owners to advance *some* interest.[281] However, this standard, like rational basis review, is extraordinarily permissive and deferential, which might permit courts to excuse otherwise arbitrary actions.[282] Indeed, the modern "rule" articulated in *Penn Central* "validate[s] automatically *any alleged* police power action which confers a substantial benefit upon society at

278. *See* Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1447, 1489, 1511–12, 1520–21 (1997).

279. *See id.* at 1521.

280. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Applying reciprocity principles, Justice Brennan ultimately rejected the challenger's argument that the benefits and burdens imposed on them were discriminatory and lopsided. *See id.* at 133–35.

281. *See* Oswald, *supra* note 278, at 1521–23.

282. *Cf. id.* at 1489, 1512, 1522.

large[,]" and allows "the state to achieve through a back-door exercise of the police power what it could not accomplish directly[.]"[283] Thus, when courts have invoked concepts of reciprocity to justify burdensome public health orders,[284] the test has not provided any greater protection against arbitrary deprivations than rational basis review, which, as demonstrated above, provides little protection.

For example, in *Daugherty Speedway v. Freeland*,[285] the district court explained in a sweeping manner that the Indiana governor's executive order forcing the challenger to shutter his speedway "benefitted the general public, who would be at greater risk of contracting COVID-19 if congregating together in close proximity."[286] The court further reasoned that the Indiana Governor's

> directives were intended to slow the spread of this deadly disease and protect citizens. Benton County followed state guidelines and attempted to shift the *benefits and burdens of economic life* in an effort to keep citizens safe. Given the gravity of the COVID-19 crisis, the Governor's response to it was both measured and entirely appropriate.[287]

The court declined to indicate how the government's actions were precisely measured or supported by data or science.[288] Furthermore, the court failed to explain, just as Justice Rehnquist had explained in his *Penn Central* dissent,[289] how *all* property owners were subjected to similar restrictions and how the racetrack owner was

283. *Id.* at 1522–23 (emphasis added).

284. *See, e.g.*, Michael Amato v. Elicker, No. 3:20CV464 (MPS), 2021 WL 1430918, at *11 (D. Conn. Apr. 15, 2021); Our Wicked Lady LLC v. Cuomo, No. 21CV0165 (DLC), 2021 WL 915033, at *6 (S.D.N.Y. Mar. 9, 2021); TJM 64, Inc. v. Shelby Cty. Mayor, No. 220CV02498JPMTMP, 2021 WL 863202, at *5 (W.D. Tenn. Mar. 8, 2021); Bimber's Delwood, Inc. v. James, No. 20-CV-1043S, 2020 WL 6158612, at *17 (W.D.N.Y. Oct. 21, 2020); Lebanon Valley Auto Racing Corp. v. Cuomo, 478 F. Supp. 3d 389, 402 (N.D.N.Y. 2020); Blackburn v. Dare Cty., 486 F. Supp. 3d 988, 999 (E.D.N.C. 2020); Northland Baptist Church of St. Paul, Minnesota v. Walz, No. 20-CV-1100 (WMW/BRT), 2021 WL 1195821, at *16 (D. Minn. Mar. 30, 2021).

285. No. 4:20-CV-36-PPS, 2021 WL 633106 (N.D. Ind. Feb. 17, 2021).

286. *Id.* at *5.

287. *See id.* at *4 (emphasis added).

288. *Id.* at *2–4.

289. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting).

not individually disadvantaged to advance the government's public health goal.[290] It was enough for the court to inexplicitly speculate that the government's regulation could theoretically benefit society,[291] which is no less deferential than the "rational speculation"[292] standard employed in the rational basis context.[293] As stated above, if the government and courts can rationalize away actions and do not meaningfully review the government's means or ends, "improper[ly] motivat[ed]" and "untethered"[294] actions will survive review, thus permitting the government to gratuitously interfere with property at little cost. Despite this standard's shortcomings, courts have found in the government's favor when employing forms of reciprocity in the context of COVID-19 public health orders.[295] Because reciprocity is as flawed as rational basis review, reciprocity may not fully protect property from arbitrary interference.[296]

Tying these points together, consider *Heights Apartments, LLC v. Walz*.[297] *Heights Apartments* involved a challenge by Minnesota landlords against the state for ordering eviction moratoria that stripped landlords of "only one stick in the[ir] . . . bundle of property rights—the ability to enforce their rights under the lease through lease termination or eviction."[298] In declining the challengers' *Penn Central* takings claim, the district court reasoned, in part, that because moratoria "[we]re precisely the kind of public program benefitting the common good that is not a compensable taking[,]" *Penn Central*'s third prong weighed against compensation.[299]

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290. *Daugherty Speedway*, 2021 WL 633106, at *4.

291. *See id.*

292. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

293. *See supra* notes 191–242 and accompanying text.

294. Teter, *Letting Congress Vote, supra* note 12, at 1441.

295. *See, e.g.*, Lebanon Valley Auto Racing Corp. v. Cuomo, 478 F. Supp. 3d 389, 402 (N.D.N.Y. 2020); Heights Apartments, LLC v. Walz, No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818, at *16 (D. Minn. Dec. 31, 2020); Blackburn v. Dare Cty., No. 2:20-CV-27-FL, 2020 WL 5535530, at *7 (E.D.N.C. Sept. 15, 2020).

296. *See also* Oswald, *supra* note 278, at 1452.

297. No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818 (D. Minn. Dec. 31, 2020).

298. *Id.* at *16.

299. *Id.*

However, the court failed to make explicit: (1) how the benefits landlords may have received from moratoria were, in fact, reciprocal; and (2) why moratoria did not lopsidedly impose burdens on landlords.[300] The court's analysis illustrates that the reciprocity standard leaves much to be desired as a doctrinal shield. How much should society theoretically benefit for genuine reciprocity? At what point are costs and benefits at equipoise? How can courts possibly quantify or operationalize a benefit to society?

The reality is that the reciprocity standard offers no greater protection than does rational basis review. Thus, the reciprocity standard will inadequately screen for arbitrary action because the standard permits courts to rationalize away what might otherwise be illegitimate actions, and excuses deprivations as long as the government appears to be acting in pursuit of valid public health ends.[301] In other words, if an arbitrary law survives a substantive due process challenge, regulatory takings jurisprudence may fail to screen for arbitrariness by permitting courts to employ deferential devices that, as demonstrated in above, may ineffectively screen for arbitrary actions.

iii. Partial Deprivations & Arbitrariness

During the COVID-19 pandemic, courts have frequently suggested that some interference is too minor to warrant compensation.[302] However, the doctrine permits the government to *significantly* interfere with property without compensating owners.[303] For

300. *See id.* at *15–16.

301. *See* Oswald, *supra* note 278, at 1452, 1521–22.

302. *See, e.g.*, Northland Baptist Church of St. Paul, Minnesota v. Walz, No. 20-CV-1100 (WMW/BRT), 2021 WL 1195821, at *15 (D. Minn. Mar. 30, 2021); Heights Apartments, LLC v. Walz, No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818, at *16 (D. Minn. Dec. 31, 2020); Flint v. Cty. of Kauai, No. CV 19-00521 JMS-WRP, 2021 WL 640903, at *6 (D. Haw. Feb. 18, 2021); Baptiste v. Kennealy, 490 F. Supp. 3d 353, 388 (D. Mass. 2020); Peinhopf v. Guerrero, No. CV 20-00029, 2021 WL 218721, at *7 (D. Guam Jan. 21, 2021); Michael Amato v. Elicker, No. 3:20CV464 (MPS), 2021 WL 1430918, at *10 (D. Conn. Apr. 15, 2021); Excel Fitness Fair Oaks, LLC v. Newsom, No. 220CV02153JAMCKD, 2021 WL 795670, at *5 (E.D. Cal. Mar. 2, 2021); *see generally* Daugherty Speedway, Inc. v. Freeland, No. 4:20-CV-36-PPS, 2021 WL 633106, at *3 (N.D. Ind. Feb. 17, 2021).

303. *See* 335-7 LLC v. City of New York, No. 20 CIV. 1053 (ER), 2021 WL 860153, at *12 (S.D.N.Y. Mar. 8, 2021).

example, the Federal Circuit has declined to find a taking when regulations halve property values.[304] The Ninth Circuit has applied a more stringent standard, noting in *Colony Cove Properties, LLC v. City of Carson*[305] that "a diminution in property value . . . ranging from 75% to 92.5% does not constitute a taking."[306] The government can also deprive an owner of "a property's most beneficial use"[307] or destroy at least "one 'strand' of the [ownership] bundle" without compensating owners.[308] Finally, the government can temporarily strip an owner of a portion of his property rights without compensating him, as long as the property "retains [*some*] value."[309]

Excusing the government from compensating owners has similar implications as those explained above. If deprivations are considered *de minimis* and non-compensable, the government has little reason to carefully craft its means to not needlessly or arbitrarily interfere with property. Consider *Heights Apartments*[310] and *Peinhopf v. Guerrero*.[311] In *Heights Apartments*, the District of Minnesota declined the challengers' regulatory takings claim, in part because the challengers retained other rights in their ownership "bundles[.]"[312] Similarly, in *Guerrero*, the District of Guam found that "[t]he economic impact of the government's action [taken to reduce the spread of COVID-19] appear[ed] to have only prevented the Plaintiff from operating his bar or tavern," and thus "only interfere[d] with a 'single strand' of the property rights he possess in his leasehold interest."[313] If arbitrary regulations survive due process challenges, *Heights Apartments* and *Guerrero* demonstrate that existing doctrine may fail, in some circumstances, to secondarily deter

304. *See* CCA Assocs. v. United States, 667 F.3d 1239, 1246 (Fed. Cir. 2011).

305. 888 F.3d 445 (9th Cir. 2018).

306. *Id.* at 451.

307. Maritrans Inc. v. United States, 342 F.3d 1344, 1354 (Fed. Cir. 2003).

308. Andrus v. Allard, 444 U.S. 51, 66 (1979), *quoted in Maritrans Inc.*, 342 F.3d at 1354.

309. Daniel L. Siegel, *The Impact of* Tahoe-Sierra *on Temporary Takings Law*, 23 UCLA J. ENV'T L. & POL'Y 273, 286 (2005).

310. No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818 (D. Minn. Dec. 31, 2020)

311. No. CV 20-00029, 2021 WL 218721 (D. Guam Jan. 21, 2021).

312. *Heights Apartments*, 2020 WL 7828818, at *16.

313. *See Guerrero*, 2021 WL 218721, at *7.

unwieldy or arbitrary interference principally because a partial deprivation may be non-compensable, weakly incentivizing non-interference.

D. Permissibly Arbitrary Property Deprivations

This section began by proposing that due process protections may fail to thwart arbitrary action, especially in cases involving property rights.[314] If due process fails to pinpoint arbitrariness, regulatory takings may also fail to deter arbitrary laws when the doctrine excuses compensation.[315] Because both safeguards may simultaneously fail to protect property from arbitrary governmental interference, this Note suggests that courts and our Republic may constitutionally tolerate arbitrary property deprivations.[316]

This phenomenon is highly problematic for two interrelated reasons. First, if private property is essential for a liberal and free society as suggested by some Founders,[317] then failing to protect it may inhibit self-governance and democracy in the manner envisioned by some Founders.[318] Second, arbitrary and ad-hoc rulemaking is inherently subversive to the rule of law.[319] Thus, arbitrary laws that interfere with property may subvert liberal democracy.

III. DETERRING ARBITRARY PROPERTY INTERFERENCE

To incentivize lawful behavior, this Note suggests that states pass laws that resemble the Texas Private Real Property Rights Preservation Act, which mandates compensation, in part, for regulatory deprivations that produce a value diminution exceeding twenty-

314. *See* Chee, *supra* note 9, at 577, 590.

315. *See generally* Cahoy, *supra* note 7, at 142; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420.

316. *Cf.* Chee, *supra* note 9, at 577.

317. *See* LARKIN, *supra* note 20, at 3–6; Brooks, *supra* note 19, at 64–65; *see generally* Eagle, *supra* note 7, at 613–14; Grossman, *supra* note 12.

318. *See* ADAMS, *supra* note 23; LARKIN, *supra* note 20, at 5; THE FEDERALIST NO. 54 (Alexander Hamilton or James Madison); *see generally State Approaches to Protecting Private Property Rights: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 105th Cong. 119 (1999) (statement of Nancie G. Marzulla).

319. *See* STARR, *supra* note 12, at 15–17, 21; *see also* Waldron, *supra* note 12; Teter, *Letting Congress* Vote, *supra* note 12, at 1442–43.

five percent.[320] Making the government liable for deprivations that exceed a pre-set threshold will generate deterrence incentives that may coerce lawful behavior.[321] This solution addresses concerns that increased takings liability may stifle action[322] by providing a narrow exception to the compensation requirement for government actions that are necessary to affirmatively address public health and safety issues[323] and by permitting the government to seek a limited period of immunity from the law's requirements under exigent circumstances. By adopting laws similar to the Texas Act, this Note contends that legislatures may guard against arbitrary deprivations.

A. Coercing Lawful Behavior

Tortious, constitutional harms may be actionable and compensable under 42 U.S.C. § 1983.[324] Section 1983's deterrence functionality[325] is simple. When courts make the government pay for its violations, the government internalizes costs associated with its unlawful actions "and modif[ies] . . . [its] behavior accordingly."[326] The Takings Clause's deterrence functionality is perhaps even sim-

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320. *See* TEX. GOV'T CODE ANN. § 2007.002 (B)(ii) (Westlaw current through the 2021 Reg. and Second Called Sess.). If compensation drives the Takings Clause's anti-arbitrariness functionality, then any remedy must provide compensation for deprivations. This idea was inspired by authors who have commented on the Takings Clause's anti-arbitrariness functionality. *See generally* Cahoy, *supra* note 7, at 142; Sax, *supra* note 7, at 64; Ellickson, *supra* note 7, at 420.

321. *See generally* Michael L. Wells, *Some Objections to Strict Liability for Constitutional Torts*, 55 GA. L. REV. 1277, 1289–91 (2021).

322. *Cf.* Grimes, *supra* note 17, at 598–99.

323. *See* TEX. GOV'T CODE ANN. § 2007.003(b)(13) (Westlaw current through the 2021 Reg. and Second Called Sess.).

324. *See* Nader James Khorassani, *Must Substantive Due Process Land Use Claims Be So "Exhaust"ing?*, 81 FORDHAM L. REV. 409, 415 (2013); Thadd J. Llaurado, *The Actionability Under Section 1983 of a Negligent Deprivation of a Liberty Interest in Light of Daniels and Davidson*, 69 MARQ. L. REV. 599, 623 (1986); Mitchell J. Edlund, *In the Heat of the Chase: Determining Substantive Due Process Violations Within the Framework of Police Pursuits When an Innocent Bystander Is Injured*, 30 VAL. U. L. REV. 161, 169 n.38 (1995).

325. *See* Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877, 917–18 (2011).

326. *See generally* Wells, *supra* note 321, at 1290.

pler than that of Section 1983 liability. The Takings Clause essentially makes the government *strictly* liable for its deprivations.[327] If the government deprives, it usually pays, no matter how inconsequential or egregious the deprivation.[328] Because strict liability increases costs and incentivizes inaction,[329] mandated compensation for *all* deprivations may guard against unwieldy, inefficient, and arbitrary ones by making interference expensive, forcing the government to be decisive about when to interfere with property.[330] By forcing the government to determine if its ends are important enough to justify its costly means, this model may incentivize legitimate interference.[331]

B. A Texas Model

Some states have adopted proactive property rights legislation that restores the Takings Clause's strict liability functionality in the regulatory takings context.[332] Some laws require the government to compensate property owners when a regulation causes a diminution in property value that meets or exceeds a legislatively calibrated threshold.[333] This Note urges states to follow Texas' approach because it reconciles and balances governmental need with a liberal democratic interest in keeping arbitrary interference at bay.

Regulatory Strict Liability. First, governments should implement laws that make the government pay for their deprivations if their regulations produce property value losses that meet or exceed a

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327. *See* John Martinez, *A Proposal for Establishing Specialized Federal and State "Takings Courts"*, 61 ME. L. REV. 467, 473 (2009).

328. *See id.*

329. Wells, *supra* note 321, at 1303.

330. *See* Eisenberg, *supra* note 7, at 673; Sax, *supra* note 7, at 64; Cahoy, *supra* note 7, at 142.

331. *See* Alex Potapov, *Making Regulatory Takings Reform Work: The Lessons of Oregon's Measure 37*, 39 ENV'T. L. INST. 10516, 10523–24 (2009); Grossman, *supra* note 12; Ellickson, *supra* note 7, at 420.

332. *See* Martinez, *supra* note 327, at 473.

333. *See* Oswald, *supra* note 15, at 540; *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 105th Cong. 106 (1999) (statement of Harvey M. Jacobs).

legislatively calibrated threshold.[334] The Texas Act defines a "Taking[,]" in relevant part, as "a governmental action that" results in "a reduction of at least *25 percent in the market value* of the affected private real property[.]"[335] Texas' low takings threshold is designed to "deter[] . . . local government regulations that would damage the value of someone's property[,]"[336] and may, if properly calibrated, "guard against the ability of local governments to arbitrarily devalue a citizen's private property."[337] In other words, by assuming the validity of the economic theory underlying strict liability, the Texas Act and like diminution-in-value laws may deter arbitrary deprivations by forcing the government to carefully consider costs, thus incentivizing precision.[338]

Limited Police Power Exception. Governments enacting a Texas-style takings law should include a narrow police power exception.[339] The Act preemptively addresses potential concerns that mandated compensation may impede legitimate public health and safety efforts.[340] For example, the Act excuses compensation, in part, when property is deprived through "lawful forfeiture[s] or seizure[s]"[341] or nuisance abatement,[342] or when property is taken to

334. *See* TEX. GOV'T CODE ANN. § 2007.002(B)(ii) (Westlaw current through the 2021 Reg. and Second Called Sess.).

335. *Id.*

336. TEX. PUB. POL'Y FOUND., 2017-18 LEGISLATURE'S GUIDE TO THE ISSUES 21 (2017-2018), https://www.texaspolicy.com/wp-content/uploads/2018/08/2017-Special-Session-Lege-Guide-2-1.pdf [https://perma.cc/4HDH-GUVP].

337. Brennan et al., *supra* note 17, at 6.

338. *See* Grimes, *supra* note 17, at 597; *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 105th Cong. 129 (1999) (statement of Nancie G. Marzulla); FISCHEL, *supra* note 17, at 96–97; *State Approaches to Protecting Private Property Rights: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 105th Cong. 22 (1999) (statement of Dean Saunders); *cf.* Potapov, *supra* note 331, at 10523.

339. *See* TEX. GOV'T CODE ANN. § 2007.003(b)(13) (Westlaw current through the 2021 Reg. and Second Called Sess.).

340. *See generally* Oswald, *supra* note 15, at 547.

341. TEX. GOV'T CODE ANN. § 2007.003(b)(2) (Westlaw current through the 2021 Reg. and Second Called Sess.).

342. TEX. GOV'T CODE ANN. § 2007.003(b)(6) (Westlaw current through the 2021 Reg. and Second Called Sess.).

"prevent a grave and immediate threat to life or property[.]"[343] Furthermore, the government can avoid compensation liability for non-nuisance deprivations that are:

> (A) "taken in response to . . . real and substantial threat[s] to public health and safety;"
>
> (B) "designed to significantly advance . . . health and safety . . . and"
>
> (C) "do[] not impose a greater burden than is necessary to achieve the health and safety purpose[.]"[344]

By requiring the government to demonstrate that it is acting in furtherance of an important police power objective, this solution patches a major doctrinal loophole;[345] namely, as argued in Part II, that the government need only show that its regulation is *theoretically* connected to its ends or objectives.[346] Thus, the Texas Act raises the bar and requires the government to proffer additional evidence that its regulation will advance its public health or safety goal, thereby patching the rational basis loophole.

Furthermore, by allowing the government to avoid takings liability under limited circumstances, this solution proactively addresses overdeterrence concerns. The Texas Act permits the government to regulate and interfere with property, as long as the government can demonstrate that it is acting in furtherance of a legitimate public or safety goal.[347] Thus, instead of imposing an absolute strict liability regime, which may incentivize less interference in situations in which regulation may be beneficial, the solution detailed above simply requires more from the government before excusing it from

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343. TEX. GOV'T CODE ANN. § 2007.003(b)(7) (Westlaw current through the 2021 Reg. and Second Called Sess.).

344. TEX. GOV'T CODE ANN. § 2007.003(b)(13)(A)–(C) (Westlaw current through the 2021 Reg. and Second Called Sess.).

345. *See generally* Chee, *supra* note 9, at 604 (recommending a due process analysis with greater scrutiny).

346. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993).

347. *See* TEX. GOV'T CODE ANN. § 2007.003(b)(13)(A)–(C) (Westlaw current through the 2021 Reg. and Second Called Sess.).

liability. Therefore, the solution may permit the government to address important public health or safety ends without fearing that it will face onerous liability for regulatory deprivations.

Immunity. To anticipatorily address concerns that the law may stifle government action in situations in which inaction may be catastrophic, this Note also proposes that a takings law include a provision permitting governments to seek immunity from the law's stringent requirements for a fixed period of time, which would allow governments to collect enough information to meet the statute's requirements. To seek immunity from the statute, the law would require government actors to demonstrate: (1) that exigent circumstances exist; (2) that such circumstances necessitate government action to avoid catastrophe; and (3) that the government actor possesses such limited information that would prevent it from carrying out its duty to the public without incurring potentially ruinous takings liability.

Under what circumstances might the government satisfy the immunity exception detailed above? Although the test is inherently fact-specific, a global pandemic would clearly satisfy all three prongs. In a short period of time, governments at all levels were tasked with determining how best to stymie COVID-19's spread.[348] Absent government intervention, models projected tens of millions of deaths and billions of cases worldwide.[349] Therefore, exigent circumstances existed that necessitated government action to avoid catastrophe. Governments also initially possessed limited information about the virus' transmission and potential health effects,[350]

348. *See* Nick Schwellenbach, *The First 100 Days of the Government's COVID-19 Response*, POGO (May 6, 2020), https://www.pogo.org/analysis/2020/05/the-first-100-days-of-the-u-s-governments-covid-19-response/ [https://perma.cc/YV2K-FHVW].

349. *See* Isaac Scher, *Without Any Interventions Like Social Distancing, One Model Predicts the Coronavirus Could Have Killed 40 Million People This Year*, BUS. INSIDER (Mar. 27, 2020), https://www.businessinsider.com/covid19-model-predicts-40-million-people-could-die-without-interventions-2020-3 [https://perma.cc/P4SJ-Y2G4].

350. *See* Anne Schuchat, *Public Health Response to the Initiation and Spread of Pandemic COVID-19 in the United States*, CDC (May 8, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e2.htm [https://perma.cc/N4NW-3ULW].

which may have interfered with their ability to craft laws and regulations that were adequately tailored to their undoubtedly compelling public health and safety objectives. Thus, officials would have likely been able to demonstrate that they would have incurred potentially ruinous liability under the statute.

Incentives. By guaranteeing compensation, and providing only a few, narrow exceptions to the compensation requirement, this solution may incentivize legitimate and precise lawmaking.[351] By forcing the government to internalize the costs associated with its actions, this solution may incentivize interference with property only when "property . . . is worth more to the government [or the public] than . . . in the marketplace[.]"[352] Therefore, this solution provides the government with "[dis]incentive[s] to arbitrarily take the property of the populace by putting a price tag on it[.]"[353]

Hindering the Police Power. Will the solution detailed above overdeter beneficial regulation despite its attached exceptions? Justice Holmes raised this objection in *Mahon*, opining that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[354] In connection to the COVID-19 pandemic, the *Harris* court specifically claimed that compensation "would severely limit the state's especially broad police power in responding to . . . health emergenc[ies]."[355]

These concerns are likely overstated but are unlikely misplaced. Oregon's Measure 37 compensation law spurred "thousands of claims for billions of dollars" arising out of alleged regulatory property deprivations.[356] However, Oregon appears anomalous among states that have implemented compensation regimes. One scholar has explained that, shortly after their passage, Florida's and Texas' compensation laws "had no substantial impact on State finances

351. *See* Brennan et al., *supra* note 17, at 6.
352. Eagle, *supra* note 7, at 613–14; *see generally* Sax, *supra* note 7, at 57–60, 64.
353. Cahoy, *supra* note 7, at 142.
354. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922).
355. TJM 64, Inc. v. Harris, 475 F. Supp. 3d 828, 839 (W.D. Tenn. 2020).
356. *See* Potapov, *supra* note 331, at 10524.

and ha[d] not interfered with State regulatory programs."[357] Thus, compensation laws may not overdeter beneficial regulation. This proposition is further supported by the logic underlying the limited police power exceptions detailed above. As long as the government has carefully contemplated its actions, it should avoid compensation under this regime, allowing the state to address critical public health and safety issues without incurring potentially ruinous liability.

But what if the government *still* cannot craft laws that comport with the requirements set forth above *after* an immunity period has ended? Opponents may again contend that the law will create potentially ruinous liability that will overdeter beneficial government action in periods of true exigency. This proposition brings the Note and reader full circle. This solution does not preclude the government from passing regulations to address serious public health or safety issues. Rather, it demands that the government compensate owners for its deprivations, just as in the physical takings context. Thus, if the government believes that "property . . . is worth more to the government [or the public] than . . . in the marketplace[,]"[358] it will choose just compensation over inaction.[359] If the government cannot possibly regulate without incurring onerous takings liability, then temporary inaction—until refinement is possible—may suggest a more prudent course. In other words, after the government has enjoyed its period of immunity, it must make a difficult choice in situations that fail to meet the limited police power exception described above: incur liability or stagnate. However, this choice is necessary to curb potentially poor and arbitrary actions that needlessly interfere with property at no demonstrable benefit to society.

CONCLUSION

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357. *State Approaches to Protecting Private Property Rights: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 105th Cong. 120 (1999) (statement of Nancie G. Marzulla); *see* Nancie Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings"*, 46 S.C. L. REV. 613, 636 (1995).

358. Eagle, *supra* note 7, at 613–14; *see also* Eisenberg, *supra* note 7, at 673.

359. *See generally* Eagle, *supra* note 7, at 613–14.

Governments are vested with certain coercive powers to avert imminent catastrophe and to solve real and substantial problems that threaten society. However, praying for benevolence where malice can motivate and where recklessly crafted laws, however motivated, can effectuate greater harm than benefit will insufficiently protect the rule of law and liberty that sustain our Republic. We can and must cauterize practically boundless governmental authority to protect private property and to preserve the rule of law.

Some envisioned that "[g]overnment [wa]s instituted no less for protection of the property, than of the persons, of individuals[.]"[360] The regulatory takings doctrine may presently fail to thwart arbitrary interference with private property by excusing the government from compensating owners for deprivations. To breathe life into the vision detailed above, thwart arbitrary deprivations, and preserve liberty and the rule of law, this Note urges states to adopt statutes that require the government to compensate owners for deprivations, which may incentivize lawful, non-arbitrary action.

360. THE FEDERALIST NO. 54 (Alexander Hamilton or James Madison).

A MINISTERIAL EXCEPTION FOR ALL SEASONS: *OUR LADY OF GUADALUPE SCHOOL V. MORRISSEY-BERRU*, 140 S. CT. 2049 (2020)

JASON J. MUEHLHOFF*

INTRODUCTION

The American polity has long been wary of federal involvement in the selection of religious personnel. This was not merely the result of abstract reasoning, but rather the felt experience from "Europe's long and bloody history of 'conflict[s] over the government's intervention in [religious] decisionmaking.'"[1] Declining to follow Europe down this same path, an early Congress rejected France's request to approve a Catholic Bishop for America,[2] calling it a "purely spiritual" decision beyond "the jurisdiction and powers of Congress."[3] This type of political entanglement with ecclesiastical

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1. Brief for Professors Douglas Laycock et al. as Amici Curiae Supporting Petitioner at 5, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (No. 19-267) (quoting Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUY 175, 179 (2011)) [hereinafter Laycock et al.].

2. *See id.* at 8.

3. *See* EXTRACT FROM THE SECRET JOURNAL OF FOREIGN AFFAIRS (May 11, 1784), *in* 1 THE DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES OF AMERICA 83, 84 (1837), *quoted in* Laycock et al., *supra* note 1, at 8.

decisions directly influenced the structure and substance of the First Amendment's dual Religion Clauses.[4] The First Amendment charted a different relationship between government and religion: "the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices."[5]

The "ministerial exception" is one such manifestation of the First Amendment's protection for religious groups from government intrusion. The ministerial exception exempts religious entities from certain laws regulating their employment relationship with employees[6] who perform important religious functions. "This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution's central mission."[7]

The Supreme Court has now addressed the ministerial exception in two cases, and both times it has properly prevented the government from interfering with a religious group's decision over who can serve as teachers at parochial schools. Religious schools are important, but the ministerial exception extends well beyond the confines of a classroom. To date, the Supreme Court has offered no overarching "formula for deciding when an employee qualifies as a minister," and so far has only addressed "circumstances" relevant to teachers.[8] This leaves open questions about employees in a whole host of other contexts, all of which present unique and fact-specific circumstances to consider.

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4. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 183 (2012) ("It was against this background that the First Amendment was adopted.").

5. *See id.* at 184.

6. Despite often analyzing which *employees* are ministers, the ministerial exception extends beyond formal employment arrangements. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 n.1 (2020) (Thomas, J., concurring) ("As the Court acknowledges, the term 'ministerial exception' is somewhat of a misnomer. . . . Rather, as these cases demonstrate, such protection extends to the laity, provided they are entrusted with carrying out the religious mission of the organization.").

7. *Id.* at 2060 (majority opinion).

8. *See Hosanna-Tabor*, 565 U.S. at 190.

The principles articulated in *Our Lady of Guadalupe v. Morrissey-Berru*[9] lay the foundation for the best path forward. As the majority and concurring opinions demonstrate, faithfully and consistently applying the ministerial exception to a myriad of contexts can best be done by: (1) focusing on the employee's *functions* over other considerations like title and training; and (2) *deferring* to the religious entities on what religious functions are critical to the group's mission. An approach centered on these dual pillars honors the First Amendment's steadfast commitment to avoiding governmental entanglement in the internal matters of religious organizations and is applicable to all faiths, circumstances, and seasons.

I. *OUR LADY OF GUADALUPE* IN CONTEXT

A. Prior Caselaw

Despite the ministerial exception's relatively short history as a matter before the Supreme Court, it is a well-established doctrine among the lower courts. Beginning with the Fifth Circuit in 1972,[10] every circuit eventually came to recognize the ministerial exception,[11] as well as every state supreme court that addressed the ministerial exception's existence.[12] This means *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the first ministerial exception case before the Supreme Court, was a moment of recognition, not creation.[13] This case centered around a religious school and Cheryl Perich, a "called teacher,"[14] who taught fourth graders all the typical curriculum found in any fourth grade classroom. But she also

9. 140 S. Ct. 2049 (2020).

10. *See* McClure v. Salvation Army, 460 F.2d 553, 560–61 (5th Cir. 1972).

11. *See Hosanna-Tabor*, 565 U.S. at 188 n.2 (collecting cases). This excludes the Federal Circuit, which jurisdictionally cannot hear such claims.

12. *See* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 846 (2012).

13. *See Hosanna-Tabor*, 565 U.S. at 188 ("We agree [with the Courts of Appeals] that there is such a ministerial exception.").

14. Within the Lutheran Church—Missouri Synod, a "called teacher" is one who has satisfied certain academic requirements, is called by a local congregation, and accepts the vocation of teaching, thereby earning the formal title of "Minister of Religion, Commissioned." *See id.* at 177.

taught a religion class, led students in prayer, and occasionally spoke at chapel services.[15] After an employment dispute arose over Perich's ability to teach following a diagnosis of narcolepsy, Perich eventually claimed employment discrimination and sued.[16]

The Supreme Court unanimously sided with the school. In doing so, the Court relied on both the Establishment and Free Exercise Clauses to justify its holding. "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[17]

The Supreme Court recognized the ministerial exception's solid constitutional foundation, but declined to provide a clear formula for evaluating future cases.[18] Instead, the Court looked at four considerations to determine that Perich was a minister: (1) her title; (2) the substance of her title; (3) "her own use of that title[;]" and (4) "the important religious functions she performed . . . ."[19] These considerations were sufficient to resolve *Hosanna-Tabor*, but offer little guidance outside of this narrow fact-pattern. This lack of guidance did not go unnoticed. In a concurrence, Justice Thomas argued that to apply this protection consistently given religious organizations' wide variety of structures, courts should defer to the organization's views of who qualifies as a minister.[20] Justice Alito also wrote a concurrence, joined by Justice Kagan, which highlighted that given the disparity among religions regarding the use and understanding of titles, including "minister," "courts should focus on the function performed by persons who work for religious bodies."[21] These ideas, presented by the concurring justices in *Hosanna-Tabor*, took center stage in *Our Lady of Guadalupe*.

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15. *See id.* at 178.

16. *See id.* at 179–80.

17. *Id.* at 184.

18. *See id.* at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.").

19. *Id.* at 192.

20. *See id.* at 197 (Thomas, J., concurring).

21. *See id*. at 198 (Alito, J., concurring).

B. Our Lady of Guadalupe

Hosanna-Tabor clearly affirmed the ministerial exception, but left unresolved many questions about its exact scope and contours. Eight years later, the Court offered another data point. *Our Lady of Guadalupe* centered on two schoolteachers—Agnes Morrissey-Berru and Kristen Biel—who both taught at Catholic elementary schools.[22] The two teachers had similar employment agreements and job responsibilities. The employee agreement explained that the school's "overriding commitment" was "to develop and promote a Catholic School Faith Community."[23] A teacher's role in the faith community was to "'model and promote' Catholic 'faith and morals'" and ensure "faith formation of the students in their charge each day."[24] This included teaching religion, regularly praying with the students, and helping students learn about and participate in Mass and other religious activities.[25]

While those job duties may sound similar to Perich's role, these facts are no carbon-copy of *Hosanna-Tabor*. Perich held a title of "Minister of Religion, Commissioned," the two individuals here were "Teacher[s]" and "Lay Employees[;]"[26] Perich completed eight theology classes as part of her commissioning, the two here had far less formal theology training;[27] and while Perich held herself out to be a minister, the other two did not.[28] This distinguished Perich from the two teachers here on three of the considerations the Court used in *Hosanna-Tabor*: title, the substance reflected by the title, and the employee's use of that title.

However, these differences were not dispositive, and the Court ultimately found the teachers here also fell within the ministerial

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22. *Our Lady of Guadalupe* was consolidated with *St. James School v. Biel*. For simplicity's sake, I will refer to this as a single case.

23. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2056 (2020) (citation omitted).

24. *Id.* at 2056–57 (citation omitted).

25. *See id.* at 2066.

26. *Id.* at 2074, 2078 (Sotomayor, J., dissenting).

27. *Id.* at 2074.

28. *Id.* at 2074, 2079.

exception. Writing for a seven-Justice majority, Justice Alito explained that *Hosanna-Tabor*'s criteria were "not inflexible requirements,"[29] because "[w]hat matters, at bottom, is what an employee *does*."[30] The Court in *Hosanna-Tabor* admittedly centered much of its analysis on Perich's title, but only because titles were particularly important *in this particular context*. The title of "minister" has an established meaning within the Evangelical Lutheran Church in the educational context—a formally trained and ordained teacher.[31] This made "Perich's case an especially easy one,"[32] though such facts are not necessarily needed to show ministerial status.

In *Our Lady of Guadalupe*, the Court thought it was clear what these teachers *did*: guide their students towards a better understanding and embodiment of their faith.[33] Moreover, their duties and responsibilities were clearly vital to the religious schools' mission. To instead prioritize factors like formal education or title over function would raise serious issues. Since titles often offer little substance, any inquiry would quickly devolve into "looking behind the titles to what the positions actually entail" and would favor organized religion with more formalized roles and functions.[34] Looking into academic requirements brings similar peril, especially since every religion and denomination could require different amounts of education, or none at all.

Justice Thomas, joined by Justice Gorsuch, concurred. The concurrence expanded on many of the points Justice Thomas originally made in *Hosanna-Tabor*. Given the Religion Clauses of the First Amendment, courts "should defer to these groups' good-faith understandings of which individuals are charged with carrying out

29. *Id.* at 2064 (majority opinion).
30. *Id.* (emphasis added).
31. *Id.* at 2063.
32. *Id.* at 2067 (citation omitted).
33. *Id.* at 2066.
34. *Id.* at 2064.

the organizations' religious missions."[35] The schools clearly demonstrated sincerity regarding the teachers' designations as ministers, so the ministerial exception should apply.

Not everyone agreed. Justice Sotomayor, joined by Justice Ginsburg, dissented because she saw danger in extending the ministerial exception to employees in Morrissey-Berru and Biel's situation. They believed *Hosanna-Tabor* was correct because Perich was a religious leader.[36] Her title, training, reputation, and function all confirmed this. But, as mentioned above, many of those factors were missing here. Moreover, most of what the teachers taught was "secular," materials taught by "any public school teacher in California."[37] And even when the school has a "pervasively religious atmosphere," faculty are unlikely to be ministers when they are not required to be members of the same faith, as was the case here.[38]

II. *OUR LADY OF GUADALUPE* OUTSIDE THE CLASSROOM

A. Conceptual Considerations

Justice Sotomayor's dissent included substantive analysis comparing the religious and secular nature of the teacher's job duties. The dissent pitted the teaching of religion against "secular" subjects—reading, science, social studies, etc. Since most of any given school day was spent teaching secular subjects, so the argument goes, the label of minister was less appropriate. However, this approach is deeply flawed. First, any analysis, test, or doctrine that parses out religious from secular duties necessarily involves judicial inquiry into the religious meaning of those duties, which is

35. *Id.* at 2071 (Thomas, J., concurring).

36. *Id.* at 2074 (Sotomayor, J., dissenting).

37. *Id.* at 2080. Interestingly, this dynamic was equally present in *Hosanna-Tabor*, yet both dissenting justices extended the ministerial exception in that situation.

38. *Id.* at 2082 (citation omitted). And here, one teacher actually claimed (after the fact) not to be a practicing Catholic. *See id.* at 2056 n.2 (majority opinion).

plainly inconsistent with a core protection of the First Amendment.[39]

Second, even if such judicial inquiries were proper, the very question itself—if the functions of the employee's jobs are sufficiently religious—is unworkable. There simply *is no* unified standard, balancing test, or doctrinal formulation that a court could use to answer this question. Religious bodies may not define what is religious in ways readily apparent or persuasive to a secular institution—nor do they try to. "In the Abrahamic religious traditions, for instance, a stammering Moses was chosen to lead the people, and a scrawny David to slay a giant."[40] Thus, the judiciary is not adequately competent to analyze the religious claims underlying ministerial exception cases.

This is not to say the courts are never able to properly adjudicate ministerial exception claims. For many cases, a minister's functions are clearly and plainly religious. Few question that certain categories of conduct such as teaching and preaching, leadership, and administering sacraments are practices central to the mission of religious groups. But in less obvious cases, and frequently in the cases involving lesser-known religions, this will not be enough. In these cases, deference to the religious entity is especially important.

B. Practical Problems

The caselaw shows these conceptual concerns are very real. While the lower courts have adjudicated a multitude of ministerial exception disputes, a pair of cases is sufficient here to demonstrate that "courts are ill-equipped to assess whether, and to what extent, an employment dispute between a minister and his or her religious

39. *See, e.g.*, New York v. Cathedral Acad., 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.").

40. Fratello v. Archdiocese of N.Y., 863 F.3d 190, 203 (2d Cir. 2017); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1417 (1990) ("[C]laimant's beliefs must be 'sincere,' but they need not necessarily be consistent, coherent, clearly articulated, or congruent with those of the claimant's religious denomination.").

group is premised on religious grounds."[41] This inadequacy is especially true when the activities of the employee in question do not appear facially religious to the outside observer.

In *Lukaszewski v. Nazareth Hospital*,[42] the court held that the ministerial exception[43] did not apply to a Roman Catholic hospital's decision to remove its director of plant operations. The court's opinion is riddled with religious analysis and conclusions that a court is wholly unsuited to make. For example, without explanation, the court concluded that "[r]eligious doctrine is a much less important factor in most hospital personnel decisions than it is in religious school decisions to hire and fire teachers."[44] Besides asserting an answer to an inherently religious question, this claim ignores *actual* Catholic teaching.[45] Built upon a flawed foundation, the court unsurprisingly concluded that "Lukaszewski was a secular employee" and that "his responsibilities did not include church administration or *religious matters*."[46]

This is not to say that courts *always* reach the wrong outcome in analyzing an employee's functions. In *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*,[47] the court held that an employee operating as a "mashgiach," or inspector who ensures compliance with Jewish kosher laws, qualified as a minister.[48] But the court reached this conclusion only after determining "his primary duties included supervision and participation in religious ritual and worship, and

41. *Fratello*, 863 F.3d at 203.

42. 764 F. Supp. 57 (E.D. Pa. 1991).

43. The court's opinion does not use the exact phrase "ministerial exception," but engages in essentially the same analysis.

44. *Lukaszewski*, 764 F. Supp. at 60.

45. *See* UNITED STATES CATH. CONF., HEALTH AND HEALTH CARE 3 (1981), http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/health-and-health-care-pastoral-letter-pdf-09-01-43.pdf [https://perma.cc/4KGC-QSZF] ("For the church, health and the healing apostolate take on special significance because of the church's long tradition of involvement in this area and because the church considers health care to be a basic human right which flows from the sanctity of human life.").

46. *Lukaszewski*, 764 F. Supp. at 60 (emphasis added).

47. 363 F.3d 299 (4th Cir. 2004).

48. *Id.* at 301.

his position is important to the spiritual mission of Judaism."[49] Little comfort should be taken when a court must first ascertain "the spiritual mission of Judaism" to reach its holding.

C. Defending Deference

These cases illustrate the need for judicial deference on religious questions. Justice Thomas understood this in both Supreme Court ministerial exception cases, arguing that "[w]hat qualifies as 'ministerial' is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis."[50] In this regard, the *Our Lady of Guadalupe* opinion was "a step in the right direction."[51] Justice Alito's opinion deferred to the schools at critical junctures in the analysis, including on the teachers' role in the organizations,[52] the level of theological training needed,[53] or who is a "practicing" member of the faith.[54] But many oppose such deference. The dissent argued that if courts assume religious groups are in the best position to determine who is a minister, "one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp."[55] A few responses disprove this claim.

First, as this brief survey of lower court rulings demonstrate, there is often *no* analysis when courts determine the underlying religious claims. Rather, these rulings simply turn on the inclinations of judges. While admittedly not a "rubber stamp," it also isn't the substantial "legal analysis" the dissent presumes. Second, such deference honors the First Amendment, which "commands civil courts to decide [legal] disputes without resolving underlying controversies over religious doctrine."[56] Avoiding religious disputes is not an

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49. *Id*. at 309 (emphasis added).

50. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2070 (2020) (Thomas, J., concurring).

51. *Id.*

52. *Id*. at 2066 (majority opinion).

53. *Id*. at 2064.

54. *Id*. at 2069.

55. *Id*. at 2076 (Sotomayor, J., dissenting).

56. *Id*. at 2070 (Thomas, J., concurring) (quoting Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969)).

abdication of judicial duty. It is an acknowledgement that there are areas of society outside the purview of governmental intrusion.[57]

Finally, many worry that this robust conception of the ministerial exception would authorize mass employment discrimination. One commentator speculated before the *Our Lady of Guadalupe* decision that a ruling for the schools "would be a windfall for religious employers, giving them a free pass to discriminate against workers whose jobs carry *any* kind of faith-related responsibilities."[58] The dissent echoed such concerns, claiming "[t]he Court's conclusion portends grave consequences" by subjecting "over a hundred thousand secular teachers" and "countless coaches, camp counselors, nurses, . . . and many others who work for religious institutions" to potential employment discrimination.[59]

Would removing this level of aggressive judicial oversight clear the path for this parade-of-horribles? There are plenty of reasons to think not. First, the long history of the ministerial exception shows no hint of this dystopia. Putting similar fears to rest in *Hosanna-Tabor*, the Chief Justice wrote that the ministerial exception has been recognized for 40 years among the lower courts, and yet has "not given rise to the dire consequences" that trouble skeptics.[60] These worries also rest upon an unsustainable assumption for crafting First Amendment doctrine. As explained in a different context:

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57. *See id.*; *see also* McConnell, *supra* note 40, at 1415 ("[E]xemptions [from generally applicable laws] were consonant with the popular American understanding of the interrelation between the claims of a limited government and a sovereign God.").

58. Mark Joseph Stern, *The Supreme Court May Exempt Religious Employers from Civil Rights Laws*, SLATE (Dec. 19, 2019, 2:29 PM) https://slate.com/news-and-politics/2019/12/supreme-court-religious-employers-discrimination.html [https://perma.cc/WB6M-QTYU].

59. *Our Lady of Guadalupe*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting). Of course, these externalities are reciprocal. Deciding to remove a minister harms that employee, but being forced to keep an unwanted minister also harms the religious group's ability to function in the manner it deems best. Therefore, the better question may be to ask, "Should A be allowed to harm B or should B be allowed to harm A?" *See* Stephanie H. Barclay, *An Economic Approach to Religious Exemptions*, 72 FLA. L. REV. 1211, 1217 (2020) (citing Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960)).

60. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

> [D]eveloping rules with a view to improbable political scenarios is poor constitutional design. No engineer builds a house capable of resisting a meteor strike; the house would be a bunker unusable for its primary purpose. . . . Constitutional law should instead be tailored to the run of cases that might occur under plausible political circumstances; to tailor it to the most lurid and feverish of hypotheticals is to distort its function.[61]

Ominous warnings about the worst-case scenario are common in the religious freedom context,[62] but have no place in proper constitutional analysis.

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61. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1743 (2002) (footnote omitted).

62. *See, e.g.*, Ian Millhiser, *The Fight over Whether Religion Is a License to Discriminate is Back Before the Supreme Court*, VOX (Feb. 25, 2020, 8:00 AM), https://www.vox.com/2020/2/25/21150692/supreme-court-religion-discrimination-lgbtq-foster-fulton-philadelphia-first-amendment ("In other words, *Fulton* could be the next big blow in the fight between religious conservatives who seek broad legal exemptions, and laws seeking to ban conduct such as anti-LGBTQ discrimination without exception."); Jay Michaelson, *The Supreme Court 'Fulton' Case Is About Anti-LGBTQ Discrimination—Not 'Religious Freedom'*, DAILY BEAST (Feb. 24, 2020, 2:33 PM), https://www.thedailybeast.com/the-supreme-court-fulton-case-is-about-anti-lgbtq-discriminationnot-religious-freedom ("But of course, [religious freedom groups] . . . aren't really fighting for religious liberty. They're fighting for religious hegemony; they want LGBTQ and women's rights to be less equal than, say, civil rights."); Mark Joseph Stern, *SCOTUS May Give Foster Care Agencies a Right to Refuse Same Sex Couples*, SLATE (Feb. 24, 2020, 5:06 PM) https://slate.com/news-and-politics/2020/02/supreme-court-philadelphia-religious-foster-care-lgbt-discrimination.html [https://perma.cc/ES7G-XWDK] (noting that "[t]his argument has sweeping implications" and further explaining that "LGBTQ nondiscrimination laws like Philadelphia's would become optional for those whose faiths condemn same-sex relationships and gender transition. Small businesses and giant corporations alike could deny service to LGBTQ people and discriminate against LGBTQ employees. Hospitals, doctors, and pharmacy employees could refuse to provide contraception."); Katherine Stewart, *Don't Let Trump Pay Back Evangelicals Like This*, N.Y. TIMES (Mar. 6, 2020), https://www.nytimes.com/2020/03/06/opinion/sunday/trump-evangelicals.html [https://perma.cc/U9DE-SE4W] ("Many Americans know by now that when Christian nationalists talk about 'religious freedom' they are really asking for the privilege to impose their religion on other people.").

III. LOOKING AHEAD

The Chief Justice noted in *Hosanna-Tabor* that "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise."[63] That time has come. Far removed from teachers in classrooms, Seattle's Union Gospel Mission is a Christian non-profit that serves the community with a variety of services. One such service is its legal aid clinic, where attorneys not only help with legal issues, but also "talk about their faith, often pray with clients, and tell them about Jesus."[64] The Mission built the clinic to serve the "legal and certain spiritual needs of the poor, including evangelizing them, in a Christ honoring way."[65] To ensure this occurs, the Mission requires its employees to adhere to the Mission's statement of faith and religious lifestyle requirements (which excludes "homosexual behavior"), be an active church member, and be eager to share their faith with clients.[66] When Matthew Woods, who was in a same-sex relationship, not active in a church, and uneager to share the Gospel with clients applied for the position, the Mission declined to hire him. Woods then filed suit.

The case eventually reached the Washington Supreme Court, which unanimously ruled for Woods.[67] In returning the case to the lower court for further analysis, the Washington Supreme Court offered guidance on how to analyze the ministerial exception claim.

63. *Hosanna-Tabor*, 565 U.S. at 196.

64. Petition for Writ of Certiorari at 8, Seattle's Union Gospel Mission v. Matthew S. Woods, No. 21-144 (2021). This case also implicates the related but distinct coreligionist exemption, but the Washington Supreme Court analyzed the case in part under the ministerial exception.

65. *Id*. (citation omitted).

66. *Id*. at 9.

67. Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060 (Wash. 2021).

The analysis is—to put it charitably—*unpersuasive*.[68] In a concurrence that was explicitly endorsed by the majority,[69] Justice Yu argues the ministerial exception is inapplicable to the Mission's lawyers for multiple reasons, including the lack of need for theological training, their failure to claim the minister's housing allowance, and the fact that *all* of the Mission's employees are tasked with furthering the Mission's religious mission.[70] Justice Yu also includes in her analysis the somewhat puzzling statement that "unlike the teachers at issue in [the Supreme Court cases], the . . . attorneys practice law first and foremost."[71]

Each of these arguments defy proper ministerial exception analysis. As explained above, judicially imposed theological training requirements are inappropriate and impossible to do with any consistency.[72] Next, whether an individual chooses to claim the minister's housing allowance cannot possibly be as important a consideration as Justice Yu asserts. The minister's housing allowance is a statutorily authorized deduction from gross income for tax purposes if a minister's compensation package includes certain housing arrangements.[73] It is entirely optional, and unlike the ministerial exception, it is governed by detailed statutory and regulatory provisions.[74] *Hosanna-Tabor* did briefly mention that Perich claimed the housing allowance, but only to bolster the already-es-

68. This is unsurprising considering the Washington Supreme Court's history of mangling religious liberty cases. *See, e.g.*, Case Comment, State v. Arlene's Flowers, Inc., *441 P.3d 1203 (Wash. 2019)*, 133 HARV. L. REV. 731 (2019).

69. *See Woods*, 481 P.3d at 1070 ("Justice Yu's concurring opinion is helpful in this regard.").

70. *Id.* at 1072 (Yu, J., concurring).

71. *Id.*

72. This is especially true for a Protestant organization like Seattle's Union Gospel Mission. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064 (2020) ("[M]any Protestant groups have historically rejected any requirement of formal theological training.") (citation omitted).

73. *See* I.R.C. § 107.

74. *See* I.R.S. Publication 517 (2020).

tablished fact that she held herself out as a minister to the community.[75] Justice Yu treating this brief aside in *Hosanna-Tabor* as a substantive factor is an improper reading of the case and ignores the guiding principles set forth in *Our Lady of Guadalupe*. Finally, her statement that the "attorneys practice law first and foremost"[76] is both conclusory and incorrect. The Mission's articles of incorporation clearly state that the Mission's overarching purpose is "preaching of the gospel of Jesus Christ by conducting rescue mission work," with all other services being "kept entirely subordinate and only taken on so far as seems necessary or helpful to the [Mission's] spiritual work."[77] Moreover, exactly how a minister understands his or her vocation furthering an overarching religious duty is a *profoundly* theological question, and one well beyond the judiciary's authority to resolve.[78] Stepping back from the individual arguments, there is a common theme undergirding Justice Yu's analysis: a marked *lack* of deference on religious questions. It is abundantly clear that the Mission sees its lawyers as serving important spiritual functions, and yet the Washington Supreme Court engaged in contorted and selective analysis to hold otherwise.

This case study demonstrates the need for courts to respect the core principles of the ministerial exception when applying the doctrine to new facts. Only by looking at the functions of the employees and deferring to the organization on the religious significance of those functions will courts honor the First Amendment and ensure religious organizations are free to pursue their goals.

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75. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 191–92 (2012).

76. *Woods*, 481 P.3d at 1072 (Yu, J., concurring).

77. Petition for Writ of Certiorari, *supra* note 64, at 6 (citation omitted).

78. Justice Yu extends this argument even further, concluding that "it is simply not possible to simultaneously act as both an attorney and a minister while complying with the [Washington Rules of Professional Conduct]." *Woods*, 481 P.3d at 1073 (Yu, J., concurring). This hostility towards ministry in the legal context is deeply troubling, but a more substantive response is outside the scope of this case comment. For one persuasive critique of Justice Yu's argument, see Brief for the State of Montana et al. as Amici Curiae Supporting Petitioner at 7–16, Seattle's Union Gospel Mission v. Woods, No. 21-144 (2021).

B. Injunctions that are narrower but still too broad

Some injunctions are narrower, but still restrict protected speech because they aren't limited to speech that falls within recognized First Amendment exceptions (such as libel or true threats).[60]

1. Negative/derogatory/disparaging speech

Some injunctions ban "negative," "critical," "derogatory," "degrading," "demean[ing]," "offensive," or "disparag[ing]" material, without limiting that to defamation.[61] Yet such negative but not defamatory material is fully protected by the First Amendment, as cases such as *Hustler Magazine, Inc. v. Falwell*[62] and *Snyder v. Phelps*[63] make clear.[64]

2. Speech interfering with business relationships

One injunction banned a disgruntled ex–tenant from "directly or indirectly interfering . . . via any . . . material posted . . . in any me-

60. *See, e.g.*, *infra* notes 215–217.

61. *See infra*.

62. 485 U.S. 46 (1988).

63. 562 U.S. 443 (2011).

64. *See, e.g.*, Shak v. Shak, 144 N.E.3d 274, 277 (Mass. 2020) ("Nondisparagement orders are, by definition, a prior restraint on speech."); Healey v. Healey, 529 S.W.3d 124, 129 (Tex. App. 2017) ("Expressions of opinion may be derogatory and disparaging but nevertheless be constitutionally protected."); Wolfe Financial Inc. v. Rodgers, No. 1:17cv896, 2018 WL 1870464, at *17 (M.D.N.C. Apr. 17, 2018) (rejecting a proposed injunction on the grounds that it "would subject [defendant] to imprisonment and fines . . . for truthful, non–defamatory statements that a judge later deems 'derogatory'"); Shoemaker v. Gianopoulos, No. H038576, 2014 WL 320061, at *9 (Cal. Ct. App. Jan. 29, 2014) ("[P]osting disparaging comments about people on internet sites is constitutionally protected activity."); Pickrell v. Verio Pac., Inc., No. B144327, 2002 WL 220650, at *6 (Cal. Ct. App. Feb. 11, 2002) (invalidating injunction against "disparaging statements," on the grounds that "[v]igorous criticism, even if amounting to a 'disparaging statement,' is at the heart of constitutionally protected freedom of speech"); Same Condition, LLC v. Codal, Inc., 2021 IL App (1st) 201187, ¶ 36 (Ill. App. Ct. June 21, 2021) ("[A] court may not enjoin a party from criticizing others 'even though they find that criticism distressing.'" (internal punctuation omitted)); Flood v. Wilk, 125 N.E.3d 1114, 1129 (Ill. App. Ct. 2019).