TEXAS REVIEW of LAW & POLITICS

VOL. 21, NO. 1 FALL 2016 PAGES 1–282

SUBSCRIPTIONS

The *Texas Review of Law & Politics* is published three times a year. To subscribe to the *Review*, please visit www.trolp.org/contact. For inquiries regarding subscriptions, email us at trolp@trolp.org, or write us at:

Texas Review of Law & Politics
The University of Texas School of Law
727 East Dean Keeton Street
Austin, Texas 78705

PAST ARTICLES

See the complete list of the *Review*'s past articles at www.trolp.org/issues. To order hard copies of past articles or issues, email us at trolp@trolp.org.

TEXAS REVIEW of LAW & POLITICS

VOL. 21, NO. 1 FALL 2016 PAGES 1–282

BOARD OF ADVISORS

Hon. Greg Abbott
Hon. Bob Barr
Mr. Bradley A. Benbrook
Mr. Clint Bolick
Prof. Steven G. Calabresi
Prof. Thomas J. Campbell
Hon. T. Kenneth Cribb Jr.
Hon. R. Ted Cruz
Ms. Susanna Dokupil
Prof. Richard A. Epstein
Prof. Richard W. Garnett
Mr. Todd F. Gaziano
Prof. Lino A. Graglia
Hon. C. Boyden Gray
Dr. Michael S. Greve
Hon. Nathan Hecht
Prof. Russell Hittinger
Ms. Allyson N. Ho
Mr. James C. Ho
Mr. Michael J. Horowitz
Mr. Peter Huber
Hon. Edith H. Jones
Hon. Royce C. Lamberth
Prof. Gary S. Lawson
Prof. Jonathan R. Macey
Prof. Gregory Maggs
Mr. John P. McConnell
Hon. Edwin Meese III
Mr. William H. Mellor
Mr. Allan E. Parker Jr.
Mr. Thomas W. Pauken
Prof. Stephen B. Presser
Mr. Keith S. Rabois
Prof. Michael Rappaport
Mr. Ron Robinson
Mr. M. Sean Royall
Mr. Joseph Smith
Mr. Daniel E. Troy
Mr. J. Michael Wiggins
Mr. Richard K. Willard
Hon. Don R. Willett

BOARD OF DIRECTORS

Adam B. Ross, *Chairman*
Andrew A. Adams, *Secretary*

Sean B. Cunningham
David J. Damiani
Amy Davis
Dennis W. Donley Jr.
Scott A. Fredricks
Benjamin B. Kelly
David A. Linehan
John R. Martin
Ryan L. Morris
Eric B. Neuman
Keith S. Rabois
Tara B. Ross
Nigel Stark
Brantley D. Starr
Gary L. Thompson
Philip A. Vickers
Douglas R. Wilson

STEERING COMMITTEE

Amy Davis, *Co-Chair*
Brantley D. Starr, *Co-Chair*
Jaimie Ensign
Cory Liu
Marc Levin
John Martin
Aaron Streett

Articles published in the *Review* do not necessarily reflect the views of its founders, members, Board of Directors, Steering Committee, or Board of Advisors.

The *Review*'s mission is to be a leading forum for influencing law and politics according to conservative and libertarian principles. We do two things in support of this mission. First, we publish thoughtful, relevant, and intellectually rigorous conservative and libertarian scholarship. Second, we connect conservative and libertarian scholars, judges, legal practitioners, law students, policy experts, and public servants to each other and to TROLP.

All rights reserved. No part of this journal may be reproduced in any form or by any means, electronic, mechanical, photocopying, scanning, or otherwise, without permission in writing from the *Texas Review of Law & Politics*, except by a reviewer who may quote brief passages in a review. Notwithstanding the foregoing, the *Review* is pleased to grant permission for copies of articles, notes, and book reviews to be made for classroom use only, provided that (1) a proper notice of copyright is attached to each copy, (2) the author(s) and source are identified, (3) copies are distributed at or below cost, and (4) the *Review* is notified of such use.

© Copyright 2016, *Texas Review of Law & Politics*

TEXAS REVIEW of LAW & POLITICS

VOL. 21, NO. 1 FALL 2016

AARON REITZ
Editor in Chief

ANDREW MCCARTNEY
Managing Editor

BEN BETNER
Deputy Managing Editor

MICHAEL MARIETTA
Executive Editor

BENJAMIN MENDELSON
Submissions Editor

ALEX CUMMINGS
Manuscripts Editor

DANIEL HUNG
Online Content Editor

Articles Editors

JAMES BARNETT
DYLAN BENAC
ALEXANDER CHERN
JARET KANAREK
DANIEL POPE
JOSHUA WINDSOR

Staff Editors

AUSTIN AGUIRRE
STEPHEN BARRON
WILLIAM BENTLEY
NATHAN BLOOM
SARAH BYRD
LANDON CAMPBELL
REBECCA CHILDS
DUSTIN FILLMORE
JOEL GARZA
DANIELLA GRUWELL
REBECCA KADOSH
BENJAMIN LANCASTER
T. RYAN LEMENS
TREVOR MARTIN
JOSHUA MICHAELS
ANDREW PARKS
MACKENZIE RIDGLE
CHRISTINA SILVA
DEBORAH SOUTHERLAND
JUSTIN STONE
ASHLEY TERRAZAS
ADY WETEGROVE
MOLLIE WILLIAMS
JACK WILSON
ADAM WOJCIK
RYAN YERGENSEN

PATRICK O'DANIEL
Legal Counsel

LINO GRAGLIA
Faculty Advisor

Founded by Adam B. Ross & Dennis W. Donley, Jr., in 1996

SUBMISSIONS

Authors may submit articles, book reviews, or notes to TROLP via submissions@trolp.org or ExpressO.

Citations should conform to the 20th edition of The Bluebook.

Publication decisions for our fall issue are made in February through April. Publication decisions for our spring issue are made in August through October.

For inquiries regarding submissions, please contact us at submissions@trolp.org.

PREFACE

With the election of Donald Trump as the 45th President and Republican majorities in both houses of Congress, conservatives and libertarians stand well positioned to undo much of the progressivism enacted in the past decade and to build a political order more conducive to life, liberty, and the pursuit of happiness.

We at the *Texas Review of Law & Politics* hope to serve a meaningful role in building that order, and I believe we do that well in this Issue. Texas Governor Greg Abbott expands on earlier arguments he has made regarding the need to call a convention of states under Article V of the U.S. Constitution—a need that persists despite the change of power in Washington. Judge Belanger invites us to consider the exclusionary rule's problematic effects on judicial decision making. Professor Cantu resurrects a wrongly 'settled" debate over the Reconstruction Amendments and argues for a serious reassessment of related federalism concerns. Meghan Fischer surveys the frequent conflict between healthcare providers' right to conscientious objection and the United Nations' insistence on a so-called right to abortion, and urges reform. Finally, John Ohlendorf offers a critical examination of the common refrain that "we are all textualists now" and warns against the complacency that comes with believing it to be true. Rather, Mr. Ohlendorf argues, purposivism is alive and well.

My most sincere thanks go, first and foremost, to the *Review*'s Articles Editors—James Barnett, Dylan Benac, Alex Chern, Jaret Kanarek, Daniel Pope, and Josh Windsor—for their front-line leadership in preparing these articles for publication. Second, I am grateful for the supervisory role our Editorial Board played throughout the process: Andrew McCartney (who deserves special recognition for his work as Managing Editor), Ben Betner, Mike Marietta, Ben Mendelson, Alex Cummings, and Daniel Hung. Third, none of us could have brought this Issue to publication without our dedicated Staff Editors. Thanks to all 26 of you. Finally, thank you to Texas Law Dean Ward Farnsworth, Adam Ross, Brantley Starr, and Cory Liu for your mentorship and for continually pushing me to make the *Review* better.

Aaron F. Reitz
Editor in Chief

THE MYTHS AND REALITIES OF ARTICLE V

GREG ABBOTT*

* Governor of Texas. Prior to serving as Governor of Texas, Governor Abbott served as the attorney general of the State of Texas, as a justice of the Supreme Court of Texas, and as a state district judge in Harris County.

I have talked about the need for a convention because somehow the federal legislature has gotten out of our control, and there is nothing we can do about it. One can say the same thing about the federal judiciary. And that is one reason I am willing to take the chance in having a convention despite some doubts that now exist. I am not sure how much longer we have. I am not sure how long a people can accommodate to directives from a legislature that it feels is no longer responsive, and to directives from a life-tenured judiciary that was never meant to be responsive, without ultimately losing its will to control its own destiny.

—*Antonin Scalia*[1]

I. INTRODUCTION

On January 8, 2016, I joined the growing chorus of legal scholars and elected officials across the country calling for a convention of states under Article V of the U.S. Constitution. I did so because all three branches of the federal government have shrugged off the rule of law. While the Constitution authorizes presidents to 'execute' laws made by Congress,[2] modern-day presidents unilaterally make law using only 'a pen and a phone.'[3] Our Supreme Court is just as comfortable making up rights that have no connection to the Constitution as it is ignoring rights that are expressly guaranteed by the document. And our Congress manages a feat possible only in Washington, D.C. It accomplishes virtually nothing, but what little it does is always expensive and frequently circumvents the Constitution's architecture. These are not merely theoretical concerns; these are profound problems that undermine the rule of law and the foundations of our constitutional republic.

My starting point for finding solutions is the Constitution itself—in particular, Article V of that document, which provides for a convention of states to propose constitutional amend-

1. AM. ENTER. INST. FORUMS, A CONSTITUTIONAL CONVENTION: HOW WELL WOULD IT WORK 18 (1979).

2. U.S. CONST. art. II, § 3 (stating that the president "shall take Care that the Laws be faithfully executed").

3. *See, e.g.*, Tim Devaney, *Obama's Pen and Phone Barrage*, THE HILL (Dec. 28, 2014, 6:00 AM EST), http://thehill.com/regulation/pending-regs/228093-obamas-pen-and-phone-barrage [https://perma.cc/9M4M-J2TF] (listing a number of executive actions the Obama administration has taken); Victor Davis Hanson, *Governing by Pen and Phone*, NAT'L REV. (Jan. 28, 2014, 4:00 AM), http://www.nationalreview.com/article/369560/governing-pen-and-phone-victor-davis-hanson [https://perma.cc/9GF9-64GK] (quoting the President's suggestion that he did not need to rely on approval from Congress to implement numerous policy changes).

ments.[4] The Constitution's authors knew it would need amending. In fact, they proposed twelve amendments in the very first session of Congress.[5] But more importantly, they knew that the states—the originators of the Constitution—would play the primary role in amending the document. The Framers *expected* the states to use that power to protect the people from the centralized federal government. That is why they wrote Article V.

As Texas Governor and Attorney General, I have fought in dozens of lawsuits against the federal government while defending the power the Framers reserved to the states. I have seen first-hand—and have the battle scars to prove—that the federal government has clearly exceeded the bounds of the Constitution and has abandoned the lawful way of amending it.

I drew on lessons from those legal battlefields in drafting a proposal for constitutional reforms called the *Texas Plan.*[6] Our Constitution was founded on state-led initiatives and state-brokered compromises. There was the Virginia Plan, the New Jersey Plan, the Connecticut Compromise, and the Massachusetts Compromise, to name just a few.[7] Those states' plans and compromises gave birth to our Constitution; the *Texas Plan* would restore it.

The *Texas Plan* calls for a convention of states and nine particular amendments that I want such a convention to propose. It is a modern-day attempt to preserve constitutional principles and restore the rule of law. And it is an attempt to fulfill the Framers' vision that each generation pass the baton of freedom to the next, and to ensure that future generations have the blessings of liberty that are protected by constitutional principles.

I elaborated on these concepts in my book *Broken But Unbowed.*[8] As I have toured Texas and the nation to talk about the

4. U.S. CONST. art. V ("The Congress, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments ").

5. *See* S. JOURNAL, 1st Cong. 1st Sess. 96–97 (1789). The states did not ratify the first two of those proposed amendments, although the second, regarding congressional pay, later became the Twenty-Seventh Amendment to the Constitution. The first Congress's other ten proposed amendments became the Bill of Rights.

6. *See generally* GREG ABBOTT, RESTORING THE RULE OF LAW WITH STATES LEADING THE WAY (Jan. 8, 2016) [hereinafter *Texas Plan*] (articulating the Texas Plan, which calls for an Article V convention of states to propose amendments to the Constitution).

7. 1 GEORGE BROWN TINDALL & DAVID EMORY SHI, AMERICA: A NARRATIVE HISTORY 192–95 (brief 9th ed. 2013) (describing the Framers' disputes and compromises that led to the ratification of the Constitution).

8. *See generally* GREG ABBOTT, BROKEN BUT UNBOWED (2016).

book, I have been struck by two things. First, there is a hunger in our country for constitutional change. Americans understand that their federal government is failing them; they understand that government loses its legitimacy when it operates without regard to the Constitution's constraints; and they are desperate for the restoration of a country that answers to the rule of law rather than the rule of man.

Second, I have been struck by the propagation of Article V myths—especially among conservatives. Many conservatives wring their hands with frustration because of the way all three branches of the federal government violate the Constitution, and yet they think they must look only to those untrustworthy federal officials—rather than to the states—for solutions. Those opponents of an Article V convention say that allowing states rather than Congress to chart the amendment process could endanger or even abolish the Constitution—perhaps forgetting that Congress's waywardness is a principal reason the Constitution needs to be amended.

The reality is that the Constitution has been all but lost already.[9] Most Americans today have no idea what the document says; the constraints that the document imposes on federal power are routinely ignored; and individuals inside and outside of government treat the Constitution as enforceable only according to the caprice of five unelected and unaccountable lawyers on the Supreme Court. The irony is that we can preserve our Constitution—and restore it to the people in whose name it is framed—by amending it.

The Article V skeptics rely on three myths in particular that need to be put to rest. First, they claim that a convention of states is somehow a 'radical' idea. In reality, it would be radical *not* to call a convention of states; the Framers made clear that such conventions were supposed to be the principal mechanisms for fixing just the kind of problems confronting us today. Second, some say that a convention of states is 'limitless' in the changes it would impose on us. In reality, the Framers intended for conventions of states to be limited, and they designed a system that sharply cabins the scope of change. Third and finally, the Article V opponents say that convention delegates are 'un-

9. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (rev. ed. 2013). I am grateful to Professor Barnett for his scholarly leadership in this area.

controllable. Again, history and experience prove otherwise.

At bottom, the Article V debate has two sides: those who trust the Constitution and those who do not. It is the Left that so often ignores that document and, for example, relies on courts to create rights that neither the Constitution nor the democratically elected legislature countenances. Conservatives must do better. We must understand the Constitution, its historical origins and meaning, and the mechanisms the Framers gave us for dealing with constitutional problems. And after we understand our Constitution, we must be willing to be governed by it, rather than falling prey to myths that would deter us from restoring the rule of law.

II. MYTH: IT IS RADICAL

One of the most common allegations made against an Article V convention of states is that it is somehow a 'radical' idea.[10] Our nation has never had such a convention, the argument goes, and therefore it is scary, revolutionary, and dangerous. It is better, these critics say, to 'amend[ ] the Constitution in the traditional way by having Congress' do it.[11]

This gets it precisely backwards, and in so doing, betrays a fundamental misunderstanding of both Article V and our nation's history. There is nothing radical, scary, or dangerous about Article V or a convention of states. To the contrary, the Constitution we hold so dear would not exist at all were it not for Article V and the promise that we would have conventions of states. The Framers agreed to the Constitution only because it included Article V[12] and only because they trusted conventions of states to maintain constitutional balance in our federal system.

---

10. *See* BROKEN BUT UNBOWED, *supra* note 8, at 126 (rebutting the argument that the process of amending the Constitution through an Article V convention is inherently radical).

11. Janine Hansen, *Convention of States Reveals Their* Revolutionary *Agenda: An Unlimited Convention to Structurally Change the U.S. Constitution*, EAGLE FORUM (Apr. 5, 2016), http://www.eagleforum.org/topics/concon/pdf/16COSRevolutionaryAgenda.pdf [https://perma.cc/K2F2-HRFE].

12. *See, e.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 116 (Jonathan Elliot ed. 2d ed. 1827) [hereinafter 2 Elliot] (J.C. Jarvis of Massachusetts: "I have found complete satisfaction [in Article V]: this has been a resting place, on which I have reposed myself in the fullest security, whenever a doubt has occurred, in considering any other passage in the proposed Constitution When we shall have adopted the Constitution before us, we shall have in this article an adequate provision for all the purposes of political reformation. If this government shall appear to be too severe, here are the means by which this severity may be assuaged and corrected.").

The only position that is radical, scary, and dangerous is that we should ignore Article V—a provision that our Framers thoughtfully adopted and intended for the use of future generations.

Moreover, the Founders would marvel at the suggestion that amendments proposed by Congress should be preferred—or worse, called 'traditional'—over the 'radical' amendments that would be proposed by states. As explained in this part, our Constitution's Framers had many spirited disagreements in the late eighteenth century. But one thing they all agreed on was that states—not Congress—should bear principal if not sole responsibility for amending the Constitution. Contrary assertions cannot be squared with the Constitution's original meaning and historical reality.

A. The Reality: The Constitution Could Not Have Been Framed Without Article V

When the Framers set out to write the Constitution, they had a laundry list of criticisms against the Articles of Confederation. At the top of the list was the impossibility of amending them.[13] The Articles of Confederation required unanimous consent from all thirteen states for any amendment.[14] And one state in particular, Rhode Island, was steadfastly opposed to any of the fledgling country's much-needed amendments to raise money, to provide for the common defense, and to regulate commerce, among many others. As one might imagine, the Founders had many colorful things to say about Rhode Island.[15]

---

13. *See* THE FEDERALIST NO. 85, at 525 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

14. ARTICLES OF CONFEDERATION of 1781, art. XIII, para 1.

15. *E.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 562 (Max Farrand ed. 1937) [hereinafter 2 Farrand] (Wilson: '[I]t [would] be worse than folly to rely on the concurrence of the Rhode Island members of Cong[ress] in the plan.'); 2 Elliot, *supra* note 12, at 197 (Ellsworth: "How contrary, then, to republican principles, how humiliating, is our present situation! A single state can rise up, and put a *veto* upon the most important public measures. We have seen this actually take place. A single state has controlled the general voice of the Union; a minority, a very small minority, has governed us. So far is this from being consistent with republican principles, that it is, in effect, the worse species of monarchy."). James Madison was particularly blunt:

> Could any thing in theory be more perniciously improvident and injudicious than this submission of the will of the majority to the most trifling minority? Have not experience and practice actually manifested this theoretical inconvenience to be extremely impolitic? Let me mention one fact, which I conceive must carry conviction to the mind of any one: the smallest state in the Union has obstructed every attempt to reform the government; that little member has repeat-

More to the point, though, the Framers had much to say about the need to adopt a charter that could and would be amended. As Alexander Hamilton summed it up, 'It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation.'[16] And Charles Pinckney was even more blunt in blaming the Articles' unanimity requirement for the nation's ills: He argued that it was so pernicious it must be 'destroyed, and he noted that 'the propriety of this alteration has been so frequently suggested, that I shall only observe that it is to this unanimous consent, the depressed situation of the Union is undoubtedly owing.'[17]

Thus, one of the Framers' chief objectives was to make the country's charter amenable to amendments. It is no surprise then that the Framers began debating what we now know as Article V on the very first day of the Convention's substantive proceedings. On Tuesday, May 29, 1787 the Convention adopted rules to govern its proceedings, and the very first speaker to open the Convention's 'main business' was Edmund Randolph. Randolph gave what Madison characterized as 'a long speech' on the defects of the Articles of Confederation.[18] After it, he introduced a resolution 'that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem

---

> edly disobeyed and counteracted the general authority; nay, has even supplied the enemies of its country with provisions. Twelve states had agreed to certain improvements which were proposed, being thought absolutely necessary to preserve the existence of the general government; but as these improvements, though really indispensable, could not, by the Confederation, be introduced into it without the consent of every state, the refractory dissent of that little state prevented their adoption. The inconveniences resulting from this requisition, of unanimous concurrence in alterations in the Confederation, must be known to every member in this Convention; it is therefore needless to remind them of them. Is it not self-evident that a trifling minority ought not to bind the majority? Would not foreign influence be exerted with facility over a small minority? Would the honorable gentleman agree to continue the most radical defects in the old system, because the petty state of Rhode Island would not agree to remove them?

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 88–89 (Jonathan Elliot ed. 2d ed. 1827) [hereinafter 3 Elliot].

16. 2 Farrand, *supra* note 15, at 558.

17. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 120 (Max Farrand ed. 1937) [hereinafter 3 Farrand].

18. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 18 n.7 (Max Farrand ed. 1937) [hereinafter 1 Farrand].

necessary, and that the assent of the National Legislature ought not to be required thereto.'[19]

On June 5, the Framers again considered the process for amending the Constitution. Elbridge Gerry rose to remind the Framers of the importance of making the states central to the amendment process: 'The novelty [and] difficulty of the [national] experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the [Government]. Nothing had yet happened in the States where this provision existed to prove[ ] its impropriety.'[20]

On June 11, the Framers revisited the amendment process. This time, it was George Mason who rose to support both the necessity of a liberal amendment process and the importance of vesting amendments exclusively in the states. As Madison's notes recount:

> Col. Mason urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments therefore will be necessary, and it will be better to provide for them, in an easy, regular and Constitutional way than to trust to chance and violence. It would be improper to require the consent of the [National] Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment.[21]

After Randolph echoed Mason's arguments,[22] the Founders unanimously agreed to the resolution 'that provision ought to be made for the amendment of the articles of union whensoever it shall seem necessary.'[23] That was a sharp break from the Articles of Confederation, which had proved impossible to amend. But that's where the Framers' agreement ended (for the time being anyway); they postponed for later consideration whether the

19. *Id.* at 22; *see also id.* at 28.
20. *Id.* at 122.
21. *Id.* at 202–03.
22. *Id.* at 203.
23. *Id.* at 194.

amendment process would be controlled exclusively by the states as Randolph originally proposed.[24]

On July 23, the Framers again unanimously agreed that the Constitution should be amendable 'whensoever it shall seem necessary.'[25] The Framers referred that provision to the Committee of Detail to draft an amendment consistent with the resolution.[26] The Committee of Detail, in turn, drafted the amendment to provide: 'This Constitution ought to be amended whenever such Amendment shall become necessary; and on the Application of the Legislatures of two thirds of the States in the Union, the Legislature of the United States shall call a Convention for that Purpose.'[27] On August 6, Rutledge and his Committee of Detail presented the provision to the other Framers as Article XIX of the first draft of the Constitution.[28]

This point cannot be overemphasized: when the Framers first met, they agreed both that the Constitution must be easily amendable and that states should have *exclusive* control over the amendment process. Obviously, the final version of Article V also allows Congress to propose amendments. But it is simply false to treat a convention of states as a constitutional afterthought. In reality, the entire document was framed against the backdrop of states' control over the amendment process.

For almost the entire month of August 1787 the Framers debated other provisions of the Constitution, while in their working draft the amendment process remained the sole prerogative of the states. It was not until August 30 that the Framers came back to what we now know as Article V.[29] On that day, Governor Morris rose to argue that Congress should have an equal power to propose amendments; in Morris's view, Congress also 'should be left at liberty to call a Convention, whenever they please.'[30] But again underscoring the Framers' agreement on the centrality of states' control over the amendment process, Morris lost on

24. *Id.*
25. 2 Farrand, *supra* note 15, at 84.
26. *Id.* at 85. John Rutledge was the chairman of the Committee of Detail. The convention adjourned from July 24 until August 6 to await Rutledge's report. Rutledge's Committee had a remarkable influence on the final text of the Constitution. *See* John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 147, 153 (2006).
27. 2 Farrand, *supra* note 15, at 159; *see also id.* at 148, 174.
28. *Id.* at 188.
29. *Id.* at 467.
30. *Id.* at 468.

the first roll-call vote; the Framers instead adopted the states-only approach reported by the Committee of Detail.[31]

The Framers reconsidered Morris's argument on September 10.[32] Hamilton reiterated that the Framers wanted 'an easy mode [to] be established for supplying defects which will probably appear in the new System.'[33] He worried, however, that states should not have *exclusive* authority to propose amendments to the Constitution. That is so, Hamilton thought, because states naturally would perceive the need for amendments only when necessary to protect or expand the states' prerogatives.[34] So Hamilton proposed for the first time giving both the states and the Congress the power to propose amendments.[35] The Framers voted nine in favor (Massachusetts, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia), one against (Delaware), and one divided (New Hampshire).[36] The Committee of Style reduced Hamilton's proposal to the text of what we now call Article V.[37]

Five days later, on September 15, George Mason rose to urge the Framers to reconsider Congress's role in the constitutional amendment process.[38] Mason argued that Congress's role should be minimized or eliminated altogether.[39] Mason reasoned that the Constitution's future amendments most likely would be occasioned by federal overreach; thus it made no sense to give the federal government a chance to stop solutions to problems the federal government itself caused. As Madison reported Mason's argument:

---

31. *Id.*
32. *Id.* at 555.
33. *Id.* at 558.
34. *Id.*
35. *Id.*
36. *Id.* at 559.
37. *See id.* at 578, 602. There was some confusion over whether the Committee of Style faithfully implemented the Framers' views in its first draft. George Mason accused Morris and King (both of whom served on the Committee and wanted Congress to have an exclusive right to propose constitutional amendments) of trying to smuggle their views into the Constitution by burying their proposal in a conference report and asking the Framers to adopt the report early in the morning when the chamber was half-empty and not paying attention. 3 Farrand, *supra* note 17, at 367–68. Mason pointed out the error in the Committee's report, leading to a contentious exchange between Mason, King, and Morris on the floor. *Id.* In all events, the matter was resolved, and the Constitution allowed either Congress or state conventions to propose amendments.
38. 2 Farrand, *supra* note 15, at 629.
39. *Id.*

> Mason thought the plan of amending the Constitution exceptionable [and] dangerous. As the proposing of amendments in both modes depend, in the first immediately, and in the second, ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case.[40]

Madison rose to clarify that nothing in Article V gave Congress primacy in the process. Quite the opposite, actually. Madison explained that Congress would be 'bound' by the will of two-thirds of the states.[41]

At the end of the convention, three delegates refused to sign the proposed Constitution: Edmund Randolph of Virginia, George Mason of Virginia, and Elbridge Gerry of Massachusetts.[42] In explaining his decision not to sign the Constitution, Randolph eerily presaged the problems confronting us today. He worried that the Constitution did not go far enough 'in defining the [powers of the federal government] so as to leave no clashing of jurisdictions nor dangerous disputes [with the states].'[43] And he worried that the Constitution would not 'prevent the one from being swallowed up by the other, under cover of general words, and implication.'[44] In Randolph's view, it should be *even easier* for states to proactively and reactively curb federal abuses through constitutional amendments.[45]

There are three important takeaways from the Framers' debates in Philadelphia. First, everyone in the convention hall in 1787 agreed that states would play the primary role in amending the Constitution. Even Alexander Hamilton—arguably the most ardent nationalist among the Founders and the man who successfully moved for Congress to play some role in the amendment process—agreed that states would be at least as important as Congress in amending the charter.[46] Second, far from recog-

40. *Id.*
41. *Id.* at 630.
42. 3 Farrand, *supra* note 17, at 124.
43. *Id.* at 127.
44. *Id.*
45. *Id.*
46. *See* 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2522 (John P. Kaminski et al. eds. 2009) ("The reason why there are two modes of obtaining amendments prescribed by the constitution I suppose to be this—it could not be

nizing Congress as the 'traditional' or preferred organ for amending the Constitution,[47] the Framers included Congress only at the eleventh hour and only in an apparent attempt to add symmetry to Article V. Third and finally, given the sheer volume of discussion among the Framers regarding Article V generally and the states' primacy in amending the Constitution specifically, we have arguably been doing things backwards for the last 230 years. The Framers would scoff at the notion that a convention of states is a radical idea.

B. The Reality: The Constitution Could Not Have Been Ratified Without Article V

When the delegates left Philadelphia, they turned their collective attention to ratifying the Constitution. Again, Article V took a central role, and again, the power of the states to propose amendments was essential to the ratification of the Constitution. The nation quickly divided itself into two camps: Federalists (who supported adoption of the Constitution) and Anti-Federalists (who opposed it).[48] Whenever the Anti-Federalists criticized the document and urged a vote against ratification, the Federalists relied on Article V as their trump card.[49] After all, the

---

known to the framers of the constitution, whether there was too much power given by it or too little; they therefore prescribed a mode by which Congress might procure more, if in the operation of the government it was found necessary; and they prescribed for the states a mode of restraining the powers of the government, if upon trial it should be found they had given too much.").

47. *See* Hansen, *supra* note 11 (declaring that '[t]here is wisdom in amending the Constitution in the traditional way,' and referring to the method of "having Congress propose a single amendment" as the "traditional way").

48. The Federalists obviously won that debate, and their identities are well-known today—they included people like James Madison, Alexander Hamilton, and John Jay, who collectively authored *The Federalist Papers* under the pseudonym "Publius. *See generally* THE FEDERALIST (Clinton Rossiter ed. 1961). The Anti-Federalists were a heterogeneous bunch who authored various papers, often under various pseudonyms, offering various reasons to oppose adoption of the Constitution. *See* THE ANTI-FEDERALIST 3 (Herbert J. Storing ed. 1985). Many of their identities are unknown or debatable. *See id.*

49. *Compare* Philanthropos, *The Anti-Federalist Papers No. 7: Adoption of the Constitution Will Lead to Civil War*, CONST. SOC'Y (originally published in The Virginia JOURNAL and Alexandria ADVERTISER by an anonymous Virginia Anti-Federalist, "Philanthropos, on Dec. 6, 1787) http://www.constitution.org/afp/borden07.htm [https://perma.cc/7JFX-KDGB] (criticizing the '[t]he new constitution in its present form" as "calculated to produce despotism, thraldom and confusion, and if the United States do swallow it, they will find it a bolus, that will create convulsions to their utmost extremities"), *with* THE FEDERALIST NO. 85, at 525–26 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (arguing that [i]n opposition to the probability of subsequent amendments, it has been urged that the persons delegated to the administration of the national government will always be disinclined to yield up any portion of the authority of which they were once possessed. [T]he observation is futile. [T]he national rulers, whenever nine States

Federalists argued, Article V ensured that the Constitution would be easily amended. The Federalists also emphasized that states would play the primary role in the Article V process—a particularly powerful retort given that the principal source of Anti-Federalists' criticisms was that the Constitution did too little to protect states' rights.

For example, on October 5, 1787 Richard Henry Lee (an Anti-Federalist from Virginia) sent a letter to Samuel Adams (an Anti-Federalist from Massachusetts).[50] Lee's letter is one of the most eloquent criticisms of the proposed Constitution, and it concludes by urging fundamental amendments to the charter: [W]hy may not such indispensable amendments be proposed by the [state ratifying] Conventions and returned With a new plan to Congress that a new general Convention may so weave them into the proffer[e]d system as that a Web may be produced fit for freemen to wear?"[51] Lee was not content to rely on Article V to make amendments after ratification; he instead wanted to amend the document before ratification. Lee's view became a plank in the Anti-Federalists' platform, which called for 'previous amendments'—that is, amendments to the Constitution before Americans agreed to displace the Articles of Confederation and submit to the new Constitution.

The Federalists responded by pointing to Article V and arguing that 'subsequent amendments'—that is, amendments after ratification—would be more than sufficient. For example, Alexander Hamilton drafted *The Federalist No. 85* to respond to the concern that the new Constitution would vest tyrannical power in federal officials who, like the English before them, would refuse to give it up.[52] Hamilton responded by emphasizing Article V—and, in particular, its provision for a convention of states—eliminates any concern that federal officeholders would insulate their abuses of power from constitutional reforms. Hamilton explained:

---

concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be *obliged* 'on the application of the legislatures of two thirds of the States to call a convention for proposing amendments which *shall be valid*, to all intents and purposes, as part of the Constitution ').

50. Letter from Richard Henry Lee to Samuel Adams (Oct. 5, 1787), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 38 (John P. Kaminski & Gaspare J. Saladino eds. 1988).

51. *Id.*

52. THE FEDERALIST NO. 85 (Alexander Hamilton).

> [The Constitution] proves beyond the possibility of a doubt that the observation is futile. It is this: that the national rulers, whenever nine States concur, will have no option upon the subject. By the fifth article of the plan, the Congress will be *obliged* 'on the application of the legislatures of two thirds of the States [which at present amount to nine], to call a convention for proposing amendments which *shall be valid*, to all intents and purposes, as part of the Constitution, when ratified by the legislatures of three fourths of the states, or by conventions in three fourths thereof. The words of this article are peremptory: The Congress '*shall* call a convention. Nothing in this particular is left to the discretion of that body. And of consequence all the declamation about the disinclination to a change vanishes in air.[53]

The Constitution's ratification story can largely be told through the debates between Anti-Federalists like Lee who did not trust Article V and Federalists like Hamilton who did. And the debate over 'previous amendments' demanded by Anti-Federalists and 'subsequent amendments' promised by Federalists recurred throughout the states' ratifying conventions.[54] Not only did the Federalists win those debates by relying on Article V but it was Article V (and the states' primacy in the amendment process) that flipped the Anti-Federalists' votes in key states in favor of ratification. Thus, it is no overstatement to say that Article V was the outcome-determinative factor that gave us our Constitution. Three states' ratification debates warrant particular emphasis: Massachusetts, New Hampshire, and Virginia.

1. Massachusetts

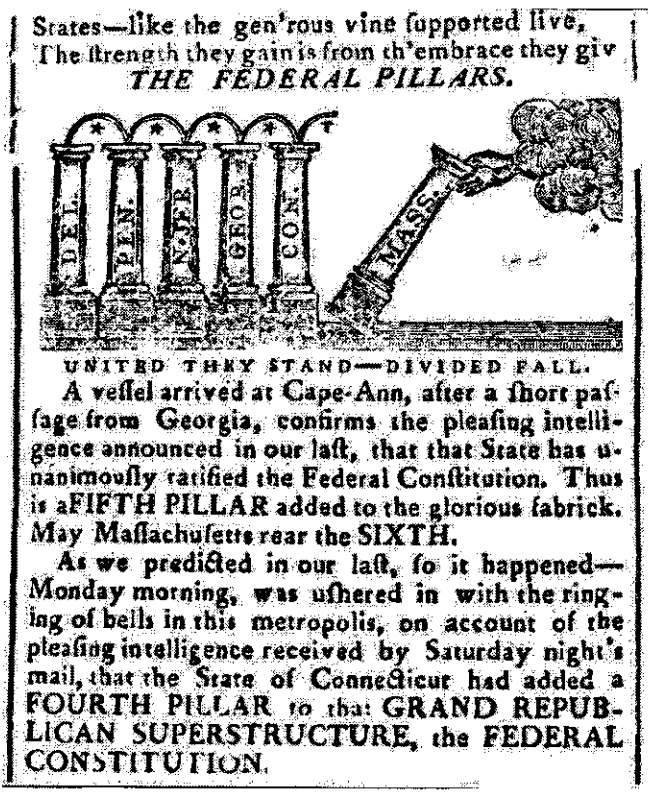
The first five states to ratify the Constitution (Delaware, New Jersey, Pennsylvania, Georgia, and Connecticut) did so quickly in the autumn of 1787. But then things stalled in New England in the winter of 1787 and 1788:

---

53. *Id.* at 526.
54. *See* 2 Elliot, *supra* note 12, at 154.

> The early victories of the Federalists were important but not decisive. Antifederalists were strong in Rhode Island, North Carolina, New York, Virginia, and New Hampshire, and in these states the outcome was certain to be profoundly affected, and probably determined, by the action of Massachusetts. Here lay the decisive conflict; had the Constitution lost in Massachusetts, it would never have been ratified.[55]

And as it turns out, Massachusetts never would have voted for ratification were it not for Article V and the promise of subsequent amendments.



Source: MASS. CENTINEL (Jan. 30, 1788).

55. JACKSON TURNER MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788, at 200 (1961).

During Massachusetts's ratification debate, state legislators launched a fusillade of criticisms against the proposed Constitution. The criticisms were as wide-ranging as they were acerbic—from the odiousness of slavery to the likelihood of congressional or presidential tyranny.[56] Time and again, the Constitution's defenders pointed to Article V: the proposed Constitution was obviously deficient, but the Framers argued, the states could and would amend it over time.

Take, for example, the views of Rufus King. King was a delegate from Massachusetts to the Continental Congress and to the Constitutional Convention, and he was an ardent Federalist.[57] After listening to a litany of criticisms against the proposed Constitution that he helped draft, King rose to remind the ratifiers of Article V:

> The Hon. Mr. King observed, that he believed [the critics] had not, in their objections to the Constitution, recollected that this article was part of it; for many of the arguments of gentlemen were founded on the idea of future amendments being impracticable. [Mr. King] observed on the superior excellence of the proposed Constitution in this particular, and called upon gentlemen to produce an instance, in any other national consti-

56. *See, e.g.*, 2 Elliot, *supra* note 12, at 107–08 (recounting Massachusetts's ratification debate from Saturday, January 26, 1788: "The debate on [Article I, Section 9] still continued desultory, and consisted of similar objections, and answers thereto, as had before been used. Both sides deprecated the slave trade in the most pointed terms; on one side, it was most pathetically lamented by Mr. Nason, Major Lusk, Mr. Neal, and others, that this Constitution provided for the continuation of the slave trade for twenty years; and on the other, the Hon. Judge Dana, Mr. Adams, and others, rejoiced that a door was now to be opened for the annihilation of this odious, abhorrent practice, in certain time."); U.S. CONST. art. V (authorizing constitutional amendments to alter Article I, Section 9 and abolish slavery but not until after 1808). The Constitution's defenders likewise resorted to heated rhetoric. For example, the Federalist Fisher Ames argued, "The period of our political dissolution is approaching. Anarchy and uncertainty attend our future state. But this we know—that Liberty, which is the soul of our existence, once fled, can return no more. The Union is essential to our being as a nation. The pillars that prop it are crumbing to powder. 2 Elliot, *supra* note 12, at 158. *See also id.* at 173 (Symmes: '[S]o ample have been the arguments drawn from our national distress, the weakness of the present Confederation, the danger of instant disunion, and perhaps some other topics not included in these, that a man must be obstinate indeed, to say, at this period, that a new government is needless.').

57. JOSEPH C. MORTON, SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY 160 (2006).

> tution, where the people had so fair an opportunity to correct any abuse which might take place in the future administration of the government under it.[58]

In response, a prominent Anti-Federalist named Dr. Charles Jarvis rose to confess that his mind had been changed. He conceded that Article V provided a 'perfect' and 'complete' response to 'whatever faults or imperfections' he had previously criticized in the document.[59] And Dr. Jarvis celebrated the fact that no other constitution ever written contained anything like Article V:

> In other countries, sir,—unhappily for mankind,—the history of their respective revolutions has been written in blood; and it is in this only that any great or important change in our political situation has been effected, without public commotions. When we shall have adopted the Constitution before us, we shall have in this article an adequate provision for all the purposes of political reformation. If, in the course of its operation, this government shall appear to be too severe, here are the means by which this severity may be assuaged and corrected. If, on the other hand, it shall become too languid, in its movements, here, again, we have a method designated by which a new portion of health and spirit may be infused in the Constitution.[60]

Dr. Jarvis closed by emphasizing that the proposed Constitution was superior to the Articles of Confederation precisely because it allowed states more leeway to correct future injustices:

> I shall not sit down, sir, without repeating, that, as it is clearly more difficult for twelve states to agree to another convention, than for nine to unite in

58. 2 Elliot, *supra* note 12, at 116.
59. *Id.*
60. *Id.* at 116–17.

> favor of amendments, so it is certainly better to receive the present Constitution, in the hope of its being amended, than it would be to reject it altogether, with, perhaps, the vain expectation of obtaining another more agreeable than the present.[61]

While Jarvis moved from the Anti-Federalists' previous-amendment camp to the Federalists' subsequent-amendment camp, his speech touched off a ferocious debate over the constitutional-amendment process. For example, the great Anti-Federalist Samuel Adams sponsored several amendments, including 'a summary of a bill of rights.'[62] Some argued that it was plainly within the Commonwealth's power to consider those amendments before or in conjunction with its decision to ratify the Constitution; as Jarvis put it, 'If we have a right to receive or reject the Constitution, surely we have an equal authority to determine in what way this right shall be exercised.'[63] Numerous other speakers rose to argue that Massachusetts was so influential that an amendment 'recommended by the [Massachusetts] Convention[] would be inserted in the Constitution.'[64] Others disagreed and argued, [W]e have no right to make [previous] amendments. It was not the business we were sent [here] for.'[65]

By February 5, 1788, the entire Massachusetts ratification convention had devolved into a debate over Article V and how, when, and to what extent the proposed Constitution could or should be amended. The starkness of the divide between the previous-amendment Anti-Federalists and the subsequent-amendment Federalists threatened to derail the entire ratification process in Massachusetts and, with it, the nation. As Ames put it, [T]he nature of the debate is totally shifted, and the inquiry is now not what the Constitution is, but what degree of probability there is that the amendments will hereafter be incor-

---

61. *Id.* at 117.
62. *Id.* at 131.
63. *Id.* at 151.
64. *Id.* at 140; *e.g.*, *id.* at 138 (Dana); *id.* at 153 (Jarvis); *see also* James Winthrop, *On the Present Prosperity: Recommit the Constitution* (Nov. 30, 1787), *in* 1 THE DEBATE ON THE CONSTITUTION 443, 445 (Bernard Bailyn ed. 1993) ("At present this state is one of the most respectable and one of the most influential in the union. If we alone should object to receiving the system without amendments, there is no doubt but it would be amended.").
65. 2 Elliot, *supra* note 12, at 140 (Thompson).

porated into it.'[66]

In the end, the members of the Massachusetts convention adopted a middle position—the so-called 'Massachusetts Compromise. In that compromise, the Commonwealth's lawmakers voted to ratify the Constitution, but they included in their ratification message a 'recommendation' for nine amendments, some of which ended up in the Bill of Rights.[67]

The Massachusetts Compromise was remarkable for three reasons. First, it relied entirely on the state's power to propose amendments under Article V. Many of the Anti-Federalists argued ardently that the Constitution could not be accepted without amendments.[68] And '[t]he so-called 'Massachusetts compromise' gave Anti-Federalists the opportunity to formally request the First Congress to consider amendments without having to go through the long and complicated second convention process.'[69] By agreeing to invoke Article V's amendment process even before the ink on the Constitution itself was dry, the Federalists disarmed the Constitution's opponents in an ultimate sign of good-faith reliance on the states' powers to amend the document.

Second, the Massachusetts Compromise was remarkable because it was the *sine qua non* of ratification in the Commonwealth and hence arguably the nation.[70] At the outset of the Massachusetts ratification convention, the Anti-Federalists had a twenty- or forty-vote majority in the Commonwealth.[71] In reliance on Article V, however, twelve to twenty of those Anti-Federalists changed their votes.[72] That would have been a momentous achievement for Article V and the Massachusetts compromise if its only consequence was to ratify the Constitution in one of the nation's

66. *Id.* at 154.

67. *Id.* at 177–78.

68. *See, e.g.*, James Winthrop, *Amend the Articles of Confederation or Amend the Constitution? Fourteen Conditions for Accepting the Constitution* (Feb. 5, 1788), *in* 2 THE DEBATE ON THE CONSTITUTION 155, 161–62 (Bernard Bailyn ed. 1993) (arguing that '[w]hatsoever way shall be chosen to secure our rights, the same resolve ought to contain the whole system of amendment").

69. Richard Labunski, *The Second Convention Movement, 1787–1789*, 24 CONST. COMMENT. 567, 588 (2007).

70. *See generally* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 73 (1990).

71. *See* MAIN, *supra* note 55, at 202–03 (noting that "when the convention assembled the Antifederalists had a clear majority, which some of their own number claimed was forty or more").

72. *Id.* at 203, 206.

biggest and most influential states. But the consequences did not end there. Ratification in Massachusetts also thawed the Constitution's New England freeze, and by defeating the Anti-Federalists in one of their staunchest strongholds, the Constitution's defenders scored an enormous political, strategic, and moral victory that all but ensured the document's ratification.[73]

2. New Hampshire

New Hampshire is the second state in which Article V played a pivotal role. New Hampshire's ratification convention first met in February of 1788.[74] At the beginning of the convention, the Anti-Federalists outnumbered the Federalists by more than a two-to-one margin.[75] For various socioeconomic and political reasons, however, the Anti-Federalists could not muster the votes to reject the Constitution outright.[76] So they settled for a vote to adjourn the ratification convention until June 1788, effectively tabling the question for four months.[77]

By the time New Hampshire's ratification convention reconvened in June of 1788, the proponents of the Constitution had secured eight of the nine states needed to make the charter effective.[78] But their odds were long in the five remaining states: North Carolina and Rhode Island refused to adopt the Constitution until after the First Congress proposed the Bill of Rights, and the Anti-Federalists were either tied or leading in New Hampshire, New York, and Virginia.[79]

Virginia was the first state of the remaining three scheduled to take up the Constitution.[80] Its ratification convention started on

---

73. *Id.* at 209–10.

74. *Id.* at 210.

75. *See id.* ("[O]ut of over one hundred delegates (107, by one account) only thirty favored ratification.").

76. *See id.* ("[T]he Antifederalists were unable to maintain sufficient control to reject the Constitution, nor were the Federalists able to induce a majority to accept it.").

77. *See id.* ("In the end the convention voted to adjourn (56–51).").

78. *See id.* at 210, 215 ("By mid-February of 1788, six states had ratified the Constitution . . . On April 26 the [Maryland] convention approved of the Constitution by the great majority of sixty-three to eleven. The Antifederalists' failure in Maryland was followed a month later by defeat in South Carolina.").

79. *Id.* at 221 (noting that '[w]hen the New Hampshire convention met there was still, according to Atherton, a majority against the Constitution"); *id.* at 288 (chart of ratification chronology reporting that Virginia's initial convention had equal numbers of Federalists and Anti-Federalists, and that New York's initial convention had nineteen Federalists to forty-six Anti-Federalists).

80. *See id.* at 288 (chart of ratification chronology reporting that Virginia's initial convention date was June 2, compared to New York's date of June 17 and North Carolina's date of July 21).

June 2 and ended on June 25.[81] When Virginia's delegates met and voted to ratify the Constitution in the Richmond Theatre, they *thought* they were voting to become the ninth state to ratify the charter and thus to make it effective.

Unbeknownst to Virginia's delegates, however, New Hampshire had stolen that honor four days earlier.[82] On June 21, after just four days of debate, New Hampshire adopted the Massachusetts Compromise and agreed to ratify the Constitution first and rely on Article V to amend it later.[83]

Many of the records of the New Hampshire convention have been lost to history.[84] But this much we know for sure: Several Anti-Federalists switched their votes during the state's second ratification debate, and they did so in reliance on Article V.[85] As Jackson Turner Main puts it, '[T]he idea of ratifying with amendments, introduced in Massachusetts, had now become general, and laid fears to rest.'[86]

Thus, when the Constitution sprung to life upon New Hampshire's ratification vote, it did so in direct reliance on Article V and the promise of subsequent amendments offered by states.

3. Virginia

Back in Virginia, the charter's prospects looked much dimmer. 'Most historians have agreed that a majority of Virginians opposed the Constitution, and the Anti-Federalists had a solid majority in Virginia's legislature.[87] At least some Federalists predicted that Virginia would refuse to ratify the Constitution.[88]

---

81. *Id.* at 228.

82. There is some evidence that New Hampshire rushed its second round of deliberations out of a competitive desire to rob Virginia of the honor of being the ninth state to ratify the Constitution and hence to make it operative. *See* Letter from Tobias Lear to George Washington (June 22, 1798), *in* 6 PAPERS OF GEORGE WASHINGTON 349–50 (W.W. Abbot ed., 1997).

83. *See id.*

84. *See* MAIN, *supra* note 55, at 211 ("Unfortunately, no record has been preserved of the New Hampshire vote in February.").

85. *See id.* at 221 ("In addition, the ratification by Massachusetts was important. [A] number of towns had already reversed their [Anti-Federalist] positions, and during the convention others followed, the delegates either joining the Federalists or abstaining."). *See also id.* at 205–06 (stating that the Federalists permitting the acceptance of amendments as a condition of Massachusetts's ratification caused "a decisive shift of perhaps a score of delegates" and led to Massachusetts's successful ratification of the Constitution).

86. *Id.* at 222.

87. *Id.* at 285.

88. *See id.* at 224–25 (stating that "though the margin against the Constitution was narrow, one discouraged Federalist predicted it would fail").

And, if the Anti-Federalists prevailed, the northern part of Virginia threatened to secede and join the Union.[89]

Among the most eloquent Anti-Federalists in the nation was Virginia's Patrick Henry. Henry became a national hero when, on March 23, 1775, he delivered his 'Give Me Liberty or Give Me Death' speech on the floor of the Second Virginia Convention in Richmond.[90] By 1788, Henry was old and largely retired from public life. Nonetheless:

> His popularity in Virginia was unbounded. It was the popularity that attends genius, when thrown with heart and soul, and with every impulse of its being, into the cause of popular freedom; and it was a popularity in which reverence for the stern independence and the self-sacrificing spirit of the patriot was mingled with admiration for the splendid gifts of oratory which Nature, and Nature alone, had bestowed upon him.[91]

In Thomas Jefferson's words, Patrick Henry 'appeared to me to speak as Homer wrote.'[92] Mustering all of his prestige and rhetorical prowess, Patrick Henry opened Virginia's ratification debate with a withering attack on both the Constitution and the Massachusetts Compromise. As to the Constitution, Henry bemoaned it as 'extremely pernicious, impolitic, and dangerous' because '[i]t is radical in this transition [from a confederacy to a consolidated national government]; our rights and privileges are endangered, and the sovereignty of the states will be relinquished.'[93] And as to the Massachusetts Compromise, Henry was equally scornful. He began on common ground:

> The necessity of amendments is universally admitted. It is a word which is reechoed from every part of the continent. A majority of those who hear me think amendments are necessary. Policy tells us

89. *Id.* at 225.

90. *See* HARLOW GILES UNGER, LION OF LIBERTY 95–99 (2013).

91. 1 GEORGE TICKNOR CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES FROM THEIR DECLARATION OF INDEPENDENCE TO THE CLOSE OF THEIR CIVIL WAR 663 (N.Y., Harper 1889).

92. 1 THE WORKS OF THOMAS JEFFERSON 8 (Paul Leicester Ford ed., 1904).

93. 3 Elliot, *supra* note 15, at 44.

> they are necessary. Reason, self-preservation, and every idea of propriety, powerfully urge us to secure the dearest rights of human nature.[94]

But Henry mocked as 'mad' and an 'absurdity' the idea that the Article V amendment process was a 'plain, easy way' to accomplish those amendments.[95] He explained:

> Does it not insult your judgments to tell you, Adopt first, and then amend! Is your rage for novelty so great, that you are first to sign and seal, and then to retract? Is it possible to conceive a greater solecism? I am at a loss what to say. You agree to bind yourselves hand and foot—for the sake of what? Of being unbound. You go into a dungeon—for what? To get out. Is there no danger, when you go in, that the bolts of federal authority shall shut you in? Human nature never will part from power. Look for an example of a voluntary relinquishment of power, from one end of the globe to another: you will find none.[96]

And even if you could find *someone* who would relinquish power and cede to constitutional reforms, Henry worried, a single beneficent person would be insufficient because Article V requires *supermajorities* of beneficent people willing to relinquish power.[97] That hurdle was just too high, Henry argued, to trust in subsequent amendments.

In Henry's view, the only way to adopt the Constitution was to amend it first: 'I conceive it my duty, if this government is adopted before it is amended, to go home. Previous amend-

---

94. *Id.* at 315.

95. *Id.* at 48–49, 174.

96. *Id.* at 174; *see also id.* at 591 (describing "subsequent amendments' as "an idea dreadful to me, and stating that '[e]vils admitted in order to be removed subsequently, and tyranny submitted to in order to be excluded by a subsequent alteration, are things totally new to me").

97. *See id.* at 49 ("To suppose that so large a number as three fourths of the states will concur, is to suppose that they will possess genius, intelligence, and integrity, approaching to miraculous. It would indeed be miraculous that they should concur in the same amendments, or even in such as would bear some likeness to one another; for four of the smallest states, that do not collectively contain one tenth part of the population of the United States, may obstruct the most salutary and necessary amendments.").

ments, in my opinion, are necessary to procure peace and tranquility.'[98] He worried that the Massachusetts Comprise would rob the Anti-Federalists of the political power to actually accomplish necessary amendments, which would cause tyranny and bloodshed.[99]

And Patrick Henry was not alone. Another prominent statesman, James Monroe, agreed with him that previous amendments were the only prudent course.[100] He argued: 'Adopt it now, unconditionally, and it will never be amended, not even when experience shall have proved its defects. An alteration will be a diminution of their power, and there will be great exertions made to prevent it.'[101]

For all of their eloquence, however, Henry and Monroe lost the debate. James Madison argued that the Anti-Federalists' concerns about the practical difficulty of amendments were unfounded; subsequent amendments, he insisted will be 'easy to obtain.'[102] And most crucially for present purposes, Madison argued that amendments would be 'easy' not because *Congress* would propose them but because the *states* would:

> [Amendments] can be proposed when the legislatures of two thirds of the states shall make application for that purpose; and the legislatures of three fourths of the states, or conventions in the same, can fix the amendments so proposed. If there be an equal zeal in every state, can there be a doubt that they will concur in reasonable amendments?[103]

Some worried that anything more than subsequent amendments could jeopardize the entire ratification process. For example, Randolph worried that previous amendments could scuttle the entire Constitution or, perhaps worse, prompt the other

98. *Id.* at 593.

99. *See id.* ("Previous amendments, in my opinion, are necessary to procure peace and tranquility. I fear, if they be not agreed to, every movement and operation of government will cease; The interval between this and bloodshed is but a moment.').

100. *Id.* at 630.

101. *Id.*

102. *Id.* at 629.

103. *Id.* at 629–30; *see also* THE FEDERALIST NO. 43, at 271–80 (James Madison) (Clinton Rossiter ed. 1961).

states to exclude Virginia from the Union.[104] James Innes, a fellow Virginian, also worried about the amendments' impact on the ratification process: 'With respect to previous amendments, they are equal to rejection. They are abhorrent to my mind. I consider them as the greatest of evils. [They are] imprudent, destructive, and calamitous. '[105]

In the end, though, it was the strength and power of Article V—and the Founders' faith in the states' role in Article V—that convinced Virginia's ratifiers to accept the Massachusetts Compromise. As George Wythe reminded the convention, the task of amending the Constitution is a tough one, but Article V was well-built for it.[106] That is why Virginia followed 'the respectable state of Massachusetts, who, to prevent a dissolution of the Union, adopted the Constitution, and proposed such amendments as they thought necessary, placing confidence in the other states that they would accede to them[.] '[107]

On June 25, 1788, five of Virginia's Anti-Federalists changed their minds and accepted the Massachusetts Compromise.[108] 'The decision would be momentous, not for America only, but the whole world. Without Virginia, this great country would have been shivered into fragmentary confederacies, or separate independent states. '[109] The Anti-Federalists' willingness to trust Article V made Virginia part of the United States; it brought stability to the ratification process both by lending the state's heft and by assuring Americans that George Washington would be their first president,[110] and it ensured that America's constitutional experiment would succeed.

C. The Reality: Originalists Must Trust Article V

The idea that a convention of states is radical rests on one of three propositions, each of which is false.

First, the critics may not take seriously the Framers' debates

---

104. 3 Elliot, *supra* note 15, at 194.

105. *Id.* at 637.

106. *Id.* at 587.

107. *Id.* at 644.

108. 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 315–16 (N.Y. D. Appleton & Co. 5th ed. 1882).

109. *See id.* at 316.

110. *See* MAIN, *supra* note 55, at 205–06 (noting that the Constitution was framed and ratified on the assumption that George Washington would be the first president, and that if Virginia had failed to ratify the Constitution, the honor likely would have fallen to John Hancock).

and compromises over Article V. Perhaps the critics are unaware of them. Or perhaps the critics think that all of those debates, all of those compromises, and all of the ink spilled in newspapers by Federalists and Anti-Federalists were empty efforts and rhetoric. Either way, for critics who fail to take seriously the framing of Article V, a convention of states might seem radical.

Of course, no originalist would take that approach to any other provision of the Constitution. We routinely rely on the Framers' debates and views to interpret, say, the Constitution's limits on presidential power, the Constitution's protections for individual liberties, or the Constitution's prohibitions on Congress.[111] In fact, in any other area of constitutional inquiry, the 'radicals' are those who *refuse* to take seriously the Constitution's words and their original public meaning. That should be *a fortiori* true for a provision like Article V, which exists as a bulwark against federal overreach and constitutional dysfunction.

Second, the critics might say that the Framers' views are irrelevant today. That is so because the Framers adopted Article V at a time of revolutionary change; now that we have lived under the Constitution for 240 years, we must be more circumspect in how we change it. According to these critics, conservatives in particular should worry about unprecedented and unpredictable constitutional change.[112]

This criticism rests on one true and one false premise. The true premise is that Americans today *should* be wary of changing constitutional provisions that have served us well for hundreds of years. And those provisions *should* remain static unless and until we amend them. Constitutional provisions are not living, breathing, and evolving organisms. As the late, great Justice Scalia was fond of saying, the Constitution is 'not a living document. It's

111. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 778 (2010) (relying on the Framers' views to discern contours of the Second Amendment); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010) (relying on the Framers' views to hold a statute "incompatible with the Constitution's separation of powers"); United States v. Lopez, 514 U.S. 549, 552–53 (1995) (relying on the Framers' views to interpret limits on Congress's Commerce Clause powers).

112. *See, e.g.*, Steven F. Hayward, *An Article V Constitutional Convention: A Bad Idea Whose Time Has Come?*, FORBES (Aug. 7, 2014, 6:24 PM), http://www.forbes.com/sites/stevenhayward/2014/08/07/an-article-v-constitutional-convention-a-bad-idea-whose-time-has-come/#b4cec855bb9d [https://perma.cc/KF93-NTKZ] (discussing the potential for a "runaway convention" where "liberals will move as a unified block and look to pick off weak-minded Republicans to go along with 'good government reform' amendments").

dead, dead, dead.'[113]

But the false premise is that we can stave off unpredictable and unprecedented change by doing nothing. In the absence of *lawful* constitutional change by the people, the status quo will remain *de facto* constitutional change by the federal government. As Thomas Sowell recently remarked, the latter is the truly radical option:

> Is it better to have the Constitution amended *de facto* by a 5 to 4 vote of the Supreme Court? By the unilateral actions of a president? By administrative rulings by anonymous bureaucrats in federal agencies, to whom federal judges 'defer"? Why are 'We the People' to be kept out of all this, through our elected representatives, when these are the very words with which the Constitution of the United States begins?[114]

The short answer is that 'We the People' should retain the same control over the Constitution that we had at the Founding.

Third, the critics might suggest the Framers could not have been particularly serious about conventions of states because they chose to use the First Congress to propose the Bill of Rights. There were many reasons why the politics of the late eighteenth century made it more feasible to use Congress to propose the first ten amendments to the Constitution.[115] None of those reasons, however, says anything about whether the Framers wanted future generations to use conventions of states—especially when, as now, Congress is a significant part of the constitutional problem.

Moreover, the fact that Congress proposed the Bill of Rights proves the reasonableness of Article V conventions, not the radicalness of them. As discussed above, several states demanded

113. Tasha Tsiaperas, *Constitution a "Dead, Dead, Dead" Document, Scalia Tells SMU Audience*, DALLAS NEWS (Jan. 28, 2013), http://www.dallasnews.com/news/highland-park/2013/01/28/constitution-a-dead-dead-dead-document-scalia-tells-smu-audience [https://perma.cc/3NTW-J7HH]; *see also* Bruce Allen Murphy, *Justice Antonin Scalia and the "Dead" Constitution*, N.Y. TIMES, Feb. 15, 2016, at A19 ("The only good Constitution is a dead Constitution.").

114. Thomas Sowell, *Messing with the Constitution*, CREATORS (Jan. 12, 2016), https://www.creators.com/read/thomas-sowell/01/16/messing-with-the-constitution [https://perma.cc/KR6R-P3GP].

115. *See infra* text accompanying notes 146–158.

those amendments during their ratification conventions, and the states' demands prompted the First Congress to act. In fact, there have been several instances over the last 240 years when convention-of-states efforts have prompted Congress to propose amendments—including the Seventeenth, Twenty-First, Twenty-Second, and Twenty-Fifth Amendments.[116] That is proof that Article V works even when the push for a convention of states fails. And in all events, the accomplishment of constitutional change belies any suggestion that applications for Article V conventions are radical.

III. MYTH: IT WILL RUN AWAY

Even if a convention of states is not radical in theory, the Article V critics argue, it is radical in practice. That is so, they say, because it is completely limitless in scope.[117] Once the delegates assemble at a convention of states, some critics contend the delegates will be able to open the entire Constitution to revision and to trash all manner of constitutional provisions that we hold dear—including the right to free exercise of religion, or the right to keep and bear arms, or the prohibition on slavery.[118] One staunch anti-Article V group puts it this way: 'This is the Convention of States proposal[:] an unlimited convention opening every section of the Constitution to structural change and possibly a revolutionary rewrite. Do you trust your state politicians and the politicians from states like California to monkey with your Constitution? Is it worth the risk?"[119] They argue that even our Founders—as wise and virtuous as they were—could not prevent the original convention in 1787 from turning into a

116. *See* Gerald Benjamin & Tom Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMP. 53, 56–57 (1996) ("The threat of calling a constitutional convention has several times motivated serious congressional consideration of possible amendments. A mounting number of state petitions for a convention to require direct popular election of U.S. Senators forced the 17th amendment out of a reluctant Senate, where it had long languished. Petition campaigns preceded passage of amendments repealing prohibition (21st), limiting the president's term (22nd), and providing for presidential disability (25th). In the early 1980's, as the number of states calling for a convention on the subject passed 30, Congress took up a balanced budget amendment.").

117. Charles Black, *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 198–99 (1972) (contending that an Article V convention is "illimitable" because any limits proposed by states do not bind Congress).

118. *See, e.g.*, RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION vii–viii, 146–47 (1988) (hypothesizing that delegates might move beyond the boundaries of a convention's initial agenda and disturb important American achievements).

119. Hansen, *supra* note 11.

runaway one.[120]

With all respect to the Article V critics, such alarmist rhetoric is based on myth, not fact. Here are the facts. First, an Article V convention of states can and will be sharply limited in its power to propose amendments. Second, the 1787 convention was not a runaway. And third, even if a convention of states were to run away, the Framers required three-fourths of the states (currently, thirty-eight) to ratify any amendment proposed by the convention—a supermajority requirement that is so stringent that it is almost impossible to imagine how a convention of states could accomplish radical, runaway change. Indeed, if we have gotten to a place in this country where we cannot count on thirteen states to block an improvident amendment proposed by a runaway convention, then we are in even deeper trouble than previously thought.

A. The Reality: A Convention of States Can Be Limited

Many of the Article V critics invoke the views of Chief Justice Burger when raising the specter of a runaway convention. Burger argued:

> I have also repeatedly given my opinion that there is no effective way to limit or muzzle the actions of a Constitutional Convention. The Convention could make its own rules and set its own agenda. Congress might try to limit the Convention to one amendment or to one issue, but there is no way to assure that the Convention would obey. After a Convention is convened, it will be too late to stop the Convention if we don't like its agenda.[121]

Burger's assertions are remarkable for many reasons, not the least of which is that they are just that: assertions. He offers no analysis of the constitutional text or the history of Article V. An analysis of that text and history shows two things. First, whatever

120. *See, e.g.*, *id.* ("In the original Constitutional Convention even the ratification process was changed from a unanimous requirement for approval by the states to just nine of the thirteen states.").

121. Letter from Chief Justice Burger (retired) to Phyllis Schlafly (June 22, 1988), EAGLE FORUM, http://www.eagleforum.org/topics/concon/pdf/WarrenBurger-letter.pdf [https://perma.cc/2VZ8-SDN3] [hereinafter Letter from Chief Justice Burger].

Burger may have thought about the matter, it is clear that the Framers believed in issue-limited conventions. Second, much of the critics' contrary position is based on confusion.

1. The Original Meaning of Article V and Founding-Era Practices Prove a Convention of States Can Be Issue-Limited

Academics have spilled much ink debating whether a convention of states can be limited in particular ways.[122] Indeed, former acting Solicitor General Walter Dellinger called the question a 'recurring' one as far back as 1979.[123] The purpose of this Article is not to re-till that well-plowed ground.

For present purposes, it is sufficient to observe that only those on one side of the debate—namely, those who believe in Article V—take seriously the provision's text, original meaning, and history.

In relevant part, Article V requires that 'on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments.'[124] So what is a 'Convention for proposing Amendments"? As Professor Natelson has observed, 'The founding generation understood a political 'convention' to be an assembly, other than a legislature, designed to serve an ad hoc governmental function,'[125] like proposing amendments to a governmental charter. The question, then, is whether 'the Legislatures of the several States' can limit their Application[s] to particular topics (like limiting the jurisdiction of the federal government) without opening a convention to every topic (like eliminating the Bill of Rights).

Some Article V critics say that an issue-limited application from a state legislature is actually no application at all because Article V only contemplates conventions that are completely unlimited in their scope to propose any amendments they want.[126]

---

122. *Compare, e.g.*, William Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295 (1979) (can be limited), *and* Robert G. Natelson, *Proposing Constitutional Amendments by Convention: Rules Governing the Process*, 78 TENN. L. REV. 693 (2011) (same), *with* Black, *supra* note 117 (cannot be limited), *and* Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L.J. 1623 (1979) (same).

123. *See generally* Dellinger, *supra* note 122.

124. U.S. CONST. art. V.

125. Natelson, *supra* note 122, at 706.

126. Charles Black, one of the principal architects of this view, put it this way: "If the view that the convention is illimitable is right, as I and others contend, if that is the kind of convention Article V refers to, then *none* of the applications [submitted by state legislatures and limited to one particular subject] would have called for the thing the

That view is plainly wrong. The most obvious reason why is the original meaning of Article V itself. As explained above,[127] under the working draft of the Constitution that existed for almost the entirety of the 1787 convention, states retained exclusive control over the amendment process. They did so because the Framers anticipated (correctly) that the then-newfangled Congress would never agree to constitutional amendments necessary to rein in federal overreach. At the eleventh hour, the Framers gave Congress an *equal* right to propose amendments to the Constitution—but no one present at the Founding ever suggested that the states thereby lost any or all control over their power to propose amendments.

Rather, when states call for an Article V 'Convention for proposing Amendments, the states are in control of it. If two-thirds of the states determine that the Constitution needs a balanced-budget amendment, for example, the states retain every right to limit their Article V applications to that effect. And it would dramatically unbalance the provisions of Article V to allow Congress to thwart the states' will either by (1) refusing to convene any convention when the states called for a limited one,[128] or (2) convening an unlimited convention when the states applied for a limited one.

The contrary result would violate everything we know about the original understanding of Article V. When the requisite proportion of states applies for a convention, we know from Hamilton that Congress *must* convene it: 'The words of this article [V] are peremptory. The Congress *shall* call a convention. Nothing in this particular is left to the discretion of that body.'[129] So plainly, congressional inaction cannot be tolerated in the face of the requisite number of state applications.

It also would make no sense to allow Congress to spite the states by calling an unlimited convention when the states apply for a limited one. One of the principal concerns motivating Article V was that the states needed a mechanism to amend the Constitution when Congress would not. That is why George Mason

---

Constitution names, properly construed. None, therefore, would be effective; none would create any congressional obligation [for Congress to call a convention]. Thirty-four times zero is zero. Black, *supra* note 117, at 198.

127. *See supra* Part II.

128. *See supra* note 126 and accompany text.

129. THE FEDERALIST NO. 85, at 526 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

argued at the Philadelphia convention that '[i]t would be improper to require the consent of the [National] Legislature, because they may abuse their power, and refuse their consent on that very account. The opportunity for such an abuse, may be the fault of the Constitution calling for amendment.'[130] Requiring the states—the victims of federal abuses—to choose between no amendments and an unlimited convention would severely burden the states' powers to respond to those abuses. That is the exact opposite of what the Framers wanted:

> Surely [it cannot be] that Congress could turn aside even identically phrased, single-item resolutions submitted by more than two-thirds of the states resolved to have a particular (constitutional) grievance considered in convention, by suddenly placing a wholly unexpected price tag (a 'Catch 22' as it were) on that right—that unless these same states were also willing that the proposed convention consider anything else appealing to the individual fancy of some delegates, some special interests, or some other states, then Congress was at liberty to refuse to call any convention at all.[131]

The limitability of an Article V convention also flows from the Framers' repeated efforts to distinguish the Philadelphia convention (which had general authority to write an entirely new Constitution) from an Article V convention (which would not).[132] For example, Hamilton distinguished between the Philadelphia convention, which was charged with deciding 'a great variety of particulars, in which thirteen independent states are to be accommodated in their interests or opinions of interest, and a convention for proposing amendments, which would have a much narrower focus.[133] Hamilton explained:

> [E]very amendment to the Constitution, if once

130. 1 Farrand, *supra* note 18, at 203.
131. Van Alstyne, *supra* note 122, at 1304.
132. *See also infra* Part III.B.
133. *See* THE FEDERALIST NO. 85, at 524 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

> established, would be a single proposition, and might be brought forward singly. There would then be no necessity for management or compromise, in relation to any other point—no giving nor taking. The will of the requisite number would at once bring the matter to a decisive issue. And consequently, whenever nine, or rather ten states, were united in the desire of a particular amendment, that amendment must infallibly take place. There can, therefore, be no comparison between the facility of affecting an amendment, and that of establishing in the first instance a complete Constitution.[134]

If states' only route for proposing amendments was through an unlimited convention, Hamilton never could have said that there would 'be no necessity for management or compromise' or that each amendment 'would be a single proposition. He could pen those words only because he recognized that states' conventions for proposing amendments were both fundamentally different from the Philadelphia convention and inherently limitable in their scopes.

The Framers also repeatedly emphasized that Congress and the states stood on equal footing in proposing amendments; given that everyone recognizes Congress's power to propose particular amendments without opening up the entire Constitution for revision, the states' equal footing requires them to have a similar power. For example, in *The Federalist No. 43*, Madison wrote that the Constitution 'equally enables the general and the state governments to originate the amendment of errors.'[135] Likewise, George Washington recognized that 'a constitutional door is open for such amendments as shall be thought necessary by nine states,'[136] just as the amendment process can be initiated by two-thirds of Congress.

Finally, the limitability of state conventions for proposing amendments is evident from Founding-Era practice. As Professor

134. *Id.* at 525.

135. THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

136. Letter from George Washington to John Armstrong (Apr. 25, 1788), NATIONAL ARCHIVES: FOUNDERS ONLINE, http://founders.archives.gov/GEWN-04-06-02-0201 [https://perma.cc/99QR-UWVU].

Natelson has expertly shown, 'Between the First Continental Congress [in 1774] and the 1787 constitutional convention, there were at least ten ['federal' or] interstate gatherings. All were limited to issuing recommendations, and none was plenipotentiary.'[137] That is, each Founding-Era convention among states was limited to proposing changes, and none had the unlimited power that the Article V critics presume.

A couple of examples suffice to prove the point. On January 24, 1777 the Continental Congress called for an interstate convention among New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia for the limited purpose of proposing a 'plan for regulating the price of labour, of manufactures and of internal produce within those states, and of goods imported from foreign parts, except military stores.'[138] The convention was to be held in York, Pennsylvania in March 1777.[139] Likewise, the Continental Congress called for an interstate convention among North Carolina, South Carolina, and Georgia for the limited purpose of recommending 'the most effectual measures for manning the continental frigates, fitted for the sea in their respective States.'[140] Congress called for that convention to meet in Charleston, South Carolina in May 1777.[141]

In summary, the principle of Article V—that states must have constitutional recourse to rein in the federal government—demands that states can limit their conventions for proposing amendments. The Founders said that such conventions could be so limited. And Founding-Era practice contains numerous examples of similar conventions being so limited.

2. Concerns Over 'Constitutional Conventions' Are Misplaced

The critics of issue-limited conventions premise their view on the idea that the word 'convention' as it is used in Article V can

137. Natelson, *supra* note 122, at 717.

138. 7 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 124 (Worthington C. Ford ed., 1907).

139. *Id.*

140. *Id.* at 125.

141. *Id.*; *see also* Natelson, *supra* note 122, at 718 ("Interstate meetings at New Haven (1778) and Philadelphia (1780) also dealt only with price regulation. The first Hartford Convention (1779) was empowered to address currency and trade, and the second (1780) met 'for the purpose of advising and consulting upon measures for furnishing the necessary supplies of men and provision for the army.' The second Providence Convention (1781) was entrusted only with recommending how to provide supplies to the army for a single year. (footnotes omitted)).

mean *only* a convention like the one held in Philadelphia in 1787.[142] When the states apply for an Article V convention for the purpose of proposing amendments, the critics argue, the states necessarily consent to a constitutional convention in the 1787 sense. Thus, according to Bruce Ackerman, states can invoke Article V *only* 'when [they] are willing to assert the need for an unconditional reappraisal of constitutional foundations.'[143]

Nothing in the text of the Constitution, in *The Federalist Papers* supporting the Constitution, nor in any debate taking place at the time the Constitution was considered and ratified adopts this interpretation of Article V. Indeed, the most that possibly can be said for the critics is that the Founders did not expressly reject their view. As Professor Van Alstyne noted in a letter to Ackerman:

> I have found *nothing* in the early materials I have been canvassing that specifically anticipates the argument or that specifically discredits it; a question in the form you and Charles [Black] have raised was, so far as I can determine, never raised at all. There is thus no expression of views, favoring it or deriding it.[144]

If anything, that is unduly generous to the Article V critics. After all, the Founders devoted immense energy to distinguishing between previous and subsequent amendments.[145] As explained above, previous amendments—that is, amendments made to the Constitution before it was ratified—would require another wide-ranging convention like the one in Philadelphia, replete with uncertainties and contingencies. By contrast, the Founders argued, the entire advantage of subsequent amendments—that is, amendments made under either of Article V's methods—was *avoiding* the unlimited scope and open-endedness of a Philadel-

142. *See, e.g.*, Letter from Chief Justice Burger, *supra* note 121 ("[T]here is no effective way to limit or muzzle the actions of a Constitutional Convention. The Convention could make its own agenda. Congress might try to limit the Convention to one amendment or to one issue, but there is no way to assure that the Convention would obey.").

143. Bruce Ackerman, *Unconstitutional Convention*, NEW REPUBLIC, Mar. 3, 1979, at 8; *see also* Black, *supra* note 117, at 201 (arguing that the Framers included Article V only so states could 'have some means of compelling a thorough reconsideration of the new plan").

144. Van Alstyne, *supra* note 122, at 1297.

145. *See supra* Part II.B.

phia-style convention. It was precisely the distinction between previous and subsequent amendments, and the Framers' assurances that the latter would be easier and less uncertain, that convinced the requisite majorities to ratify the Constitution in the first place. Thus, it can hardly be said, that the Founders were silent on the subject.

The last reed upon which the Article V critics rely is a letter that James Madison wrote to George Turberville in November of 1788.[146] In that letter, Madison responds to New York's call for an Article V convention for proposing amendments, which it made in conjunction with its ratification of the Constitution.[147] Madison begins his letter by doing the very thing that the critics say is impossible—namely, distinguishing between an Article V convention of states for proposing amendments and a constitutional convention like the one in Philadelphia: 'A convention cannot be called without the unanimous consent of the parties who are to be bound by it, *if first principles are to be recurred to*; or without the previous application of [two-thirds] of the State legislatures, *if the forms of the Constitution are to be pursued.* '[148] If this letter is the best that the Article V critics have, that sentence alone should be the end of the debate, because it expressly rejects the notion that an Article V convention for proposing amendments can revisit and undermine the Constitution's 'first principles.

Instead of acknowledging or explaining away that sentence, however, the Article V critics like to quote snippets from Madison's statements[149] that, in the particular circumstances confronting America in 1788, amendments proposed by Congress were superior to those proposed by a convention of states. Because so much is lost when the critics selectively quote Madison's views, here is his point in its entirety:

---

146. Letter from James Madison to George Lee Turberville (Nov. 2, 1788), NATIONAL ARCHIVES: FOUNDERS ONLINE, http://founders.archives.gov/documents/Madison/01-11-02-0243 [https://perma.cc/765G-V75K] [hereinafter Letter from James Madison].

147. New York's ratification message read, in part, "We the said Delegates, in the Name and in the behalf of the People of the State of New York Do by these presents Assent to and Ratify the said Constitution. In full Confidence nevertheless that until a Convention shall be called and convened for proposing Amendments to the said Constitution, the Militia of this State will not be continued in Service out of this State for a longer term than six weeks without the Consent of the Legislature thereof[.]' U.S. DEP'T OF STATE, 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1787–1870, at 195 (D.C. Dep't of State 1894).

148. Letter from James Madison, *supra* note 146 (emphases added).

149. *See* Dellinger, *supra* note 122, at 1634 n.47 (arguing Madison was concerned that the Article V convention process was potentially susceptible to "insidious characters from different parts of America").

> If a General Convention were to take place for the avowed and sole purpose of revising the Constitution, it would naturally consider itself as having a greater latitude than the Congress appointed to administer and support as well as to amend the system; it would consequently give greater agitation to the public mind; an election into it would be courted by the most violent parti[s]ans on both sides; it [would] probably consist of the most heterogeneous characters; would be the very focus of that flame which has already too much heated men of all parties; would no doubt contain individuals of insidious views, who under the mask of seeking alterations popular in some parts but inadmissible in other parts of the Union might have a dangerous opportunity of sapping the very foundations of the fabric. Under all these circumstances it seems scarcely to be presumeable that the deliberations of the body could be conducted in harmony, or terminate in the general good. Having witnessed the difficulties and dangers experienced by the first Convention which assembled under every propitious circumstance, I should tremble for the result of a Second, meeting in the present temper of America and under all the disadvantages I have mentioned.[150]

Several items from Madison's letter merit emphasis. First and most important is what he does *not* say: Madison does not say that a state-called convention under Article V to propose amendments is limitless. Obviously, Madison knew that such conventions could be limited for all of the reasons given above. And he said as much: he expressly distinguished a convention that proposes amendments according to the 'sole purpose' identified in the delegates' commissions from a convention that 'recur[s] to 'first principles.'[151]

A second omission is also key: Madison does *not* say that New

150. Letter from James Madison, *supra* note 146.
151. *Id.*

York's call for a convention to propose specific amendments somehow would open the entire Constitution to revision. New York wanted a convention of states to deliberate over a whole host of amendment topics, from presidential term limits to a bar on capitation taxes to a prohibition on federal courts exercising jurisdiction over 'Controversies respecting Land.'[152] Madison never says that by calling for a convention of states on those topics New York would open the Constitution to revision on every topic. To the contrary, he says that a convention that could revisit the Constitution's 'first principles' would be a different beast altogether.[153]

Third, it is true that Madison worried that America in 1788 was not ready for an Article V convention of states. He worried that such a convention would stir the passions of 'the most violent parti[s]ans on both sides, would 'probably consist of the most heterogeneous characters, would attract 'individuals of insidious views, and would pose 'a dangerous opportunity of sapping the very foundations of the [nation's] fabric.'[154] Madison's concerns about the motivations of would-be convention delegates may or may not have been well-founded in 1788, and similar concerns may or may not be relevant today. Regardless, that is a very different concern from whether the convention of states could be limited to particular topics. Madison may not have liked the potential topics that the states and their would-be delegates would have chosen in 1788, but he never doubted that they *could* choose and limit those topics.

Fourth, Madison made clear that his views on the issue were limited to the particular issues confronting America shortly after the Constitution's ratification. In considering the various proposals for amendments that emerged from the states' ratification proceedings, Madison noted that some were uncontroversial and 'ought to be made according to the apparent sense of America, while '[t]here are others, concerning which doubts are entertained by many, and which ought to receive the light of actual experiment' before being adopted.[155] Perhaps it made sense in that moment for Congress to draft and propose the uncontroversial amendments and to delay an Article V convention until

152. U.S. DEP'T OF STATE, *supra* note 147, at 190–202.
153. *See* Letter from James Madison, *supra* note 146.
154. *Id.*
155. *Id.*

later. Regardless, nothing Madison said would warrant delaying an Article V convention for 240 years.

Fifth, it is obvious Madison wanted Congress to draft the Constitution's first amendments, not the states through Article V conventions.[156] Fair enough. After all, he was an arch-Federalist, the architect of a Constitution that was designed to establish a more powerful federal government, and he ran for the First Congress where he personally introduced those amendments and earned the title "Father of the Bill of Rights."[157] But as explained in the *Texas Plan*,[158] one of Madison's chief insights was that the pendulum of state-federal power might one day swing the other way. That is why Article V has two routes for amending the document—so both the states and the federal government have the power to stand up to encroachments by the other.

B. The Reality: The 1787 Convention Was Not a Runaway

The critics do not stop with claiming that a modern-day Article V convention would run away; they claim that the Philadelphia convention also was a runaway. The critics often argue that the Articles of Confederation required unanimous consent from all thirteen states for any amendment,159 yet the Framers threw away the Articles and made the Constitution operative on the vote of only nine of the thirteen states.160 Thus, the argument goes, a future convention could run away, change the procedures for ratifying amendments, and thrust radical changes upon us. Again, this argument is based on myths and misunderstandings.

---

156. *See id.* ("A convention cannot be called without the unanimous consent of the parties who are to be bound by it, if first principles are to be recurred to; or without the previous application of [two-thirds] of the State legislatures, if the forms of the Constitution are to be pursued. The difficulties in either of these cases must evidently be much greater than will attend the origination of amendments in Congress, which may be done at the instance of a single State Legislature, or even without a single instruction on the subject.").

157. *See* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 178–212 (2006) (describing the role Madison played in the introduction of the Bill of Rights).

158. *See Texas Plan*, *supra* note 6, at 65–66 (discussing Article V's two paths of amending the Constitution and noting that "[t]he Framers included the second path for proposing constitutional amendments as a protection against federal overreach").

159. *See* ARTICLES OF CONFEDERATION of 1781, art. XIII.

160. *See* U.S. CONST. art. VII.

1. Annapolis (1786)

Trade was one of the principal issues motivating the Framers and their desire for constitutional change.[161] Under the Articles of Confederation, Congress could only beg and plead with states not to balkanize the nation by imposing discriminatory trade regulations.[162] And that obviously was ineffectual.

Eventually, Virginia had enough. On November 30, 1785, the House of Delegates in Richmond instructed the state's congressional delegation to explore ways to create uniform trade regulations.[163] Virginia wanted Congress to impose a uniform system of duties on foreign vessels entering states' ports and to ban one state from imposing duties on goods from any other state.[164] And Virginia appointed delegates to meet with their counterparts in other states for the purpose of proposing amendments to the Articles of Confederation.[165] As with other interstate conventions of the era, the anticipated convention was limited to particular issues:

> [The delegates shall meet] to take into consideration the trade of the United States; to examine the relative situation and trade of the said states; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several states such an act relative to this great object as, when unanimously rati-

---

161. *See, e.g.*, 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109 (Jonathan Elliot ed., 1901) [hereinafter 1 Elliot] (reprinting a REPORT ON REGULATION OF COMMERCE, which provided in part: '*Resolved*, That the states of New Hampshire, Rhode Island, and North Carolina be solicited to reconsider their acts, and to make them agreeable to the recommendations of the 30th April, 1784").

162. *Id.*

163. *Id.* at 114 ("Whereas the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States; for preventing animosities which cannot fail to arise among the several states from the interference of partial and separate regulations; and whereas such uniformity can be best concerted and carried into effect by the federal councils, which, having been instituted for the purpose of managing the interests of the states in cases which cannot so well be provided for by measures individually pursued, ought to be invested with authority in this case, as being within the reason and policy of their institution.").

164. *Id.* at 114–15.

165. *Id.* at 115.

> fied by them, will enable the United States in Congress assembled effectually to provide for the same.[166]

Eight other states authorized delegates to attend an issue-limited interstate convention for proposing amendments for normalizing trade.[167]

Delegates from Virginia, New York, Pennsylvania, Delaware, and New Jersey met in Annapolis, Maryland on September 11, 1786.[168] The circumstances confronting the delegates were dire. As reported by Tench Coxe, who represented Pennsylvania: 'Goods of the growth product and manufacture of the Other States in Union were [in several of the States] charged with high Duties upon importation into the enacting State—as great in many instances as those imposed on foreign Articles of the same Kinds.'[169] Coxe and others believed these practices were 'evidently opposed to the great principles and Spirit of the Union, and the Articles of Confederation needed to be amended to address them.[170]

But Coxe and his fellow delegates at Annapolis faced two even bigger problems. First, only five of the thirteen states were represented.[171] Thus, in their report to Congress at the end of the convention, the Annapolis delegates reported: '[Y]our commissioners did not conceive it advisable to proceed on the business of their mission under the circumstance of so partial and defective a representation.'[172]

Second, the delegates to Annapolis recognized that the problems confronting the country were not limited to trade. Yet, 'the express terms of the powers to your commissioners' were limited

166. *Id.* at 115–16.

167. *Id.* at 117. Three states (Virginia, New York, and Pennsylvania) authorized their delegates to attend "nearly in the same terms. Delaware and New Jersey authorized their delegates to attend on similar but not identical terms. Four states (New Hampshire, Massachusetts, Rhode Island, and North Carolina) authorized their delegates to attend, but they did not make it to Annapolis in time for the convention. And four states (Connecticut, Maryland, South Carolina, and Georgia) neither appointed commissioners nor took any other action as far as the record reveals. *See id.*

168. 1 Elliot, *supra* note 161, at 116.

169. Letter from Tench Coxe to the Virginia Commissioners at Annapolis (Sept. 13, 1786), NATIONAL ARCHIVES: FOUNDERS ONLINE, http://founders.archives.gov/?q=Volume%3AMadison-01-09&s=1511311112&r=42 [https://perma.cc/UU5L-3KFQ].

170. *Id.*

171. *See* 1 Elliot, *supra* note 161, at 117.

172. *Id.*

to 'the trade and commerce of the United States.'[173] Rather than disregard the limits on their powers, the delegates reported back to their home states regarding the need for a broader, unlimited convention that would include all of the states and be empowered to address all of the problems facing the nation and its 'federal system'

> [Y]our commissioners cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures may be taken to effect *a general meeting of the states,* in a future convention, for the same *and such other purposes as the situation of public affairs may be found to require.* [Y]our commissioners submit an opinion, that the idea of *extending the powers of their deputies to other objects than those of commerce* will deserve to be incorporated into [the plan] of a future convention. They are the more naturally led to this conclusion, as, in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the federal government, that, to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, *may require a correspondent adjustment of other parts of the federal system.*[174]

The Annapolis delegates reported that the problems facing the United States were so extensive that 'it would be a useless intrusion of facts and observations' to list them.[175] Accordingly, the Annapolis delegates recommended that a new, boundless convention meet in May of 1787 with an unlimited agenda 'to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union.'[176]

Three upshots from the Annapolis convention merit empha-

173. *Id.*
174. *Id.* at 117–18 (emphases added).
175. *Id.* at 118.
176. *Id.*

sis. First, if the Framers wanted to accomplish 'runaway' changes, Annapolis was the place to accomplish them. Several of the key Framers were there—including Madison, Hamilton, and Randolph.[177] And by virtue of the sparse attendance, there would have been fewer barriers to the would-be usurpers who allegedly wanted to exceed the bounds of their commissions. To the contrary, however, the delegates scrupulously adhered to the confines of the single-issue, limited Annapolis convention. And they worried that by even asking for a broader, unlimited convention they may have exceeded the scope of their powers, and they asked forgiveness:

> If, in expressing this wish [for a broader, unlimited convention], or in intimating any other sentiment, your commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence that a conduct dictated by an anxiety for the welfare of the United States will not fail to receive an indulgent construction.[178]

That is not the stuff of people pursuing a runaway convention.

Second, Congress agreed with the delegates at Annapolis and recommended a broad, unlimited constitutional convention in Philadelphia the following year. In doing so, it is striking how differently Congress conceived of the convention's mandate. Whereas the delegates to Annapolis were supposed to propose amendments limited to 'the trade of the United States' and 'a uniform system in their commercial regulations,'[179] the delegates to Philadelphia should propose *any* 'such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the states, render the federal Constitution adequate to the exigencies of government and the preservation of the Union.'[180]

Third, as broad as Congress *wanted* the Philadelphia convention to be, the breadth of that convention (or any interstate convention, for that matter) was not up to Congress. The Articles of

177. *Id.* at 116.
178. *Id.* at 117.
179. *Id.* at 115.
180. *Id.* at 120.

Confederation had no provision that allowed Congress to 'call' or appoint a convention; that power, like so much else, was reserved to *the states*. Accordingly, the limitless scope of the Philadelphia convention is owed to the states that commissioned their delegates to meet on plenipotentiary terms and to propose any change to the federal system necessary to preserve the Union.[181]

2. Philadelphia (1787)

The Philadelphia convention of 1787, in stark contrast to the Annapolis convention of 1786, was plenipotentiary—that is, the convention's delegates were vested with full powers to propose every amendment they might deem necessary, and they were not limited to a particular issue or issues.[182] Indeed, Virginia's James Monroe suggested that the call for the Philadelphia convention was unprecedented in its breadth and limitlessness: 'From the beginning of time, in any age or country, did ever men meet under so loose, uncurbed a commission? There was nothing to restrain them but their characters and reputation.'[183]

It is difficult to overstate how broad those commissions were. Between September 14, 1786 (when the delegates at Annapolis published their report and called for a non-issue-limited convention) and February 21, 1787 (when Congress passed a resolution on the topic),[184] seven states appointed delegates to meet on unlimited terms:

- Virginia authorized its delegates to propose any 'revision of the federal System' necessary to cure 'all it[]s defects.'[185] It further empowered its delegates to propose 'all such Alterations and farther Provisions as may be necessary to render the Federal Constitution adequate to the Exigencies of the Union.'[186]
- New Jersey likewise empowered its delegates to propose amendments 'as to trade and other important objects, and [to] devis[e] such other Provisions as shall appear to be necessary to render the Constitution of the Federal Government adequate to the exigencies

181. *Id.*
182. 3 Elliot, *supra* note 15, at 308.
183. *Id.* at 631.
184. *See* CAPLAN, *supra* note 118, at 26; 1 Elliot, *supra* note 161, at 116–17.
185. 3 Farrand, *supra* note 17, at 559.
186. *Id.* at 560.

thereof.'[187]

- Pennsylvania authorized its delegates to propose 'revising the federal Constitution for the purpose of making such Alterations and amendments as the exigencies of our Public Affairs require.'[188]
- North Carolina empowered each of its delegates '*To hold*, exercise and enjoy the appointment aforesaid [to serve as a delegate], with all Powers, Authorities and Emoluments to the same belonging or in any wise appertaining, You conforming in every instance, to the Act of our said Assembly under which you are appointed.'[189] That Act, in turn, empowered the delegates 'to discuss and decide upon the most effectual means to remove the defects of our Federal Union, and to procure the enlarged Purposes which it was intended to effect.'[190]
- New Hampshire likewise empowered its delegates 'to discuss and decide upon the most effectual means to remedy the defects of our federal Union; and to procure, and secure, the enlarged purposes which it was intended to effect.'[191]
- Delaware authorized its delegates to propose 'revising the Federal Constitution, and adding thereto such further Provisions, as may render the same more adequate to the Exigencies of the Union.'[192]
- Georgia authorized its delegates 'to join with [other states' delegates] in devising and discussing all such Alterations and farther Provisions as may be necessary to render the Federal Constitution adequate to the exigencies of the Union.'[193]

After February 21, 1787 when Congress likewise urged the

187. *Id.* at 563.

188. *Id.* at 565. Pennsylvania also authorized its delegates to join their counterparts "in devising, deliberating on, and discussing, *all such alterations and further Provisions*, as may be necessary to render the federal Constitution fully adequate to the exigencies of the Union. *Id.* at 565–66 (emphasis added).

189. *Id.* at 568.

190. *Id.* at 570.

191. *Id.* at 573.

192. *Id.* at 574. Delaware did not, however, give its delegates a completely blank check. The one limitation imposed by that state's legislature is discussed in Part IV.A.2, *infra.*

193. 3 Farrand, *supra* note 17, at 577.

states to appoint delegates to the Philadelphia convention,[194] three more states authorized their delegates on unlimited terms:

- Maryland authorized its delegates 'to join with [other states' delegates] in considering such Alterations and further Provisions as may be necessary to render the Federal Constitution adequate to the Exigencies of the Union. '[195]
- South Carolina used slightly different terms, but its commission was nonetheless sweeping in scope. It authorized its delegates to join the others 'in devising and discussing all such Alterations, Clauses, Articles and Provisions, as may be thought necessary to render the Federal Constitution entirely adequate to the actual Situation and future good Government of the confederated States. '[196]
- Connecticut authorized its delegates to meet 'for the purposes mentioned in the said Act of Congress that may be present and duly empowered to act in said Convention, and to discuss upon such Alterations and Provisions agreeable to the general principles of Republican Government as they shall think proper to render the Federal Constitution adequate to the exigencies of Government and, the preservation of the Union. '[197]

That left just three states—Rhode Island, Massachusetts, and New York.Rhode Island abstained altogether.[198] But Massachusetts and New York were more complicated. Legislators in both states agreed that changes were necessary, but they wanted those changes to be limited to revising the Articles of Confederation—not eliminating the Articles altogether.[199] Massachusetts simply authorized its delegates to meet under the terms of Congress's resolution.[200] And New York authorized its delegates to meet 'for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and to the several Legisla-

194. CAPLAN, *supra* note 118, at 26.
195. 3 Farrand, *supra* note 17, at 586.
196. *Id.* at 581.
197. *Id.* at 585.
198. *Id.* at 574–75.
199. *See* Natelson, *supra* note 122, at 720–21.
200. 3 Farrand, *supra* note 17, at 584; *see also supra* note 180 and accompanying text (Congress's resolution recommending a convention).

tures, such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the several states, render the federal Constitution adequate to the exigencies of Government, and the preservation of the Union. '[201]

There are four important takeaways from the states' authorizations for the Philadelphia convention. First, the states and not Congress set the convention's agenda. While Congress could urge the states to act, it could not formally or legally require them to do anything. Thus, when the critics claim that the Framers were themselves runaways, the critics must explain how the Framers deviated from the limitless commissions given to them by their respective states. This the critics cannot do.

Second, some of the states' commissions reference—in seemingly ambiguous ways—amendments to the 'Federal Constitution. For example, Virginia authorized its delegates to negotiate 'all such Alterations and farther Provisions as may be necessary to render the Federal Constitution adequate to the Exigencies of the Union. '[202] The modern reader might be tempted equate 'Federal Constitution' to the then-operative charter for the United States, the Articles of Confederation, and to conclude that even Virginia's broad commission presumed that the Articles would not be scrapped entirely. But as Professor Natelson expertly explains, in the late eighteenth century, the term 'constitution' was a generic one that referred generally to the structure of government. It was not the proper noun we understand today:

> According to usages of the time, the term 'constitution' usually did not denote a particular document, such as the Articles, but rather a governmental structure as a whole. Particular documents traditionally had not been called 'constitutions, but 'instruments of government, 'frames of government, or 'forms of government. This explains why several of the early state constitutions described themselves in multiple terms.[203]

201. 3 Farrand, *supra* note 17, at 581.

202. *Id.* at 560.

203. Natelson, *supra* note 122, at 719 (footnote omitted). The confusion is exacerbated by the Founders' penchant for capitalizing nouns, even common ones. *Cf.* Akhil Reed Amar, *Our Forgotten Constitution: A Bicentennial Comment*, 97 YALE L.J. 281, 291 (1987) (noting the Constitution's "quaint capitalization of every noun").

Third, it is true that two states wanted to limit the Philadelphia convention and to preserve the Articles of Confederation. But so what? That certainly does not mean that the delegates from the other ten states were unfaithful to their commissions; to the contrary, the other ten states *wanted* their delegates to propose broad and sweeping reforms to the federal system. The delegates from those ten states would have been unfaithful if they had shrunk from the task. That is, contrary to the critics' view, it is not as if the delegates arrived at the Philadelphia convention and then ran away from their commissions. Instead, they acted according to the purpose for which they were sent.

It also is hard to argue that even the hamstrung delegates from Massachusetts and New York violated their commissions. Elbridge Gerry of Massachusetts noted at the outset of the Philadelphia convention that his state did not authorize him to 'annihilate the confederation.'[204] Accordingly, he refused to sign the Constitution.[205] And New York also failed to sign the document; two of its delegates left before the end of the convention, thus depriving its lone remaining delegate (Alexander Hamilton) of the quorum needed to act on behalf of the state.[206]

Fourth and finally, the allegation that the 1787 convention was a runaway is premised on a misunderstanding of the confederation that preceded it. A *confederation* is fundamentally different from a *nation*.[207] The former is merely a league of separate and independently sovereign entities that come together to serve mutual purposes, like common defense or mutual trade.[208]

Thus, when the Framers accepted their states' commissions and assembled in Philadelphia, they were attending something akin to a modern-day international tribunal. And the convention

204. 1 Farrand, *supra* note 18, at 43. It is true, however, that Nathaniel Gorham and Rufus King did sign the document. *See* 2 Farrand, *supra* note 15, at 664.

205. *See* 1 Farrand, *supra* note 18, at 43.

206. For further discussion regarding New York and its delegates, see *infra* Part III.A.3.

207. *See* ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 20–29 (2010) (discussing the differences between "federal' and 'confederal' forms of government among foreign and early colonial governments).

208. The very first substantive provision of the Articles of Confederation provides: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation, expressly delegated to the United States, in Congress assembled. ARTICLES OF CONFEDERATION of 1781, art. II. That is, the states retained *all* of their "sovereignty, freedom, and independence" they simply ceded some of their "powers" to Congress.

itself was less like a meeting of the U.S. Congress and more like a meeting of the United Nations. Each constituent sovereign was free to participate to the extent it wanted to, but it was not in any sense obligated to. And like the recommendations made by international tribunals, the document produced by the Philadelphia convention was just a proposal: each sovereign could accept or reject it as it saw fit.

Viewed in this light, the Framers no more ran away from the Articles of Confederation than the United States ran away from the League of Nations after World War II. The League's 1919 Covenant, much like the Articles, recognized the sovereignty of each member nation and included a series of promises from one nation to the others regarding mutual defense.[209] When the League's Covenant proved ineffectual, its members disbanded the League and formed the United Nations—even though nothing in the League's Covenant contemplated that result.[210] No one would say the United States' participation in the disbandment of the League and the creation of the U.N. was unlawful or the product of rogue runaways. So too when the delegates from sovereign states, consistent with their commissions, met in Philadelphia to replace an ineffectual confederation.[211]

3. The Framers' Debate

Still, there were some present at the Founding who challenged the legitimacy of the Philadelphia delegates' actions. As usual, Patrick Henry was among the most eloquent critics:

---

209. *Compare, e.g.*, League of Nations Covenant art. 10 ("The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."), *with* ARTICLES OF CONFEDERATION of 1781, art. III ("The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.").

210. *Cf.* League of Nations Covenant art. 26 (providing for amendments to the League Covenant but not providing for the disbandment or wholesale replacement of the League).

211. Of course, things are very different now that we are a *nation*. The states no longer have their sovereign independence from one another, and our current Constitution is much more than a confederation or league of allegiance. So the constraints on modern-day delegates to an Article V convention of states would mean much more than the ones that attached to the Framers. Moreover, we have no obligation to give our modern-day delegates the same sweeping powers that delegates like Madison had. *See infra* Parts III.C & IV.

> I had doubts of the power of those who went to the Convention, but now we are possessed of it, let us examine it. When we trusted the great object of revising the Confederation to the greatest, and best, and most enlightened, of our citizens, we thought their deliberations would have been solely confined to that revision. Instead of this, a new system, totally different in its nature, and vesting the most extensive powers in Congress, is presented. Will the ten men you are to send to Congress be more worthy than those seven were? If power grew so rapidly in their hands, what may it not do in the hands of others? If those who go from this state will find power accompanied with temptation, our situation must be truly critical. When about forming a government, if we mistake the principles, or commit any other error, the very circumstance promises that power will be abused. The greatest caution and circumspection are therefore necessary; nor does this proposed system, on its investigation here, deserve the least charity.[212]

But how exactly did Virginia's delegates exceed the bounds of their commissions? Henry does not say. And why did he think that Virginia's delegates were limited to revising the Articles when their commissions said no such thing? Again, Henry does not say. And why did he think the delegates at Annapolis insisted on—and received—commissions that were not limited to amending the Articles if they nonetheless were to be limited to amending the Articles? Yet again, Henry does not say.

Moreover, Edmund Randolph rose to explain why he and his fellow Framers did what they did. And he explained, quite rightly, that the delegates would have violated their commissions if they had *failed* to discard the Articles of Confederation:

> After meeting in Convention, the deputies from the states communicated their information [regarding the crises confronting America] to one

212. 3 Elliot, *supra* note 15, at 144.

> another. On a review of our critical situation, and of the impossibility of introducing any degree of improvement into the old system, what ought they to have done? Would it not have been treason to return without proposing some scheme to relieve their distressed country?[213]

And Madison devoted an entire Federalist Paper to the topic.[214] It is one of his most passionate and candid defenses of the Constitution. In *The Federalist No. 40,* Madison begins by pointing to the ten states that gave plenipotentiary powers to their delegates.[215] He observed that '[t]he States would never have appointed a convention with so much solemnity, nor described its objects with so much latitude, if some *substantial* reform had not been in contemplation.'[216]

Then Madison candidly 'admitted that the convention [delegates] have departed from the tenor of their commission' in 'one particular' way.[217] He noted that many of the states instructed their delegates to report a Constitution that would be approved by 'all the states, whereas the proposed Constitution 'is to be confirmed and may be carried into effect by *nine states only.*'[218] For this Madison offered three justifications.

First, he pointed out that one of the principal objectives was to prevent Rhode Island—which did not even deign to send delegates—from scuttling every single constitutional reform.[219] And Madison argued that:

> [Both supporters and opponents of the Constitution share] an irresistible conviction of the absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth; from the example of inflexible opposition given by a *majority* of one sixtieth of the people of America to a measure approved and called for by the

213. *Id.* at 27–28.
214. *See* THE FEDERALIST NO. 40 (James Madison).
215. *See* THE FEDERALIST NO. 40, at 247–51 (James Madison) (Clinton Rossiter ed. 1961).
216. *Id.* at 249.
217. *Id.* at 251.
218. *Id.*
219. *Id.*

> voice of twelve States, comprising fifty-nine sixtieths of the people—an example still fresh in the memory and indignation of every citizen who has felt for the wounded honor and prosperity of his country.[220]

Second, Madison emphasized the exigencies confronting the Framers. '[T]hey were deeply and unanimously impressed with the crisis, which had led their country almost with one voice to make so singular and solemn an experiment for correcting the errors of a system by which this crisis had been produced.'[221] And in gathering to propose remedies for that crisis, the Framers remained ever cognizant of 'the transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.'[222] The critics who challenged the Framers' legal authorization to adopt the Constitution did so under the 'masks' of 'forms' and procedures—not because they cared about legal niceties, but rather to disguise 'their secret enmity to the substance contended for' in a stronger federal union.[223]

Third, Madison argued, if the Framers erred in choosing to prioritize the need for constitutional reform over the need to maintain the Articles' unanimity requirement, then the states could simply reject the proposed Constitution. After all, the Framers simply recommended it. And even if the Framers made grave mistakes in understanding their commissions, Madison argued, it does not follow that the proposed Constitution should be discarded:

> The prudent inquiry, in all cases, ought surely to be, not so much *from whom* the advice comes, as whether the advice be *good.* The sum of what has been here advanced and proved is, that the charge against the convention of exceeding their powers, except in one instance little urged by the objectors, has no foundation to support it; that if they had exceeded their powers, they were not

220. *Id.*
221. *Id.* at 252.
222. *Id.* at 253 (quoting THE DECLARATION OF INDEPENDENCE (U.S. 1776)).
223. *Id.*

> only warranted, but required, as the confidential servants of their country, by the circumstances in which they were placed, to exercise the liberty which they assume; and that finally, if they had violated both their powers and their obligations, in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America.[224]

Madison's views in *The Federalist No. 40* remain as true today as they were in 1788: any concern over a runaway convention is answered fully by the right of the people and the states to refuse to ratify any amendment that, in their judgment, does not 'accomplish the views and happiness of the people of America.

C. The Reality: Originalists Must Trust Article V

Today, Article V contains two ironclad protections against a runaway convention. First, unlike the states that convened the Philadelphia convention in 1787, we will *not* give our delegates unlimited powers. Rather, as explained in the *Texas Plan*, the delegates' marching orders should be and will be sharply limited to particular issues.[225] And the states should impose strong measures to ensure that delegates do not stray beyond those limits.[226]

Second, even if the delegates do stray, the ratification process provides a double security. Just as Madison argued in *The Federalist No. 40*, the products of the convention are just proposals. The ultimate decision to accept or reject them lies with the states. And Article V's supermajority requirement is so strong that it makes it exceedingly unlikely that a runaway convention could accomplish anything.

While it is true that America never has held an Article V convention of states, that does not mean that Article V's protections

---

224. *Id.* at 254.

225. *See Texas Plan*, *supra* note 6, at 68 ("While the Constitution's text is silent on the topic, the Framers themselves were not. To take just one example, George Nicholas pointed out during Virginia's ratification debates that conventions called by the states could—indeed *would*—be limited to particular issues."); *see also* 3 Elliot, *supra* note 15, at 102 (in which Nicholas noted that delegates would have "no local interest to divert their attention; nothing but the necessary alterations [to the Constitution]").

226. *See infra* Part IV.

are purely theoretical at this point. To the contrary, we see them in operation every day in this sense: Congress is effectively a standing and unlimited convention under Article V because it can propose any constitutional amendment whenever it wants. Tomorrow, in theory, two-thirds of Congress could propose to repeal the First Amendment, the Second Amendment, the right to a jury trial, the prohibition on slavery, or women's suffrage. But of course, no one fears a runaway Congress and its 'revolutionary' agenda to destroy the Constitution through radical amendments.[227]

At bottom, the concern over a runaway convention rests on one of two propositions, both of which are false. First, some Article V critics might think that delegates to a convention of states are even more irresponsible than the lawmakers we send to Congress. Given the breadth and scope of Congress's malfeasance,[228] it is difficult to imagine any multi-member body that would be as irresponsible. But even if it were possible to imagine a more irresponsible group, there is no reason that states would be forced to pick their Article V convention delegates from that universe of (hypothetically) irresponsible people. The states get to choose their delegates and, unlike members of Congress, the Article V delegates would labor under an issue-limited commission, not an unlimited one. That makes a convention of states safer, not more dangerous, than the standing convention in Congress.

The second premise that could underlie concerns over a runaway convention is that ratification is not an adequate check on the process. But if we have gotten to a place in this country where thirteen states cannot be trusted to block the improvident proposals of a runaway convention, then they cannot be stopped anyway. For example, in the early twentieth century, states submitted a deluge of calls for issue-limited Article V conventions for the purpose of directly electing U.S. Senators. When it became obvious that the political groundswell would force Congress to call a convention of states, Congress instead proposed the Seventeenth Amendment,[229] and the states quickly ratified it. That is proof that Article V effectively channels popular opinion

227. *Cf.* Hansen, *supra* note 11 (arguing that amendments proposed by Congress are less dangerous than those proposed by conventions).

228. *See Texas Plan*, *supra* note 6, at 9–21.

229. *See, e.g.*, William Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933, 943 (1984).

into constitutional change, not that Article V is scary.

The runaway-convention myth has thrived for far too long. In 1969, the states came one application shy of calling for an Article V convention limited to correcting the Supreme Court's redistricting cases. 'As the number of states that had applied approached thirty-four, [however,] well-publicized speculation that the convention, once called by Congress, could not be limited to a single issue spread fear of an uncontrollable convention.'[230] In the face of that fear, several states rescinded their applications, and the Article V movement stalled. The discussion above should prevent the runaway-convention myth from stalling the Article V movement again.

IV. MYTH: THEY ARE UNCONTROLLABLE

The third and final myth that is prevalent among Article V critics is that the delegates to a convention of states would be 'uncontrollable.'[231] Even if the idea is not radical in theory, as explained in Part I above, and even if the convention itself could be limited in fact, as explained in Part II above, the critics still worry that the delegates will get together and propose whatever amendments they want.

One complete answer is that ratification provides a back-end check to anything the delegates might do.[232] But more fundamentally, the tradition of states limiting their delegates dates to before the Founding, and those limitations work. Moreover, modern limitations on delegates both exist and are effective. Accordingly, the concern that delegates to a convention of states would be uncontrollable is based on a myth.

230. James Kenneth Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL'Y 1005, 1009 (2007); *see also* Ann Stuart Diamond, *A Convention for Proposing Amendments: The Constitution's Other Method*, 11 PUBLIUS 113, 137 (1980) (stating that interpreting Article V "so that it contemplates a constitutional convention that writes—not amends—a constitution, is often a rhetorical ploy to terrify sensible people").

231. *See, e.g.*, Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1533 (2010) (quoting President Jimmy Carter).

232. *See supra* Part III.C.

A. The Reality: Delegates Were Controllable at the Founding

1. The Founders Believed Delegates Were Controllable by the People

In the Founders' view, government derives its legitimacy from the consent of the governed, and it is *the people* who provide the ultimate source of the government's power. As John Stuart Mill explained:

> The meaning of representative government is that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which, in every constitution, must reside somewhere. This ultimate power they must possess in all its completeness. They must be masters, whenever they please, of all the operations of government.[233]

That is why our Constitution begins 'We the People"[234]—not 'We the States' or 'We the Aristocrats' or anything else.

The Constitution's first words were deliberately chosen to frame the document under the auspices of popular sovereignty. As James Wilson explained it:

> There necessarily exists, in every government, a power from which there is no appeal, and which, for that reason, may be termed supreme, absolute, and uncontrollable. Where does this power reside? To this question writers on different governments will give different answers. Sir William Blackstone will tell you, that in Britain the power

233. John Stuart Mill, *On Representative Government, in* REPRESENTATION 181 (Hanna Fenichel Pitkin ed. 1969).

234. U.S. CONST. pmbl. As Judge Edmund Pendleton, the president of Virginia's ratification convention, explained the preamble, '[W]ho but the people have a right to form government? The expression ['we the people'] is a common one, and a favorable one with me. The representatives of the people, by their authority, is a mode wholly inessential. If the objection be, that the Union ought to be not of the people, but of the state governments, then I think the choice of the former very happy and proper. What have the state governments to do with it? Were they to determine, the people would not; in that case, be the judges upon what terms it was adopted. 3 Elliot, *supra* note 15, at 37.

> is lodged in the British Parliament .[235]

In other countries, that absolute and supreme power resides in a monarch or the aristocracy.[236] By contrast:

> [In] the United States, the supreme power resides in *the people*, and that they never part with it. It may be called the panacea in politics. There can be no disorder in the community but may here receive a radical cure. If the error be in the legislature, it may be corrected by the constitution; if in the constitution, it may be corrected by the people. There is a remedy, therefore, for every distemper in government, if the people are not wanting to themselves; if they are wanting to themselves, there is no remedy. From their power, as we have seen, there is no appeal; of their error there is no superior principle of correction.[237]

It is precisely because 'the supreme power resides in the people, that the Constitution 'opens with a solemn and practical recognition of that principle' and is framed in the name of 'We, the People.'[238] As Wilson explained, 'It is announced in their name—it receives its political existence from their authority: they ordain and establish. What is the necessary consequence? Those who ordain and establish have the power, if they think proper, to repeal and annul.'[239]

The Constitution's preamble signaled a sharp break from the Articles of Confederation, which were framed in the name of 'We, the States.'[240] But the break was an intentional one. And it signified that the new government would be by, of, and for the people. The Framers' decision to open the Constitution by invoking 'We, the People' and popular sovereignty was unprece-

---

235. 2 Elliot, *supra* note 12, at 432.
236. *Id.* at 433.
237. *Id.* (emphasis added).
238. *Id.* at 434.
239. *Id.* at 434–35.
240. *See* ARTICLES OF CONFEDERATION of 1781, pmbl. ("To all to whom these Presents shall come, *we the undersigned Delegates of the States* affixed to our Names send greeting. (emphasis added)); *compare* 2 Elliot, *supra* note 12, at 54–55 (Rufus King, defending the shift), *with* 3 Elliot, *supra* note 15, at 44 (Patrick Henry, criticizing it).

dented; '[i]n the late 1780s, this was the most democratic deed the world had ever seen.'[241]

One upshot of the Framers' belief in popular sovereignty was the widespread practice of 'instruction' at the time of the Founding.[242] Instruction allowed the people to force their delegates or representatives to vote a particular way.[243] And the practice of instruction was not merely customary; it was often codified as positive law. For example, the Acts of the Commonwealth of Virginia in 1812 provided that delegates 'must express the will, and speak the opinions, of the constituents that depute him.'[244]

2. Delaware

Thus, it is not surprising that at least one state provided express instructions to its delegates to the constitutional convention in Philadelphia. After giving its delegates broad power to amend or replace the Articles of Confederation, the Delaware Legislature wrote: 'Provided, that such Alterations or further Provisions, or any of them, do not extend to that part of the Fifth Article of the Confederation of the said States, which declares that 'In determining Questions in the United States in Congress Assembled each State shall have one Vote.'[245]

And the Delaware delegates honored those instructions. For example, on May 29, 1787 Edmund Randolph kicked off the Philadelphia convention with his famous fifteen resolutions.[246] The second of those resolutions struck at both the one-state-one-vote rule and the limitations on Delaware's delegates; it resolved 'that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem

241. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5 (2005).

242. *See* ALFRED DE GRAZIA, PUBLIC AND REPUBLIC 125 (1951) ("Pennsylvania declared explicitly the right of instructions. North Carolina and Vermont followed the example. Massachusetts stated the principle in even stronger words. New Hampshire followed suit, as did the new states of the Northwest Territory.").

243. *See, e.g.*, HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 146 (1972) ("A mandate theorist will see the representative as a 'mere' agent, a servant, a delegate, a subordinate substitute for those who sent him."); DE GRAZIA, *supra* note 242, at 123 ("The doctrine of instruction[] maintains that, at any time, a clear expression of the will of the majority of constituents is binding on the action of their representative ").

244. SAMUEL PLEASANTS, ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF VIRGINIA 147 (Richmond, Samuel Pleasants 1812).

245. 3 Farrand, *supra* note 17, at 574–75.

246. *See* 1 Farrand, *supra* note 18, at 18–23 (highlighting fifteen measures necessary to strengthen the federal system and "prevent[] the fulfilment of the prophecies of the American downfal[l]").

best in different cases.'[247]

The delegates from Delaware immediately objected on the ground that Randolph's second resolution violated their commissions: 'Mr. Reed [of Delaware] moved that the whole clause relating to the point of Representation be postponed; reminding the Com[mittee] that the deputies from Delaware were restrained by their commission from assenting to any change of the rule of suffrage, and in case such a change should be fixed on, it might become their duty to retire from the Convention.'[248] And the Delaware delegates took care not to vote on 'any of the resolutions in favor of proportional suffrage.'[249]

The Delaware delegates' scrupulous adherence to their commissions had a profound effect on the direction of the convention. Governor Morris of Pennsylvania urged his fellow Framers to table Randolph's second resolution because the convention could not do without Delaware:

> Mr. [Governor] Morris observed that the valuable assistance of those members could not be lost without real concern, and that so early a proof of discord in the convention as a secession of a State, would add much to the regret; that the change proposed was however so fundamental an article in a national [Government] that it could not be dispensed with.[250]

Then 'the Federalists rapidly retreated. At the time of these debates in late May, representatives from only eight states had appeared in Philadelphia. A legalistic walkout by Delaware could have readily pushed the convention down the road to [the failed convention in] Annapolis.'[251]

Moreover, the steadfastness of Delaware's delegates had a lasting effect on America's constitutional structure. For example, Delaware's Gunning Bedford famously told his fellow Framers:

---

247. *Id.* at 20.
248. *Id.* at 37.
249. *Id.* at 32 n.6.
250. *Id.* at 37.
251. Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 506 n.88 (1995).

> The little States are willing to observe their engagements, but will meet the large ones on no round but [the one-state-one-vote rule] of the Confederation. We have been told (with a dictatorial air) that this is the last moment for a fair trial in favor of a good Governm[en]t. It will be the last indeed if [a Congress based only on proportional representation] go[es] forth to the people. If they do the small [states] will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.[252]

It was impassioned pleas like Bedford's that prompted Virginia and the other big states to abandon their preference for a Congress based exclusively on proportional representation.[253] And it also paved the way for the Connecticut Compromise, which created a bicameral Congress in which states have equal votes in the upper chamber and proportional votes in the lower chamber.[254]

For present purposes, though, the most important upshot of the Connecticut Compromise is that it allowed Delaware's delegates to both support the Constitution and to honor their commissions. As noted above,[255] those commissions prohibited Delaware's delegates from derogating the states' equal votes in determining questions in Congress. Under the new Constitution, the concurrence of both houses is necessary to determine questions in Congress, and every state has an equal vote in one of those houses; thus, the states still maintain the same one-state-one-vote power to block action in the new Congress as they did in the old one.[256]

3. New York

Delaware was not the only state that sent its delegates to Phil-

252. 1 Farrand, *supra* note 18, at 492.
253. *Id.* at 167.
254. *See id.* at 524.
255. *See supra* note 245 and accompanying text.
256. *See* Natelson, *supra* note 122, at 722 ("Because the new bicameral Federal Congress was a very different entity with a very different role than the Articles of Confederation's unicameral 'United States in Congress Assembled, the Delaware delegates could argue that they had remained within the strict letter of their commission.').

adelphia with idiosyncratic commissions. Most states imposed quorum requirements for their delegates. For example, New Hampshire required the presence of two of its four delegates to vote for the state;[257] Massachusetts required three of its five delegates to be present;[258] and Pennsylvania required four of its seven delegates to be present.[259] New York, however, did not impose any quorum requirement on its three delegates.[260]

New York's three delegates were the arch-Federalist Alexander Hamilton and two Anti-Federalists named John Lansing and Robert Yates.[261] In June of 1787 Lansing and Yates left the convention and went back to New York as a protest against the Framers' desire to create a powerful, centralized, national government.[262] Lansing and Yates wrote to New York Governor George Clinton to explain they did not want to be 'culpable' in the convention's usurpation of the people's liberties:

> We therefore gave the principles of the Constitution, which has received the sanction of a majority of the Convention, our decided and unreserved dissent; but we must candidly confess that we should have been equally opposed to any system, however modified, which had in object the consolidation of the United States into one government.[263]

Lansing and Yates's decision to leave the convention is remarkable because of the basis they gave for it. They framed that decision in terms of their commissions and their shared desire to be faithful delegates of the people. Lansing and Yates argued that they were sent by the people of the State of New York, so their commission could not possibly include an authorization to destroy the State of New York:

> [W]e were led to believe that a system of consolidated government could not, in the remotest de-

257. *See* 1 Elliot, *supra* note 161, at 126.
258. *Id.* at 127.
259. *Id.* at 129.
260. *See id.* at 127–28.
261. *Id.* at 128.
262. *Id.* at 480–82.
263. *Id.* at 480.

> gree, have been in contemplation of the legislature of this state; for that so important a trust as the adopting measures which tended to deprive the state government of its most essential rights of sovereignty, and to place it in a dependent situation, could not have been confided by implication.[264]

After Lansing and Yates returned to New York, Alexander Hamilton stayed behind.[265] Hamilton routinely spoke at the convention, but he did not vote.[266] Many scholars have declared that Hamilton could not vote because the departure of Lansing and Yates deprived New York of a quorum.[267] As noted above, however, nothing in Hamilton's commission limited him to acting or voting only when one or more of his fellow delegates were present.[268]

Perhaps Hamilton was deterred by political pressure even in the absence of a formal legal impediment. After all, his two dissenting and absent Anti-Federalist delegates had gone home, where a popular Anti-Federalist was governor and an overwhelming majority of Anti-Federalists dominated the state's legislature.[269] For present purposes, however, it does not matter why Hamilton did not vote. All that matters is that he abstained—notwithstanding his zeal as a Federalist, his unrivaled support of

---

264. *Id.*

265. *See* 3 Farrand, *supra* note 17, at 56, 366, 369, 400.

266. *Id.*

267. *See, e.g.*, George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 646 n.22 (1992) ("The New York delegation in the Federal Convention no longer had a quorum, two of its three members having gone home (evidently because they did not like the course that the Convention was following). The third New York member, Alexander Hamilton, could speak but could not cast his State's vote."); Dan T. Coenen, *A Rhetoric for Ratification: The Argument of the Federalist and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 474–75 (2006) ("In July, however, the states-rights-minded Lansing and Yates abandoned the Convention altogether, stripping New York of even a quorum entitled to vote and leaving Hamilton as the state's sole signatory of the final constitutional proposal."); Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7, 10 n.7 (2006) ("[Yates] and his fellow-delegate, John Lansing, left the Convention after less than a month, on the grounds that it was exceeding its authority in drafting a new constitution. Their departure deprived New York of a vote, since the third delegate, Alexander Hamilton, was left without a quorum.").

268. *See supra* note 260 and accompanying text.

269. *See supra* note 55 and accompanying text. Yates and Governor Clinton were particularly influential Anti-Federalists; they likely penned several of *The Anti-Federalist Papers* under the pseudonyms Brutus and Cato, respectively. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 n.6 (1995); THE ANTI-FEDERALIST, *supra* note 48, at 103.

the Constitution, and his co-authorship of *The Federalist Papers*. He represented New York at the ineffectual interstate convention in Annapolis in 1786, and surely he wanted to help the Philadelphia convention succeed. Even with all of that, Hamilton was controllable at the Founding.

B. The Reality: Delegates Are Controllable Today

Delegates also are controllable today. Three examples suffice to show that modern-day fears of uncontrollable delegates are premised on myths, not realities.

First, it is true that we have never had a convention of states under Article V of the U.S. Constitution. But from '1776 to the present, the 50 states have held a total of 233 state constitutional conventions; 146 state constitutions have been adopted; and over 6,000 amendments have been enacted to the current documents.'[270] And where are the horror stories from the runaway delegates to those conventions? Surely, if the states' delegates were prone to wander, there would be at least some evidence of it in the hundreds of state-level conventions held over the last 240 years.

Second, states have to trust their delegates in all sorts of ways short of conventions for amending (or proposing amendments to) constitutions. Every day, U.S. Senators represent their states, and for all of Congress's irresponsibility, Senators do not run away and precipitate the parade of horribles posited by Article V's critics.[271] Nor is there evidence that state legislators exceed their commissions in state legislatures across the country.

Consider, for example, special sessions in Texas. The Texas Constitution empowers the Governor to convene the Legislature for a special session, the subject of which the Governor gets to pick.[272] And just like an issue-limited convention under Article V, the special session is limited to *only* the subject picked by the Governor: 'When the Legislature shall be convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the Governor calling

270. John J. Dinan, *State Constitutions and American Political Development*, *in* CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS 43, 46 (Michael Burgess & G. Alan Tarr eds. 2012).

271. *See also supra* note 227 and accompanying text.

272. TEX. CONST. art. III, § 5.

such session, or presented to them by the Governor '[273]

One will look in vain for examples of legislators coming to Austin when the Governor calls a special session to discuss transportation policy only to introduce bills that, say, abolish the right to carry arms. That is partly because a host of rules preclude legislators from exceeding the bounds of the Governor's call. For example, it is well settled that a bill that exceeds the Governor's call is out of order,[274] and the chair may refuse to refer it to a committee.[275] And on the rare occasion that an out-of-order bill is attempted, the legislature itself prevents it from moving.[276]

To illustrate, on January 31, 1950, the Governor of Texas called a special session.[277] He explained: 'An emergency exists. There is no money with which to pay for food, clothing and care for the unfortunate people in our state institutions during the coming year.'[278] Accordingly, the Governor called a special session '[t]o make and to finance such appropriations as the Legislature may deem necessary for the agencies and institutions for which appropriations were made by Chapter 553, Acts of the 51st Legislature, Regular Session' for state hospitals and special schools.[279] When a legislator introduced an amendment to divert certain revenues for the benefit of the M.D. Anderson Hospital for Cancer Research, it was disallowed as out of order.[280]

There is no reason to think that a convention of states would operate differently—in terms of either the delegates' general willingness to hew closely to the terms of the call, or in terms of the rules that would keep the delegates in line.

Third, if the delegates to an Article V convention of states fall out of line, the consequences will be much stronger than an unfavorable ruling from the chairperson of the convention. That is because several states have enacted delegate-limitation laws that impose *criminal* penalties on delegates who stray from their commissions.

---

273. TEX. CONST. art. III, § 40.

274. *See* S.J. 44th Leg., 1st C.S. p. 63 (Tex. 1935) (Senator Small's Rural Aid Bill held out of order).

275. *See* S.J. 41st Leg., 5th C.S. p. 9 (Tex. 1930) (Senator Love's Bill held out of order).

276. *See* S.J. 47th Leg., 1st C.S. p. 69 (Tex. 1941) (in which Senator Metcalf raised the point of order from the floor).

277. H.J. 51st Leg., 1st C.S. p. 10 (Tex. 1950).

278. *Id.* at pp. 12–13.

279. *Id.* at p. 2.

280. *Id.* at p. 101.

Take Florida, for example. Whenever that state appoints delegates to an Article V convention of states, 'the Legislature shall adopt a concurrent resolution to provide instructions to the delegates and alternate delegates regarding the rules of procedure and any other matter relating to the Article V convention that the Legislature considers necessary.'[281] If a delegate casts a vote outside the scope of the Legislature's instructions or resolution calling for an Article V convention, it is void.[282] But more concerning to any delegate who might be tempted by the trappings of a runaway convention, the delegate casting an outside-the-bounds vote faces prosecution for a third-degree felony, punishable by up to five years in prison.[283] Several other states impose similarly draconian penalties on would-be wayward delegates to an Article V convention of states.[284]

Such penalties, especially when combined with modern evidence from other bodies, suffice to show that delegates to an Article V convention of states would be controllable today as they were in 1787.

C. The Reality: Originalists Must Trust Article V

At bottom, the concern that Article V delegates are 'uncontrollable' rests on the proposition that the individuals sent by states to propose constitutional amendments will be singularly irresponsible—in ways that no delegates ever have been in all of America's history. The critics would have you believe that Article V delegates will propose amendments that no member of Congress ever would, that no state legislator ever would, and that no delegate to any state constitutional convention ever has. All of this while also facing potential criminal penalties for violating

281. FLA. STAT. ANN. § 11.934(1) (West 2014).
282. FLA. STAT. ANN. § 11.9342 (West 2014).
283. FLA. STAT. ANN. § 11.9345 (West 2014).
284. *See, e.g.*, IND. CODE ANN. § 2-8.2-4-6 (West 2014) (knowing or intentional violation of legislative instructions is Level 6 felony); TENN. CODE ANN. § 3-18-106 (West 2014) (voting outside of legislative instructions is a Class E felony); UTAH CODE ANN. § 20A-18-101 (West 2014) (establishing third-degree felony for violating legislature's instructions); N.D. CENT. CODE ANN. § 54-03-33 (West 2015) ("A delegate casting or attempting to cast a vote at a convention in violation of this section must be rendered ineligible to continue to serve as a delegate and must be immediately removed from office and replaced by an alternate delegate as provided under this section. A vote cast by a delegate at a convention which is in violation of this section is void."); S.D. CODIFIED LAWS § 2-15-20 (2016) (violation of Article 5 convention oath makes delegate subject to civil fine not to exceed $5,000); GA. CODE ANN. § 28-6-8(f)(2) (West 2014) (violation of Article 5 convention oath is felony punishable by one to five years in prison).

their commissions.

It is true that an Article V convention of states is not without risk. The same could be said of virtually anything. But less hypothetical is the far bigger risk that comes from doing nothing and idly abiding the status quo, in which the federal government acts free from meaningful constraints imposed by the Constitution or the people. In that regard, the late, great Antonin Scalia put it best in the epigraph that opened this Article:

> I am willing to take the chance in having a convention despite some doubts that now exist. I am not sure how much longer we have. I am not sure how long a people can accommodate to directives from a legislature that it feels is no longer responsive, and to directives from a life-tenured judiciary that was never meant to be responsive, without ultimately losing its will to control its own destiny.[285]

The time for all Americans to control our own destiny is now.

285. AM. ENTER. INST. FORUMS, *supra* note 1, at 18.

JUDICIAL DECISION MAKING AND THE EXCLUSIONARY RULE

ROBERT E. BELANGER*

* Circuit Judge, Nineteenth Judicial Circuit, Florida. Thesis submitted in partial fulfillment of the requirements for the degree of Master of Laws (LL.M.) in Judicial Studies at Duke University School of Law. I am grateful to Jack Knight and Mitu Gulati for their guidance and suggestions. I also thank Richard Posner for his helpful comments. All remaining errors are my own.

INTRODUCTION

How do judges make decisions? What factors influence them? Legal scholars have long debated whether formalism or realism provides the best explanation for how judges make decisions.[1] Scholars from other disciplines attempt to explain judicial decision making through the lens of their respective social science, advancing models of judicial behavior, often based upon crude proxies, to determine if political ideology, psychological factors, or economic considerations (Judge Posner's 'judge as rational maximizer of personal utility")[2] influence decision making—as if politics or economics could fully explain how a judge decides a case.[3]

The most plausible theory of judicial decision making is that a complex amalgam of factors and influences affects those decisions. All of these influences—political, economic, and psychological—happen at the same time, albeit in different proportions, and depending on the individual judge and the type of case being decided. In cases involving constitutional questions, political considerations may predominate; in cases involving the interpretation of complex regulatory schemes, economic considerations may (and probably should) influence the ultimate deci-

---

1. Pierre Schlag explains that formalism and realism are not simply mirror images of each other. They represent fundamentally different views of the law. Professor Schlag summarizes the two theories:

Formalism	Realism
is a	is a
Comprehensive	Partial
Pure	Compromised
Ideal	Worldly
First-best	Second-best
Model	Approach
of law	to law

Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 207 (2009).

2. Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-making*, 75 B.U. L. REV. 941, 945 (1995); *see generally* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

3. Judge Posner describes nine theories of judicial behavior: attitudinal, strategic, sociological, economic, psychological, organizational, phenomenological, legalist, and pragmatist. RICHARD A. POSNER, HOW JUDGES THINK 19 (2008). However, after describing these theories, he then proceeds to integrate them into one unifying theory, "that of the judge as a participant in a labor market—that is, as a worker. LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 25 (2013).

sion.

But these political and economic models look at how *external* influences affect judicial decision making. In cases involving the exclusionary rule, the influence of these external factors may be diminished, isolating the effect of the rule *itself* on judicial decision making. It seems likely that the inexorable consequences of a per se rule of exclusion may influence the outcome. It is a reasonable proposition that judges of all political backgrounds and persuasions feel uncomfortable with a remedy that is often disproportionate. Moreover, there exists among judges a natural antipathy towards mandated outcomes; that is, where judicial discretion is circumscribed or removed.[4] From mandatory sentencing schemes to the mandatory exclusion of evidence, when the law compels what is perceived to be an unjust or unfair result, there may be some tendency to ameliorate the resultant harm—a kind of judicial nullification or judicial avoidance in applying the rule or the law.

A rule, unlike a standard, is intended to limit the discretion of the decision maker.[5] Mandatory rules further circumscribe, and in some instances, eliminate discretion.

Rules and standards each have their own 'vices and virtues.'[6] For example, one virtue generally ascribed to rules is that they provide clear guidance to third parties. Standards, on the other

---

4. *See* Michael Tonry, *Mandatory Penalties*, 16 CRIME & JUST. 243, 256–57 (1992) (detailing survey results that reveal widespread judicial dislike of mandatory penalty laws).

5. Judge Posner explains the distinction between rules and standards in *Mindgames, Inc. v. W. Publ'g Co.*, 218 F.3d 652, 657 (7th Cir. 2000):

> A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard's rationale. A speed limit is a rule; negligence is a standard. Rules have the advantage of being definite and of limiting factual inquiry but the disadvantage of being inflexible, even arbitrary, and thus overinclusive, or of being underinclusive and thus opening up loopholes (or of being both over- and underinclusive!). Standards are flexible, but vague and open-ended; they make business planning difficult, invite the sometimes unpredictable exercise of judicial discretion, and are more costly to adjudicate—and yet when based on lay intuition they may actually be more intelligible, and thus in a sense clearer and more precise, to the persons whose behavior they seek to guide than rules would be. No sensible person supposes that rules are always superior to standards, or vice versa, though some judges are drawn to the definiteness of rules and others to the flexibility of standards. But that is psychology; the important point is that some activities are better governed by rules, others by standards.

6. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 399 (1985).

hand, are preferred for doing justice in a particular case. A per se rule of exclusion seems a particularly problematic rule. It lacks the virtues we expect of a rule (clear guidance to third parties) while at the same time has vices that might be ameliorated by the exercise of discretion (the exclusion of evidence where the transgression is minor or unintentional).[7]

The survey and interviews, which are discussed in greater detail below, tend to confirm the primary premise of this Article: namely, that the per se application of the exclusionary rule affects judicial decision making. The rule sometimes requires a remedy that is disproportionate, even unjust. Avoiding unjust results is one possible explanation for the rule's effect on decision making.[8]

A secondary premise explores *why* the remedy is viewed as unjust in certain cases. In some cases, a judge may perceive the rule as unjust because the underlying law of search and seizure does not always provide clear guidance to law-enforcement officers. An officer can make a traffic stop with the honest, good-faith belief that he is following the law, only to be told later that the stop was unlawful. Under a per se rule, if the stop is unlawful, even if the transgression is minor, the rule requires the exclusion of evidence.[9]

Most judges and scholars believe that the justification for the rule is to discourage police misconduct.[10] However, if the underlying law is unclear or confusing, it seems unfair to accuse an officer of 'misconduct. This is why the remedy is sometimes seen as too harsh. To be clear, the exclusionary rule itself may be easy

---

7. *See* United States v. Leon, 468 U.S. 897, 907–08 (1984) ("Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred [by the exclusionary rule] on such guilty defendants offends basic concepts of the criminal justice system.").

8. *See* Dep't of Justice, Office of Legal Policy, *Report to the Attorney General on the Search and Seizure Exclusionary Rule, "Truth in Criminal Justice" Report No. 2*, 22 U. MICH. J.L. REFORM 573, 613–14 (1989) [hereinafter Office of Legal Policy] (noting that, '[b]ecause the price of suppressing evidence is so high, judges may be willing to accept outrageous police stories of how evidence was obtained, or ignore complaints about warrant defects or the conduct of investigations, to keep evidence in, and "[b]ecause judges are sensitive to the problem of allowing criminals to go free, they have an incentive to find that the basis for police action was sufficient").

9. *See, e.g.*, United States v. Herrera, 444 F.3d 1238, 1246 (10th Cir. 2006) (holding a stop to be invalid where an officer mistakenly believed that the defendant's vehicle was a commercial vehicle subject to a random regulatory inspection).

10. *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961) ("Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" (citing Elkins v. United States, 364 U.S. 206, 217 (1960))).

to apply. However, judicial application of the law of search and seizure is often unclear, confusing, or contradictory.[11]

I. THE PROBLEMATIC EXCLUSIONARY RULE: A REVIEW OF THE LITERATURE

Few legal rules are more controversial or polarizing than the exclusionary rule.[12] The rule has been the subject of hundreds, if not thousands, of scholarly articles.[13] Many articles debate the merits or flaws of the rule.[14] Some articles seek to measure empirically the influence of the rule in practice. One of the earliest studies by Dallin Oaks concluded that, '[a]s a device for directly deterring illegal search and seizures by the police, the exclusionary rule is a failure.'[15] Justice Rehnquist cited the Oaks study in *California v. Minjares*[16]:

> The most comprehensive study on the exclusionary rule is probably that done by Dallin Oaks for the American Bar Foundation in 1970. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970). According to this article, it is an open question whether the exclusionary rule deters the police from violating Fourth Amendment protections of individuals. Whether or not this be the case, the exclusionary rule certainly deters the police and prosecuting authorities from convicting many guilty defend-

11. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) (evidentiary exclusion has led to a body of Fourth Amendment law that is 'complex, 'contradictory,' and 'often perverse').

12. *See, e.g.*, Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 941–42 (1983) (calling for an alternative to the exclusionary rule); Myron W. Orfield, Jr. *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 75 (1992) (noting that both sides of the debate put forward arguments 'concerning the practical operation and effects of the rule, that 'are almost entirely speculative; driven by ideological commitments rather than by observation').

13. Note, *Rethinking the Good Faith Exception to the Exclusionary Rule*, 130 U. PA. L. REV. 1610, 1610 n.2 (1982) (noting, more than thirty years ago, that 'literally hundreds of articles have been written on the rule and its effects').

14. *Id.* (highlighting the 'sharp disagreement on almost every aspect of the rule' in the hundreds of articles that have discussed it).

15. Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 755 (1970).

16. 443 U.S. 916 (1979).

ants.[17]

Richard Posner, coming from a law-and-economics background, persuasively argues that the exclusionary rule leads to over-deterrence. He explains, "[T]o yield the optimum level of deterrence, the exclusionary rule has no readily apparent mechanism for adjustment. It deters too little or too much; only by accident would it deter optimally."[18] He goes on to say:

> I am trying to give some precision to the widely shared intuition that the exclusionary rule is an exceptionally crude deterrent device. It is not merely crude; to the extent obeyed, it systematically overdeters, because it imposes social costs that are greatly disproportionate to the actual harm to lawful interests from unreasonable searches and seizures.[19]

To be sure, most of the empirical research on the exclusionary rule involves the rule's effect on police practices and procedures.[20] One study explored the effect of the rule on juror decision making.[21] Another study examined the effects of the rule on criminal behavior and crime rates.[22]

---

17. *Id.* at 926–27 (Rehnquist, J., dissenting from denial of stay).

18. Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54 (1982).

19. *Id.* at 56.

20. *See* Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1376–77 (2008); Henry M. Caldwell et al. *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 709 (1998) (citing questionnaire surveying police officers).

21. *See* Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 591 (2011) ("[T]he exclusionary rule harms innocent defendants through three effects: juror resistance, juror error, and a perverse screening effect—that is, it undermines the differentiation the criminal justice process would otherwise make between innocent and guilty defendants.").

22. *See* Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 173–74 (2003) ("The goal of our research was to test the application of the prevalent economic theories of criminal behavior in criminal procedure, which might alter any subsequent normative analysis of criminal procedure. We accomplished this goal. We observed substantial but predictable results from changing criminal procedure. We found a positive and significant effect of the Supreme Court's alteration of criminal procedure on the crime rates of those states affected. Looking at aggregated state data, *Mapp* increased crimes of larceny by 3.9 percent, auto theft by 4.4 percent, burglary by 6.3 percent, robbery by 7.7 percent, and assault by 18 percent. Moreover, these results mask larger im-

There are very few studies that even include judges in the survey population. In 1963, Stuart Nagel sent 250 questionnaires to police chiefs, prosecuting attorneys, judges, and defense attorneys.[23] Only seventeen judges responded.[24] The questionnaire sought opinions regarding the effect of the rule on police practices, not its effect on judicial decision making.[25] In another study, Professor Myron Orfield interviewed fourteen public defenders, eleven prosecutors and thirteen judges.[26] Similarly to the 1963 study, Professor Orfield sought opinions concerning the efficacy of the rule and its effect on police practices.[27] The small number of respondents undermines the validity of these studies. Moreover, these studies were primarily concerned with the perceived effect of the rule on police conduct.

There are few, if any, studies of judges that explore the exclusionary rule's effect on judicial decision making.[28]

What factors or influences affect judicial decision making in applying the exclusionary rule? Does the lack of discretion in fashioning an appropriate remedy affect how motions to suppress are decided at the trial court level?[29] Do appellate courts recognize the problematic combination of confusing law and a per se rule of exclusion?

---

pacts in suburban cities—where the imposition of the exclusionary rule increased violent crimes by 27 percent and property crimes by 20 percent.").

23. Stuart S. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, WIS. L. REV. 283, 283–84 (1965).

24. *Id.*

25. *Id.* at 286; Caldwell, *supra* note 20, at 691.

26. Orfield, *supra* note 12, at 81.

27. Orfield, *supra* note 12, at 85–90.

28. Some commentators might argue that empirical study of the exclusionary rule is unnecessary insofar as the exclusionary rule rests primarily on what Yale Kamisar called a "principled basis" rather than "an empirical proposition. Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 565 n.1 (1983); *see also* Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL'Y 711, 740–41 (2000) ("The exclusionary rule fits neatly within the Constitution's separation of powers framework. The men who framed and ratified the Constitution recognized 'the insufficiency of a mere parchment delineation of the boundaries' between the three branches of government."). However, it seems clear that, at least since 1974 when the Supreme Court issued its opinion in *United States v. Calandra*, 414 U.S. 338, 354 (1974), the exclusionary rule exists primarily to deter police misconduct. The exclusionary rule is a "massive remedy" to be applied only as a "last resort. Hudson v. Michigan, 547 U.S. 586, 591, 599 (2006). In order to exclude unlawfully obtained evidence, the benefit of "some incremental deterrent" to police misconduct must outweigh the "substantial social costs" of setting a criminal free. Herring v. United States, 555 U.S. 135, 141 (2009) (quoting Illinois v. Krull, 480 U.S. 340, 352–53 (1987)). This is what empiricists seek to study and measure.

29. *See* Jacobi, *supra* note 21, at 617 ("The effect of the exclusionary rule at the trial level has gone largely unexplored in the exclusionary rule literature, which focuses overwhelmingly on policing.").

Justice Lewis Powell wrote:

> I recognize—as the dissenting opinions find it easy to proclaim—that the law of search and seizure with respect to automobiles is *intolerably confusing*. The Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided. Much of this difficulty comes from the necessity of applying the general command of the Fourth Amendment to ever-varying facts; more may stem from the often unpalatable consequences of the exclusionary rule, which spur the Court to reduce its analysis to simple mechanical rules so that the constable has a fighting chance not to blunder.[30]

The law has grown even more confusing over the last quarter century.[31] This may explain why the United States Supreme Court has revisited the wisdom of an unthinking and automatic application of the exclusionary rule.[32]

An illustration of Justice Powell's observation regarding the intolerably confusing law of search and seizure occurred at the Florida College of Advanced Judicial Studies (AJS). In May 2007 AJS offered a course entitled *Search and Seizure: The Law of Hide and Seek*.[33] There were perhaps forty circuit judges in attendance and a few appellate judges. The course of instruction involved displaying a factual scenario on a large screen. Each judge was asked to review the scenario, then vote, indicating whether the stop was lawful or unlawful. The first factual scenario was displayed on the screen. Half the judges voted that the stop was lawful. Half voted that the stop was unlawful. Of course, half the

30. Robbins v. California, 453 U.S. 420, 430 (1981) (Powell, J. concurring) (emphasis added); *see generally* HAROLD ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 35–65 (1996); H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA (1996).

31. Caldwell, *supra* note 20, at 980–81 ("The tortured interpretations of Fourth Amendment law in the wake of *Mapp* have created a body of law that is remarkably complicated.").

32. *See, e.g.*, *Herring*, 555 U.S. at 141 (noting that the Court "ha[s] repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation").

33. Florida College of Advanced Judicial Studies, Search and Seizure: The Law of Hide and Seek (May 22–23, 2007) (continuing judicial education course) (course packet on file with the author and with the Texas Review of Law & Politics).

judges were flat-out wrong. Then a second factual scenario was displayed. It seemed factually identical to the last case, so all the judges voted that the stop was lawful. Now, 100 percent of the judges were flat-out wrong. The factual scenarios were from conflicting appellate decisions.[34] This went on for about an hour. Case after case, vote after vote, experienced circuit court judges guessed wrong on vehicle stops and search and seizure law.

Eventually, the inevitable question was asked: if forty experienced judges, sitting well rested in the comfort of a hotel conference room, cannot figure out if a stop is legal, how can we hold a law-enforcement officer, making a traffic stop on a dark road at 3:00 A.M. to a higher standard? It was also noted that, if a law-enforcement officer had these judge's phone numbers stored in her cell phone, and she randomly called a judge at 3:00 A.M. to ask if a stop was legal, she would have about a fifty percent chance of getting a correct answer. Further, this question was asked of all the judges in attendance: when a reasonable officer, acting in good faith, makes a traffic stop but guesses wrong on the (intolerably confusing) law, what 'police misconduct' are we sanctioning by the harsh remedy of excluding evidence? The silence was deafening. Finally, it was generally agreed that perhaps it is time to revisit the indiscriminate and unthinking application of the exclusionary rule. There was a general and near universal sense of discomfort with the per se rule of exclusion.

Craig Bradley suggests that 'requiring law enforcement officers to use their common sense, and judging them by that standard, seems more likely to produce sensible results than does a set of unknowable rules and vague exceptions that neither the police nor the courts can understand.'[35] That approach would give judges the discretion to use a totality-of-the-circumstances test to

34. *Compare* State v. Perez-Garcia, 917 So. 2d 894, 897 (Fla. Dist. Ct. App. 2005) (finding that it was *lawful* to stop a vehicle for an inoperable taillight because the inoperable light is an "unsafe condition"), *quashed*, 983 So. 2d 578 (Fla. 2008), *with* State v. Burger, 921 So. 2d 847, 848–49 (Fla. Dist. Ct. App. 2006) (finding that it was *unlawful* to stop a vehicle for an inoperable taillight because two of the three brake lights worked). Ultimately, the Florida Supreme Court quashed the decision in *Perez-Garcia* with Justices Wells and Bell dissenting on the grounds that the district court's conclusion as a matter of law that an inoperable left taillight is an objectively unsafe condition was in line with recent precedent. *Perez-Garcia*, 983 So. 2d at 578–79 (Wells, J. dissenting, with Bell, J. concurring in the dissent). This is not to suggest the majority opinion is wrong, but to show that a circuit judge, three appellate judges, and two Florida Supreme Court justices believed the stop was lawful and proper. How, then, do we justify labeling that officer's real-time actions as unreasonable misconduct?

35. HAROLD J. ROTHWAX, GUILTY 65 (1996) (paraphrasing Craig Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1489 (1985)).

determine an appropriate, proportional remedy if a violation is found.

Until such discretion is permitted, judges will continue to be troubled, on occasion, with a reflexive application of the rule. But how, if at all, does this discomfort manifest itself in judicial decision making?

II. THE RULE AND JUDICIAL DECISION MAKING

The ways in which a per se rule of exclusion might affect judicial decision making are numerous.[36] First, the judge is the finder of fact in a suppression hearing.[37] Discomfort with the rule may create a template through which evidence is filtered, to lessen the likelihood of excluding evidence in a case where the evidence is critical and the transgression is minor. Supporting evidence may be overvalued while contradictory or ambiguous evidence may be undervalued. This is known as motivated reasoning or confirmation bias.[38] Certainly, judges would not knowingly accept perjured testimony. Judges take very seriously their role as neutral gatekeepers and the responsibility to vindicate Fourth Amendment violations.[39] But, in a close case where the law is unclear, and especially where no conflicting evidence is of-

36. Namely, in cases involving a set of unknowable rules with vague exceptions. Excluding evidence where, for example, law-enforcement officers conducted a warrantless search of a person's home would trouble few, if any, judges. The difficult cases arise most commonly in the context of searches conducted during a traffic stop, or a citizen encounter in a public place. *See generally, e.g.*, Smith v. Maryland, 442 U.S. 735 (1979) (contrasting a property-based-trespass approach to the Fourth Amendment for a home with an expectation-of-privacy approach for a traffic stop).

37. Elizabeth P. Marsh, *Does Evidence Law Matter in Criminal Suppression Hearings*, 25 LOY. L.A. L. REV. 987, 995 (1992) ("In hearings on motions to suppress the judge is the fact finder.").

38. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 884 (1991) ("Exclusion may bias judges' after-the-fact probable cause determinations by requiring that they be made in cases where the officer actually found incriminating evidence."). This may be due in part to the fact that scientists are trained to look for evidence that refutes their hypothesis, while lawyers and judges are taught to look for evidence to support their case and to minimize or ignore any contradictory information. LEE EPSTEIN, WILLIAM LANDES & RICHARD A. POSNER, *supra* note 3, at 45; Stephen Porter & Leanne Brinke, *Dangerous Decisions: A Theoretical Framework for Understanding How Judges Access Credibility in the Courtroom*, 14 LEGAL & CRIMINOLOGICAL PSYCHOL. 119, 129 (2009); *see generally* AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982).

39. Professor Uviller suggests that most police mendacity is of a minor character, such as in the case where perjury takes the form of a "slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result. H. RICHARD UVILLER, TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE 115–16 (1988). Most judges would find indefensible any justification for perjury, however minor.

fered, confirmation bias may cause a disinclination to discount sworn testimony.

Judges, being human, are also subject to hindsight bias. That is, if you know the outcome of an event, you tend to interpret the facts differently.[40] For example, if a law-enforcement officer testifies that he suspected that a defendant had contraband, and if contraband is found, the very fact that there is something unlawful to suppress validates the officer's suspicion.

Additionally, some commentators suggest that an unintended effect of a per se exclusionary rule is that it fosters mendacity.[41] Some go so far as to suggest that there is a pervasive culture of lying among police officers.[42] However, those sweeping assertions have not been verified by any reliable studies.[43] As Professor Kevin Reitz explains:

> In 1988 the American Bar Association (ABA) published a major study of the American criminal justice system undertaken by a special committee chaired by Professor Samuel Dash. The committee held hearings and commissioned a telephone survey of over 800 defense lawyers, prosecutors, judges, and police officials. With respect to testilying by police, the ABA concluded that the problem was 'isolated' and observed that 'no one has established the pervasiveness of the practice[]. '[44]

In addition to finding facts, the judge can select case law to support the final ruling. It has been suggested that judges may 'cherry-pick' case law to support a desired outcome.[45] Professor

---

40. *See* Stuntz, *supra* note 38, at 884.

41. Office of Legal Policy, *supra* note 8, at 613.

42. *See, e.g.*, Christopher Slobogin, *Testilying: Police Perjury and What to Do about It*, 67 U. COLO. L. REV. 1037, 1042–44 (1996) (discussing a number of related types of police misconduct in connection with Fourth Amendment requirements, including police perjury at suppression hearings).

43. Kevin R. Reitz, *The Police: Testilying as a Problem of Crime Control: A Reply to Professor Slobogin*, 67 U. COLO. L. REV. 1061, 1062 (1996) ("We know almost nothing about the testilying 'rate, its variations across and within police departments, its changes over time, or its etiology. We can guess about such patterns, but the truth is that no one knows. Compared with many other offenses, the crime of [police lying in testimony] been poorly measured, and we should be suspicious of claims that its incidence is known or its causes understood.").

44. *Id.* at 1064 (alternation in original).

45. *See* Stephen J. Choi & Mitu Gulati, *Bias in Judicial Citations: A Window into the Behavior of Judges?*, 37 J. LEGAL STUD. 87, 89, 91 (2008) (concluding that a judge's political affiliation "is correlated with the willingness of a judge to make outside-circuit citations'

Anthony Niblett did a statistical study regarding case selection.[46] He explains that the legal- realist and legal-skeptic theories suggest that judges simply cite precedents that best support their desired ruling.[47] Professor Niblett tested that hypothesis and found that the data suggests that judges do not cherry-pick cases: [T]he instrumental variable analysis suggests that judges are not simply cherry picking precedents. '[48] However, Professor Niblett acknowledges the limitations of his study, which only looked at a pool of cases from one jurisdiction deciding one extremely narrow issue: the unconscionability of arbitration clauses in standard-form contracts. He recognizes that,

> [F]ocusing on just one law in just one jurisdiction, does not capture the entire scope of the phenomenon of judges potentially cherry picking precedents. It may be seen more broadly in other spheres of law. The framework presented here can be easily applied to other areas and perhaps results will differ.[49]

It seems likely that the results *would* differ when it comes to the exclusionary rule. As Judge Guido Calabresi explains:

> Judges—politicians' claims to the contrary notwithstanding—are not in the business of letting people out on technicalities. If anything, judges are in the business of keeping people who are guilty *in* on technicalities. [T]he judge facing a clearly guilty murderer or rapist [claiming a Fourth Amendment violation] will do her best to protect the fundamental right *and* still keep the defendant in jail
>
> This means that in any close case, a judge will decide that the search, the seizure, or the in-

and that '[m]ost studies looking at citations focus on the aggregate numbers of citations a judge receives and do not look on a case-by-case basis at how a judge decides when to cite another opinion"); Anthony Niblett, *Do Judges Cherry Pick Precedents to Justify Extra-Legal Decisions?: A Statistical Examination*, 70 MD. L. REV. 234, 269 (2010).

46. Niblett, *supra* note 45, at 244.
47. *Id.* at 234–35.
48. *Id.* at 267.
49. *Id.* at 269.

> vasion of privacy was reasonable. That case then becomes the precedent for the next case. The next close case comes up and the precedent is applied: same thing, same thumb on the scale, same decision. [C]ourts [thus] keep expanding what is deemed a *reasonable* search or seizure.[50]

Additionally, a judge may be less concerned with being reversed by an appellate court, insofar as a suppression ruling comes to the reviewing court clad in a presumption of correctness.[51] Appellate courts cannot use their review powers in such cases as a mechanism for reevaluating conflicting testimony and exerting covert control over the factual findings. A judge may even be affirmed under the 'tipsy-coachman' doctrine, if he or she is right for the wrong reason.[52]

Finally, a judge may be concerned about being voted out or removed from office if evidence is suppressed and a criminal goes free. This concern is certainly greater for an elected judge, but even a federal judge with a lifetime appointment may feel pressured not to suppress evidence. By way of example, in 1996, United States District Court Judge Harold Baer, Jr. initially granted a motion to suppress in a drug-trafficking case, but then

---

50. Guido Calabresi, *Law and Truth Debate: The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003).

51. However, this determination is reviewed de novo in most jurisdictions. 29 AM. JUR. 2D *Evidence* § 666 (2015).

52. The "tipsy-coachman' label comes from a nineteenth-century Georgia case, *Lee v. Porter*, 63 Ga. 345, 346 (1879), in which the Georgia Supreme Court, noting that the "human mind is so constituted that in many instances it *finds the truth* when wholly unable to *find the way* that leads to it, quoted the following verse by Oliver Goldsmith:

> The pupil of impulse, it forc'd him along,
> His conduct still right, with his argument wrong;
> Still aiming at honor, yet fearing to roam,
> The coachman was tipsy, the chariot drove home.

This long-standing principle of appellate law, sometimes referred to as the 'tipsy-coachman' doctrine, allows an appellate court to affirm a trial court that reaches the right result, but for the wrong reasons so long as there is any basis which would support the judgment in the record. *See* Tubbs v. State, 897 So. 2d 520, 522 (Fla. Dist. Ct. App. 2005) ("The right-for-the-wrong-reason doctrine applies in reviewing the validity both of police seizures and of judgments and orders of lower courts. In this case, which involves both situations, the rule applies in spades."); *see also* Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002) ("[I]n some circumstances, even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling.").

reversed himself.[53] Although only Judge Baer knows the true reason for changing his ruling, the reversal came after his original decision was severely criticized by both Democrats and Republicans.[54]

III. EARLY DEVELOPMENT OF THE EXCLUSIONARY RULE

For a century after the Constitution was ratified, the remedy for an unreasonable search was limited.[55] A citizen could sue the offending officer for compensatory or punitive damages under trespass or tort law.[56] One of the earliest decisions excluding evidence dates back to 1886. In *Boyd v. United States*,[57] the Supreme Court held that documents subpoenaed from a defendant could not be used in a trial under revenue laws because of the 'intimate relation' between the Fourth Amendment's protection from unreasonable searches and seizures and the Fifth Amendment's right against self-incrimination.[58] This justification for exclusion, based upon an amalgamation of the two amendments, was eventually abandoned.[59]

The exclusionary rule as a remedy to a Fourth Amendment violation can be traced to the case of *Weeks v. United States*.[60] In *Weeks*, the Court reversed a defendant's conviction for running an illegal lottery because the incriminating evidence was discovered as a result of an unconstitutional search.[61] The exclusion of the evidence was seen as necessary to give meaning to the Fourth Amendment's protections and for purposes of judicial integrity.[62]

---

53. United States v. Bayless, 913 F. Supp. 232, 234 (S.D.N.Y.), *opinion vacated on reconsideration by* 921 F. Supp. 211, 212 (S.D.N.Y. 1996).

54. *See* John M. Goshko & Nancy Reckler, *Controversial Drug Ruling Is Reversed*, WASH. POST (Apr. 2, 1996), www.washingtonpost.com/archive/politics/1996/04/02/controversial-drug-ruling-is-reversed/e065d37a-d939-4f61-b2ae-f9940a9b2b13/ [https://perma.cc/WYA6-Z72R] (quoting Professor Albert Alschuler as saying that Judge Baer's reversal was "a little like a baseball umpire who reverses his call when the crowd boos").

55. *See* George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 TEXAS TECH L. REV. 199, 219–28 (2010) (noting that property interests were central to protecting against unlawful searches and seizures and the resulting remedy rested mostly in trespass law during the framing-era of the Constitution).

56. *Id.*

57. 116 U.S. 616 (1886).

58. *Id.* at 633.

59. In *Fisher v. United States*, 425 U.S. 391, 407 (1976), the Supreme Court declared expressly that several of the principles in *Boyd* "[had] not stood the test of time.

60. 232 U.S. 383 (1914). *See also Mapp*, 367 U.S. at 655 (extending the exclusionary rule to state law-enforcement actions).

61. *Weeks*, 232 U.S. at 398.

62. *Id.* at 393.

Justice Ruth Bader Ginsburg eloquently describes the exclusionary rule as an 'essential auxiliary' to the 'majestic' Fourth Amendment right.[63] The remedy is necessary, she explains, to ensure that 'the Fourth Amendment['s] prohibitions are observed in fact' and 'that the government would not profit from its lawless behavior.'[64] However, the rule is not without its problems. Certainly, there is nothing 'majestic' happening when a hotel conference room full of judges, completely baffled by the law, return to their respective courtrooms and suppress evidence because the police were equally perplexed by the same intolerably confusing law. To add insult to injury, the judge implicitly finds that the officer engaged in 'misconduct.'[65] Any self-aware judge cannot help but feel a tinge of hypocrisy suppressing evidence in a case where the judge is as perplexed by the law as the offending police officer. Where the law is unclear, we all pay the cost of intolerably confusing laws. Constitutional platitudes aside, it cannot be gainsaid that the exclusionary rule's application is often lacking in proportionality.

IV. LACK OF PROPORTIONALITY: THE PROBLEM OF OVER-DETERRENCE

Judge Benjamin Cardozo famously complained about the application of the exclusionary rule: 'The criminal is to go free because the constable has blundered.'[66] Akhil Reed Amar has written that the exclusionary rule is an 'awkward and embarrassing remedy [that excludes] reliable evidence of criminal guilt.'[67]

Perhaps the most compelling complaint relates to the lack of proportionality in the per se application of the rule. As Justice Potter Stewart remarked, 'The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of

63. *Herring*, 555 U.S. at 151–52 (Ginsburg, J., dissenting); *see also* Robert Bloom & David H. Fentin, *"A More Majestic Conception' The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 47 (2010) (attributing the phrase 'majestic' Fourth Amendment right" to Justice Ginsburg).

64. *Herring*, 555 U.S. at 152 (Ginsburg, J. dissenting).

65. *See Leon*, 468 U.S. at 911 (noting that "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule).

66. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

67. Amar, *supra* note 11, at 785.

justice.'[68] Recently, Eugene Milhizer wrote:

> The present understanding and application of the Fourth Amendment exclusionary rule—a court-made rule imposed for the sole purpose of deterring future police misconduct—is morally objectionable, practically unwise, and, therefore, in need of radical reconsideration or abandonment. I argued that in its current form, the exclusionary rule raises serious jurisprudential concerns, rests on a bare utilitarian premise, and employs a simplistic approach that is ill-suited to accomplish its fundamental purpose.
>
> The rule is blunt in its application insofar as it is automatic and largely categorical, rather than nuanced in principle or tailored in application
>
> Nothing matters except the imperative of deterring largely undifferentiated police misconduct at the expense of largely undifferentiated social costs.[69]

V. How Other Countries Implement the Exclusionary Rule: A Small Sampling—The United Kingdom & Canada

Chief Justice Roberts notes that 'the automatic exclusionary rule applied in our courts is still 'universally rejected' by other countries.'[70] More than a half century earlier, in *Wolf v. Colorado*,[71] Justice Frankfurter noted that the majority of states and other countries rejected the exclusionary rule, explaining:

> When we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an

68. Stone v. Powell, 428 U.S. 465, 490 (1976); *see also* Yale Kamisar, *"Comparative Reprehensibility' and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 6–7 (1987) (discussing proportionality in the context of the exclusionary rule).

69. Eugene Milhizer, *The Exclusionary Rule Lottery Revisited*, 59 CATH. U. L. REV. 747, 753–54 (2010) (citations omitted).

70. Sanchez-Llamas v. Oregon, 548 U.S. 331, 344 (2006) (quoting Craig M. Bradley, Mapp *Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399 (2001)).

71. 338 U.S. 25 (1949), *overruled by Mapp*, 367 U.S. 643 (*Mapp v. Ohio* held that evidence seized in violation of the Constitution is inadmissible in state courts. 367 U.S. at 655.).

> essential ingredient of the right. The contrariety of views of the States is particularly impressive in view of the careful reconsideration which they have given the problem in the light of the *Weeks* decision.[72]

Justice Frankfurter also noted that the states and countries that did not apply the exclusionary rule were still able to provide remedies for unlawful searches.[73] Similarly Judge Richard Posner explains:

> The idea that only the exclusionary rule stands between us and a reign of police terror, or at least a wave of official lawlessness that will sap faith in the Constitution and the Rule of Law, is parochial. There are other civilized countries in the world, and none excludes unlawfully obtained evidence to the extent we do.[74]

So how do other countries handle the suppression of unlawfully seized evidence?[75]

A. Canadian Charter of Rights and Freedoms

Craig Bradley characterizes the Canadian exclusionary law as 'the most fully developed' of any country outside of the United States.[76] This characterization can be attributed, at least in part,

---

72. *Wolf*, 338 U.S. at 29.

73. *Id.* at 30–31 n.1 (outlining numerous other mechanisms through which the 'common law provides actions for damages against the searching officer" for an unlawful search and seizure).

74. Posner, *supra* note 18, at 62.

75. There are potential advantages in examining foreign legal systems and rules. Domestic-law reform involves coming up with new ideas to resolve common problems. As Professor George Fletcher says, "The advantage of comparative law is that it expands the agenda of available possibilities. George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 695 (1998). To be sure, the use of comparative law is not without controversy, especially where foreign law is used (or misused) to interpret the U.S. Constitution. *See, e.g.*, Foster v. Florida, 810 So. 2d 910 (Fla.), *cert. denied*, 537 U.S. 990 (2002) (Thomas, J. concurring in denial of certiorari, wrote that '[w]hile Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans. *Foster*, 537 U.S. at 990 n.*.). However, the use of comparative law to examine how other legal systems create remedies or rules for quotidian, universal legal issues seems far less controversial.

76. Bradley, *supra* note 70, at 382.

to the fact that the rule is addressed in some detail in the Canadian Charter.[77] The Charter provides:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.[78]

The Canadian Charter says nothing about deterring police misconduct. Instead, it allows for judicial discretion. It does not mandate the automatic suppression of evidence. Instead, exclusion is warranted only after the court considers 'all the circumstances"[79] and determines that the admission of evidence would reflect poorly on the justice system. That common-sense rule avoids the need for exception upon exception and instead trusts trial judges to make discretionary decisions.

B. United Kingdom Police and Criminal Evidence Act of 1984 (PACE)

Mid-nineteenth century English courts showed little concern with how evidence was obtained.[80] As one court noted, 'It matters not how you get it; if you steal it even, it would be admissible in evidence. '[81] Because of this lack of concern, very few reported English cases address the issue. Indeed, the 1870 case of *Jones v.*

77. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.), paras. 8, 24(2).

78. *Id.* para. 24.

79. *Id.*

80. *See* R v. Warickshall (1783) 168 Eng. Rep. 234 (KB) ("It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith: no such rule ever prevailed.").

81. R v. Leatham (1861) 8 Cox CC 498, 501. The case is officially reported at 121 Eng. Rep. 589 (QB 1861); however, that report does not contain the quoted comment.

Owens[82] is the only English decision reported before 1955 that treats the issue of admissibility of illegally obtained evidence.[83]

In the early twentieth century, English courts gradually developed judicial discretion to exclude certain types of evidence, including evidence obtained by search and seizure.[84] However, while judges in England have discretion to exclude evidence, this discretion is infrequently invoked.[85]

In 1984, Parliament passed the Police and Criminal Evidence Act of 1984 (PACE).[86] Under PACE, evidence is excluded when (1) it was obtained by oppression; (2) it is unreliable or unduly prejudicial; or (3) when admission 'would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.'[87] Again, it is the trial judge who makes the discretionary decision to exclude evidence.[88]

The discretion given the judge by PACE is quite broad insofar as there are a wide variety of factors including:

> [A] review of the legality of the police actions; the seriousness of the offence; the bad faith of the investigators; the type of evidence and its potential

82. Jones v. Owens [1870] 34 QB 759 (Eng.).

83. *See* William Thomas Worster, *The Effect of Leaked Information on the Rules of International Law*, 28 AM. U. INT'L L. REV. 443, 461 n.57 (2013) (quoting Jones v. Owens [1870] 34 QB 759 at 760 (Eng.) for the proposition that "[i]t would be a dangerous obstacle to the administration of justice to hold because evidence was obtained by illegal means it could not be used against a party charged with an offense"); Kuruma v. Regina [1955] AC 197 at 199–200 (Eng.) (summarizing development of judicial discretion in evidence admission in English law).

84. *See* Elias v. Pasmore [1934] 2 KB 164 at 164 (judge had discretion to exclude evidence obtained via trespass); Noor Mohamed v. Rex [1949] AC 182 at 191–92 (Eng.) (stating that judge should evaluate whether evidence is sufficiently substantial to justify its admission); *see also* Kuruma v. Regina [1955] AC 197 at 199–200 (Eng.) (summarizing development of judicial discretion in evidence admission in English law).

85. *See* Yue Ma, *Comparative Analysis of Exclusionary Rules in the United States, England, France, Germany, and Italy*, 22 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 280, 283–84 (1999) (discussing judicial reluctance to exercise discretion in evidence admission).

86. The Police and Criminal Evidence Act of 1984 (PACE) and the PACE codes of practice provide the core framework of police powers and safeguards around stop and search, arrest, detention, investigation, identification, and interview of detainees. PACE sets out to strike the right balance between the powers of the police and the rights and freedoms of the public. Maintaining that balance is a key element of PACE.

87. Police and Criminal Evidence Act 1984, c. 60, § 78 (Eng.), www.legislation.gov.uk/ukpga/1984/60/section/78 [https://perma.cc/5JFW-WM2L]; *see also* THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, 1981, Cmnd. 8092 (UK).

88. *See, e.g.*, Osman v. Southwark [1999] EWHC (Admin) 622 (Eng.) (overturning a prior court's criminal conviction due to illegal search and seizure), www.bailii.org/ew/cases/EWHC/Admin/1999/622.html [https://perma.cc/9PAA-5TNP].

> reliability; the existence of other evidence; the opportunity to challenge the evidence at trial; the type of impropriety involved; and the type of right or protection infringed.[89]

The Canadian and United Kingdom experiences tend to validate Richard Posner's observation that the idea that a per se rule is necessary to prevent a 'reign of police terror' is parochial and erroneous.

VI. MEASURING THE EFFECT OF THE RULE: METHODOLOGY AND DATA

On methodology, Albert Alschuler wrote:

> The empirical scholarship of Dallin Oaks has stood the test of time. Indeed, rereading Oaks prompts an appreciation of some scholarly virtues that may be fading. Oaks's methodology was eclectic and adapted to the issues he confronted. He probed official records and presented numbers when he could, but he also talked to police officers and others who, it turned out, did know something. He did not sneer at anecdotal evidence. He presented his empirical findings in ways that even lawyers could understand.
>
> Much of today's empirical scholarship is different. Researchers run formulaic econometric regressions on large datasets; their computers spew forth conclusions that often look like nonsense; the researchers add some filler about prior studies; and then they publish.[90]

In an effort to avoid nonsensical conclusions, I tried to follow Oaks's methodology, with a blend of interviews and a survey to offset the weakness inherent in the respective research tools.

Between September 2013 and March 2014, I conducted interviews with twelve trial court judges in the Nineteenth Judicial

89. Stephen C. Thaman, *"Fruits of the Poisonous Tree" in Comparative Law*, 16 SW. J. INT'L L. 333, 344 (2010) (citation omitted).

90. Alschuler, *supra* note 20, at 1382.

Circuit of Florida. I was able to gain access to the judges since they are my judicial colleagues. This interview technique has at least two potential weaknesses. First, as with all interviews, the answers represent what the respondents say they do, not what they actually do. Second, even though the respondents are told that their answers are confidential and not for attribution, this may create a bias in the responses.[91] A final weakness: unlike an interview regarding, for example, the warrant-application process, here I am seeking to explore what may be subtle, perhaps even subconscious, influences on decision making.

To make the interviewees more comfortable, the interviews were not recorded, but I did take notes. The interviews were conducted without a fixed set of questions. Initially, I sought the subject's view of motions to suppress generally and understanding of the exclusionary rule. I did not share my views or my thesis topic with the subjects, so as not to guide the answers and eliminate their spontaneity. Subsequent questions encouraged respondents to fill out their stories and experiences with additional detail.

Only after I obtained the initial responses did I share a synopsis of the thesis abstract and an explanation of the data or information I was attempting to collect. Finally, I asked each of the judges what changes, if any, they would make to the rule.

To offset the weaknesses in the personal-interview technique, I sent out a survey to Florida trial judges. The survey was developed using Qualtrics© software which was sent via email to the judges. A link was included in an email that invited 921 trial judges and sixty-one appellate judges[92] to participate in the survey; 207 surveys were completed, a response rate of 21.08%. Once the participants click on the link provided in the email message, they are immediately directed to the survey page. The survey questions and results are at Appendix A.

Both the survey and interviews tend to confirm the primary premise of this Article: namely, that the per se application of the

91. Each interview began with a formal statement regarding the subject's rights of confidentiality and anonymity. In accordance with these rights, I will not be disclosing the names of the interviewees, including those that I subsequently quote and paraphrase.

92. There are 599 circuit judges and 322 county judges for a total of 921 trial-level judges, as of Fiscal Year 2011–2012. There are sixty-one appellate judges in the five district courts of appeal. *Historic Statewide Judgeships,* FLORIDA COURTS, www.flcourts.org/publications-reports-stats/statistics/historic-statewide-judgeships.stml [https://perma.cc/8AGV-28WR] (last visited Dec. 19, 2016).

exclusionary rule affects judicial decision making. The survey asked judges if the lack of discretion in excluding evidence has a tendency to influence their view of evidence in a suppression hearing. For the legal formalist, there is only one correct answer: a rule of law should not influence a judge's view of the evidence.[93] Surprisingly, only 56% of the judges answered that it would never influence their view of the evidence. Incredibly, 44% percent of the judges answered that it may, or almost certainly does, influence their view of the evidence.[94]

Of the 56% of the judges who said the rule would never influence their view of the evidence, several judges who were interviewed suggested the possibility that those judges are influenced by the rule, but that they 'don't realize they are doing it. One judge, who was firmly in the 'never influence' camp, nevertheless candidly acknowledged, 'Could it happen? Yes. Has it happened? I don't think so.' The judge went on to say:

> Depending on the nature of the hearing, there is likely to be a large subset of cases where that could easily occur. Viewing the rule as a 'limited rule of inadmissibility' if I can rule either way in a close case and be correct, I would lean toward denying suppression so that the fact finder could consider the evidence.

Again, the survey and interviews tend to establish that the rule does affect judicial decision making. Specifically, the apparent effect on judicial decision making is that judges look for ways not to suppress evidence, if there is any way to find the search lawful. Explaining the reasons for the effect is somewhat more intractable.

One very plausible explanation is that judges generally want to see a just result in a case. There is an intuitive sense that truth is a necessary component of justice. When 'truth is encumbered, justice is threatened, and legitimacy is compromised.'[95]

---

93. *See* Schlag, *supra* note 1.

94. *Infra* App. A, question 15.

95. Eugene Milhizer, *The Exclusionary Rule Lottery Revisited*, 59 CATH. U. L. REV. 747, 779 (2010); *accord generally* MORTIMER ADLER, SIX GREAT IDEAS: TRUTH, GOODNESS, BEAUTY, LIBERTY, EQUALITY, JUSTICE (1981). Note that the concepts of truth and justice seem inextricably intertwined: truth is an idea we judge by, while justice is an idea we act on.

The survey results also show that Florida trial judges are generally experienced in criminal law. Fully one-half (53%)[96] of the judges previously served as a prosecuting attorney, and 58% have criminal defense experience.[97] Almost all the judges (91%) have handled criminal cases at some point in their judicial careers.[98] Most of the judges believe that they have at least a 'good' understanding of search-and-seizure law; only 11% rated their knowledge as 'fair' and 3% rated their understanding as 'poor.'[99]

Three-quarters of the judges have had more than ten hours of continuing legal education in the area of search-and-seizure law.[100] Half of the judges have ruled on more than twenty-five motions to suppress in their judicial careers.[101]

The survey tends to negate or refute the claim that there is a pervasive culture of lying among police officers. Fully 43% of the sampled judges said they were unaware of *any* instance of a law-enforcement officer misrepresenting facts during a suppression hearing.[102] Moreover, among the 57% of the sampled judges who were aware of some deception, 66% of those judges believed that such mendacity is extremely rare, occurring in less than 5% of the suppression hearings.[103] Only 5% of the judges who were aware of some deception believed that deception occurred in more than 20% of the hearings.[104]

The interviews with the judges provide a possible explanation for the widely held view that police are mostly candid in their testimony during suppression hearings and that that relates to the paucity of motions to suppress filed in the trial courts. Almost all the Florida judges interviewed noted the screening or gatekeeping function of the assistant state attorney, the prosecuting attorney who makes the filing decision after arrest.[105] In Florida,

96. *Infra* App. A, question 4.
97. *Infra* App. A, question 5.
98. *Infra* App. A, question 9.
99. *Infra* App. A, question 11.
100. *Infra* App. A, question 10.
101. *Infra* App. A, question 12. These numbers may actually be higher, insofar as they represent the maximums in the survey question.
102. *Infra* App. A, question 13.
103. *Infra* App. A, question 14.
104. *Infra* App. A, question 14.
105. This gatekeeping function has been explored in the context of search warrants. The authors found that the search warrant applications were reviewed by an assistant U.S. attorney prior to the review of the application by a magistrate judge. Mitu Gulati, Jack Knight & David Levi, In the Absence of Scrutiny: Narratives of Probable Cause 19 (July 1,

most criminal cases are charged by the filing of an information, rather than an indictment from a grand jury.[106] If a crime is charged by way of an information, a state-attorney hearing will be set within twenty-one days of the defendant's arrest.[107] The hearing takes place at the state attorney's office.[108] The assistant state attorney assigned to handle the case meets with all the witnesses, including the arresting officer, to determine what crimes, if any, can be proven in court.[109] Candor is expected from all witnesses, especially law-enforcement witnesses. If an officer misleads the prosecutor, such deception is reported to the officer's supervisor. At the conclusion of the state-attorney hearing, if there are obvious search-and-seizure issues that would result in the suppression of crucial evidence, the charges are usually dropped.[110]

This screening process greatly reduces suppression issues and in turn, this tends to reduce the number of motions to suppress. When motions are filed, quite often they involve issues where the law is unsettled or confusing, i.e. searches involving automobiles[111] or *Terry* stops.[112]

Similarly, one judge noted the paucity of motions to suppress in the federal system. He suggested that 'cases in which the rule is violated are rare. The prosecutors and the police are very experienced in circumventing the rule, which is possible because the rule is porous. In either case, whether it is confusing law or a porous rule, there is little incentive to lie.

The surveyed judges were also asked if they agreed or disa-

2013) (unpublished manuscript) (on file with Duke University School of Law), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5773&context=faculty_scholarship [https://perma.cc/M46S-TWTD].

106. An information is a sworn document signed by the prosecuting authority which charges a person with a violation of the law. The state attorney must charge all criminal offenses punishable by death by indictment, but may elect whether to charge all other offenses by either filing an indictment or an information. FLA. R. CRIM. P. 3.140; Pinder v. State, 42 So. 3d 335, 337 (Fla. Dist. Ct. App. 2010).

107. FLA. R. CRIM. P. 3.133.

108. *Criminal Justice Process*, OFFICE OF STATE ATTORNEY, 19TH JUDICIAL CIRCUIT (Oct. 16, 2016, 11:45 AM), www.sao19.org/criminal_justice.htm [https://perma.cc/9DAN-KF29].

109. *Id.*

110. *Id.*

111. *See, e.g.*. United States v. Ross, 456 U.S. 798, 830–31 (1982) (warrantless search of a brown paper bag discovered during the search of a car upheld); Carroll v. United States, 267 U.S. 132, 147 (1925) (warrantless search of the passenger compartment of an automobile was upheld as reasonable under the Fourth Amendment).

112. Terry v. Ohio, 392 U.S. 1, 29–31 (1968) (finding permissible a reasonable search for weapons for the protection of the police officer where he has reason to believe that the individual is armed and dangerous, regardless of whether he has probable cause to arrest the individual for a crime).

greed with the statement, 'Suppression of evidence under a per se rule of exclusion often is too harsh a remedy.'[113] The results are represented in a unimodal or normal distribution (bell curve), where 33% neither agreed nor disagreed, 23% disagreed, 8% strongly disagreed, and a total of 35% either agreed or strongly agreed that the remedy is often too harsh.[114] Again, judges who were interviewed did say the exclusion of evidence is too harsh in many cases, and that it impairs the truth-finding function of the court. One appellate judge said, 'I have never thought suppression was an effective deterrent for law enforcement; sometimes it seems like too generous a remedy for a violation of privacy—but that is admittedly hard to factor. But another judge said, 'I think it's a silly rule, but I don't have any sense of being hesitant to enforce it.'

Given the survey response, I expected to see a similar normal distribution in response to question 18 regarding whether the per se rule of exclusion should be replaced with a discretionary rule. However, only 19% neither agreed nor disagreed, with 81% of the judges having an opinion one way or the other.[115] Thirty percent of the judges disagreed, and 14% strongly disagreed with a discretionary rule.[116] In contrast, 29% of the judges agreed, and 8% strongly agreed with replacing the per se rule, allowing judicial discretion.[117] The results are represented in a bimodal distribution. Many of the interviewed judges could not understand why a judge would not want discretion.

However, question 18 failed to distinguish between two very distinct situations that arise in motions to suppress.[118] The first situation involves the search of property—people's homes, dwellings, or offices. These are situations where a search warrant can and should be sought. Few, if any judges were troubled with a per se rule of exclusion for a warrantless search of a person's home, even where the crime is serious and the evidence is critical to the prosecution. So the 44% of the judges who would keep

113. *Infra* App. A, question 16.
114. *Infra* App. A, question 16.
115. *Infra* App. A, question 18.
116. *Infra* App. A, question 18.
117. *Infra* App. A, question 18.
118. *Infra* App. A, question 18 ("Indicate your agreement or disagreement with the following statement: The per se rule of exclusion should be replaced with a discretionary rule, which would allow a judge to consider the totality of the circumstances, including the seriousness of the offense; the importance of evidence; the existence of other evidence; and the type of impropriety involved.').

a per se rule may have had in mind the warrantless search of a person's home.

The second broad category relates to searches of automobiles or persons in public places, where warrantless searches may be authorized. This second category is where the vast majority of motions to suppress are filed, and where the rule is most problematic. These are situations where there is a diminished expectation of privacy, and quite often, decisions are made quickly in a dynamic situation. This is where the law is often unclear or confusing. These are the cases which generally cause more concern with a per se rule.

So the 37% of the judges who wanted to replace the per se rule with a discretionary rule may have had in mind a traffic stop or consensual citizen encounter. The survey failed to distinguish between these two quite different situations.[119]

Regarding the primary purpose of the rule, almost three-fourths (72%) believed that the rule was intended to deter police misconduct, while 27% believed that the rule was to protect privacy rights.[120]

Another unexpected finding relates to whether the law is perceived as clear and easy to apply. Fully 75% of the judges surveyed said the law is reasonably clear and is not difficult to apply in court.[121] Similarly, only 21% of the judges agreed with the statement, 'The law of search and seizure with respect to automobiles is intolerably confusing. '[122] About a quarter of the judg-

119. After *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court deviated from an exclusively property-based trespass approach to the Fourth Amendment which had marked Fourth Amendment jurisprudence until the latter half of the twentieth century. It was Justice Harlan's concurring opinion which set forth a two-part test for determining whether Fourth Amendment protections are warranted in a particular situation: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable. *Id.* at 361 (Harlan, J., concurring). In *Smith*, 442 U.S. at 740, the Court referred to the Harlan framework as the Court's "lodestar" and applied it as the exclusive test. A property or trespassed based approach is fairly easy to apply in the situation involving a warrantless search of a person's home. In contrast, an expectation-of-privacy approach to a traffic stop would seem to be more difficult to apply. Justice Scalia described the *Katz* test as a "fuzzy standard' and a "self-indulgent test" that was based on a "catchy slogan' but that had "no plausible foundation in the text of the Fourth Amendment. Minnesota v. Carter, 525 U.S. 83, 91, 97–98 (1998) (Scalia, J. concurring). In *United States v. Jones*, 132 S. Ct. 945, 951 (2012), the Supreme Court announced the return of the trespass test for what is a Fourth Amendment "search. According to Justice Scalia's majority opinion, *Katz* had supplemented the pre-*Katz* trespass test but not replaced it. *Id.* at 947.

120. *Infra* App. A, question 17.

121. *Infra* App. A, question 19.

122. *Infra* App. A, question 20.

es neither agreed nor disagreed, and 53% disagreed with the statement.[123] It is probably safe to assume that the 53% of the judges who disagreed with the statement did not know that they were disagreeing with a statement made by Justice Lewis Powell in *Robbins v. California.*[124]

These results were unexpected because of the mass confusion exhibited at the search-and-seizure seminar at the College of Advanced Judicial Studies (AJS) described earlier.[125] The three quarters of judges who answered that the law is clear and easy to apply either did not attend that seminar, or if they did attend, they simply forgot how utterly perplexed they were during the seminar. It might be easy to simply dismiss the mass judicial confusion on display at AJS as isolated or aberrational. But it is neither. Consider this critique:

> Confusion over Fourth Amendment law is not limited to police officers. Judges and lawyers also have difficulty interpreting and applying the law in this difficult area. As one commentator noted, 'The uncertainty is so great that even skilled criminal lawyers cannot predict with accuracy the application of exclusionary rules in a particular hearing.'[126] Indeed, the history of Fourth Amendment jurisprudence is replete with repeated disagreement among appellate justices over what is and what is not a proper search. The procedural history of a recent United States Supreme Court decision, *Arizona v. Evans*, is a good example of this phenomenon. In *Evans*, an Arizona trial court granted Evans'[s] motion to suppress evidence. The Court of Appeals reversed the decision and allowed the evidence to be admitted. The Arizona Supreme Court disagreed and excluded the evidence. Finally, the United States Supreme Court held that the evidence was admissible.

123. *Infra* App. A, question 20.

124. 453 U.S. 420, 430 (1981) (Powell, J. concurring) (recognizing that "the law of search and seizure with respect to automobiles is intolerably confusing"). *Infra* App. A, question 20.

125. *Infra* Part I.

126. MACKLIN FLEMING, OF CRIMES AND RIGHTS 156 (1978).

> Another interesting example of judicial uncertainty involved a recent search and seizure experiment conducted by New York Supreme Court Judge Harold Rothwax. Judge Rothwax provided to a gathering of appellate justices the fact patterns of two recently decided, but not yet widely circulated, United States Supreme Court Fourth Amendment cases and asked the judges to decide the suppression issue. Not surprisingly, the overwhelming majority of judges reached decisions contrary to the Supreme Court's holding in both cases.[127]

I suspect that if the judges had to submit to a test of their knowledge immediately prior to answering the survey question, the percentage of judges finding the law clear and easy to apply would drop precipitously. The judges who were interviewed in person expressed the same concerns. Said one, 'I think the law is confusing to law enforcement and to us. None of the interviewed judges thought the law of search and seizure was clear or easy to apply.

I recognize that a conflict exists between the survey results and the not uncommon belief that the law of search and seizure is confusing.[128] However, my central premise or hypothesis is that a per se rule affects judicial decision making. That is to say, because the remedy is mandated, judges may have some innate resistance to applying the rule where the remedy is disproportionate to the underlying wrong.

There is an apparent disconnect between the assertion that the *law of search and seizure* is confusing and the survey results saying the *rule* is clear. To be sure, numerous scholarly articles describe the uncertainty and lack of clarity in search-and-seizure law,[129] as well as Justice Powell's assertion that the law is 'intoler-

127. Gregory D. Totten et al. *The Exclusionary Rule: Fix It, But Fix It Right—A Critique of If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 26 PEPP. L. REV. 887, 901–02 (1999).

128. The conflict arises from the fact that, while none of the judges interviewed in person thought the law of search and seizure was clear or easy to apply, this finding conflicts with the findings of the survey, which showed a significant number of respondents stating the contrary position. *Infra* App. A, question 19.

129. *See* Totten et al. *supra* note 127; *see generally* Amar, *supra* note 11; Bradley, *supra* note 35, Caldwell et al. *supra* note 20.

ably confusing.'[130] It is difficult to reconcile the survey results where 75% said the rules are reasonably clear (survey question 19).[131] Part of the problem may be in survey question 19, which is admittedly not a model of clarity: it only asks for 'your attitude toward the *rules*.'[132] The question could have been clearer.

Similarly, the use of the strident qualifier 'intolerably' may have skewed the results in question 20, although only 53% of the judges disagreed with the statement.[133] Perhaps if judges were asked to agree or disagree with the more moderate statement, 'The law of search and seizure with respect to automobiles is often unclear, confusing or contradictory,' the percentage who agreed would almost certainly be higher. The lesson here is to avoid inflammatory or emotionally charged words. Such language may work in a court opinion, but not in a survey.

Fortunately, the interviews brought some clarity to this issue. Most of the judges I interviewed agreed that the *law of search and seizure* is often confusing and unclear, both for law enforcement and for judges.[134] However, no one thought that the exclusionary *rule* itself is unclear.[135] Most judges agree that the rule itself is clear and easy to apply—if the stop is unlawful, the evidence is automatically suppressed.[136] The interviewed judges noted that a discretionary rule would add another layer to a suppression hearing and actually make more judicial work (with a per se rule, judicial labor comes to an end as soon as the lawfulness of the search is determined).[137]

VII. ALTERNATIVE REMEDIES

Justice Potter Stewart expressed his belief that, in the real world, none of the alternative remedies were as effective as the exclusionary rule:

> In sum, the most 'powerful' remedies, criminal prosecutions for willful violation of the [F]ourth

130. *Robbins*, 453 U.S. at 430 (Powell, J. concurring) (recognizing that 'the law of search and seizure with respect to automobiles is intolerably confusing").
131. *Infra* App. A, question 19.
132. *Infra* App. A, question 19.
133. *Infra* App. A, question 20.
134. *Infra* App. A, questions 11, 19, and 20.
135. *Infra* App. A, question 19.
136. *Infra* App. A, questions 17, 18.
137. *Infra* App. A, questions 18, 19.

> [A]mendment and actions for injunctions against large-scale violations, are rarely brought and rarely succeed. Damage actions for [F]ourth [A]mendment violations serve the salutary objective of compensating all victims of [F]ourth [A]mendment violations to a degree reasonably related to the harm resulting from the infringement. But damage actions are also expensive, time-consuming, not readily available, and rarely successful. As a result, the deterrent effect of these actions can hardly be said to be great, since the prospect of a judgment for money damages is extremely remote.
>
> Taken together, the currently available alternatives to the exclusionary rule satisfactorily achieve some, but not all, of the necessary functions of a remedial measure. They punish and perhaps deter the grossest of violations, as well as governmental policies that legitimate these violations. They compensate some of the victims of the most egregious violations. But they do little, if anything, to reduce the likelihood of the vast majority of [F]ourth [A]mendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice. For those violations, a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the [F]ourth [A]mendment. *There is only one such remedy—the exclusion of illegally obtained evidence.*[138]

But does 'only one remedy' inevitably require a per se rule of exclusion? Would an exclusionary rule that allows for judicial discretion address Justice Stewart's concerns? Perhaps there is a reasonable compromise between the extremes of re-

138. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1388–89 (1983) (emphasis added). While endorsing an exclusionary rule, Justice Stewart's conclusions do not lead inexorably to a rigid, unthinking, per se rule of exclusion. In other words, his observations do not preclude a discretionary rule of exclusion.

taining a rigid, per se exclusionary rule and the total abolition of the rule.

Even the most ardent supporters of a per se rule of exclusion acknowledge the considerable flaws in the remedy[139] and yet they seem to oppose any reform of the rule.[140] Proponents of the per se rule do not refer to evidence-based studies showing that the rule works, but merely offer the tepid endorsement, 'It's the best we can do.'[141] In addition to the obvious flaws, substantial literature demonstrates that the rule does not work as intended, suggesting perhaps that we can do better.[142]

One extreme position is to keep a per se rule, notwithstanding the flaws and the lack of evidence regarding the efficacy of this remedy. The other extreme is to completely eliminate the exclusion of evidence and replace it with a tort cause of action. Judge Posner persuasively argued for a tort remedy over thirty years ago:

> I have argued that the overdeterrence problem that the exclusionary rule has created in search and seizure cases is solvable today because there is now a feasible tort alternative: a damage action against the misbehaving officer (or the government agency employing him) in which the court can nicely calibrate the damages to yield the optimal amount of deterrence.[143]

More recently, Professor Amar suggested that tort suits might remedy some of the flaws inherent in a per se rule of exclu-

---

139. *See, e.g.*, Carol S. Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 847 (1994) ("Professor Amar is quite right when he charges that the exclusionary rule is flawed as a system ").

140. *See, e.g.*, *id.* at 848 (contending that the exclusionary rule is the "best we can realistically do").

141. *Id.*

142. *See, e.g.*, Eugene R. Milhizer, *Debunking Five Great Myths about the Fourth Amendment Exclusionary Rule*, 211 MIL. L. REV. 211, 227 (2012) ("It is astounding, therefore, that even after decades since its inception, the deterrence arguments in support of the exclusionary rule have never been empirically verified."); *see also* Illinois v. Gates, 462 U.S. 213, 259–60 (1983) ("The deterrent effect of the exclusionary rule has never been established by empirical evidence, despite repeated attempts."); Stone v. Powell, 428 U.S. 465, 492 (1976) (noting a lack of empirical evidence that the exclusionary rule deters police misconduct).

143. Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 640 (1982).

sion.[144] However, the tort remedy has not gained much traction in the last thirty years. Many commentators have dismissed a tort remedy as inadequate and unworkable. An example from Judge Calabresi:

> It is true that, nominally, the tort regime does include the right incentives for the detained criminal to make known police misconduct. The criminal receives the tort verdict, and the misbehaving cop can thereafter be punished.
>
> There are, however, two major problems with using tort law in this manner. The bigger problem is that it does not take into account how juries actually work in tort cases. The reason that tort suits—that great American pastime—work the way they do in most civil cases is because juries identify with the plaintiff. They see the plaintiff as someone like themselves and consequently decide in favor of the plaintiff.
>
> Jurors are considerably more reluctant to identify with a criminal defendant who brings a tort action against the police for violation of his rights. In these cases, the plaintiff is a criminal and the jurors do not see themselves in that way. Of course, the mechanism works a little bit better when the illegal search was of innocent people. Even there, however, the jurors tend not to identify with the people searched. All to[o] often, jurors think those people are the sort likely to be criminals even if they have not committed a crime in the case at hand. Hence, they view the plaintiffs as different from themselves. The result is that plaintiffs bringing tort actions against the police often fail to get jury verdicts.[145]

Additionally, Judge Posner warns against having both an exclusionary rule and a tort remedy:

144. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 31–45 (1997).

145. Calabresi, *supra* note 50, at 114–15.

> Commentators ignore the distinction between simple and optimum deterrence in another way. I have never read a discussion of the Fourth Amendment in which the author expressed concern that a combination of the exclusionary rule and an effective tort remedy might produce overdeterrence. But it would. Suppose, as is indeed the case under existing law, that a criminal could both bar the use of unconstitutionally obtained evidence against him and obtain damages for the invasion of his lawful interests by the search. He would clearly be overcompensated. This does not trouble advocates of the exclusionary rule, and this can only be because they do not understand that there can be such a thing as too much deterrence of violations of constitutional rights.[146]

Ronald J. Rychlak suggested that Fourth Amendment violations be treated like direct criminal contempt of court.[147] Under such a regime, 'if a judge determines that there has been a serious Fourth Amendment violation, the offending officer could be criminally punished. '[148] However, Professor Rychlak limits this remedy to 'serious' violations.[149] Those are probably the easy cases, for example, the warrantless search of a home. Making a traffic stop for an inoperable taillight would not rise to the level of criminal contempt. To be sure, a contempt remedy would necessarily require the judge to exercise discretion. The contempt remedy seems both cumbersome and limited. The remedy is imposed only for serious violations and then only after the evidence is introduced in a jury trial. Professor Rychlak explains:

> In the case where police officers have seriously violated constitutional rights and evidence obtained from their illegal search or seizure is introduced into evidence, direct criminal contempt

146. Posner, *supra* note 18, at 57.

147. Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.–KENT L. REV. 241, 254 (2010).

148. *Id.* at 241.

149. *Id.* at 253.

> of court is a reasonable sanction. In such a case, the police action has hindered trial and the cause of justice. Officers would or should be on notice about these risks, and the court would have had the opportunity to explore the issues of relevance during the criminal trial at which the evidence was offered.[150]

Under current law, the rule is most commonly enforced in an all-or-nothing fashion.[151] If the evidence was obtained unlawfully, it is typically suppressed, regardless of the nature of the violation, seriousness of the crime, or uncertainty of the law.[152] Many of the judges interviewed believed that relatively minor violations should not automatically lead to total exclusion without regard to the importance of the evidence or the public interest in the outcome of the case.[153]

This may be a reasonable compromise between the extreme positions of retaining the per se rule without change and eliminating the rule entirely. A balancing test—a discretionary rule—might be a reasonable substitute for the current all-or-nothing rule. Under such a test, if a judge finds that an illegal search and seizure occurred, he or she could consider a multitude of factors in determining the appropriateness of suppression.

In determining whether exclusion of evidence is warranted, the judge could consider the magnitude of the illegality. A warrantless search of a private home at night is a wrong of far greater magnitude than a traffic stop on a public highway.

The court could consider the good faith of the officers.[154] An officer's honest, but erroneous, belief in the legality of his con-

---

150. *Id.* at 252 (citations omitted).

151. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV 1885, 1891 (2014) ("Today, the voluminous literature on Fourth Amendment remedies tends to view the exclusionary rule as an all-or-nothing proposition."); Totten et al., *supra* note 127, at 914 ("Under current law, the rule is most commonly enforced in an all or nothing fashion.").

152. *See, e.g.*, LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 185 (2006) (explaining that unlawfully obtained evidence must be excluded regardless of its relevance and importance to ascertaining the truth in a case).

153. *See infra* App. A, questions 16, 18; *see also* David H. Kaye, *Unraveling the Exclusionary Rule: From* Leon *to* Herring *to* Robinson—*And Back?*, 58 UCLA L. REV. DISC. 207, 213 (2011) ("Some judges and commentators have little sympathy for the exclusionary rule and would prefer to enable good-faith violations of the Constitution without incurring its costs.").

154. *See Leon*, 468 U.S. at 922 (drawing a link between an officer's good faith and the reasonableness of the search).

duct would suggest that the harsh remedy of exclusion is not warranted because, quite simply, there is no police misconduct to deter.

The court could consider the importance and probative value of the evidence and the degree to which the admissibility of the evidence is likely to affect the integrity and accuracy of the fact-finding process.

The court could consider the seriousness of charged offenses. Evidence that is critical in cases involving serious injury or death would militate against the exclusion of evidence. One of the interviewed judges even suggested a 'homicide exception' to the per se rule of exclusion, allowing discretion in homicide cases.

Another solution might involve a two-tiered rule of exclusion. The judge would use a property- or trespass-based approach to searches of dwellings, structures, hotel rooms, and offices.[155] Those cases would require the court to utilize a per se rule of exclusion. For a property-based trespass, officers must obtain a search warrant unless the trespass fits within narrowly delineated exceptions. However, a discretionary rule of exclusion would be applied to searches of motor vehicles and public encounters, where there is a lesser expectation of privacy.

At the time the Fourth Amendment was adopted, and well into the twentieth century, searches were defined as tortious trespasses upon private-property interests.[156] A hybrid or two-tiered system could be used based upon traditional trespass property interests.

The first tier would provide for a per se rule of exclusion for property-based trespass. A warrantless search of a person's home or business would be governed by a per se rule of exclusion. A traffic stop for an inoperable rear taillight, however, would not be subject to a per se rule.[157]

The second tier would cover warrantless automobile searches, traffic stops, and *Terry* stops when the officer acted in good faith.

---

155. *See Jones*, 132 S. Ct. at 949–50 (describing the historical ties between the Fourth Amendment and the common-law trespass, grounded on a property-based foundation).

156. *See id.* at 949; *see also* Olmstead v. United States, 277 U.S. 438, 466 (1928) (finding that wiretapping, although prohibited by state statute, did not constitute a search because there was no physical trespass).

157. *See Perez-Garcia*, 983 So. 2d at 579 (granting review of a case in which the police stopped a motorist for a broken taillight and analogized it to *Hilton v. State*, 961 So. 2d 284, 300 (Fla. 2007), where the court ruled that a broken windshield did not create a legal basis for a traffic stop).

Those cases would be covered by a discretionary rule. Exclusion would still be an available remedy, especially for 'deliberate, reckless, or grossly negligent conduct."[158] However, the judge would have discretion to fashion a remedy short of suppression for less serious transgressions.

A discretionary rule might provide for a liquidated-damages penalty for Fourth Amendment violations (for example, a statutorily created fine of $500 to $2500 for each violation, to be paid by the police agency—creating a financial incentive to train officers on lawful searches). Judge Posner's concern that having both an exclusionary rule and a tort remedy would lead to overdeterrence would be eliminated. The judge would have discretion to impose one sanction, but not both. The exclusion of evidence would be reserved for the most serious violations, while minor transgressions would result in the imposition of a fine imposed by the trial court against the officer or the agency. It would not require the filing of a separate tort action.

VIII. CONCLUSION

[A] basic premise of all empirical research—and indeed of every serious theory of inference—is that all conclusions are uncertain to a degree. After all, the facts we know are related to the facts we do not know but would like to know only by assumptions that we can never fully verify. '[159] Notwithstanding the foregoing, the survey and interviews tend to show that the per se rule of exclusion does influence judicial decision making. Several judges candidly admitted that the fact that evidence, and therefore the truth, would be suppressed did affect the way they viewed the evidence at a suppression hearing.[160]

Although there is uncertainty in this study, it can be said that a per se rule of exclusion does have a tendency to affect judicial decision making in a significant portion of cases. The survey and the interviews confirm that premise. Surprisingly, only 56% of the judges said that the lack of discretion in a per se rule would never affect their view of the evidence in a suppression hearing.

158. *Herring*, 555 U.S. at 144 ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. ').

159. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 50 (2002).

160. *Infra* App. A, question 15.

Not quite half the judges said that it might (37%) or that it would almost certainly (8%) influence their view of the evidence.[161] The interviews tended to verify this premise, with many judges candidly acknowledging that the rule affects how they view the evidence in a suppression hearing.

Again, the central focus of this thesis is the exclusionary rule's effect on judicial decision making. Ultimately, I do not argue for a change in the rule (from per se to discretionary) because the *law of search and seizure* is unclear, but because the *rule* results in a rigid, unthinking application of the remedy of exclusion. Replacing the per se rule with a discretionary rule patterned after the Canadian rule seems to be the most widely accepted compromise.[162] This is a rule that has been used successfully in other common law countries.[163] A further compromise, one that has not been proposed before (to my knowledge) would be a hybrid or two-tiered exclusionary rule. The per se rule would be reserved for the most serious violations—property-based trespasses involving the warrantless search of a dwelling. A discretionary rule would be applied in warrantless automobile searches and *Terry* stops.

Perhaps we will not get better decisions with these proposed reforms, but the results may be more predictable and the decision-making process more transparent. Many judges said that a per se rule does affect their view of the evidence—which means they may actually be exercising discretion, covertly or subconsciously. In addition to being a more transparent process, a discretionary rule would enhance the truth-finding function of the court and foster respect and confidence in the criminal-justice system.

Either a pure discretionary rule, like the Canadian rule, or a two-tiered rule would seem to be an improvement over the current per se rule. Although the Supreme Court said, 'Suppression of evidence has always been our last resort, not our first impulse, '[164] with a per se rule, suppression is the first and only im-

161. *Infra* App. A, question 15.

162. *See* Bradley, *supra* note 70, at 382–84; James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L & COMP. L. REV. 77, 140 (1999).

163. *See* Bradley, *supra* note 70, at 392, 395 (predicting that a Canadian-style, discretionary exclusionary rule is likely to be developed and observing that the South African exclusionary rule contains language adopted from the Canadian Constitution).

164. *Hudson*, 547 U.S. at 591.

pulse. We can do better—or at least we should try.

APPENDIX A

Last Modified: 01/07/2014

SURVEY OF JUDGES ON JUDICIAL DECISION MAKING.

1. **INTRODUCTION: Thank you for taking the time to participate in this survey. Completion of the survey may take between 10 and 20 minutes, but could take longer depending on your responses. Your participation is entirely voluntary and you may quit at any time. Your answers will be entirely confidential.**
2. **PURPOSE OF STUDY: This survey is part of a study of the "Exclusionary Rule." In general terms, that rule requires the exclusion of evidence at a criminal hearing or trial if it was obtained in violation of a criminal defendant's constitutional rights. This survey seeks information about the effect the exclusionary rule has on you in ruling on motions to suppress and the ease or difficulty with which you are able to apply search-and-seizure rules to police conduct.**
3. **STATEMENT OF CONFIDENTIALITY: For this survey to yield representative results, it is important that each person contacted complete and return this questionnaire. But your response is entirely voluntary and your failure to provide some or all of the requested information will in no way adversely affect you.**
4. **ALL INFORMATION YOU PROVIDE IS CONFIDENTIAL. It will be used for statistical purposes and will be released only in the form of statistical summaries that will preclude the identification of any survey participant. We thank you for your assistance in helping with this project. As you see from the questionnaire, there is no way to attribute a particular questionnaire to any one judge, and no effort will be made to do so.**
5. **ADDITIONAL INFORMATION: This survey is part of a study for completion of a master's thesis in the Judicial Studies Program at Duke Law School. If you have any questions or comments about this survey, or would like additional information about the study, you may contact Robert Belanger at the St. Lucie County Courthouse, 218 S. 2nd Street, Fort Pierce, Florida 34950, (772) 462-2545.**

1. Please state your age

#	Answer	Response	%
1	Under 40	4	2%
2	40-55	74	36%
3	over 55	130	63%
	Total	208	100%

2. Please state your sex.

#	Answer	Response	%
1	Male	151	73%
2	Female	55	27%
	Total	206	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.27
Variance	0.20
Standard Deviation	0.44
Total Responses	206

3. In which court are you sitting as a judge?

#	Answer	Response	%
1	County Court (trial level)	57	28%
2	Circuit Court (trial level)	136	66%
3	District Court (appellate level)	13	6%
	Total	206	100%

4. Have you ever worked as a prosecuting attorney?

#	Answer	Response	%
1	Yes	109	53%
2	No	97	47%
	Total	206	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.47
Variance	0.25
Standard Deviation	0.50
Total Responses	206

5. Have you ever worked as a criminal defense attorney?

#	Answer	Response	%
1	Yes	120	58%
2	No	87	42%
	Total	207	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.42
Variance	0.24
Standard Deviation	0.49
Total Responses	207

6. Have you attended any courses, seminars, or continuing judicial training dealing specifically with the Fourth Amendment and search-and-seizure issues since becoming a judge?

#	Answer	Response	%
1	Yes	183	89%
2	No	23	11%
	Total	206	100%

7. How long have you been a judge?

#	Answer	Response	%
1	Less than one year	18	9%
2	1 to 5 years	40	19%
3	6 to 10 years	46	22%
4	11 to 15 years	37	18%
5	16 or more years	66	32%
	Total	207	100%

8. If you are a Circuit Judge, describe your current assignment.

#	Answer	Response	%
1	Criminal/Felony	56	41%
2	Civil	38	28%
3	Family/Domestic Violence	30	22%
4	Juvenile /Dependency	13	9%
	Total	137	100%

9. If you are a Circuit Judge, have you ever handled criminal cases?

#	Answer	Response	%
1	Yes	126	91%
2	No	12	9%
	Total	138	100%

Statistic	Value
Min Value	1
Max Value	2
Mean	1.09
Variance	0.08
Standard Deviation	0.28
Total Responses	138

10. Approximately how many hours of search-and-seizure training or education have you received in your legal career (both as an attorney and since becoming a judge)?

#	Answer	Response	%
1	0 to 3 hours	18	9%
2	4 to 6 hours	21	10%
3	7 to 10 hours	12	6%
4	Over 10 hours	153	75%
	Total	204	100%

11. In general, how would you characterize your knowledge about search and seizure and its applicability to your work as a judge?

#	Answer	Response	%
1	Excellent	59	29%
2	Very Good	70	34%
3	Good	46	23%
4	Fair	22	11%
5	Poor	7	3%
	Total	204	100%

12. Approximately how many times have you had to rule on a motion to suppress physical evidence (not including motions to suppress confessions or admissions)?

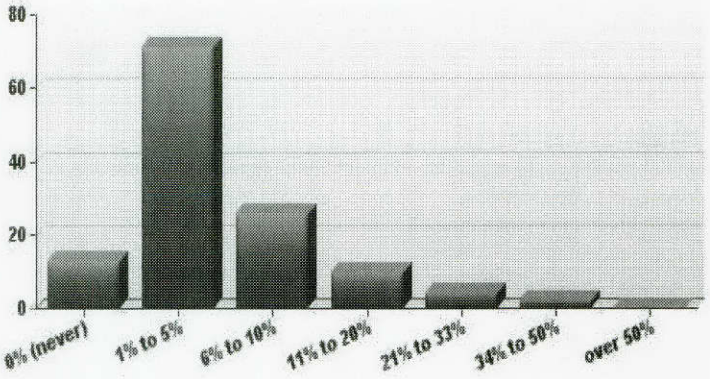
#	Answer	Response	%
1	1 to 5	36	18%
2	6 to 15	35	18%
3	16 to 25	28	14%
4	More than 25	98	50%
	Total	197	100%

13. Do you know of anyone in law enforcement who has misrepresented or failed to fully disclose facts while testifying in your court during a suppression hearing?

#	Answer	Response	%
1	Yes	113	57%
2	No	85	43%
	Total	198	100%

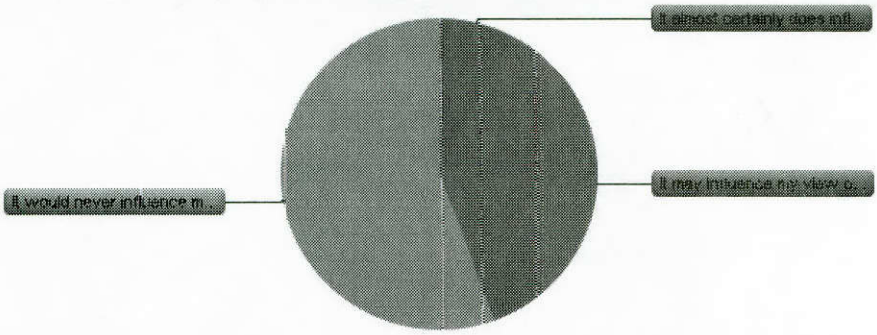
Statistic	Value
Min Value	1
Max Value	2
Mean	1.43
Variance	0.25
Standard Deviation	0.50
Total Responses	198

14. If you answered yes, indicate approximately the percentage of times such misrepresentation occurred:



#	Answer	Response	%
1	0% (never)	13	10%
2	1% to 5%	71	56%
3	6% to 10%	26	21%
4	11% to 20%	10	8%
5	21% to 33%	4	3%
6	34% to 50%	2	2%
7	Over 50%	0	0%
	Total	126	100%

15. Do you believe that the lack of discretion in excluding evidence has a tendency to influence your view of the evidence in a suppression hearing?



#	Answer		Response	%
1	It almost certainly does influence my view of the evidence.		11	8%
2	It may influence my view of the evidence		53	37%
3	It would never influence my view of the evidence		80	56%
	Total		144	100%

Statistic	Value
Min Value	1
Max Value	3
Mean	2.48
Variance	0.41
Standard Deviation	0.64
Total Responses	144

16. Suppression of evidence under a per se rule of exclusion often is too harsh a remedy.

#	Answer	Response	%
1	Strongly Disagree	16	8%
2	Disagree	47	23%
3	Neither Agree nor Disagree	67	33%
4	Agree	54	27%
5	Strongly Agree	17	8%
	Total	201	100%

17. The primary purpose of excluding evidence that is obtained from an improper search and seizure is:

#	Answer	Response	%
1	To protect privacy rights	56	27%
2	To deter law enforcement officers from violating the rights of suspects	146	72%
3	To compensate suspects for the rights violations they suffered	1	0%
4	Uncertain of purpose	1	0%
	Total	204	100%

18. Indicate your agreement or disagreement with the following statement: The per se rule of exclusion should be replaced with a discretionary rule, which would allow a judge to consider the totality of the circumstances, including the seriousness of the offense; the importance of evidence; the existence of other evidence; and the type of impropriety involved.

#	Answer		Response	%
1	Strongly Disagree		29	14%
2	Disagree		60	30%
3	Neither Agree nor Disagree		39	19%
4	Agree		58	29%
5	Strongly Agree		17	8%
	Total		203	100%

19. Which, if any, of the following statements most accurately reflects your attitude toward the rules governing search and seizure:

#	Answer		Response	%
1	The law is too uncertain to be easily applied in court.		27	14%
2	I would prefer a bright-line rule that always requires a search warrant.		10	5%
3	I would prefer a bright-line rule eliminating the need for a search warrant so long as probable cause exists		11	6%
4	The law is reasonably clear and is not difficult to apply in court		147	75%
	Total		195	100%

20. Indicate your agreement or disagreement with the following statement: The law of search and seizure with respect to automobiles is intolerably confusing.

#	Answer		Response	%
1	Strongly Disagree		11	5%
2	Disagree		96	48%
3	Neither Agree nor Disagree		52	26%
4	Agree		35	17%
5	Strongly Agree		8	4%
	Total		202	100%

NORMATIVE HISTORY AND CONGRESS'S ENFORCEMENT POWER UNDER THE RECONSTRUCTION AMENDMENTS

EDWARD CANTU*

* Associate Professor, University of Missouri–Kansas City (UMKC) School of Law. The author would like to thank Michigan law professor Evan Caminker, Yale law professors Jack Balkin and Akhil Amar, Texas law professor Joseph Fishkin, as well as his UMKC colleagues, for their helpful comments on drafts.

ABSTRACT

As an originalist matter, what degree of logistical power did the Framers of the Reconstruction Amendments want Congress to have in actualizing the substantive guarantees of those amendments? In the 1990s the Court, seeking to revive its federalism vigilance, answered: "relatively limited power." Scholars pounced, and it quickly became 'settled' in the scholarly literature that the Court had misread the historical record regarding the Framers' intent. Despite the scholarly reactions, the Roberts Court has carried the Rehnquist Court's torch on this interpretative matter. As such, strident accusations of conservative judicial activism toward the Roberts Court have paralleled the charges leveled at the Rehnquist Court since the 1990s.

The scholars who claimed to settle the underlying issue via an originalist analysis of historical evidence are very respected scholars, and rightly so. However, this article constructively complicates things by highlighting that, when one takes a critical look at the very evidence these scholars invoked to 'settle' the matter, the certitude of said scholars on the subject has been grossly unwarranted. That certitude has nevertheless spawned a vicious cycle of citation to a few scholarly works that, in turn, do not do justice to the complexity of the evidence. This, in turn, has bred within the scholarly climate an unwarranted and often shrill intolerance for judicial invocations of state sovereignty in cases implicating the Reconstruction Amendments. The goal here is to, by highlighting the relevant complexities, tame this shrillness and call for greater intellectual empathy toward (even if not agreement with) judicial sensitivity to federalism concerns.

INTRODUCTION

'Cherish those who seek the truth but beware of those who find it. –Voltaire

The past twenty-odd years have witnessed two trends, each like a train heading toward the other at full speed. First, the Court has infused into its federalism jurisprudence at least a marginal sense of vigilance in policing congressional overreach. One primary example is decisions of the past twenty years restricting Congress's power under the Reconstruction Amendments.[1] The second trend, one seemingly unrelated to the first, is that legal scholars who might have traditionally scoffed at the alleged need to respect the original meaning of constitutional text, or the original intent of its authors, have embraced originalism.[2] This trend is what this author has previously termed 'the turn toward fidelity.'[3]

The second trend quite predictably has given rise to a tension in the hearts and minds of those who, because of their political, moral, or intellectual priors have problems with the first trend. What has resulted is what might be politely termed 'normative history' the employment of textualist and original-intent methodologies to justify conclusions normatively desirable for those who favor greater federal power in the individual rights context, and thus a decreased focus on federalism.

This tension is most recently, and most illustratively, on display in scholarly reactions to the Court's recent decision in *Shelby*

1. *See, e.g.*, Shelby County v. Holder, 133 S. Ct. 2612 (2013) (striking down portions of the Voting Rights Act); United States v. Morrison, 529 U.S. 598 (2000) (holding that the Enforcement Clause of the Fourteenth Amendment did not authorize Congress to enact certain provisions of the Violence Against Women Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (invalidating the Patent and Plant Variety Protection Remedy Clarification Act's abrogation of state sovereign immunity); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding the Religious Freedom Restoration Act unconstitutional as applied to the states).

2. Barry Friedman, *Reconstructing Reconstruction: Some Problems for Originalists (And Everyone Else, Too)*, 11 U. PA. J. CONST. L. 1201, 1210 (2009) (noting the "originalist stirrings on the ideological left" even though traditionally "the enterprise of original understanding has been one for conservatives"); *see also, e.g.*, Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1805 (2010) ("[The Reconstruction Amendments] were designed to give Congress broad powers to protect civil rights and civil liberties "); A. Christopher Bryant, *The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments*, 47 HOUS. L. REV. 579, 601 (2010) ("[Reconstruction] history indisputably reaffirms what the text seems to say—that the principal responsibility for carrying these Amendments' promises to fruition was committed to Congress. ").

3. Edward Cantu, *Posner's Pragmatism and the Turn Toward Fidelity*, 16 LEWIS & CLARK L. REV. 69 (2012).

County v. Holder,[4] wherein the Court struck down a key provision of the Voting Rights Act (VRA).[5] While the case will be detailed later, most important presently is that the Court based its decision on what it termed the 'fundamental principle of equal sovereignty"[6]— that is, the idea that equal treatment of the states is at some level constitutionally required.

Academics were in almost unanimous agreement that the decision was incorrect.[7] But *how* wrong was the Court? Was the Court's reliance on the 'equal sovereignty principle' plausible but unpersuasive, or was it utterly laughable? Even some *conservative* commentators could hardly stop laughing long enough to answer. Justice Roberts's opinion for the Court in *Shelby County* was greeted by charges from even conservative jurists that the majority simply 'made up' the doctrine of 'equal sovereignty' on which the decision turned.[8]

More politically left commentators charged that this prudential conjuring was part of a larger war waged by the conservative justices on progressive legislation and goals.[9] These commentators appear to share the premise that the kind of pro-federalism vigilance on display in decisions like *Shelby County* cannot be the product of anything other than the justices' pure policy animus toward the respective progressive legislation. Why so cynical? This response—which represents a rough consensus among le-

4. 133 S. Ct. 2612 (2013).

5. *Id.* at 2631 (holding § 4(b) of the VRA unconstitutional).

6. *Id.* at 2622 (quoting Nw. Austin Mun. Util. Dist. One v. Holder, 557 U.S. 193, 203 (2009)).

7. *See, e.g.*, Jack M. Balkin, *The Last Days of Disco: Why the American Political System is Dysfunctional*, 94 B.U. L. REV. 1159, 1165 (describing the *Shelby County* decision as one of the "features of our current system that make it dysfunctional"); Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 714 (2014) (characterizing *Shelby County* as not only wrongly decided but also "nefarious").

8. *See, e.g.*, Nina Totenberg, *Whose Term Was It? A Look Back at The Supreme Court*, NPR (July 5, 2013, 3:55 AM EST), http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court [https://perma.cc/489F-KNLN] (quoting Michael McConnell, a former Tenth Circuit judge appointed by George W. Bush, as declaring that the principle of equal sovereignty was "made up" rather than being constitutionally mandated).

9. *See, e.g.*, Richard L. Hasen, *The Chief Justice's Long Game*, N.Y. TIMES, June 25, 2013, http://www.nytimes.com/2013/06/26/opinion/the-chief-justices-long-game.html?_r=0 [https://perma.cc/H95A-JJ6K] (describing the *Shelby County* decision as part of Roberts's "long game" of "tee[ing] up major constitutional issues for dramatic reversal"); Sanford Levinson, *Tendentious, Mendacious or Audacious? John Roberts Rewrites the 10th Amendment*, BALKINIZATION (June 30, 2013, 3:19 PM), http://balkin.blogspot.com/2013/06/tendentious-mendacious-or-audacious.html [https://perma.cc/KK7P-A3UJ] (charging that the Court struck down portions of the VRA "because [Chief Justice Roberts], as a legislator, would not have joined Congress's overwhelming 2006 vote to renew the VRA").

gal academics[10]—is the result of a shaky premise about the degree of power the Reconstruction Framers wanted Congress to have in 'enforcing' the Reconstruction Amendments.

The Court, in its 1997 decision in *City of Boerne v. Flores*,[11] concluded controversially that Congress's power in this context was narrower than when it exercises an Article I enumerated power coupled with the Necessary and Proper Clause.[12] Most of the academy rejected this view, beginning with a few articles by prominent scholars that purported to demonstrate that the Court's conclusion was clearly inconsistent with the Framers' original intent.[13] This quickly became a seemingly well-settled 'fact' the enforcement provisions of the Reconstruction Amendments were intended to grant Congress power coextensive with its power under the Necessary and Proper Clause with respect to its Article I powers.[14] Given how obviously true this is, how can the Court's contrary conclusion be anything but a springboard for conservative judicial activism?

This premise lives on through a vicious cycle of citation; it was initially offered without sufficient substantiation; it then echoed with a righteous certainty down the tin walls of the academic wishing well for years following. The reactions to *Shelby County* were the most recent echoes.

Shelby County and its specific fallout are not the central focus here. To be sure, this article will devote substantial space to challenging the notion that the equal sovereignty principle cannot in

10. *See, e.g.*, Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Voting Rights Law and Policy in Transition*, 127 HARV. L. REV. 243, 247 (2014) ("The Court's decision is best understood not in institutional terms, but in ideological terms.").

11. 521 U.S. 507 (1997).

12. *Id.* at 519.

13. *See* Balkin, *supra* note 2, at 1815 (arguing that '*Boerne* is really a case about federalism' and that, as such, "it is contrary to the basic purpose of the Fourteenth Amendment: to ensure that Congress has the same power to enforce civil rights and civil liberties against the states as it does against the federal government"); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 188 (1997) (arguing that the Reconstruction Framers' use of the *McCulloch*-inspired term "appropriate" signaled their "intention to allow Congress considerable [enforcement] discretion").

14. *See, e.g.*, Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 825–26 (1999) (arguing that "the [Reconstruction] framers saw the Enforcement Clause phrase 'appropriate legislation' as *equivalent* to the Article I, Section 8 phrase 'proper laws' "); Evan H. Caminker, *"Appropriate" Means–Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1159 (2001) (asserting that "an originalist inquiry firmly supports the conclusion that Section 5 was designed and understood to impose a means–ends tailoring test that mimicked the test applied to Article I executory statutes' and arguing accordingly that 'Section 5's 'appropriate' standard is best understood as codifying Chief Justice Marshall's especially deferential gloss on the former language in *McCulloch*").

good faith be reconciled with Congress's power to 'enforce' through 'appropriate' legislation the substantive guarantees of the Thirteenth, Fourteenth, and Fifteenth Amendments. But more fundamentally, this article challenges the tentatively prevailing premise on which the above criticisms of the decision are based.

Importantly, this article is not meant to definitively resolve the debate regarding either the merits of *Shelby County* specifically, or Congress's Reconstruction Amendment power more generally. The latter in particular is far too ambitious a task. As such, there will be no comprehensive treatment of the works of historians, analysis of nineteenth-century personal correspondence, and the like. Rather, the discussion will parallel, quite deliberately, the methodology employed in the confronted scholarly works, in order to demonstrate that methodology's inability to definitively resolve the question at hand.

So the point here is to muddy the analytical waters, not for the sake of advancing a point of view on the merits but rather for the sake of giving the complexity of the issue its due. The goal is to disrupt the trend of scholars circuitously citing the same problematic works as having resolved once and for all what is in fact an interminably vexing question.

The article proceeds as follows. Part I briefly contextualizes the issue via a discussion of the relevant doctrinal background, the controversy that doctrine has generated, and the *Shelby County* decision as a vignette of that controversy.[15] Part II is devoted to tackling the very interpretative question that others have repeatedly claimed is already settled.[16] It will discuss relevant original-intent evidence that is usually not given its due, and will attempt to demonstrate how leading scholars espousing the 'settled' position have engaged in analytical overreach via incomplete originalism. Part III will chew over some of the dynamics that perhaps have led to the currently underdeveloped and problematic understanding of the relevant original intent, and it will propose a reframing of recent federalism jurisprudence that is more measured, considered, and intellectually empathic, and less shrill, morally strident, and epistemically cynical than scholarly treatment of this issue often is.[17]

15. *Infra* Part I.
16. *Infra* Part II.
17. *Infra* Part III. These adjectives are not meant to apply to all scholars who, after

I. THE SEEDS OF THE CONTROVERSY AND ITS PRESENTLY SOUR FRUIT

A. Situational and Doctrinal Background

The last several decades have witnessed a reinvigoration of states' rights in constitutional law. First, the Burger and Rehnquist Courts sought to, and somewhat did, breathe new life into federalism by limiting Congress's power under the Commerce Clause.[18] Recognizing that the Court was no longer going to turn a blind eye to Congress's most aggressive uses of its power to regulate interstate commerce, Congress took to pushing the limits of its enforcement power under the Reconstruction Amendments to keep its legislation alive.[19] As such, the second major doctrinal context for the Court's reinvigoration of federalism has been Congress's power to enforce the Reconstruction Amendments. A brief overview of these amendments and related jurisprudence is warranted.

The Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—all have enforcement provisions. That is, they not only guarantee the substantive rights described in them respectively, but also expressly empower Congress (and thus not just the courts) to proactively protect those rights via legislation. For example, and most relevantly, after establishing the rights of due process and equal protection,

---

consideration of the available evidence, endorse the view of broad congressional power. For example, while Evan Caminker's scholarship is confronted in this article, there is little doubt that he, and a number of other scholars who agree with him, have simply reached different conclusions after a dispassionate and intellectually honest analysis of the evidence.

18. Most notably, see *Morrison*, 529 U.S. at 617–18 (holding that statute regulating 'gender based violence' exceeded Congress's power under the Commerce Clause); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (holding that Congress exceeded its power under the Commerce Clause in enacting statute banning gun possession near schools).

19. Writing in 2000, after the Court handed down its controversial Commerce Clause decisions, but before it handed down many of its federalism-vigilant Reconstruction Amendment decisions, Richard Levy noted that because "most of the new federalism limits are specific to the commerce power . . . the power to enforce the Reconstruction Amendments and the spending power are especially attractive and potentially expansive alternative bases of authority for federal action . . . " Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629, 1631 (2000). The spending power is indeed equally attractive, hence the spate of Spending Clause decisions in recent years. *See also* Caminker, *supra* note 14, at 1129 (noting shortly after *Boerne* that '[w]hile it remains unclear just how significant a reduction in the scope of Congress'[s] Commerce Clause power these recent precedents portend, it surely places greater pressure on Section 5 as a potential alternative source of congressional power").

Section 5 of the Fourteenth Amendment reads, 'The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.'[20] The enforcement provisions in each of the Reconstruction Amendments are for all practical purposes identical. That is, they all employ the same operative terms 'enforce' and 'appropriate.'[21]

The language of these provisions has led to a vexing interpretative problem, vexing especially because the substantive rights protected by them collectively are broad, thus making Congress's power to regulate state conduct broad as well. This reality runs head-on into the fact that the Tenth Amendment and a mandate for federalism still formally exist. This difficulty arises especially with regard to the Fourteenth Amendment, because it is addressed to a broad and vague swath of state action: those that deny 'equal protection,' 'privileges and immunities,' and 'due process' (as opposed to addressing relatively defined and discrete matters such as 'slavery' and 'the right to vote,' which the Thirteenth and Fifteenth Amendments address respectively).[22]

Until the Court asserted itself in this context, Congress was quite generous in interpreting what substantive protections the Fourteenth Amendment promised, a generosity that the vagueness of phrases like 'equal protection' invited. Relatedly, Congress was also quite aggressive (for better or worse) in abrogating states' Eleventh Amendment immunity so that individuals could sue states in federal court for violations of those statutory (and allegedly constitutional) rights.[23]

For example, Congress enacted the Patent and Plant Variety Protection Remedy Clarification Act[24] (PPVPRA) to protect patent holders from state infringement of their patents. The Act provided for abrogation of state sovereign immunity so that patent holders could sue states in federal court for such violations.[25] Congress seemed to think it possessed the power to legis-

20. U.S. CONST. amend. XIV, § 5.

21. *See id.* amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation."); *Id.* amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

22. *Id.* amends. XIII, XV.

23. *See* U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.").

24. Pub. L. No. 102-560, 106 Stat. 4230 (1992) (codified at 7 U.S.C. §§ 2541(f), 2570 (2012); 35 U.S.C. §§ 271(h), 296 (2012)).

25. 35 U.S.C. §§ 271(h), 296.

late in protection of patent holders pursuant to its power to 'enforce' the Fourteenth Amendment's protection of property rights from state infringement. Though patents are clearly 'property interests' for purposes of the Due Process Clause,[26] Congress did not merely seek to remedy actual violations of patent rights; again, Congress abrogated the states' Eleventh Amendment immunity from suit by its own citizens in federal court without consideration of whether the remedies provided by the laws of the various states adequately protected patent holders' property interests. This thus presented a conflict between states' rights principles via the Eleventh Amendment[27] and individual rights under the Fourteenth.[28] What to do?

Prior to 1997 the Court responded with great deference toward Congress. For example, in *City of Rome v. United States*,[29] the Court, consistent with what it had declared in prior decisions, asserted that it should review congressional enforcement of the Reconstruction Amendments using the same level of deference as that triggered when Congress exercises its powers under the Necessary and Proper Clause in Article I.[30] Chief Justice John Marshall famously established this standard in *McCulloch v. Maryland*[31]: 'Let the end be legitimate, [and] let it be plainly adapted to' the exercise of a substantive enumerated power.[32] Importantly, this standard has grown even more deferential, hav-

26. *See Fla. Prepaid*, 527 U.S. at 642 (including patents "within the 'property' of which no person may be deprived by a State without due process of law").

27. Of course, there are good arguments that the Eleventh Amendment, neither on its own terms nor in light of original intent, protects states from suits by their own citizens. *See, e.g.*, Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 109–15 (1996) (Souter, J. dissenting) (considering "two plausible readings' of the Eleventh Amendment). But the Court has concluded otherwise, and that conclusion creates the conflict between federalism and individual rights described here. *See id.* at 54 (stating that the Eleventh Amendment stands for the presupposition that "each State is a sovereign entity in our federal system' and that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent" (internal quotations omitted)).

28. Indeed, Congress's primary use of Section 5 of the Fourteenth Amendment has been abrogation of state sovereign immunity in order to subject the states to substantive limitations. So much, if not most, of the doctrine relating to Section 5 powers in recent years relates to Congress's attempts at abrogation.

29. 446 U.S. 156 (1980).

30. *See id.* at 176–77 (citing Oregon v. Mitchell, 400 U.S. 112 (1970) (holding that 'Congress may prohibit practices that do not violate § 1 of the [Fifteenth] Amendment, so long as the prohibitions are 'appropriate, as that term is defined in *McCulloch v. Maryland*" and buttressing that holding with reference to '[o]ther decisions of this Court [recognizing] Congress'[s] broad power to enforce the Civil War Amendments"); South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 681 (1966)).

31. 17 U.S. 316 (1819).

32. *Id.* at 421.

ing become a basic rationality test that is virtually impossible not to satisfy:

> [I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.[33]

However, beginning with *City of Boerne v. Flores*, the Court began applying a more searching review standard—the 'congruence and proportionality' standard—which calls for greater Court vigilance in ensuring that Congress does not excessively burden the states by either (1) declaring the existence of substantive individual rights that the Reconstruction Amendments were not intended to recognize or (2) protecting established constitutional rights with remedies out of proportion to the threats to those rights.[34]

At issue in *Boerne* was the Religious Freedom Restoration Act (RFRA),[35] whereby Congress sought to prevent states from substantially burdening the exercise of religion with 'rule[s] of general applicability' (i.e. laws that were not passed with any intent or expectation that they would in any way burden someone's religious practice).[36] A Catholic church in Boerne, Texas sought to expand its historic building to accommodate a greater number of worshippers, but the municipality prohibited this pursuant to an ordinance designed to prevent the destruction or alteration of historical landmarks.[37] The Fifth Circuit found the city's conduct violated the RFRA because the effort to protect historic landmarks incidentally, but substantially, burdened the church.[38]

The Court reversed, ruling that the degree of protection Congress granted religious persons and institutions against state regulation—and thus the degree Congress interfered with state regulatory interests—exceeded Congress's power under Section

33. United States v. Comstock, 560 U.S. 126, 134 (2010) (quoting Sabri v. United States, 541 U.S. 600, 605 (2004)).
34. *Boerne*, 521 U.S. at 520.
35. 42 U.S.C. §§ 2000bb–2000bb-4 (2012).
36. *Id.* § 2000bb-1(a).
37. *Boerne*, 521 U.S. at 511–12.
38. Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 521 U.S. 507 (1997).

5 of the Fourteenth Amendment.[39] The Court explained that [t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.'[40]

> Congress does not enforce a constitutional right by changing what the right is While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a *congruence and proportionality* between the injury to be prevented or remedied and the means adopted to that end.[41]

The Court explained that the evil the RFRA was designed to combat paled in comparison to other evils the Framers had in mind when granting Congress an enforcement power in the Reconstruction Amendments:

> RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. It is difficult to maintain that [there exists] some widespread pattern of religious discrimination in this country. Congress'[s] concern was with the incidental burdens imposed. [42]

The Court thus concluded that RFRA was 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive

39. *Boerne*, 521 U.S. at 536.
40. *Id.* at 530.
41. *Id.* at 519–20 (emphasis added).
42. *Id.* at 530–31.

change in constitutional protections.'[43]

The upshot of *Boerne* is that it represents the Court's rejection of the deferential *McCulloch* review rubric in favor of a less forgiving congruence and proportionality test. Had the Court applied the *McCulloch* standard, especially as that standard has been calibrated by more recent decisions such as *Comstock*, there is little doubt it would have upheld RFRA: clearly religious exercise is a constitutional right, and thus protecting that right from substantial burdens, even when those burdens arise from generally applicable laws, is 'rationally related' to protecting religious freedom.

After *Boerne*, the Court in subsequent cases applied the new congruence and proportionality test—as opposed to the more deferential rationality *McCulloch* test—to strike down other laws that were similarly aggressive. For example, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[44] the Court invalidated the PPVPRA because 'Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.'[45]

Scholarly reactions to the Court's renewed vigilance in *Boerne* and its progeny were overwhelmingly negative. Well-respected scholars threw their weight behind arguments that, as an originalist matter, the Court got it wrong. Specifically, Jack Balkin, Akhil Amar, Michael McConnell, and Evan Caminker—collectively referred to herein as 'The Scholars'—have put forth the most oft-cited originalist arguments in support of Congress having relatively wide *McCulloch*-esque latitude to enforce the Reconstruction Amendments.[46]

---

43. *Id.* at 532.

44. 527 U.S. 627 (1999).

45. *Id.* at 640.

46. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION 361–63 (2005) (presenting an account of the framing of the Reconstruction Amendments and portraying the Reconstruction Framers as intent on expanding congressional authority); Amar, *supra* note 14, at 823 (arguing that the Reconstruction Framers had a broad view of Congress's enforcement power under Section 2 of the Thirteenth Amendment and, noting the similarity of the Thirteenth Amendment enforcement provision with that of the Fourteenth Amendment, condemning *Boerne* for its less expansive reading of the latter); Caminker, *supra* note 14, at 1159 (castigating *Boerne* for its "inexplicable failure to engage in a[n] originalist inquiry before articulating the 'congruence and proportionality' constraint on Section 5 means"); McConnell, *supra* note 13, at 180–81 (faulting *Boerne* for its insufficient and "distorted" reading of the legislative history of the Fourteenth Amendment enforcement provision and arguing that "nothing in that history suggests that Congress was expected to be limited to enforcing judicially decreed conceptions of rights").

Naturally, other scholars sympathetic to the invalidated laws and similar congressional efforts began regularly citing to The Scholars for the originalist basis for deference without critical reexamination of the initial scholarly assertions.[47] Thus, work by The Scholars has led to at least a tentative consensus[48] among academics that the matter is settled, and thus to a resulting circuitous citation pattern for the same idea.[49] While there are exceptions to this consensus, they help prove the rule.[50]

---

47. This is an observation more than a criticism. A scholar cannot feasibly reevaluate every premise of an argument anew, but a problematic premise is still a problem. For examples of this seemingly unquestioning citation to Balkin's work, see Tiffany C. Graham, *Rethinking Section Five: Deference, Direct Regulation, and Restoring Congressional Authority to Enforce the Fourteenth Amendment*, 65 RUTGERS L. REV. 667, 670 (2013) (relying on Balkin's work in arguing that "the enforcement power laid out in Section 5 is an enumerated power much like those laid out in Article I, Section 8 [L]egislation passed under Section 5 was intended to be measured along the same generous lines as the Article I powers—namely, pursuant to the *McCulloch v. Maryland* standard").

48. *See* Jennifer Mason McAward, *McCulloch and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769, 1808 (2012) ("Congress's power to enforce the Thirteenth Amendment is commonly assumed to track its power to pass executory legislation, as described in *McCulloch v. Maryland*.").

49. *See, e.g.*, J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 423 (2003) (asserting that the Framers of the Fourteenth Amendment incorporated the standard from *McCulloch* into Section 5); Bryant, *supra* note 2, at 597 (quoting Caminker in asserting that 'Section 5 provides Congress with the same capacious discretion to select among various means to achieving legitimate ends as does Article I as construed in *McCulloch v. Maryland*"); Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 117–18 (1999) (citing Amar for the argument that the Fourteenth Amendment enforcement power is congruent with *McCulloch*'s reading of Congress's power under Article I); James W. Fox, Jr., *Re-readings and Misreadings:* Slaughter-House, *Privileges or Immunities, and Section Five Enforcement Powers*, 91 KY. L.J. 67, 129 n.217 (2002) (citing Amar, McConnell, Caminker, and Engel in asserting the *McCulloch* approach to be correct); Graham, *supra* note 47, at 670 (citing Balkin (and others who either rely on Balkin or advance the same arguments he does) and declaring that 'the combination of statements from the framers, contemporaneous analyses by the Supreme Court, and the assessment of legal scholars supports the position that the Framers of the Fourteenth Amendment wanted Congress's enforcement authority to be co-extensive with the breadth it enjoyed under Article I"); Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2362–63 (2003) ("[T]he *Boerne* cases expressly reject[] historical evidence indicating that the Framers of the Fourteenth and Fifteenth Amendments intended for Congress to have [broad *McCulloch*] authority."); Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 455 (2012) (citing Balkin in asserting that "Congress indicat[ed] that it wanted the Section Two power [under the Thirteenth Amendment] to be at least as broad as Congress'[s] other powers. Lest there be any doubt about this, note also that they chose the term 'appropriate' to define the power, invoking the Court's deference to congressional power in the case of *McCulloch v. Maryland*.").

50. *See, e.g.*, Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 478 (1999) (arguing that proportionality review is not inconsistent with judicial precedent and that "the proportionality requirement is consistent with the Court's close attention to the Constitution's structural protections of liberty and democracy inherent in the separation

Given that 'we're all legal realists now, it is not too cynical to assume that this generally unified opposition to the Court's new rubric was inspired, at least in many cases, by the critics' general sympathies for the social policy goals the respective invalidated laws represented. Obviously, laws designed to combat violence against women, discrimination against religious minorities, and unfair treatment of the physically disabled, at a general level at least implicate very delicate and serious policy concerns. Thus, significantly cabining Congress's ability to address these concerns, in the name of a structural abstraction, is going to cause controversy. The general scholarly reaction to the above decisions, then, reflects how the Court's currently non-deferential doctrine fits into a broader pattern of restricting federal power in recent contexts where, it is fair to say, most legal academics have viewed federal power as necessary for the realization of social justice ideals.

It is no surprise, then, that while most of the decisions teasing out the new doctrinal standard are ten years old or more,[51] the standard remains controversial wherever and whenever it rears its head. Enter *Shelby County*—and enter the corresponding need to understand the decision as adding fuel to an already roaring fire regarding how to characterize the constitutional restructuring that the Reconstruction Amendments envisage. While a minority of scholars have pushed back against the prevailing view, those works do not as forcefully as possible highlight the vulnerabilities of the prevailing view.[52] This article is meant to supplement those works in order to maximize a healthy destabilization of the prevailing view.

---

of powers and federalism); McAward, *supra* note 48, at 1771 (challenging "the conventional view that *McCulloch* licenses expansive, and virtually unchecked congressional power in the Thirteenth Amendment context").

51. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509 (2004); Nevada Dep't Human Res. v. Hibbs, 538 U.S. 721 (2003); *Fla. Prepaid*, 527 U.S. at 627 (1999); *Boerne*, 521 U.S. at 507 (1997).

52. Elizabeth Reilly has noted that the revitalization of "scholarship on the original and historical meaning of the Section Five grant of power" is part of a much larger centuries-long oscillation between views of narrow and broad congressional power. Elizabeth Reilly, *The Union as It Wasn't and the Constitution as It Isn't: Section Five and Altering the Balance of Powers*, 42 AKRON L. REV. 1081, 1089 (2009). Thus, *Boerne* represents the reversing of the pendulum swing, and *Shelby County* and the resulting debate helps us to determine just how much momentum is behind the swing.

B. The Fifteenth Amendment and the Voting Rights Act: Shelby County as a Vignette

Despite its relatively narrow area of focus, the Fifteenth Amendment has for decades stoked debates about the breadth of Congress's power to interfere with the traditional right of states to manage their own elections. The Voting Rights Act (VRA) has, since 1965, been a point of contention in this regard.

Congress passed the VRA pursuant to its power under Section 2 of the Fifteenth Amendment. After providing in Section 1 that states may not deny or abridge the right to vote on the basis of race,[53] the Amendment provides that 'Congress shall have power to enforce this article by appropriate legislation.'[54] Since, theoretically at least, Congress can only exercise enumerated powers,[55] it follows that if any provision of the VRA is not 'appropriate' to 'enforce' Section 1 as these terms are used in the Amendment, that statutory provision is unconstitutional. Thus, much of the debate before and after *Shelby County* was decided revolved around the contextual meaning of the terms 'appropriate' and 'enforce.

The VRA regulates the states' management of their elections to ensure state laws do not impede voting on the basis of race or systemically disable racial minorities from electing their preferred candidates. In *Shelby County* the question was: if the VRA was constitutional when it was passed in 1965, why not now? The answer, and thus the case, centered on how changed circumstances informed the continued legitimacy of Congress's tight control over how and when the relevant states may change their election laws. Important for present purposes are two provisions of the statute.

First, Section 5[56] of the VRA required that states 'pre-clear' changes to their election laws with the U.S. Attorney General before these laws could go into effect.[57] The original reason for this

53. Section 1 of the Fifteenth Amendment provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. U.S. CONST. amend. XV, § 1.

54. *Id.* § 2.

55. *See id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

56. Voting Rights Act of 1965 § 5, 52 U.S.C. § 10304 (2012) (formerly classified as 42 U.S.C. § 1973c(a) (2006)).

57. *Id.*; *see also* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own*

remedy made perfect sense when Congress enacted the VRA in 1965, and it arguably still does: the standard remedy of enforcement through private suit was inadequate in light of the costs and time necessary to fully and effectively pursue such litigation.[58]

Second, Section 4[59] of the VRA established the geographical 'coverage' of the VRA's pre-clearance provision, and that provision imposed pre-clearance on only certain southern states.[60] Congress in 1965 justified this unequal burdening of the states via statistical evidence regarding voter registration patterns, etc. which tended to illustrate that race-based disenfranchisement was a greater problem in the covered states than in others.[61]

The problem in *Shelby County* was that in 2005, when Congress renewed the VRA, it did not, and never had since 1965, reevaluate whether changed circumstances brought the original coverage formula out of sync with the otherwise legitimate purpose of the statute.[62] According to the Court, continued reliance on forty-year-old data made the coverage formula in Section 4 'irrational.'[63] Thus, unequal treatment of the states based on such data was a violation of the 'principle of equal sovereignty' be-

---

Success?, 104 COLUM. L. REV. 1710, 1712 (2004) (describing the pre-clearance mechanism).

58. *Katzenbach*, 383 U.S. at 314. Upholding the VRA, the Court noted:

> Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.
>
> *Id.*

59. Voting Rights Act of 1965 § 4, 52 U.S.C. § 10303 (2012) (formerly classified as 42 U.S.C. § 1973b (2006)).

60. *Id.*; *see also Katzenbach*, 383 U.S. at 328 (limiting applicability to states where immediate action seemed most necessary).

61. *See* Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9, 17–18 (2010) (describing the criteria for coverage under Section 5).

62. *Shelby Cty.*, 133 S. Ct. at 2627–28.

63. *Id.* at 2629 (emphasizing that Congress "reenacted a [coverage] formula based on 40-year-old facts having no logical relation to the present day" and noting the 'irrationality of continued reliance on the § 4 coverage formula' in imposing pre-clearance).

tween the states because this now 'irrational' imposition burdened only some states and not others, thereby unequally interfering with the traditional power of sovereigns to control their own election processes.[64] This meant, according to the Court, that imposing a pre-clearance requirement on the states was not a valid exercise of Congress's power to 'enforce' the Fifteenth Amendment with 'appropriate' legislation.[65]

According to a vast majority of commentators, equal sovereignty as a constitutional rule was implausible and the product of rhetorical trickery. For example, Sanford Levinson accused Chief Justice Roberts of basing his analysis on nothing more than the fact that 'he, as a legislator, would not have joined Congress's overwhelming 2006' renewal of the VRA.[66] Richard Hasen accused the majority of 'hiding behind a cloak of judicial minimalism, and characterized Roberts as a 'patient man playing a long game,'[67] leaving the reader to wander cynically through the darker possibilities in determining what exactly the 'game' is. According to Hasen, the majority issued an 'audacious opinion [that] ignore[s] history"[68] and was 'nefarious' in avoiding answering certain doctrinally important questions.[69]

Conservatives ready to defend the Court's reasoning were hard to find.[70] Richard Posner announced that the *Shelby County* ruling was 'about the conservative imagination, declaring that the equal sovereignty principle was a 'principle of constitutional law of which I had never heard—for the excellent reason that there is no such principle.'[71] According to Posner, 'apart from the spurious principle of equal sovereignty, all that the majority had on which to base its decision was tenderness for 'states' rights. [T]here is no doctrine of equal sovereignty.

64. *Id.* at 2623.
65. *Id.* at 2636–37.
66. Levinson, *supra* note 9.
67. Hasen, *supra* note 9.
68. Hasen, *supra* note 7, at 714.
69. *Id.* at 730.
70. Richard Epstein was one of few outliers. *See* Richard Epstein, *The Cynicism of the Voting Rights Act's Defenders,* RICOCHET (June 26, 2013), https://ricochet.com/archives/the-cynicism-of-the-voting-rights-acts-defenders/ [https://perma.cc/9W46-M2LA] (defending *Shelby County* against accusations that the decision "dismantle[d] some of the major safeguards of the Civil Rights era").
71. Richard A. Posner, *Supreme Court 2013: The Year in Review,* SLATE (June 26, 2013, 12:16 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html [https://perma.cc/WM9S-PJFT].

The opinion rests on air.'[72] As such, the opinion must have been driven not by a concern for 'states' rights in some abstract sense, but by the policy preferences of the majority.[73] Professor Eric Posner, like his father, charged that the notion of equal sovereignty is a 'newly invented idea' and 'a joke' in a 'pretty lame' opinion.[74]

The uncharitableness of these reactions is at least superficially understandable given the Court's rhetorical approach. Should the Court have deferred to Congress in deciding whether the coverage provision still mapped over the problem states, and thus was 'rational'? The answer is important because it informs the legitimacy of the equal sovereignty principle. As such, one would have expected the Court to have reached its conclusion by asking this preliminarily crucial question, that is, by way of an express finding that, based on what the terms 'enforce' and 'appropriate' mean, deference to Congress was not warranted. Not so fast.

The Court took another route: rather than expounding on the meaning of the terms in the Enforcement Clause, the Court at least ostensibly evaded the issue, concluding instead that, as mentioned above, Congress's treatment of the states differently without an updated empirical basis to justify this disparate treatment was 'irrational, and thus violated the principle of equal sovereignty between the states.[75] That's it; no *Boerne*-like pronouncement that Court vigilance is required in the Fifteenth Amendment context just as it is in the Fourteenth.

The Court's rhetorical route did not correspond with prior Court efforts to tease out the limits of Congress's power under the Reconstruction Amendments; even ardent defenders of the case's outcome must sheepishly concede this. So, for those seeking to make the best sense of the opinion, a fork in the road is presented: the self-appointed oracle can either, using the currently fashionable hyper-realism, chalk the opinion up to arbitrary conservative judicial activism, or he can, without an exces-

72. *Id.*

73. *Id.*

74. Eric Posner, *John Roberts' Opinion on the Voting Rights Act Is Really Lame*, SLATE (June 25, 2013, 1:44 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_on_the_voting_rights_act_chief_justice_john_roberts_struck.html [https://perma.cc/L7GJ-E6GP].

75. *Shelby Cty.*, 133 S. Ct. at 2631.

sive amount of gymnastics, attempt to discover what may have been *driving* the decision, and whether that 'driver' was at least minimally sober. I take the second route.

II. TAKING THE INTERPRETIVE QUESTION SERIOUSLY

Regardless of what the Court wrote in *Shelby County*, consistent with doctrinal seeds planted in previous opinions, the Court was operating on the notion that, when Congress 'enforces' the substantive provisions of the Reconstruction Amendments, its power is more circumscribed than it is when it exercises an enumerated power under Article I (combined with the Necessary and Proper Clause).[76] A justification for this conclusion is in order.

First, regardless of the degree to which the Court obfuscated a particular reality, that reality is indisputable: Congress enacted the VRA to 'enforce' the Fifteenth Amendment.[77] As such, the VRA could be a legitimate exercise of congressional power only if the statute is 'appropriate' and consistent with the concept of 'enforcement. The next necessary question, then, is what do these terms mean in the Reconstruction Amendment context? Again, all of the Reconstruction Amendments use the same operative language in their respective enforcement clauses. Thus, the breadth of power granted to Congress under one enforcement clause directly informs the breadth of Congress's authority under another.[78]

Precedent and evidence of original intent both posed a problem for those on both sides of the interpretive debate. Again, the

---

76. *Id.* at 2637.

77. *Id.* at 2631 (Thomas, J. concurring).

78. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 373 n.8 (2001) ("Section 2 of the Fifteenth Amendment is virtually identical to [Section] 5 of the Fourteenth Amendment."); *City of Rome*, 446 U.S. at 207 n.1 (Rehnquist, J. dissenting) (dissenting on another matter and noting that "the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive"); Graham, *supra* note 47, at 674 ("Even though *Katzenbach* is technically a case focused on Section 2 of the Fifteenth Amendment, the analysis is instructive because Congress's power here has been described as 'coextensive' with Section 5 of the Fourteenth Amendment."). Some scholars have argued that the same enforcement language should be read to grant Congress different breadths of power depending on the Amendment. For example, Calvin Massey has suggested, "There are historical and structural reasons for the differences in the scope of the enforcement power [in the] Civil War Amendments. Calvin Massey, *The Effect of* Shelby County *on Enforcement of the Reconstruction Amendments*, 29 J.L. & POLITICS 397, 397 (2014). However, this language notwithstanding, Massey does not appear to argue that, as an originalist matter, each enforcement provision should be read differently. In any event, little, if any, basis exists to inspire such a conclusion, which is why scholars and justices have generally described their reach as "coextensive.

most common position among scholars is that in ratifying Section 5 of the *Fourteenth* Amendment—that Amendment's enforcement provision—the Framers intended to grant Congress the same logistical boost that it enjoys under the Necessary and Proper Clause.[79] The Court and a minority of scholars disagreed: had the Framers intended this, they would have used the terms 'necessary and proper' in Section 5 rather than 'appropriate' and 'enforce.'[80] The fact that they did not, the reasoning goes, evinces a design that at once profoundly broadened the breadth of legitimate congressional concern, while also preemptively tamed Congress's enforcement power lest it erase all traditional state regulatory primacy.

Unsurprisingly, then, the interpretive question is crucial because, *regardless of what doctrinal phraseology the Court uses to express the idea*, the answer to the interpretive question determines the deference level with which courts should approach questions of congressional power in the Reconstruction Amendment context. Should courts take the enforcement language as a cue for heightened federalism vigilance, or conversely as a signal that they should take Congress's lead in defining not only the breadth of the substantive guarantees in the Amendments but also in determining how much prophylactic breathing room Congress enjoys in effectuating those guarantees? If the answer is the former, the Court is left with an obligation to review the VRA and like legislation with relatively greater scrutiny. Hence the primary defense of the Court's *Shelby County* opinion: that the Court's sausage-making employment of the 'fundamental principle of equal sovereignty' is a placeholder for a more accurate and less rhetorically flashy notion that disparate treatment of the states without a good reason is not reasonable, and thus Congress in such a scenario does not merely 'enforce' the Fifteenth Amendment but rather effectively inflates its own power to burden states in the process of attempting to protect substantive rights.

The discussion that follows seeks to substantiate—but by no

79. *See, e.g.*, Balkin, *supra* note 2, at 1808.

80. *Boerne*, 521 U.S. at 520–23 (discussing the significance of the Reconstruction Framers' rejection of the use of "necessary and proper"); *see, e.g.*, John T. Valauri, *McCulloch and the Fourteenth Amendment*, 13 TEMP. POL. & C.R. L. REV. 857, 868–70 ("The Framers of the Amendment and the *Boerne* Court must both perceive a difference [between the proposed amendment including the *McCulloch*-inspired 'necessary and proper' verbiage and the accepted language] that the critics of the *Boerne* Court do not see.").

means prove—the premise that a relative lack of deference by the Court in *Shelby County* was completely consistent with the very antecedent authority many invoke to attack the Court's decision as tendentious. The purpose of this substantiation is not to defend the Court's decision *per se* but rather to defend the *plausibility* of it. That is, to tame the certitude with which many have attacked the implicit premises about congressional power in the Court's decision.

Importantly, most of those who have attacked the Court's decision have often employed an originalist methodology in doing so.[81] That is, they rely on traditional antecedent authority—namely, judicial precedent and original-intent evidence—as fodder for their criticisms. The following discussion works within this justificatory framework.[82] As such, rather than heavily discussing the work of professional historians and attempting a groundbreaking synthesis of knowledge to explain 'what happened' and 'why it happened,' the goal is more incremental. It is to highlight the epistemic limitations of those primary historical materials (debate transcripts, court opinions, provision text, etc.) that legal scholars directly analyze as experts in their own right, but often do so with a conspicuous and consistent refusal to recognize the relevant limitations.

In other words, the primary task will be to illustrate how original-intent evidence and judicial precedent can very easily be read by those lacking a 'conservative agenda' as supporting the Court's lack of deference to Congress in the Reconstruction Amendment context. This, in turn, will feed the broader point about how off-kilter many criticisms of the Roberts Court have been due to selective evaluation of original-intent evidence. Because the discussion of precedent is straight-forward relative to that of original-intent evidence, that discussion will come first. This discussion of the relevant evidence will conclude with a discussion of methodological historicism, historical context, and the centrality of both in the work of The Scholars.

---

81. *See, e.g.*, Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 404-421, 425 (2014) (criticizing *Shelby County* as inattentive or mistaken in its understanding of the Reconstruction Framers' original intent).

82. This methodology will be discussed in greater detail at *infra* Part II.B.4. "Sometimes Less is More: A Note About Methodology, the Importance of Historical Context, and the Limits of Professional Historical Literature.

A. Precedential Ammunition

Superficially, precedent seems to support the Court's detractors who argue that the *McCulloch* standard applies to the Fifteenth Amendment. The Court in *South Carolina v. Katzenbach*,[83] in upholding the original VRA, squarely asserted that [a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.'[84] This is the same standard the Court recently affirmed governs whether a law falls permissibly within the limits of the Necessary and Proper Clause.[85] And given that review for rationality usually means the initial burden falls on the challenging party to tentatively establish irrationality,[86] there is a good argument that because Shelby County never demonstrated that the coverage of states was no longer rationally related to the legitimate purpose of the VRA, the challenge to the law should have failed (any possible irrationality notwithstanding).

But other precedent strongly supports the idea that the enforcement language triggers a different, more searching, level of scrutiny: namely, *City of Boerne*, discussed above, where the Court held that under the *Fourteenth* Amendment, use of the terms 'appropriate' and 'enforce' means that Congress may only pass laws that are congruent and proportional to both a substantive right already created in Section 1 and the severity of the problem being confronted.[87]

The Court in *Boerne*, in explicating this standard, detailed the version of the remedial provision Ohio Representative John Bingham originally proposed to the House in 1866, which provided that 'Congress shall have power to make all laws which shall be *necessary and proper* to secure to the citizens of each State' the rights protected under Section 1 of the Amendment.[88] After three days of debate, this wording, the Court explained, was rejected.[89] The Court explained: 'Members of Congress from across the political spectrum criticized the [draft] Amend-

83. 383 U.S. 301 (1966).
84. *Id.* at 324.
85. *Comstock*, 560 U.S. at 126.
86. *See, e.g.*, *Garrett*, 531 U.S. at 367.
87. *Boerne*, 521 U.S. at 521.
88. *Id.* at 520 (citing CONG. GLOBE, 39th Cong. 1st Sess. 1034 (1866)) (emphasis added).
89. *Id.*

ment' because it 'gave Congress too much legislative power at the expense of the existing constitutional structure.'[90] What resulted from this tension, the Court explained, was the current enforcement language.[91]

The Court concluded that Congress's choice to avoid using the 'necessary and proper' language—language the Court had previously interpreted in *McCulloch* to be very permissive toward Congress—signaled that the terms 'enforce' and 'appropriate' in the final draft were designed to be more constraining on Congress.[92] Those supporting *Shelby County*, in turn, borrowed this reasoning from *Boerne* and applied it to the Fifteenth Amendment,[93] which makes perfect sense given that, again, the remedial provisions in both the Fourteenth and Fifteenth Amendments, while not identical, employ identical operative terms.

So *Katzenbach* called for deference, *Boerne* for vigilance. Putting aside for the moment the Court's historical premises—which are debatable, but which should be discussed separately for their complexity—what was the Court in *Shelby County* supposed to do as a matter of *stare decisis*?

To be sure, *Katzenbach* specifically addressed not only the Fifteenth Amendment (as opposed to the Fourteenth, tackled in *Boerne*), but also addressed the VRA specifically. But this argument has force only if some principled reason could be provided for concluding that *Boerne* did not effectively overrule *Katzenbach*. That is, one invoking *Katzenbach* as controlling needs support for the notion that the two enforcement provisions, which are virtually verbatim identical, mean substantially different things. Due to the dearth of evidence supporting this argument, it is not unreasonable to conclude that *Boerne* implicitly overruled *Katzenbach* and that the Court in *Shelby County* implicitly recognized that the same congruent and proportional standard also applied with regard to the Fifteenth Amendment. This, in turn, is important because, if the congruent and proportional standard

90. *Id.*
91. *Id.*
92. *Id.* at 522–23.
93. *See* Joshua P. Thompson, *Towards a Post-*Shelby County *Section 5 Where a Constitutional Coverage Formula Does Not Reauthorize the Effects Test*, 34 N. ILL. L. REV. 585, 592–93 (2014) ("[T]he Fifteenth Amendment's Enforcement Clause allows Congress to 'enforce the prohibitions by appropriate legislation. [T]he *City of Boerne* Court explained that the enforcement clauses limit Congress's power such that legislation must be 'adapted to carry out the objects the amendments have in view.' ").

controls, it undermines claims that the Court was required under precedent to review the VRA with extreme deference toward Congress's decision not to revise the coverage provision.

This is an especially plausible analytical starting point when considered in the light of original-intent evidence and the logic of precedent dealing with the legitimacy of laws passed pursuant to the Reconstruction Amendments. But it is also a starting point most in the current scholarly climate reject for allegedly contradicting original-intent evidence. The next section is devoted to emphasizing that the current loose originalist consensus rests on shaky ground, and thus so do many critics' attacks on the *Shelby County* decision.

The discussion below is not meant to definitively resolve the argument over original intent, as much as it is intended to replace heat with light. The primary point of the section that follows is to illustrate the precariousness of the historical premises on which the current consensus rests—in a sense, to highlight the methodological faint-heartedness of those who gloss their work with the legitimizing rhetoric of fidelity, but who quite conspicuously fail to present a complete picture of the relevant history.

B. Muddying the Waters: Taking Incomplete Originalism to Task

As noted in the introduction, this piece attempts to be both constructive and responsibly discrete. First, it quite deliberately avoids taking a stance on the 'correct' answer to the interpretative question—indeed, doing so would undermine the entire point of this article that no such answer can be gleaned without veering into tendentious certainty. Second, in highlighting that unwarranted certainty, the article confronts the same historical materials on which The Scholars most often rely in making their arguments. Overwhelmingly, those materials tend to be (1) transcripts of the congressional Reconstruction debates; (2) contemporary Supreme Court opinions; and (3) other legal textual material, such as the language of contemporary statutes that contextually suggest certain beliefs and expectations on the part of Reconstruction-era lawmakers.

As to this material, while there is some evidence that, in approving the enforcement language, the Framers envisioned broad *McCulloch* congressional power, there is strong evidence to the contrary. As such, the argument for deference is far from air-

tight and, in any event, the historical evidence is not strong enough to warrant the certitude with which the proponents of this view have advanced their interpretations. These proponents—again, 'The Scholars' —are Jack Balkin, Akhil Amar, Michael McConnell, and Evan Caminker, and their work will be of particular focus here.

Jack Balkin, in his article *The Reconstruction Power*, has put forth what is likely the most forceful argument that Congress's powers under the Reconstruction Amendments and Article I are coextensive. As such, scholars sympathetic to calls for deference toward Congress regularly cite to Balkin's arguments without critical re-examination of them.

But Balkin's argument ignores counterarguments begged and gives short shrift to counter-arguments he expressly acknowledges. Balkin has argued that '[t]he framers of the Reconstruction Amendments assumed that the *McCulloch* test would apply to Congress's new Reconstruction Powers, and the use of the term 'appropriate' in the text of all three enforcement clauses reflects this assumption.'[94] To substantiate this claim using historical (as opposed to textual, addressed later) evidence, he discusses primarily evidence found in the congressional debate transcripts regarding, first, whether Congress should pass the Civil Rights Act of 1866 and, second, whether it should ratify the Fourteenth Amendment.

1. The Thirteenth Amendment and the Civil Rights Act of 1866

In his article, *The Reconstruction Power*, Jack Balkin enlisted original-intent evidence in an effort to demonstrate the illegitimacy of the so-called 'state-action doctrine,' which the Court established in the *Civil Rights Cases*.[95] There, the Court addressed the legality of the Civil Rights Act of 1875 to the extent it applied to private conduct.[96] The Court's decision gave birth to the state-action doctrine: Congress cannot use its enforcement power under the Fourteenth Amendment to prohibit private discriminatory conduct.[97] Balkin argues that Congress does indeed, as an originalist matter, have the power to 'ban discriminatory private conduct that it reasonably believes will contribute to or produce

94. Balkin, *supra* note 2, at 1810.
95. 109 U.S. 3 (1883).
96. *Id.* at 8–9.
97. *Id.* at 14–15.

second-class citizenship.'[98] Thus, for example, Balkin argues that per the Thirteenth Amendment's ban on slavery:

> [Congress] can do far more than simply punish or prevent what courts could hold illegal under the Thirteenth Amendment—that is, slavery. Instead, Congress has the power to make people free *in practice* by wiping out the legal, *social*, and economic aspects of slavery. Slavery was not just legal ownership of people; it was an entire system of *conventions, understandings, practices*, and institutions that conferred power and social status and maintained economic and social dependency.[99]

Balkin's primary support for his characterization of Congress's prophylactic power is his argument that '[t]he framers of the Reconstruction Amendments assumed that the *McCulloch* test would apply.'[100] He supports this premise via statements of various representatives of the 39th Congress during debates over the proposed Civil Rights Act of 1866.[101] The issue at the time was whether Congress had the constitutional authority to pass it. Congress had only the Thirteenth Amendment to work with, and unlike the more broadly empowering Fourteenth Amendment that would be ratified two years later, the Thirteenth performed the relatively discrete function of proscribing slavery and involuntary servitude. In light of this, how could Congress, armed only with the power to 'enforce' through 'appropriate' legislation the proscription on slavery, enact a law that also proscribed any 'discrimination in civil rights or immunities among the inhabitants of any State, on account of race, and promised freedmen the 'same right to make and enforce contracts, to sue purchase, lease, sell, hold, and convey real property'?[102]

Rep. James Wilson, as Balkin emphasizes, defended the constitutionality of the Act by expressly invoking the Court's opinion in *McCulloch* as the proper guide for contemplating Congress's power under the Thirteenth Amendment.[103] Thus, as Balkin's

98. Balkin, *supra* note 2, at 1806.
99. *Id.* at 1816–17 (second and third emphases added).
100. *Id.* at 1810.
101. *Id.* at 1842 n.52.
102. Cong. Globe, 39th Cong. 1st Sess. 1122 (1866).
103. *Id.* at 1118.

argument goes, to Reconstruction-era politicians, the enforce/appropriate language found in the other Reconstruction Amendments established a rubric no different than the one announced in *McCulloch*.[104] Reading Wilson's statements in isolation does indeed tend to show what Balkin claims they do, but the context of those statements complicate things considerably—to the point of almost completely discrediting Balkin's specific use of Wilson's remarks.

To begin with, Balkin fails to mention the remarks of Rep. Andrew Rogers from New Jersey, who spoke immediately following Rep. Wilson.[105] Rogers quite clearly challenged Wilson's characterization of the breadth of Congress's power under the enforcement language of the Thirteenth Amendment.[106] He viewed the enforcement clause as permitting only legislation necessary to enforce the core prohibition of Section 1. slavery, as opposed to, say, social customs, etc. that fostered racial hierarchy, and in turn were used in attempts to morally justify slavery.[107]

Rogers prefaced his response to Wilson's point by making clear that he was directly confronting Wilson's invocation of *McCulloch*: 'The honorable chairman undertook to establish a theory for this action [the Civil Rights Act being debated] upon a clause in the amendment to the Constitution abolishing slavery which authorizes Congress to pass appropriate legislation to carry the foregoing clause into effect. '[108]

In rejecting the *McCulloch* standard as the applicable one, Rogers asserted that the enforcement provision 'is to enable Congress to lay the hand of Federal power upon the States to prevent them from re-enslaving the blacks which [the federal government] could not do before the adoption of this amendment to the Constitution. '[109] He responded to Wilson's express

104. Balkin, *supra* note 2, at 1806–08.
105. Cong. Globe, 39th Cong. 1st Sess. 1120 (1866).
106. *Id.*
107. *Id.* at 1121.
108. *Id.* at 1123.
109. *Id.* More completely, Rogers responded to Wilson as follows:

> The honorable chairman undertook to establish a theory for [the Act of 1866] upon a clause in the amendment which authorizes Congress to pass appropriate legislation to carry [Section 1] into effect.
>
> Now, the constitutional amendment abolishing slavery provides in the second section that "Congress shall have power to enforce this

reliance on *McCulloch* by asserting that Congress's power was far more circumscribed in the Thirteenth Amendment context; he believed that Congress did not have the authority to pass laws that did more than, in a relatively direct sense, make the proscription of slavery manifest.[110]

Rogers's view was consistent with other representatives' views. For example, Rep. Burton Cook of Illinois suggested that the purpose of the Enforcement Clause of the Thirteenth Amendment was to ensure that states could not permit slavery under another name through the manipulative use of, for example, vagrancy laws.[111] Cook explained that although the Thirteenth Amendment banned 'chattel slavery, [v]agrant laws have been passed; laws which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude '[112]

Cook explained that without the Thirteenth Amendment's Enforcement Clause, 'it is apparent that under other names and in other forms a system of involuntary servitude might be perpetuated over this unfortunate race. They might be denied the right of freemen unless there was vested a power in the Congress to enforce by appropriate legislation their right to freedom. '[113]

Cook was of course referring to the infamous 'Black Codes' in states such as South Carolina, whereby southern states sought to maintain a de facto system of economic subordination of Afri-

---

> article by appropriate legislation. 'Appropriate legislation' for what? What is the subject-matter to which the legislation is to apply? Slavery or involuntary servitude is forever abolished, and this is to enable Congress to compel a State that undertakes to inflict the stigma of slavery again to forebear from so doing. It is to enable Congress to lay the hand of Federal power upon the States to prevent them from re-enslaving the blacks which [the federal government] could not do before the adoption of this amendment to the Constitution.
>
> *Id.* at 1122–23.

110. *Id.* at 1124.

111. *Id.* at 1123–24.

112. *Id.* at 1123.

113. *Id.* at 1124. Though Cook did go on to argue that the Enforcement Clause of the Thirteenth Amendment permits passage of the Civil Rights Act, he viewed the rights granted thereby, such as the right to purchase a home and to sell one's labor, as direct prerequisites to preventing de facto re-enslavement, not just general degradation. This is wholly consistent with a more restrictive view of Congress's remedial power.

can-Americans after the War.[114] The Black Codes prompted Justice Samuel Miller to remark that these laws 'do but change the form of the slavery.'[115]

Rogers's and Cook's interpretation of Congress's power specifically under the enforcement language contradicts Balkin's assertion that, in light of the Thirteenth Amendment's use of the term 'enforce'

> [Congress] can do far more than simply punish or prevent what courts could hold illegal under the Thirteenth Amendment—that is, slavery. Instead, Congress has the power to make people free in practice by wiping out all the institutions, *practices, and customs associated with* slavery and make sure they can never rise up again.[116]

According to Balkin, the Court was wrong in *The Civil Rights Cases* to hold that Congress did not have the power to outlaw private racial discrimination in businesses such as hotels, theaters, and the like, because such customs were 'interlocking social structures and status-enforcing practices that were identified with slavery or that rationalized and perpetuated it.'[117]

This was Rep. Wilson's take; but Rep. Rogers flatly disagreed. He characterized the Act's relatively broad grant of civil rights to freedmen as 'broad and dangerous, as the Act would 'destroy the foundations of the Government as they were laid by our fathers, who reserved to States certain privileges which ought sacredly to be preserved to them.'[118] He argued that the Act's

114. Under the Black Codes, African-Americans were not permitted to sell agricultural products (and thus compete with white farmers); were subjected to the same types of punishment as were slaves under antebellum laws; and were subjected to being deemed "vagrants' if they did not possess "work certificates, thus triggering fines: 'those who could not pay fines for labor code violations or other petty criminal offenses could be hired out to pay their fines. JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW 46 (2006).

115. Michael A. Ross, Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era 115 (2003) (internal quotations omitted).

116. Balkin, *supra* note 2, at 1817 (emphasis added). Of course, Rogers's argument can be interpreted to simply be that, under the *McCulloch* rubric, the Civil Rights Act of 1866 exceeded congressional power under the Thirteenth Amendment. For reasons already explained, this is not the stronger argument and, in any event, certainty here is not needed to well-take the point being made: that the historical evidence is too unclear to state with certitude that the Framers generally shared Wilson's view.

117. *Id.*

118. CONG. GLOBE, 39th Cong. 1st Sess. 1121 (1866).

plain terms would make the segregated schools in Pennsylvania illegal because, under the *McCulloch* rubric, Rogers correctly pointed out, banning such segregation could easily be conceptually tethered to a broader social project of making emancipation more 'effective' or aspirationally meaningful.[119] His obvious rejection of the notion that this was a legitimate project in light of Congress's power under the Thirteenth Amendment makes clear his stated belief that the Thirteenth Amendment's enforcement provision did not parallel the *McCulloch* rubric.[120]

Akhil Amar commits the same overreach as does Balkin. He argues that the term 'appropriate' is a 'word obviously borrowed from *McCulloch*'s famous gloss on the Necessary and Proper Clause.'[121] Amar argues that Wilson's remarks are 'clear evidence' for this allegedly 'obvious' proposition.[122] What is unclear is how Wilson's remarks make Amar's point so 'obvious' when the Framers dropped the 'necessary and proper' language from the Amendment before ratification, especially in light of the evidence above as to *why* they changed it. Also missing from Amar's argument is an appreciation of the term 'appropriate' as being used in conjunction with the term 'enforce,' an important point discussed below.

Balkin's and Amar's uses of Wilson's remarks cannot be correct if Rogers's take on Congress's power is to be given as much weight here as is Wilson's, and there is of course no reason why it should not be.[123] Thus, Wilson's remarks, in light of Rogers's, are best interpreted as an *argument* about, rather than an *assumption* about, the enforcement provision's meaning. Of course, this proves nothing, other than the fact that nothing here can be

119. *Id.*

120. See *Id.*

121. Akhil Reed Amar, *The Lawfulness of Section 5—And Thus of Section 5*, 126 HARV. L. REV. F. 109, 115 (2013).

122. *Id.* at 115 n.15.

123. This might be an understatement. Wilson was among the most unequivocal and strident supporters of the Civil Rights Act of 1866. After invoking the language in *McCulloch*, he went on to note that all possible congressional powers should be leveraged to "work out a proper measure of retributive justice. CONG. GLOBE, 39th Cong. 1st Sess. 1118 (1866). As such, Wilson's inclination to propose that the enforcement language implicated *McCulloch* deference hardly rebuts the notion that the meaning of that language was at least the subject of controversy among those who adopted it. Of course, conversely, Rogers was no John Bingham. He was a Democrat who opposed the Thirteenth Amendment and thus can safely be placed in the wrong-side-of-history camp. As such, his take on Congress's power can equally be chalked up to "normative interpretation' rather than fidelity to broader principles of congressional self-restraint.

proven;[124] rather than the applicability of the *McCulloch* standard being obvious to the Framers of the Reconstruction Amendments, it seemed to be a point of contention among them, one that was never explicitly settled in the Congressional Record.[125]

Or was it? After all, as Akhil Amar has argued, Congress enacted the Civil Rights Act of 1866, and it did so pursuant to its authority to enforce the Thirteenth Amendment.[126] Because, as the logic goes, the Act of 1866 'swept far beyond merely prohibiting slavery and involuntary servitude,'[127] we 'know' that the Framers of the Thirteenth Amendment believed that 'enforcing' the substantive guaranty against slavery included regulating a range of behavior significantly broader than slavery itself.[128]

Amar's argument has two problems. First, nothing in the Act of 1866 is inconsistent with the notion that Congress at the time was constrained by a congruence and proportionality standard under the Thirteenth Amendment. On the contrary, as Rep. Cook alluded to in his remarks above, the Act was overwhelmingly concerned with ensuring the *property* rights of African-Americans or otherwise the right to be free to engage in behavior needed to acquire and materially enjoy property.[129]

---

124. *See* Richard H. Fallon, Jr. *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1148 (1988). Commenting on the difficulties inherent to legal analysis of historical material, Fallon observed:

> [I]t is difficult if not impossible to approach historical problems without imposing analytical schemes that reflect contemporary concerns and preferences. [O]ur traditions of constitutional and statutory interpretation, which accord relevance to original meaning and intent but do not always regard them as controlling variables, encourage the search for a 'usable past. In the face of reasonable uncertainty about historical understandings, legal interpreters tend to prefer conclusions that accord with their conceptions of good social policy.

Id.

125. It is not altogether clear how Caminker could conclude, based on the evidence discussed above, that the debates evince "the Framers' specific endorsement of the *McCulloch* standard. *See* Caminker, *supra* note 14, at 1161–62.

126. Amar, *supra* note 14, at 823.

127. *Id.*

128. *Id.*

129. The Act of 1866 expressly guaranteed to African-Americans the rights to:

> enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the

The reason for such a focus is obvious: protecting the right of African-Americans to engage in lucrative behavior was necessary to prevent states from effectively reducing them to the economic servitude of whites and/or the state via the Black Codes, thereby continuing slavery under another name.[130] Thus, as Jennifer McAward has noted, the Act was precisely the type of prophylactic protection that the enforcement provision empowered Congress to enact because it was necessary to make the substantive guarantee of the Thirteenth Amendment meaningful rather than merely nominal.[131]

This is a far less ambitious use of the Thirteenth Amendment enforcement power than would be the use of it to combat all customs and practices by private parties that socially and culturally denigrate African-Americans, which Balkin claims the enforce-

---

contrary notwithstanding.

Civil Rights Act of 1866 § 1, ch. 31, 14 Stat. 27 (1866).

Indeed, along with Rep. Cook, Rep Martin Thayer of Pennsylvania, in his defense of the proposed Civil Rights Act, emphasized this concern for economic/proprietary freedom as specifically crucial to de-enslavement due to the actual nature of pernicious post-war practices. He rhetorically asked what purpose the Thirteenth Amendment could serve if not to empower Congress to ensure that the states could not deny African-Americans the:

> privilege of purchasing a home, their ability to make contracts for labor and which then declare them vagrants because they have no homes and because they have no employment ? The bill under consideration is intended only to carry into practical effect the [Thirteenth] [A]mendment. Its object is to declare not only that slavery shall be abolished upon the pages of your Constitution, but that it shall be abolished in fact and in deed.

CONG. GLOBE, 39th Cong. 1st Sess. 1151–52 (1866).

130. As McAward interestingly explains, supporters of the Act such as Rep. Wilson proposed the Act specifically to abrogate the Black Codes, as the supporters were, in the words of Wilson, concerned about "persons who are liable to be reduced to a condition of slavery. McAward, *supra* note 48, at 1789 (quoting CONG. GLOBE, 39th Cong. 1st Sess. 475 (1866)). The Act's supporters wanted not only to outlaw slavery but also combat "the very restrictions which were imposed in consequence of the existence of slavery, even if they did 'not make a man an absolute slave." Thus, "the Act's supporters defended it as a prophylactic measure, passed on behalf of former slaves and with a *close causal relationship* between the rights protected and the end of securing the demise of slavery. *Id.* at 1790 (emphasis added).

131. '[T]he sponsors of the Civil Rights Act of 1866 did not argue that the Black Codes violated Section 1 of the Amendment. While repressive, the Codes did not effect a wholesale return of slavery. At the same time, it was widely agreed that they were an effort to shape a labor system as close to slavery as possible without crossing the line. By voiding these laws and conveying a right to be free from racial discrimination in the exercise of basic civil rights, the Civil Rights Act ensured that the law's beneficiaries could not 'be reduced to slavery.' McAward, *supra* note 48, at 1800.

ment power allows Congress to do.[132] The latter can only work, as Balkin seems to admit, under the more forgiving *McCulloch* standard. Given that Congress was not nearly this ambitious, the Act of 1866 is not incompatible with a congruence and proportionality standard, and it thus did not '[sweep] far beyond merely prohibiting slavery' as Amar claims.[133]

The second problem with Amar's argument is that it elides the reality that many who voted for the Act of 1866 harbored doubts about its constitutionality, but that politics appears to have won the day rather than strict fidelity to constitutional text.

First, as to the general phenomenon of Framers acting inconsistently with the principles they constitutionalize, scholars who defend the results in cases like *Brown v. Board of Education*[134] invoke this very historical reality—quite persuasively—to defend such holdings on originalist grounds. As the reasoning goes, it is perfectly plausible that those who enshrined various constitutional concepts could, given common human frailties, fail to see how their own practices violated those very principles. One scholar has termed this the 'Theory of Original Sinn.'[135]

Second, and most powerfully, John Bingham of all people—that is, the very man who proposed ratification of the Fourteenth Amendment—believed that Congress did not have the power to protect the 'civil rights' of freedmen that the Act of 1866 protected.[136] Interestingly, Bingham harbored these doubts about the Act's constitutionality *after* it was watered down to allay fears

---

132. Balkin, *supra* note 2, at 1817.

133. Amar, *supra* note 14, at 823.

134. 347 U.S. 483 (1954).

135. Christopher Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 581–82. Professor Green described the theory and asserted that:

> [It is a mistake to] derive[] beliefs about the Fourteenth Amendment too quickly from the Framers' contemporary practice. We must be wary of assuming perfect cognitive coherence in the Framers. Alas, we are all eminently capable of asserting principles inconsistent with our actions. And it is a good thing, too, as our actions are frequently the wrong ones, and we at least want our principles to be the right ones. The possibility of a separation between principles and action allows us to think in a principled way about how we act and commit ourselves to principles that we later work into practice, rather than having to reform our actions first, and only *then* assert our principles.
>
> *Id.*

136. Alexander Tsesis, Principled Governance: The American Creed and Congressional Authority, 41 CONN. L. REV. 679, 715–16 (1994).

by others that it went too far.[137] As Raoul Berger has explained, the initial version of the Act of 1866 broadly guaranteed all 'civil rights and immunities.'[138] At Bingham's urging, this phrasing was removed before passage.[139] The first problem for Amar's argument here is that this revision would not have been constitutionally necessary if the *McCulloch* standard applied. Further, even with the revision, Bingham 'explained that he was unwilling to support a statute granting Congress the authority to affect rights the Supreme Court had left at the sole discretion of the states.'[140] He thus proposed the Fourteenth Amendment largely because he believed it would retroactively legitimize the Act of 1866.[141]

Bingham's behavior is quite telling: he *liked* the Act of 1866 but thought Congress had no constitutional authority under the Thirteenth Amendment to enact it. Why? Because the power to prohibit slavery, in his view, did not include the power to protect peripheral 'civil rights,' even though, undoubtedly, under the *McCulloch* standard the protection of civil rights would have been 'plainly adapted' to the end of prohibiting slavery.[142] Bingham, the champion of expanding liberty and equality during the Reconstruction era—the father of the Fourteenth Amendment—appeared, at the time anyway,[143] to strongly disagree with both Balkin and Amar about what 'enforce' and 'appropriate' in the Thirteenth Amendment meant.

---

137. *See id.* (noting that Bingham opposed the Act even at its final vote).

138. Raoul Berger, Incorporation and the Bill of Rights: Akhil Amar's Wishing Well, 62 U. CIN. L. REV. 1, 20 (1993).

139. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 426 (2d ed. 2005) (noting that Bingham "moved to have the general prohibition on 'discrimination in civil rights or immunities' struck from the bill because he believed that Congress lacked constitutional power to pass it.").

140. Tsesis, *supra* note 136, at 715–16.

141. *Id.* (citing CONG. GLOBE, 39th Cong. 1st Sess. 1291 (1866), explaining that, in Bingham's mind, "only an additional constitutional amendment could extend congressional power over civil rights and citizenship. To this end, even before the passage of the Civil Rights Act, Bingham had begun advocating for the passage of the Fourteenth Amendment."); FARBER & SHERRY, *supra* note 139, at 429 ("One purpose of the Fourteenth Amendment was to 'constitutionalize' the Civil Rights Act."); McAward, *supra* note 48, at 1787 ("[L]ingering doubts about the adequacy of Congress's power to pass the [Civil Rights] Act led to the ratification of the Fourteenth Amendment, and the subsequent reenactment of the Act in 1870.").

142. *See* CONG. GLOBE, 39th Cong. 1st Sess. 1291 (1866) (Bingham objecting to the Civil Rights Act on constitutionality grounds, particularly the blanket protection of 'civil rights," and proposing an amendment to the Act accordingly.).

143. *Id.*

2. The Fourteenth Amendment Ratification Debates

The Framers were most express about their views of Congress's enforcement power in the debates over the Fourteenth Amendment. And the Congressional Record, beyond merely muddying the waters about the meaning of operative terminology, actually strongly implies that the issue was settled by the key participants. It does so in a manner that those who espouse the *McCulloch* posture regularly fail to mention, but which is probably the strongest circumstantial evidence of the alternative view.

Although The Scholars make their interpretative argument in the context of attacking the Court's decision in *Boerne*, they generally fail to address the primary basis for the Court's original-intent conclusion that 'enforce' and 'appropriate' meant something akin to 'congruent and proportional' rather than the *McCulloch* 'necessary and proper' standard.

Recall that the Court in *Boerne* emphasized Congress's rejection of the original version of the Fourteenth Amendment, and that the version ultimately approved reflected a conspicuous change in the remedial language: from 'necessary and proper' to 'enforce/appropriate.'[144] For reasons that will be explained shortly, in emphasizing this change, the Court in *Boerne* understated its case.

The Scholars, of course, take the opposite view. Evan Caminker, for example, has argued that 'there is no hint in the legislative record, nor logical implication from the structural change, suggesting that the Framers intended this terminological shift to ratchet up the required means-ends nexus [employed by the *McCulloch* test].'[145] Caminker's claim is simply false. Understanding why requires appreciating oft-invoked assertions in their sequential contexts.

In bristling at the originally proposed 'necessary and proper' wording of the Fourteenth Amendment's remedial clause offered by Rep. Bingham, Rep. Robert Hale of New York did not merely assert that the Amendment was 'an utter departure from every principle ever dreamed of by the men who framed our Constitution.'[146] He went on to specifically emphasize how the 'necessary and proper' language would give Congress unlimited

144. *Boerne*, 521 U.S. at 530.
145. Caminker, *supra* note 14, at 1160.
146. *Boerne*, 521 U.S. at 175 (citing CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866)).

power in regulating such broad areas of public life as those *relating to* 'life, liberty, and property'

> [R]eading the language in its grammatical and legal construction, it is a grant of the fullest and most ample power to Congress to make all laws 'necessary and proper' it is not a mere provision that when States undertake to give protection which is unequal Congress may equalize it; it is a grant of power in general terms—a grant of a right to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation.[147]

Hale continued, conceding that the Necessary and Proper Clause—"that sweeping, comprehensive clause"—has its place in Article I, but that the specter of unlimited power is not present in that context because, in light of the wording of Article I, Congress is granted 'no general power to legislate upon matters of a municipal nature,'[148] but rather its power is 'limited directly to these enumerated powers [in Article I].'[149]

Importantly, Hale's specific words suggest that he believed not that the proposed Amendment intruded on states' rights due to its substantive breadth. His words here do not suggest a belief that, even after the Civil War, regulation of matters relating to equal protection, due process, etc. remained categorically or qualitatively the turf of the states. Indeed, Hale favored imposition of the Bill of Rights against the states.[150]

In short, Hale was no Andrew Rogers, and so his motivations for protest are not as suspect. Hale was, after all, a Republican congressman from New York who 'thank[ed] God' for the Union victory.[151] His concern was specifically with the breadth of

147. CONG. GLOBE, 39th Cong. 1st Sess. 1064 (1866).

148. *Id.* Clearly, Hale did not foresee the Court's future Commerce Clause jurisprudence.

149. *Id.*

150. *See* Frank J. Scaturro, The Supreme Court's Retreat from Reconstruction: A Distortion of Constitutional Jurisprudence 58 (2000). *See also* Kurt T. Lash, The Fourteenth Amendment and the Privileges and Immunities of American Citizenship 99–100 (2014) ("Hale[] was not opposed to enforcing the Bill of Rights against the states and did not oppose the second, and significantly changed, version of the Fourteenth Amendment.").

151. CONG. GLOBE, 39th Cong. 1st Sess. 1065 (1866) (noting that while he desired

Congress's logistical power in giving the substantive guarantees meaning:

> It has been settled judicially that the words 'necessary and proper' by no means imply indispensable necessity [I]t has been expressly settled that it means simply 'needful, 'requisite, 'conducive to, and under that settled interpretation of his language I ask the gentleman [Rep. Bingham] where he will draw the line as to the powers which Congress may exercise as the 'necessary and proper' legislation to attain these very general results [of Section 1 of the Amendment].[152]

Hale thus had no problem with a 'mere provision that when the States undertake to give protection which is unequal Congress many equalize it.'[153] Rather, he faulted the initial version of the Amendment for reflecting a 'grant of general power' —a phrase he repeatedly used—to 'legislate for the protection of life, liberty and property, simply qualified with the condition that it shall be equal legislation.'[154]

Given that Hale supported application of the Bill of Rights against the states—and given that he ultimately did not oppose the final version of the Fourteenth Amendment after the enforcement language was modified[155]— the evidence strongly sug-

---

to retain meaningful state sovereignty, the "doctrine of states' rights may, when pushed beyond its due measure, generate evil, and exclaiming "thank God, sir, that heresy [of absolute state sovereignty] has been put down").

152. *Id.* at 1065.

153. *Id.* at 1063–64.

154. *Id.* at 1064.

155. To be sure, Hale also initially objected to the proposed Amendment because he thought it was unnecessary: in his mind, the Bill of Rights already applied to the states, so what extra substantive work was the Fourteenth Amendment doing? Scholars generally interpret Hale's position as reflecting his unawareness that the Court had previously described the Bill of Rights as inapplicable to the states. *See* Scaturro, *supra* note 150, at 58. As such, after Bingham informed him of this error, Hale adjusted his critique accordingly. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 101 (1986) ("In responding to Hale, Bingham explicitly noted the case of *Barron v. Baltimore* to show why the Amendment was required [to enforce the Bill of Rights against the states].'). But this does not explain Hale's specific concern about the breadth of power the initial version gave Congress, the issue that he focused on overwhelmingly in his opposition speeches. Therefore, it makes much more sense, especially in light of the above debate language, to conclude Hale's change of heart had something to do with the change in the enforcement provision specifically.

gests that his initial objection was with the breadth of logistical power Bingham's initial version granted Congress.

Garrett Davis of Kentucky agreed with Hale, noting that while he 'cheerfully supported' the Amendment's substantive guarantees 'because [he] believed [them] to be just' (again, no Andrew Rogers), he could not support a version that gave Congress such broad legislative power because it allowed Congress to 'arrogate powers of legislation which are the peculiar monuments of State organizations"[156]:

> I will, sir, consent to no centralization of power in Congress in derogation of constitutional limitations, nor will I lodge there today any grant of power which may in other times, and under the control of unprincipled political aspirants or demagogues, be exercised in contravention of the rights and liberties of my countrymen.[157]

Again, given his remark as to the substantive justness of the Amendment, Davis's remarks are plausibly interpreted as a protest not of proposed federal power of intervention in order to effectuate the guarantees of Section 1, but rather of the breadth of logistical power the 'necessary and proper' language appeared to grant Congress.

Important here are Bingham's remarks made in immediate response to the above objections. He repeatedly and adamantly rejected any interpretation of the proposed Amendment that would 'take away from any State any right that belongs to it The proposition pending is simply a proposition to arm the Congress with the power to *enforce* the bill of rights as it stands. It hath that extent—no more.'[158]

Bingham, in his long remarks, repeatedly—methodically—employed the term 'enforce' in characterizing the power he believed the original ("necessary and proper") version of the remedial provision facially granted Congress. For example, in characterizing the position taken by Hale and Davis, Bingham somewhat facetiously paraphrased their words as 'Ah! we are

156. CONG. GLOBE, 39th Cong. 1st Sess. 1087 (1866).
157. *Id.*
158. *Id.* at 1088 (emphasis added).

not opposed to equal rights; we are not opposed to the bill of rights that all shall be protected alike in life, liberty, and property; we are only opposed to enforcing it by national authority." He responded:

> The question is, simply, whether [we] will give to the people the power, by legislative enactment, to *punish officials of States for violations*[159] of the oaths enjoined upon them by their Constitution? That is the question, and the whole question. The adoption of the proposed amendment will take from the States no rights that belong to the States. Gentlemen who oppose this amendment oppose the grant of power to *enforce* the bill of rights.[160]

Bingham made clear that the congressional power clause was necessary to fix a problem inherent in the original constitution: the Framers placed limits on the states, but 'omitted to insert an express grant of power in Congress to enforce by penal enactment [the] great canons' of individual rights in, for example, Article IV.[161] In Bingham's view, such an omission was deliberate pragmatism:

> I am perfectly confident that that grant of power would have been there but for the fact that its insertion in the Constitution would have been utterly incompatible with the existence of slavery in any State; for although slaves might not have been admitted to be citizens they must have been admitted to be persons. This is the only reason why it was not there.[162]

Thus, Bingham characterized Hale and others as opposing:

> the grant of power to enforce the bill of rights.

---

159. A phrasing which runs counter to Jack Balkin's arguments against the state action doctrine, discussed below.

160. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (emphasis added).

161. *Id.*

162. *Id.*

> Gentlemen who oppose this amendment simply declare to these rebel States, go on with your confiscation statutes, your statutes of banishment, your statutes of unjust imprisonment, your statutes of murder and death against men because of their loyalty to the Constitution and Government of the United States.[163]

So Bingham thought the objectors were over-reading the remedial clause language; in other words, there appears to have been a misunderstanding.

Interesting about the above excerpts is not only the quite obvious fact that it was specifically the 'necessary and proper' language that several pro-Union congressmen objected to, but also the fact that Rep. Bingham appeared to believe that by using the phrase 'necessary and proper,' the proposed amendment was merely giving Congress the power to 'enforce' (as opposed to legislate in general furtherance of) the substantive protections, and 'punish' actual 'violations' of the substantive provisions, as opposed to, say, combat social practices that culturally foster official inclinations to violate substantive rights.[164] That, to Bingham, 'enforce' meant something meaningfully less than the power to regulate any state action loosely 'associated' with slavery is further evidenced by this assertion:

> I would like to know [from] whence [Mr. Hale] derives the authority for supposing that any State has the right to deny to a citizen any of the privileges or immunities of a citizen of the United States. And if a State has not the right to do that, how can the right of a State be impaired by giving to the People of the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution? If a State has not the right to deny equal protection to any human be-

163. *Id.* at 1090–91.

164. See also Bingham's response to the question of whether the Amendment would apply in the Northern states: "It is to apply to other States also that have in their constitutions and laws today provisions *in direct violation* of every principle of our Constitution. *Id.* at 1065 (emphasis added).

> ing under the Constitution of this country in the rights of life, liberty and property, how can State rights be impaired by penal prohibitions of such denial as proposed? The question is, simply, whether you will give to the people the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? This is the question, and the *whole question.*[165]

This is strong evidence that what Bingham had in mind in rhetorically invoking the concept of enforcement was simply the limited notion of ensuring that states do not violate the core promises of the proposed Amendment's substantive provisions.[166] And this, in turn, is strong evidence that the *Boerne* Court—in expressly accepting the idea that Congress may enact prophylactic legislation to facilitate meaningful enforcement of substantive protections—actually recognized the very reality that modern *Boerne* detractors vociferously invoke as if the matter were actually in dispute: that Congress needs breathing room to ensure meaningful protection of substantive rights.[167]

In sum, the record reflects the following series of events:

---

165. *Id.* at 1089–90 (emphasis added). In light of Bingham's emphasis on enforcement, is it particularly puzzling how—as has been highlighted in other places in this article—other scholars compare the terms "proper" (Necessary and Proper Clause) with "appropriate" (Reconstruction Amendment clauses) and declare an "etymological link' between the two clauses without addressing the deliberate use of "enforce" in the Reconstruction Amendments. *See* Caminker, *supra* note 14, at 1161. Indeed, Caminker goes further; after declaring the alleged etymological link, he asserts that "it is difficult to deny [the terms 'proper' and 'appropriate'] equivalent meaning *in this context.*' *Id.* (emphasis added). No, it's not.

166. Professor Elizabeth Reilly is only partially correct in her assertion that because Bingham appeared to use the terms of the initial version of the Fourteenth Amendment and the term "enforce" "interchangeably, "nothing indicates this [revision of the enforcement provision represents] a substantive change," and thus the "modern Court has made much of the shift in language. Reilly, *supra* note 52, at 1086 n.23. This doesn't follow, and the reason why is crucial. Just because Bingham used the relevant terms interchangeably doesn't mean others did; in fact, the evidence just discussed shows that others didn't. The very fact that Bingham felt compelled on the House floor to make clear his interchangeable use of the terms to allay the fears of others suggests that the Framers were not of one mind regarding whether Congress should have *McCulloch*-esque powers in the Fourteenth Amendment context. As such, regardless of Bingham's linguistic predilections, the *Boerne* Court was not unreasonable in believing the shift in language to represent a substantive change in meaning.

167. *Boerne*, 521 U.S. at 517–18 (citing Ex parte Virginia, 100 U.S. 339, 345–346 (1879), for the idea that '[]legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional ").

(1) Bingham's original draft of the Fourteenth Amendment, which included the 'necessary and proper' language, was proposed;
(2) Several representatives specifically objected to the draft's use of the necessary and proper standard because it granted Congress too much power;
(3) Bingham responded to these concerns by repeatedly insisting that all the provision would allow Congress to do would be to 'enforce' the substantive provisions;
(4) A new draft of the Amendment replaced the phrase 'necessary and proper' with the terms 'enforce' and 'appropriate.

What may be inferred from this series of events? A strong inference—if not the strongest—is that the objecting congressmen's concerns were allayed via a change in the remedial provision's language (and thus the applicable standard, as the objections were not over style).[168] Of course, it is impossible to know with certainty whether the language change was meant to serve such a purpose. And, of course, the term 'enforce' is obviously open to differing interpretations. But both of these realities are beside the point.

The point is that circumstantial evidence, and the sequence of those circumstances, appreciably weakens The Scholars' claim—

168. Is the following exchange in the Capitol hallways really so difficult to imagine?

> Bingham: "Ok, you have a problem with the whole necessary and proper thing in light of the Court's decision in *McCulloch*.
>
> Hale/Davis: "Yeah, we like the Amendment overall, but that necessary and proper thing can create real problems, especially in light of the whole federalism thing.
>
> Bingham: "Ok, but I take it you have no problem with Congress being able to fundamentally *enforce* the substantive guarantees, right?"
>
> Hale/Davis: "Oh, of course not. You kind of straw-manned us in suggesting otherwise out on the floor.
>
> Bingham: "Fine, how about I change it to say that Congress can only 'enforce' the substantive provisions?"
>
> Hale/Davis: "Yeah, we can go with that. Change that, and we're good. Now we're off to a fundraiser.
>
> Bingham: "What a coincidence

one for which they rely significantly on debate statements to support—that, as Balkin has put it, [t]he Framers of the Reconstruction Amendments sought to ensure that the test of *McCulloch* would apply to the new powers created simply because 'they included the word 'appropriate' in the text of all three enforcement clauses;'[169] or that the 'language of *McCulloch* is actually embedded in the text of Section 5.'[170]

Evan Caminker has argued with even greater certitude on the matter:

> [T]he framing history of the Thirteenth and Fourteenth Amendment's Enforcement Clauses reveals that the same Framers whose intentions the Court canvassed regarding legislative ends appear *uniformly* to have embraced the *McCulloch* standard Their debates *clearly indicate* .that 'appropriate' was selected with the *McCulloch* standard in mind. [T]here is *no hint* in the legislative record, nor logical implication from the structural change, *suggesting* that the Framers intended this terminological shift to ratchet up the required means-ends nexus.[171]

The above evidence clearly reveals Caminker's assertions to be severe overreaches.

To support his assertion, Caminker cites sources all of which either beg questions, rely on problematic assumptions, or cite to other scholars making the same assertion without adequate support. For example, the most authoritative source Caminker cites is Michael McConnell, a highly respected legal scholar and a conservative to boot (thus further increasing the persuasive force of his credibility via agreeing with more politically liberal scholars who espouse the *McCulloch* rubric).[172]

McConnell, however, appears to have simply relied on the problematic assertions of The Scholars or others who have inaccurately characterized the evidence as unequivocal. McConnell asserts:

---

169. Balkin, *supra* note 2, at 1807.
170. *Id.* at 1815.
171. Caminker, *supra* note 14, at 1159–60 (emphasis added).
172. *Id.* at 1132.

> There are six differences between the two drafts [that is, the initial versus the final ratified version of the Fourteenth Amendment]. The pertinent question, which the *Boerne* Court failed to address, is how any of these changes diminished the power of Congress. Two of the changes (switching the verb in Section Five from 'secure' to 'enforce' and changing the standard of review from 'necessary and proper' to 'appropriate") were mere changes in nomenclature, with no substantive significance.[173]

But to support this assertion McConnell provides extremely little evidence. He asserts in the corresponding footnote:

> I have never seen a suggestion, either in congressional debates or in academic literature, that the [textual alterations in the enforcement clauses were] of any substantive significance. The replacement of the 'necessary and proper' language is insignificant. In *McCulloch v. Maryland* the terms 'appropriate' and 'necessary and proper' were used interchangeably. After the change, supporters of the Amendment continued to invoke *McCulloch* in interpreting the reach of Section Five, without any protest from opponents. Even opponents of civil rights legislation conceded that the enforcement power under Section Five was equivalent to congressional power under the Necessary and Proper Clause. Presumably, the change was made for purposes of achieving parallelism with Section Two of the Thirteenth Amendment.[174]

In other words, McConnell provided some evidence to support his interpretation of the enforcement clauses; what he failed to do was confront or even recognize evidence in the legislative

173. McConnell, *supra* note 13, at 178.
174. *Id.* at 179 n.153.

record supporting the contrary interpretation. This is crucial because he does not merely assert his interpretation; he rather strongly suggests that his interpretation is the only plausible one.[175] And it is this circuitous certitude, and little else, that supports the consensus among scholars about how much power the Reconstruction Amendments grant Congress. In turn, that consensus fuels strident denouncements of judicial pronouncements of limited congressional power.

The point here is not to wag a finger; in fact, some of The Scholars are among those this author most often cites and looks to for useful insights. The point rather is to underscore the systemic cause of what is unwarranted certitude and indignation about the Court's unwillingness to dismiss states' rights principles in the Reconstruction Amendment context as being passé in light of the Civil War. Circumstantial aspects of the debates strongly suggest what the *Boerne* Court suggested in a rather restrained fashion: that the eventual alteration of the Fourteenth Amendment's remedial provision was a clarification of an ambiguity—probably a misunderstanding[176]—brought to light

175. *See id.* at 194–95.

176. Sen. William M. Stewart, Republican from Nevada, suggested such a misunderstanding on the Senate floor. Referring to the "necessary and proper" language of the original remedial provision, he stated:

> [Under this provision,] Congress shall have power by law in all the States *affecting* the protection of either life, liberty, or property . . . When this was done, there would not be much left for the State Legislatures, for I apprehend that the great body of the laws of the several States . . . relate to the protection of life, liberty, and property. Undoubtedly [the proposed language] had reference to some other subject. . . . I think the committee had in view one object, but by their amendment would accomplish another. Is all action going to be postponed until this amendment is adopted by the States? I do not think it will ever be adopted . . . It seems to me that the grammatical, legal, and necessary construction . . . can hardly have been intended . . . .
>
> CONG. GLOBE, 39th Cong., 1st Sess. 1082 (1866).

In other words, Stewart appears to have doubted that the Amendment could be ratified specifically because of the breadth of the "necessary and proper" language. If Stewart's contemporaneous pulse-taking is authoritative—and it should be deemed at least minimally as such—the fact that the Amendment was subsequently ratified is arguably best interpreted as a result of the change in the remedial language. Rep. Thaddeus Stevens of Pennsylvania highlighted the same confusion when responding to Rep. Hale's characterization of the "necessary and proper" language in the draft version as granting Congress *McCulloch*-esque powers. Stevens, who apparently supported the original language, responded suggesting that Hale was reading too much into the use of the "necessary and proper" phrasing:

through debate.

3. Contemporary Court Decisions and Textual Inferences

Balkin and others do not just rely on the ratification debates to support their view of relatively broad congressional authority; they also invoke contemporary court decisions, and engage in textualist reasoning. But these arguments all beg quite obvious challenges that proponents of broad congressional power fail to adequately preempt.

For example, Balkin argues that 'by its own terms, the Necessary and Proper Clause [in Article I] applies not merely to 'the foregoing powers [of Article I, Section 8 but also to] all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. '[177] Therefore, the argument goes, it applies to the Reconstruction Amendments as well. This cannot be right, at least not pursuant to its own logic. If Balkin is correct, it would mean that the Framers of Article I established congressional enforcement power for all conceivable future purposes, even for amendments ratified by future generations, and even though the Framers of those future amendments clearly sought to customize their amendments with their own enforcement provisions (and clearly rejected the 'necessary and proper" language during that customization).

Under this line of reasoning, the original Necessary and Proper Clause is made into a sort of super-constitutional provision that cannot be overridden via amendment. Thus, the Reconstruction Amendment enforcement provisions, if they do not perfectly track Article I's necessary and proper rubric, must strangely be unconstitutional, even though those provisions were properly ratified per the formal amendment process spelled out in the Constitution. Interestingly, Rep. Hale during the House debates appeared to offer a mocking response to this in-

> Does the gentleman mean to say that, under this provision, Congress could interfere in any case where the legislation of a State was equal, impartial to all? Or is it not simply to provide that, where any State makes a distinction in the same law between different classes of individuals, Congress shall have power to correct such discrimination and inequality? Does this proposition mean anything more than that?
>
> *Id.* at 1063.

177. Balkin, *supra* note 2, at 1811.

terpretative approach when Rep. Higby of California employed it:

> The ingenuity of the argument was admirable. I never heard it paralleled except in the case of the gentleman who undertook to justify suicide from the Scripture by quoting two texts: 'Judas went and hanged himself' 'Go thou and do likewise.'[178]

A. Christopher Bryant advances the most problematic specimen of this reasoning:

> Section 8 already empowered Congress to 'make all Laws which shall be necessary and proper for carrying into Execution all other Powers vested by this Constitution in the Government of the United States. The Enforcement Clauses were added to the Reconstruction Amendments to foreclose any ambiguity on this score by placing congressional authority on an unassailable foundation.[179]

In other words, Bryant argues that the Framers' way of making clear that the 'necessary and proper' standard applies was to *actively ditch* the phrase 'Necessary and Proper' and change the language to 'enforce/appropriate. This is obviously a facially problematic argument.

Caminker leverages context more, but does so unconvincingly. A common argument—one advanced by Akhil Amar, as noted above—is that the term 'appropriate' was used to intentionally track the *McCulloch* standard because the Necessary and Proper Clause uses the word 'proper.'[180] Caminker declares this to be an 'etymological[] link[]' between the two clauses and asserts 'it is difficult to deny [the terms'] equivalent meaning in this context.'[181] But Caminker does not address the importance of the term 'enforce' during the debates; specifically, Bingham's

178. CONG. GLOBE, 39th Cong., 1st Sess. 1063 (1866).
179. Bryant, *supra* note 2, at 597.
180. *See* Amar, *supra* note 121, at 115.
181. Caminker, *supra* note 14, at 1161.

very deliberate use of the term, and thus its seeming importance in the Reconstruction Amendments' empowering clauses. Interestingly, Caminker seeks to strengthen his argument by stating that 'the term 'necessary' is notable by its absence in Section 5 [of the Fourteenth Amendment]. '[182] Therefore, Caminker argues, 'a reader of the text would naturally conclude' that the Reconstruction Amendments implicate an even less stringent test than does the Necessary and Proper Clause.[183] Yet nowhere is a discussion of the *addition* of the term 'enforce' and the role that concept appears to have played in the debates.

Other scholars have taken the tack of interpreting relevant terms in a seemingly straight-forwardly literal sense, but in reality these arguments often ignore obviously important contextual realities. For example, Bryant has asserted that 'appropriate' is surely not a more confining term than 'necessary and proper. '[184] This is true at least when 'appropriate' is not combined with the term 'enforce, which, as the debates indicated, was the term very deliberately used when the 'necessary and proper' rubric was challenged on the House floor.

The Scholars also rely on Court opinions in the period shortly after passage of the Reconstruction Amendments. By far they most commonly invoke the Court's opinion in the *Civil Rights Cases*. On the way to reaching the conclusion that Congress cannot, pursuant to its Reconstruction Amendment powers, regulate private discriminatory conduct—a conclusion Balkin, as discussed above, disagrees with—the Court threw a bone to Congress:

> [T]he legislation which Congress is authorized to adopt is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be *necessary and proper* for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing .[185]

182. *Id.*
183. *Id.*
184. Bryant, *supra* note 2, at 597 (quoting David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 463 (2008)).
185. *Civil Rights Cases*, 109 U.S. at 13–14.

While the Court here strongly implied that the *McCulloch* rubric defined Congress's power in the Reconstruction Amendment context, the Court, again, went on to hold that Congress cannot reach private conduct.[186] Balkin argues that the first conclusion was correct; the second, a 'mistake.'[187]

First, certainly Balkin would not be seen relying heavily on the Court's decision in *Plessy v. Ferguson*,[188] being closer in time to the ratification of the Fourteenth Amendment, as authority for whether the Equal Protection Clause prohibits segregation. Second, and more conspicuously, while Balkin argues that the Court in *The Civil Rights Cases* applied the *McCulloch* standard, and that this was evidence of what the Framing generation thought the enforcement language means, he also argues that the majority in the same case made a 'mistake' by construing this power 'narrowly' and thus ruling that Congress exceeded its authority under the enforcement provision in regulating private conduct under the Fourteenth Amendment.[189]

It is unclear why one cannot just as confidently, and persuasively in employing Balkin's approach to reading precedent, invoke *The Civil Rights Cases* as evidence that the Framers envisioned relatively narrow congressional enforcement power. In any event, cases such as *The Civil Rights Cases* could plausibly be read as simply contravening the original intent of the Framers (indeed, Balkin interprets the *Civil Rights Cases* as doing just that!), and future judges could, with intellectual honesty, see it as their duty to apply the Amendments as they were intended to be applied rather than repeat the 'mistakes' of earlier courts (indeed, Balkin proposes the courts do just that!).

Balkin and others also seem to excessively read into Court opinions propositions that do not follow from a reading of the relevant opinion passages. For example, Balkin enlists *Ex parte Virginia*:

> [T]he Necessary and Proper Clause applies not merely to 'the foregoing powers [of Article I, Section 8 but also to] all other powers vested by this Constitution in the Government of the United

186. *Id.*
187. Balkin, *supra* note 2, at 1818.
188. 163 U.S. 537 (1896).
189. Balkin, *supra* note 2, at 1817–18.

> States, or in any Department or Officer thereof.' Contemporaneous Supreme Court decisions agreed. In *Ex parte Virginia*, the Court explained that:
>
> ["W]hatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.["][190]

It is difficult to see how the quoted language reliably reflects Court agreement that Congress enjoys *McCulloch*-breadth powers under the Reconstruction Amendments. The Court asserted that Congress may 'enforce submission to' the Amendment's 'prohibitions' and to ensure 'perfect equality in civil rights' from 'state' interference; these ideas are perfectly consistent with a congruence and proportionality limitation. In fact, this language can easily be read to imply that Congress may only 'enforce' the actual substantive guarantees ("prohibitions") rather than legislate prophylactically. Of course, one could counter that the phrase 'adapted to carry out the objects' of the amendments sounds in prophylactic power, but the *Boerne* Court expressly stressed that the congruence/proportionality standard allows for prophylactic breathing room in making the substantive guarantees meaningful.[191] In fact, one could easily—and this author does—agree with the *Boerne* Court that that the above language is an early articulation of the *Boerne* standard.[192]

Last, but—if Akhil Amar's claim about the importance of the case is to be believed—not least, is *Prigg v. Pennsylvania*.[193] In *Prigg* the Court addressed the validity of a federal statute, the Fu-

190. *Id.* at 1811 (quoting *Ex parte Virginia*, 100 U.S. at 345–46).

191. *Boerne*, 521 U.S. at 519 (citing this very same language in *Ex parte Virginia*, 100 U.S. at 345–46, for the idea that "[]legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional ").

192. In fact, the *Boerne* Court agreed. *See* Balkin *supra* note 2, at 1811 (discussing the Court's invocation of *Ex parte Virginia* to support Congress's limited prophylactic power under the congruence and proportionality standard).

193. 41 U.S. 539 (1842).

gitive Slave Act of 1793, designed to enforce slaveholders' rights under the Fugitive Slave Clause in the Constitution[194] to retrieve slaves having escaped to other states.[195]

The Fugitive Slave Clause contains no enforcement provision. Nevertheless, the Court upheld the federal law on the ground that the express establishment of rights in the Constitution implied a power of Congress to create remedies aimed at protecting that right.[196] The Court thus expressly rejected the argument that 'although rights are exclusively secured by the National Government unless the power to enforce these rights can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress.'[197] The Court further suggested that the 'necessary and proper' standard, which the *McCulloch* Court had interpreted as allowing for any 'appropriateness' legislation, defined the breadth of Congress's enforcement power even outside of powers enumerated in Article I.[198]

Amar explains that Reconstruction Republicans seized on *Prigg*, using it to argue that, for example, the Thirteenth Amendment's use of the term 'appropriate' 'allowed Congress to legislate not merely against slavery itself, but against all the 'badges' and relics of a slave system.'[199]

In short, the argument is that, in using the term 'appropriate' in the Enforcement Clauses, the Framers understood that term to grant the same breadth of power that the Court in *McCulloch* had interpreted Congress to have under the Necessary and Proper Clause. Why? Because *Prigg* read that breadth of

194. U.S. CONST. art. IV, § 2, cl. 3 ("No person held to service or labour in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on claim of the party to whom such service or labour may be due.").

195. *Prigg*, 41 U.S. at 617.

196. *Id.* at 541 ("Congress may call [its] power into activity for the very purpose of giving effect to that right; and, if so, then it may prescribe the mode and extent in which it shall be applied, and how and under what circumstances the proceedings shall afford a complete protection and guarantee to the right.").

197. *Id.* at 618.

198. *Id.* at 619–20 ("[Congress] has on various occasions exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also, or, in other words, that the power flows as a necessary means to accomplish the end."); *Id.* at 622 (noting the right and "corresponding power in Congress to use the appropriate means to enforce the right").

199. AMAR, *supra* note 46, at 362.

power into a provision that didn't merely use terminology ("appropriate") similar as that used in the Necessary and Proper Clause, but contained *no enforcement provision at all.* Surely, if Congress can be *assumed* to have *McCulloch*-esque powers when no enforcement power is expressly granted, it must have it under an enforcement provision that shares terms with the Necessary and Proper Clause.

No doubt some Republican's invoked *Prigg* in arguing over Congress's powers to pass Reconstruction legislation, and this is evidence of Amar's point. Fortunately, because disproving his point is not the aim here, this matters little, for there are several serious problems with relying on *Prigg* in arguing for *McCulloch*-esque power with the certitude that Amar's arguments reflect.

First, the most obvious response is this: If the Reconstruction Republicans thought *Prigg* really did reflect Congress's legitimate enforcement power, why bother to draft an express enforcement provisions for the Reconstruction Amendments? The fact that they did suggests (but does not prove) that they believed that they were tailoring enforcement power for those specific amendments, and thus not defaulting to the *Prigg* presumption of *McCulloch*-esque power. Of course, the response might be that the use of the term 'appropriate' does indeed reveal an intent to trigger the *Prigg* presumption because the term 'appropriate' is, as Amar puts it, the 'etymological cousin' of the term 'proper' used in the Necessary and Proper Clause.[200] This argument, however, does not answer the question begged by the Framers' active abandonment of the *exact* language used in the Necessary and Proper Clause. Amar anticipates this objection, arguing that the reason why the Framers chose to not track that Clause was 'most likely because Congress preferred to use the language that the Supreme Court had itself used in construing congressional power broadly.'[201]

But Amar provides no basis for thinking that this explanation is 'most likely,' and the conclusion seems hardly presumable. One would think that if the Framers wanted to reserve Necessary and Proper Clause powers in enforcing the Reconstruction Amendments, they would have used the *same language as that Clause.* Such an approach would have seemed much more likely

200. *Id.* at 361.
201. *Id.*

to make the point clear to future courts interpreting the Enforcement Clauses than would using only one word, and one that is only etymologically linked, to the Necessary and Proper Clause, merely because the *McCulloch* Court used that term in its opinion.

And what of the fact that the Framers also included 'enforce' in the amended versions of the Enforcement Clauses? Does this mean nothing in light of the debaters' focus on the term and concept, and the corresponding emphasis on the narrowness of Congress's enforcement power by those, like Bingham, pushing for ratification? And why assume that just because some Republicans invoked *Prigg*, that others who agreed to the final enforcement language thought *Prigg* would operate the same way? Isn't it at least as reasonable to conclude that the fact that some in the House were arguing over the Enforcement language—and that the language was changed—reflects the belief, and hope, of some/many of the debaters that *Prigg* would not apply to Congress's enforcement powers? Did John Bingham not understand the implications of *Prigg* in arguing that the language of the clauses implied only narrow 'enforcement' power, and if so what might this say about others who voted for the Amendments?

In short, *Prigg* does not do nearly the work that scholars such as Amar claim it does. It settles nothing; it only serves to highlight how nothing here, it seems, can be settled.

4. Sometimes Less is More: A Note About Methodology, the Importance of Historical Context, and the Limits of Professional Historical Literature

The dispute here is over historical accuracy, and few legal academics involved in this debate (including this author) are professional historians.[202] At the very least, shouldn't any assertive foray into this contentious subject be lubricated with generous discussion of the conclusions, or at least contextual illuminations

202. *See, e.g.*, *Akhil Reed Amar*, YALE LAW SCHOOL, https://www.law.yale.edu/akhil-reed-amar [https://perma.cc/8AK8-JK2C] (last visited Nov. 7, 2016); *Jack M. Balkin*, YALE LAW SCHOOL, https://www.law.yale.edu/jack-m-balkin [https://perma.cc/T4MQ-9HLH] (last visited Nov. 7, 2016); *Michael W. McConnell*, STANFORD LAW SCHOOL, https://law.stanford.edu/directory/michael-w-mcconnell [https://perma.cc/2NRW-MNQ7] (last visited Nov. 7, 2016); *Caminker, Evan H.* MICHIGAN UNIVERSITY, https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=caminker [https://perma.cc/2LVP-SSV8] (last visited Nov. 7, 2016).

of, historians?

Even though this author does not attempt to 'settle' a historical question, and thus there is little need to rely on an exhaustive survey of historical material, certainly an appreciation for historical context is crucial, which is why the discussion so far has included such illuminations where necessary. But it is a mistake to misjudge the centrality of the work of historians in circumstances where such work, as important as it generally is, cannot answer the question at issue. More pointedly, it is an error, perhaps one induced for convenience, to chalk up opposing views as insufficiently sensitive to 'historical realities' and 'contextual nuances' rather than recognizing that, in situations like the present, those contextual details dead-end as sources for all but relatively abstract conclusions. Legal scholars, then, play the constructive role of simply picking up where responsible historians leave off. It must be this way, given that legal scholars, unlike historical scholars, ultimately work within the realm of asserting, either normatively or descriptively, what judges or lawmakers should do on the ground (this is true, though often less directly and obviously so, with heavily theoretical legal scholarship, not just 'doctrinal' work).

For this reason, this article so far has attempted to avoid the mistake of using the works of historians to a degree greater than the usefulness of their work warrants. Nevertheless, because it is common—perhaps excessively fashionable—for some to fault other works as being insufficiently 'interdisciplinary' or 'historicist,'[203] a brief discussion about the methodology used so far is in order.

First, for reasons already explained, the methodology used in this article very deliberately tracks that used in the works confronted: it, in a 'law-office history' fashion, interprets traditional legal antecedent authority, using traditional modes of analyses. It nevertheless does this with important but ultimately peripheral references to historical context. For example, in his heavily cited paper *The Reconstruction Power*, Jack Balkin does indeed cite to various historians, but it is his law-office history that constitutes

203. *See, e.g.*, Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L. J. 1017, 1017 (1981) (lamenting that legal scholarship too often fails to deal "with the fact that law exists in and must to some extent always be understood by reference to particular contexts of space and time").

his work.[204] His analysis appears to have been driven primarily by his (educated) personal interpretation of the primary (law-office) materials. His cites to historians, by contrast, appear as diffusely supportive atmospherics.[205]

The same is true of much of Akhil Amar's writing on this specific topic. For example, in his book *America's Constitution*, Amar makes the point—not really an argument, but the point—in favor of *McCulloch*-esque congressional power.[206] Anticipating the challenge as to why, if this is right, the Framers used in the Thirteenth Amendment's enforcement provision different language than that found in Article I, Amar responds:

> Most likely because Congress preferred to use the language that the Supreme Court had itself used in construing congressional power broadly. In *McCulloch* the great chief justice had construed the necessary-and-proper clause to permit all congressional laws 'which are appropriate. *McCulloch* was read in the nineteenth century as providing a generous understanding of congressional power.[207]

In any event, there is no doubt that the zeal of Reconstruction Republicans, both before and after the Civil War, nurtured the amendments ultimately ratified, and that the moral outrage over slavery among a critical mass of people can rightly be said to characterize the impetus for the legal revolution that the amendments represent. Amar employs phraseology to remind us

---

204. *See* Balkin, *supra* note 2, at 1810, 1818.

205. For example, as discussed above, Balkin argues that 'the framers of the Reconstruction Amendments assumed that the *McCulloch* test would apply to Congress's new Reconstruction Powers, and the use of the term 'appropriate' in the text of all three enforcement clauses reflects this assumption. *Id.* at 1810. But Balkin provides no meaningful support from the secondary literature for claims such as these—the most important types of claims in his paper. Rather, he drops footnote 34, wherein he primarily relies on Rep. Wilson (law-office analysis of legislative intent) for this declaration of fact (and on other scholars, most of whom are discussed herein, who reach the same conclusions with unwarranted certainty). *Id.* at 1810–11. In the next breath he asserts that 'by its own terms, the Necessary and Proper Clause applies not merely to the foregoing powers [of Article I, Section 8 but also to] all other powers vested [in Congress]' (i.e. law-office textualism). *Id.* at 1811. Citations to secondary literature are offered very peripherally in a manner that does not get Balkin close to answering the ultimate question.

206. *See generally* AMAR, *supra* note 46.

207. *Id.* at 361–62. This argument is very similar to the one advanced by Caminker; it is confronted more squarely above.

of this reality,[208] but this background premise is not in dispute. And, more importantly, it does little work to support his specific conclusion about what the enforcement provision means.

For reasons already explained, the idea that the Amendments represent a legal and social revolution is not in tension with a simultaneous concern for preserving meaningful state sovereignty, and thus a fear that an open-ended nature of the originally proposed enforcement language might have inspired fears of over-correction. We thus come full circle to the need, not to repeat sententiously terms such as 'context' and 'historicism' that re-emphasize the shared understanding about the general socio–political situation in which the amendments were ratified. Rather, we must get into the weeds of 'law-office history. It is, unfortunately, precisely at this point in the analytical process that Amar stops.[209]

Importantly, highlighting Balkin and Amar's reliance on law-office history is not a criticism of that methodology. It *is* a criticism of those who employ that methodology while at once employing a rhetorical motif that dismisses such methodology as facile and unsophisticated when others use it.[210] It makes sense that the work of scholars such as Balkin would ultimately turn on law-office history: the historians they cite in their work ultimately cannot answer the interpretative question at issue, at least not nearly with the certitude with which The Scholars answer it. A brief illustration of this point, and thus how citations to the sec-

208. For example, Amar alludes to the moral determination of congressional Republicans in noting, 'Congress overrode [President Johnson's veto of the Civil Rights Act of 1866] in a dramatic vote that made headlines and indeed made history: Never before had any Congress ever surmounted a president's veto of a major bill. The two-thirds vote in each house on this bill foreshadowed the eventual two-thirds votes on the Fourteenth Amendment later that spring. *Id.* at 362.

209. For example, in discussing the Fourteenth Amendment, Amar does note that the original version of the Fourteenth Amendment contained the "necessary and proper" language; however, he suggests that the only reason for the change to the final version was "plainly" to track the language used in the Thirteenth Amendment. *Id.* at 363. Nowhere is a mention by Amar that the language was changed after Democrats *and Republicans* expressed concerns over the original wording. Nor is there reference to the fact that the modified provision employed the term 'enforce, which appears neither in *McCulloch* nor Article I.

210. As Jack Balkin has noted, competing camps criticize each other's law-office history when doing so is rhetorically convenient. Jack Balkin, *New Originalism and Uses of History*, 82 FORDHAM L. REV. 643, 676 (2013) ("critique of 'law-office history' [was originally] an attack on liberal Warren Court originalism, not the conservative originalism of Robert Bork and Antonin Scalia. Years later, as movement conservatives gained power and influence in American law, historians would level similar charges of law-office history at conservatives.").

ondary literature of historians can be more impressive than useful, is in order.

The strongest arguments in favor of the *McCulloch* approach arise from a further examination of the state-action doctrine. While the Reconstruction Congress during the ratification debates did not expressly discuss in detail the implications of the enforcement provisions, what it did do is pass in the following years laws that regulated private conduct even though the Fourteenth Amendment provides only that 'no *state* shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws.'[211]

For example, the 1871 Act to Enforce the Fourteenth Amendment was inspired by the need to combat Ku Klux Klan terrorism and that of other groups attempting to undermine the political power of Republicans, black and white alike.[212] The Act, for example, made it a crime to conspire to deprive 'any person or any class of persons of the equal protection of the laws.'[213] Historian Michael Kent Curtis describes this Act as provoking the 'most extensive debate on constitutional power to reach private violence.'[214]

As the argument often goes, because such laws passed both houses of Congress, and because the men who voted for these laws heavily overlapped with those men who just a few years prior voted to ratify the Fourteenth Amendment, they likely assumed that Congress could use the Fourteenth Amendment to proscribe private conduct. This chain of reasoning now splits off into two alternative final steps. First, as the argument goes, because the Framers thought Congress could directly proscribe private conduct, it likely thought its enforcement authority included the power not only to check state action but also to, in *McCulloch*-esque fashion, regulate all activity rationally related to ensuring, say, equal protection of the laws.[215]

The second conclusion in the chain of reasoning is that, given

211. U.S. CONST. amend. XIV, § 6.

212. Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments and the State Action Syllogism, A Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1399–1401 (2009).

213. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

214. Curtis, *supra* note 212, at 1401.

215. Balkin makes this argument: "Under the *McCulloch* standard, the test is whether Congress could reasonably conclude that banning violence against members of a certain group would help them gain equal protection of the laws. Balkin, *supra* note 2, at 1854.

the aforementioned facts, the phrase 'no state shall' should be read to include not only affirmative state denials of rights, but 'state neglect' that is, state failures to equally protect certain persons or classes from private harms.[216]

While both of these arguments have their weaknesses, the second one has much more force. It is in fact the strongest argument that the state-action doctrine is inconsistent with the Framers' original intent as well as a textual reading of the Fourteenth Amendment's language. But how much further does an emphasis on historical context take these arguments toward warranting a confident answer to the interpretive question at issue? Let's examine that historical context and then determine whether the answer remains just as debatable as it was without reference to Curtis's (generally interesting and impressive) work.

Michael Kent Curtis is a highly respected legal historian on Reconstruction. Balkin heavily cited Curtis in his paper *The Reconstruction Power*[217] and, as Curtis's biographical page indicates, 'Akhil Amar of Yale Law School [has] described Curtis's book 'No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights' as 'one of the most important and most impressive works of constitutional scholarship of the late twentieth century. '[218] Curtis has explained that during the 1871 debates (as opposed to during the debates over the Fourteenth Amendment):

> A number of congressmen believed that Congress had the power to supply protection when the state failed to do so, and that it also had the power to protect any national constitutional right belonging to the citizen against a conspiracy aimed specifically at that right.
>
> Still, a few Republicans accepted the idea that the Privileges or Immunities Clause (whatever it meant), the Due Process Clause, and the Equal Protection Clause merely limited state

216. Again, this is one of the arguments Balkin advances. *See* Balkin, *supra* note 2, at 1848 ("When states neglect to protect people within their jurisdiction from private injury . . . this is state action within the meaning of the Fourteenth Amendment.").

217. *See generally* Balkin, *supra* note 2.

218. *Michael Curtis Faculty Profile*, WAKE FOREST UNIVERSITY SCHOOL OF LAW, http://law.wfu.edu/faculty/profile/curtismk/bio/ [https://perma.cc/G4N3-99EF] (last visited Nov. 7, 2016).

power.[219]

One of the 'few Republicans' Curtis discusses is Congressman Farnsworth of Illinois, who believed that the proposed Act tended toward 'abolishing the State lines and State governments or abridging their powers.'[220] According to Curtis, Farnsworth reviewed the trajectory of the Fourteenth Amendment's drafting before ratification and concluded that the Amendment's supporters contemplated the final version as restricting state (not private) power.[221] Similarly, Republican (and future President) James Garfield of Ohio also held a relatively narrow view of Congress's powers on the matter.[222]

What does a responsible legal academic do with Curtis's findings? One option is to conclude that most Republicans in 1871 would have rejected the state-action doctrine as virtually conclusive evidence that Congress three years earlier, per the first chain of reasoning above, contemplated *McCulloch*-esque powers under the enforcement provisions all along. But Curtis's literature does not warrant the assumptions on which this logic depends.

Curtis explains that, unlike in 1871, in 1868 Congress 'did not consider whether the revised [Fourteenth] Amendment would allow Congress to act against private terrorists' because Congress was not yet 'facing massive political terrorism.'[223] Importantly, as Curtis explains, the terrorism in Southern states was not a widespread problem immediately after the end of the War:

> For a time, multi-racial democracy worked. A white-black Republican political coalition controlled Southern states. But, the Ku Klux Klan and similar organizations soon undertook a campaign of political terror against white and black Republicans. Congress responded with acts designed to enforce the Fourteenth and Fifteenth Amendments.[224]

219. Curtis, *supra* note 212, at 1410.
220. *Id.* at 1411 (citing CONG. GLOBE, 42d Cong. 1st Sess. app. 117 (1871)).
221. *Id.*
222. *Id.* at 1412.
223. *Id.*
224. Curtis, *supra* note 212, at 1398.

As such, it is highly plausible that Republicans in Congress who voted in favor of laws such as the Act of 1871 did so based on an expedient ex post reading of constitutional language. This is something politicians seeking to solve serious and concrete problems do all the time. Daniel Farber and Suzanna Sherry have noted this specifically with regard to Reconstruction-era Republicans:

> The Republicans [during this time] were not strict constructionists. During the war they came to believe that the national government's powers should be defined broadly enough to resolve whatever problems [were] facing the nation. The Civil War had called for unprecedented actions by the president and Congress. By the end of the war, Republicans were accustomed to finding some source of constitutional authority for whatever actions they thought necessary.[225]

As such, votes for 1870s legislation notwithstanding, perhaps the literal emphasis on 'no state shall' is not simplistic, but rather virtuously reflects the fact that some things are *simple*. After all, it was certainly perfectly foreseeable to those in 1868 that the words 'no state shall' would—or at least might—be read by future courts to only control state conduct.

But let us assume that a vast majority of Republicans who voted for the regulation of private conduct genuinely contemplated that the Fourteenth Amendment would allow for this when they voted for the Amendment several years prior. Even with this assumption we are still a ways from being able to assume *McCulloch*-esque congressional powers.

It is rather clear that Republican congressmen who voted for the Act understood that the laws they supported were intended to target crimes that were part of a systemic effort to undermine the constitutional rights of some via the exploitation of state neglect. As Curtis explains:

> When it adopted the Fourteenth Amendment, Congress had been concerned both with individ-

225. FARBER & SHERRY, *supra* note 139, at 427.

> ual rights and federalism. Because [the Enforcement Acts] were limited by a specific intent requirement, they left ordinary crimes entirely to the states. But they reached politically motivated attempts to use the tactics of terror to prevent the exercise of constitutional rights. This approach protected the fundamental rights of citizens while also protecting the role of the states.[226]

So the 'state neglect' theory survives congruence and proportionality review: it is very arguable that federal prosecution of the relevant Southern actors was 'congruent and proportional' to the goal of ensuring that states did not manifestly (through deliberate inaction) deny classes of persons 'equal protection of the laws.

It is thus interesting how Curtis situates the Enforcement Acts in their broader legal context. Curtis ultimately emphasizes that the limits of the Enforcement Acts reflect the reality that the Amendments, like most laws, are the product of both good intentions as well as the need to prevent paving the road to hell with them:

> When it adopted the Fourteenth Amendment, Congress rejected a version that many thought permitted Congress to legislate on any and every subject of state concern. The Enforcement Acts did not do that In state action cases, allowing Congress under the Fourteenth Amendment to reach private violence specifically designed to punish or deter the exercise of core constitutional rights would hardly herald the end of the states. Obviously, if congressional power is limited to crimes with the specific intent to deprive people of constitutional rights and the doctrine is carefully developed with a view to federalism, destruction of the role of the states would not follow.[227]

---

226. Curtis, *supra* note 212, at 1415.
227. *Id.* at 1417.

The 'careful' legislating and adjudication that Curtis describes here is one of congruence and proportionality, for if Balkin and others are correct that the modern *McCulloch* standard applies—and make no mistake about it, it is the modern rubric, which is infinitely forgiving toward Congress, that Balkin seeks to legitimize—there is essentially no private conduct that Congress cannot regulate under the Reconstruction Amendments.[228] This, in turn, puts Curtis's contextual highlights in tension with the *McCulloch* approach.

The point here is not to enlist historians into the cause of narrow congressional power. This would be a far too ambitious—and an irresponsibly hasty—pursuit. The point is that the relative indecisiveness of the secondary literature brings into relief the degree to which The Scholars—as experts in synthesizing understanding of legally controlling materials in order to descriptively or normatively propose binding principles—must rely on old-fashioned law-office work to move their ball forward. The secondary literature on the subject is, to be sure, helpful in providing a threshold non-controversial framing of the relevant socio–political context. But beyond that, heavy citation of that literature in a law review article may serve mostly as pseudo ballast in an age of fashionable belittlement of conventional law-office methodology. It is thus easy to exaggerate the degree to which that literature 'clearly' answers the interpretive inquiry, and there is, in turn, no escaping a primary reliance on a lawyerly interpretation of law office materials.

C. Coming Home to Shelby County

In sum, there is meaningful (but by no means air-tight) evidence of two things: (1) that the Framers of the Reconstruction Amendments did not equate 'enforce/appropriate' with 'necessary and proper' and (2) that the House's alteration of the language from one to the other phrasing was the result of a perceived need to cabin congressional power so as not to allow Congress to legislate in 'general furtherance of' the Amendments. Since Section 2 of the Fifteenth Amendment, pursuant to which the VRA was enacted, contains the same enforcement lan-

228. As Balkin himself describes the standard, '[T]he test is whether Congress could reasonably conclude that banning violence against members of a certain group would help them gain equal protection of the laws.' Balkin, *supra* note 2, at 1854. Is it even *possible* to fail this standard?

guage, it very arguably follows that Congress's power thereunder is not as broad as many commenters today with such confidence assume or conclude it to be. As such, conceptual contrivances such as 'congruent and proportional' or 'equal sovereignty' very arguably correspond to a judicial duty to scrutinize the reasonableness of legislation passed pursuant to the Reconstruction Amendments with a relative lack of deference.

Basic reasonableness suggests that if federal laws passed pursuant to the Fifteenth Amendment must not only be 'rational' (as the term is doctrinally used today so as to impose little meaningful restraint on Congress) but also 'congruent and proportional' to protecting existing voting rights, then Congress's unequal burdening of states with little justification (assuming justification is indeed scant) must be 'inappropriate' under the remedial provision. Since the VRA's pre-clearance provision applied to states based on forty-year-old data regarding which states presented the most significant threat to the voting rights of racial minorities,[229] it is not a stretch to conclude that the current coverage formula is not demonstrably 'congruent and proportional' (or even rational) relative to the otherwise legitimate goals of the VRA.

Judging by the reactions of some, one might conclude that the Court invoked 'equal sovereignty' as an absolute imperative of constitutionalism, and thus that the Court willfully ignored the elephant in the room: that Congress regularly treats states differently. This, in turn, apparently supports the broader narrative that the Court was tendentious, results-oriented, and had little genuine formalistic intent. For example, Eric Posner remarked:

> [T]he federal government doesn't treat states equally and couldn't possibly. Nearly all laws affect different states differently. So whatever explains the court's decision today, the putative principle of equal sovereignty can't be it.[230]

Posner wrote further:

> The federal government calls the shots, and the

229. *See Shelby Cty.*, 133 S. Ct. at 2629.
230. *See* E. Posner, *supra* note 74.

> states obey, in the area of elections as much as in any other. Roberts accepts the constitutionality of Section 2 of the Voting Rights Act, which forbids states to discriminate against minority voters and in this way also intrudes on state control over their elections. If Section 2 does not violate the Constitution, then what is special about Section 5—which also forbids discrimination? From the standpoint of state autonomy, Roberts' argument does not wash.[231]

If the majority had reasoned that unequal treatment of states is always presumptively unconstitutional, this would be a strong argument.

Posner's reasoning seemingly distills to this: Congress treats the states unequally not only in other contexts, but in this specific context (election law), all the time, and Roberts suggests this is perfectly acceptable; so clearly equal sovereignly 'does not wash. This line of reasoning also featured prominently in Justice Ginsburg's dissent, in which she noted that 'federal statutes that treat States disparately are hardly novelties.'[232] Thus, as the argument goes, unless we are to conclude that many currently enforced laws are suddenly unconstitutional, the equal sovereignty principle as an actual constitutional rule simply makes no sense.

But Roberts's opinion is very plausibly read to mean that when the unequal treatment of states cannot be shown to be meaningfully and rationally related to an otherwise legitimate objective of federal law, such unequal treatment must be deemed to be for little more than its own sake[233] (much as, say, a law that targets homosexuals with the ostensible sole purpose of expressing animus toward a politically unpopular group will not survive ration-

---

231. *Id.*

232. *Shelby Cty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting).

233. "There is only one reason why the 1965 baseline remained: [Congress] could [not] possibly agree on a new list, for the simple reason that no state deserves the opprobrium that inclusion on it would carry. In order to avoid any unwarranted slur, inertia carried the day, strictly and solely as a matter of political expedience. Any effort to construct a new list of preclearance state or counties would have raised hopeless questions of inclusion and exclusion, and would have shown that there is not a single state or county in the nation where voting practices are remotely comparable to the despicable standards of 1965. Congress did not budge from its position because it knew that it could not make the change." Epstein, *supra* note 70.

al-basis review, notwithstanding traditional deference to states to regulate in the moral sphere[234]). After all, equal protection, like equal sovereignty, is not absolute: the Court permits unequal treatment of individuals but only when such treatment satisfies a threshold of rationality.

Originalist inquiry into vague phraseology is most often futile, at least if one expects the inquiry to yield logical certainty. But this is a problem only for those who include too many 'clearlys' in their scholarship. This is even more problematic when the asserted 'clearly' relates not merely to an assertion that 'X means Y,' but rather that 'no evidence exists to support the idea that X means anything other than Y.' The latter is the posture often taken without adequate analytical caution, and it has unconstructively influenced other legal scholarship, much to the detriment of the quality of responses to Roberts Court decisions.

III. REFLECTING ON EPISTEMIC COMPLACENCY

An attempt to interpret and apply a constitutional provision with fidelity necessarily entails an effort to appreciate the historical context in which that provision was ratified. In this regard, the idea that, in ratifying the Reconstruction Amendments, the Framers wished to maintain meaningful limits on congressional power in light of states' rights concerns is in significant tension with modern scholars' notions of the structural changes the Reconstruction Amendments brought.

This tension is amplified by the justified assumption that both sides' conceptions of the post-war structural order are often influenced by ideological priors.[235] While The Scholars themselves may not be guilty of results-oriented scholarship (this author often finds the work of McConnell and Caminker in particular to be quite dispassionately insightful), their less-than-complete analyses can enable such academic soldiering—an excessive certitude and moral entrepreneurship that dulls what is otherwise the wise epistemic caution of the academic at his or her most tame.[236] A discussion of this tendency and its costs is in order.

234. *See* Romer v. Evans, 517 U.S. 620 (1996) (holding that an amendment to the Colorado Constitution that prohibited legislative action intended to defend homosexual persons from discrimination violated the Equal Protection Clause).

235. Aviam Soifer, *Truisms That Never Will Be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793, 799 (1986) ("[B]oth sides in the constitutional debate about federalism tend to abuse history.").

236. An example of this posture in a relatively concentrated form is the following

A. The Problem as Zero-Sum Conceptualism

A common refrain by those supporting broad congressional power is that those who believe in relatively confined federal power in this context are engaged in wishful thinking, or perhaps denial, regarding how the Civil War and the resulting Amendments altered the relationship between the states and the federal government. Two illustrations of this attitude together highlight this problematic framing phenomenon: the first from around the time of the Court's decision in *Boerne*, the second relating to the recent Voting Rights Act controversy.

Douglas Laycock, in his attack on the Court's invalidation of the RFRA in *Boerne* (at least as it applied to the states), characterized the Reconstruction Amendments as a legal "revolution" (which it was), and those who supported *Boerne*-esque limits on congressional power as 'counter-revolutionaries' (which, for reasons discuss shortly, they are clearly not).[237] He argued:

> No one wants to go back to the 1870s on race, but powerful forces want to go back very far indeed on federalism. The more outspoken opponents of

---

email message from Professor Steven Jamar recently sent via a constitutional-law listserv to all members:

> No amount of whitewashing (charged word chosen intentionally) can erase the darkest hour of the Supreme Court—the immoral, illegitimate, poorly crafted, legally unsupportable decision of *Dred Scott*. The Anti-Federalists (who we now, through the curiosity of English call federalists), had carried the day over time—fortunately they could not permanently undo all that the Federalist/Constitutionalist Marshall court had wrought—*Marbury* and *McCulloch* especially.
>
> We appear to be stuck with the Slaughterhouse Cases and the Civil Rights Cases and State Action doctrine And the modern rebirth of this same sort of attitude as exemplified in *Boerne* (making it so much harder for Congress to exercise its 14th Amendment given power—with no justification for a higher standard of review than that of the Necessary and Proper Clause in general)
>
> At some level, even constitutional law cannot be head-in-the-sand formalistic and must address things from a moral stance. Too many justices, lawyers, and law professors and libertarians ignore the import of the Reconstruction Amendments, trying to do to them even more than was done to them in the 19th Century decisions.

Email from Steven Jamar, Professor of Law, Howard U. Sch. of Law, to Conlawprofs listserv (Aug. 10, 2015) (on file with author).

237. Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 760 (1998).

> RFRA were committed to a sweeping counterrevolution. Their model of federalism is from 1787 or 1791. It is as if the Civil War never happened. Speaking across this conceptual chasm, the two sides found each other incomprehensible. One side thought the Civil War and the amendments fundamentally changed the structure of federalism; the other side interpreted the amendments in a way that was faithful to 1787.[238]

One of the alleged counterrevolutionaries Laycock expressly referred to was Professor Marci Hamilton, who took the view that the RFRA should be ruled unconstitutional.[239] But far from arguing 'as if the Civil War never happened, and exhibiting a blinkered fidelity to only a 1787 conception of constitutional structure, Hamilton expressly recognized the revolution that the Civil War brought to constitutional law via emphasizing Congress's prophylactic power: 'Congress is only permitted to expand upon the scope of a constitutional right under the enforcement provisions of the Civil War Amendments.'[240] Hamilton further termed 'uncontroversial' what the enforcement provisions most clearly establish: that 'Congress has the capacity to provide a remedy for or attempt to prevent what the courts have identified as a violation of the substantive guaranties of the Fourteenth Amendment.'[241] As such, Hamilton appreciates that the Reconstruction Amendments came with play in the joints in order to make substantive protections meaningful, but she denied that Congress is entitled to enough regulatory breathing room to swing its elbows wildly.[242]

Fast forward about fifteen years to example two. In reflecting on state-dignity arguments made against provisions of the Voting Rights Act, Joseph Fishkin writes, 'The North—the Union—won the War. But to a remarkable extent, the South's twentieth-century apologists won the peace. That is why we are having a conversation right now about the equal dignity of the Southern

238. *Id.* at 758–63.

239. See generally Marci A. Hamilton, The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment, 16 CARDOZO L. REV. 357 (1994).

240. *Id.* at 387.

241. *Id.* at 388.

242. *Id.* at 376.

states rather than the equal dignity of Southern black voters.'[243]

Fishkin discusses historical revisionists' attempts to re-characterize the Civil War (*e.g.* the familiar phraseology feud: the 'Civil War' versus the 'War Between the States"), its causes (*e.g.* 'slavery' versus 'states' rights") and its consequences.[244] Regarding the latter, to Fishkin, as the above quote suggests, the invocation of state dignity and its corollary, 'equal sovereignty,' can best be—and perhaps only be—explained by a mentality of denial by those who wish to forget the South's defeat in 1865.[245] So, according to Fishkin, the 'new federalism' of the Rehnquist era was the product of Chief Justice Rehnquist being 'locked into an antiquated view of the Reconstruction era long abandoned by scholars.'[246]

An example Fishkin provides of this allegedly 'antiquated' thinking helpfully illustrates how the background assumptions of scholars can avoidably bring more heat than light to the debate. Fishkin describes Justice Scalia's dissent in *Arizona v. United States*[247] as reflective of the problematic attitude that 'the Civil War never occurred.'[248] In *Arizona*, the Court ruled that Arizona's immigration bill, S.B. 1070, enacted to combat illegal immigration, was preempted by federal immigration law. In his dissent, Scalia explained that the majority's decision ignored Arizona's sovereignty, a 'defining characteristic of' which is 'the power to exclude from the sovereign's territory people who have no right to be there.'[249] Fishkin explains:

> In the ensuing discussion of Arizona's sovereignty Justice Scalia cites Madison; the Kentucky and Virginia Resolutions; the Massachusetts Resolutions in Reply to Virginia; a 1758 treatise on the Law of Nations; and a case from 1837. The Civil War is nowhere to be found. It is as though the War did nothing at all to alter the valence and viability of arguments based 'upon the principle of

243. Joseph Fishkin, *The Dignity of the South*, 123 YALE L.J. ONLINE 175, 180–81 http://www.yalelawjournal.org/pdf/1174_iyst6fvo.pdf [https://perma.cc/LH5F-LBNR].

244. *Id.* at 180, 185.

245. *Id.* at 178–79.

246. *Id.* at 188 (quoting Eric Foner, *The Deciding Vote*, THE NATION, Mar. 11, 2004, http://www.thenation.com/article/deciding-vote [https://perma.cc/3K85-GPLC]).

247. 132 S. Ct. 2492 (2012).

248. Fishkin, *supra* note 243, at 189.

249. *Arizona*, 132 S. Ct. at 2511 (Scalia, J., dissenting).

> state-sovereignty. Which is to say, it is as though the War's meaning were its narrowest possible meaning—the one most protective of the dignity of the South.[250]

This author agrees that Scalia was probably wrong, and that Arizona's law was unconstitutional, not only on preemption grounds but probably on individual-rights grounds as well. But Fishkin's reading of Scalia's position as one driven by the 'narrowest possible' characterization of the Civil War's constitutional impact—or, as he puts it less forgivingly in the prior sentence, 'as though the Civil War never occurred'—rings with obvious ideological indulgence, but at once a right-side-of-history-esque gloss of genuine background conviction.

Arizona did not in any obvious way even implicate the Reconstruction Amendments, the only constitutional provisions that memorialize the Civil War's *legal* legacy. One need not deny, or drastically minimize, the Civil War's impact on constitutional law to conclude that unless Congress's action (or state action) implicates the Reconstruction Amendments (or the Bill of Rights by way of them), those Amendments and their historical contexts are simply irrelevant in deciding a given case. But Fishkin appears to think this irrelevance irrelevant. As the implicit reasoning goes, the Civil War 'radically transformed' the federal-state relationship; it thus follows that invocations of pre-war notions of state sovereignty in *any* context are anachronistic. This, in turn, reflects what appears to be the unstated sentiment that the Reconstruction Amendments reduced 'states' rights' to little more than an artifact of legal history.

The Reconstruction Framers did not repeal the Tenth Amendment. Nor did they do so implicitly by ratifying the Reconstruction Amendments.[251] As discussed above, substantial evi-

---

250. Fishkin, *supra* note 243, at 189–90 (quoting William A. Dunning, *Are the States Equal Under the Constitution?*, 3 POL. SCI. Q. 425 (1888)).

251. Will Baude has made the point well:

> It is important to separate descriptive and normative constitutional change. Not everything that happened during the Civil War changed the meaning of the Constitution going forward. The Civil War certainly did yield many valid changes to constitutional federalism. At the same time, the Civil War did not change everything about federalism. The Constitution was not abolished and replaced; it was amended.

dence exists that those Framers were quite concerned that ratification of the versions initially proposed would excessively compromise state sovereignty.[252] And those congressmen who expressed such concerns were either from Union states such as New York, or Southern states with Reconstruction-sympathetic representatives, such as Kentucky.[253] Primary-source evidence such as this is in irreconcilable tension with the conquest/submission framing advanced by scholars such as Fishkin.[254]

Of course, one cannot dispute this framing of the historical context in which the Union was reconstructed, but one can challenge the logical fallacy that such historical context must be *legally* meaningful.[255] It is well-known that the Northern states avoided excessive reveling in the spoils of their victory for wise pragmatic reasons: first, to expedite genuine reintegration of the Southern states into the Union, and second, because they understood that any amendments they ratified would apply to decrease the sovereignty of their own Northern state governments as well.[256] As such, scholars generally recognize that the post-War Congress eschewed the winner-take-all approach to Reconstruction.[257] Thus legal scholars recognize that historical evidence

---

William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1812 (2013).

252. *See also* ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS DEBATES 121 (1967) (quoting a Republican member of the Joint Committee on Reconstruction as stating, "The proposition to prohibit States from denying civil or political rights to any class of persons encounters a great objection on the threshold. It trenches upon the principle of existing local sovereignty.").

253. CONG. GLOBE, 39th Cong., 1st Sess. 1083 (1866). Rep. Garrett Davis, whose remarks are discussed above, was opposed to secession and supported the Constitutional Union Party.

254. By this I mean the following problematic reasoning: the context in which the Southern states ratified the Amendments was one of conquest and coercion, and therefore prideful claims of violated sovereignty and dignity ignore the legally meaningful humility with which the Southern states acquiesced to the Northern states' terms for readmission.

255. Since this is not intended as a paper on the topic of Reconstruction-era history per se, further elaboration of this point is best left for another time, or perhaps to other authors. The point is not to disapprove of Fishkin's framing but rather to demonstrate how genuinely debatable and vulnerable it is in light of historical evidence.

256. *See, e.g.*, CONG. GLOBE, 39th Cong. 1st Sess. 1064 (1866) (Rep. Bingham, noting that the Fourteenth Amendment would apply not only to the Southern states but "to other States also that have in their constitutions and laws to-day provisions in direct violation' of it).

257. *See, e.g.*, WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 1–12 (1988) (noting that evidence exists to support both framings of the War's structural consequences, but that the better view is that the Framers wished to both secure individual rights and preserve federalism to a meaningful

makes plausible both the 'federalist' or 'nationalist' approaches of federalism.[258]

B. Language, Definitional Creep, and Intellectual Empathy

One explanation for the stridence of some of the Court's critics might be the way in which the shifting implications and connotations of language pervert our perception of past events. It is common for scholars to—accurately—characterize the Reconstruction Amendments as collectively representing a 'revolution.'[259] The problem with using this term, however, is that it conjures up in the mind what to us, in our present time, seems 'revolutionary' rather than what would have been deemed 'revolutionary' to those who lived in the 1860s. The result of this definitional creep is that some today are accused of denying the Civil War's revolutionary legal legacy if they conceive of that revolution being a bit less radical than do the strident accusers.[260]

This phenomenon is arguably the result of scholars failing to keep their reference points sufficiently constant. To one who appreciates that the antebellum order entrusted in the states the job of protecting individual rights, premised on the obviously erroneous belief that states were most predisposed to do so, the Reconstruction Amendments did indeed bring a legal revolution in structure without reading the *McCulloch* standard into the enforcement provisions. Elizabeth Reilly explains that, even if we read the congruence and proportionality test into the enforcement provisions, the Amendments represent 'a revolutionary

---

degree); Robert J. Kaczorowski, *To Begin the Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 67–68 (1987) (noting that the Reconstruction process "held the potential of ending federalism and establishing a consolidated, unitary state" but that the "framers eschewed this extreme institutional arrangement").

258. *See, e.g.*, Fallon, *supra* note 124, at 1144–45. ("Like its Federalist rival, [a] Nationalist model claims foundations in early constitutional history, but it also emphasizes the vast reordering of federal relations inaugurated by the Civil War and Reconstruction. A Nationalist model of judicial federalism furnishes as plausible a set of assumptions to guide federal courts decisions as does the Federalist vision.').

259. Or, a "radical transformation. *See* Fishkin, *supra* note 243, at 179 (implying that those with whom he disagrees forget that "the Civil War and Reconstruction [were] a radical transformation of the South through federal military and civilian power, with a series of amendments specifically ratifying the use of that federal power to establish the equal citizenship of Southern blacks").

260. *See, e.g.*, Michael Scimone, *More to Lose Than Your Chains: Realizing the Ideals of the Thirteenth Amendment*, 12 N.Y.C. L. REV. 175, 176 (2008) (insisting the original understanding of the Thirteenth Amendment was "far more expansive and radical' than the modern one, and arguing "limiting the force of [The Framers'] ideals' is to "imagine nearsighted visionaries and milquetoast revolutionaries").

grant of power to Congress.'[261]

Similarly, McAward argues that even if the *McCulloch* standard applies, what the Court applied in the *Civil Rights Cases* was akin to what we now call 'congruence and proportionality' [I]t is possible to read *Boerne* simply as the Court's effort to apply in the Fourteenth Amendment context the understanding of *McCulloch* that prevailed during the antebellum and Reconstruction eras.'[262]

Insightfully, McAward compares the evolution of the Court's Reconstruction Amendment jurisprudence with the trajectory of its Commerce Clause jurisprudence, and emphasizes the fact that in the post-New Deal era the Court became increasingly less demanding that Congress substantiate the alleged causal connections between its legislation and the problems it purportedly addressed.[263] In its more recent opinions somewhat reinvigorating the theoretical limits on Congress's power under the Commerce Clause, the Court has applied greater scrutiny to the purported means relative to ends.[264]

So one need not be a reactionary who bitter-sweetly romanticizes the bygone Gone-with-the-Wind southern charm and 'way of life' to believe that the Court's renewed assertiveness simply

---

261. Reilly, *supra* note 52, at 1089, 1106–07. She continues, discussing Section 5 of the Fourteenth:

> [I]t profoundly reconceived the role of the national legislature vis-a-vis individual rights. Even in the current restrictive view of Section Five powers, the balance of powers differs from the antebellum concept and practice. Section Five authorizes Congress to enact active and prophylactic protections and enforcement of critical guaranteed rights and liberties formerly conceived as limitations on power. Congress can effectively go[] beyond current Court pronouncements when necessary.

Id.

262. McAward, *supra* note 48, at 1796. *See also* Derek T. Muller, *Judicial Review of Congressional Power Before and After* Shelby County, 8 CHARLESTON L. REV. 287, 287 (2014) (discussing the "landscape of the litigation surrounding the Voting Rights Act leading up to the Supreme Court's decision in *Shelby County v. Holder*. and find[ing] that, in three specific contexts, the Court was generally consistent with its previous practice of employing a relatively searching judicial review of Congress' exercise of its enumerated powers").

263. McAward, *supra* note 48, at 1805.

264. *See, e.g.*, *Lopez*, 514 U.S. at 568 (striking down the Gun-Free School Zones Act by refusing to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power"); *contra* Katzenbach v. McClung, 379 U.S. 294, 305 (describing the power of Congress under the Commerce Clause as "broad and sweeping" and that, as a general rule, the Supreme Court would not interfere with Congress's use of that power).

represents the Court doing what it is supposed to be doing: backtracking from the arguably excessive deference of the post-New Deal courts.[265] But, of course, this is not what occurs to many scholars whose reference points, and thus expectations, have shifted with time. One could even go so far as to argue that the reactions discussed above reflect an attitude of ideological privilege; that some have become so accustomed to congressional supremacy in certain contexts that they've come to believe that federal supremacy is just constitutional common sense; that post-World War II jurisprudence is the be-all and end-all of enlightened constitutionalism, and thus that any meaningful protection of federalism is strange and anachronistic, almost fetishistic.[266]

Fishkin's and similar views may be the most morally, even if not historically, persuasive, but this is not the present concern. The concern is rather the conflation of morality with law. An admonition not to confuse the two may come across as didactically and condescendingly trite, but never bet against the possibility that otherwise sophisticated and respected scholars might slip into normative storytelling. This slip derives from viewing the post-ratification processes as representing a punctuated moral and intellectual renaissance for all, or a vast majority of, the Framers, rather than a relatively mundane and painstaking

265. As Levy has put it after *Boerne* was decided, '[C]ourts are engaged in their first extended analysis of the scope of congressional power to enforce the Reconstruction Amendments since the nineteenth century. Levy, *supra* note 19, at 1631. The Warren Court's assertions on the subject seem to have been assumptions about Congress's Reconstruction Amendment power, rather than findings from extensive analysis, thus perhaps explaining the absence of an "extended analysis' of Congress's power in the case law until *Boerne*. Barry Friedman has argued that:

> [The Court's] strategy with regard to interpreting the Fourteenth Amendment at critical moments has been one akin to confession and avoidance. Did those who adopted the Equal Protection Clause intend to prohibit racial discrimination in schools? The Court found no meaningful answer in the history (or perhaps not the one it wanted), so it quickly moved on to other reasons why such discrimination was unlawful. As serious works of scholarship have made clear, the history of the Fourteenth Amendment actually had a lot to say about [such issues,] albeit not in the terms the Court was willing to hear. So, that inconvenient history was simply cast to one side.

Friedman, *supra* note 2, at 1208.

266. Following the Court's reinvigoration of congressional Commerce Clause power, scholars reacted with now-familiar stridence. *See* Friedman, *supra* note 2, at 1202 (noting that '[m]any liberals were hyperbolic, displaying deep anger with the decision [in *United States v. Morrison*]); Cass R. Sunstein responded to the Rehnquist Court's Commerce Clause decisions as representing a "remarkable period of right-wing judicial activism. Cass R. Sunstein, *Tilting the Scales Rightward*, N.Y. TIMES, Apr. 26, 2001, at A23.

product of compromise[267] between those who generally abhorred slavery, but who were also tentative and reluctant to do away wholesale with the federalism that was central to the constitutional ethos they inherited from the original Framers. On this score, Pamela Brandwein interestingly states that 'it is [only] in the context of accumulated experience with entrenched racial thinking that twentieth-century observers attribute the 'broad and expansive' view of federal power to Republicans. '[268]

In short, the cost of epistemic complacency is that the incompleteness of respected scholarship contaminates understanding so as to foreclose a more intellectually empathetic demarcation of the bounds of reasonable disagreement.[269] An example of such priors is a tendency to perhaps forget that a discussion of these matters is ultimately one about law, and in debating law—Fishkin's ultimate point is to undermine the validity of the dignity of Southern states as a controlling legal concept—historical context and moral evolution are relevant only to the extent they help interstitially to determine what the law is.[270]

Fishkin's piece is, of course, a short essay, and thus is not fairly viewed as a comprehensively nuanced explication of his views on federalism generally. But on its face, Fishkin's argument appears to begin and end with the general truism—which is undebatable as far as it goes—that the Civil War 'radically transformed' the relationship between the federal government and the states. And this beginning and end sandwiches a background intuitive sen-

---

267. Radical Republican Thaddeus Stevens articulated this state of compromise best: This [second proposed version of the Fourteenth Amendment] is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several states are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal states could be induced to ratify any proposition more stringent than this.

CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866).

268. Pamela Brandwein, Reconstructing Reconstruction 87–88 (1999).

269. There are very strong arguments that the Framers of both the original Constitution and the Reconstruction Amendments greatly exaggerated the necessity of federalism as a way of preserving liberty, and that a major lesson of history is that a strong federal government works to protect ordered liberty better than does subsidiarity. But rule utilitarianism's response, as quaint as it may still sound to some, would answer: these alleged realities matter not in determining what genuine adherence to the rule of law requires.

270. The assumption that the historical context and such should be limited to a truly interstitial role might seem simplistic and question-begging. "Determining what survives a new revolution and what does not requires figuring out what is central to the content of the new constitutional departure. That task requires contestable interpretive choices. Richard A. Primus, *The Riddle of Hiram Revels*, 113 HARV. L. REV. 1, 28 (2006). Certainly one legitimate contender in the interpretive methodology debate is original intent and textualism, even if misguided in its application, or pretextual in its invocation.

timent that those who believe that federalism remains a meaningful constraint on federal power simply remain willfully ignorant of how historical context informs proper interpretation of the Constitution.[271] This type of posture reflects a failure to recognize that all views—including those that predominate among the most talented and respected today—are in part or whole the products of intellectual fashion, and that understanding those who hold unfashionable views is perhaps the quintessence of progressive exploration.

C. Toward a Measured Reframing of the Greater Narrative

Ideological privilege may be what's keeping many of *Shelby County*'s detractors from recognizing that what they perceive as hyper-formalism at best, or an undisciplined agenda-driven zeal for states' rights at worst, may actually be a form of pragmatism. As I have argued elsewhere,[272] when wrestling in the weeds of specific cases implicating specific political battles, Roberts Court decisions may appear to be provocative and ideologically driven. But when situated in their greater historical and analytical contexts, those decisions represent a resignation on the part of relatively conservative yet pragmatic justices that the only kind of federalism the Court can feasibly sustain is a symbolic and exceedingly flexible form. This 'penumbral federalism' allows for virtually unlimited federal activity on traditionally state regulatory turf, but at the margins it protects state 'dignity' and the like by symbolically invalidating federal laws that violate these 'penumbral' derivatives of the Tenth Amendment.[273]

Derek Muller has done an interesting job of specifically framing Roberts's opinion in *Shelby County* in these pragmatic terms. For example, he suggests that the Court's equal sovereignty concoction came about only after an effort to avoid resolving the congressional deference issue in a case in which a more aggressive court could have broken new ground.[274] In *Northwest Austin Municipal Utility District v. Holder*,[275] the petitioners asked the

271. Richard Fallon's assertion is worth repeating here: '[I]t is difficult if not impossible to approach historical problems without imposing analytical schemes that reflect contemporary concerns and preferences. Fallon, *supra* note 124, at 1148.

272. Edward Cantu, *The Roberts Court and Penumbral Federalism*, 64 CATH. U. L. REV. 271 (2015).

273. *Id.* at 289–90.

274. Muller, *supra* note 262, at 310–11.

275. 557 U.S. 193 (2009).

Court to invalidate the VRA specifically because the congressional power implicated by the context of the case could not withstand congruence and proportionality review.[276] Muller explains:

> When a Texas utility district sought a finding that the renewed Voting Rights Act was unconstitutional, the Court declined to address the issue and interpreted the statute to allow the utility district to pursue an alternative form of relief first. Because the Court did not reach the constitutional question it likewise found that it 'need not resolve' the question of the standard to apply. Breaking down the language in *Northwest Austin*, the Court noted that there were 'serious constitutional questions' whether it reviewed Congress's exercise of power under a 'rational' review or a 'congruence and proportionality' review.[277]

Muller's jurisprudential framing of the *Shelby County* opinion is sound, and it helps beg the question: far from being a specimen of conservative judicial activism, might *Shelby County* actually be an attempt at a pragmatic negotiation between all values at stake, including meaningful deference to federal power, judicial institutional legitimacy, constitutional fidelity to structural mandates, and the protection of substantive Fifteenth Amendment rights?

This rhetorical question, of course, assumes that the responder is inclined toward a methodology that takes seriously all the principles in the traditional bundle, including those principles that evoke no intuitive sense of that principle's value in on-the-ground social-justice terms.[278] For those inclined to think that 'brass tacks' pragmatism has no legitimate patience for abstractions like states' rights, perhaps the plausibility of an affirmative answer to the above question depends completely on the norma-

276. *Id.* at 196.

277. Muller, *supra* note 262, at 303–05.

278. Fishkin's arguments reflects the opposite attitude when he asserts that it would be a mistake to, in *Shelby County*, 'elevate a principle of equal [sovereignty] of the states to the status of a constitutional constraint on Reconstruction power, in a case about federal protection for minority voting rights. Fishkin, *supra* note 243, at 192. To Fishkin, what the case was "about" was apparently only those things he thought worth worrying about. No matter how hard we try to rhetorically stack the deck, there would have been no case at all in *Shelby County* were it not for the issue of what limits *federalism* places on congressional power.

tive desirability of limiting federal power.

While for the past eighty years one could be forgiven for assuming that cries of states' rights and social conservatism were intrinsically intertwined, the long-term trajectory of federalism as an advocacy tool reveals a different story. For example, the same tool that was used to defend the parochial prejudices of Southern states during the slavery and segregation controversies, was invoked (with partial success) to protect same-sex couples against the federal government via the Defense of Marriage Act. Likewise, California relied (very persuasively, even though unsuccessfully) on federalism arguments to protect its policy of marijuana legalization from federal interference.[279] Juxtaposing *Shelby County* and *United States v. Windsor*[280] highlights that neither side of the political spectrum can have it both ways when it comes to federalism.

Scholars such as Ernie Young have commented on how the political left in recent years has increasingly relied on federalism to protect against encroachment from 'conservative' federal policies.[281] For example, the State of Oregon, during the presidency of George W. Bush, successfully defended its physician-assisted suicide law[282] against the Attorney General's attempt to undermine Oregon's legalization of the practice through interpretation of the federal Controlled Substances Act;[283] the Supreme Court sided with Oregon.[284] And Ann Althouse has discussed how local governments have voiced formal opposition to what they believe are threats to individual rights by the Patriot Act.[285] Regarding global warming and environmental policy, Da-

279. *See* Gonzales v. Raich, 545 U.S. 1 (2005).

280. 33 S. Ct. 2675 (2013).

281. *See* Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1278 (2004) (describing how "some liberals have taken up the cause of state autonomy" in response to conservative national policies).

282. OR. REV. STAT. §§ 127.800–867 (2003).

283. 21 U.S.C. §§ 801–904 (2012).

284. Albeit on statutory interpretation grounds, not constitutional grounds. *See* Gonzales v. Oregon, 546 U.S. 243, 274–75 (2006).

285. Ann Althouse, *The Vigor of Anti-commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1252–57 (2004) (citing Carol Rose, *Ashcroft Bars the Doors to Democracy*, BOS. GLOBE, Sept. 16, 2003, at A19 (criticizing the Patriot Act's authorization of allegedly excessive surveillance, and supporting resolutions passed in "more than 160 towns and cities in support of the Bill of Rights and against the unconstitutional provisions' of the Act); *see also* John W. Dean, *Grassroots Opposition to Rights-Infringing Antiterrorism Tactics*, CNN (Sept. 15, 2003, 2:18 PM EDT), http://www.cnn.com/2003/LAW/09/15/findlaw.analysis.dean.patriot/ [https://perma.cc/LR2M-M2C4] (describing the proliferation of resolutions passed by

vid R. Hodas has noted that, during the George W. Bush presidency, '[a]t the federal level, all policy makers oppose[d] all efforts to control [Greenhouse Gas (GHG)] emissions, while by contrast, states took 'the opposite approach, encouraging GHG mitigation actions, whether big or small, at every turn,'[286] a state trend that began during the beginning of the Clinton presidency.[287] And any constitutional law professor who teaches *Massachusetts v. EPA*[288] must contend with helping students reconcile traditional standing analysis with an obvious desire by the majority justices to infuse federalism concerns into its analysis in order to allow Massachusetts to protect its air quality from federal regulatory laxness.

Thus, according to scholars such as Young, 'federalism has no dependable liberal or conservative valence as those terms are understood today in an intuitively political sense,'[289] and the left's instinctive suspicion toward federalism-based arguments is passé: 'to someone of my own (post-Baby Boom) generation, liberal antipathy to federalism seems so Sixties.'[290] That liberals are beginning to rethink this instinct is no surprise, given that the 'Democratic Party's dominance of Congress, from which liberals 'no doubt derived their preference for national power, finally came to an end during George W. Bush's presidency.[291] Thus, '[i]t is an ahistorical mistake to take the particular political patterns of the last third of a century for immutable structural truth.'[292]

Perhaps, then, those who react with visceral distrust toward invocations of states' rights are merely revealing that driving their

---

municipalities in opposition to the Patriot Act from 2002 to 2003).

286. David R. Hodas, State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?, 21 PACE ENVTL. L. REV. 53, 53–54 (2003).

287. *See id.* at 54 (writing in 2003 that '[b]eginning over a decade ago, there has been a steady drumbeat of announcements of state and local initiatives to mitigate global warming from the emission of greenhouse gases (GHG)").

288. 549 U.S. 497 (2007).

289. Young, *supra* note 281, at 1280.

290. *Id.* at 1302.

291. *Id.* at 1307.

292. *Id.* at 1308. Young, for example, notes Virginia's and Kentucky's opposition to the Alien and Sedition Acts and abolitionist Northern states' opposition to the federal Fugitive Slave Law, *Id.* at 1277, as well as the fact that some of the greatest progressive causes in American history initially got their momentum through local activism, nurtured by local power structures, such as abolition and the civil rights movement, *Id.* at 1287 (citing J. TAYLOR BRANCH, PARTING THE WATERS 128–205 (1988); Morgan Kousser, *"The Supremacy of Equal Rights' The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 NW. U. L. REV. 941 (1988)).

background premises is nothing more than a reflexive default to conflict theory, a reflex nurtured by intellectual fashions that feature an excessive glibness toward rule utilitarianism.[293] To those so attitudinally geared, taking states' rights seriously seems extreme.[294] Those who are more measured can easily frame *Shelby County* as a judicial backing-down by a court that recognizes that truly protecting federalism in its most formal dimensions is not worth its costs.

CONCLUSION

No scholar, regardless of the exaggerated claims to originality, will ever be able to definitively settle the interpretive question discussed above. It does not follow, however, that works that attempt to incrementally advance general understanding of the intended meaning of constitutional text are futile without groundbreaking-esque certitude. In fact, trustworthy work on these matters might be characterized by a tendency to further mystify rather than settle or clarify.

Perhaps the most significant benefit of the academic community's acceptance of ambiguity might be a greater tolerance, even if not agreement, of differing views, rather than strident denunciations or cursory dismissals of them. In turn, such tolerance might serve to recalibrate the boundaries of reasonable disagreement. This is sorely needed in this doctrinal context. For if the last fifteen years are any indicator of what is to come in the coming decades of doctrinal evolution, glib references to 'law as politics' will not do to prepare students for effective advocacy, or to prepare future scholars and lawyers for the increasing willing-

293. Fallon, *supra* note 124, at 1447 ("[I]t would be a reductionist mistake to view federal courts arguments as nearly always being crudely political ones in which judges and theorists claim for their predilections the status of the law. Functioning as ideal types of structures of thought, the [conflicting federalist and nationalist federalism] models do not deny the significance of ideological orientation, but illuminate the way in which ideology exerts its influence.").

294. Fishkin repeatedly suggests that anyone who takes ideas like equal sovereignty seriously is a bit brainwashed: "[T]he roots of such principle[s]' like equal sovereignty, he explains, are "found in the losing arguments of Reconstruction's opponents. Fishkin, *supra* note 243, at 192. Of course, he tames his assertion a bit with the caveat that jurists who doctinalize such principles would likely not do so with the *knowledge* that those principles are only the product of Southern post-War intellectual gymnastics. *See id.* at 237. But it does not seem to have occurred to Fishkin that acceptance of these principles might represent, in their greater context, a concession that Fishkin would almost certainly support: that in the modern world, states' rights principles generally should not control the outcomes of the cases in which they are invoked. After all, the Queen of England has plenty of dignity; but how much power does she have?

ness of legal thinkers to once again take federalism seriously, regardless of its faults.

On this score, this article has attempted to highlight not that the confronted scholars are 'wrong,' but rather that some of their work should not be treated as authoritative as it is often treated. There is plenty of evidence in the historical record to destabilize the insufficiently measured conclusion that the Reconstruction Amendments 'clearly' incorporate the *McCulloch* standard.

THE UNITED NATIONS AND THE RIGHT TO CONSCIENTIOUS OBJECTION IN THE HEALTH-CARE FIELD

MEGHAN GRIZZLE FISCHER*

* Meghan Grizzle Fischer is UN Counsel at ADF International. She received her J.D. from Harvard Law School in 2011 and her Bachelor's and Master's degrees in Linguistics from Harvard in 2007.

I. INTRODUCTION

In July 2014, the Mayor of Warsaw fired highly regarded Polish OB/GYN Bogdan Chazan from his position as director of Holy Family Hospital for refusing to perform an abortion on a baby with serious fetal abnormalities.[1] Dr. Chazan also had not referred the woman to a willing abortion provider, as he was not her primary doctor;[2] instead, he referred the woman to a hospice for palliative care for her child.[3] Donald Tusk, then-Prime Minister of Poland and current President of the European Council, weighed in and said that doctors should forgo their consciences so that patients may be sure that doctors will perform all legal procedures,[4] ignoring the fact that conscientious objection is protected in Polish law[5] and that over 3,000 Polish doctors and medical students have publicly indicated their opposition to participating in abortion and other reproductive health services.[6]

Poland has been pressured regularly by United Nations human rights bodies to regulate health-care providers' exercise of conscientious objection in the provision of abortion. Four bodies that monitor international human rights treaties—the International Covenant on Civil and Political Rights;[7] the International Covenant on Economic, Social and Cultural Rights;[8] the Conven-

1. Elise Harris, *Outcry Ensues over Top Polish Doctor Fired for Abortion Refusal*, NAT'L CATH. REG. (Aug. 4, 2014), http://www.ncregister.com/daily-news/outcry-ensues-over-top-polish-doctor-fired-for-abortion-refusal [https://perma.cc/GF3D-77H4].

2. *Id.*

3. Marcin Goettig & Aneta Pomieczynska, *Poland Asks: Should a Doctor Serve God, or Patients?*, REUTERS (July 9, 2014), http://www.reuters.com/article/us-poland-abortion-idUSKBN0FE1VF20140709 [https://perma.cc/6HHZ-NFXH].

4. *Poland's PM: Doctor's Duty Is above His Faith*, DAILY MAIL (June 10, 2014), http://www.dailymail.co.uk/wires/ap/article-2654020/Polands-PM-doctors-duty-faith.html [https://perma.cc/E4GJ-9KJ5].

5. Anand Grover (Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health), *Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Addendum: Mission to Poland*, ¶ 52, U.N. Doc. A/HRC/14/20/Add.3, annex (May 20, 2010) [hereinafter Grover] (emphasis added) (explaining that Article 39 of the Act of 5 December 1996 on the medical profession recognizes that "the doctor may abstain from accomplishing medical services discordant with his/her conscience ' The doctor must then "indicate real possibilities of obtaining the service from another doctor, or in another medical institution and justify his/her decision and mention about the refusal in the medical documentation. ').

6. *See* Robert Walley, *Official Statement: MCI Supports Dr. Bogdan Chazan* (June 12, 2014), http://www.matercare.org/news-publications/official-statements/official-statement-mci-supports-dr-bogdan-chazan/ [https://perma.cc/U4NA-AXAQ].

7. Human Rights Committee [HRC], Concluding observations of the Human Rights Committee: Poland, ¶ 12, U.N. Doc. CCPR/C/POL/CO/6 (Nov. 15, 2010).

8. Committee on Economic, Social and Cultural Rights [CESCR], Concluding observations of the Committee on Economic, Social and Cultural Rights: Poland, ¶ 28, U.N.

tion on the Elimination of All Forms of Discrimination Against Women;[9] and the Convention Against Torture[10]—have told Poland that it must structure its system of conscientious objection so that women have access to exercise their 'right' to abortion, including referral to other doctors willing and able to provide abortions.[11]

Anand Grover, United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health from 2008 to 2014, visited Poland and identified, as he understood the situation, the problem of the exercise of conscientious objection in abortion cases as a conflict between the right to conscience and the right to health: 'Healthcare providers' conscientious objection to involvement in certain health-related procedures is grounded in the right to freedom of religion, conscience and thought. However, the exercise of conscientious objection should not entail interference with sexual and reproductive health rights, which are *fundamental.*'[12]

As a solution to the burden placed on women seeking an abortion by a health-care provider who refuses to provide an abortion on the grounds of conscience, Grover identified providers' 'responsibility to treat an individual whose life or health is immediately affected, and otherwise to refer the patient to another provider who will perform the required procedure.'[13] In addition, he suggested that Poland record or register conscientious objectors.[14]

Doc. E/C.12/POL/CO/5 (Dec. 2, 2009).

9. Committee on the Elimination of Discrimination Against Women [CEDAW], Concluding observations on the combined seventh and eighth periodic reports of Poland, ¶¶ 36–37, U.N. Doc. CEDAW/C/POL/CO/7-8 (Nov. 14, 2014); CEDAW, Concluding comments of the Committee on the Elimination of Discrimination Against Women: Poland, ¶ 25, U.N. Doc. CEDAW/C/POL/CO/6 (Feb. 2, 2007).

10. Committee Against Torture [CAT], Concluding observations on the combined fifth and sixth periodic reports of Poland, ¶ 23, U.N. Doc. CAT/C/POL/CO/5-6 (Dec. 23, 2013).

11. *See, e.g., id.* ("The Committee is concerned about restrictions on access to abortion, especially for victims of rape, due to the refusal of some physicians and clinics to perform legal operations on the basis of conscientious objection. In accordance with the 2012 World Health Organization technical and policy guidance on safe abortion, the State party should ensure that the exercise of conscientious objection does not prevent individuals from accessing services to which they are legally entitled.').

12. Grover, *supra* note 5, ¶ 50 (emphasis added).

13. *Id.*

14. *See id.* ¶ 52. ("Without regularly updated information [about conscientious objectors], women's access to legal health services is seriously compromised.").

The case of Chazan in Poland is not isolated.[15] The threat to the conscience rights of health-care providers is present around the world. For example, two midwives in Sweden, Linda Steen and Ellinor Grimmark, were denied employment because of their conscientious objections to participating in abortions.[16] Mary Doogan and Connie Wood, senior midwives in Scotland, were told that as labor ward coordinators they would be required to coordinate staff for the performance of abortions, and therefore they brought a legal challenge to determine whether they would be obligated to participate.[17] How UN entities have addressed conscientious objection in Poland is thus important for more than just Chazan's case.

Further, the UN's treatment of Poland illustrates the broader treatment by UN entities of the exercise of conscientious objection in the health-care field. This article examines how health-care providers' right to conscientious objection, grounded in the right to freedom of thought, conscience, and religion, is treated by the United Nations when it comes into conflict with women's so-called right to abortion, which is grounded in the right to health.

Various United Nations entities, including human rights treaty bodies, special rapporteurs of the Human Rights Council, and global policy-setting agencies, treat conscientious objection[18] as a

15. *See* R.R. v. Poland, 53 Eur. Ct. H.R. 31, ¶ 206 (2011) (holding that, even though individual doctors could exercise conscientious objection, to comply with its obligations under article 8 of the European Convention on Human Rights on the right to respect for private life, Poland must "organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.").

16. *Sweden Faces Human Rights Problem*, ADF INT'L (Jan. 26, 2016), http://adfinternational.org/detailspages/press-release-details/sweden-faces-human-rights-problem [https://perma.cc/94A7-KNNG]; *see also* Fed'n of Catholic Families in Europe (FAFCE) v. Sweden, European Comm. of Soc. Rights, ¶ 71, Compl. No. 99/2013 (July 27, 2015), http://hudoc.esc.coe.int/eng/?i=cc-99-2013-dmerits-en [https://perma.cc/3GC8-C8MC] (discussing a claim brought by a European federation before the European Committee of Social Rights, which monitors the European Social Charter, a Council of Europe treaty, alleging that Sweden's failure to recognize in law a right to conscientious objection for health-care providers is a violation of the Charter's article 11 on the right to protection of health; the Committee found that article 11 does not include a right to conscientious objection).

17. *Four Reasons for Hope in the Scottish Midwives Case*, ADF INT'L (Mar. 25, 2015), http://adfinternational.org/detailspages/blog-details/commentary/2015/03/25/four-reasons-for-hope-in-the-scottish-midwives-case [https://perma.cc/4RBJ-U9EC].

18. Many health-care providers—doctors, nurses, and anesthesiologists, among others—object on the grounds of conscience to a number of practices, such as prescribing contraception to adolescents without parental consent, facilitating fertility treatments such as in vitro fertilization, injecting lethal drugs into an inmate sentenced to the death

nominal right that must be limited in practice, even though the conflicting 'right to abortion' is not enumerated or even mentioned in international human rights treaties. The Article then evaluates the 'compromise' positions promoted by these UN entities, including requiring referral to other providers and direct provision of abortion in the event of a life- or health-threatening emergency, actions that are still participatory and therefore morally problematic for many health-care providers who conscientiously object to providing abortion. The UN and its various bodies and representatives are therefore not sympathetic to the exercise of conscientious objection in the context of health care. This, ultimately, is based on a flawed understanding of conscientious objection, one that views it as a moral judgment rather than an exercise of personal liberty recognized in international human rights law.

II. INTERNATIONAL LAW

It is beyond the scope of this Article to comprehensively examine international law on the right to health and the right to freedom of conscience. However, a brief consideration of these rights, and how they are perceived by States, is necessary before discussing how United Nations entities treat them.

A. International law on the right to health

International law explicitly guarantees the right to health, but there is disagreement among States, United Nations entities, and non-governmental organizations (NGOs) about what is included in that right. International Covenant on Economic, Social and Cultural Rights (ICESCR) article 12(1) states, 'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'[19] Article 12 does not enumerate an exhaustive list of components of the right to health, and in particular does not include any mention of abortion.[20] Article 12(2)(a) includes

penalty, participating in euthanasia and physician-assisted suicide, and withdrawing or not providing artificial hydration and nutrition in end-of-life care. However, because UN bodies have focused primarily on conscientious objection specifically to participation in abortion, this Article focuses on that topic. The principles of the right to conscience nevertheless apply to these other areas of medical practice.

19. International Covenant on Economic, Social and Cultural Rights [ICESCR] art. 12(1), Dec. 16, 1966, 993 U.N.T.S. 3.

20. *See id.*

[t]he provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child' as a necessary step 'to achieve the full realization of this right '[21]

The Committee on Economic, Social and Cultural Rights (CESCR) recently issued General Comment No. 22, claiming that article 12 includes a right to sexual and reproductive health, and that as a component of this right, States should liberalize abortion laws and guarantee women access to abortion.[22]

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) article 12(1) requires States Parties to 'take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. '[23] Article 12(2) requires States Parties to provide women 'appropriate services in connection with pregnancy, confinement and the post-natal period '[24]

Article 24 of the Convention on the Rights of the Child (CRC) recognizes 'the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. '[25]

Despite the lack of any specific mention of abortion in the treaties, and despite the intent of the drafters of the International Covenant on Civil and Political Rights (ICCPR) to recognize that unborn life is worthy of protection,[26] UN entities nevertheless use these specific provisions to assert that abortion is included in the international right to health. As noted in the introduction, Special Rapporteur on the right to health Anand Grover even called 'sexual and reproductive health rights, a term that does not appear in any international treaty and is widely understood to include abortion, 'fundamental. '[27]

---

21. *Id.* art. 12(2)(a).

22. CESCR, General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the ICESCR), ¶ 28, U.N. Doc. E/C.12/GC/22 (Mar. 4, 2016).

23. CEDAW, Dec. 18, 1979, 1249 U.N.T.S. 13.

24. *Id.*

25. Convention on the Rights of the Child, Nov. 20 1989, 1577 U.N.T.S. 3.

26. *See Contribution to the General Discussion on the Preparation for General Comment No. 36 Article 6 of the ICCPR: Right to Life,* ADF INT'L (June 12, 2015), https://adflegal.blob.core.windows.net/international-content/docs/default-source/default-document-library/legal-documents/united-nations/un-hrc-iccpr-article-6/adf-international-submission-on-article-6-iccpr.pdf?sfvrsn=8 [https://perma.cc/7KCX-YFX9].

27. Grover, *supra* note 5, ¶ 50.

The CEDAW Committee has recommended that States ensure access to 'family planning services, including emergency contraception, and 'safe abortion services' as components of the right to health.[28] The CRC Committee has recommended that as components of the right to health, States 'consider allowing children to consent to certain medical treatments and interventions without the permission of a parent such as sexual and reproductive health services, including education and guidance on sexual health, contraception and safe abortion. '[29]

Further, international NGOs that exert influence on the UN's treatment of abortion, such as the Center for Reproductive Rights[30] and the International Planned Parenthood Federation,[31] also argue that the international right to health is the basis for an international right to abortion.

Again, international law says nothing about a right to abortion, and it is not mentioned in any international human rights treaty.[32] Full engagement of this question is beyond the scope of this Article. However, the evidence included in this Article shows that many UN entities assume that the right to health includes a right to abortion, at least in countries where abortion is legal, which colors these entities' treatment of conscientious objection in the health-care field.

---

28. CEDAW, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, ¶ 52(c), U.N. Doc. CEDAW/C/GC/30 (Nov. 1, 2013).

29. Comm. on the Rights of the Child, General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (Art. 24), ¶ 31, U.N. Doc. CRC/C/GC/15 (Apr. 17, 2013) [hereinafter CRC General Comment 15].

30. *See, e.g., Bringing Rights to Bear: Abortion and Human Rights*, CTR. FOR REPROD. RIGHTS (Oct. 2008), http://www.reproductiverights.org/document/bringing-rights-to-bear-abortion-and-human-rights [https://perma.cc/NYV6-6RFF].

31. *See generally, e.g.*. INT'L PLANNED PARENTHOOD FED'N, ACCESS TO SAFE ABORTION: A TOOL FOR ASSESSING LEGAL AND OTHER OBSTACLES (June 2008), http://www.ippf.org/sites/default/files/access_to_safe_abortion.pdf [https://perma.cc/UBG9-HRZ9].

32. The Maputo Protocol, an African human rights treaty, does contain a provision requiring States Parties to "protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus." Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa art. 14(2)(c), July 11, 2003. However, the Maputo Protocol has been ratified by only two-thirds of African countries, with several making reservations on this provision. *See* African Commission on Human & Peoples' Rights, Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, http://www.achpr.org/instruments/women-protocol/ratification/ [https://perma.cc/QKG2-3XB7] (last visited Mar. 10, 2016).

B. International law on the right to conscience

The Universal Declaration of Human Rights (UDHR) acknowledges in its first article that '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience '[33] With this statement, the UDHR—the first United Nations effort to capture international consensus on fundamental human rights[34]—explicitly ties conscience to human dignity and understands that a person's conscience is essential to his being. The UDHR thus recognizes freedom of conscience, alongside freedom of religion and thought, in its article 18.[35]

ICCPR article 18 also guarantees 'the right to freedom of thought, conscience and religion.'[36] Article 18(1) identifies a right 'to manifest [one's] religion or belief in worship, observance, practice and teaching.'[37] Article 18(3) specifies that this '[f]reedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'[38]

The Human Rights Committee (HRC), the body created to monitor States' implementation of the ICCPR, elaborated on and emphasized the wide scope of article 18 in its General Comment No. 22. Article 18, which is non-derogable,[39] 'is far-reaching and profound,'[40] and the freedom to manifest religion 'encompasses a broad range of acts.'[41] Restrictions on the freedom to manifest religion, outlined in article 18(3), 'must not be applied in a manner that would vitiate the rights guaranteed in article 18.'[42] Further, they 'may be applied only for those purposes for which they were prescribed and must be directly relat-

33. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

34. *See Universal Declaration of Human Rights, History of the Document*, UNITED NATIONS, http://www.un.org/en/sections/universal-declaration/history-document/ [https://perma.cc/S3HB-L63X] (last visited Dec. 20, 2016).

35. UDHR, *supra* note 33.

36. International Covenant on Civil and Political Rights [ICCPR] art. 18(1), Dec. 19, 1966, 999 U.N.T.S. 171.

37. *Id.*

38. *Id.* art. 18(3).

39. *Id.* art. 4(2).

40. HRC, General Comment No. 22: Article 18: Freedom of thought, conscience or religion, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993) [hereinafter HRC General Comment 22].

41. *Id.* ¶ 4.

42. *Id.* ¶ 8.

ed and proportionate to the specific need on which they are predicated."[43]

Heiner Bielefeldt, UN Special Rapporteur on freedom of religion or belief from 2010 to 2016, writing on the exercise of freedom of religion, conscience, or belief in the workplace context, states:

> [These] restrictions must remain within the realm of proportionality, which, inter alia, means that they must always be limited to the *minimum degree of interference* that is necessary to pursue a legitimate purpose. These criteria are prescribed with a view to safeguarding the essence of freedom of religion or belief, even in situations of conflict with the rights or freedoms of others or with important public interests.[44]

He continues: 'The onus of proof therefore falls on those who argue in favour of the limitations, not on those who defend the full exercise of a right to freedom. '[45] The default then should be the protection of the exercise of conscience.

The HRC has not examined whether the right to conscience specifically includes a right to refuse to perform certain medical services on the grounds of conscience, but in General Comment No. 22, it recognized that the right to refuse to perform military service on the grounds of conscience 'can be derived from article 18. '[46] The language the HRC used to justify the derivation of this right can be applied to the provision of abortion, as viewed by the objector: 'the obligation to use lethal force, in a system that does not allow a health-care provider to opt out of providing an abortion on grounds of conscience, 'may seriously conflict with the freedom of conscience and the right to manifest one's

43. *Id.*

44. Heiner Bielefeldt (Special Rapporteur on freedom of religion or belief), *Interim rep. of the Special Rapporteur on freedom of religion or belief*, ¶ 35, U.N. Doc. A/69/261 (Aug. 5, 2014) [hereinafter Workplace Freedom of Religion Report] (emphasis added). Although in this excerpt he refers to "freedom of religion or belief," it is clear from his broader comments that he includes the exercise of freedom of conscience therein, especially as he identifies the conscientious objection of doctors and nurses to being involved with abortions as manifestation of beliefs in the workplace; *see id.* at 6 n.4.

45. *Id.* ¶ 36.

46. HRC General Comment 22, *supra* note 40, ¶ 11.

religion or belief.'[47] The HRC later determined that the right to conscientious objection exists not only if recognized by a State, but that States are obligated to recognize it.[48] The European Court of Human Rights has also used reasoning that can apply to conscientious objection in the health-care field. In deciding in favor of a military conscientious objector in 2011, the court emphasized that 'the system existing at the material time imposed on citizens an obligation which had potentially serious implications for conscientious objectors while failing to allow any conscience-based exceptions' that 'system failed to strike a fair balance between the interests of society as a whole and those of the applicant, especially because 'no allowances were made for the exigencies of his conscience and beliefs.'[49] By analogy, a legal system that does not recognize a right to conscientious objection in the health-care field fails to accommodate the demands of health-care providers' consciences and does not balance society's interests with the individual's.[50]

Organizations that promote legalization of abortion and access to abortion recognize that there is a right to conscientiously object in the health-care field; such organizations include the Center for Reproductive Rights[51] and Human Rights Watch.[52]

CESCR has stated that the 'obligation to protect' found in

47. *Id.*

48. HRC, Views: Communications Nos. 1321/2004 and 1322/2004, U.N. Doc. CCPR/C/88/D/1321-1322/2004 (Jan. 23, 2007); *see also* OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS [OHCHR], CONSCIENTIOUS OBJECTION TO MILITARY SERVICE 11, 14 (2012) [hereinafter OHCHR Conscientious Objection], http://www.ohchr.org/Documents/ Publications/ConscientiousObjection_en.pdf [https://perma.cc/XD42-PZP5].

49. Bayatyan v. Armenia, 54 Eur. Ct. H.R. 15, ¶ 124 (2011).

50. *See Case of Ellinor Grimmark (19760930-2406) vs. Landstinget i Jönköpings Län.*, ALL. DEFENDING FREEDOM (July 3, 2014), http://www.adfmedia.org/files/GrimmarkBrief.pdf [https://perma.cc/X4U7-UZ4P].

51. *See* CTR. REPROD. RIGHTS, CONSCIENTIOUS OBJECTION AND REPRODUCTIVE RIGHTS: INTERNATIONAL HUMAN RIGHTS STANDARDS 1 (2013), http://www.reproductiverights.org/ sites/crr.civicactions.net/files/documents/_Conscientious_FS_Intro_English_FINAL.pdf [https://perma.cc/3FQX-BTC5] ("The right to conscientiously object to providing health services means that health care professionals may legitimately be able to refuse to provide certain services because they are contrary to their personal convictions.").

52. *See Comprehensive Approach to Regulating Conscientious Objection in the Health Care Field Needed*, AMNESTY INT'L & HUMAN RIGHTS WATCH, https://www.hrw.org/sites/ default/files/related_material/Statement%20by%20Amnesty%20International%20and%20 Human%20Rights%20Watch%20- %20Comprehensive%20approach%20to%20regulating%20conscientious%20objection.p df [https://perma.cc/A32S-YKRN] ("International standards recognize the importance of conscientious objection to the exercise of an individual's fundamental right to freedom of thought, conscience, and religion.").

ICESCR article 12's right to health 'requires States to take measures that prevent third parties from interfering with Article 12 guarantees,'[53] which can implicate the right to conscience. However, restrictions on the right to conscience still must meet the threshold outlined in ICCPR article 18(3).

The question, then, is how much this right can be limited under international law, and whether the limitations on the manifestation of the freedom of religion—here, the exercise of conscientious objection—proposed by various United Nations mechanisms in the context of health care 'vitiate'[54] the right to freedom of religion.

III. THE UNITED NATIONS ON CONSCIENTIOUS OBJECTION IN THE HEALTH-CARE FIELD

The United Nations is a large organization and has various bodies and human rights mechanisms.[55] A number of them have made pronouncements on the exercise of conscientious objection in the health-care field. None of these pronouncements is legally binding, but States often take UN recommendations seriously and sometimes change their laws and practices to accord with them.[56]

A. Positive language on the right to conscientious objection

Some UN entities have acknowledged that there is a right to conscientious objection in the health-care field. However, such acknowledgement has always been accompanied by a call to limit or regulate the exercise of that right, as extensively detailed below. This translates into support for the freedom to conscientiously object only in principle, but not in practice—that is, support for the *idea* of conscientious objection, but not when it actually is exercised and its exercise impacts other people.

Special Rapporteur on the freedom of religion or belief Heiner Bielefeldt has spoken positively about the right to conscientious objection in the health-care field, starting from the position

53. CESCR, General Comment No. 14: The right to the highest attainable standard of health, ¶ 33, U.N. Doc E/C.12/2000/4 (Aug. 11, 2000).

54. HRC General Comment 22, *supra* note 40, ¶ 8.

55. *See Human Rights Bodies*, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx [https://perma.cc/HQT2-9PDV] (last visited Dec. 21, 2016).

56. *See* Kelsey Zorzi, *The Impact of the United Nations on National Abortion Laws*, 65 CATH. U. L. REV. 409 (2015).

that the legal order is responsible for accommodating the exercise of conscientious objection, and not from a position where that right is only secondary to other rights.[57] At an event on conscientious objection in the health-care field, Bielefeldt stated that health-care institutions 'should try to accommodate conscientious objection, especially in 'sensitive areas' like abortion.[58] Nevertheless, he narrowed the right, saying that conscientious objectors must inform institutions of their objection, notify patients once a conflict arises, allow for a referral to a willing provider, and possibly even perform an abortion if the woman's life is threatened.[59]

The absence of positive treatment of the right to conscientious objection in the health-care field is in contrast to the outright recognition and support of the right to conscientious objection to military service by UN entities.[60]

B. No call for recognition of the right to conscientious objection

Several countries do not guarantee health-care providers a right to conscientious objection,[61] despite the fact that even the Center for Reproductive Rights and Human Rights Watch recognize its existence.[62] However, human rights treaty bodies, including the ICCPR-monitoring HRC, have never reprimanded a country for failing to protect this component of the right to conscience. No United Nations body has issued any document promoting the right to conscientious objection in the health-care field. Instead, any mention of conscientious objection by health-care providers is focused on limiting the exercise thereof, even though the right to freedom of conscience and religion, and the manifestation thereof, is recognized as a fundamental right in article 18 of the ICCPR.[63]

---

57. Officiel ECLJ, *Conscientious Objection, UN Special Rapporteur on the freedom of religion or belief*, YOUTUBE (Mar. 11, 2016), https://www.youtube.com/watch?v=G22qRHykhAk [https://perma.cc/RW5X-EU92].

58. *Id.*

59. *Id.*

60. *See* OHCHR Conscientious Objection, *supra* note 48.

61. Anna Heino et al. *Conscientious Objection and Induced Abortion in Europe*, 18 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 231 (2013) (noting that several European countries, including Sweden, Finland, Bulgaria, Iceland, and the Czech Republic, do not recognize a right to conscientious objection).

62. *See supra* notes 51–52 and accompanying text.

63. *See* ICCPR, *supra* note 36.

C. Promotion of restrictions on the right to conscientious objection

On the contrary, most discussion of conscientious objection in the health-care field by UN entities has been focused on limiting its exercise. Most criticism of the exercise of conscientious objection has occurred in the past ten years, and has increased recently, coinciding with the UN's push for the recognition of so-called 'sexual and reproductive health and rights. Criticism takes different forms, with treaty bodies and special rapporteurs targeting specific countries' laws and policies, although they also issue general pronouncements. UN agencies typically issue policy recommendations directed at all countries, although they sometimes praise or condemn individual State practices.[64]

1. What kind of entities?

Notably, the UN entities that treat conscientious objection as a limited right are not the bodies in which Member States negotiate and vote, such as the General Assembly, the Human Rights Council, and the Economic and Social Council commissions. It is unelected individuals with special mandates to independently investigate and report on human rights violations—treaty bodies and rapporteurs—as well as agencies with no accountability to Member States, who are leading the UN efforts to degrade the right to conscientious objection. While the battle to introduce language related to 'sexual and reproductive health and rights' rages in many negotiations,[65] there has been no consensus among Member States to limit the freedom of conscience.[66]

2. Human rights treaty bodies

Each major international human rights treaty established a body to monitor countries' implementation and maintenance of

64. *See, e.g.*, ICESCR, *supra* note 19.

65. *See, e.g.*, Elyssa Koren, *The Fight over Abortion in the UN's New International Development Agenda*, PUB. DISCOURSE (Mar. 2, 2016), http://www.thepublicdiscourse.com/2016/03/16470/ [https://perma.cc/W7L4-Y87W] (discussing the UN's attempt to craft pro-abortion language in its "indicators' used to track countries' progress in meeting the UN's Sustainable Development Goals); Elyssa Koren, *Life, Marriage and Family Must Be Affirmed at UN General Assembly Session*, ZENIT (Sept. 11, 2014), https://zenit.org/articles/life-marriage-and-family-must-be-affirmed-at-un-general-assembly-session/ [https://perma.cc/8VQ7-FNSF] [hereinafter *Life, Marriage and Family*] (noting the frequent impasse within the General Assembly that results from resolutions containing pro-abortion language).

66. *See Life, Marriage and Family*, *supra* note 65 ("[D]iscussions surrounding issues of abortion often result in an impasse that is only resolved at the eleventh hour.").

their treaty obligations.[67] These human rights treaty bodies issue both general recommendations and elaborations on rights enumerated in the treaties—as they interpret them—and specific observations on individual countries' progress in meeting and keeping their commitments. Human rights treaty bodies do not have binding authority over States Parties to the treaties, but their pronouncements carry weight and are often taken seriously by States, with some States even changing their laws in accordance therewith.[68] In recent years, these bodies increasingly have used their platform to criticize States' 'unregulated' allowance of the practice of conscientious objection.

i. General recommendations

Two treaty bodies, CEDAW and CRC, have issued general recommendations or comments that touch on the exercise of conscientious objection in the health-care field. CEDAW General Recommendation No. 24 on the right to health states:

> It is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.[69]

CEDAW reiterated this position in a statement on sexual and reproductive health and rights for the Beyond 2014 ICPD Review. After calling for the legalization of abortion,[70] CEDAW urges States Parties to 'further organize health services so that the

67. *Monitoring the Core International Human Rights Treaties*, OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx [https://perma.cc/GB25-KFBX] (last visited Mar. 16, 2016).

68. *See* Zorzi, *supra* note 56.

69. CEDAW, General Recommendation No. 24: Article 12 of the Convention (Women and Health), Chap. I, ¶ 11, U.N. Doc. A/54/38/Rev.1 (1999) [hereinafter CEDAW General Recommendation 24].

70. Rep. of CEDAW, Statement of the Committee on the Elimination of Discrimination Against Women on sexual and reproductive health and rights: Beyond 2014 ICPD review, Annex 2, U.N. Doc. CEDAW/C/2014/I/CRP (Feb. 2014) ("States parties should legalize abortion at least in cases of rape, incest, threats to the life and/or health of the mother, or severe foetal impairment . . .").

exercise of conscientious objection does not impede their effective access to reproductive health care services, including abortion and post-abortion care.'[71]

In a section on family planning, the CRC's General Comment No. 15 on the right to health recommends, 'States should ensure that adolescents are not deprived of any sexual and reproductive health information or services due to providers' conscientious objections.'[72]

Neither CEDAW's nor CRC's recommendation on its face condemns the exercise of conscientious objection, yet what each body recommends may be problematic. Neither recommendation details which measures should be introduced to ensure patients' access to the right to health. Yet some bodies' concluding observations recommend more specific action, which could violate health-care providers' right to conscience, as discussed in section IV.

ii. Concluding observations

Human rights treaty bodies evaluate States' fulfillment of their obligations under human rights treaties and issue concluding observations to tell the States how to fulfill these obligations. Some bodies, most often CEDAW, have used the State review process to criticize the exercise of conscientious objection by health-care providers.[73]

In one case, CEDAW lauded South Africa—noting 'with satisfaction'—for ensuring 'that while health workers are not forced to participate in the provision of legal abortions, they may not obstruct access to services for termination of pregnancy.'[74]

In 2015, CEDAW told Croatia it was concerned '[t]hat the right to abortion is being denied by hospitals on the ground of conscientious objection although this 'right' is recognized only to individual doctors and that hospitals are legally required to ensure the provision of abortions.'[75] Notably, CEDAW conde-

71. *Id.*

72. CRC General Comment 15, *supra* note 29, ¶ 69.

73. *See, e.g.*, CAT, Concluding observations on the second periodic report of the Plurinational State of Bolivia as approved by the Committee at its fiftieth session, ¶ 23, U.N. Doc. CAT/C/BOL/CO/2 (June 14, 2013) (focusing on the judiciary's exercise of the right to conscientious objection when it told Bolivia in 2013 that such exercise has been an "insurmountable obstacle" to women's obtaining abortions in rape cases).

74. CEDAW, Consideration of reps. of states parties: South Africa, Ch. IV, ¶ 113, U.N. Doc. A/53/38/Rev.1 (1998).

75. CEDAW, Concluding observations on the combined fourth and fifth periodic

scendingly refers to the right of conscientious objection as a 'right,' in quotation marks, suggesting that conscientious objection is not an actual right, while abortion is.[76] Further, it provides no argument for its point that conscientious objection can only be exercised on an individual basis. CEDAW then urges Croatia to '[e]nsure that the exercise of conscientious objection does not impede women's effective access to reproductive health care services, especially abortion and post-abortion care as well as contraceptives.'[77]

In 2013, CEDAW likewise told Hungary, in the face of 'increasing resort to conscientious objection by health professionals,'[78] to '[e]stablish an adequate regulatory framework and a mechanism for monitoring of the practice of conscientious objection by health professionals and ensure that conscientious objection is accompanied by information to women about existing alternatives and that it remains a personal decision rather than an institutionalized practice.'[79] CEDAW again provided no justification for its assertion that conscientious objection can only be 'personal' and not institutional.[80]

In 2015, CEDAW told Ecuador it was 'concerned' about 'recourse to conscientious objection by health personnel, which prevents women from gaining access to modern methods of contraception.'[81] Although CEDAW could have phrased its concern as being about women's lack of access to contraception, it instead highlighted the exercise of conscientious objection as the concern.[82] CEDAW's word choice matters, and it again chose to emphasize conscientious objection as a negative.

CEDAW also expressed disapproval of the exercise of conscientious objection by health-care providers in Uruguay in 2016,[83] Portugal in 2015[84] and 2008,[85] Slovakia in 2015[86] and 2008,[87] Peru

reps. of Croatia, ¶ 30(a), U.N. Doc. CEDAW/C/HRV/CO/4-5 (July 28, 2015).

76. *See id.*

77. *Id.* ¶ 31(a).

78. CEDAW, Concluding observations on the combined seventh and eighth periodic reps. of Hungary, ¶ 30, U.N. Doc. CEDAW/C/HUN/CO/7-8 (Mar. 26, 2013).

79. *Id.* ¶ 31(d).

80. *See id.*

81. CEDAW, Concluding observations on the combined eighth and ninth periodic reps. of Ecuador, ¶ 32(d), U.N. Doc. CEDAW/C/ECU/CO/8-9 (Mar. 11, 2015).

82. *See id.*

83. CEDAW, Concluding observations on the combined eighth and ninth periodic reps. of Uruguay, ¶ 34, U.N. Doc. CEDAW/C/URY/CO/8-9 (July 25, 2016).

84. CEDAW, Concluding observations on the combined eighth and ninth periodic reps. of Portugal, ¶ 37, U.N. Doc. CEDAW/C/PRT/CO/8-9 (Nov. 24, 2015).

in 2014,[88] and Italy in 1997.[89] In a special Optional Protocol article 8 inquiry[90] in 2015, CEDAW also urged the Philippines to regulate conscientious objection.[91] Meanwhile, CESCR chastised the allowance of conscientious objection in Italy in 2015,[92] Romania in 2014,[93] and Spain in 2012.[94]

The HRC lauded Colombia in 2010 for decriminalizing abortion in some circumstances, but urged it to stop health providers from refusing to provide abortions.[95] The HRC refrained from acknowledging such practice as 'conscientious objection, instead using the less charitable verb 'refuse' and ignoring the fact that refusal often involves the exercise of conscience.[96] It lamented that 'despite Ministry of Health Decree No. 4444 of 2006, health-service providers refuse to perform legal abortions.'[97] The HRC enjoined Colombia to 'ensure that health providers and medical professionals act in conformity with the ruling of the Court and do not refuse to perform legal abortions.'[98] However, Decree No. 4444 was suspended in 2009,[99]

85. CEDAW, Concluding observations of the Committee on the Elimination of Discrimination Against Women: Portugal, ¶ 42, U.N. Doc. CEDAW/C/PRT/CO/7 (Apr. 1, 2009).

86. CEDAW, Concluding observations on the combined fifth and sixth periodic reps. of Slovakia, ¶¶ 30(d), 31(d), U.N. Doc. CEDAW/C/SVK/CO/5-6 (Nov. 25, 2015).

87. CEDAW, Draft concluding observations of the Committee on the Elimination of Discrimination Against Women: Slovakia, ¶¶ 28–29, U.N. Doc. CEDAW/C/SVK/CO/4 (July 17, 2008).

88. CEDAW, Concluding observations on the combined seventh and eighth periodic reps. of Peru, ¶ 36(d), U.N. Doc. CEDAW/C/PER/CO/7-8 (July 24, 2014).

89. CEDAW, Consideration of reps. of states parties: Italy, ¶¶ 353, 360, U.N. Doc. A/52/38/Rev.1 (Aug. 12, 1997).

90. G.A Res. 54/4, Optional Protocol to CEDAW (Oct. 6, 1999) ("[e]stablishes an inquiry procedure that allows the Committee to initiate a confidential investigation by one or more of its members where it has received reliable information of grave or systematic violations by a State Party of rights established in the Convention").

91. CEDAW, Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 52(f), U.N. Doc. CEDAW/C/OP.8/PHL/1 (Apr. 22, 2015).

92. CESCR, Concluding observations on the fifth periodic rep. of Italy, ¶¶ 48–49, U.N. Doc. E/C.12/ITA/CO/5 (Oct. 28, 2015).

93. CESCR, Concluding observations on the combined third to fifth periodic reps. of Romania, ¶ 22, U.N. Doc. E/C.12/ROU/CO/3-5 (Dec. 9, 2014).

94. CESCR, Concluding observations of the Committee on Economic, Social and Cultural Rights: Spain, ¶ 24, U.N. Doc. E/C.12/ESP/CO/5 (June 6, 2012).

95. *See* HRC, Concluding observations of the Human Rights Committee: Colombia, ¶ 19, U.N. Doc. CCPR/C/COL/CO/6 (Aug. 4, 2010).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Legal Interpretation of the Temporary Suspension of Abortion Regulations. The Right to Have an Abortion Stands*, WOMEN'S LINK WORLDWIDE (Oct. 22, 2009), http://www2.womenslinkworldwide.org/wlw/new.php?modo=detalle_prensa&dc=157&l

continued to be suspended at the time the HRC made its recommendations, and later was nullified by the highest administrative court;[100] therefore, the HRC referenced an inoperative decree. Further—and more tellingly—neither the decree nor the referenced ruling, Constitutional Court ruling C-355 of 2006, which decriminalized abortion in some circumstances, requires health providers to perform abortions. While one may surmise based on the HRC's pronouncements that both the decree and the ruling forbid the exercise of conscientious objection, both actually recognize the right to conscientious objection,[101] with the decree also stating that health providers cannot be discriminated against for exercising this right.[102]

3. Special rapporteurs and working groups

The UN Human Rights Council—a forty-seven-member body designed specifically to protect and promote human rights—selects special rapporteurs and working groups, collectively called special procedures, to investigate and report on human rights violations in certain fields in various countries.[103] Special rapporteurs and working groups also issue general reports on the rights they are charged with covering, although both their reports and their recommendations to countries are not binding. Paul Hunt, Special Rapporteur on the right to health from 2002 to 2008, stated in 2005 that health professionals who refuse to provide certain information have 'been complicit in human rights violations.'[104] These health professionals' '[p]ersonal views may be inconsistent with the rights of patients. For example, in some countries, health professionals make deci-

---

ang=en [https://perma.cc/N582-AEGA].

100. Luisa Cabal et al. *Striking a Balance: Conscientious Objection and Reproductive Health Care from the Colombian Perspective*, 16 HEALTH & HUM. RTS. J. 73, 77 (2014).

101. *C-355/2006 Corte Nacional: Constitutional Court*, WOMEN'S LINK WORLDWIDE (May 10, 2006), http://www2.womenslinkworldwide.org/wlw/ new.php? modo= observatorio&id_decision=277 [https://perma.cc/EU2L-LBAU].

102. *Making Abortion Services Accessible in the Wake of Legal Reforms: A Framework and Six Case Studies*, GUTTMACHER INSTITUTE (Apr. 2012), https://www.guttmacher.org/report/making-abortion-services-accessible-wake-legal-reforms-framework-and-six-case-studies [https://perma.cc/5DR4-7FWU].

103. *Special Procedures of the Human Rights Council*, UNITED NATIONS, http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx [https://perma.cc/W9TR-Y65G] (last visited Dec. 21, 2016).

104. Paul Hunt (Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health), *Rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, ¶ 9, U.N. Doc. A/60/348 (Sept. 12, 2005).

sions based on their own views and conscience [to] deny sexual and reproductive health information to women or adolescents.'[105] Whether a health professional chooses to provide such information 'can mean the difference between the protection or violation of human rights.'[106]

Anand Grover, the special rapporteur who so strongly opposed the exercise of conscientious objection in Poland, lamented in a 2011 report to the UN General Assembly that conscientious objection 'contribute[s] to making legal abortions inaccessible. Conscientious objection laws create barriers to access by permitting health-care providers and ancillary personnel, such as receptionists and pharmacists, to refuse to provide abortion services, information about procedures and referrals to alternative facilities and providers.'[107] Grover specifically called on States, in order to be in line with 'international human rights law, to [e]nsure that conscientious objection exemptions are well-defined in scope and well-regulated in use and that referrals and alternative services are available in cases where the objection is raised by a service provider.'[108]

Another special procedure, the UN Working Group on the issue of discrimination against women in law and in practice, visited the United States in late 2015 as part of its mandate. The Working Group lamented that the 2014 *Hobby Lobby* decision by the U.S. Supreme Court,[109] which found in favor of employers who object on the grounds of conscience to providing insurance coverage for drugs and services they view as potentially life-ending,[110] would allow freedom of religion to trump women's ability to access contraceptives.[111] The Working Group ignored the possibility that freedom of religion allows employers to exercise freedom of conscience when insuring their employees and

105. *Id.*

106. *Id.*

107. Anand Grover (Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health), *Interim rep. of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, ¶ 24, U.N. Doc. A/66/254 (Aug. 3, 2011).

108. *Id.* ¶ 65(m).

109. Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751 (2014).

110. *Id.* at 2759.

111. *UN Working Group on the Issue of Discrimination Against Women in Law and in Practice Finalizes Country Mission to the United States*, U.N. OFFICE OF THE HIGH COMM'R (Dec. 11, 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16872& LangID=E. [https://perma.cc/V3YZ-VJQG].

instead favored 'women's equal right to decide freely and responsibly on the number and spacing of their children which includes women's right to access contraceptives.'[112] The Working Group also called on the U.S. 'to prohibit refusal to provide sexual and reproductive health services on grounds of religious freedom, where such refusal will effectively deny women immediate access to the health care to which they are entitled under both international human rights law and US law.'[113] The religious freedom of doctors, according to the Working Group, should be subjugated to the health-care decisions of their patients.

Earlier in 2015, the Working Group told Spain that its 'progressive law' on abortion is hindered by 'gaps in its implementation, because the law also allows for exemptions owing to conscientious objection.'[114] It called for the removal of the 'obstacle[]' of 'blanket refusal in certain regions, on grounds of conscientious objection, to provide abortions'[115] In 2013, the Working Group also criticized the attempted introduction in Moldova of 'conscientious objection for medical providers' as a 'risk[] of regression in legal protection' for reproductive rights.[116] The Working Group is unparalleled among UN entities for its open disdain for the exercise of conscientious objection by health-care providers, categorizing it as a practice that may be 'permitted' by States but that must be regulated,[117] while identifying the decriminalization of abortion as necessary for women's human rights.[118]

4. OHCHR

The Office of the High Commissioner for Human Rights (OHCHR) is the UN agency focused on the protection and

112. *Id.*

113. *Id.*

114. U.N. Human Rights Council, Rep. of the Working Group on the issue of discrimination against women in law and in practice: Mission to Spain, ¶ 103, U.N. Doc. A/HRC/29/40/Add.3 (June 17, 2015) [hereinafter Women's Working Group Mission to Spain].

115. *Id.* ¶ 110(a).

116. U.N. Human Rights Council, Rep. of the Working Group on the issue of discrimination against women in law and in practice: Mission to the Republic of Moldova, ¶ 26, U.N. Doc. A/HRC/23/50/Add.1 (Mar. 15, 2013).

117. Women's Working Group Mission to Spain, *supra* note 114, ¶ 77.

118. U.N. Human Rights Council, Rep. of the Working Group on the issue of discrimination against women in law and in practice: Mission to Chile, ¶ 62, U.N. Doc. A/HRC/29/40/Add.1 (May 20, 2015).

promotion of human rights that are identified in international human rights treaties.[119] Although its mandate is to monitor the status of human rights guaranteed by international law, which gives it a certain degree of independence, it has used this independence to push countries into adopting human rights that are not in fact internationally recognized.[120] As such, OHCHR has asserted that States' obligation to protect women's rights, as it identifies those rights, requires States to 'organize their health system to ensure that women are not prevented from accessing health services by health professionals' exercise of conscientious objection. For example, where abortion is legal, if a doctor refuses to perform it, the health system must refer women to an alternative health care provider.'[121]

At the request of the Human Rights Council, in 2012, OHCHR issued a report called 'Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality.'[122] In it, the OHCHR states, 'Laws and policies that impede access to sexual and reproductive health services must be changed, including laws criminalizing certain services only needed by women [and] laws and policies allowing conscientious objection of a provider to hinder women's access to a full range of services.'[123]

119. *Who We Are*, U.N. OFFICE OF THE HIGH COMM'R, http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx [https://perma.cc/QA8Y-4EVA] (last visited Mar. 16, 2016).

120. For example, it has created the public education campaign Free & Equal on 'LGBT rights, which are not mentioned in international human rights treaties. *See* Free & Equal, *About Us*, U.N. HUMAN RIGHTS OFFICE, https://www.unfe.org/en/about [https://perma.cc/4WKA-6EXJ] (last visited Mar. 16, 2016); *see also* Paul Coleman, *The UN's Push for "Same-Sex Marriage"*, PUB. DISCOURSE (Jan. 21, 2016), http://www.thepublicdiscourse.com/2016/01/16281/ [https://perma.cc/ZEE4-GPSJ].

121. *Information Series on Sexual and Reproductive Health and Rights: Abortion*, U.N. OFFICE OF THE HIGH COMM'R, http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/ INFO_Abortion_WEB.pdf [https://perma.cc/VU5K-8RTZ] (last visited Dec. 21, 2016); *see also* U.N. Human Rights Council, Practices in adopting a human rights-based approach to eliminate preventable maternal mortality and human rights: Rep. of the Office of the United Nations High Commissioner for Human Rights, ¶ 30, U.N. Doc. A/HRC/18/27 (July 8, 2011).

122. U.N. Human Rights Council, Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality: Rep. of the Office of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/21/22 (July 2, 2012).

123. *Id.* ¶ 30; *see also id.* ¶ 61.

5. UNFPA

The United Nations Population Fund (UNFPA) is the UN agency focused on sexual, reproductive, and maternal health.[124] UNFPA's 2012 State of World Population report on family planning presents 'regulating conscientious objection' as necessary to '[t]he State's obligation to ensure the availability of the full range of family planning methods.'[125] It cites the International Federation of Gynecology and Obstetrics' (FIGO) understanding that health-care providers 'have, as a matter of respect for their patient's human rights, an ethical obligation to disclose their objection, and to make an appropriate referral so [the patient] may obtain the full information necessary to make a valid choice.'[126] The report lauds the mandate of the U.S. Department of Health and Human Services requiring employers' group health-insurance plans to cover contraception and sterilization, including emergency contraception,[127] a requirement that is objectionable to many individual and institutional employers on grounds of conscience, and that resulted in the *Hobby Lobby* decision.[128]

UNFPA has partnered with the Center for Reproductive Rights (CRR), an abortion-rights, legal-advocacy organization, to issue a number of reports, despite UNFPA's assertion that it does not promote abortion.[129] UNFPA and CRR together call on

---

124. *About Us*, U.N. POPULATION FUND, http://www.unfpa.org/about-us [https://perma.cc/8VYD-7BMU] (last visited Mar. 16, 2016).

125. U.N. POPULATION FUND, BY CHOICE, NOT BY CHANCE: FAMILY PLANNING, HUMAN RIGHTS AND DEVELOPMENT, STATE OF WORLD POPULATION 2012 11 (2012), http://www.unfpa.org/sites/default/files/pub-pdf/EN_SWOP2012_Report.pdf [https://perma.cc/L3GH-3S9B] [hereinafter UNFPA State of World Population 2012]; *see* MEGHAN GRIZZLE, WHITE PAPER ON FAMILY PLANNING 2 (2012), https://www.wya.net/wp-content/uploads/2014/04/WYA_family_planning_white_paper.pdf [https://perma.cc/4X44-XHPF] (stating that despite UNFPA's assertion, States are not required to provide any particular form of family planning).

126. UNFPA State of World Population 2012, *supra* note 125, at 11 (quoting *FIGO Committee for the Study of Ethical Aspects of Human Reproduction*, 104 BRIT. J. OBSTETRICS & GYNECOLOGY 511, 511 (1997)).

127. UNFPA State of World Population 2012, *supra* note 125, at 11–12.

128. *See Hobby Lobby*, 134 S. Ct. at 2759.

129. *See Frequently Asked Questions, Does UNFPA Promote Abortion?*, U.N. POPULATION FUND, http://www.unfpa.org/frequently-asked-questions#abortion [https://perma.cc/3PF3-YM8Y] (last visited Mar. 10, 2016). This assertion is dubious given the large number of reports UNFPA has published and events and initiatives it has hosted with the Center for Reproductive Rights (CRR) and the International Planned Parenthood Federation. The United States did not fund UNFPA for several years given the controversy over UNFPA's complicity with China's coercive population policies, which involved forced abortion. *See* Christopher Marquis, *U.S. Is Accused of Trying to Isolate U.N. Population Unit*, N.Y. TIMES (June 21, 2004), http://www.nytimes.com/2004/06/21/world/us-is-accused-of-trying-to-isolate-un-

States to regulate the exercise of conscientious objection by doctors and pharmacists.[130] Their briefing paper on 'The right to contraceptive information and services for women and adolescents' declares, 'Because a conflict of conscience can be experienced only by an individual, conscientious objection cannot be exercised on behalf of an institution, citing as its only support decisions from a French court and a Colombian court[131] and ignoring the position that institutions do have conscience rights.[132] The report also provides very specific recommendations for regulation of conscientious objection:

> In particular, governments should require that conscientious objectors inform patients about all available contraceptive methods and refer patients to non-objecting healthcare providers; make clear that the use of conscientious objection is limited to individuals and does not extend to institutions; require health facilities to have non-objectors available to provide medical services and goods; require objectors to submit their objections in writing and for review; and prohibit individuals not engaged directly in the [] provision of the service (including administrative staff) from exercising conscientious objection.[133]

6. WHO

The World Health Organization (WHO), a specialized public health agency of the UN, is an important voice on the exercise of conscientious objection because it is the major international

---

population-unit.html [https://perma.cc/65H2-VPRR].

130. CRR & UNFPA, REPRODUCTIVE RIGHTS: A TOOL FOR MONITORING STATE OBLIGATIONS § III (2013), http://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/crr_Monitoring_Tool_State_Obligations.pdf [https://perma.cc/7GB6-8NX7] ("[States have an] obligation to: Regulate conscientious objection by health care providers to ensure that women and girls have access to the information and services they need to make informed decisions regarding their pregnancies and reproductive health.").

131. CRR & UNFPA, THE RIGHT TO CONTRACEPTIVE INFORMATION AND SERVICES FOR WOMEN AND ADOLESCENTS 21 (Morgan Stoffregen ed. 2010), https://www.unfpa.org/sites/default/files/resource-pdf/Contraception.pdf [https://perma.cc/Q6XW-MHTU].

132. *See generally, e.g.*, THE CONSCIENCE OF THE INSTITUTION (Helen Alvaré ed. 2014).

133. Stoffregen, *supra* note 131, at 21.

health authority and one of its roles is to set standards for the provision of health care.[134] Although it does not have the authority to determine human rights, the WHO has asserted that there is a 'human rights rationale' for 'safe, legal abortion' and has issued guidelines on the provision of 'safe abortion' that touch on conscientious objection.[135]

In 2013, the Committee Against Torture referenced these 2012 WHO guidelines, 'Safe abortion: technical and policy guidance for health systems, when it told Poland to 'ensure that the exercise of conscientious objection does not prevent individuals from accessing services to which they are legally entitled.'[136] Chapter 3 of this report on 'planning and managing safe abortion care' recognizes that '[i]ndividual health-care providers have a right to conscientious objection to providing abortion'[137] However, 'that right does not entitle them to impede or deny access to lawful abortion services because it delays care for women, putting their health and life at risk.'[138] The guidelines state that providers must refer the patient, 'in accordance with national law.'[139] If there is no provider to whom the professional can refer the patient, then the objector 'must provide safe abortion to save the woman's life and to prevent serious injury to her health.'[140] The guidance suggests that training for abortion-service providers should include information on their 'ethical responsibility to provide abortion (or to refer women when the health-care professional has conscientious objection to providing abortion).'[141]

Chapter 4 on legal and policy considerations was written by the pro-reproductive rights Programme on International Reproductive and Sexual Health Law in the Faculty of Law at the Uni-

134. *See About WHO, What We Do*, WORLD HEALTH ORG. [WHO], http://www.who.int/about/what-we-do/en/ [https://perma.cc/3VH9-BZTL] (last visited Mar. 10, 2016).

135. WHO, SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 1 (2d ed. 2012), http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf?ua=1 [https://perma.cc/W5MV-DCDQ] [hereinafter WHO, SAFE ABORTION 2012]; *see also* Stoffregen, *supra* note 131, at 17–29.

136. CAT, *supra* note 10, ¶ 23.

137. WHO, SAFE ABORTION 2012, *supra* note 135, at 69.

138. *Id.*

139. *Id.* The guidelines do not recommend a protocol in cases where national law protects the provider from having to refer.

140. *Id.*

141. *Id.* at 73. However, a medical professional who is training to be an abortion provider would presumably have no conscientious objection to providing abortion.

versity of Toronto. The guidance recognizes the right to freedom of conscience but then immediately qualifies it, stating that 'international human rights law also stipulates that freedom to manifest one's religion or beliefs might be subject to limitations necessary to protect the fundamental human rights of others.'[142] The conclusion then is that 'laws and regulations should not entitle providers and institutions to impede women's access to lawful health services.'[143] The guidance recommends 'ensur[ing] that the exercise of conscientious objection does not prevent individuals from accessing services to which they are legally entitled' through mandatory referral by conscientious objectors.[144]

The WHO issued more guidelines on abortion in 2015. The main body of '[h]ealth worker roles in providing safe abortion care and post-abortion contraception' gives little attention to conscientious objection, simply indicating that 'where allowed, [it] should be regulated, and provision of alternate care for the woman ensured.'[145] The unenthusiastic 'where allowed'—with no mention of a right—is a departure from the more assertive statement in the 2012 'Safe Abortion' guidance that health-care providers indeed do have a right to conscientious objection.

An annex gives more treatment to conscientious objection, which is referred to as 'resistance to and support of abortion care services on moral or religious grounds.'[146] A synthesis of studies and reports on health-care providers in Bangladesh, Ethiopia, Nepal, South Africa, and Uruguay shows that resistance to abortion provision was 'widespread in South Africa and was also common in Ethiopia and Uruguay, with opposition in Nepal and Bangladesh occurring in certain circumstances.[147] In addition to general religious opposition, 'some nurses perceived a contradiction between their professional pledge to preserve life

142. *Id.* at 96 (footnote omitted).

143. *Id.* (footnote omitted).

144. *Id.* at 89.

145. WHO, HEALTH WORKER ROLES IN PROVIDING SAFE ABORTION CARE AND POST-ABORTION CONTRACEPTION 68 (2015), http://apps.who.int/iris/bitstream/10665/181041/1/9789241549264_eng.pdf?ua=1&ua=1 [https://perma.cc/N7YW-QHA5] [hereinafter WHO, SAFE ABORTION 2015].

146. C. GLENTON ET AL., ANNEX 28, BARRIERS & FACILITATORS TO THE PROVISION OF ABORTION CARE SERVICES BY PHYSICIANS, MID-LEVEL PROVIDERS, PHARMACISTS AND LAY HEALTH WORKERS: A MULTICOUNTRY CASE STUDY SYNTHESIS 17 (2015), http://apps.who.int/iris/bitstream/10665/177628/1/WHO_RHR_15.11c_eng.pdf?ua=1 [https://perma.cc/5DL8-HCX8].

147. *Id.*

and their role as carers of mothers and children on the one hand, and their involvement with abortion on the other.'[148]

The synthesis indicates that there was 'widespread use of conscientious objection, both within and outside legal conditions, leading to a shortage of health-care providers available to meet the demand for services,'[149] which was exacerbated by the fact that '[r]ules guiding health-care providers' right to conscientiously object were sometimes poorly understood by health-care providers [and] systems were not in place to ensure their enforcement.'[150] Despite the recognition in the annex—although neutral rather than sympathetic—of the reality that many health-care providers object to providing abortions, nowhere in the main report does the WHO acknowledge the right to conscientious objection.[151]

A 2015 WHO report, 'Sexual health, human rights and the law,' recognizes the 'unique' situation of conscientious objection to the provision of sexual health information or services[152] 'because of the tension existing between protecting, respecting and fulfilling a woman's rights, and a health-care provider's own right to follow his or her moral conscience.'[153] The report laments that the exercise of conscientious objection puts 'people's health in jeopardy' and continues on to outline the necessary restrictions on the exercise of conscientious objection:

> Health-care professionals who claim conscientious objection must refer people to a willing and trained service provider in the same or another easily accessible health-care facility. Where such referral is not possible, the health-care professional who objects must provide safe services to save an individual's life or to prevent damage to her health.[154]

148. *Id.*
149. *Id.*
150. *Id.* at 18.
151. *See id.*
152. WHO, SEXUAL HEALTH, HUMAN RIGHTS AND THE LAW 15 (2015), http://apps.who.int/iris/bitstream/10665/175556/1/9789241564984_eng.pdf?ua=1 [https://perma.cc/UL95-5EPY].
153. *Id.* at 15 (footnote omitted).
154. *Id.* (footnotes omitted).

According to the report, States also have a duty to ensure that the exercise of conscientious objection does not impede adolescents' access to sexual and reproductive health information and services.[155]

Again, the negative views on the exercise of conscientious objection expressed by UN human rights treaty bodies, special rapporteurs, and agencies do not reflect consensus by UN Member States. Although Member States have not asserted support for the right to conscientious objection by consensus, they have refrained from condemning it. States who endure pressure from these entities must be reminded of this fact.

IV. ARE UN ENTITY RECOMMENDATIONS A FAIR COMPROMISE?

Although UN entities consistently call on *the State* to organize the health system in such a way that women have access to services to which they are legally entitled, the proposed and implied compromises would put significant burden on *health-care providers*. Although some UN entities acknowledge that there is a right to conscientious objection for health-care providers, they treat such a right as limited, stating that providers must engage in acts that in reality will also violate their conscience and vitiate the right to freedom of conscience. In effect, UN entities support freedom of conscience in principle, but not actually in practice.

A. Mandatory direct referral

The measure most recommended by UN entities, as indicated above, is referral to a willing abortion provider. Treaty-body recommendations are general and say, obliquely, that referral must be made, with no indication as to who makes the referral or how the referral should be made. However, Special Rapporteur Anand Grover,[156] UNFPA,[157] and the WHO[158] say that the conscientious objector must make a direct referral to another provider.

Such direct referral to another provider is unacceptable to many conscientious objectors, since it is viewed as participating in the problematic act. The American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) has explained, 'Those who morally object to abortion usually do so because

155. *Id.*; *see also id.* at 26.
156. Grover, *supra* note 5, ¶ 50.
157. UNFPA State of World Population 2012, *supra* note 125, at 11.
158. WHO, SAFE ABORTION 2012, *supra* note 135, at 69.

they understand abortion as the taking of innocent life. To require a physician who believes this to refer someone for an abortion would force him or her to be complicit in that act.'[159] Another group shared, 'If a physician truly believes that participation in, for instance, abortion is always gravely wrong, said physician cannot be forced to become complicit in its provision by referring for it, without gravely violating his/her freedom to practice according to conscience.'[160]

The United States Conference of Catholic Bishops, which provides guidance to many Roman Catholics on issues of conscience, has stated:

> The [Roman Catholic] Church[,] [which owns and operates many hospitals and health-care facilities,] cannot, even reluctantly, provide information, make arrangements for, facilitate, counsel or instruct people on how to obtain these immoral procedures. To do so would be to participate in the violation of the moral law and thus to act against conscience.[161]

Therefore, UN bodies and rapporteurs who state that referral is mandatory essentially gut the right to conscientious objection, at the very least as viewed by health-care providers who actually have a stake in how conscientious objection is treated, such as AAPLOG's constituents. UN entities have decided that referral should not be objectionable to a conscientious objector, or that it is a surmountable burden. Further, they have decided that a woman's 'right' to an abortion—which is not explicitly guaranteed in any international human rights treaty—is more important than a health-care provider's right to act on his or her

159. *News Release: Statement on ACOG Letter Urging U.S. Senators to Violate the Rights of Conscience of Physicians*, AM. ASS'N OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS [AAPLOG] (Sept. 14, 2005), http://www.aaplog.org/physician-conscience-rights/news-release-statement-on-acog-letter-urging-u-s-senators-to-violate-the-rights-of-conscience-of-physicians/ [https://perma.cc/7DRL-389B].

160. Memorandum from Dr. Hannah Klaus, Exec. Dir., Nat. Family Planning Ctr. of Wash., D.C. to Members of the President's Council on Bioethics, https://bioethicsarchive.georgetown.edu/pcbe/transcripts/sept08/nfp_statement.pdf [https://perma.cc/DH5D-HUU7].

161. William Lori, *Referral Is Not the Answer, Rescinding the Mandate Is*, USCCBLOG (Feb. 9, 2012, 11:52 AM), http://usccbmedia.blogspot.com/2012/02/referral-is-not-answer-rescinding.html [https://perma.cc/KE2K-7R67].

conscience.

As noted above, ICCPR article 18(3) states that the right to manifest one's beliefs may be limited if specific, narrow criteria are met.[162] The HRC elaborated: 'Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18.'[163] Even mandatory referral, as indicated by the responses of associations representing health-care providers with objections to abortion, vitiates the right to freedom of conscience for these providers.

B. Mandatory direct participation in the event of an emergency

Special Rapporteur Anand Grover[164] and the WHO[165] recommend direct participation in abortion in the event of an emergency. To many health-care providers opposed to abortion, this is not an uncontroversial recommendation. They believe that when a pregnant woman faces a life-threatening complication, such as pre-eclampsia, the goal is to treat the woman while also trying to preserve the life of the fetus—that is, to do everything possible to save both lives. The treatment may require early delivery of the fetus, at a stage at which the fetus cannot survive, but the goal is never to take the life of the fetus.[166] These health-care providers would therefore find it a violation of their right to conscience to be forced to take the life of the fetus deliberately.

---

162. ICCPR, *supra* note 36, art. 18(3).

163. HRC General Comment 22, *supra* note 40, ¶ 8.

164. *See* Grover, *supra* note 5, ¶ 50 ("In short, health service providers who conscientiously object to a procedure have the responsibility to treat an individual whose life or health is immediately affected, and otherwise to refer the patient to another provider who will perform the required procedure.").

165. WHO, SAFE ABORTION 2015, *supra* note 145, at 15 ("Where such referral is not possible, the health-care professional who objects must provide safe services to save an individual's life or to prevent damage to her health.").

166. *See, e.g.*, *Our Mission Statement*, AAPLOG, http://www.aaplog.org/about-2/our-mission-statement/ [https://perma.cc/95QG-M8F6] (last visited Mar. 10, 2016) ("When extreme medical emergencies that threaten the life of the mother arise AAPLOG believes in 'treatment to save the mother's life, including premature delivery if that is indicated This is NOT 'abortion to save the mother's life.'"); *Premature Delivery Is Not Induced Abortion*, AAPLOG, http://www.aaplog.org/position-and-papers/premature-delivery-not-induced-abortion/ [https://perma.cc/2MC7-3JTC] (last visited Mar. 10, 2016) ("There are times when separating the mother and her unborn child is necessary to save the life of the mother, even if the unborn child is too premature to live. In those tragic cases, if possible the life of the baby will be attempted to be preserved "); *Dublin Declaration on Maternal Healthcare*, DUBLIN DECLARATION, http://www.dublindeclaration.com/ [https://perma.cc/3KZQ-SW7G] (last visited Mar. 10, 2016) ("We uphold that there is a fundamental difference between abortion, and necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn child.").

The 2012 WHO safe abortion guidelines and the 2015 WHO sexual health report go even further. The 2012 guidelines say that when no doctor is available for a referral, the conscientious objector 'must provide safe abortion to save the woman's life *and to prevent serious injury to her health.* '[167] The 2015 report says that in the same situation the objector 'must provide safe services to save an individual's life or *to prevent damage to her health.* '[168]

This requirement that the health-care provider provide an abortion to save the woman's health is vague. There is no standard as to what constitutes 'damage' or 'serious injury' to health; there may be concern that a woman can say that continuing a pregnancy would seriously jeopardize her emotional and mental health, obligating a doctor to perform an abortion on her.

C. Mandatory direct participation if no provider is available

When health and well-being, as specified by FIGO in its 2006 'Resolution on 'Conscientious Objection, '[169] are broadly understood, a health-care provider is essentially forced to participate directly if no provider is available. This is completely out of the control of the conscientious objector, and once again, places a woman's right to health above the provider's conscience rights.

This is an issue in Italy, which has a liberal abortion law and where a large percentage of health-care providers conscientiously object to participating in abortion. In 2009, 70.7% of gynecologists, 51.7% of anesthetists, and 44.7% of non-medical personnel were opposed to participating in abortions.[170] In the region of Lazio in southern Italy, 91.3% of gynecologists are conscientious objectors to abortion.[171] The European Committee of Social Rights, which monitors the European Social Charter, a Council of Europe treaty on social and economic rights, held in

167. WHO, SAFE ABORTION 2012, *supra* note 135, at 69 (emphasis added).

168. WHO, SAFE ABORTION 2015, *supra* note 145, at 15 (emphasis added).

169. *Resolution on 'Conscientious Objection' (Kuala Lumpur, 2006)*, INT'L FED'N OF GYNECOLOGY & OBSTETRICS, http://www.figo.org/sites/default/files/uploads/OurWork/2006%20Resolution%20on%20Conscientious%20Objection.pdf [https://perma.cc/VN7L-KFYV] ("FIGO affirms that to behave ethically, practitioners shall: 3. Provide timely care to their patients when referral to other practitioners is not possible and delay would jeopardize patients' health and well-being . ').

170. Int'l Planned Parenthood Fed'n – European Network v. Italy, European Comm. of Soc. Rights, Compl. No. 87/2012, tbl. 2 at ¶ 85 (2013).

171. *Id.* ¶ 109.

2013 'that the provision of abortion services must be organised so as to ensure that the needs of patients wishing to access these services are met,'[172] as the current framework was violating women's right to health.[173] The Committee, despite stating otherwise, believes that the high number of objecting providers is per se evidence that Italy's abortion law has not been implemented effectively.[174] Nevertheless:

> [T]here is no solid evidence demonstrating that women in Italy are impeded in having access to procedures of termination of pregnancy in healthy conditions implying risks for their life and physical or moral integrity because of the high number of personnel refusing to carry out these procedures on conscientious grounds.[175]

The Committee's decision shows how the focus on the right to health, understood here as including a right to abortion, takes precedence over the right to conscience. Although the decision stops short of saying that Italy must require health-care providers to participate in abortions in order to guarantee women's right to health, the obvious 'solution' is a health-care system in which objecting providers are forced to participate. Going even further, objectors may not even be allowed to be trained or become certified in the field of obstetrics and gynecology. Notably, the decision cites the CEDAW general recommendation on health stating that referral in the case of conscientious objection is required.[176]

In short, to the doctor, nurse, anesthesiologist, or other health-care provider who is opposed to participating in an abortion, the apparent recognition by UN human rights treaty bodies and rapporteurs of the right to conscience in the health field is meaningless, because in actuality, as the UN sees it, the right to health requires him or her to perform or participate in an abortion in many objectionable situations. The UN gives more weight to the woman's right to health than to the health-care provider's

172. *Id.* ¶ 163.

173. The Charter does not recognize abortion as a component of the right to health, but Italy recognizes abortion as a component of health services.

174. *Id.* ¶ 4 (Quezada, J., dissenting).

175. *Id.* ¶ 6.

176. *Id.* ¶ 41; *see also* CEDAW General Recommendation 24, *supra* note 69, ¶ 11.

right to freedom of conscience.

D. Mandatory registration of conscientious objectors

One additional 'compromise' may not directly violate the right to conscience but may put the objecting health-care provider's standing or employment in jeopardy. Suggested by Special Rapporteur Anand Grover in his report to Poland, mandatory registration by health-care providers of their conscientious objection to participation in certain services does not seem problematic on its face. It does not violate one's conscience to inform employers or medical oversight bodies of one's objection, and this allows institutions to make appropriate arrangements. However, mandatory registration may result in discrimination against those providers who are unwilling to participate in abortion. For example, the employer may decrease the responsibilities of the objector, or, in extreme cases, fire him or her. The medical oversight body may seek to revoke his or her license. In any case, discrimination against an employee on the basis of his or her beliefs should be illegal, and freedom of religion or belief is fully applicable in the workplace[177] and does not vanish when an employment contract is signed.[178]

V. CONSEQUENCES

UN entities' comments on conscientious objection do not occur in a vacuum. They have consequences, particularly when States act on the entities' recommendations and amend their laws and practices to conform to what they believe is necessary to comply with their international obligations—all on the basis of the UN's perceived authority.

Medical and nursing students may choose not to enter the field of obstetrics and gynecology. Some OB/GYNs, nurses, and other health-care providers may leave a field that is hostile to the exercise of their conscience and practice in a field where they will not be forced to act in violation of their conscience. In fact, medical professionals, asked how they would react if forced to violate their consciences, have indicated as such.[179]

177. Workplace Freedom of Religion Report, *supra* note 44, ¶ 31.

178. *Id.* ¶ 32.

179. *See* Memorandum from Jonathan Imbody, Vice President for Gov't Relations, Christian Med. Ass'n, to Office of Pub. Health & Sci., Dep't of Health & Human Servs. (Apr. 9, 2009), http://cmda.org/library/doclib/cma-survey-analysis-for-hhs.pdf

A United States-based Christian Medical Association survey of members of Christian health-care organizations asked respondents if they strongly agree, somewhat agree, somewhat disagree, or strongly disagree with the statement, 'I would rather stop practicing medicine altogether than be forced to violate my conscience.'[180] Seventy-seven percent of the nearly 3,000 respondents strongly agreed, and 14% somewhat agreed.[181] More specifically, 88% of obstetricians and gynecologists strongly agreed and 9% somewhat agreed.[182] Eighty-two percent of respondents said that if conscience protections were rescinded, they would be very or somewhat likely to limit the scope of their practice.[183] Many respondents—81% of 608 respondents who considered avoiding a specialty 'because of attitudes prevalent in that specialty that is not considered tolerant of [their] moral, ethical or religious beliefs'—specifically avoided obstetrics and gynecology.[184] Twenty percent of students said they chose not to pursue a career in obstetrics or gynecology 'mainly because [they] do not want to be forced to compromise [their] moral, ethical, or religious beliefs by being required to perform or participate in certain procedures or provide certain medications.'[185]

Requiring actions that would violate health-care providers' conscience thus would not solve the 'problem' of having too few doctors who are willing to perform abortions. Rather, this would direct trained health-care providers away from fields like family medicine in which there is great need, especially in rural areas and in developing countries. In countries where there are few health-care providers in any specialty, and thus any provider could be required to participate in abortions because there are no willing providers, this threat could mean some people will choose to avoid studying and practicing medicine altogether. The solution cannot be forcing health-care providers to act in ways that the UN considers a compromise, but that the providers themselves find unconscionable.

[https://perma.cc/J98P-3WCR].

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 6.
184. *Id.* at 10.
185. *Id.*

VI. CONCLUSION

Ultimately, at the heart of the UN's treatment of conscientious objection in the health-care field is an improper understanding of what that objection is. UN entities handle the exercise of conscientious objection as if it is a moral judgment imposed on women seeking abortions, rather than viewing it in and of itself as an exercise of personal liberty by the provider, as guaranteed by the right to freedom of conscience. This is compounded by the conclusion—albeit, unsubstantiated—of many of these entities that States must provide legal abortion in order to meet their obligations under the international guarantee of the right to health.

As a result, human rights treaty bodies and special rapporteurs directly target States to regulate conscientious objection without any consideration of the impact of increased regulations—such as requirements to refer and to provide abortion in the event that no willing provider is available—on conscientious objectors' right to freedom of conscience. Influential global policy-makers like the WHO and UNFPA promote conscientious objection standards without regard for how they will force conscientious objectors to violate their conscience, change fields, or leave the medical field altogether, which in the end will hamper the fulfillment of the right to health. A woman's access to abortion, as the UN views it, trumps a doctor's ability to live according to the dictates of her conscience.

Fortunately, States are not obligated to follow the pronouncements of these UN entities, and they must be encouraged to recognize and promote the right to conscience as a fundamental human right in their laws and policies. However, as human rights treaty body recommendations and agency publications in recent years indicate, the campaign to hinder the exercise of conscientious objection in the health-care field is ever-increasing, and the pressure on States will become increasingly difficult to bear. The UN must return to one of its original purposes: 'to reaffirm faith in fundamental human rights '[186]

186. U.N. Charter pmbl.

PURPOSIVISM OUTSIDE STATUTORY INTERPRETATION

JOHN DAVID OHLENDORF*

* Associate, Cooper & Kirk, PLLC, Washington, D.C. J.D. Harvard Law School. The views below, of course, are my own. I am grateful to Amy Barrett and Abbe Gluck for their thoughtful comments.

ABSTRACT

According to the conventional story of modern statutory interpretation, legal-process-style purposivism, dominant in statutory interpretation a half-century ago, has been largely vanquished by the textualist critique. A common refrain in the literature is that we are "all textualists now." This Article argues that the death of purposivism has been greatly exaggerated. In a whole host of important but often overlooked doctrinal areas—from severability to statutory standing to choice of law—courts continue to take a strongly purposivist approach. By recognizing that purposivism has continued to flourish alongside textualism, we can see that statutory interpretation is fundamentally pluralistic, in the sense that most judges tackle the interpretive task with more than one methodological approach. To assess this interpretive pluralism, I draw on the discussion of a similar phenomenon in the constitutional context—the commitment of most judges to a plurality of interpretive "modalities." Looking at the pluralism in statutory interpretation through this lens suggests that, while both contexts are importantly similar, they are also importantly different. The pluralism generally discussed in constitutional theory is 'holistic' each interpretive issue is addressed through an interpretive process that includes a blend of methodologies. But the pluralism in statutory interpretation is "disjoint" textualism dominates those issues that fall "inside" statutory interpretation, while purposivism continues to thrive in those areas "outside." This disjoint type of interpretive pluralism, I argue, is far more problematic than its more-familiar holistic cousin. Textualism might be the correct approach to statutory interpretation, or purposivism might, but there are serious theoretical difficulties with any attempt to split the baby. I conclude by suggesting that these insights can be carried back to the constitutional context, where they will likely create trouble for interpretive pluralism on its home turf, as well.

INTRODUCTION

There is a familiar story about the modern history of statutory interpretation.[1] In the mid-twentieth century, courts and commentators, most of them associated with the 'Legal Process School,' coalesced around a strongly purposivist approach to interpreting federal statutes. The approach is epitomized by the unpublished casebook compiled by Henry Hart and Albert Sacks—two of process theory's best known champions—which bids courts engaged in statutory interpretation to '[d]ecide what purpose ought to be attributed to the statute' and then '[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can,' all the while bearing in mind the assumption 'that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.'[2]

Starting in the 1980s, however, this golden age of purposivism began to fade. The serpent in this particular garden was public choice theory, which, through an emphasis on rent-seeking interest groups and narrowly reelection-focused politicians, made lawmaking seem more a matter of beady-eyed haggling than, as Hart and Sacks seemed to imagine it, 'a rational process, whereby policy judgments and factual information become the basis of carefully reasoned solutions.'[3] Following this loss of innocence, judges began to place a great deal more emphasis on particular statutory text and a great deal less on abstract statutory purpose. As put by one of textualism's most capable defenders, '[T]he Court has become much less of a generality shifter and much more of a generality stickler in matters of statutory interpretation.'[4] Or, as conceded by a prominent critic: 'In a significant sense, we are all textualists now.'[5]

This Article suggests that the rumors of purposivism's death are greatly exaggerated. Purposivism—full-throated, generality-

1. For versions of the story, see WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION 115–88 (1999) (describing versions of the modern history of statutory interpretation); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 823–43 (1985) (same); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 16–29 (2006) (same).

2. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1374–78 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

3. *Id.* at 695.

4. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2020 (2009).

5. Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998).

shifting, *Church of the Holy Trinity*[6]-style purposivism—is alive and well, outside statutory interpretation proper. When operating in the traditional domain of statutory interpretation—interpreting operative statutory provisions for the purpose of discerning their legal content—the familiar story is more or less accurate. But when courts turn to collateral doctrines that rely on statutory meaning not to determine operative legal content but to decide a large, eclectic, and important set of issues such as prudential standing, choice of law, and severability, Hart and Sacks still reign supreme.[7] Indeed, in most of these doctrinal areas, textualists have barely even noticed that the purposivist style of reasoning, which they decry as unmoored and perhaps even unconstitutional when it comes to ordinary statutory interpretation, continues to thrive.

Recognizing that purposivism has flourished outside statutory interpretation raises deep theoretical questions, for both textualists and purposivists. The difficulty is not just that textualists have won on some terrain and purposivists have prevailed elsewhere; it is that *each* side apparently *concedes* the ground occupied by the other. In statutory interpretation proper, purposivists now largely give textual arguments pride of place, taking a 'textually-structured approach to purposivism.'[8] Outside statutory interpretation, the textualist justices join their purposive colleagues in relying on textually untethered purposes, interests, and goals.[9] Contrary to the standard story, then, the 'statutory interpretation wars' were not a rout with one side sweeping away all opposition. Instead, statutory interpretation, considered in its entirety, is rife with *interpretive pluralism*: courts use more than one method to unpack statutory meaning, and the methods they use are clearly different and apparently inconsistent.

Though the problem of interpretive pluralism is relatively unexplored in the context of statutory interpretation, a large literature probes the phenomenon in the constitutional context.[10]

---

6. Church of the Holy Trinity v. United States, 143 U.S. 457 (1892); *see infra* notes 14–20 and accompanying text.

7. I think the distinction between interpretive questions "inside" and "outside" statutory interpretation is intuitive enough to be useful for purposes of exposition, but I don't mean for much to hang on the distinction, so there is little harm if the distinction is not as intuitive as I suppose. Indeed, one of the upshots of my analysis in Part II is that, on a fundamental level, the distinction ultimately *cannot* be fully maintained.

8. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 115 (2011).

9. *Id.* at 146–47.

10. *See infra* note 220.

Roughly, while courts often give originalist lines of inquiry—like text and history—prominence in their constitutional decisions, they also rely freely on non-originalist 'modalities' (reasoning from current values, consequences, precedent, and the like), with little apparent rhyme or reason.[11] In opposition to the originalist movement in constitutional theory, which would dramatically limit the role of non-originalist methodologies, several prominent theorists have defended the interpretive pluralism of current constitutional practice.

This literature from constitutional theory provides a suggestive frame through which to examine the interpretive pluralism in statutory interpretation unearthed by this Article, but the two contexts differ in a way that turns out to be theoretically fruitful. The pluralism generally discussed in the context of constitutional interpretation is *holistic*: multiple modalities of interpretation are mixed together in one inclusive reasoning process. When we turn to the statutory context, however, we find it pluralistic in a different, *disjoint* way: for one class of statutory interpretation questions—questions of operative statutory meaning—interpretation is relatively monistic, not pluralistic: text matters far more than anything else. But for another class of questions about statutory meaning—those that I've been calling questions *outside* statutory interpretation—statutory interpretation is relatively monistic in a different, far more purposive way. This disjoint type of interpretive pluralism, I will argue, is far more theoretically problematic than its holistic cousin. Moreover, once our exploration of the pluralism in statutory interpretation has yielded the analytical distinction between these two types of pluralism—and a reason to be suspicious of the disjoint variety—we can then glance back at *constitutional* interpretation and note that, there too, a type of disjoint pluralism exists alongside the more frequently discussed holistic kind.

Here is the plan for the rest of the Article. In Part I, I sketch the textualist critique of purposivism inside statutory interpretation and then survey five collateral areas of law where current doctrine still relies on a strongly purposivist approach to determining statutory meaning: zone-of-interests standing, choice of law, obstacle preemption, unconstitutional-motive tests, and severability. In Part II, I assess the dominance of purposivism in

11. *See infra* notes 213–217 and accompanying text.

these areas as an example of interpretive pluralism. First, I provide a brief overview of the constitutional-theory literature examining interpretive pluralism in that context. I then discuss the extent to which the insights from the constitutional context can be carried over to the statutory side, concluding that while the constitutional-side discussion provides a suggestive frame, the type of pluralism that Part I unearths in the statutory context differs in one theoretically salient way: it is disjoint, rather than holistic. Next, I provide a simple but powerful reason for thinking that disjoint pluralism is likely to be pernicious.[12] In short, it is hard to see why the particular mix of interpretive tools thought useful in segment A should not be equally useful in segment B, and vice versa. Finally, I suggest that the Article's analysis of disjoint pluralism in the statutory context might itself be fed back into the constitutional context.[13] Doing so would likely show that some interpretive practice in that context is also pluralistic in the disjoint way, a pluralism that, by parity of reasoning, we might suspect to be similarly difficult to justify.

I. TEXTUALISM INSIDE AND PURPOSIVISM OUTSIDE STATUTORY INTERPRETATION

A. Traditional Purposivism and the Textualist Critique

The purposivist approach that dominated statutory interpretation for much of the twentieth century is epitomized by the opinion in *Church of the Holy Trinity v. United States*,[14] a case that has become something of a chestnut in the literature. After the church contracted with one E. Walpole Warren, a resident of England, to move to America and serve as its pastor, charges were brought against it for violating a federal act making it unlawful for any person or entity to 'prepay the transportation, or in any way assist or encourage the importation or migration of any alien into the United States to perform labor or service of any kind.'[15] The church's contract, Justice Brewer wrote for the Court, admittedly seemed to fall within the letter of the Act, since 'the relation of rector to his church is one of service, and implies labor on the one side with compensation on the

12. *See infra* Part II.C.
13. *See infra* Part II.D.
14. 143 U.S. 457, 472 (1892).
15. Alien Contract Labor Law of 1885, ch. 164, § 1, 23 Stat. 332.

other.'[16] But [i]t is a familiar rule[,] that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit[,] nor within the intention of its makers.'[17] Since 'the evil which was intended to be remedied' apparently was 'simply the influx of cheap unskilled[] labor,'[18] not 'the coming into this country of any class whose toil is that of the brain,'[19] the Court concluded that 'however broad the language of the statute may be, the [church's] act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.'[20]

The purposivist reasoning exemplified by *Holy Trinity*—abstracting away from 'the letter of the statute' and drawing the operative legal content instead from 'the evil which it is designed to remedy'—was at odds with the 'plain-meaning' approach to statutory interpretation which was still influential when the decision was handed down;[21] by the middle of the following century, however, *Holy Trinity*'s approach was regnant. In their unpublished course materials on 'The Legal Process'—materials which have become for later generations a near-canonical restatement of the approach to legal reasoning that dominated the post-war generation of lawyers, judges, and scholars[22]—Henry Hart and Albert Sacks urged that '[e]very statute must be conclusively presumed to be a purposive act,'[23] which should be interpreted 'so as to carry out [its] purpose as best it can.'[24]

Reading through The Legal Process materials, one cannot

16. *Holy Trinity*, 143 U.S. at 458.
17. *Id.* at 459.
18. *Id.* at 465.
19. *Id.* at 463.
20. *Id.* at 472.
21. *See* United States v. Gudger, 249 U.S. 373, 374–75 (1919) ("No elucidation of the text is needed to add cogency to this plain meaning, which would, however, be reinforced by the context if there were need to resort to it."); Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise."); United States v. Hartwell, 73 U.S. 385, 396 (1868) ("If the language be clear it is conclusive. There can be no construction where there is nothing to construe."); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 234, at 310 (Chicago, Callaghan & Co. 1891) ("If a statute is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless."); Blatt, *supra* note 1, at 812–13 (discussing the plain-meaning rule).
22. William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2049–50 (1993).
23. HART & SACKS, *supra* note 2, at 1124.
24. *Id.* at 1374.

help but be struck by how Hart and Sacks's purposivism was not simply a theory of statutory interpretation, but was one part of an expansive approach to public-law reasoning in general, an approach perhaps unmatched in the ambition of its scope by anything that has come since. Hart and Sacks offered a general theory of legal reasoning as 'reasoned elaboration' the neutral discernment and application of the 'principles and policies' that lie beneath 'every statute and every doctrine of unwritten law' and, more generally, are embedded in the warp and woof of the law writ large.[25] 'The organizing and rationalizing power of this idea, they wrote, 'is inestimable,'[26] and either they or their legal-process fellow travelers concretely demonstrated this power by building a nearly unified approach to public law, centered on these or like ideas, which in its heyday dominated the fields of administrative law,[27] federal jurisdiction,[28] choice of law,[29] legislation and statutory interpretation,[30] and constitutional law.[31]

---

25. *Id.* at 145–58.

26. *Id.* at 148.

27. *See generally, e.g.*, LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); *see also* Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law Theory*, 72 CHI.-KENT L. REV. 1159, 1159 (1997) ("Professor Jaffe's efforts to organize the fast growing mass of legal materials bearing on public administration and regulation into a coherent, normative framework was critically important for the generation of administrative lawyers, judges, and legal scholars who faced the complex set of regulatory issues raised by the post-New Deal, pre-Civil Rights era of social and economic regulation, that is, the era of roughly the 1940s through the 1960s.").

28. *See generally, e.g.*, HENRY HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1st ed. 1953); *see also* Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691–93 (1989) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988) and describing the relationship between legal process theory, Hart and Wechsler's famed casebook, and the field of federal courts); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 956–70 (1994) (same).

29. *See generally, e.g.*, DAVID F. CAVERS, THE CHOICE OF LAW, SELECTED ESSAYS, 1933–1983 (1985); BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); *see also* Winston P. Nagan, *Conflicts Theory in Conflict: A Systematic Appraisal of Traditional and Contemporary Theories*, 3 N.Y. J. INT'L & COMP. L. 343, 441–89 (1982) (discussing choice of law and the legal-process paradigm).

30. *See generally, e.g.*, HART & SACKS, *supra* note 2; *see also* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 227–30 (1995) (describing process theory's influence on statutory interpretation); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 78 (2006) (describing the "mid-twentieth-century account of purposivism developed in the Legal Process materials' as "canonical"); Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 455–56 (2005) (suggesting that the strong purposivism "that dominated American jurisprudence after World War II" was "encapsulated in the teaching materials of Professors Henry Hart and Albert Sacks").

31. *E.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1st ed. 1962); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); *see also* DUXBURY, *supra* note 30, at 267–97 (describing the legal process school's influence on constitutional theory); LAURA

The last three decades have seen the legal-process consensus either fade or collapse in all of these fields;[32] here, I will confine my discussion to statutory interpretation. Starting in the mid-'80s, a group of 'new textualists' launched a strident critique on the legal process school's purposivism, largely grounded in then-cutting-edge insights from public choice theory.[33] While Hart and Sacks had apparently assumed an 'optimistic pluralist' account of legislation, in which 'the legislature produced generally good public policy because a variety of interests (representing a variety of views) would form around all salient issues,'[34] these early textualists were less optimistic about the representative and lawmaking systems. Rather than 'reasonable persons pursuing reasonable purposes reasonably,'[35] the textualists saw self-interested politicians pursuing self-interested purposes selfishly.

In the decades that followed this initial critique, a 'second generation' of textualism has emerged, one that places less emphasis on beady-eyed interest-group theory and more on the ways in which our constitutionally prescribed lawmaking process encourages groups with very different visions of the public good to come together to advance common causes by crafting specific, delicate compromises.[36] [N]o legislation, these modern textualists insist, 'pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplis-

KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 22–59 (1996) (discussing pluralism and legal process influence starting in the 1950s).

32. *See* KALMAN, *supra* note 31, at 77–93 (describing the waning influence of process theory in the 1970s); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 278 (1990) (noting that interest analysis's "hold is slipping"); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1071 (1997) (describing the influence of public choice theory on administrative law theory); The field where legal process theory retains the most influence is federal courts. Fallon, *supra* note 28, at 956 (noting that Hart and Wechsler's approach continues to have "pervasive influence on Federal Courts teaching and scholarship").

33. *See* POPKIN, *supra* note 1, at 157–69 (discussing textualism's reliance on public choice theory); John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1292 (2010) (noting that early textualists' "most influential line of argument against the use of legislative history was grounded in public choice theory").

34. William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 697 (1987); *see* HART & SACKS, *supra* note 2, at 689 ("The welding together of a legislative program is a far more complex matter than the summoning of the majority necessary to pass a single bill. [T]here must be negotiation and accommodation of interests and desires among the representatives of many groups, economic, social, and geographical.').

35. HART & SACKS, *supra* note 2, at 1378.

36. Manning, *supra* note 33, at 1289–90.

tically to assume that whatever furthers the statute's primary objective must be the law.'[37] To be sure, most textualists concede that an inquiry into a statute's purpose has *some* legitimate role, for example in resolving textual ambiguities.[38] But coalitions do not attract enough pivotal legislators to surmount the Article I, Section VII lawmaking hurdles[39] by putting forth a set of broad and abstract purposes; they do so by crafting narrow, complex, and sometimes apparently arbitrary compromises whose lines can best be discerned in a statute's textual detail.[40]

As noted in the Introduction, this combination of textualist critiques has seen a great deal of success. John Manning, perhaps textualism's foremost academic defender, recently noted that the Court 'has not cited *Holy Trinity* positively for more than two decades.'[41] Moreover, in a recent survey of the courts in five different states, Abbe Gluck concludes that textualism has emerged as 'the *controlling* interpretive approach—the consensus methodology chosen by the courts'—albeit in a modified form that tempers a primary focus on the text with a secondary reliance on legislative history in cases of textual indeterminacy.[42] The general consensus, among scholars both sympathetic and critical of the theory, is that '[t]extualism seems to have been so successful that we are all textualists in an important sense.'[43]

Or are we? In cases where courts are engaged in canonical statutory interpretation—interpreting statutory language for the purpose of crafting a rule of decision to carry the statute into effect—textualism does seem to have gained considerable ground against purposivism, particularly on the Supreme Court. The

37. Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam) (emphasis omitted).

38. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 56–58 (2012).

39. U.S. CONST. art. I, § 7.

40. Manning, *supra* note 33, at 1303–11.

41. Manning, *supra* note 8, at 113.

42. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010).

43. Molot, *supra* note 1, at 43. Besides the sources cited *supra* in notes 4–5, see Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 742 ("Many recent law review articles contain some version of the phrase '[w]e are all textualists now'—proof positive of the Scalia effect."); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1090 (2001) ("We are all textualists."); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1905 (2008) ("Textualism has shaped the way in which even nontextualist Justices on the Supreme Court write their opinions, and very few judges and scholars today advance the strong purposivist approach to statutory interpretation that once dominated in the academy.").

Court today would almost certainly not rely on the 'spirit' of the Alien Contract Labor Act or 'the evil which was intended to be remedied'[44] to override its clear text. But this typical type of statutory interpretation is not the only context that requires the Court to determine the meaning of statutory language. Statutory meaning is also relevant for a variety of collateral but highly significant legal doctrines, doctrines typically studied in fields such as administrative law, constitutional law, federal courts, and choice of law. In the remainder of this Part, I survey five doctrines which require courts to interpret statutes 'outside' the canonical domain of statutory interpretation, suggesting that each area is still dominated by the purposive approach that reigned supreme during the Legal Process era.

B. Purposivist Reasoning Outside Statutory Interpretation

1. Prudential Standing

To properly invoke the subject-matter jurisdiction of a federal court, parties must show they have standing to sue.[45] Partially anchored in Article III's limitation of federal jurisdiction to cases and controversies,[46] modern standing doctrine 'subsumes a blend of constitutional requirements and prudential considerations.'[47] The Court has stated:

> [A]t an irreducible minimum, Art[icle] III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision.[48]

Going beyond this constitutional floor, the 'prudential' prong of the standing requirement 'embraces several judicially

44. *Holy Trinity*, 143 U.S. at 459–65.
45. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 88–89 (1998).
46. U.S. CONST. art. III, § 2.
47. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 471 (1982).
48. *Id.* at 472 (citations and internal quotation marks omitted).

self-imposed limits on the exercise of federal jurisdiction, including 'the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'[49]

There is some authority for the notion that this 'zone of interests' test is merely a gloss on the right of review granted by § 702 of the Administrative Procedure Act (APA) to any person 'adversely affected or aggrieved by agency action within the meaning of a relevant statute,'[50] and is therefore applicable only to parties seeking review under that provision.[51] But the Court has recently and prominently insisted that the test 'applies to all statutorily created causes of action' as a matter of 'general application,'[52] though Congress can certainly negate the requirement,[53] and 'the breadth of the zone of interests varies according to the provisions of law at issue.'[54] Moreover—and most importantly, for our purposes—while the zone-of-interests doctrine is ordinarily seen as an issue of administrative law or perhaps federal jurisdiction, the Court has made clear that [w]hether a plaintiff comes within 'the zone of interests' requires the use of the 'traditional tools of statutory interpretation' to 'determine the meaning of the congressionally enacted provision creating a cause of action.'[55]

But the *way* in which the Court goes about 'determining the meaning of the congressionally enacted provision' when conducting a zone-of-interests analysis continues to have a pronounced legal-process flavor.[56] The test, as the Court has described it, seeks to determine whether 'the plaintiff's interests

49. Allen v. Wright, 468 U.S. 737, 751 (1984).

50. 5 U.S.C. § 702 (2012).

51. *See* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 400 n.16 (1987) ("The principal cases in which the 'zone of interest' test has been applied are those involving claims under the APA, and the test is most usefully understood as a gloss on the meaning of § 702. While inquiries into reviewability or prudential standing in other contexts may bear some resemblance to a 'zone of interest' inquiry under the APA, it is not a test of universal application."); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 156–60 (5th ed. 2003) (suggesting that the 'zone of interests' test is confined to APA cases).

52. Lexmark Int'l, Inc. v. Static Control Components, Inc. 134 S. Ct. 1377, 1388 (2014).

53. *See* Bennett v. Spear, 520 U.S. 154, 161–66 (1996) (concluding that the cause of action granted by the Endangered Species Act to 'any person' displaces the ordinary zone-of-interests analysis); Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970) ("Congress can, of course, resolve the question [of prudential standing] one way or another, save as the requirements of Article III dictate otherwise.').

54. *Bennett*, 520 U.S. at 163.

55. *Lexmark*, 134 S. Ct. at 1387–88.

56. *See id.*

are marginally related to or inconsistent with the purposes implicit in the statute,'[57] through an analysis of the 'congressional concern' that motivated passage of the law,[58] its 'context and purpose,'[59] and indeed 'any provision that helps us to understand Congress'[s] overall purposes.'[60] As I hope is clear, this type of holistic inquiry into statutory purpose is starkly at odds with the more grounded, text-focused approach the Court now takes to ordinary statutory interpretation. In that more familiar context, the Court has insisted that [i]t is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text.'[61] But if a purposivist approach to ordinary statutory interpretation is inappropriate for reasons like this, then why does the Court—with the active participation, I hasten to add, of its most ardent textualists[62]—continue to base its prudential standing doctrine on such a thoroughly purposivist inquiry?

One criticism of purposivism that textualists have pressed is the 'level of generality problem. [T]he purpose of a statute can reasonably be described at many levels of generality, and giving judges freedom to pick the relevant level of abstraction is at odds with the judiciary's constitutional obligation to respect 'not the legislature in the abstract, but rather the specific outcomes that were able to clear the hurdles of a complex and arduous legislative process.'[63] The same objection can be lodged

57. *Clarke*, 479 U.S. at 399.

58. Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517, 525–26 (1991).

59. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2211 (2012).

60. *Clarke*, 479 U.S. at 401.

61. City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 339 (1994).

62. *See, e.g.*, *Lexmark*, 134 S. Ct. 1377 (Scalia, J. writing for the Court); Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co. 522 U.S. 479 (1998) (Thomas, J. writing for the Court); *Bennett*, 520 U.S. 154 (Scalia, J., writing for the Court). *Lexmark* is arguably less in conflict with Scalia's ordinary approach to interpretation, since the Act at issue in that case "includes an 'unusual, and extraordinarily helpful, detailed statement of the statute's purposes. *Lexmark*, 134 S. Ct. at 1389 (quoting H.B. Halicki Prods. v. United Artists Commc'ns, Inc., 812 F.2d 1213, 1214 (9th Cir. 1987)). Scalia has elsewhere insisted, however, that purpose clauses are "in reality as well as in name *not* part of the congressionally legislated set of rights and duties, though they may "shed light on the meaning of the operative provisions that follow. SCALIA & GARNER, *supra* note 38, at 217–18.

63. Manning, *supra* note 30, at 106–08; *see also* SCALIA & GARNER, *supra* note 38, at 18–19 ("The most destructive (and alluring) feature of purposivism is its manipulability. Any provision of law or of private ordering can be said to have a number of purposes, which can be placed on a ladder of abstraction. The purposivist is free to climb up this ladder of purposes and to 'fill in' or change the text according to the level of gener-

against the purposivism inherent in the zone of interests test, as is well illustrated by Justice Scalia's opinion for the Court in *Bennett v. Spear*.[64]

The Endangered Species Act of 1973 (ESA),[65] requires federal agencies to determine, through consultation with the Secretary of the Interior, whether any action they are poised to take is 'likely to jeopardize the continued existence of any endangered species,'[66] and, if so, to obtain from the Fish and Wildlife Service (FWS) a 'written statement detailing how the agency action affects the species or its critical habitat' and suggesting 'reasonable and prudent alternatives' that would not do so.[67] In 1992, the Bureau of Reclamation consulted with the FWS to determine whether an ongoing project designed to supply irrigation water to farmers in northern California and southern Oregon posed a threat to two endangered species of fish indigenous to the area—the Lost River and Shortnose Suckers.[68] The FWS concluded that the two species were indeed threatened by the project and proposed, as part of a 'reasonable and prudent alternative, that a minimum water level be maintained at two reservoirs in the region. Two irrigation districts and two individual ranchers from southern Oregon, upset that the FWS's proposed alternative would diminish the amount of water available for their use, sued under § 702 of the APA, charging in part that the FWS had ignored evidence showing that the operation of the project would not adversely affect the species in question, violating § 1536's requirement that 'each agency use the best scientific and commercial data available.'[69]

Both the district court and the Ninth Circuit Court of Appeals concluded that the plaintiffs fell outside the ESA's 'zone of interests. The Ninth Circuit's reasoning is instructive: 'The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic

---

ality he has chosen.'); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 62 (1994) (critiquing reliance on legislative history for "boosting the level of generality. Having reduced to possession the values behind the texts, the judge proceeds to advance the cause of those values in the case at hand.').

64. 520 U.S. 154 (1997).

65. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–44 (2006)).

66. 16 U.S.C. § 1536(a)(2) (2006).

67. 16 U.S.C. § 1536(b)(3)(A) (2006).

68. *Bennett*, 520 U.S. at 158–59.

69. 16 U.S.C. § 1536(a)(2) (2006).

and recreational interests that underlie the plaintiffs' challenge.'[70] Accordingly, 'suits by plaintiffs who are interested only in avoiding the burdens of that preservation effort 'are more likely to frustrate than to further [those] statutory objectives.'[71] But the Supreme Court, on certiorari, took a more expansive view of the purposes behind the ESA and reversed: 'The obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, and while 'this no doubt serves to advance the ESA's overall goal of species preservation, we think it readily apparent that another objective (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.'[72] Accordingly, the plaintiffs' suit was 'plainly within the zone of interests that the provision protects.'[73]

These dueling opinions illustrate the extent to which the zone-of-interests test depends on *Holy Trinity*-style purposivism. By casting the purpose of the ESA narrowly, as 'singularly devoted to the goal of ensuring species preservation,'[74] the Ninth Circuit was able to place the plaintiffs outside that zone. By walking the purpose up to a more inclusive level of abstraction, including the prevention of 'needless economic dislocation,'[75] the Court could justify the opposite conclusion. According to the familiar textualist critique, of course, *both* descriptions of the ESA's purpose are equally correct. Courts possess substantial discretion to cast the purposes behind legislation narrowly or broadly, and thereby close or open the courthouse door.[76] One thus might expect to find textualists stridently charging that the manipulability inherent in the nature of the purposivist enterprise is di-

70. Bennett v. Plenert, 63 F.3d 915, 920 (9th Cir. 1995), *rev'g judgment sub nom.* Bennett v. Spear, 520 U.S. 154 (1997).

71. *Id.* (quoting Nev. Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)).

72. *Bennett*, 520 U.S. at 176–77.

73. *Id.* at 177.

74. *Plenert*, 63 F.3d at 920.

75. *Bennett*, 520 U.S. at 176–77.

76. *Compare* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012) (describing the purpose of the relevant statute broadly and allowing the case to proceed), *Nat'l Credit Union Admin.*, 522 U.S. 479 (same), *Clarke*, 479 U.S. 388 (same), Barlow v. Collins, 397 U.S. 159 (1970) (same), *and Camp*, 397 U.S. 150 (same), *with Air Courier Conference*, 498 U.S. 517 (describing the purpose of the relevant statute narrowly and concluding that the plaintiffs lacked standing), *and* Block v. Cmty. Nutrition Inst., 467 U.S. 340 (1984) (similar).

rectly responsible for the notorious difficulty of reconciling the zone-of-interest cases;[77] instead one finds them merrily playing the game.[78]

2. Choice of Law

In many cases, all of the legal questions that a court must decide concern a single body of law which obviously applies to the case at bar. But in some cases, more than one sovereign can plausibly claim the authority to have its law decide a dispute—*Mary* from Maryland forms a contract with *Al* from Alabama (or Algeria) and later sues for breach—and the court must choose which law to apply. For the better part of our nation's history, courts took a 'territorial' approach to these types of questions: the laws of Maryland, Alabama, and Algeria, it was assumed, bind only 'within the territorial limits and jurisdiction of [each] country.'[79] But 'with a wise and liberal regard to common convenience and mutual benefits and necessities,'[80] enlightened nations would nonetheless 'as a matter of comity"[81] apply the law of a foreign sovereign according to 'rules which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to [each] in return.'[82] The trick was to divine from these territorialist postulates which choice-of-law rules to apply, and then to get everyone to apply them.

Starting in about the middle of the twentieth century, conflict-of-laws scholars started to see the matter very differently. One point of departure was the content of the territorial rules that had taken hold. Many of these rules seemed wooden, formalistic, and, at the same time, manipulable, and in an era dominated by

77. *See Clarke*, 479 U.S. at 396 ("The 'zone of interest' formula in *Data Processing* has not proved self-explanatory. '); FALLON, JR. ET AL. *supra* note 51, at 160 ("Since *Clarke*, the Supreme Court has consistently applied the 'zone-of-interests' test, though with arguable variations in the stringency of its interpretation."); Kenneth E. Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 646 (1973) (describing standing doctrine as "in disarray").

78. *See supra* note 62 and accompanying text.

79. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 7 (Boston, Little, Brown & Co., 5th ed. 1857); *see also* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 1 cmt. 1 (AM. LAW INST. 1934) ("No state can make a law which by its own force is operative in another state.").

80. STORY, *supra* note 79, § 7.

81. *Id.* § 36.

82. *Id.* § 35.

Hart-and-Sacks-style 'reasoned elaboration, these features were not endearing.[83] But, to some, the problem with traditional choice of law went deeper: its fundamental methods and objectives needed to be rethought. The result of this rethinking was the 'choice of law revolution, and the revolutionary-in-chief was Brainerd Currie.

To begin with, Currie discarded the territorialist assumption that 'inexorably assigns to a single state 'legislative jurisdiction' to control the outcome of any conceivable case, not only without regard to the implications of the result but with utter indifference to what the result itself may be.'[84] In place of this 'territorialist dogma, Currie started from a pragmatic position that emphasized that laws are instruments of public policy, and he sought to articulate an approach to conflicts that took adequate account of 'the policies and interests of the states involved.'[85] In particular, rather than attempt to derive a set of choice-of-law rules from territorialist or any other jurisprudential axioms, Currie suggested that courts should 'first of all, determine the governmental policy expressed in the law of [that state], and then 'inquire whether the relation of the [state] to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy.'[86]

This 'interest analysis, of course, depended centrally on the

---

83. The form of territorialism that dominated early twentieth-century conflicts jurisprudence was the "vested rights' theory prominently articulated by Joseph Beale. Beale's theory centrally depended on determining in which jurisdiction a party's legal rights "vested. *See generally* JOSEPH BEALE, A SELECTION OF CASES ON THE CONFLICT OF LAWS (1907). In tort, for example, Beale argued that the right to recover vested in whichever state the "last event" necessary for the cause of action to accrue occurred. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (AM. LAW INST. 1934). Contractual rights vested in the place where the contract was ultimately formed. *Id.* §§ 312–31. This approach led to rules, which, in Currie's estimation, "have not worked and cannot be made to work. Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 174 (1959).

84. Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 237 (1958).

85. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 66 (1958); *see also* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1284 (1989) ("The central thesis of the modern approaches to choice of law is that law-making is an instrumental activity."); Brainerd Currie, *The Constitution and the "Transitory' Cause of Action*, 73 HARV. L. REV. 36, 76 (1959) ("The determination of what matters are within the legitimate concern of a state is realistically made not by reference to territorialist dogma and common-law precedent but by reference to the legal policies of the state and the circumstances in which the execution of such policies is reasonable.").

86. Currie, *supra* note 83, at 178. If only one state were "interested' in this way, that state's law should apply. If both the forum and a foreign state were interested, Currie would have the court default to forum law. *Id.*

courts' ability to discern the policy behind each law, but writing in the late '50s and early '60s, Currie was able to confidently assert that this process was merely 'the familiar one of construction and interpretation.'[87] 'Lawgivers, legislative and judicial, are accustomed to speak in terms of unqualified generality, and they ordinarily give little thought to the appropriate interstate scope of the laws they pass.[88] This absence of specific intent or clear textual command, however, was the *starting point* for Hart and Sacks's approach to interpretation,[89] and in very much the same spirit, Currie concluded that '[l]eft thus to our own devices, we may inquire what policy can reasonably be attributed to the legislature, and how it can best be effectuated by the courts.'[90] A great virtue of his 'interest analysis,' Currie was thus able to proclaim, was that it essentially unified choice of law with statutory interpretation, taking a strongly purposivist approach to both.[91]

In the ensuing decades, choice-of-law and statutory interpretation have come uncoupled. As described above, purposivism's star has faded in ordinary statutory interpretation. But while 'consensus is lacking' among courts and theorists about the appropriate approach to choice of law, '[i]nterest analysis is the leading scholarly position, and the only doctrine that could plausibly claim to have generated a school of adherents.'[92] Indeed, a strong majority of states—including the four states (Michigan, Oregon, Texas, and Wisconsin) that, according to Abbe Gluck's path-breaking survey, exemplify the state-level trend toward textualism in statutory interpretation[93]—currently apply either interest analysis or one of the alternative modern approaches to

87. Brainerd Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 40 (1963).

88. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 230–33 (1958).

89. *See* HART & SACKS, *supra* note 2, at 1188–94, 1228–33.

90. Currie, *supra* note 88, at 233; *cf.* HART & SACKS, *supra* note 2, at 1374 (directing courts to '[d]ecide what purpose ought to be attributed to the statute' and then '[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can").

91. Currie, *supra* note 83, at 178 ("This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.").

92. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2466 (1999).

93. *See generally* Gluck, *supra* note 42.

choice of law such as the Second Restatement,[94] which likewise includes a dominant element of purposivism.[95]

To be sure, developments from the statutory interpretation literature have not gone entirely unnoticed in the conflicts 'theory wars.'[96] Throughout the '80s, Lea Brilmayer pressed a methodological critique of interest analysis, which apparently drew in part on then-cutting-edge insights from statutory-interpretation theory about the difficulty of discerning legislative intent. 'When a legislature has not indicated the territorial scope of a statute in either the words enacted or in the legislative history, Brilmayer insisted, 'it is a fiction to speak of 'legislative intent.'[97] Accordingly, she was 'suspicious about whether Currie was deducing true legislative intent, or whether his 'principles of inference were rather a product of his own normative beliefs about how far certain policies *ought* to reach.'[98]

The interest analysts were not persuaded. 'Interest analysis, wrote Robert Sedler, 'does not proceed on the assumption that it is a method of determining the legislature's intent whether or not a statute should apply to a particular situation.'[99] Rather, 'interest analysis seeks to determine 'legislative purpose' in the sense of ascertaining the objective that the legislature was trying to accomplish by the enactment of the statute,'[100] and, as Russell

94. Symeon C. Symeonides, *Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey*, 62 AM. J. COMP. L. 223, 281 (2014).

95. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (AM. LAW INST. 1971) (including, among the factors relevant to the choice of law, "the relevant policies of the forum' and "the relevant policies of other interested states, as well as "the basic policies underlying the particular field of law"); *id.* cmt. e ("Every rule of law, whether embodied in a statute or in a common law rule, was designed to achieve one or more purposes. A court should have regard for these purposes in determining whether to apply its own rule or the rule of another state in the decision of a particular issue.').

96. Phrase borrowed from Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631 (2005).

97. Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 430–431 (1980).

98. *Id.* at 400; *see generally* Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985) (articulating Brilmayer's methodological critique, yet relying less on worries about legislative intent); Lea Brilmayer, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555 (1984) (same); Brilmayer, *supra* note 85 (same).

99. Robert A. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer's "Foundational Attack"* 46 OHIO ST. L.J. 483, 486 (1985).

100. *Id.*; *see also* Herma Hill Kay, *"The Entrails of a Goat" Reflections on Reading Lea Brilmayer's Hague Lectures*, 48 MERCER L. REV. 891, 900 (1997) ("[T]he first analytical task for a judge following Currie's approach is to identify the policy underlying the laws invoked by the parties."); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 609 (1983) ("Interest analysis is an 'attempt to determine legislative purpose' in the sense that legislative

Weintraub put it, '[t]here's nothing new or remarkable about that.'[101] Indeed, Larry Kramer opined, Brilmayer's charge that the interest analysts' imputation of legislative intent is a myth 'is an objection to a conventional method of statutory construction,' since 'it is black letter law that [the lack of specific intent] can be resolved by ascertaining the statute's purpose and extrapolating from that purpose to the particular question.'[102] This method, Kramer averred, 'is the most widely used and accepted approach to interpretation both in practice and in the academy.'[103] When Sedler and Weintraub were writing in the mid-'80s—and perhaps even when Kramer wrote, in 1990—this may yet have been true. Over two decades later, it is not.

3. Preemption

The Supremacy Clause makes federal law 'the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,'[104] and the Supreme Court has developed an intricate doctrinal framework to guide courts in determining whether federal law 'preempts' contrary state law under that Clause. '[T]he purpose of Congress is the ultimate touchstone in every pre-emption case,'[105] and when 'a federal law contains an express preemption clause,' —cases of express preemption—the Court will 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress's preemptive intent.'[106] Even if Congress's preemptive intent is not 'explicitly stated in the statute's language,' it might be 'implicitly contained in its structure and purpose.'[107] Courts will find such implied preemption in two types of circumstances: where 'federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for

---

purpose refers to the *policies* embodied in a statute . . .').

101. Russell J. Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 MERCER L. REV. 629, 631 (1984); *see also* Kay, *supra* note 100, at 899 n.46 ("This method of statutory interpretation is not unique to choice of law.').

102. Kramer, *supra* note 32, at 300.

103. *Id.*

104. U.S. CONST. art. VI, cl. 2.

105. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

106. Chamber of Commerce of the U.S. v. Whiting, 563 U.S. 582, 594 (2011) (quoting CSX Transp. Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

107. Cipollone v. Liggett Grp. 505 U.S. 504, 516 (1992) (quoting Jones v. Rath Packing Co. 430 U.S. 519, 525 (1977)).

the States to supplement it, '[108] or where state law 'actually conflicts with federal law.'[109] This latter category of 'conflict preemption' is, in turn, further subdivided into two types of cases: 'impossibility preemption' where 'compliance with both federal and state regulations is a physical impossibility,'[110] and 'obstacle preemption' where 'state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'[111]

This final doctrine of obstacle preemption is significant in two respects. First, obstacle preemption does much of the heavy lifting in the Court's modern preemption jurisprudence. Qualitatively, commentators have noted for over a decade now that the Court is taking an increasingly 'muscular' approach to obstacle preemption;[112] quantitatively, beginning in the 1980s, obstacle preemption cases began to take up a growing share of the Court's docket.[113] And second, the type of reasoning the Court uses to determine whether state law 'frustrates the deliberate purpose of Congress'[114] has an undeniably purposivist hue. This is perhaps best illustrated by comparing two cases.

First, take a typical example of the current Court's dominant approach to statutory interpretation. Enacted in 1908, the Federal Employer Liability Act (FELA)[115] provides a cause of action to interstate railroad employees who are injured on the job due to the negligence of the railroad or its employees.[116] Designed in part to remedy several defects in then-contemporary tort law, FELA expressly discards the common law contributory-negligence bar in favor of the rule that a plaintiff's 'damages shall be diminished by the jury in proportion to the amount of negligence attributable to [the plaintiff].'[117] FELA grants the

108. *Id.* at 516 (quoting Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)).

109. *De la Cuesta*, 458 U.S. at 153.

110. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

111. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

112. Kenneth W. Starr, *Reflections on* Hines v. Davidowitz*: The Future of Obstacle Preemption*, 33 PEPP. L. REV. 1, 5 (2005).

113. John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 385–86 (2013).

114. Hillman v. Maretta, 133 S. Ct. 1943, 1952 (2013) (quoting Wissner v. Wissner, 338 U.S. 655, 659 (1950)).

115. Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (2006)).

116. 45 U.S.C. § 51 (2006).

117. 45 U.S.C. § 53 (2006).

states concurrent jurisdiction over its cause of action,[118] and Missouri adopted a jury instruction for FELA cases providing that a railroad is liable if its negligence contributed 'in whole or in part' to plaintiff's injury, but that a plaintiff's contributory negligence works to offset her damages only if it 'directly contributed to cause' her injury.[119] This apparently held railroads to a lower standard of causation than plaintiff–employees, and in *Norfolk Southern Railway Co. v. Sorrell*,[120] Norfolk Southern urged that this was a misinterpretation of FELA.[121] The Supreme Court agreed.[122]

FELA, the Court's cases had long maintained, was to be interpreted 'by reference to the common law' except when it expressly provided to the contrary,[123] and the traditional common law rule was that a defendant's negligence and a plaintiff's contributory negligence were to be proved by the same standard of causation.[124] FELA's text did not clearly indicate a departure from this common law standard, but Sorrell—the plaintiff in the case—nevertheless urged the Court to sanction Missouri's plaintiff-friendly disparity in standards because of 'FELA's remedial purpose.'[125] The Court declined Sorrell's invitation. 'FELA was indeed enacted to benefit railroad employees, the Court conceded, and giving them the benefit of a higher standard of causation than their employers would certainly aid the plaintiff–employees.[126] But 'this remedial purpose' simply does not 'require[] us to interpret every uncertainty in the Act in favor of employees.'[127] After all, 'it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'[128]

Now consider a recent obstacle preemption case. The Federal Arbitration Act (FAA)[129] expressly preempts state laws that inter-

118. 45 U.S.C. § 56 (2006).
119. Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 161 (2007).
120. 549 U.S. 158 (2007).
121. *Id.*
122. *Id.* at 160.
123. *Id.* at 165–66.
124. *Id.* at 166.
125. *Id.* at 171.
126. *Id.*
127. *Id.*
128. *Id.* (quoting Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam)).
129. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 1–16, 201–08, 301–07 (2012)).

fere with arbitration agreements, but it includes a savings clause protecting interference based on 'grounds as exist at law or in equity for the revocation of any contract.'[130] In 2005, the California Supreme Court developed a doctrine of tort law, known as the *Discover Bank* rule, which deems a class action waiver in an arbitration agreement included as part of a 'contract of adhesion' to be 'unconscionable' and thus unenforceable.[131] The *Discover Bank* rule is clearly an example of state interference with arbitration agreements, but since it merely extends unconscionability doctrine, it might be thought to fit comfortably within the FAA's savings clause. Nevertheless, in *AT&T Mobility LLC v. Concepcion*,[132] the Court found California's rule preempted by the FAA, and it did so, remarkably, without even addressing the scope of the FAA's savings clause.[133] Instead, Justice Scalia's opinion for the Court moved directly to an obstacle-preemption analysis. 'The overarching purpose of the FAA,' wrote Scalia, 'is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings,'[134] and '[t]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.'[135] Because it in this way 'interferes with fundamental attributes of arbitration,' the California rule 'creates a scheme inconsistent with the FAA.'[136]

The result in *Concepcion* may well be justifiable,[137] but the reasoning certainly should appear jarring, at this point. The FAA does seem concerned to 'facilitate streamlined proceedings'[138]—this purpose is, as Justice Scalia noted, 'readily apparent from the FAA's text.'[139] But, as Scalia has noted elsewhere, '[n]o legislation pursues its purposes at all costs,' and '[e]very statute purposes, not only to achieve certain ends, but also to achieve them by particular means.'[140] In this spirit, one might

130. 9 U.S.C. § 2 (2012).
131. Discover Bank v. Super. Ct., 36 Cal. 4th 148, 162–63 (Cal. 2005).
132. 563 U.S. 333 (2011).
133. *Id.* at 351–52.
134. *Id.* at 334.
135. *Id.*
136. *Id.*
137. *See* Ohlendorf, *supra* note 113 (arguing that most obstacle preemption cases can in fact be justified in a way consistent with textualism).
138. *Concepcion*, 563 U.S. at 343.
139. *Id.*
140. Freeman v. Quicken Loans, Inc. 132 S. Ct. 2034, 2044 (2012) (Scalia, J. writing

have expected Scalia to emphasize that, although striking down California's rule might indeed further the FAA's broad purpose, the Act's *text* provided that state law was preempted only to the extent it went beyond those 'grounds as exist at law or in equity for the revocation of any contract, '[141] and '[d]eduction from the 'broad purpose' of a statute begs the question if it is used to decide by what means (and hence to what length) Congress pursued that purpose. '[142]

More so than with the other doctrines discussed in this Part, the tension between the Court's apparently disparate approaches to preemption and ordinary statutory interpretation has been recognized and discussed. To a large extent, this is due to the assiduous critiques of obstacle preemption advanced by Justice Thomas and his former law clerk, Professor Caleb Nelson.[143] In an influential article, Professor Nelson argued that the doctrine of obstacle preemption was both historically unmoored and at odds with 'our widely shared interpretive conventions' which 'set limits on the relevance of congressional purpose. '[144] And in a prominent separate opinion in a 2009 preemption case, Justice Thomas launched a full-scale assault on obstacle preemption, relying in part on Nelson's article to maintain that the doctrine's reliance on 'the broader purposes of the statute inevitably leads [the Court] to assume that Congress wanted to pursue those policies 'at all costs'—even when the text reflects a different balance. '[145] Due to these efforts, the tension between the Court's apparent purposivism in obstacle preemption and textualism in ordinary statutory interpretation has become fairly well appreciated in the scholarly literature.[146] But those efforts have

for the Court) (second alteration in original) (citations and internal quotation marks omitted).

141. 9 U.S.C. § 2 (2012).

142. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) (emphasis omitted).

143. Professor Nelson clerked for Justice Thomas during the 1994 term. *Caleb E. Nelson, Faculty*, UNIV. OF VA. SCH. OF LAW, https://content.law.virginia.edu/faculty/profile/cen2d/1194571 [https://perma.cc/RC4M-485Y] (last visited Nov. 13, 2016).

144. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 284 (2000).

145. *Wyeth*, 555 U.S. at 601 (Thomas, J., concurring).

146. *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2103–05, 2116–17 (2000); Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 590–91 (2008); Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1201–28 (1998); John F. Manning, *Competing Presumptions about Statutory Coherence*, 74 FORDHAM L. REV. 2009, 2034 n.114 (2006); Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1 (2013); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 362–68

not yet yielded dividends on the bench. The Court continues to preempt state law based on the 'purposes and objectives' of Congress, and Justice Thomas continues to write separately, insisting that 'the 'purposes and objectives' framework is an illegitimate basis for finding the pre-emption of state law.'[147] So far, none of his colleagues seems to be convinced.

4. Constitutional Law

The role of legislative purpose or motive in judicial review for unconstitutionality is notoriously vexed.[148] In one breath, we find the Court proclaiming it 'a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'[149] In the next, it insists that 'the basic equal protection principle' is that 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'[150] The reality seems to be that unconstitutional purpose matters at least some of the time, for some areas of constitutional law. In this section, I briefly survey the two areas of doctrine where it seems most obviously to matter: the First Amendment and the Equal Protection Clause.[151]

(2002); Ohlendorf, *supra* note 113; Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J.L. & LIBERTY 63, 86–93 (2010); *see generally* Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056 (2013).

147. *See, e.g.*, *Hillman*, 133 S. Ct. at 1955 (Thomas, J., concurring).

148. *See generally* Robert W. Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049 (1979); Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Colloquium, *Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925 (1978); Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1 (1993).

149. United States v. O'Brien, 391 U.S. 367, 383 (1968).

150. Washington v. Davis, 426 U.S. 229, 240 (1976).

151. While these two doctrinal areas are the ones where inquiries into legislative purpose loom the largest, motive-tests are also scattered throughout much of the rest of constitutional law. First, as early as *McCulloch v. Maryland*, the Court suggested that "should [C]ongress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government," the Court would be obliged to "say [] that such an act was not the law of the land, 17 U.S. 316, 423 (1819). References to the "pretext" analysis hinted at in *McCulloch* reappear, from time to time, in one or another Justice's analysis, *e.g.*, United States v. Comstock, 560 U.S. 126, 180 (2010) (Thomas, J., dissenting); Gonzales v. Raich, 545 U.S. 1, 66 (2005) (Thomas, J., dissenting), as well as an opinion of the Court, Jinks v. Richland Cty., 538 U.S. 456, 464 (2003). Second, the determination whether state regulation of interstate commerce is "motivated

a. First Amendment. To the extent that there is a governing test in the Court's Establishment Clause doctrine, it is the one described in *Lemon v. Kurtzman*[152]: 'First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.'[153] The Court's devotion to the *Lemon* test has been infamously uneven,[154] but there is no question that its demand that legislation have 'a secular legislative purpose' is alive and well. As late as 2005, the Court insisted that '[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates th[e] central Establishment Clause value of official religious neutrality,'[155] justifying this inquiry into purpose in part by noting that '[e]xamination of purpose is a staple of statutory interpretation.'[156]

Purpose plays a similarly important role in the Free Exercise context. Although it remains black-letter law that the Free Exercise Clause 'does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'[157] where 'the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to

---

by 'simple economic protectionism' and accordingly "subject to a 'virtually *per se* rule of invalidity," under the so-called "dormant Commerce Clause, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338 (2007) (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)), can "be made on the basis of 'discriminatory purpose,' Bacchus Imps. v. Dias, 468 U.S. 263, 270 (1984) (citing Hunt v. Washington Apple Advert. Comm'n, 432 U.S. 333, 352–53 (1977)). Finally, the constitutionality of regulatory legislation under the Ex Post Facto Clause, the Double Jeopardy Clause, the Due Process Clause, or the Bill of Attainder Clause in some circumstances might depend in part on whether the regulation was enacted with "punitive intent." *See* Smith v. Doe, 538 U.S. 84, 92–106 (2003) (ex post facto); Hudson v. United States, 522 U.S. 93, 98–105 (1997) (double jeopardy); Bell v. Wolfish, 441 U.S. 520, 535–40 (1979) (due process); Flemming v. Nestor, 363 U.S. 603 (1960) (bill of attainder).

152. 403 U.S. 602 (1971).

153. *Id.* at 612–13 (1971) (citations and internal quotation marks omitted).

154. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398–400 (1993) (Scalia, J. concurring).

155. McCreary Cty. v. ACLU, 545 U.S. 844, 860 (2005).

156. *Id.* at 861; *see also* Town of Greece v. Galloway, 134 S. Ct. 1811, 1824 (2014) (suggesting that an otherwise constitutional practice of opening town board meetings with prayer might violate the First Amendment if there were "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose").

157. Emp't Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J. concurring)).

advance that interest.'[158] This inquiry into whether 'the object or purpose of a law is the suppression of religion,'[159] moreover, need not 'end with the text of the laws at issue,'[160] since the Clause also 'forbids subtle departures from neutrality.'[161]

The role of purpose analysis in free-speech law is less straightforward—it was in this context that the Court insisted that there was 'no support whatever' for the position that otherwise constitutional legislation might be rendered unconstitutional due to 'a wrongful purpose or motive'[162]—but it seems clear, the Court's erstwhile protestations to the contrary, that an inquiry into purpose or motive plays at least *some* role in the Court's free-expression doctrine. At one extreme, then-Professor Kagan opined in a much-read 1996 article that 'First Amendment Law has as its primary, though unstated, object the discovery of improper governmental motives, and in fact was 'best understood and most readily explained as a kind of motive-hunting.'[163] But one needn't go this far to recognize that purpose analysis plays an important role in the doctrine, in several ways.

First, in determining which regulations of speech are content based—and therefore generally subject to strict scrutiny—the Court has indicated that the 'principal inquiry. is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'[164] 'The government's purpose is the controlling consideration,'[165] and 'even a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys.'[166] Second, while 'the mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face, discriminates based on content,'[167] the Court has occasionally applied a

158. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (internal citation omitted).

159. *Id.*

160. *Id.* at 534.

161. *Id.* (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)).

162. *O'Brien*, 391 U.S. at 383 (quoting McCray v. United States, 195 U.S. 27, 56 (1904)).

163. Kagan, *supra* note 148, at 414.

164. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *accord* McCullen v. Coakley, 134 S. Ct. 2518, 2531–32 (2014).

165. *Ward*, 491 U.S. at 791.

166. Turner Broad. Sys. v. FCC, 512 U.S. 622, 645 (1994); *see also* Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) ("In determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation ").

167. *Turner*, 512 U.S. at 642–43.

doctrine of 'secondary effects, which treats a facially content-based regulation as content neutral if the purposes or '"predominant' intent' of the regulation is 'unrelated to the suppression of free expression.'[168] Finally, the Court has held that although content-based regulation of the categories of so-called 'unprotected' speech[169] is permissible if enacted 'because of [the unprotected speech's] constitutionally proscribable content,'[170] such regulation cannot constitutionally be 'based on hostility—or favoritism—toward the underlying message expressed'[171]—clearly a purposivist inquiry.

b. Equal Protection. In the Court's Equal Protection Clause jurisprudence, the role of purpose is well established. John Hart Ely claimed that the entire tiers-of-scrutiny apparatus is 'a way of 'flushing out' unconstitutional motivation,'[172] and the Court has indeed long cleaved to 'the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'[173] The same rule applies to gender-based discrimination.[174] And the developing jurisprudence on discrimination based on sexual orientation likewise has a similar purposivist coloring.[175]

This reliance on legislative purpose is perhaps nowhere more evident than in the Court's voting-rights doctrine. The Equal Protection Clause, the Court has held, bars racially motivated in-

168. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986); *see also* City of L.A. v. Alameda Books, 535 U.S. 425, 433–43 (2002) (plurality opinion) (discussing *Renton*).

169. *See* United States v. Alvarez, 132 S. Ct. 2537, 2543–44 (2012) (describing categories of unprotected speech); *see generally* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (same).

170. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

171. *Id.* at 386; *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 576 (2001) (Kennedy, J. concurring) ("Even when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category.').

172. JOHN HART ELY, DEMOCRACY AND DISTRUST 146 (1980); *see generally* Ely, *supra* note 148.

173. *Davis*, 426 U.S. at 240.

174. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (applying the discriminatory-purpose requirement to gender-discrimination claims).

175. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (stating that "a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest" (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))); *see also* United States v. Windsor, 133 S. Ct. 2675, 2695 (2013) (holding part of the Defense of Marriage Act unconstitutional under the Fifth Amendment's Due Process Clause because "the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage").

fringement of voting rights,[176] and '[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.'[177] Accordingly, 'equal protection principles govern a State's drawing of congressional districts,' precluding redistricting laws 'that explicitly distinguish between individuals on racial grounds,' as well as 'laws neutral on their face but 'unexplainable on grounds other than race.'[178] And in determining whether a particular attempt at redistricting amounts to 'an effort to segregate the races for purposes of voting,'[179] the primary inquiry, according to the Court, is whether 'race [was] 'the predominant factor motivating the legislature's [redistricting] decision.'[180]

As in the other areas surveyed in this Part, the tension between the Court's inquiry into legislative purpose and modern developments in statutory-interpretation theory has not gone entirely unnoticed. The susceptibility of motive analysis to familiar worries about group intent has been ventilated both in separate opinions from the bench[181] and in the literature.[182] But inquiries into illicit legislative purpose continue apace; Ely, at times, seems right that a large proportion of our intuitions about what does and does not count as unconstitutional legislative action 'cannot be responsibly rationalized on anything *but* a motivation theory.'[183]

5. Severability

When a court holds part of a statute unconstitutional, modern doctrine holds that it should 'try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'[184] This 'inquiry into whether a statute is sev-

176. Reynolds v. Sims, 377 U.S. 533, 554–71 (1964).

177. Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969).

178. Miller v. Johnson, 515 U.S. 900, 905 (1995) (quoting Shaw v. Reno, 509 U.S. 630, 642–44 (1993)).

179. Bush v. Vera, 517 U.S. 952, 958 (1996) (quoting *Shaw*, 509 U.S. at 642).

180. *Id.* at 959 (second alteration in original) (emphasis omitted) (quoting *Miller*, 515 U.S. at 916).

181. *E.g.*, *Church of Lukumi Babalu Aye*, 508 U.S. at 557–59 (Scalia, J. concurring); Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987) (Scalia, J., dissenting).

182. *E.g.*, Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 937–38 (1978); Kagan, *supra* note 148, at 438–42.

183. ELY, *supra* note 172, at 139.

184. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 507–09 (2010) (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328–29 (2006)).

erable is essentially an inquiry into legislative intent,'[185] to determine whether 'it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'[186] While 'the presumption is in favor of severability,'[187] the Court has directed that 'Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently, or incapable of 'function[ing] in a *manner* consistent with the intent of Congress.'[188] And this 'nebulous inquiry into hypothetical congressional intent"[189] frequently proceeds in purposivist fashion, as is illustrated in fine form by the boldest modern use of severability doctrine, *United States v. Booker*'s[190] creation of the 'advisory' federal-sentencing regime.[191]

At the dawn of the twenty-first century, the Court began a revolution in the constitutional doctrine governing sentencing law. New Jersey had enacted hate-crime legislation allowing a judge to extend the statutory sentencing range for certain crimes by finding, after conviction and by a preponderance of the evidence, that the crime was racially motivated.[192] In *Apprendi v. New Jersey*,[193] the Court held that this sentencing enhancement violated the Sixth Amendment's jury guarantee, concluding that [o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'[194] Four years later, in *Blakely v. Washington*,[195] the Court applied *Apprendi*'s rule to invalidate Washington's determinate sentencing scheme, which gave courts discretion to enhance a defendant's 'standard range' by finding 'aggravating factors' to be present.[196] Washington's system happened to look

185. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999).
186. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam)).
187. Regan v. Time, Inc., 468 U.S. 641, 653 (1984).
188. *Alaska Airlines*, 480 U.S. at 684–85.
189. United States v. Booker, 543 U.S. 220, 320 n.7 (2005) (Thomas, J., dissenting).
190. 543 U.S. 220.
191. *See id.*
192. Apprendi v. New Jersey, 530 U.S. 466, 468 (2000).
193. 530 U.S. 466.
194. *Id.* at 490. The Court had hinted at this rule the preceding term, in *Jones v. United States*, 526 U.S. 227, 239–52 (1999).
195. 542 U.S. 296 (2004).
196. *Id.* at 299–300.

a lot like the *federal* one, so the dissenters in *Blakely* were surely warranted in fearing that that the Federal Sentencing Guidelines would be the next penny to drop.[197]

When the Court faced an *Apprendi* challenge to the Federal Sentencing Guidelines the following term, in *United States v. Booker*, it did not disappoint: like its Washington cousin, the Federal Guidelines, the Court concluded, violated the Sixth Amendment's jury guarantee.[198] But the kill was not a clean one. Justice Stevens wrote an opinion for himself and Justices Scalia, Souter, Thomas, and Ginsburg—the same majority as in *Apprendi* and *Blakely*—finding the challenged application of the Federal Guidelines unconstitutional under the Sixth Amendment.[199] But when it came to what the Court called 'the question of remedy,' Justice Ginsburg jumped ship, joining an opinion authored by Justice Breyer for the two of them, Chief Justice Rehnquist, and Justices O'Connor and Kennedy.[200] While Justices Stevens, Scalia, Souter, and Thomas would have cured the Sixth Amendment defect by retaining the overall structure of the Sentencing Guidelines but requiring the Government to 'prove any fact that is required to increase a defendant's sentence under the Guidelines to a jury beyond a reasonable doubt,'[201] Justice Breyer's separate 'remedial' majority concluded that a different 'remedial approach[] was 'more compatible with the Legislature's intent.'[202] Importantly, the difference between the two approaches largely came down to a dispute about 'Congress'[s] basic statutory goal.'[203]

Justice Breyer rejected the Stevens–Scalia–Souter–Thomas remedy—'engraft[ing] onto the existing system' a 'jury trial' requirement'—as too significant a departure from 'the system that Congress has designed.'[204] Instead, Justice Breyer's remedial majority 'severed and excised' the statutory provisions that made the Federal Guidelines mandatory, rendering the Guidelines 'effectively advisory,' but still available for courts to con-

197. *Id.* at 323–26 (O'Connor, J. dissenting).
198. *Booker*, 543 U.S. at 226–27.
199. *Id.* at 226–44 (Stevens, J., delivering the opinion of the Court in part).
200. *Id.* at 244–68 (Breyer, J., delivering the opinion of the Court in part).
201. *Id.* at 284–85 (Stevens, J. dissenting in part); *accord id.* at 324–25 (Thomas, J. dissenting in part).
202. *Id.* at 246 (Breyer, J. delivering the opinion of the Court in part).
203. *Id.* at 250 (Breyer, J. delivering the opinion of the Court in part).
204. *Id.* at 246 (Breyer, J. delivering the opinion of the Court in part).

sider alongside 'other statutory concerns.'[205] This use of severability, the majority on this point urged, resulted in a sentencing system more in tune with the Sentencing Act's 'language, its history, and its basic purposes'[206]—in particular, its 'basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.'[207] The dissenters' remedial approach, Breyer argued, was 'plainly contrary to the intent of Congress,'[208] because it undermined the Act's 'basic statutory goal—a system that diminishes sentencing disparity, which 'depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.'[209] By contrast, 'the Act without its 'mandatory' provision and related language remains consistent with Congress'[s] initial and basic sentencing intent, since '[t]he system remaining after excision' would 'continue to move sentencing in Congress'[s] preferred direction.'[210]

Justice Scalia defended the alternative approach, but, significantly, he did not do so by critiquing Justice Breyer for 'simplistically assum[ing] that *whatever* furthers the statute's primary objective must be the law.'[211] Indeed, Scalia accepted the purposive nature of severability analysis and further accepted that 'the primary objective of the Act was to reduce sentencing disparity.'[212] Scalia's line of attack, instead, was that Justice Breyer had '[i]nexplicably conclude[d] that the *manner* of achieving uniform sentences'[213]—a 'judge-based sentencing system'[214]—was 'more important to Congress than actually achieving uniformity.'[215] A curious inversion of the ordinary principle of statutory interpretation that '[e]very statute purposes, not only to achieve certain ends, but also to achieve them by particular means.'[216] It was left to Justice Thomas to suggest, alone and

205. *Id.* at 245–46 (Breyer, J., delivering the opinion of the Court in part).
206. *Id.* at 248 (Breyer, J., delivering the opinion of the Court in part).
207. *Id.* at 252 (Breyer, J., delivering the opinion of the Court in part).
208. *Id.* at 250 (Breyer, J., delivering the opinion of the Court in part) (quoting United States v. X-Citement Video, Inc. 513 U.S. 64, 78 (1994)).
209. *Id.* (Breyer, J., delivering the opinion of the Court in part).
210. *Id.* at 264 (Breyer, J., delivering the opinion of the Court in part).
211. Rodriguez v. United States, 480 U.S. 522, 526 (1987) (per curiam).
212. *Booker*, 543 U.S. at 303–04 (Scalia, J. dissenting in part).
213. *Id.* at 304 (Scalia, J. dissenting in part).
214. *Id.* at 303 (Scalia, J. dissenting in part).
215. *Id.* at 304 (Scalia, J. dissenting in part).
216. *Freeman*, 132 S. Ct. at 2044 (alteration in original) (quoting Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co. 514 U.S. 122, 126 (1995)).

halfheartedly, that all might not be well with 'our severability precedents—which require a nebulous inquiry into hypothetical congressional intent.'[217]

II. INTERPRETIVE PLURALISM IN STATUTORY INTERPRETATION

A. Interpretive Pluralism

The five doctrinal areas just surveyed indicate that, contrary to widespread perception, we are not all textualists now; nor are we all purposivists. Instead, it seems that most of us are sometimes one and sometimes the other, depending on the doctrinal context. Put in the terminology that has developed in the literature on *constitutional* interpretation, the contemporary practice of statutory interpretation is *pluralistic*: that is, there are at least *two different* interpretive methodologies that flourish within the interpretive domain,[218] and most practitioners (judges, lawyers, academics, and the like) regularly employ *each* of them. This naturally raises an important normative question: is this interpretive pluralism vicious or virtuous? Before tackling that question head-on, however, it will prove fruitful to take a brief tour through the constitutional-theory literature discussing interpretation in that context. For while a few of the statutory-interpretation classics grapple with the problem of interpretive pluralism,[219] it has been

---

217. *Booker*, 543 U.S. at 320 n.7 (Thomas, J. dissenting in part). For other examples of modern severability doctrine's reliance on purposivism, see *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 191 (finding an Executive Order inseverable because it "embodied a single, coherent policy" the "predominant purpose of which' would be frustrated by excising the unconstitutional provision); *Alaska Airlines*, 480 U.S. at 691 (finding a legislative-veto clause severable from other, employee-protective provisions the Airline Deregulation Act because, while "Congress regarded labor protection as an important feature of the Act, it "paid scant attention to the legislative-veto provision"); *Regan*, 468 U.S. at 653 ("[W]e are quite sure that the policies Congress sought to advance by enacting [the relevant Act] can be effectuated even though the [unconstitutional provision] is unenforceable.").

218. This is as good a place as any to acknowledge that whether a given set of interpretive practices qualifies as pluralistic in this sense depends on how one identifies the proper scope of each interpretive domain. For example, if each of the five areas identified in Part I are "outside" the domain of statutory interpretation in a strict as well as metaphorical sense, then statutory interpretation would not be pluralist: it would be (roughly, or perhaps "faint-heartedly") monist and textualist. My description of these five doctrinal areas as "outside' statutory interpretation is, however, indeed merely metaphorical. While they do not involve interpreting the operational content of a statute in the sense familiar from our stereotype of what statutory interpretation involves, the Court's approaches to each of the five areas discussed in fact depend on the quintessential act of statutory interpretation: determining the meaning of the statutory text.

219. In particular, the work of Professors Eskridge and Frickey, both individually and together, presses an account of statutory interpretation that is essentially pluralist. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 199–204 (1994) (de-

a much larger feature in the modern discussion of *constitutional* interpretation.[220]

In the 1970s a number of constitutional scholars weighed then-current constitutional practice and found it wanting. In the main, these commentators were ideologically conservative, and surely much of what they found distasteful about contemporary constitutional law was its liberal bent. But the critique they began to advance was one not of results but of method: the interpretive methodology dominant in the Warren and Burger Courts, they urged, placed far too little weight on those value choices 'that text or history show the framers actually to have intended.'[221] Originalism was born.

In 1980, in an effort to fend off this still-nascent originalist critique, Paul Brest penned an extraordinarily influential article[222] that largely set the terms for the debate over constitutional interpretation that has dominated contemporary constitutional theory. Brest thought that current interpretive practice accorded

---

fending a "critical pragmatist" theory of statutory interpretation where "no single legal convention governs statutory interpretation, but all are relevant—statutory text, legislative intent or purpose, the best answer"); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 57 (1994) (suggesting that "the Court does not adhere to any single foundation for statutory meaning, but has traditionally followed a multi-factored, pragmatic approach to statutory interpretation that shows certain regularities"); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990) (arguing that "the Court considers a broad range of textual, historical, and evolutive evidence when it interprets statutes"); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 258 (1992) (urging that "the great virtue of the new textualism—its rigidity—is also its essential vice").

220. Some of the most enlightening contributions include PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517 (1998); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEXAS L. REV. 1739 (2013); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEXAS L. REV. 1753 (1994); Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13 (1990); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165 (2008); Keith E. Whittington, *On Pluralism Within Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 70 (Grant Huscroft & Bradley W. Miller eds., 2011).

221. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17 (1971). Other examples from roughly this era include RAOUL BERGER, GOVERNMENT BY JUDICIARY (1977); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981), and William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS. L. REV. 693 (1976). As Larry Solum has noted, much of the work in this first tide of originalist scholarship is 'only loosely 'originalist' in the contemporary senses of that term." Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM, *supra* note 220, at 12, 16.

222. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

the Constitution's 'text and original history presumptive weight, but that it rightly did 'not treat them as authoritative or binding.'[223] In place of giving one or two considerations—like text or original intent—"binding authority, Brest defended a process of 'mere adjudication' which 'derives legal principles from custom, social practices, conventional morality, and precedent.'[224] More recent defenses of non-originalism largely start (and, frankly, end) in much the same place. Philip Bobbitt's justly famous book, for example, defends six 'modalities' of constitutional interpretation: historical, textual, doctrinal, prudential, structural, and ethical.[225] And one of the most prominent modern critics of originalism, Mitch Berman, has similarly criticized originalism for too strictly limiting the sources of constitutional meaning upon which interpreters might draw[226] and has defended non-originalism as appropriately recognizing 'that judges legitimately employ a variety of moves, arguments, or considerations when engaged in the activity properly denominated 'constitutional interpretation.'[227]

B. Holistic and Disjoint Pluralism

Interpretive pluralism, then, has been widely recognized in the constitutional context—and widely celebrated by those not taken with the 'originalist' movement in constitutional theory. It is important to note, however, a significant feature of the pluralism in constitutional interpretation: it is what I will call *holistic* pluralism. The idea is that a variety of considerations—text, structure, consequences, precedent, deeply held values—all get folded into a robust, wide-ranging balancing process, with the ultimate contribution of each modality to the final conclusion left to 'the realm of inarticulate judgment.'[228]

The pluralism in statutory interpretation is different; it is *disjoint*, rather than holistic. In one segment of cases—the cases traditionally part of the statutory interpretation canon, which involve ascertaining the operative meaning of a statutory text—courts approach statutory interpretation in a largely monistic,

223. *Id.* at 205.
224. *Id.* at 228–29.
225. PHILIP BOBBITT, CONSTITUTIONAL FATE 9–119 (1982).
226. *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 21–23 (2009).
227. Mitchell N. Berman, *Constitutional Interpretation: Non-Originalism*, 6 PHIL. COMPASS 408, 416 (2011).
228. Primus, *supra* note 220, at 167.

not pluralistic, way. To be sure, no one thinks that we are *literally* all textualists now. This common refrain is usually accompanied by some such disclaimer as '[i]n a significant sense,'[229] or 'in an important sense.'[230] But the critical point is that judicial practice seems to have arrived, in the ordinary case of statutory interpretation, at a shared methodological approach that is far less pluralistic than in the constitutional context and that places the bulk of its weight on textual meaning. As shown in Part I, however, in those cases outside the stereotypical domain of statutory interpretation, courts approach the interpretive task in a strongly purposivist way. And here too, the interpretive practice is (relatively) monistic. Other considerations besides legislative purpose count, of course, and there is growing dissensus on the edges, but the approach in these areas remains largely committed to the strong purposivism advocated by Hart and Sacks, and this is largely the case both for judges that are 'conservative' and 'liberal,' formalists about ordinary statutory interpretation and functionalists.

Rather than a mix of interpretive methods being taken into consideration in each instance of interpretation, then, in the statutory context we find one (largely) monistic approach used to determine statutory meaning for one class of issues and another, different approach used to the same end for another class of issues. By using the literature on pluralism in the constitutional context as a lens through which to examine the statutory cases, we can see that interpretive pluralism comes in at least two different varieties: holistic and disjoint. And with this distinction in hand, we are now prepared to face the normative question we set aside just a moment ago: should we celebrate the disjoint pluralism in statutory interpretation, or should we instead seek to bury it?

C. The Problem with Disjoint Pluralism

Whatever the merits of the holistic pluralism in constitutional theory, in what remains of this Article, I will argue that the disjoint pluralism we exposed in Part I is very likely pernicious. I come, in other words, shovel in hand. To begin to see the problem, we must note that the interpretive practices with which this

229. Siegel, *supra* note 5, at 1057.
230. Molot, *supra* note 1, at 43.

Article is concerned are interpretive practices in a specific sense: they have as their overriding goal the faithful discernment of the meaning or communicative content of the text being interpreted.[231] The word 'interpretation' can refer to different types of social practices in different circumstances; in the context of literary or theatrical interpretation, for example, an interpreter may have robust freedom to add content to the object of interpretation—to put her own 'spin' on it—as part of the interpretive process. And I make no claims about the nature of interpretation in the constitutional context. But it is clear that both in the stereotypical case of statutory interpretation and in the five doctrinal contexts discussed above, courts view their role as much more circumscribed.

American statutory interpretation has long been dominated by the 'faithful agent model,' which sees the proper judicial role in interpreting legislation as confined to faithfully carrying out the policy choices made by Congress.[232] Where a statute is under-determinate, the traditional model allows judges to fill in the gaps through the use of normative canons or (what is perhaps ultimately the same thing) the creation of common law, but where a statute's meaning can be discerned, that meaning—whether described in terms of plain text or congressional intent,

---

231. On "communicative content," see generally Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2013). Distinguishing between this type of interpretation—which aims at faithfully unpacking meaning—and more creative forms of interpretation is a common move in several contexts. For example, writers on statutory interpretation have long drawn a theoretical line between interpreting a statute and creating common law to fill in its interstices. *See* FALLON, JR. ET AL., *supra* note 51, at 685–709 (discussing the distinction between statutory interpretation and federal common law). In addition, some writers on constitutional theory, often those associated with the New Originalism movement, draw a similar distinction between "interpretation," which "recognizes or discovers the linguistic meaning or semantic content of the legal text," and "construction," which "is the process that gives a text legal effect (either [b]y translating the linguistic meaning into legal doctrine or by applying or implementing the text)." Lawrence B. Solum, *The Interpretation-Construction Distinction*, 96 CONST. COMMENT. 95 (2010); *see also* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 5–14 (1999); *see generally* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011).

232. *See* HART & SACKS, *supra* note 2, at 1374 ("In trying to discharge th[e] function [of interpretation] the court should . . . [r]espect the position of the legislature as the chief policy-determining agency of the society, subject only to the limitations of the constitution under which it exercises its powers."); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 4 (1997) ("All judicial approaches to statutory interpretation are framed by the constitutional truism that the judicial will must bend to the legislative command."); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 103 (2001) ("By the late nineteenth century . . . the Supreme Court had firmly settled on the ideal that the federal judge's duty was to implement the legislature's intent.").

will, or purpose—is understood to control, leaving no room for normative considerations to intrude.[233] Similarly, in each of the five areas discussed previously, courts have confidently described their role as grounded in fidelity to the lawmaking will.[234] The decisions in these areas clearly view that lawmaking will in a much more purposivist way than is prevalent in ordinary statutory interpretation cases; that is the upshot of Part I. But the debate between textualism and purposivism is a disagreement about the best *methodology* for ascertaining the meaning expressed by the statute, not about whether that meaning, once discerned, should control.[235] Accordingly, while interpretation of one of Shakespeare's sonnets might have as its goal aesthetic enjoyment, not the accurate uptake of the communicative content Shakespeare sought to convey, and still be called an 'interpretation, the type of interpretation at issue here is different. It aims at fidelity.

Moreover, because legal interpretation of this kind is a purposive activity aimed at this single overriding end, it is properly subject to criticism for failing to achieve that end as well as it could. Judicial opinions are susceptible to all kinds of criticism: for their prose if turgid, for their results if deplorable, for their reasoning if loose, illogical, or uncandid. But where a court relies on interpretive reasoning that aims at fidelity, it is always liable to the criticism that it falls short of this goal.

All of this means one thing more: since an interpretive practice of the type here has fidelity as its overriding goal, and since it is subject to criticism for falling short of this goal, the approach to interpretation that a court takes toward any given interpretive question carries with it the implicit claim that it is a *caeteris paribus optimum* way of achieving fidelity.[236]

---

233. I am here describing the role that most theorists would normatively defend and that nearly all judges would describe as their proper function. A large empirical literature purports to demonstrate, however, that more normative considerations do indeed intrude into the interpretive process. *See generally* LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES 65–100 (2013) (surveying the literature that describes the correlative effect of judges' political ideologies and outside political pressure on judicial behavior).

234. *See* discussion *supra* Section I.B.

235. While "purposivists also conceived of themselves as faithfully carrying out Congress's instructions, modern textualists argue that close adherence to precise statutory texts represents a purer form of fidelity and cabins a judge's ability to—perhaps unwittingly—impose her own value judgments in place of the legislature's. Ohlendorf, *supra* note 113, at 378.

236. By "*caeteris paribus optimum*" I mean that no other total interpretive approach could achieve greater fidelity without sacrificing some increment of any other relevant

We are now in a position to see the potential problem with disjoint pluralism. In the context of disjoint pluralism, it is the interpretive approach *in each segment* that makes the claim, all else equal, to be best. But, by definition, in an interpretive domain that is pluralistic in the disjoint way, the approach to interpretation employed in segment A is nontrivially different from the approach used in segment B. This raises the obvious question: why is what's good enough for A not good enough for B? And *vice versa*? If the methodology used to answer interpretive questions in A claims to be the *best* way of faithfully discerning the text's communicative content, all things considered, then why isn't *that* method also used to answer B questions? The method used in B, it seems, is *incomplete*. But since B's method makes the same claim to optimality, the same question could be asked of A; either A is an incomplete method of interpretation (and its claim to be *caeteris paribus* at best a canard), or B is. Call this the 'incompleteness objection.

The incompleteness objection is compelling, I think, but it is not a knockout. In particular, the question it raises—"why is

---

value. The *caeteris paribus* hedge is designed to account for the conviction of many that even when an interpretive practice purports to be fidelity-based—as statutory interpretation surely does—it would not sensibly pursue fidelity at *all* cost. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 15–85 (2006); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 647–50 (1999); Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867, 2874 (2007); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 16–18 (1996); Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 88–91 (2000). To put the point numerically but crudely, say that the current approach to ordinary statutory interpretation in the generality of cases faithfully unpacks 90% of statutory meaning. The courts could alter their approach in such a way as to unpack an additional 1% of meaning, but only by multiplying the time courts spend deciding statutory interpretation cases by an order of 100. However crass it seems to weigh administrative costs against fidelity to the legislature, it's hard to imagine a court making this trade. While fidelity may be the *overriding* goal of this the of legal interpretation, then, it might not be the *exclusive* one, and the *caeteris paribus* condition is meant to recognize this. But, to see how the flipside of the *caeteris paribus* optimality claim works, imagine that the interpretive practice could be changed to gain an additional 1% increment of accuracy at no cost in either time or any other relevant value. Then it would surely be appropriate to criticize the current approach, and surely inappropriate for the courts not to revise it. It is in this sense that when a court uses a total interpretive approach to answer an interpretive question, it makes the implicit claim that its approach is, all things considered, the *best* one. An intermediate claim would be that the total interpretive approach reflects the optimum balance of relevant values—fidelity, decision costs, and the like. Assessing such a claim would require us to determine what the proper balances *is*, of course, and even assuming that the relevant values are commensurable in such a way as to be susceptible to this type of balancing analysis, agreement on what mix is right is unlikely to be forthcoming. Since the weaker claim of *caeteris paribus* optimality is strong enough to create trouble for the disjoint pluralism in statutory interpretation, I raise these further complications only to set them aside.

what is sauce for segment A not sauce for segment B?'—can in principle be answered. For starters, note that the incompleteness objection does not necessarily apply *across* interpretive domains. A long tradition of interpretive thought, for example, holds that the Constitution ought to be interpreted in a way fundamentally different from statutes; 'we must never forget, after all, 'that it is a constitution we are expounding.'[237] Those in favor of cleavage between these two interpretive domains may be right and they may not; the point is that I don't think the incompleteness objection rules them out of conceptual bounds, so to speak. It is not meant to apply this broadly across interpretive domains.

Moreover, even *within* a single interpretive domain, we can imagine reasonably persuasive attempts at rebutting the incompleteness objection. For example, compare two imaginary statutes: one is a new addition to the revenue code; its pages number in the thousands and its subsections in the tens of thousands. It was the product of intense interest-group lobbying and hundreds of hours of combined committee hearings and floor debate; for every new tax rule it adopts, there are dozens of tightly drawn exceptions. If ever a statute was 'the result of compromise among various interest groups,'[238] it is this one. The second statute is a single sentence long: 'The EPA shall take all reasonable steps necessary to ensure that the level of arsenic in the water supply is safe for human consumption. The statute was passed three days after a headline-grabbing study showing that the nation's water supply contained dangerous levels of arsenic, and it was passed unanimously. It seems both likely and at least potentially appropriate that the first of these statutes would be interpreted in a beadier-eyed way then the second. And while a number of different stories might be told to justify this difference,[239]

237. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis omitted). I should note that those who think the two types of documents should be interpreted in the same way are not ready to give up on Justice Marshall. *See* SCALIA & GARNER, *supra* note 38, at 405 (arguing that "far from suggesting that the Constitution evolves, Marshall's "whole point was just the opposite There would be no need to give [a constitutional] provision an expansive reading if today's narrow reading could be changed ('evolved') tomorrow as the need arises.").

238. E. Associated Coal Corp. v. United Mine Workers of Am. 531 U.S. 57, 68–69 (2000).

239. One story, for example, goes like this: both statutes are interpreted in the same way; it's just that "all reasonable steps necessary" is a vague phrase, and this underdeterminacy is an implicit grant to the courts of discretion to exercise greater freedom in fleshing out its contours, accounting for the likely disparate approaches to the two statutes.

surely a plausible one is that the textualist critique of purposivism simply has more force with the first type of statute.[240]

We can certainly imagine, then, heroic attempts to redeem instances of disjoint pluralism from the incompleteness objection. But it must be noted at this point that the pluralism in statutory interpretation that is the subject of this Article is a remarkably poor candidate for this type of redemption. That is so because of the particular way that the segments in this domain overlap: the same textual chunk will often, if not invariably, be an object of interpretation both inside and outside statutory interpretation in different cases.

Consider the provision of the Alien Contract Labor Law at issue in *Holy Trinity*, which barred the 'importation or migration of any alien into the United States to perform labor or service of any kind.'[241] In *Holy Trinity*, this was the object of ordinary statutory interpretation. But it is not hard to imagine the same exact provision coming up later in a preemption case, where the question is not simply what the provision *means*, but whether *part* of what it means is that a more demanding state law—say one that bars importation of aliens to perform labor or service 'including as a rector'—is preempted as an obstacle to the purposes of federal law. Each of the areas of law surveyed in Part I is susceptible to an analogous type of overlap. Once a court has determined that a plaintiff falls within a statute's 'zone of interests,' it will have to interpret that same statute—in the ordinary way—to see whether the plaintiff has made out her claim. Once a court has determined that the purposes of State A's guest statute are implicated in a case, and that the statute should thus be applied instead of State B's law, it must figure out what the statute *means*. Once a court has determined that the purposes of a zoning ordinance barring adult theaters from certain districts are constitutionally benign, it may have to figure out whether the ordinance *applies* to the theater in question. And once the Court has determined that the bulk of the federal-sentencing scheme is severable from the provisions that made them unconstitutionally mandatory, it must begin the arduous

240. *Cf.* Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 169–71 (1995) (arguing that the Court takes a more textualist approach to private-law statutes than public-law statutes because it is more likely to view the former as predicated on "legislative bargains").

241. Alien Contract Labor Law of 1885, ch. 164, § 1, 23 Stat. 332.

process of figuring out how the sentencing system that emerges works, a process that involves a great deal of stereotypical statutory interpretation.

No matter whether some disjoint pluralism in some interpretive domains can weather the incompleteness objection, then, the interpretive pluralism unearthed by this Article seems unlikely to do so. Not only must it somehow be explained why what's sauce for ordinary statutory interpretation isn't sauce for the collateral doctrines discussed in Part I, both segments are concerned with interpreting *the very same texts*, and in pursuit of *the very same goal*: fidelity. It's hard to see why the interpretive approach the courts have settled upon, as *caeteris paribus* best for faithfully discerning the meaning of statutory texts 'outside' statutory interpretation, should be so different from the approach they've settled on for interpreting those very same texts in the more familiar context.

I conclude that the incompleteness objection constitutes a large, as yet unrebutted, and perhaps insuperable problem for the disjoint pluralism we have discovered in statutory interpretation. Textualists will see this result as something of a research agenda: the textualist credo has been proclaimed in the statutory-interpretation literature and has borne considerable fruit; all that remains is to spread the word with missionary zeal to the benighted remnants of public law where purposivism still prevails. Purposivists, on the other hand, can run the argument in the other direction and argue that the enduring appeal of purposivism in these collateral areas implies that the textualist critique of purposivism inside statutory interpretation was all wet from the get-go. This Article's purpose is not to take sides in this debate, but rather to insist that the debate must go forward, and that one side or the other must prevail. Either textualism is the correct approach across the generality of issues that depend on statutory meaning or it isn't; it can't, unless the incompleteness objection is somehow answered, go halfsies with purposivism.

D. Pluralism in Constitutional Interpretation (Again)

Using the constitutional-theory literature on interpretive pluralism to frame an examination of the pluralism in statutory interpretation unearthed by Part I has borne considerable fruit; we have identified two different types of interpretive pluralism and seen that a serious objection applies to the disjoint type. All this

fruit, however, is in some sense the low-hanging stuff; additional important implications await, farther up the tree. Rather than attempt to reap this second harvest in this Article, I will simply note one promising route of exploration before closing.

This Article is about pluralism in statutory interpretation, and so this Part has focused on the theoretical implications that can be drawn on the statutory side of the ledger. But the theoretical insights we have gleaned here might profitably be fed back into the constitutional side. For example, now that we have in hand the distinction between holistic and disjoint pluralism, we might notice that *both* varieties exist in the constitutional context. We have already hashed out the holistic pluralism that is so prevalent in constitutional interpretation, but there is no shortage of disjoint pluralism, as well. It is a familiar point, for example, that the Court's approach to the First Amendment's Religion Clauses tends to rely heavily on founding-era history,[242] while its approach to First Amendment speech cases is highly doctrinal.[243] Separation-of-powers jurisprudence, similarly, often emphasizes text and structure,[244] while Eighth Amendment jurisprudence

242. *See, e.g.*, Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014) ("[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings. [I]t is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.' (citations omitted) (quoting County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part))); McCreary County v. ACLU, 545 U.S. 844, 876 (2005) (defending a "neutrality principle" in part on the grounds that '[t]he Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists).') (citations omitted); Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees."); Marsh v. Chambers, 463 U.S. 783, 790 (1983) ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.").

243. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2528–31 (2014) (relying on doctrinal structures differentiating public and private fora, distinguishing between content-based and content-neutral regulations of expression, and defining the scope of compelling governmental interests); McCutcheon v. FEC, 134 S. Ct. 1434, 1440–42 (2014) (relying on the complex set of doctrines governing the constitutionality of campaign-finance regulation); United States v. Alvarez, 132 S. Ct. 2537, 2543–47 (2012) (scrutinizing precedents to determine whether "false statements of fact" comprise a category of "unprotected speech"); Snyder v. Phelps, 131 S. Ct. 1207, 1215–16 (2011) (reasoning from prior cases applying the First Amendment to private tort suits).

244. *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2558–60 (2014) (determining the scope of the President's recess-appointments power based on text and structure,

leans heavily on evolving values.[245] Indeed, all of this is well-known in the literature—these examples of interpretive cleavage have long formed a part of the pluralists' claim to best capture current interpretive practice as a descriptive matter.[246] But once we recognize that a large chunk of the pluralism in current constitutional interpretation comes in the disjoint shade, at least three important implications potentially follow.

First, unless constitutional interpretation is materially different from statutory interpretation, this means that these examples of disjoint pluralism in constitutional interpretation are liable to the incompleteness objection. The two contexts may be materially different, so my conclusion here is necessarily tentative. In particular, the segments in the constitutional context do not appear to overlap in the way that the statutory interpretation segments do, so the incompleteness objection may be easier to parry. One can imagine an argument that the different clauses of the Constitution are just ontologically different in such a way as to cry out for different interpretive approaches. Part of this argument seems initially plausible,[247] and part of it doesn't;[248] the row,

---

though relying on historical practice to resolve ambiguities in the text); *Free Enter. Fund*, 561 U.S. at 483–84 (relying largely on text and structure to invalidate a dual for-cause limitation on presidential removal of certain officers of the United States); Clinton v. City of New York, 524 U.S. 417, 436–41, 448 (1998) (invalidating the Line Item Veto Act based on primarily textualist arguments); INS v. Chadha, 462 U.S. 919, 945–46, 959 (1983) (relying on text and structure to hold the one-House veto unconstitutional).

245. *See, e.g.*, Hall v. Florida, 134 S. Ct. 1986, 1992 (2014) ("The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force."); Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) ("Whether [the cruel and unusual punishment] requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail.'") (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002)); Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

246. *See, e.g.*, BOBBITT, *supra* note 225, at 80–84 (noting the importance of structure in separation-of-powers cases); Fallon, *supra* note 220, at 1206 (noting that "value arguments" play a large role in Eighth Amendment jurisprudence).

247. The plausible: separation of powers is inherently about structure, so it seems natural that structure would bulk large; the Free Speech Clause is a particularly gnomic one, so a greater-than-normal degree of interpretive freedom may be called for, and doctrinalism is one plausible way of giving structure to that freedom; and the Eighth Amendment's reference to "unusual" punishments might be thought to call out for a more dynamic approach, *but see generally* John F. Stinneford, *The* Original Meaning of "Unusual" *The Eighth Amendment as a Bar to* Cruel *Innovation*, 102 NW. U. L. REV. 1739 (2008) (arguing that "unusual" calls for analysis of long-standing tradition, not current morality).

248. The implausible: the Eighth Amendment's reference to "unusual" punishments probably doesn't call out for a more dynamic approach, *see* Stinneford, *supra* note 247,

however, is certainly easier to hoe here than on the statutory plot. Nonetheless, noting that both types of pluralism are present in the constitutional context should change the terms of the debate over pluralism, there, if nothing else.

This implication goes to that part of constitutional interpretation that is pluralistic in the disjoint way, but there are implications for the more familiar, holistic variety of interpretive pluralism, as well. The defenders of pluralism in constitutional interpretation have always woven together normative and descriptive strands of argument (just as the pluralist interpretation they defend would do). Part of the case is that openness to a variety of interpretive considerations is a more normatively desirable approach to constitutional interpretation, but another part of the case is that *that's just how we do it around here.*[249] But if the incompleteness objection to disjoint pluralism in constitutional interpretation succeeds even only in part, the force of this descriptive prong seems to be substantially dampened. For then it will be shown that at least *part* of 'the way we've always done things' is indefensible. And what is left of 'the way we've always done things' (the defensible part) will not be quite as pluralistic.

III. CONCLUSION

Statutory interpretation, so the story goes, has undergone a remarkable revolution during the last three decades. While the mid-twentieth century saw courts and commentators converge on a strongly purposive approach to interpreting legislative handiwork, the textualist critique that began in the '80s has now largely swept the field, both on the bench and in the academy. While there is much in this story that is true, this Article has focused on a part that is not. Look outside statutory interpretation's stereo-

---

and it is hard to see why founding-era history would be relevant to interpretation of the Religion Clauses but not relevant elsewhere.

249. *See* Brest, *supra* note 222, at 234 ("[I]f you consider the evolution of doctrines in just about any extensively-adjudicated area of constitutional law—whether 'under' the commerce, free speech, due process, or equal protection clauses—explicit reliance on originalist sources has played a very small role compared to the elaboration of the Court's own precedents. It is rather like having a remote ancestor who came over on the Mayflower."); Fallon, *supra* note 220, at 1213 ("Assessed as a descriptive theory of contemporary constitutional interpretation, originalism fails spectacularly. Originalism cannot account for much of our constitutional practice of at least the last 50 years."); Griffin, *supra* note 220, at 1757 ("Pluralistic theories perform well in the descriptive-explanatory dimension because the Supreme Court does not use a single interpretive principle or method in making constitutional decisions, but instead—as argued by Bobbitt, Post, and Fallon—uses multiple methods of interpretation.").

typical domain, in the nooks and crannies of public law, and you will find courts—including, to a remarkable extent, textualist judges—wresting meaning from statutes as though Hart and Sacks had had the last word on interpretive theory. In doctrinal areas as diverse as standing, choice of law, and preemption, courts continue to take a strongly purposivist approach to interpreting statutes.

The story of purposivism outside statutory interpretation could be told as one of intellectual history. The postwar period saw a remarkable degree of consensus in American legal thought, as elsewhere in American society, and this opened the door for judges and scholars associated with the legal-process school to articulate an approach to legal reasoning that, at its zenith, spanned nearly the totality of American public law.[250] Although modern scholars within individual academic fields—especially federal courts and statutory interpretation—have long felt the continuing weight of process theory, few have appreciated just how expansive the approach's influence once was. From administrative law to conflicts, federal courts to constitutional law and beyond, some form of 'reasoned elaboration' guided the development of legal doctrine and reasoning. If not notable for its theoretical sophistication,[251] legal-process theory impresses by its sheer breadth.

But as the decades wore on, leaf turned down to leaf, and process theory, it seems, came to grief. The field where the tale of the legal-process school's demise is best known is statutory interpretation, but the rise of textualism, starting in the '80s, was part

250. *See* DUXBURY, *supra* note 30, at 242–51 (describing the relationship between process theory and contemporary political science's emphasis on "consensus").

251. Two common critiques of legal-process theory hold that it was developed by "lawyers' lawyers" who cared little for the more sophisticated aspects of legal theory, Fallon, *supra* note 28, at 970–71, and that it depended on a naïve political science, William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to THE LEGAL PROCESS, *supra* note 2, at cxi–cxiii; Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2124 (2003). To be sure, process theory was developed at a time in which legal scholars—to an extent unimaginable today—were more simpatico with the bench and bar than with the broader academy. But reading through Hart and Sacks's *magnum opus*, I for one am struck by the extent to which both lines of criticism seem overdone. *See* HART & SACKS, *supra* note 2, at 1–6, 102–13, 127–58 (discussing the "nature and function of law" in a fairly abstract and theoretically sophisticated way); 114–17, 128–29 & n.5, 1131, 1188–90 (drawing on contemporary language theory); 4–6, 107–12 (discussing the "is-ought" distinction); 687–91, 711, 714–15, 804, 833–44, 870–78, 910–11 (exhibiting a relatively realistic and sophisticated understanding of political science); *see generally* Charles Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1 (2013) (arguing that legal-process thought was far more theoretically sophisticated than is commonly thought).

of a broader—and itself quite ambitious—intellectual movement in American legal thought, a movement toward formalism. This movement encompasses not just the 'new textualism' in statutory interpretation, but also the rise of originalism in constitutional law and theory,[252] a newfound appreciation of text and structure in federal-courts scholarship,[253] the heightened influence of public choice theory in administrative law scholarship,[254] and a renewed interest in formalism in legal theory.[255] Like process theory before it, when this formalist movement is viewed in its totality, its scope cannot fail to impress, whatever one thinks of its merits. But while many parts of the movement—including textualism—have seen remarkable success, this newfound appreciation of formalism has achieved nowhere near the consensus that process theory once enjoyed. The 'mansion of the law"[256] is a large one, after all, and legal thought dispositionally conservative. Moreover, the last few decades—unlike the postwar period the legal-process school occupied—have seen a significant degree of ideological splintering.[257] So it perhaps should not come as a surprise that the victory of textualism has not been total, that several pockets of postwar purposivism remain in (if a

252. See, for example, the collection of essays in THE CHALLENGE OF ORIGINALISM, *supra* note 220, and in Symposium, *The New Originalism in Constitutional Law*, 82 FORDHAM L. REV. 371 (2013).

253. Prominent, for example, in the work of Akhil Amar, *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 (1985); Bradford Clark, *e.g.*, Bradford R. Clark, *Federal Common Law: A Structural Interpretation*, 144 U. PA. L. REV. 1245 (1996); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEXAS L. REV. 1321 (2001); and John Manning, *e.g.*, John F. Manning, *The Eleventh Amendment and the Interpretation of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004).

254. *See* Merrill, *supra* note 32, at 1071 (describing the influence of public-choice theory on administrative-law theory).

255. *See, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW (2001); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155 (2006). For a thoughtful discussion of the interconnection between some of these movements, see John O. McGinnis, *Public Choice Originalism: Bork, Buchanan and the Escape from the Progressive Paradigm*, 10 J.L. ECON. & POL'Y 669 (2014). I have discussed this broader movement as based on a renewed appreciation of formalism; one could also more crudely discuss it as a reassertion of "conservative' legal thought. *See, e.g.*, STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2010).

256. This delightful turn of phrase is borrowed from JAFFE, *supra* note 27, at 590.

257. This lack of deep moral agreement, indeed, forms one of the principal premises of much of modern formalist thought. For a more detailed discussion of some of the implications of deep ideological disagreement for legal reasoning, see generally John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 NOTRE DAME L. REV. 735 (2014).

bit 'outside") statutory interpretation.

The evolution of legal theory through history is neither steady nor consistent, but its conceptual demands are both of these things. While as a matter of intellectual history it should not surprise us to find statutory interpretation to be pluralist—textualist in the core, but with a host of collateral niches that remain strongly purposivist—from the standpoint of legal theory, this methodological dissonance is not obviously benign. And in this Article, I have chosen to tell the story of purposivism outside statutory interpretation from this standpoint. So viewed, it is one instance of the broader phenomenon of interpretive pluralism, a phenomenon much discussed in the context of constitutional interpretation. But the interpretive pluralism in statutory interpretation, we have seen, is different in kind—is disjoint, with one technique employed for some interpretive questions and a different technique for others—rather than holistic, with a variety of interpretive modalities blended together in an open-ended reasoning process. And while theorists have not before discussed the merits or demerits of this disjoint type of interpretive pluralism, the demerits, I have concluded—at least tentatively, and at least in this context—predominate.

Fundamentally, disjoint interpretive pluralism must answer this simple question: why is the technique thought best in one segment not thought best in the others? In the statutory context, where the same statutory text is interpreted by textualist lights for some issues but in a strongly purposivist way for others, this question seems to be nigh unanswerable. I have ended by suggesting that these insights might fruitfully be carried back into the constitutional context. Without looking too hard, we can find interpretive pluralism of the disjoint flavor in constitutional interpretation, as well. And not only will this disjoint pluralism in constitutional interpretation, I suggest, be hard to justify, its discovery might well make the case for holistic pluralism more difficult, as well.


TEXAS REVIEW OF
LAW & POLITICS