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Article

Federalism and State Democracy

David Schleicher*

When scholars, judges, and politicians talk about federalism, they frequently praise the qualities of state and local democracy. State and local governments, it is said, are closer to the people, promote more innovation, and produce outputs that are a better fit for the diverse set of preferences that exist in a large nation. But these stories about state democracy rarely wrestle with the reality of elections for, say, state senator and city council. Voters frequently know little about the identity or performance of officials in these offices or about political parties at the state and local levels. Voting in state and local elections is frequently "second order," reflecting voter preferences about the President and Congress with little or no variation based on the performance or promises of state officeholders and candidates. State and local elections vary in the degree to which they are second order—chief executive races seem to be less second order than legislative ones, and elections were less second order in the 1970s and 1980s than they are today—but we see second-order voting behavior quite consistently across many state and local elections.

This Article addresses the consequences of second-order elections for federalism doctrine, policy making, and theory. First, it argues that virtually all of the ends of federalism—responsiveness, respect for diversity, laboratories of democracy, variation to permit foot voting, and so forth—are premised not only on state governments having authority but also on the success of state democracy at reflecting local needs and wants. Second, it shows that proponents of greater federalism focus largely on questions of state authority rather than the quality of state democracy, leading to proposals and doctrines that frustrate federalism's normative goals. For instance, efforts to repeal the Seventeenth Amendment are premised on the grounds that doing so would give greater authority to state governments. But proponents fail to see that repeal would make state legislative elections even more second order. Further, proponents of more devolution of power either ignore or are hostile to efforts by the federal government or courts to shift power from state legislatures to governors, viewing the question as somehow not central to debates over federalism. Given that gubernatorial elections are less second order than legislative ones, cooperative federalism regimes or changes in state law doctrines that empower state executives should lead to policies that are more responsive to specific state needs. The Article also

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sketches several new paths for proponents of federalism that aim at reform of state government and state elections rather than changes to federal policy.

Finally, the Article shows that research on second-order elections reveals the emptiness of several prominent theories about federalism, particularly work about the "political safeguards of federalism."

Introduction

Be honest.[1] Do you know who your state senator is? Which party controls the state assembly in your state?[2] What issues were in front of your state legislature this year? Do you know what the Democratic and Republican legislative caucuses in your state think about, say, pension reform or transportation financing?[3] Whether to authorize local governments to file for Chapter 9 bankruptcy?[4] Reforming the environmental review process?[5] If you live in a big city, do you know your councilmember's stance on

1. Really, it's fine. *See* David Schleicher, *From Here All-The-Way-Down, or How to Write a Festschrift Piece*, 48 TULSA L. REV. 401, 415 n.112 (2013) ("Voter ignorance is not a problem of a benighted 'they,' but rather is a problem for all of us who live in the real world with its competing demands; requirements that we feed ourselves, and the like. If you show me someone who has deeply and truly studied each choice [she has] to make when voting, I will show you someone who is not all that busy.").

2. Fewer than half of voters do. Steven Michael Rogers, Accountability in a Federal System 35 (Sept. 2013) (unpublished Ph.D. dissertation, Princeton University), http://stevenmrogers.com/Dissertation/Rogers-Dissertation.pdf [https://perma.cc/U9FE-VV3J].

3. In Rhode Island and Illinois, pension reform was the biggest issue facing the legislatures in the early 2010s, and the parties split internally. *See* Carl Horowitz, *Rhode Island Public-Sector Unions Lock Horns with State Treasurer over Pensions*, NAT'L LEGAL & POL'Y CTR. (Dec. 23, 2013), http://nlpc.org/stories/2013/12/23/rhode-island-unions-lock-horns-state-treasurer-over-pensions-liuna-boss-resigns [https://perma.cc/GY94-4UB2] (discussing union pushback on pension reform in Rhode Island); Monica Davey & Mary Williams Walsh, *Pensions and Politics Fuel Crisis in Illinois*, N.Y. TIMES (May 25, 2015), https://www.nytimes.com/2015/05/26/us/politics/illinois-pension-crisis.html [https://perma.cc/JRE7-FAXK] (describing the crisis in Illinois); *see also* Matt Taibbi, *Looting the Pension Funds*, ROLLING STONE (Sept. 26, 2013), http://www.rollingstone.com/politics/news/looting-the-pension-funds-20130926 [https://perma.cc/KPE7-SSY7] (surveying the problem of high-fee pension fund investments). Transportation financing was the biggest issue in front of the Virginia legislature in 2013, and the bill that eventually passed split both parties. *See* Fredrick Kunkle & Laura Vozzella, *Virginia Lawmakers Approve Sweeping Transportation Plan*, WASH. POST (Feb. 23, 2013), https://washingtonpost.com/local/va-politics/va-lawmakers-approve-landmark-transportation-plan/2013/02/23/712969d8-7de4-11e2-82e8-61a46c2cde3d_story.html [https://perma.cc/34C9-USLM] (noting that Virginia had struggled with transportation reform for decades).

4. State-level Republicans and Democrats across the country have taken a variety of stances on the eligibility of localities for Chapter 9. *See* Cate Long, *The Looming Battle Between Chicago and Illinois*, REUTERS (Aug. 7, 2013), http://blogs.reuters.com/muniland/2013/08/07/the-looming-battle-between-chicago-and-illinois [https://perma.cc/SGE4-H9V5] (mapping the states' varying approaches to municipal bankruptcy).

5. California has repeatedly considered reforms to its environmental review process around permitting dense development. The dominant Democratic Party in the state is divided on the issue. *See* Steven Greenhut, *Climate Bill May Chill New Infrastructure*, SAN DIEGO UNION-TRIB. (Sept. 4, 2015) (describing the "infamous" California Environmental Quality Act).

mayoral control over schools, broken windows policing, or allowing increased housing density?[6]

You probably answered "no" to at least one of these questions. But when you showed up to vote, my guess is that your lack of knowledge about individual politicians or state parties didn't trouble you, perhaps generating a "¯_(ツ)_/¯"[7]—but not more.[8] Most voters don't know much about the candidates when they vote for Congress, either. But members of Congress are also members of political parties, and most voters have at least some preferences about Democrats and Republicans. As a result, most are able to vote somewhat knowledgeably—particularly in an era of party polarization.[9]

Many voters treat state races the same way. If they like President Obama and Senator Chuck Schumer, they vote for Democrats for state legislature; if they do not, they vote Republican.[10] Elections where voters rely on party preferences developed in relation to another level of government are common enough worldwide that political scientists have developed a term for them: "second-order elections."[11] It is relatively clear that many state and local elections in the United States are substantially second order. The extent to which they are second order, though, varies across type of office (gubernatorial races are less second order than state

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6. *See* David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 433–36 (2007) (showing the lack of consensus among Democrats on these issues).

7. *Cf.* Kyle Chayka, *The Life and Times of ¯_(ツ)_/¯*, AWL (May 20, 2014), https://theawl.com/the-life-and-times-of-%E3%83%84-39697541e6ac#.4svds1wv8 [https://perma.cc/7WUJ-A3BR].

8. Assuming you even showed up to vote. *See* Charlotte Alter, *Voter Turnout in Midterm Elections Hits 72-Year Low*, TIME (Nov. 10, 2014), http://time.com/3576090/midterm-elections-turnout-world-war-two [https://perma.cc/3AWN-TJPE] (reporting that only 36.4% of eligible voters participated in the 2014 midterm elections).

9. *See* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 363–84 (discussing use of party heuristics in federal elections).

10. There are obviously many types of state and local elections other than chief executive (governors, mayors, county executives) and legislative. These elections vary in prominence—state supreme court judges and attorneys general are more prominent, while state insurance commissioners and local treasurers are less prominent and more likely to be second order. Existing research does not allow us to know in each instance whether these elections look more like gubernatorial races or legislative ones, although they likely either fall between those poles or are like legislative races, depending on their prominence. But given the scope of this Article, inquiries into how to think about specific non-chief executive and judicial races will have to wait for future efforts.

11. The theory was developed to explain European Parliament elections but has been applied to local elections in Europe as well. *See* David Schleicher, *What if Europe Held an Election and No One Cared?*, 52 HARV. INT'L L.J. 110, 111–13, 111 n.3 (2011) (describing the consistency with which national-party preferences predict European Parliament election results); Karlheinz Reif & Hermann Schmitt, *Nine Second-Order National Elections—A Conceptual Framework for the Analysis of European Election Results*, 8 EUR. J. POL. RES. 3, 8–9 (1980) (providing the original description of "first-order" and "second-order" elections, in the context of European politics).

legislative elections), location (small-town elections are less second order than those in big cities) and time (state elections in the 1970s and 1980s seem to have been less second order than elections today).[12]

Party-line voting can be individually rational both across the federal ballot and between the levels of government.[13] But the systemic implications differ substantially. At the federal level, party-line voting can promote representation and accountability. Particularly following the intense party polarization of recent years, preferences or beliefs about the positions or performance of Presidents Obama or Bush translate relatively easily to their copartisans in Congress.[14] Their beliefs about issues facing the federal government are quite similar.[15] And beliefs among members of Congress of a single party are more similar than they have been at any point since the end of World War I.[16] Further, the major parties have been pretty consistent ideologically and organizationally over time,[17] so observations from many

12. *See infra* Part I.

13. *See infra* notes 66–71 and accompanying text.

14. *See* Geoffrey Skelley, *Coattails and Correlation: Presidential and Senate Results Should Track Closely in 2016—And That's Nothing New*, *Sabato's Crystal Ball*, U. VA. CTR. FOR POL. (Mar. 5, 2015), http://www.centerforpolitics.org/crystalball/articles/coattails-and-correlation-examining-the-relationship-between-presidential-and-senate-results/ [https://perma.cc/Y2SW-9KHT] (showing the correlation between public support for the President and copartisans in the Senate, taking political polarization into account).

15. *See generally* ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (2010); NOLAN MCCARTY ET AL., POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES (2006); PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTIPATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE (2014).

16. *See* MCCARTY ET AL., *supra* note 15, at 23–25 (tracking polarization by classifying roll call votes). Nolan McCarty, Keith Poole, Howard Rosenthal, and Chris Hare have created illuminating graphs to illustrate the phenomenon. *See* Nolan McCarty et al., *Polarization is Real (and Asymmetric)*, MONKEY CAGE (May 15, 2012), http://themonkeycage.org/2012/05/polarization-is-real-and-asymmetric/ [https://perma.cc/4ZRX-QFMC] (demonstrating that party polarization has largely been driven by the Republican party's rightward shift); Keith T. Poole, *The Polarization of the Congressional Parties*, VOTEVIEW BLOG (Jan. 30, 2016), http://www.voteview.com/political_polarization_2015.htm [https://perma.cc/E8BY-7JKV] (illustrating ideological party means since the end of Reconstruction). This isn't to say that there isn't variation inside parties—between Tea Party types and more institutionalist Republicans, for instance—but rather that the parties have been growing more internally similar over time. *See generally* David Schleicher, *Things Aren't Going That Well Over There Either: Party Polarization and Election Law in Comparative Perspective*, 2015 U. CHI. LEGAL F. 433 (arguing that a global change in voter preferences toward "more radical and fundamentalist opinions" explains observed polarization).

17. A quick note on the last election cycle. Given the upheavals of the 2016 election, some have argued that American politics is about to go through a transition period during which party heuristics become less predictive for a period of time until things shake out. *See* Michael Lind, *This Is What the Future of American Democracy Looks Like*, POLITICO (May 22, 2016), http://www.politico.com/magazine/story/2016/05/2016-election-realignment-partisan-political-party-policy-democrats-republicans-politics-213909#ixzz4KLzZZwIo [https://perma.cc/EUD7-SQZD] (arguing that the 2016 election marks the beginning of a shift in party platforms to align with a shift in party voters that has already happened). President Trump's political success is

years ago remain useful today.[18] As a result, if voters know the party of a member of Congress (information that, after all, is on the ballot), and know how they feel about that party, then they have quite good tools to vote as if they were informed—even if they know little about the candidates or the goings-on of Congress.[19]

In contrast, to the extent that they are second order, the outcomes of many state and local elections have little to do with anything that *ought* to matter—like the past performance of state government, or candidates' positions on issues in front of the state or local governments.[20] Beliefs about political parties are almost entirely based on the performance and promises of national politicians on issues largely addressed by national officials—war and peace, monetary policy, deficit spending, Medicare, and Social Security, for example.[21] Because these issues lack clear state or local analogues, preferences about national issues do not necessarily correlate closely with preferences about state or local ones.[22] Further, the ideological location of the state median voter is almost always different from the ideological location of the national median voter. When state elections are second order, the parties do not have any incentive to cater to the median voters' positions, resulting in policies unrepresentative of the majority in that state.[23] Finally,

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certainly problematic for those who argue state politics are useful for national-level democracy because statehouses provide a venue for ideas that are excluded from national politics to develop. *See infra* Part IV. Trump's combination of ideological stances—nationalism, mercantilism, criticism of Wall Street, opposition to "political correctness," support at least the basics of the welfare state—has few if any state-based precursors. One might see aspects of "Trumpism" in the rise of Governor Paul LePage of Maine, perhaps, or Jan Brewer of Arizona, but that's about it. Wherever Trumpism came from, it was not a major part of Republican politics in statehouses around the country.

18. This isn't to say that there hasn't been change in the parties, but that their relative ideological positions have been quite consistent, far more consistent than they were decades earlier. A voter in 1940 who relied on observations about the parties' stances in 1920 would be fundamentally misled. A voter today who only knew what the parties stood for in 1995 and her own preferences likely would make similar choices to those of a fully informed voter, particularly for federal offices other than the Presidency.

19. In addition, because the most important vote for members of Congress is the vote about how to organize their chamber, voting based on party preference is in many ways a more reasonable stance than taking into consideration facts about the individual candidates.

20. *See* Rogers, *supra* note 2, at 3–8 (reviewing evidence that local elections are generally not responsive to local-party performance); Schleicher, *supra* note 6, at 424 (noting that national parties do not compose "coherent ideological blocs" on local issues).

21. *See* Elmendorf & Schleicher, *supra* note 9, at 397–98 (presenting evidence that voters in municipal elections respond to national-party brands rather than local-party performance).

22. To be clear, for the theory of "mismatch" voting that I have offered elsewhere and describe in notes 68–69 and accompanying text, *infra*, these preferences must correlate to some degree. And they certainly do, particularly because of the ubiquity of cooperative federalism arrangements. But they do not necessarily correlate closely, nor do they correlate to the same degree across space and type of government (state or local).

23. *See infra* Part IV. A world in which, say, Wisconsin or North Carolina's median voter is faced with a choice between a Republican Party that would be at home in Alabama and a Democratic Party much like California's is not likely to produce particularly representative outcomes.

voting behavior can be retrospective rather than prospective in focus. Generally, voters punish incumbents when the economy does poorly, or when policies work out badly, providing officials with an incentive to produce good results.[24] When elections are second order, however, incumbent officials have little direct electoral incentive to promote successful policies; their electoral futures will not sink or swim based on the effect of their decisions on the general public. That is, to the extent that they are second order, state elections provide voters with weak prospective representation and little retrospective accountability.[25]

Discussions of federalism often elide any consideration of how or why state legislators get to places like Albany, Austin, Sacramento, or Tallahassee. Instead, when politicians, judges, and scholars talk about federalism, they put state democracy on a pedestal.[26] Speaker of the House Paul Ryan, for example, argues in favor of Medicaid block grants because state governments are "closer to the people."[27] The Supreme Court praises federalism for being "more sensitive to the diverse needs of a heterogeneous society" and for "increas[ing] opportunity for citizen involvement in democratic processes."[28] These purely theoretical claims do not consider the real, on-the-ground problems of state democracy.

This Article will argue that federalism doctrine, policy, and theory should take the problem of state elections far more seriously. Doing so will result in proponents of greater devolutions of power (and merely interested parties) asking different questions about how federalism operates and looking at different tools for achieving their goals.

First, it will argue that many of the benefits of federalism turn on the quality of state elections. Scholars have long assumed that what "federalism" protects is a state government's authority to make policy decisions.[29] While

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24. *See generally* MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981).

25. *See* Rogers, *supra* note 2, at 15–16 (arguing that second-order elections decrease local political accountability by skewing the incentives of prospective challengers); *see generally* John E. Chubb, *Institutions, the Economy, and the Dynamics of State Elections*, 82 AM. POL. SCI. REV. 133, 134 (1988) (showing that state politicians face little accountability for local economic conditions).

26. *See, e.g.*, Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 220–21 (2000) [hereinafter Kramer, *Putting the Politics Back in*] (explaining that "almost everything that really matters to people in their daily lives" is done by state officials, and describing "the enduring importance of the states"); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1504 (1994) [hereinafter Kramer, *Understanding Federalism*] (declaring that "most governing in this country is still done at the state level and by state officials").

27. *Paul Ryan: Poverty Programs Should Be Measured by Outcomes*, REAL CLEAR POL. (May 7, 2012), http://www.realclearpolitics.com/video/2012/05/07/ paul_ryan_poverty_programs _should_be_measured_by_outcomes_not_compassion.html [https://perma.cc/9FPP-BTX7].

28. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

29. This is true whether states have autonomy over some policy area or merely influence a broader policy process. *See infra* note 84. To be clear, *none* of this turns on whether one views

they regularly debate whether federalism doctrine should protect the power of state governments to make decisions autonomously or merely the power to influence decisions made in coordination with the federal government, scholars generally agree that federalism protects state power one way or another. While this focus is understandable, it misses that the underlying reasons for caring about federalism—better fit between policies and preferences, laboratories of democracy, interstate diversity and sorting, protection of political or cultural identities—only make sense in the context of functioning state democracies. Where state democracy does not produce policies or outcomes that are responsive to preferences of residents of the state, we will see less of the benefits of federalism. Thus, when state elections become more second order, the case for devolving power becomes weaker.[30]

Once the reliance of federalism on the quality of state democracy comes into focus, new issues arise, changing how we think about federalism and what we need to do to make it functional.[31] Some policies affect whether elections are second order; other policies allocate power among different state entities that are more or less second order. These policies have not traditionally been thought of as central to federalism doctrine or theory. But they should be.

Where an increase in state authority has the effect of making elections more second order, we should understand the greater power held by the state to lead, perhaps counterintuitively, to a reduction in the "federalism benefits" we should expect to see (and vice versa). For instance, the Seventeenth Amendment reduced the authority of state governments by removing from state legislatures the power to select U.S. senators and giving that power directly to voters.[32] As was argued at the time, the power of the state legislature to choose senators gave voters a strong incentive to ignore state issues and use state legislative elections to vote their federal preferences.[33] Modern federalism advocates argue for repeal of the Seventeenth Amendment but fail to acknowledge its likely effect on state legislative elections: repeal would make them (even more) second order. State

federalism through the lens of sovereignty or of influence in cooperative federal–state policy making.

30. This, however, does not on its own answer any *specific* question about whether the federal government should assume control over some policy area or whether courts should protect state decisions against federal encroachment. There are, of course, many considerations in any such decision, and state elections are never entirely second order. Further, one's beliefs about the proper allocations of power between entities are almost surely developed not on a chalkboard but through experience of how states and localities actually performed during periods when their elections were at least somewhat second order. But regardless of one's *ex ante* belief about the balance of federal and state and local power, increases in the degree to which state and local elections are second order should weaken the case for devolution (and vice versa).

31. Thanks to Larry Kramer for suggesting this formulation.

32. *See infra* subpart III(A).

33. *See infra* subpart III(A).

legislative power to draw congressional district lines works in a similar fashion—a power held by state legislatures that makes state elections more responsive to national-party preference and hence reduces the gains from federalism generally.

How power is divided between state legislatures and governors is rarely considered a question with many implications for federalism per se.[34] But in eras—like today's—when state legislative elections are more second order than gubernatorial ones, it should be. When and if the federal government attempts to allocate power in cooperative federalism programs to specific branches of state governments, rather than to state governments as entities, we can understand the choice as one that either increases difference, sorting, and local democracy (when power is allocated to an official like the governor whose election is less second order) or one that tends simply to allocate power among national parties (when power is allocated to a branch elected in largely second-order elections, like the state legislature).

Similarly, we can understand state constitutional and statutory decisions about allocations among state entities as having a federalism dimension of a similar type, even in the absence of explicit federal policy. For instance, New York State's nondelegation doctrine has been employed against the delegation of major "policy decisions" to New York City's mayoral agencies, most famously Mayor Michael Bloomberg's ban on large single offerings of soda.[35] Viewed with an understanding of how mayoral and city council elections actually work, the New York Court of Appeals' decision to adopt a nondelegation doctrine far stronger than its (almost nonexistent) federal counterpart in the name of political accountability is extremely odd. The likelihood that mayoral agencies in big cities are more responsive and accountable to the local voters than the city council is far higher than the likelihood that federal agencies are more responsive and accountable than Congress.

Third, when federalism scholars do consider state elections, they misunderstand either how such elections work or the normative implications of second-order elections. The most well-known discussion of political

34. There are, of course, exceptions to this. *See, e.g.*, Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1573–75 (2015) (analyzing the roles of governors and state administrative actors in cooperative federalism programs); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1202–03 (1999) (discussing the federal government's ability to delegate powers to various state and local institutions without the consent of the state legislature).

35. *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 560–61 (N.Y. 2014) (Read, J., dissenting) (noting the political furor surrounding the ban).

parties in the literature is Larry Kramer's account of how decentralized, nonideological parties provide "the political safeguards of federalism."[36]

While his description may have had some purchase on the politics of the 1960s and 1970s, today, Kramer's account of the political safeguards of federalism gets three things wrong: politics, safeguards, and federalism.

Contemporary political parties are national in scope, largely coherent ideologically, and do little to represent state-specific interests in Washington. That so many state elections are second order shows that Kramer's understanding of safeguards is backward; modern political parties frequently make state politics responsive to national concerns and limit the degree to which state politics is representative of state-specific interests or the state median voter. And his description of federalism focuses exclusively on state authority and not at all on the quality of state democracy, despite the fact that the normative justifications for federalism largely turn on the latter. While Kramer was right to focus the study of federalism on how the institutions of democracy work, evidence about second-order elections shows Kramer's account has aged badly.

Other accounts provide more insight into how parties have changed and how state governments actually operate today. State behavior today is, as Jessica Bulman-Pozen argues, virtually impossible to understand without reference to how it reflects national-party politics—we have a "partisan federalism."[37] But Bulman-Pozen's (admittedly tentative) normative claim that such partisan federalism produces a better functioning national democracy is far less convincing. While second-order elections are clearly bad for traditional accounts of the ends of federalism, it is not clear that they make for a more effective opposition at the national level or provide greater checks on the party that controls the Presidency. In each case, it is equally plausible that a more differentiated set of state governments—not divided exclusively along lines that are red and blue—would improve national democracy. These differentiated governments could provide a wider set of possible alternatives for opposition parties to draw on, and they could set up more (and different kinds) of hurdles for dominant national coalitions. The supposed benefits of partisan federalism and second-order elections are largely conjectural, but the harms to the traditional goals of federalism are easily seen.

The problem of second-order elections should also urge federalism's advocates to develop a new normative agenda. The arguments developed in this Article suggest that those who seek the ends of federalism should focus not only on protecting the authority of states but also on enhancing the quality

36. *See* Kramer, *Putting the Politics Back in*, *supra* note 26, at 217–22.

37. *See* Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1092 (2014) (arguing that federalism is often used by state governments to advance partisan goals rather than state interests).

of state democracy. Avenues for doing so could include: (1) enhancing the power of state and local executives vis-à-vis relatively unknown legislatures and divided executives (attorneys general, insurance commissioners, etc.) and (2) developing election law tools that aid voters in differentiating state and national elections.

The rest of the paper is organized as follows. Part I surveys the evidence of second-order elections in states and localities. Part II discusses why protecting the outcomes of state democracy, and not merely the extent of state authority, fits the normative justifications usually offered for federalism doctrine and practice. Part III discusses implications of second-order elections for constitutional reform and for state-level separation of powers. Part IV discusses the implications of second-order elections for federalism theory. Part V is a conclusion that sets out what election and constitutional reforms those interested in enhancing federalism might use to improve state democracy.

I. Second-Order Elections in States and Localities

As the goal of this Article is to explore the implications of second-order elections for federalism theory, it is necessary to review *what* a second-order election is, *how much* evidence exists that state and local elections are second order, and *why* elections might be second order. This Part will show that state and local elections vary substantially in the degree to which they are second order—by type of office, over time, and across place. But there is substantial evidence that many state and local elections today are largely second order—particularly, elections for state legislatures, city councils in big cities, and other lower profile state and local offices. A full recounting of which elections are mostly or entirely second order is beyond the scope of this review. But it can be said that swings in preferences about national issues and reviews of the performance of national officials, rather than preferences of state voters about state policies and the performance of state officials, do a great deal to determine the outcome of state elections and the direction of state policy.

What are second-order elections? A term coined by Karlheinz Reif and Hermann Schmitt, second-order elections refers to elections at one level of government that reflect voter preferences developed in relation to another level of government.[38] Reif and Schmitt developed the term to discuss European Parliament elections (a directly elected European Union institution) in which voters relied exclusively on their preferences for national parliaments and prime ministers.[39]

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38. Reif & Schmitt, *supra* note 11, at 8–9.

39. Prior to 1979, the international organization now known as the European Union (EU) had no directly elected officials; appointees and officials from Member States made all decisions. *See* SIMON HIX & BJØRN HØYLAND, THE POLITICAL SYSTEM OF THE EUROPEAN UNION 146–47 (3d

But second-order elections happen in many multilevel democracies, not just in supranational institutions. In Europe, local races are often second order.[40] So too in the United States.

The best recent evidence on state legislative elections comes from the work of Steve Rogers. He found that the correlation in the percentage change by party in seats in the U.S. House of Representatives and state legislatures is 96%![41] Further, causation almost certainly flows from the way national

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ed. 2011). Concerns about a "democratic deficit" led Member States to reform the institution, creating a directly elected body, the European Parliament (EP), that would over time become a powerful part of the EU's legislative process. *See* Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612, 1697 (2002) ("The primary response to concerns about a 'democratic deficit' has been a call to enhance the role of the European Parliament—the only directly elected institution in the Community system."). But as Reif and Schmitt showed in their pathbreaking paper, voters largely did not use those elections to express their preferences about EU policy or hold EU officials accountable for their performance. Reif & Schmitt, *supra* note 11, at 8–15; *see also* SIMON HIX, WHAT'S WRONG WITH THE EUROPEAN UNION AND HOW TO FIX IT 79–80 (2008) [hereinafter HIX, WHAT'S WRONG] (discussing the extent to which EP elections are second order). Instead, voters in EP elections simply voted for their preferred domestic-level party—i.e., Labour or the Conservatives in Britain, the Christian Democrats or the Social Democrats in (then) West Germany—using the elections to punish or reward domestic politicians and parties. Reif and Schmitt called EP elections "second order" because voters use preferences developed in relation to one level of government—say, the performance of a Prime Minister—as a guide for voting at an entirely different level of government. Reif & Schmitt, *supra* note 11, at 8–9. Across a series of treaties, EU Member States responded to the problems of EP elections by making the EP more and more powerful. *See* Schleicher, *supra* note 11, at 122–23; HIX, WHAT'S WRONG, *supra*, at 34–37. Even so, voters continue to simply vote their domestic preferences in EP elections, although the low turnout and seemingly low stakes have also meant that radical (and just plain strange) parties do better than they do in national elections. *See, e.g.*, David Charter & Rory Watson, *European Elections: Extremist and Fringe Parties are the Big Winners*, TIMES (June 8, 2009), http://www.thetimes.co.uk/tto/news/politics/elections/article1842621.ece# [https://perma.cc/FK4M-N7RN] (discussing the effects of low turnout); Jonathan Eyal, *EU Parliament on Fringe of Lunacy; Newly Elected Rightist and Extremist Parties Have Little Clout But Could Undermine Unity*, STRAITS TIMES (Sing.), June 14, 2009 (describing the success of xenophobic, nationalist, and odd parties like the Pirate Party of Sweden); *Swing Low, Swing Right: The European Elections*, ECONOMIST (June 11, 2009), http://www.economist.com/node/13832286 [https://perma.cc/BK2Y-MHP6] (discussing turnout and results); *Trouble at the Polls: The Worrying European Elections*, ECONOMIST (June 11, 2009), http://www.economist.com/node/13829453 [https://perma.cc/7W2G-86DV] (bemoaning "wide support for a ragbag of far-right, populist, anti-EU or plain nutty parties"). For the most part, despite the increasing importance of the EP as an institution, EP elections remain almost entirely second order. As I have noted, "nothing a Member of European Parliament . . . has ever said, and nothing one has ever done, has ever [affected] an EP election." David Schleicher, *What if Europe Held an Election and No One Cared?*, OPINIO JURIS (Feb. 8, 2011), http://opiniojuris.org/2011/02/08/hilj_what-if-europe-held-an-election-and-no-one-cared/ [https://perma.cc/HD32-5ASS].

40. *See, e.g.*, Anthony Heath et al., *Between First and Second Order: A Comparison of Voting Behaviour in European and Local Elections in Britain*, 35 EUR. J. POL. RES. 389, 391 (1999). *But see* George A. Boyne et al., *Democracy and Government Performance: Holding Incumbents Accountable in English Local Governments*, 71 J. POL. 1273, 1282 (2009) (finding that extremely poor performance in local office is punished by voters, but elections are otherwise second order).

41. Rogers, *supra* note 2, at 3–6.

events influence state legislative elections and not the other way around.[42] Presidential approval rates and the health of the national economy play a large role in determining which party gains seats in state legislatures.[43] In contrast, objective measures of the performance of state government—from state economic variables to student test results to the crime rate—do not seem to matter very much in state legislative elections.[44] This is consistent with earlier research showing that state economic variables have little effect on state legislative races.[45] And subjective measures, like voter impressions of the performance of state legislatures, matter only a bit and are far outweighed in influence by national factors.[46] "The state economy, state policy outcomes, or voters' approval of the legislatures appear to have little—if any—consequences for members of the governor's or state house majority party in state legislative elections."[47]

Further, individual legislators are not punished for unpopular votes. By comparing roll call votes with subsequent referendum elections, Rogers shows that unpopular votes do not substantially influence election outcomes. In two district-level analyses, Rogers found that voters punished unpopular votes in only two of ten states and punished ideologically extreme representation (relative to the district) in only nine of thirty-eight.[48] A majority of voters cannot identify which party is in charge of the state assembly or the state senate, making retrospective voting difficult.[49] Voters generally use their national-level preferences in state legislative elections and

42. *Id.* at 55–56 (finding that "[s]tate representatives' behavior and performance may matter at the margins, but evaluations of the president more likely determine whether legislators are reelected").

43. *Id.* at 43. Rogers's finding is consistent with previous research, which found a presidential coattail effect in state legislative races (the party of the presidential race winner gained seats) and an opposite "repercussion" effect in midterm elections. The presidential coattail/repercussion effects were only slightly weaker than the coattail/repercussion effects for Congress. James E. Campbell, *Presidential Coattails and Midterm Losses in State Legislative Elections*, 80 AM. POL. SCI. REV. 45, 60–61 (1986) ("[T]he median magnitude of presidential coattail and repercussion effects in state legislative races is only slightly less than those effects in congressional races.").

44. *See* Rogers, *supra* note 2, at 39–42 (finding that impressions of performance have a small effect on state legislative voting).

45. Chubb, *supra* note 25, at 140–41. This is not to say that there are no studies finding state-level effects. For instance, it seems that the governor's party does slightly worse in midterm state legislative elections (by one to four percent under most specifications) controlling for other factors—a weak version of the midterm "balancing" hypothesis regularly discussed at the national level. *See* Michael A. Bailey & Elliot B. Fullmer, *Balancing in the U.S. States, 1978–2009*, ST. POL. & POL'Y Q. 148, 155–58 (2011); Olle Folke & James M. Snyder, *Gubernatorial Midterm Slumps*, 56 AM. J. POL. SCI. 931, 946 (2012).

46. *See* Rogers, *supra* note 2, at 48–49 (finding that strong approval of state legislatures correlates with a small increase in voter turnout for state elections).

47. *Id.* at 6–7.

48. *Id.* at 7.

49. *Id.* at 35.

pay little to no attention to what state legislators (individually or as a caucus) actually think or how they actually voted.

Since voters do not judge state candidates and parties as we might expect (say, for promises breached or roads mended), there is little reason to expect that state legislative elections should produce either representative policies or much in the way of accountability for performance. And as it happens, state policy is not particularly representative of popular preferences. Jeffrey Lax and Justin Phillips have found that, at the state level, "[r]oughly half the time, opinion majorities lose—even large supermajorities prevail less than 60% of the time. In other words, state governments are on average no more effective in translating opinion majorities into public policy than a simple coin flip."[50] Even after close state elections, voters rarely get what they want from state legislatures.[51]

Gubernatorial elections seem to work a bit differently. These races are less predictable than state legislative races. The attributes of candidates matter more, though national-level partisanship and preference swings are still relatively more important.[52] Further, voters do hold governors accountable *to some extent* for events that happen during their term, particularly state economic performance and tax increases.[53] The reason is

50. Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 149 (2012).

51. *See id.* at 148–49. Others have found contrary results, however, suggesting that close elections can cause state parties to change their behavior in order to attract the few informed swing voters. *See* Elmendorf & Schleicher, *supra* note 9, at 401 n.187 (noting that researchers have "found evidence consistent with the hypothesis that the imminent prospect of winning or losing control of state government induces lawmakers to invest in building statewide party brands"); Gerald Gamm & Thad Kousser, *Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures*, 104 AM. POL. SCI. REV. 151, 151–56, 161–63 (2010) (finding, in a study of thirteen states over almost 120 years, that balance between "particularistic" (district oriented) and "general" (issue oriented) policymaking shifts toward the latter when parties are evenly balanced); Thad Kousser et al., *Ideological Adaptation? The Survival Instinct of Threatened Legislators*, 69 J. POL. 828, 829 (2007) (showing that "the electoral connection can indeed motivate legislators to adjust their behavior in response to a strong signal that their constituents have shifted").

52. *See* Chubb, *supra* note 25, at 149 (arguing that "[w]hile party establishes a firm baseline, and outside influences encourage a regular pattern of change, [gubernatorial] elections can easily turn on the qualities of the candidates themselves").

53. *See, e.g.*, *id.* (finding state economic variables have some effect on gubernatorial elections, although far less than national economic variables); Richard G. Niemi et al., *State Economies and State Taxes: Do Voters Hold Governors Accountable?*, 39 AM. J. POL. SCI. 936, 936 (1995) (finding, against the "prevailing wisdom in research on gubernatorial voting . . . that the *national* economy" is all that is important, that "[a] poor state economy, increases in taxes, and lowered personal finances all contribute to votes against incumbent governors and their parties"). This includes holding governors responsible for things over which they have little control, like national economic booms. But all the same, voters still have some ability to link governors to relative state economic performance. As economist Justin Wolfers notes, voters are about as good at linking governors to state economic performance (independent of national performance) as boards of directors are at linking CEO pay to company performance (independent of industry performance). Justin Wolfers, Are Voters Rational? Evidence from Gubernatorial Elections 1 (Mar. 19, 2002) (unpublished manuscript) (on file with the Texas Law Review).

pretty clear: governors are higher profile than legislators, and voters know enough about the identity and positions of a governor to hold her accountable—at least somewhat.[54]

We see similar trends at the local level. There is substantial evidence that city council races in big cities are extremely second order.[55] But the degree to which local elections are second order differs substantially based on the type of local government and the type of office. William Fischel's "homevoter hypothesis" argues that voters in small local governments have incentives to pay attention to local politics and thus can and do exert substantial control over local and county legislators.[56] Empirical evidence supports this. For instance, voters in less-population-dense areas are more wont to split their tickets, voting one way in national races and another in local ones.[57] But voters in denser places do this rarely.

Some big-city officials are sufficiently high profile that the electorate is able to reward them for good performance. For instance, the Mayor of New York's approval rating is closely tied to the crime rate.[58] And sometimes an event occurs in an otherwise sleepy race that makes voters sit up and pay attention to local officials' performance.[59] But in general, down-ballot elections in big cities are second order.

The degree to which elections are second order also changes over time. While the correlation between changes in control of state legislative and congressional seats is tight over time, it was weaker in the 1970s and 1980s

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54. In general, the more visible a candidate is—whether on account of incumbency, name recognition, or campaign spending—the more likely we are to see her gain support through ticket splitting. Paul Allen Beck et al., *Patterns and Sources of Ticket Splitting in Subpresidential Voting*, 86 AM. POL. SCI. REV. 916, 925 (1992) ("Candidates who enjoy a visibility advantage are very successful in attracting votes beyond their own partisan camp . . . .").

55. *See* Schleicher, *supra* note 6, at 447–59 (presenting a "somewhat stylized" political markets model to explain this phenomenon).

56. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 4 (2001). Fischel suggests that this dynamic recedes in larger cities both because voters there are less likely to "know what is going on in local government" and because they are less likely to be homeowners in the first place. *Id.* at 92–93.

57. Kristen Badal & Jessica Trounstine, The Mystery of Local Versus National Partisan Representation 18 (unpublished manuscript), http://faculty.ucmerced.edu/jtrounstine/Local_partisanship_March10_3.pdf [https://perma.cc/5YH4-5SEA] ("In contexts where local politics is likely to be less salient—counties with large populations and a higher proportion of recent movers—the local vote is more predictable. In these settings, voters appear more likely to be consistent across levels of government with regard to their partisan loyalty.").

58. R. Douglas Arnold & Nicholas Carnes, *Holding Mayors Accountable: New York's Executives from Koch to Bloomberg*, 56 AM. J. POL. SCI. 949, 960 (2012).

59. *See, e.g.*, Christopher R. Berry & William G. Howell, *Accountability and Local Elections: Rethinking Retrospective Voting*, 69 J. POL. 844, 845, 851–52 (2007) (finding a brief surge in retrospective voting in South Carolina school board elections driven by public interest in a new student-testing accountability system).

than it is today.[60] Ticket splitting happened more frequently in the 1960s, 1970s, and 1980s than it does today.[61] Gubernatorial votes by county correlated relatively weakly with presidential votes in the 1960s and 1970s, but now correlate more strongly than at any point since the 1940s.[62] Consistency between presidential and state legislative votes seems to be increasing as well, as Gary Jacobson has documented in California.[63] The high levels of ticket splitting from 1960 through the 1980s were a deviation from prior periods, when ticket splitting was much rarer.[64] Eras (like today) with "strong parties"—that is, with clear ideological divisions between parties and less internal variation within them—are correlated with low levels of ticket splitting by voters, even across levels of government.[65] As we see greater polarization, we should expect to see increasingly second-order state elections.

There is very little scholarship about the structural factors underlying second-order elections. My previous work, both individual and with Christopher Elmendorf, provides the most thorough effort to explain why we see second-order elections in the United States and Europe.[66] Because voters know little about individual candidates at lower levels of government, they often rely on preferences formed in relation to another level of government. As there is likely some degree of correlation (even if it is weak) between party stances at different levels of government, this reliance is rational.[67] The result is party-line voting across levels of government.

Minority parties at the local or state level *ought* to want to distinguish themselves on local issues to appeal to voters. But election laws often limit their ability to rebrand themselves.[68] The result is "mismatch": local parties

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60. *See* Elmendorf & Schleicher, *supra* note 9, at 400 fig.1.

61. ABRAMOWITZ, *supra* note 15, at 95–97; Gary C. Jacobson, *Partisan and Ideological Polarization in the California Electorate*, 4 ST. POL. & POL'Y Q. 113, 118 (2004).

62. Dan Hopkins, *All Politics Is Presidential*, FIVETHIRTYEIGHT (Mar. 17, 2014, 5:38 AM), http://fivethirtyeight.com/features/all-politics-is-presidential/ [https://perma.cc/NC66-HCSP].

63. *See* Jacobson, *supra* note 61, at 124 fig.2 (showing a marked increase in shared variance between votes for the California Assembly and votes for the President).

64. *See* Joe Soss & David T. Canon, *Partisan Divisions and Voting Decisions: U.S. Senators, Governors, and the Rise of a Divided Federal Government*, 48 POL. RES. Q. 253, 256 fig.1 (1995) (detailing the increase in split senator–governor outcomes from 1962 to 1992).

65. *See id.* at 261 (explaining that when voters perceive party labels as less relevant, ticket splitting and divided outcomes become more common).

66. *See generally* Elmendorf & Schleicher, *supra* note 9; David Schleicher, *I Would, but I Need the Eggs: Why Neither Exit Nor Voice Substantially Limits Big City Corruption*, 42 LOY. U. CHI. L.J. 277 (2011); David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 HASTINGS L.J. 1043 (2014) [hereinafter Schleicher, *Seventeenth Amendment*]; Schleicher, *supra* note 11; Schleicher, *supra* note 6.

67. Schleicher, *supra* note 6, at 451.

68. *See id.* at 450–51 (describing three "unitary party rules": first, national parties are automatically entitled to enter candidates in local elections; second, loyalty rules forbid membership in multiple parties—say, one national and one local; and third, the First Amendment enables national parties to endorse candidates even in formally nonpartisan elections); *see also* Elmendorf

are organized according to splits at the national level and fail to develop locally specific platforms to compete for the median voter.[69] Further, even if parties do develop locally specific platforms, voters may not react.[70] Some substantial percentage of voters may have affective or social ties to national parties and thus support them in local elections regardless of preferences on local issues. And they may not trust platforms of minority parties that have not governed in a long time. For example, Wyoming Democrats have not had a majority in either house of the legislature since 1964; Massachusetts Republicans have not controlled either house since 1958.[71]

If the second-order voting that this mismatch model attempts to explain is a problem, primary elections are unlikely to do much to mitigate it. Second-order voting is either the result of an informational problem (voters lack information about a minority party's state-policy stance) or an organizational one (election laws do not allow minority parties to easily rebrand). Both of these problems become more acute at the primary level. Primary voters have even less ballot information, since there are no parties internal to the Democrats or Republicans, and thus voters cannot easily determine what faction within a party each candidate is associated with. So if a voter wanted to choose or reject, to reward or punish, say, the Tea Party, she could not easily determine this faction's membership among Republican legislators. Further, primary voters are unlikely to be particularly representative of the general population. State or local primaries will therefore do little to make state or local elections more representative or accountable.[72]

But regardless of its structural causes, second-order voting in state elections weakens state democracy. One might think that no harm results if citizens' preferred (national) party wins at the state level too. Pressing this argument even slightly, however, reveals its emptiness. First, elections should ensure both prospective representation (roughly, the fit between candidate platforms and voter preferences) and retrospective accountability for the performance of a state under a party or coalition's control. Second-order elections completely undermine the latter of these two democratic imperatives. If elections are second order, the *actual* votes of legislators and the *actual* performance of the state government will not affect elections.

Prospective representation also suffers when we see second-order elections. There is no reason to assume perfect correlation between voter

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& Schleicher, *supra* note 9, at 405–07 (discussing how local party building is limited by unified registration rules, which gut the local party's prospective primary electorate).

69. Elmendorf & Schleicher, *supra* note 9, at 367–68.

70. *See id.* at 403–05.

71. *See* MICHAEL J. DUBIN, PARTY AFFILIATIONS IN THE STATE LEGISLATURES: A YEAR BY YEAR SUMMARY, 1796–2006, at 94–95, 205–06 (2007).

72. *See* Elmendorf & Schleicher, *supra* note 9, at 388–90.

preferences on what states do and what the federal government does. The federal government does all sorts of things that states often cannot do as a constitutional matter: wage war, make foreign policy, engage in Keynesian deficit spending, use monetary policy to fight unemployment or inflation, and appoint Supreme Court judges—among other things.[73] Similarly, states decide issues that the federal government (largely) does not—like land use, property issues, and tort, contract, and family law.[74] Other issues are mostly state based and make up a far larger part of state budgets and policy making, like criminal law (90% of prisoners are in state prisons),[75] public infrastructure investment (85% funded by states and localities),[76] and education (88% funded by states and localities).[77] This is equally true at the local level in big cities, where it is often very hard to identify a consistent Republican or Democratic position on important policy questions.[78]

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73. *See* U.S. CONST. art. I, § 10 (war, foreign policy, monetary policy); U.S. CONST. art. II, § 2 (Supreme Court justices); *see generally* NAT'L CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS (Oct. 2010), http://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf [https://perma.cc/8V6N-WF8W] (describing various state constitutional prohibitions on deficit spending).

74. *See* Steven G. Calabresi, *Does Institutional Design Make a Difference?*, 109 NW. U. L. REV. 577, 581 (2015) ("[T]he substantive law of contract, property, torts, inheritance, family law and criminal law are overwhelmingly areas of state law . . . .").

75. John F. Pfaff, *Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 HASTINGS L.J. 1567, 1572–73 (2015) (finding that almost 90% of prisoners are in state prisons and that federal grants to states do little to encourage greater state incarceration rates).

76. BARRY BOSWORTH & SVETA MILUSHEVA, INNOVATIONS IN U.S. INFRASTRUCTURE FINANCING: AN EVALUATION 2 (2011), https://www.brookings.edu/wp-content/uploads/2016/06/1020_infrastructure_financing_bosworth_milusheva.pdf [https://perma.cc/8BKA-54AV].

77. *School Funding*, NEW AM., https://www.newamerica.org/education-policy/policy-explainers/early-ed-prek-12/school-funding/ [https://perma.cc/83DY-ZK23].

78. What is the Democratic position on raising limits on building heights? On mayoral control of the schools? *See* Schleicher, *supra* note 6, at 440–45 (discussing polling data and newspaper endorsements in New York City's mayoral elections as prime evidence that political commitments on national and local issues are not closely correlated); *see also* Fernando Ferreira & Joseph Gyourko, *Do Political Parties Matter? Evidence from U.S. Cities*, 124 Q.J. ECON. 399, 420–21 (2009) (using regression discontinuity design around close elections to find no systematic differences in policies adopted by Democrat- and Republican-controlled cities); Elisabeth R. Gerber & Daniel J. Hopkins, *When Mayors Matter: Estimating the Impact of Mayoral Partisanship on City Policy*, 55 AM. J. POL. SCI. 326, 330, 337 (2011) (using regression discontinuity design around close elections to find no systematic differences in fiscal policies outside of public-safety spending between Democratic and Republican mayors). *But see* Katherine Levine Einstein & Vladimir Kogan, *Pushing the City Limits: Policy Responsiveness in Municipal Government*, 52 URB. AFF. REV. 3, 4–5 (2016) (finding that Democrats spend more on social services, adopt more progressive taxation systems, and seek more intergovernmental transfers); Matthew E. Kahn, *Do Liberal Cities Limit New Housing Development? Evidence from California*, 69 J. URB. ECON. 223, 227 (2011) (finding that more liberal cities grant fewer housing permits than otherwise observationally similar cities in the same metropolitan area). Some degree of correlation between national party and local policy is to be expected—it is in fact *necessary* for the "mismatch model" discussed above to work (otherwise it would not be individually rational for voters to use their national-party preference in local elections). The question is one of degree. And local elections that follow national-party voting

Therefore, we should expect at least some differences between voter preferences on state and local issues and federal issues, meaning that second-order elections result in poor representation.

Even if the types of issues faced by the state and the federal government were exactly the same, though, prospective representation would *still* suffer. The preferences of the federal-level and state-level median voter are likely to differ; the median voter's bundle of preferences in Arkansas or New York probably doesn't match the federal median voter's preferences. If state-level party competition were decided by voters based on state-level policy preferences and state-specific retrospective evaluations, then state parties would tailor their platforms to the state median voter's preferences instead of following the stances of the national parties. Second-order elections thus rob the state median voter of her influence.

For these reasons, second-order elections undermine both prospective representation and retrospective accountability. The rest of the paper will discuss the implications of second-order elections for federalism theory.

II. "You Keep Using That Word. I Do Not Think It Means What You Think It Means"[79]: Federalism as State Democracy, Not Just State Authority

How much federalism is optimal? How much does the Constitution require? These are perhaps the oldest and most debated questions in American constitutional law.[80] There are endless arguments over whether more or less should be done to protect the power of state governments through the courts, the political system, or inside federal statutory regimes. But, with a few exceptions, scholarly discussions and judicial opinions have largely elided a different question: What is federalism meant to protect?[81]

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do not produce as much responsiveness as they ought to (or as national elections due to national-voter preferences).

79. THE PRINCESS BRIDE (20th Century Fox 1987).

80. *See* New York v. United States, 505 U.S. 144, 149 (1992) (describing the "proper division of authority between the Federal Government and the States" as "perhaps our oldest question of constitutional law").

81. There are some exceptions. Most notable is the work of John McGinnis and Ilya Somin. Taking off from the well-known section from *New York v. United States*, 505 U.S. at 181–82, that argues that federalism must be protected from state officials who would like to cede responsibility to the federal government, McGinnis and Somin clearly distinguish a state's power to make policy decisions from what should be protected by constitutional guarantees of federalism. John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. Rev. 89, 89–92 (2004). Jim Gardner argues that national parties influence state politics as much as (if not more than) state parties influence national politics, and that federalism theory does not reflect this. James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 1 (2013). As I will argue below, I agree—although Gardner's account does not discuss why elections are second order or explain much about the connection between second-order elections and normative federalism theory.

The reason for this elision is that the answer may seem obvious. Larry Kramer stated the standard view: "[F]ederalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices."[82]

This Part will show that the standard view is wrong. More specifically, it will show that the most common normative justifications for federalism are not premised on state regulatory authority as such, but rather on the ability of state majorities to choose policy outputs.[83] This is true whether "authority" refers to state autonomy or merely the state's capacity to introduce differentiated state preferences into a federal policy process.[84] The quality of state democracy is central to virtually any possible justification for distributing power to states and protecting that allocation either structurally or constitutionally.

Although this Part will make the case on the basis of theory, the argument has deep roots in the American constitutional tradition. After all, although the Guarantee Clause has meant many things to many people, at the very least it makes clear that state democracy—a "republican form of

82. Kramer, *Putting the Politics Back in*, *supra* note 26, at 222; *see also* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEXAS L. REV. 1, 50–52 (2004) ("[I]t makes sense to look to the underlying values that federalism is generally thought to serve. . . . Autonomy . . . provides the common theme of all these arguments.").

83. Malcolm Feeley and Edward Rubin reject the idea that federalism is the same as local democracy. They argue that "federalism reserves particular issues to subnational governmental units, regardless of the political process that exists within these units." MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE 31 (2008). While it is not impossible to imagine systems of federalism that rely on nondemocratic subnational regimes, they are unlikely to produce many of the commonly cited benefits of federalism, as discussed below. And the quality of democracy matters a great deal if the subnational units' claims to representation are based on elections. For Feeley and Rubin, the main benefit of federalism is that it protects distinct political identities inside a single country. If subnational elections become more second order—i.e., less representative of the preferences of locals on local issues—they will do less to achieve this end. If subnational entities' claims to representation of distinct political identities are based on an elected form of government (rather than some other claim, like hereditary leadership), then the quality of those elections is more important than the formal authority of the unit.

84. There is substantial argument that, even in this era of cooperative federalism, scholars still focus too much on "autonomy"—that is, a state's ability to make decisions unimpeded by federal oversight. Instead, these critics argue, we should understand state authority or power as the means to participate in national policy making, rather than as the power to legislate free of oversight. *See, e.g.*, Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2097 (2014) (arguing that federalism's value lies in its creation of a framework that facilitates negotiation between governments); Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7–8 (2010) (arguing that federalism gives minority factions a voice in national policy making). For what it's worth, not much in this Article turns on whether states are acting autonomously or inside a national policy-making process. Even if we conceive of federalism as simply providing state officials with the means to present alternative viewpoints and participate meaningfully in national policy making, the quality of that participation will turn on whether state elections provide accurate representations of state voters' preferences. Thus, there is no need to debate the point here.

government"[85]—is a bedrock principle of American constitutionalism.[86] At first glance, a distinction between state authority and state democracy may seem unimportant. After all, states hold elections, and expanding state authority gives power to the candidates who win those elections. But the distinction between state authority and the product of state democracy turns out to be important to a number of policy, legal, and theoretical disputes.

Second-order elections help explain the need for this distinction. First, giving authority to state governments may not produce policies that are particularly representative of local preferences or for which state officials are held accountable.[87] If the legislators in Albany win their seats in second-order elections, then increasing New York's authority may not lead to policies much more agreeable to the people of New York than whatever the federal policy would have been otherwise. That is, the degree to which granting (or not denying) state authority *actually* achieves the goals of federalism will depend substantially on how well state democracy works.

Further, some federal policies that enhance state authority can actually retard the ability of majorities at the state level to choose state policy. Some forms of increased state authority will increase the degree to which state elections are second order—that is, the degree to which state majorities use state elections for something other than selecting state policies or retrospectively imposing accountability on state officials who have chosen ineffective policies. Anything that makes state elections more second order, including this sort of increase in state authority, harms the normative goals of federalism.

With this distinction (between state authority and the quality of state democracy) in mind, consider now some of the most common normative justifications for federalism. I will not be able to capture all the varied arguments in the literature here, but the best place to start is the Supreme Court's discussion in *Gregory v. Ashcroft*[88]:

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85. U.S. CONST. art. IV, § 4.

86. "Like the apostle Paul, Republican Government has been 'made all things to all men.'" Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (quoting 1 *Corinthians* 9:22). As Amar argues, "[t]he central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule." *Id.* This understanding of republican government provides the roots of the theory of federalism this Part advances.

87. That said, one has to answer the "compared to what" question. Even if elections are second order, state authority may result in more responsive policy making than whatever the national government would impose, as at least Republican states will get Republican policies (and the same for Democratic states). But the *degree to which* devolution of power achieves the ends discussed below will turn substantially on how well state elections work at expressing state-level preferences. For most policy areas, there are reasons to nationalize and reasons not to, and where state democracy is working less well, the argument for devolution is relatively weaker.

88. 501 U.S. 452 (1991).

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[89]

The sources cited by the Court for this proposition—work by Michael McConnell and Deborah Merritt—add to this that federalism serves as a check on federal power, limits the principal–agent problems that arise as governments expand in size, produces greater legitimacy given wide differences in values across a large nation, and provides an outlet for differences in values and identity.[90] To these, one should add that federalism might promote good policy through cooperation between officials at two levels with different talents or sources of authority (cooperative federalism) or through disagreement and conflict (uncooperative federalism).[91] These are far from the only justifications one could provide for federalism doctrine or policies, but they are the ones that are offered most frequently.

Each of these justifications for federalism requires state democracy actually to function. More precisely, we will see (a) that policies that enhance state authority but detract from the majoritarianism of state democracy retard these values, and (b) that the quality of state democracy will determine the extent to which any allocation of power to states enhances these normative values of federalism.

A. Democracy-Promoting Theories of Federalism and the Quality of State Elections

Under some theories, constitutional protections for the states are good because they encourage policy formulation by a sovereign closer to the people—either because citizens can more easily monitor officials closer to home or because state lawmaking allows a better fit between preferences and policies in an expansive, heterogeneous society. If this is true, then the

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89. *Id.* at 458 (citations omitted).

90. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3–10 (1988); *see also* Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 853–57 (1979) (reviewing the advantages of localism and greater state autonomy).

91. *See, e.g.*, ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 90–97 (2009) (defining and evaluating the concept of cooperative federalism); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1274–80 (2009) (developing a theory for uncooperative federalism and offering case studies of "interstitial dissent").

quality of state democracy clearly matters.[92] If voters choose state legislators because of their copartisan president's stance on war in Iraq, rather than anything the state legislators themselves do, then state elections probably will not promote representative policies at the state level. If states are allocated authority to make policy in such a way that state officials' policy choices are not rewarded or punished at the ballot box, there is no reason to believe that these policies will be made according to local preferences.[93]

Further, certain types of increases in state authority can make elections more second order, and hence less representative of local preferences on policies the state makes. If voters select state legislators so that they, say, will gerrymander congressional districts in order to influence voting in Congress, state officials will not be held accountable for the results of state policy.[94] Thus, state authority—in this example, the power of state officials to draw congressional districts—can reduce the representativeness of state democracy regarding the issues for which states make public policy.

B. Political-Identity Theories of Federalism and the Quality of State Elections

Malcolm Feeley and Edward Rubin have argued that federal regimes exist to "resolve conflicts among citizens that arise from the disjunction between their geographically based sense of political identity and the actual or potential geographic organization of their polity."[95] This argument for federalism clearly turns on state elections representing state-specific preferences. If political identity were solely centered on a state (if, for example, Texans defined themselves only as Texans and thought about politics through a Texan lens), then the political dynamics discussed in Part I would never occur. State elections would not be second order.

But political identity is often mixed in form (Texans identify both as Americans and as Texans). And identity-protecting theories of federalism end up relying quite heavily on the quality of state elections and thus are

92. This is equally true for theorists who focus on the benefits federalism provides by creating multiple points of entry for interest groups and rights claimants. *See generally* Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006). As Resnik notes, "translocal" nonstate entities condition how much diversity and fit federalist arrangements create. Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-essentializing Jurisdictional Divides, and Temporizing Accommodations*, *in* FEDERALISM AND SUBSIDIARITY 363, 363–64 (James E. Fleming & Jacob T. Levy eds., 2014). Political parties are simply the most powerful translocal entities in state politics and, with rising polarization and second-order elections, entities that iron out differences between states in very dramatic ways.

93. And as discussed above, it turns out that state policies are only weakly connected to popular opinion at the state level. *See* Lax & Phillips, *supra* note 50, at 149 (indicating that "state policy is far more polarized than public preferences" (emphasis omitted)).

94. *See* Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1089.

95. FEELEY & RUBIN, *supra* note 83, at 38.

frustrated by second-order elections. If voters use elections to comment on national rather than state policies, then holding such elections likely weakens state identity formation. This idea is central to the work of constitutional-design theorists working under the banner of "centripetalism." They argue that holding national elections can help overcome deep ethnic or cultural divisions in transitional democracies following civil wars or other democratic failures.[96] Centripetalists favor using election systems like single transferable voting or distributional requirements (requiring candidates to get a certain percentage of the vote in every state) to create national political parties because holding elections over national issues encourages voters to think like members of a national community rather than a provincial one.[97] To the extent that increases in state authority—for instance, having state legislatures appoint U.S. senators, as they did before the Seventeenth Amendment[98]—force state voters in choosing state officials to consider national politics to a greater extent, such increases undermine rather than protect distinct political identities in states.

C. Laboratories of Democracy and the Quality of State Elections

States are often lauded as "laboratories of democracy,"[99] but the quality of state experiments turns crucially on how state elections function. As Susan Rose-Ackerman has noted, states innovate less than we might think because states lack property rights in their policy innovations and local politicians are risk averse.[100] If state officials are likely to win or lose without respect to their performance, but exclusively due to the performance of their copartisans, then there is even less reason to expect innovation.[101] To the

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96. *See* BENJAMIN REILLY, DEMOCRACY AND DIVERSITY: POLITICAL ENGINEERING IN THE ASIA-PACIFIC 83–91 (2006) (characterizing centripetalist mechanisms as designed to "break down the appeal of narrow parochialism or regionalism"); TIMOTHY D. SISK, DEMOCRATIZATION IN SOUTH AFRICA: THE ELUSIVE SOCIAL CONTRACT 17–55 (1995) (contrasting centripetalist and consociational theory in context of the negotiated transition to a new democratic political order); *see also* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 569–70 (1985) (outlining key features of consociational theory). For a discussion of this literature, see Schleicher, *supra* note 11, at 149–52.

97. REILLY, *supra* note 96, at 85–86.

98. *See infra* Part III.

99. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

100. *See* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 603–05 (1980) (identifying governmental innovations as "pure public goods," therefore subject to the free-rider problem); *see also* Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1346–61 (2009) (discussing the free-rider problem in an assessment of Rose-Ackerman's work).

101. A counternarrative should be noted. As entities that exist in multiple jurisdictions, national political parties have incentives to invest in "R&D" in the laboratories of democracy. Rose-

extent that general elections turn on national issues, risk-averse politicians seeking to stay in office, or to advance, will realize that their fates turn on primary elections—where ideological conformity, support from key political organizations, or fundraising may be more important than policy success.[102] And if increases in state authority further reduce the degree to which local politicians see electoral benefit from their successes, then so too will they reduce the politicians' incentive to innovate.[103]

D. Competitive Federalism and the Quality of State Elections

Second-order elections also reduce the benefits of interstate competition. The existence of mobile residents inside a federal system produces benefits by allowing individuals to choose where to live among many jurisdictions and, by doing so, to opt in to the jurisdiction's policies. This promotes fit between state policies and popular preferences, and creates accountability for officials worried that unpopular decisions will result in residential or capital flight. The classic version of fiscal federalism, the Tiebout Model, notably did not have a "supply side"—it simply assumed that governments would change policies in order to keep an optimal number of residents.[104] However, more recent Tiebout-based theories, like William Fischel's work, have incorporated the "supply side"—on the insight that the population is not as mobile as the classic model suggests because the attractions of particular agglomeration economies make populations sticky

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Ackerman's worry about a lack of property rights is thus obviated as parties (who likely won't steal from one another because of ideological differences) have incentives to experiment so they can export successful policies to other states they control. But this requires a particular view of political parties. They must be extremely centralized organizationally, but without much pressure from primary voters on state officials to toe the party's ideological line. Modern political parties are almost exactly the opposite, featuring very consistent ideologies but less in the way of internal political control. *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 278–80 (2011) (describing the increase in parties' internal ideological consistency); *see also* Jonathan Martin, *Eric Cantor Defeated by David Brat, Tea Party Challenger, in G.O.P. Primary Upset*, N.Y. TIMES (June 10, 2014), https://www.nytimes.com/2014/06/11/us/politics/eric-cantor-loses-gop-primary.html [https://perma.cc/XP7X-TM24] (discussing the then-House majority leader's shocking, ideology-driven primary defeat). The specific state legislators trying out an innovation with an eye toward export would have to be more influenced by a scheming party chairman than worried about local ideologues who vote in primaries.

102. *See* Elmendorf & Schleicher, *supra* note 9, at 388–90 (discussing voter information in primary elections).

103. On the other hand, politicians in states with second-order elections may be less risk averse, as they will not see any electoral penalty for failures. They may lose the upside from innovating, but they also lose the downside. But even if this is the case—and it very well may be in some situations—the types of experiments these politicians undertake will be biased away from things that produce positive policy results for the state's general population and toward experiments that advance a narrower partisan agenda.

104. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditure*, 64 J. POL. ECON. 416, 424 (1956) (arguing that diffusing power to many local governments will produce an optimal provision of local public services under some conditions).

and exit economically costly.[105] More efficient voice obviates the need for a potentially costly exit.[106]

To the extent that state elections become more second order, voice is less efficacious, and the system must rely on exit more extensively and at greater cost.[107] Further, when state elections turn on shifts in national-level politics, exit by mobile citizens may not actually harm incumbent officials. While state budgets are reduced by exit, incumbents still know their jobs will turn on the President's success and not their own.

Second-order elections also likely create less variation across jurisdictions. If states are either Republican or Democratic with little local flavor, mobile citizens will have fewer options and, as a result, public service will fit local preferences less well. If state authority increases the degree to which elections are second order, there will be less effective sorting and competition between states.[108]

E. Cooperative Federalism and the Quality of State Elections

Other normative theories in favor of federalism are altered by the problem of second-order elections and the resulting difference between state authority and state majoritarianism, although in several directions. For instance, theories of "interjurisdictional synergy" come in a variety of flavors, both cooperative or "polyphonic" (in Robert Schapiro's nicely turned phrase)[109] and "uncooperative" or perhaps discordant (in Heather Gerken and Jessica Bulman-Pozen's work).[110] Cooperative theories call for state and federal officials to work together, bringing to bear the representative, regulatory, and fiscal capacities of each to solve problems in areas where both have power to act.[111] Discordant or uncooperative theories focus on the

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105. *See* FISCHEL, *supra* note 56, at 74–76 (noting that exit costs incentivize homeowners' political participation); Wallace E. Oates, *The Many Faces of the Tiebout Model*, *in* THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 21, 29–32 (William A. Fischel ed., 2006) (describing Fischel's work as providing a supply side to the Tiebout Model). For a discussion of this work and an explanation for why agglomeration economies can explain why people do not sort in ways suggested by the Tiebout Model, see David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1535–40.

106. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 37 (1970) (explaining that voice, or direct influence, can function as an alternative or a complement to exit).

107. *See* Schleicher, *supra* note 105, at 1510–11 (discussing the costs of sorting).

108. Modern federalism is full of examples of just this. Republican-controlled Midwest states adopt the same type of right-to-work laws as Southern states, despite a median voter who is presumably more pro-labor. State exchanges under the ACA theoretically allowed for a great deal of state variation, but no Republican-controlled state adopted them, reducing diversity. And so on.

109. *See* SCHAPIRO, *supra* note 91, at 92.

110. *See* Bulman-Pozen & Gerken, *supra* note 91, at 1258–59.

111. SCHAPIRO, *supra* note 91, at 98–101. "Process federalism" ideas are similar in this regard. Under these theories, federalism incorporates existing or natural subnational governmental units like states into the national governing process because their legitimacy and efficacy will exceed that of the national government. *See* FEELEY & RUBIN, *supra* note 83, at 70–71. But granting powers

benefits created by allowing diverse subnational jurisdictions to "dissent by deciding," creating concrete examples of alternatives to the preferences of national majorities, and allowing minorities to force majorities to overrule them, giving the minorities some degree of agenda control.[112]

If federalism is supposed to create beautiful interjurisdictional symphonies or useful discord from a polyphonic nation, then second-order elections reduce this synergy to a monotone (or, perhaps, to two notes repeating across the country). When state elections are second order, the nonformal capacities of federal and state authorities—that is, their ability to call upon popular support—become more similar. This affects both theories of interjurisdictional synergy. Strong organizational similarity between state and federal officials should make cooperation more likely, at least when the same party is in the White House and the statehouse (otherwise, cooperation becomes less likely). Discordant theories are changed in similar ways. If the state supports the national minority party, there is likely to be more disagreement and more use of uncooperative means to control the federal agenda (and if the state supports the majority party, then we might expect less disagreement than we would if state politics were more independent from national politics). Further, the use of uncooperative federalism is more likely to be on behalf of the national minority party and will not be used to the benefit of other types of dissenters or to add more dimensions to national politics.[113]

F. Federalism as a Check on Federal Authority and the Quality of State Elections

"Checks and balances" theories are similarly changed, but not necessarily weakened, by second-order elections. The existence of many states, each with some degree of autonomy, makes it harder for a national majority to achieve its objectives. Where state elections are second order, this effect becomes stronger at some times and weaker at others. Second-order elections make the President's coattails longer, and state officials who will only be reelected if the President is popular will have incentives to push the President's national agenda in areas where Congress cannot legislate (due to constitutional constraints or sheer lack of time and resources). However, where the President's party is rejected in midterm elections, as is often the

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to states that make it harder for the states' citizens to control state government reduces the states' efficacy and legitimacy.

112. *See* Bulman-Pozen & Gerken, *supra* note 91, at 1263–64 (framing uncooperative federalism as an account of how integration "can empower states to challenge federal authority"); Gerken, *supra* note 84, at 61–62 (drawing a connection between federalism and First Amendment values). For what it is worth, it would be equally reasonable to see these theories as an aspect of checks and balances, discussed below.

113. *See* Schleicher, *supra* note 1, at 417–19 (discussing the implications of second-order elections for uncooperative federalism).

case, his power will diminish, and there will be greater checks on federal power.[114] Thus, increases in the degree to which state elections are second order will alternatively increase and decrease the extent of checks and balances in the system. In contrast, having state elections turn on state issues will mean a steadier check on the power of national officials.

G. The Quality of State Elections and Federalism Theory

What the above shows is that, across theories of federalism, the functioning of state elections as a method for state voters to express preferences about state issues is crucial. That said, it does not follow that the existence of second-order elections means that we should not give any authority to states. First, even fully second-order elections express something about state-voter preferences on state issues. After all, there is likely some correlation between preferences on state issues and on federal issues (sometimes high, sometimes not so much). If there were not, it would be irrational for voters to use national-level preferences in state elections.[115] Thus, leaving power in state or local governments with purely second-order elections would achieve the ends of federalism to some extent. But the degree to which such state or local power achieves the traditional ends of federalism turns substantially on how well state elections express the preferences of state voters on state policy.

This Part is not intended to canvass the entire field of federalism studies—the field is too rich and too varied to do so adequately here.[116] What

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114. This is a generalization of the point made by Daryl Levinson and Rick Pildes. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006). They noted that the separation of powers does not work as the framers intended except where institutions like the Presidency and Congress are controlled by different parties. To the extent that states are another source of checks and balances, the same thing is true. States will check presidential power to a greater degree when they have electoral incentives to do so.

115. Unless, of course, their reasons for doing so are affective, expressive, instrumentally aimed at future federal elections, or otherwise motivated by something other than a desire to get preferred policies at the state or local level. *See* Elmendorf & Schleicher, *supra* note 9, at 396 (describing the rationality of uninformed voting and the implications of affective "Michigan Voters").

116. For instance, Michael McConnell notes that devolving power is attractive because allowing Congress to make policy on issues that only affect one state is problematic. *See* McConnell, *supra* note 90, at 1493–96 (discussing the diversity of local interests and the costs of localized externalities). We are likely to see in these instances the problem of distributive politics. Every member of Congress might prefer low taxes and low spending to high taxes and high spending, but most also prefer to protect spending in their districts. The result of this can look something like a prisoner's dilemma: a stable norm forms when each member protects her pork spending by not voting against anyone else's. Devolution of power avoids this problem *even if* elections are largely second order. But increases in polarization and party identification, which also drive second-order elections, make distributive politics problems less likely. As party membership becomes more likely to drive voting patterns, pork becomes less important for creating majority coalitions. For a more detailed discussion on how greater polarization makes pork less needed, see David Schleicher, *How Polarization Cooked Congress's Pork*, PRAWFSBLAWG (May 8, 2012), http://prawfsblawg.blogs.com/prawfsblawg/2012/05/-how-polarization-cooked-congresss-pork-.html [https://perma.cc/3NS2-H2FF].

I hope the above discussion shows, however, is that to the extent that granting a power to states reduces the ability of state voters to achieve policy results, that grant of power reduces rather than enhances the values of federalism. This appears true across most common theories of federalism. The next Part will discuss a number of areas in which this distinction turns out to be important.

III. State Authority v. State Democracy and the Problem of Second-Order Elections: Two Examples

The problem of second-order elections could theoretically influence any question about federalism or the devolution of powers. If devolution makes sense in the context of providing power to state democracy, and state democracy is functioning poorly, it follows that we ought to devolve less power when we see second-order elections (not zero, as discussed above, but less). If we devolve some policy choice to the states (or bar the federal government from entering) to some degree, and then we see state elections become more second order as a consequence, perhaps we ought to reduce the extent of that devolution or protection of state authority.

But one should be cautious. First, there are countervailing effects. If an increase in the degree to which local elections are second order means that devolving power results in, say, less variation and thus less sorting, we might say that we need to devolve more power because the amount of state variation is insufficiently low.[117] Second, and probably more importantly, such an argument relies on a curious assumption about how our prior notions about devolution are formed. If we come to our beliefs about how much power should be devolved through some process not informed by recent experience, by all means the discovery of second-order elections should cause us to shift those beliefs away from devolution. But if our preferences for devolution develop based upon our knowledge of how programs and doctrines have worked in practice over time (and we do not see shocks in the degree to which state elections are second order), we already will have factored in the problems of state democracy when developing our beliefs about how much power should be devolved.[118]

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117. The logic is like that of an income effect versus a substitution effect in tax policy. *See* JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 35–36 (2d ed. 2007).

118. This problem crops up in many discussions of voter ignorance. Consider Ilya Somin's fascinating book, ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2013). He notes that the lack of individual incentives to learn about politics leads to both ignorance and "rational irrationality" (roughly, incentives to have a coherent worldview even if it is not based on facts or likely outcomes). *Id.* at 62–66, 78–83. Rather than rely on voters cursed with such problems, Somin argues, we should devolve power to states, localities, and individuals because people engaged in "foot voting," or choosing where to live, have better incentives to become informed than voters at the ballot box. *Id.* at 121–25. Whatever one makes of this claim, Somin's argument only provides a reason to believe in "smaller" government relative to some baseline, not in any particular level of "small" government. As long as one's beliefs

This does not mean that our beliefs about federalism should not be influenced by understanding second-order elections. To start, during periods of political change, we should be skeptical about evidence and examples drawn from substantially earlier periods. If a new cooperative federalism policy is imagined, examples about how states behaved under similar programs in the 1970s, when state politics was more distinct from federal politics, may not tell us much.

Two other lessons are possible. Where policies increase the degree to which elections are second order, we should be more skeptical of them on federalism grounds. And where powers are devolved not simply to states as entities, but rather to particular institutions and individuals inside states, we can see that the choice among those institutions and individuals has implications for the normative ends of federalism discussed in Part II. This Part will discuss these lessons through contemporary debates about repealing the Seventeenth Amendment, the design of cooperative federalist regimes, and states' separation-of-powers doctrines.

A. The Seventeenth Amendment and Constitutional Design

Over the past half decade, a large group of conservative politicians, jurists, and activists have gravitated to constitutional reform as a method of limiting the power of Washington and increasing the power of states.[119] Perhaps the group's most-widely-agreed-upon pro-federalism constitutional reform is repeal of the Seventeenth Amendment, which gave voters rather than state legislatures the power to choose U.S. senators. Senators Ted Cruz, Jeff Flake, and Mike Lee have all raised their voices in criticism of the Seventeenth Amendment, as have a host of members of the House, as well as other prominent figures like columnist George Will and radio host and author of a bestselling book on constitutional law Mark Levin. Even the late Justice Antonin Scalia joined in.[120]

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about how large the federal government should be were developed through experience and testing using evidence from periods when many voters were both ignorant and rationally irrational, there is no reason to change those beliefs upon realizing the problem of voter ignorance. To do so would be to account for the problem twice.

119. David Schleicher, *States' Wrongs: Conservatives' Illogical, Inconsistent Effort to Repeal the 17th Amendment*, SLATE (Feb. 27, 2014, 11:20 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/conservatives_17th_amendment_repeal_effort_why_their_plan_will_backfire.html [https://perma.cc/RY6Y-EYNT].

120. *Id.*; Alan Greenblatt, *Rethinking the 17th Amendment: An Old Idea Gets Fresh Opposition*, NPR (Feb. 5, 2014), http://www.npr.org/blogs/itsallpolitics/2014/02/05/271937304/rethinking-the-17th-amendment-an-old-idea-gets-fresh-opposition [https://perma.cc/YJ6K-5KVS]; George F. Will, *Sen. Feingold's Constitution*, WASH. POST (Feb. 22, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/02/20/AR2009022003034.html [https://perma.cc/6XN2-R3TF].

The argument above—as I have shown elsewhere[121]—reveals why this "reform" is premised on a severely problematic concept of federalism. Repealing the Seventeenth Amendment would be terrible for federalism because it would make state elections even more second order than they already are. State policy would track the preferences of state voters less well because all of the focus in state legislative elections would be on their effect on the U.S. Senate. The effect that state legislative appointment of U.S. senators had in making state elections second order was, in fact, central to the argument in favor of passing the Seventeenth Amendment in the first place.[122] Today's constitutional reformers fail to heed the lessons of history and, as a result, propose something in the name of federalism that would be quite damaging to constitutional federalism's values.

Prior to the passage of the Seventeenth Amendment, senators were chosen by state legislatures.[123] But contrary to the understandings offered by modern supporters of repeal, this did not mean that state-focused figures pondered which candidate among many would be best for the interests of the state.[124] Instead, state legislative elections were frequently led by candidates for U.S. Senate over national issues.[125] The most famous example of this "public canvass" was the 1858 election in Illinois.[126] Neither Stephen Douglas nor Abraham Lincoln was on the ballot, but they campaigned for U.S. Senate on behalf of their copartisans; the election was seen as a referendum on the Senate race.[127] Following the nationalizing of party organizations in the 1870s and the realigning election of 1896, national parties developed clearer stances on national issues, and state legislative elections became increasingly second order.[128] By the 1890s, newspapers criticized state legislative candidates for even talking about state issues rather than national ones like the tariff or monetary policy.[129]

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121. This subpart largely summarizes the case made in Schleicher, *Seventeenth Amendment*, *supra* note 66 and Schleicher, *supra* note 119 and fits it into the broader argument of this paper.

122. *See* Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1075–78 (presenting evidence that "the effect of senatorial appointment on state legislative elections was a key concern in the debate in Congress over the Seventeenth Amendment").

123. U.S. CONST. art. I, § 3, cl. 1 (amended 1913).

124. *See* Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1075–76.

125. *Id.*

126. *Id.* at 1055.

127. For a terrific history of the Lincoln–Douglas Senate race, see generally Allen C. Guelzo, *Houses Divided: Lincoln, Douglas, and the Political Landscape of 1858*, 94 J. AM. HIST. 391 (2007). Notably, and rarely discussed, in 1858 Republicans won a majority of the popular vote in both the state house and state senate, but Douglas was reelected because of the way legislative seats were apportioned. *Id.* at 414–16.

128. For further discussion, see Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1055–1058, 1065–71.

129. *See id.* at 1080–81; *They Want to Dodge National Issues*, CHI. TRIB., May 14, 1894, at 6 ("Do these Democratic State Senators think the voters can be called off from the national issues involved in the direct election of Representatives and the indirect election of a Senator to consider

State legislators and powerful state interest groups did not simply accept this move toward national elections. In states around the country, state legislatures began to move away from choosing senators long before the Seventeenth Amendment was enacted. They began calling for a constitutional amendment during the 1880s and 1890s, and eventually a number of states passed resolutions calling for a constitutional convention for the purpose of ending appointment by state legislatures.[130] At the same time, states began instituting electoral reforms. States passed laws requiring direct primaries for Senate candidates, tying legislators' hands about the identity of each party's candidate.[131] And some states moved to the "Oregon System," under which a formally nonbinding direct election for senators was held, the winner of which state legislative candidates pledged to support.[132]

The effect of senatorial appointment on state legislative elections was central both to the public campaign for the Seventeenth Amendment and in debates on the floor of Congress. One early advocate, Senator John Mitchell, argued that a "vital objection to the choosing of Senators by the legislatures" is that "the question of senatorship . . . becomes the vital issue in all such campaigns, while the question as to the candidate's qualifications or . . . the views he entertains upon the great subjects of material interest to the State . . . is wholly ignored . . . ."[133] Another Senator argued that "legislators are elected with reference to the vote they will cast for Senator . . . and the national interests, the party interests, are so overwhelming in comparison with those of the people of the States . . . [that] if they elect a Senator who is satisfactory to the party in power all their shortcomings in regard to the interests of the people of their States are forgiven . . . ."[134] Debate in the House was similar.[135] The leading scholar studying the movement for the Seventeenth Amendment during the early twentieth century noted that its "advantage to the state and local governments" was central to the case for the Amendment.[136] State legislative appointment put voters in a "most embarrassing dilemma," voting in state legislative elections, between voting for the party of the senator they preferred or the party who they supported on state issues.[137]

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only local questions? That they will drop the Wilson bill and devote their attention to the establishment of a Police Board in Chicago?").

130. For further discussion of these movements, see *id.* at 1055–57.

131. *Id.* at 1055.

132. *Id.* at 1056.

133. John H. Mitchell, *Election of Senators by Popular Vote*, FORUM, June 1896, at 385, 394, http://www.unz.org/Pub/Forum-1896jun-00385 [https://perma.cc/96M7-QBUB].

134. 28 CONG. REC. S6160–61 (June 5, 1896) (statement of Sen. Palmer).

135. Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1077–78.

136. GEORGE H. HAYNES, THE ELECTION OF SENATORS 180 (American Public Problems, Ralph Curtis Ringwalt ed., 1906).

137. *Id.* at 185.

Repealing the Seventeenth Amendment would make state legislative elections more second order. Today, voters rely on federal-level cues in state legislative elections for informational and affective reasons. Relying on one's national-level preference in state elections makes sense for individuals (if not for society) when voters know little about the state party's performance and where there is likely a correlation between preferences on state issues and on federal issues (which there surely is). And it makes sense for individuals when party membership is a group identity and furthering the group's success provides psychic benefits.[138] But state legislative appointment of senators would add a perfectly rational reason for even well-informed, non-affective voters to follow national-level preferences in state legislative elections. And it would give national-level interest groups an even greater incentive to get involved in state legislative elections.[139]

While repealing the Seventeenth Amendment would increase state authority, it would reduce the degree to which state elections turn on state issues. Thus, it would reduce the quality of state democracy. As argued in Part II, this would undermine federalism's normative goals. The conservatives supporting repeal of the Amendment fly the flag of federalism but work against its operation.

Further, the logic that applies to the Seventeenth Amendment also applies to all state election laws. State legislatures are the central players here: they draw congressional district lines, determine ballot access and voter qualifications, and generally conduct elections.[140] These are powers of the state, but they also force state voters to think about the effect of their vote for state legislature on future congressional and presidential races. Given that context, state authority over election laws likely reduces the degree to which state elections produce responsive and accountable state governance.

B. State Democracy v. State Authority: Executives v. Legislatures as Agents of Federalism

For most federalism scholars, the study of federalism stops at the statehouse door[141]: States are the proper subject of questions about the

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138. *Cf.* Elmendorf & Schleicher, *supra* note 9, at 375, 380 (noting that party identification exerts "a powerful pull on voters' choices and even their opinions on issues").

139. Not that they need much encouragement. *See* Republican State Leadership Comm., *2012 REDMAP Summary Report*, REDMAP (Jan. 4, 2013), http://www.redistrictingmajorityproject.com/?p=646 [https://perma.cc/C6YK-C7BT] (celebrating the GOP's successful initiative to win control of state legislatures ahead of decennial redistricting).

140. *See* Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 553 (2015) (noting the tremendous power that states have in running federal elections).

141. Not everyone, of course. For some prominent examples, see generally Fahey, *supra* note 34 (discussing the federalism implications of federal statutes that give different state actors the power to sign off on cooperative federalism arrangements); Gerken, *supra* note 84 (arguing that federalism should be understood as encompassing all devolutions of power); Hills, *supra* note 34 (discussing under what conditions the federal government can allocate money or regulatory

allocations of power, and it is up to them to decide how to allocate power internally. One of the centerpieces of modern federalism—the *Erie* doctrine—is partially premised on exactly this understanding, that it is not the place of federal officials to decide between different lawmaking sources at the state level.[142] If states possess authority to make certain decisions, they also have authority to decide how to decide.

But if the focus is on the quality of state democracy, then it matters which entities within states make decisions. The problem of second-order elections exists to a different extent for different officials. Whether a governor or state legislature is left to decide an issue will affect whether it results in greater fit to state-specific preferences, and therefore also in greater policy variation across states, or whether delegation to state governments reflects something more like a division of power among national parties.

This subpart will focus on conflicts between legislatures and executives, although one could just as easily focus on conflicts between state governments and localities, between executives and courts, or between any other divisions inside state government. The problem of second-order elections should also inform a whole variety of policy proposals and judicial decisions[143] about the relative influence of the executive and legislative branches at the state and local level. To narrow the scope, I will discuss two types of health regulation.[144]

1. The Affordable Care Act (ACA).—Under the terms of the ACA and following Health and Human Services (HHS) regulations, an application by a governor is sufficient to establish a state-based health insurance exchange.[145] Medicaid expansions, including expansions under the ACA, require a peculiar process of proposals and comments between a state's Medicaid agency and its governor. This has led to a number of conflicts. In

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authority to state agencies and local governments in the face of opposition from the state legislature); Judith Resnick et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008) (discussing the role of translocal organizations in shaping the practice of federalism); Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE L. & POL'Y REV. 149 (1996) (discussing how the institutional structure of states—from the size of agencies to the number of legislators—and the relationship between state and local governments affects our federalism).

142. Ernest A. Young, *A General Defense of* Erie Railroad Co. v. Tompkins, 10 J.L. ECON. & POL'Y 17, 108–09 (2013).

143. I am not going to discuss the doctrine or legal materials in these cases. I mean something like "the effects of legal decisions" and not the degree to which they are "rightly" decided according to some interpretive theory.

144. These just happen to be useful examples; one can find many others. For instance, Cristina Rodríguez shows that state and local executives making immigration policy are far more flexible than state legislators. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581–90 (2008).

145. *See* Bridget A. Fahey, *Health Care Exchanges and the Disaggregation of States in the Implementation of the Affordable Care Act*, 125 YALE L.J. F. 56, 57–58 (2015).

Mississippi, the insurance commissioner attempted to establish an exchange but was not allowed to do so under the terms of governing regulations.[146] In Kentucky, Democrat Steve Beshear succeeded in creating a state-based health insurance exchange and expanding Medicaid coverage under the Act, over the opposition of Republicans in the state legislature, using executive authority to accept federal money granted under previously passed statutes.[147] The Governor of Ohio, Republican John Kasich, pushed through Medicaid expansion over Republican legislative opposition, acting through a hybrid legislative–executive agency created to accept federal money.[148] These expansions were opposed by Republican state legislatures and were challenged in state courts as excessive uses of executive authority.[149] Nine states have passed laws explicitly barring governors from expanding Medicaid or establishing state-based health insurance exchanges without legislative approval.[150]

The regulations governing state exchanges are a straightforward effort to give authority to the parts of states most responsive to local opinion and least tied to Washington's political fights. As Bridget Fahey notes, the federal government frequently designates who speaks on behalf of a state for the purpose of agreeing to the terms of cooperative federalist programs.[151] HHS regulations assigned the power to establish exchanges to governors—

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146. *See* Fahey, *supra* note 34, at 1564–65 (describing the Mississippi Insurance Commissioner's rejected effort to establish a state-based exchange).

147. In 2012, the Governor issued executive orders to establish the exchange and accept Medicaid money for expansion. He issued new executive orders reestablishing them in 2014. *See* Matt Young, *Beshear Reauthorizes Health Care Exchange, Again Sidestepping State Lawmakers*, LEXINGTON HERALD-LEADER (July 2, 2014), http://www.kentucky.com/news/politics-government/article44496006.html [https://perma.cc/P95T-UPBM].

148. *See* Trip Gabriel, *Medicaid Expansion Is Set for Ohioans*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/22/us/medicaid-expansion-is-set-for-ohioans.html?_r=0 [https://perma.cc/PBW3-346C].

149. *See id.* (describing Ohio Republicans' opposition to Medicaid expansion); Mike Wynn, *Medicaid Expansion Can Go On, Judge Decides*, COURIER-JOURNAL, July 27, 2013, at B1 (reporting a Kentucky court's decision not to enjoin Medicaid expansion); State *ex rel.* Cleveland Right to Life v. State of Ohio Controlling Bd., 3 N.E.3d 185, 192 (Ohio 2013) (rejecting a challenge to the Controlling Board's authority to approve increased Medicaid funding).

150. *See* Richard Cauchi, *State Laws and Actions Challenging Certain Health Reforms*, NAT'L CONF. ST. LEGISLATURES (July 1, 2016), http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx [https://perma.cc/2NR-7-D4T6].

151. Fahey, *supra* note 34, at 1564. Fahey argues that giving the federal government—unchecked by the Supreme Court—the power to make these decisions can "turn state-federal collaboration into state-federal assimilation." *Id.* at 1571. This critique assumes that if the states instead were to determine their structures for accepting federal money, those structures would maximize the benefits of federalism. But it may be that a state's chosen structure would serve other ends, like maximizing the power of the national party favored in the state. Allocations of authority among state officials should be analyzed for whether they go to figures more likely to adopt state-specific preferences or to those more likely simply to reflect national-party concerns. Either allocation may be justified, but it is not the case that privileging organizational structure chosen by a state government necessarily enhances diversity, sorting, local democracy, etc.

high-profile executives facing elections are less likely than other state elections to be second order. In contrast, state-insurance-commissioner elections are lower profile and candidates are less likely to represent the state median voter. By assigning this responsibility and power to a governor instead of a state agency, federal regulations actually further federalism values.

In the Medicaid-expansion litigation, we can see the same federalism issues emerging in cases about state statutory interpretation and state constitutional law.

In Ohio, for example, the Controlling Board—a strange, hybrid legislative–executive body[152]—is able to authorize state agencies to apply for and accept federal money,[153] but it "shall take no action which does not carry out the legislative intent of the general assembly regarding program goals and levels of support of state agencies as expressed in the prevailing appropriation acts of the general assembly."[154] After the Controlling Board voted to accept Medicaid expansion, its decision was challenged in court.[155] Challengers argued that the passage through the legislature of a bill barring the state from expanding Medicaid, which was vetoed by the Governor, should be understood to limit the power of the Controlling Board.[156] The statutory interpretation question was thus whether "legislative intent of the general assembly . . . as expressed in the prevailing appropriation acts of the general assembly" meant only laws passed into effect, or whether it included laws passed by the general assembly that did not actually become law. The Ohio Supreme Court held that the Controlling Board was only limited by actual laws and not vetoed ones.[157]

As noted in Part I, gubernatorial elections are less second order than state legislative ones. Policy changes or the performance of the state economy during a governor's term can have a substantial effect on her reelection chances—but they hardly make a difference in state legislative elections, in which national-party preference plays a larger role. The Ohio Supreme Court's decision thus had the effect of privileging state residents' distinct preferences about state policy.

On the other hand, governors are also elected at a given time and in a given context, which should lead to greater variation in their behavior, as a

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152. The Controlling Board is made up of: one executive appointee; two members from the majority party and one member from the minority of the Ohio House of Representatives; and two members from the majority and one from the minority of the Ohio Senate. OHIO REV. CODE ANN. § 127.12 (West 2016).

153. *Id.* § 131.35(A)(5).

154. *Id.* § 127.17.

155. State *ex rel.* Cleveland Right to Life v. State of Ohio Controlling Bd., 3 N.E.3d 185, 190 (Ohio 2013).

156. *Id.* at 191.

157. *Id.*

scandal, personal characteristics, a candidate's capacity to raise money, etc., can introduce a lot of randomness. As multimember bodies, state legislatures are more likely to accurately express the preferences of state voters on issues where the correlation between national-level politics and state-level politics is high. The court's reading of the statute was hostile to this interest. Further, as Jessica Bulman-Pozen argues, voters may vote in state elections in order to influence national politics rather than to change state policies.[158] As state legislative elections are more second order than gubernatorial ones, legislatures are more likely to advance this "partisan federalism" interest. The ACA is probably the best example that exists for this claim. In 2010, voters surely voted in state elections partially to comment on the ACA, giving Republicans huge wins across many states.[159] To the extent that state law ought to maximize the degree to which state voters can and do use state elections to influence national debates or advance their national preferences, the Ohio decision retarded this goal.

In Kentucky, the question was whether accepting federal Medicaid money to expand the program violated the state's nondelegation doctrine.[160] Kentucky law provides that "it is the policy of the Commonwealth to take advantage of all federal funds that may be available for medical assistance."[161] Previous Kentucky decisions had applied a version of the nondelegation doctrine similar to federal constitutional law, limiting legislative decisions to delegate to an administrative agency only if there were no "sufficient standards controlling the exercise of that discretion."[162] And in ACA litigation a trial court dismissed a complaint that the law violated this rule.[163] In the context of second-order elections, a loose nondelegation doctrine furthers the goal of state policy being more responsive to state voters on state issues, but also reduces the degree to which state officials will be direct participants in national partisan conflict.

2. The Soda Ban.—We can see similar themes emerge even when the federal government is in no way involved. State courts frequently invoke federal precedent when deciding separation-of-powers cases. But the problem of second-order elections and differences in the level of bureaucratic remove give the same doctrines very different meanings.

In 2014, the New York Court of Appeals held that the New York City Board of Health under Mayor Michael Bloomberg had overstepped its authority by barring restaurants and stores from selling sodas in containers

158. *See infra* subpart IV(B).

159. *See* Brendan Nyhan et al., *One Vote Out of Step? The Effects of Salient Roll Call Votes in the 2010 Election*, 40 AM. POL. RES. 844, 862–63 (2012) (estimating that Democrats lost twenty-five House seats solely on the basis of backlash to the ACA).

160. Adams v. Commonwealth, No. 13-CI-605, slip op. at 1–2 (Ky. Cir. Ct. Sept. 3, 2013).

161. KY. REV. STAT. ANN. § 205.520(3) (LexisNexis 2013).

162. Holtzclaw v. Stephens, 507 S.W.2d 462, 471 (Ky. 1974).

163. *Adams*, slip op. at 4–5.

larger than sixteen fluid ounces.[164] The court reasoned that the board's regulation "involved more than simply balancing costs and benefits according to preexisting guidelines; the value judgments entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch."[165] The court thus reaffirmed a precedent that put far sharper nondelegation-doctrine limits on local legislatures than there are on Congress.[166]

The "soda ban" case, *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene*,[167] shows how misleading it can be for courts to use separation-of-powers analogies across levels of government.[168] In *Statewide Coalition*, the Court of Appeals applied a test developed in a previous case, *Boreali v. Axelrod*,[169] to overturn the Board of Health's limit on the size of sodas.[170] *Boreali*, relying largely on materials developed to understand the federal Constitution, developed a four-factor test to determine whether there has been an excessive delegation of power from the legislature to a regulatory agency.[171] This test required the court to ask: (1) whether the agency in issuing regulations impermissibly balanced concerns from within its expertise with other concerns and thereby engaged in impermissible policy making; (2) whether the regulation was created on a "clean slate" (a stronger version of the "intelligible principle" concept); (3) whether the legislature had previously considered addressing the issue; and (4) whether the regulation required the agency's "special expertise or technical competence" (which is largely repetitive of the first factor).[172] New York courts consider these four "coalescing circumstances" together to determine whether "the difficult-to-define line between administrative rule-making and legislative policy-making has been transgressed."[173] The court in *Statewide Coalition* noted that *Boreali* applied because the New York City Charter includes a "doctrine of separation of powers" and argued that "[a]ny *Boreali* analysis

164. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 16 N.E.3d 538, 541 (N.Y. 2014).

165. *Id.* at 547.

166. States vary substantially in how they apply the nondelegation doctrine, ranging from a relatively lax approach to one much stricter than that taken by federal courts. *See* Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 560–62 (2001) (highlighting Texas as an example of the stricter approach).

167. 16 N.E.3d 538 (N.Y. 2014).

168. The discussion here is largely informed by a brief in *Statewide Coalition* written by a group of law professors. *See generally* Brief of *Amici Curiae*, Paul A. Diller et al., in Support of Respondents-Appellants, *Statewide Coalition*, 16 N.E.3d 538 (APL 2013-00291).

169. 517 N.E.2d 1350 (N.Y. 1987).

170. *Statewide Coal.*, 16 N.E.3d at 549.

171. *Boreali*, 517 N.E.2d at 1355–56.

172. *Id.*; *see also* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

173. *Boreali*, 517 N.E.2d at 1355; *Statewide Coal.*, 16 N.E.3d at 545–46.

should center on the theme that 'it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.'"[174]

The court focused on the first *Boreali* factor. By making soda sales inconvenient but not impossible, the court ruled, the agency's rule "embodied a compromise that attempted to promote a healthy diet without significantly affecting the beverage industry," which "implied a relative valuing of health considerations and economic ends . . . . Moreover, it involved more than simply balancing costs and benefits according to preexisting guidelines; the value judgments entailed difficult and complex choices between broad policy goals—choices reserved to the legislative branch."[175] Further, because the Board of Health considered other ways of limiting the effect of soda on obesity (from providing public information to banning soda sales), the choice of an "indirect means achieving compliance with goals of healthier intake of sugary beverages was itself a policy choice."[176] When administrators choose information-forcing requirements or outright bans, "personal autonomy issues related to the regulation are nonexistent and the economic costs either minimal or clearly outweighed by the benefits to society, so that no policy-making in the *Boreali* sense is involved."[177] But the choice of a middle ground implicated "policy" in ways that disclosure requirements or an outright ban on an unsafe product did not.

The court's distinction between disclosure or outright bans on the one hand and maximum sizes on the other is quite strange. Requiring disclosure of calories would have clearly had an effect on personal autonomy (a form of required speech, by some lights).[178] Such rules are regularly the subject of major political debates, and it is unclear whether they actually promote healthier eating (or just greater guilt).[179] Similarly, regulations that ban products that are demanded by some consumers but pose substantial public health risks can be very "difficult or complex."[180] The distinction the court sought to draw between clear subjects for regulation and complex policy questions is both impossible and silly.

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174. *Statewide Coal.*, 16 N.E.3d at 545–46 (quoting *Boreali*, 517 N.Y.2d at 1356).

175. *Id.* at 547.

176. *Id.*

177. *Id.*

178. *See* Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 621–36 (D. Vt. 2015) (discussing a First Amendment challenge to a Vermont food-labeling law).

179. *Compare* Bryan Bollinger et al., *Calorie Posting in Chain Restaurants*, AM. ECON. J.: ECON. POL'Y, Feb. 2011, at 91, 113 (finding that calorie posting was associated with a 6% reduction in calories per transaction at Starbucks stores), *with* Eric A. Finkelstein et al., *Mandatory Menu Labeling in One Fast-Food Chain in King County, Washington*, 40 AM. J. PREVENTIVE MED. 122, 125 (2011) (finding no significant effect).

180. Think of debates about drug legalization.

But the bigger problem with the opinion is that it continues *Boreali*'s strict rule of limiting regulatory agencies from making policy determinations. The court argued that the Board of Health engaged in "policy-making, not rule-making," in violation of the state constitution.[181] The *Boreali* and *Statewide Coalition* version of the nondelegation doctrine thus substantially limits the ability of the state legislature or of city councils to devolve the power to make policy decisions to administrative agencies. Despite relying exclusively on materials created to understand the federal Constitution, the New York Court of Appeals created a doctrine far stricter than its almost nonexistent federal counterpart, which only requires that Congress give agencies an "intelligible principle" to guide rule making.[182]

What's stranger still is that the effect of a strict nondelegation doctrine is almost certainly different at the local level than it is at the state level. Supporters of a stricter federal nondelegation doctrine worry about vast, unaccountable bureaucracies displacing the decisions of a democratically accountable (but lazy or craven) Congress.[183] Or they worry about entrenchment by a Congress seeking to ensure that a friendly president or bureaucracy can continue to govern even after the coalition currently in charge is out of power.[184] In contrast, opponents of the nondelegation doctrine (and the federal courts) argue that Congress frequently wants to, and should have the power to, leave such decisions in the hands of apolitical experts or presidential designees, and is unlikely to excessively limit its own power.[185]

At the local level, a nondelegation doctrine is likely to have almost the exact opposite effect that it has at the national level. While turnout for presidential elections is greater, both congressional and presidential races are largely referenda on the popularity of national political parties. The local level is very different. Mayors, due to their high profile, are judged at least somewhat on their performance in office.[186] In contrast, elections to city council can be almost entirely second order, with general elections turning

181. *Statewide Coal.*, 16 N.E.3d at 548.

182. *See* David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1387 (2011) (describing the modern nondelegation doctrine); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (noting that the nondelegation doctrine "has had one good year [, 1935], and 211 bad ones (and counting)").

183. *See, e.g.*, Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1466–67 (2015) (arguing that delegation makes Congress less accountable as an entity and allows individual legislators to influence policy through control over agencies without owning those decisions).

184. *Id.* at 1479.

185. *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2148 (2004); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1744–45 (2002); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 494 (1987).

186. *See* Arnold & Carnes, *supra* note 58, at 951–52.

on the President's popularity in the district.[187] The national-level worry about a shift of power from the politically accountable to the insulated should be reversed. Similarly, state and local bureaucracies are less likely to be vast and insulated from politics. Local mayoral agencies are more likely than the city council to be responsive to majoritarian opinion.[188]

Further, consistency of control is higher in city councils. Parties often dominate city councils for decades, whereas mayoral races feature more competition.[189] On average, delegating power will not result in entrenchment; keeping power in the city council will.[190] On the other hand, we should expect substantially less expertise from smaller, less-well-funded local agencies than we do from national agencies. So even if we are more respectful of their claims of democratic responsiveness, we should be comparatively more skeptical of their claims of apolitical knowledge.

The *Boreali* and *Statewide Coalition* courts got local administration almost entirely backward. They misunderstood federal law, using federal constitutional materials—a case here, a treatise there—and invocations of common constitutional principles like the separation of powers to create a rule far stricter than applies at the federal level. And then they failed to consider the differences between state and local government on the one hand and the federal government on the other, creating a doctrine skeptical of the thing local administrative agencies might be good at (representing majoritarian opinion) and trusting of the things they are less likely to be good at (apolitical expertise).

C. *On What Types of Questions Should Proponents of Federalism Focus?*

Attention to the problems created by second-order elections should change the range of issues that are considered part of the debate over federalism. Scholars, judges, and policy makers should recognize that the quality of state democracy is as important as the authority of state governments in producing the ends of federalism, like fit between preferences and policy, laboratories of democracy, variation that permits foot voting, etc. Doing so will force those interested in federalism to look beyond divisions of power between the federal and state governments and to consider allocations of power inside states and how state and federal policies affect the quality of state elections.

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187. *See* Schleicher, *supra* note 6, at 459. This is despite party labels carrying only very weak information about the policy stances of candidates on local issues. Elmendorf & Schleicher, *supra* note 9, at 397–98.

188. Or at least there is less likely to be a major difference in responsiveness than there is at the federal level.

189. Schleicher, *supra* note 6, at 420.

190. By party. The council does have term limits, but then again so does the mayor.

IV. Federalism Theory and the Problem of Second-Order Elections

As discussed in Part II, the existence of second-order elections presents challenges for traditional theories of federalism. We devolve power or protect state authority in order to encourage sorting, representative outcomes, laboratories of democracy, etc. But for any given devolution of power, as state elections become more and more second order, we get less and less of federalism's benefits.

One might leave discussions of the scholarship there. But two major strands in contemporary federalism theory directly address the question of the role of parties in promoting the benefits of federalism and are worth commenting on separately. This Part will address the literature first on the "political safeguards of federalism" and second on "partisan federalism" and, more generally, "federalism as the new nationalism."

A. "The Political Safeguards of Federalism" and Second-Order Elections

First discussed by Herbert Wechsler and then substantially reformed by Larry Kramer, the most influential theoretical argument in modern federalism has been that the Constitution and the structure of American politics provide states with "the political safeguards of federalism," which obviate the need for the judiciary to enforce limits on federal encroachment on state authority.[191] Fights over the political safeguards theory have been waged throughout the literature and in judicial opinions for decades.

One hesitates before wading into this swamp of argument, but the discussion above provides a useful frame for thinking about this theory. When we take into account the fact of second-order state elections, we can see that nothing about the operation of our constitutional order or party-based democratic politics necessarily (or even probably) preserves the benefits of federalism.

Before I can offer this critique, a quick summary is probably necessary. Wechsler argued that the hardwired parts of the Constitution—the Senate, that representatives in the House were allocated by state and not purely by population, the electoral college—meant that states were protected inside the branches of the federal government.[192] Accordingly, states could stand up for themselves in Washington.[193] The Supreme Court largely accepted

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191. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558–60 (1954) (presenting the argument); *see generally* Kramer, *Putting the Politics Back in*, *supra* note 26 (updating the argument); Kramer, *Understanding Federalism*, *supra* note 26 (same).

192. Wechsler, *supra* note 191, at 546–47.

193. Other scholars have critiqued this on the grounds that the vast increase in federal authority in the 1960s and 1970s was inconsistent with the belief that states could stand up for themselves in Washington. *See* Kaden, *supra* note 90, at 867–68.

Wechsler's reasoning, along with similar arguments advanced by Jesse Choper, in *Garcia v. San Antonio Metropolitan Transit Authority*.[194]

Kramer rejected Wechsler's characterization of the safeguards of federalism.[195] In Kramer's telling, the institutional protections cited by Wechsler may protect interests inside states—groups powerful enough to win state elections—but they do little for states as institutions.[196] For example, there is little reason to believe that a presidential candidate fighting to win a state's electoral votes will defer to the state's governor once elected.[197] But this does not mean that states need courts to protect their authority.[198] The framers' design relies not on "Wechsler's tidy, bloodless constitutional structures" to protect states, but on "real politics, popular politics: the messy, ticklish stuff that was (and is) the essence of republicanism."[199] State leaders can use their popularity at home to limit federal encroachment on their authority.[200] And this lasted through the twentieth century as a result of the way that American political parties developed: in contrast with European political parties, the Democrats and Republicans have been less "programmatic" (roughly, less ideologically coherent) and less "centralized" (lacking a hierarchical organizational structure).[201] Instead, American political parties are run by state and local politicians and activists; since these actors can use their control over the party apparatus and local elections to discipline efforts by federal officials to grab too much power, the parties protect the states as institutions.[202] And state officials can similarly work to limit federal aggrandizement through their important role both in lobbying and running the administrative state and in implementing federal legislation.[203]

Kramer's version of the political safeguards of federalism is a powerful argument. It is right to focus on how political institutions, and not just formal ones, work. Further, Kramer helpfully pushed not only the Supreme Court but also the attention of federalism scholars away from constitutional

194. 469 U.S. 528, 550–51, 551 n.11 (1985) (citing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) and Wechsler, *supra* note 191).

195. *See* Kramer, *Putting the Politics Back in*, *supra* note 26, at 221–27 (arguing that Wechsler's hardwired constitutional structures do not themselves guarantee a robust federalism); Kramer, *Understanding Federalism*, *supra* note 26, at 1503–14 (same).

196. Kramer, *Putting the Politics Back in*, *supra* note 26, at 223.

197. *See id.* at 225–26; Kramer, *Understanding Federalism*, *supra* note 26, at 1507–08.

198. Kramer, *Putting the Politics Back in*, *supra* note 26, at 278–79.

199. *Id.* at 256–57.

200. *See id.* at 256–66 (detailing the framers' views).

201. *See id.* at 278–87 (describing the evolution of the party system); Kramer, *Understanding Federalism*, *supra* note 26, at 1522–42 (same).

202. *See* Kramer, *Putting the Politics Back in*, *supra* note 26, at 279–82 (arguing that the weakness of American parties has contributed to a robust federalism).

203. *Id.* at 283–85; Kramer, *Understanding Federalism*, *supra* note 26, at 1542–43.

protections and toward thinking about how politics shapes how federalism works in practice. But the argument is very wrong in how it understands how party politics work in the United States, who has an interest in protecting states against federal encroachment, and what federalism is all about.

In reverse order, the "federalism" protected by political safeguards is, as Kramer states directly, the regulatory authority of state governments.[204] As discussed in Part II, this is a mistake. Normative theories of federalism suggest that we should be concerned about the ability of state majorities to set state policy—and the extent of state authority and the majority's ability to set policy are not necessarily the same thing. Certain increases in state authority can make state elections more second order and therefore reduce the degree to which state majorities can and do use state elections to implement state policy.

This is particularly true for the types of questions that Kramer's theory is designed to answer. When Congress passes laws that enhance state authority but decrease the impact of local democracy, state officials may support it—but not to the benefit of federalism. A number of scholars—notably John McGinnis, Ilya Somin, and Lynn Baker[205]—have made just this point with respect to conditional spending cases like *South Dakota v. Dole*[206] and *NFIB v. Sebellius*.[207] State officials may like conditional grants of spending, as it gives them more money and thus more authority. But such conditional spending can, theoretically at least, reduce the degree to which local preferences drive policy outcomes by making it harder for voters to allocate responsibility.[208] Further, the federal government can act as a "cartel manager," reducing competition by effectively ensuring that states adopt the same policies and do not undercut one another.[209] In these ways, conditional spending can increase state authority while at the same time reducing

204. Kramer, *Putting the Politics Back in*, *supra* note 26, at 222.

205. *See* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1914 (1995) (characterizing *South Dakota v. Dole*, 483 U.S. 203 (1987), as creating an "easy end run" around constitutional limits to the federal regulation of states); Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95, 101 (1998) (same); McGinnis & Somin, *supra* note 81, at 117 (arguing that even "noncoercive" grants undermine federalism); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 462 (2002) (same). For what it's worth, I have no strong opinion on how these cases should come out.

206. 483 U.S. 203 (1987).

207. 132 S. Ct. 2566 (2012).

208. *See* McGinnis & Somin, *supra* note 81, at 118 (suggesting that federal grants operate as bribes to suppress vertical competition). McGinnis and Somin generalize this point as an outworking of the commandeering doctrine. However, there is a possible counternarrative here. Heather Gerken argues, for example, that states continue to exercise substantial power even when they are commandeered: it is the "power of the servant" (rather than the sovereign) to refuse to follow orders and thereby force the national government to respond. Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633, 2635 (2006).

209. McGinnis & Somin, *supra* note 81, at 117–18.

diversity, fit, innovation, and sorting. Kramer is wrong to focus on state authority instead of state democracy.

Second, the concept of "safeguards" in both Kramer and Wechsler's work is substantially problematic. Central to both versions of the safeguards argument is the idea that someone—state officials or state-party bosses, perhaps—*wants* to maximize the authority of state governments. But as Daryl Levinson argues, this theory has no microfoundations.[210] The individual incentives of state legislators, governors, administrators, and activists at the state level run in many directions. It is not necessary, or even likely, that they will seek to maximize the power of state governments.[211] As Levinson has shown in a number of contexts, the assumption that individuals in government institutions will necessarily engage in "empire building" on behalf of the institutions in which they work lacks both theoretical underpinning and empirical evidence.[212] Government officials do not have the direct pecuniary incentives to maximize the size and power of their institutions that corporate officials often have. Individual state legislators may achieve their ideological or policy goals by granting power to institutions other than the state legislature, or may focus on growing their power inside their institution rather than enhancing the power of the institution relative to others.[213] Alternatively, a legislator may grant power to the executive for the sake of a later appointment or other favor. Nor is there any systematic reason to believe that an elected official's electoral chances increase when the power of the institution of which she is a part increases.[214] Legislators avoid electoral risk by granting power to executives and thus avoiding responsibility; executives might do the same by vetoing bills that would give them authority. Similarly, an official may believe that her reelection chances are enhanced if power is allocated to another, more effective branch or level of government controlled by a copartisan.[215]

So, the individual incentives of state officials do not necessarily push them to enhance the power of their state vis-à-vis the federal government. There is similarly no reason to believe that federal officials seek to enhance the power of the federal government at the cost of the states. Levinson levies this summary critique: "Subtract the assumption of empire-building,

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210. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 940–41 (2005).

211. *Id.*

212. *Id.* at 923–37.

213. *Id.* at 926–29; *see also* Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 93, 98–99 (discussing politicians' individual incentives).

214. *See* Levinson, *supra* note 210, at 929–31 (describing electoral incentives).

215. *Id.* at 952–55.

however, and the political safeguards solution disappears along with the problem it is meant to solve."[216]

Levinson's critique of the very idea of "safeguards" has even greater weight in a world where state elections are largely second order. To the extent that state officials' reelection chances turn on the fortunes of the President and the national parties, their interest (at least their short-term electoral interest) in autonomy becomes largely dependent on how that autonomy would affect perceptions of the President in their states. A state legislator may have interests in reducing state authority if doing so would make her copartisan president's program more successful. Or it may go the other way if greater state authority would make the policy more effective and hence more popular. The reverse is true for party officials from the opposition party. State authority may allow opposition-party state officials to gum up the works of the President's program, or alternatively, state officials may refuse authority on the grounds that accepting it would make the policy work better. Similarly, federal officials may view granting power to states as a way of making better policy, improving both their electoral chances and those of their copartisans at the state level, or they may be intensely skeptical of doing so if it would help the other party. In a world where national-party preference determines the result of all types of elections (which is not quite our world, as noted above), the likelihood of federal empire building or of state political figures safeguarding anything is contingent on how it helps or hurts the parties in a given context. It is not a hardwired part of the political system. In such a world, no one can be counted on to safeguard anything except, perhaps, the party's interest.

Finally, Kramer's view of parties—that state parties were dominant in determining federal elections for most of American history—is simply not true, as it ignores the huge swings in power between state and national political figures over time and the extent to which state elections have been second order.[217] Kramer acknowledges in his work that parties by the 1990s had become more centralized and programmatic.[218] But he did not see how much more programmatic and nationalized (if not centralized) they would become.[219] As the data on polarization makes clear, today's parties are

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216. *Id.* at 940.

217. That the parties change in form over time has been invoked as a reason to ignore safeguards arguments in constitutional adjudication. *See* Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 960 (2001).

218. *See* Kramer, *Putting the Politics Back in*, *supra* note 26, at 281–82 (describing shifts in party structure and function toward the end of the century). Further, even before the rise of polarization, the weakness of state parties (in the 1960s and 1970s) meant that federal elected officials were increasingly independent of the influence of state-party organizations. *See* Kaden, *supra* note 90, at 862–67.

219. The degree of centralization is disputed. *See* Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 980 (2002) (discussing party centralization); *see also* Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy*

extremely programmatic, with Republicans and Democrats almost entirely differentiated by ideology—and with party medians continuing to move further apart.[220]

But Kramer also ignores how much the parties changed before the modern period. Different eras saw massive changes in the degree of centralization and of the programmatic nature of the parties.[221] For instance, after the Realignment of 1896, the parties became much more clearly programmatic than they had been before. Rates of party-line voting in Congress and the degree of centralized control both increased substantially.[222]

Further, Kramer focuses almost exclusively on the way that state and local parties influence national politics.[223] But he ignores the ways in which national politicians and parties influence state politics. National politicians

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Demands and Nominations in American Politics, 10 PERSP. ON POL. 571, 571–72 (2012) (laying out a model of parties as networks of interest groups and activists). But, whether or not the parties have become more organized (a discussion that depends crucially on the definition of party), the key here is that they have become more national. *See* Elmendorf & Schleicher, *supra* note 9, at 393–94.

220. MCCARTY ET AL., *supra* note 15, at 22–25.

221. *See* Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1062–66 (describing how the parties became more centralized and programmatic after 1876 and 1896); *see generally* HANS NOEL, POLITICAL IDEOLOGIES AND POLITICAL PARTIES IN AMERICA (2013) (discussing how parties became more matched with ideology).

222. Schleicher, *Seventeenth Amendment*, *supra* note 66, at 1064–66.

223. Kramer also argues that, as parties became more centralized, states developed other capacities for influencing the federal government, particularly through influence inside the regulatory state. Kramer, *Putting the Politics Back in*, *supra* note 26, at 283–85; Kramer, *Understanding Federalism*, *supra* note 26, at 1542–43. Miriam Seifter picked this line of analysis up, arguing that institutions like the National Governors Association (NGA) or the National Association of Attorneys General are dominant players in advocating the interests of states as institutions. Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 984–91 (2014). Seifter's ingenious argument is that these organizations protect the interests of states qua states because these institutional interests represent the lowest common denominator—a compromise that all members can accept. *Id.* at 957–58. What Seifter misses, though, is that the generalist institutions she focuses on have largely been eclipsed by partisan organizations. The NGA is just less important than its partisan counterparts, the Democratic Governors Association and Republican Governors Association. Zeke J. Miller, *Governors in D.C.: Beset by Lobbyists, Riven by Partisanship*, TIME (Feb. 23, 2015), http://time.com/3717941/national-governors-association/ [https://perma.cc/P3KY-KD72] ("[I]n recent years, governors and staff say . . . the NGA . . . has lost influence, driven by concerns about a slow-moving organization and growing polarization among the governors, who increasingly favor party-specific Governor gatherings."). The Republican Attorneys General Association and the Democratic Attorneys General Association have risen in importance. *See* Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), http://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html?_r=1 [https://perma.cc/63Q7-TCG5] (describing fundraising prowess of partisan attorneys general groups). Partisan groups of state legislators like the American Legislative Exchange Council and the State Innovation Exchange are in many ways more important today than the National Conference of State Legislators. Polarization runs deep. And this shift toward partisan state institutions is understandable in the terms discussed in this Article.

have been involved in state politics in order to improve their standing and their chances in federal elections for virtually the entire history of the United States. For instance, in 1800, New York was the swing state in the presidential race between John Adams and Thomas Jefferson. The state legislature was then in charge of choosing electors for the Electoral College.[224] In order to swing the election, Alexander Hamilton campaigned for Federalist state legislative candidates and Aaron Burr did so for Democratic-Republicans, focusing almost exclusively on national issues.[225] Today, we see something similar when federal groups get heavily involved in state elections every ten years in order to influence post-Census redistricting.[226]

Even more fundamentally, party brands make state elections second order, with voters responding to national rather than state cues. As a result, it is far from clear that the structure of American political parties has either led to greater state influence over the federal government or protected federalism in a meaningful sense.

Put together, we can see that the problem of second-order elections gives added punch to each major strand of criticism of the safeguards theory. Understanding that state elections are second order may or may not help resolve particular cases in front of the Supreme Court about Congress's power. But it does suggest that we must resolve those questions without recourse to "the political safeguards of federalism."

It's time to put this one to bed.

B. Partisan Federalism and Its Discontents

Scholarship, particularly recently, has not entirely missed how national partisanship influences theories of federalism. Perhaps the most important of these recent works is Jessica Bulman-Pozen's *Partisan Federalism*. The piece proposes that one can only understand contemporary state-governmental behavior in light of the party membership of state officials.[227] While its positive description of contemporary federalism is both extremely insightful and hard to dispute, its normative analysis is less convincing. Bulman-Pozen argues that partisan federalism improves the functioning of national politics by providing out-of-power parties a space to develop policies and coalitions and a capacity to check the power of the national government.[228] As we saw in Part II, the harmful effects of both second-

224. EDWARD J. LARSON, A MAGNIFICENT CATASTROPHE: THE TUMULTUOUS ELECTION OF 1800, AMERICA'S FIRST PRESIDENTIAL CAMPAIGN 86 (2007).

225. *Id.* at 87–106.

226. *See, e.g.*, Republican State Leadership Comm., *supra* note 139.

227. Bulman-Pozen, *supra* note 37, at 1078–81.

228. Bulman-Pozen notes that her paper provides a "sympathetic rendering of partisan federalism," but that "[c]onsideration of the many tradeoffs that inform a complete normative

order elections and partisan federalism are easy to see. The supposed benefits Bulman-Pozen discusses, though, are harder to measure and may be illusory.

Bulman-Pozen argues that it is impossible to understand recent state behavior without an "appreciation of partisanship's influence."[229] She notes that traditional state interests (economic ones, for example) do not drive state reactions to federal initiatives. Instead, state governments seek to block or limit federal policies when the party that does not control the White House or Congress controls the state. Likewise, states controlled by the President's copartisans follow and encourage federal policy making.[230] According to Bulman-Pozen, central to contemporary federalism are "[(1)] political actors' use of state and federal governments in ways that articulate, stage, and amplify competition between the political parties, and [(2)] the affective individual processes of state and national identification that accompany this dynamic."[231] Bulman-Pozen calls this "partisan federalism."

State governments, she continues, have become "site[s] of partisan opposition," where out-of-power parties enact their own preferred policies and develop new policy ideas that may work their way into the party's platform.[232] These recalcitrant states also act "uncooperatively," administering federal statutes in ways that frustrate the President's agenda.[233] Even absent a federal policy, states frequently enact policies designed by nationally organized partisan groups—from the American Legislative Exchange Council to national labor unions.[234] Traditional stories about federalism (like state competition for limited resources or greater responsiveness to local opinion) cannot explain these phenomena. But a story about party politics does.

Bulman-Pozen also notes that partisan federalism can explain some problems in federalism theory. Consider Daryl Levinson's critique (discussed above) that federalism scholars assume that state officials check the federal government, but do not provide any account of why.[235] Bulman-Pozen argues that state officials act on behalf of their parties and thus check federal encroachment when it serves their party's interests—that is, only

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assessment must await future work." *Id.* at 1081 n.7. This subpart will not provide a "complete normative assessment" either, but it will consider some of the tradeoffs involved.

229. *Id.* at 1079, 1082–96.

230. *See id.* at 1096–108 (discussing examples of states' partisan response to federal measures). As examples of these initiatives, she cites in particular the ACA and the federal ban on stem cell research.

231. *Id.* at 1080.

232. *Id.* at 1082–108, 1122–35.

233. *Id.* at 1105–08; *see also* Bulman-Pozen & Gerken, *supra* note 91, at 1260–64 (putting this in context of prevailing themes in federalism theory).

234. Bulman-Pozen, *supra* note 37, at 1101.

235. *See supra* notes 210–16 and accompanying text.

some of the time.[236] This is a powerful account of how contemporary federalism operates. Though Bulman-Pozen rarely discusses the role of elections, partisan federalism can be seen as the behavior-in-office analogue to second-order elections.

Her story becomes problematic when it shifts from the positive to the normative. The degree and kind of partisan federalism are neither inevitable nor constant. Elections are more or less second order over time, between offices, and in different places. Partisan state behavior mimics this variation, since different officials face different incentives to act, or not to act, on behalf of their parties.[237] Changes in policy—in election law or in cooperative federal consent procedures, for example—may affect the extent to which states act on behalf of the interests of a national political party. In particular, policies that make elections less second order may disrupt partisan federalism. So the relevant normative question is whether such policy changes have marginal benefits that outweigh their costs. Further, even if changes in policy would *not* alter patterns of partisan-federalist behavior, decisions to devolve power to the states should depend on the degree to which state officials currently engage in partisan federalism.

Parts I and II canvassed some of the costs of second-order elections for traditional justifications of federalism. All of these arguments apply here. As state officials act more and more on behalf of their national party, the fit between state-voter preferences and state-policy outcomes will become weaker and weaker; party platforms will not tack toward the state's median voter but rather according to the demands of the national party. When voter preferences about state policies do not correlate strongly with the main

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236. Bulman-Pozen, *supra* note 37, at 1089–93. That said, Bulman-Pozen does not *quite* respond to Levinson's critique and thereby misses some important dynamics affecting when states will check the federal government. She argues that state officials act on behalf of their national party as an institution. *Id.* at 1100–01. But this is just another form of an "empire-building" argument. It does not provide an individual-level explanation for the behavior of state officials. There is no explanation of why state officials engage in empire building on behalf of their national political party when, alternatively, they can work on burnishing their own image or simply slack and allow others to do the hard work of building the party brand. An account that focuses on second-order elections can provide the type of microfoundations needed to explain state officials' partisan behavior. State officials may work to enhance the national-party brand: (a) when elections become more second order and thus their reelection chances are more closely tied to the national party (an incentives story, although one where officials must overcome collective-action problems); (b) because they were selected due to their preferences on those issues in nationally oriented primaries and their preferences match those of the party (a representation story, although one where changes in the national party's strategy might result in more dissent and less partisan-federalist behavior); or (c) because toeing the party line will result in some kind of reward from the organization or because failure to do so will result in punishment in primaries (an internal-party-accountability story, driven by forces like centralized campaign-finance decisions or the participation of interest groups in primaries). Each of these explanations operates at the individual level, not the group level, and can yield predictions about when partisanship might cause states to check federal power (and when it might not).

237. *See supra* subpart III(B).

dimension of national politics, this problem becomes even more pronounced. These areas of substantial state policy making range from land use to occupational licensing to criminal procedure to aspects of educational policy, and each area lacks neat Republican or Democratic camps. Similarly, as party officials increasingly act on behalf of national interests, regional variation will be increasingly dampened, reducing the gains from sorting and experimentation.[238]

Bulman-Pozen doesn't deny these problems. But her "sympathetic rendering of partisan federalism" lays out a set of benefits that may offset these costs.[239] Like her fellow travelers in the new "nationalist school of federalism," she focuses on how federalism organizes, shapes, and creates national political debate.[240] But Bulman-Pozen's specific claims about how partisan federalism improves democracy at the national level are questionable at best.

For instance, consider her argument that partisan federalism serves as a "safeguard of parties." Control over state governments gives minority parties space to reform themselves, refashion themselves, and advertise their ideas.[241] Republicans shut out of the presidency from 2008–2016 used their control over state legislatures to work out policies—for example, on immigration—that have now found their way onto the national agenda.[242]

But it is not clear that partisan federalism makes for more effective opposition parties. Minority-party control over state governments could just as easily lead to complacency. If policies that would sell on the national stage would be unpalatable to state officials and interest groups, party officials might choose not to risk their control over friendly states in service of

238. Bulman-Pozen notes that variations among red states and blue states remain—but this is because there is more to state politics than partisan federalism. Changes that make for more partisan federalism should reduce variation at the margin. Alternatively, it is possible that an organized central party apparatus might intentionally create variation among the states. But this relies on a great belief in the power of the party organization and a lack of belief in the capacity of the ideological groups that make up the party to impose discipline on outliers.

239. Bulman-Pozen, *supra* note 37, at 1081 n.7.

240. *See* Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1890, 1893 (2014) (observing that scholars in the "nationalist school of federalism" view "[s]tate power . . . [as] a means to achieving a well-functioning *national* democracy").

241. *See* Bulman-Pozen, *supra* note 37, at 1123–30.

242. *See* Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2122–23 (2014); *see also* Randal C. Archibold, *Arizona Endorses Immigration Curbs*, N.Y. TIMES (Apr. 14, 2010), http://www.nytimes.com/2010/04/15/us/15immig.html [https://perma.cc/HRL9-5UJC]; Glenn Thrush, *Trump's Immigration Whisperer*, POLITICO (Oct. 19, 2016), http://www.politico.com/story/2016/10/kris-kobach-donald-trump-immigration-rigged-230000 [https://perma.cc/4X72-9MMJ] (discussing how Kris Kobach, the Secretary of State of Kansas, helped develop restrictive immigration policies in Arizona, Alabama, and Kansas, and then advised now-President Trump to push these policies at the national level).

increasing the odds of a far-off, national political success.[243] Further, when state parties are integrated with national parties, successful state politicians naturally become national-party leaders.[244] This can result in less effective minority parties, as their natural leaders may come from states with politics distant from the national median voter.[245]

In contrast, a system with less partisan federalism could make out-of-power parties more successful at the national level because they could draw on figures and ideas untainted (or less tainted) by losing national political stances. Independent figures like generals and businesspeople, free from previous partisan compromises or policy commitments, can be attractive candidates.[246] Similarly, in earlier eras, with greater divides between the images of state and national parties, state leaders often rose to power quickly at the national level. For instance, differences between the national Democratic Party and the more conservative Arkansas and Georgia Democratic parties were central to the ability of Bill Clinton and Jimmy Carter to be effective national candidates.[247]

Or take the argument that heavily partisan state governments create greater checks on the President or on national-level majorities. For example, Republican governors generally chose not to expand Medicaid under the ACA.[248] But dominance of national parties over state parties might also result in *fewer* checks on the Executive or the majority party in Congress. After all, parties in power at the national level also have allies in state government. If the President's party were to tap these allies, it would effectively commandeer the institutional capacity of state governments, thus

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243. Consider the Democratic Party after the Civil War, which only won two Presidential elections between 1868 and 1912, but retained control over many state governments, particularly in the South.

244. *See* Alex Greer, *The Most Common Jobs Held by Presidents*, INSIDEGOV (Dec. 4, 2015), http://us-presidents.insidegov.com/stories/8620/common-jobs-presidents#Intro [https://perma.cc/UZ6M-WNRT] (showing that seventeen former presidents had prior experience as state governors and that twenty had experience as state legislators); Masood Farivar, *Americans Most Likely to Elect Former Governor, Senator as President*, VOA (Oct. 13, 2016), http://www.voanews.com/a/us-voters-interest-foreign-policy-presidential-election/3548162.html [https://perma.cc/MWJ7-CCYR] (detailing the American electorate's tendency to favor state experience when voting in national elections). Newly elected President Donald Trump never served in state office, but prior to him, the last President who did not serve in state office was Gerald Ford.

245. Think Bernie Sanders of Vermont, for instance.

246. Jane Hampton Cook, *How Often Do Americans Elect Political Outsiders to the Presidency?*, HILL (Sept. 2, 2015), http://thehill.com/blogs/pundits-blog/presidential-campaign/252557-how-often-do-americans-elect-political-outsiders-to [https://perma.cc/2TD5-LEZG] (discussing the backgrounds of nonpoliticians who became president).

247. *See* D. Jason Berggren, *Two Parties, Two Types of Nominees, Two Paths to Winning a Presidential Nomination, 1972–2004*, 37 PRESIDENTIAL STUD. Q. 203, 211 (2007) (noting the "catch-all, coalitional nature of the Democratic party" as compared to the GOP).

248. *See* Bruce Japsen, *As Red States Balk, Medicaid Expansion Stops at 31 States*, FORBES (Apr. 3, 2016), http://www.forbes.com/sites/brucejapsen/2016/04/03/as-gop-digs-in-medicaid-expansion-holds-at-31-states [https://perma.cc/V34R-2Z4V].

furthering national-partisan purposes and eliminating a possible check. The checks-and-balances argument cuts both ways.

So too with the "laboratories of democracy." Partisan federalism may lead to parties using state governments as "laboratories of party politics"—that is, to help develop new ideas or coalitions.[249] Or it might lead to less experimentation, as parties choose not to experiment with their safe assets in state governments. Laboratories of party politics also may lead to experiments that do not translate to the national level due to differences in population and preferences between minority-party-controlled states and the rest of the country.

One could go on. Nonetheless, pointing out these contrary narratives is not a debater's trick. Absent some clear metric, it is hard to say whether marginal changes in partisan federalism improve national democratic discourse. In contrast, the heavy costs of partisan federalism for traditional justifications of federalism—representation, accountability, variation, sorting, etc.—are manifest.

Finally, Bulman-Pozen's *Partisan Federalism* suggests a disagreement—or at least the seeds of one—among the scholars comprising the nationalist school of federalism. Many in that group, including scholars like Heather Gerken and Cristina Rodríguez, embrace the ways in which the devolution of power can enable political minorities to shake up national politics.[250] They focus on low-level governmental institutions (city councils, juries, school boards) to show how devolution allows national-level minorities to exercise power and to engage in meaningful dissent by enacting actual policies and forcing national majorities to overrule them (thereby taking some control of the majority's national agenda).[251] Bulman-Pozen's work, in contrast, focuses on the very biggest national minority—a losing political party, which rarely represents less than 45% of the national electorate—and *its* ability to use federalism for similar purposes.[252]

But there are very different reasons to care about the access to power of big national minorities that are majorities in some states (like, say, the Republican Party between 2008 and 2010)[253] and the power of small national minorities who yet dominate some small local governments (like Muslims in Dearborn, Michigan,[254] or supporters of marriage equality in New Paltz, New

249. *See supra* note 99 and accompanying text.

250. Gerken, *supra* note 240, at 1898; Rodríguez, *supra* note 84, at 2127–29.

251. "[W]e could look to local institutions as sites for minority rule. Those institutions are small enough to benefit two groups that are generally too small to control at the state level: racial minorities and dissenters, both objects of constitutional solicitude." Gerken, *supra* note 84, at 47.

252. Bulman-Pozen, *supra* note 37, at 1123–24.

253. *See* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2008 (2009).

254. Nancy Kaffer, *Dearborn, MI: Where Muslims Are . . . Americans*, DAILY BEAST (Feb. 2, 2015), http://www.thedailybeast.com/articles/2015/02/02/dearborn-mi-where-muslims-are-americans.html [https://perma.cc/BX84-5JAJ].

York in the early 2000s).[255] At the national level, power is frequently divided among parties, and a number of aspects of our constitutional structure allow a majority-turned-minority to retain power (e.g., life tenure for judges, six-year terms for senators, etc.). Minority parties also have some access to the national agenda even without control over state governments, either through the press or through legislative horse trading. In contrast, smaller minorities cannot force national majorities to respond to their concerns without being given control over some governmental entity.

And it might not be possible to protect *both* large national minorities *and* smaller, more local minorities. The very things that make partisan federalism work may prevent smaller national minorities from using local power to affect national discussions. For instance, reforms that give more power to state officials vis-à-vis local ones may make state officials more effective at developing a national opposition, as they will be able to enact a fuller platform at the state level. But this will also reduce the ability of smaller national minorities to have any access to the national or even state agenda. Further, when state and local officials seek to help their national party, they frequently do so by suppressing the power of embarrassing allies. For example, rank-and-file Democrats (then the minority party) did not engage in much "uncooperative federalism" on marriage equality in the early 2000s, as it almost certainly would not have helped them win the elections at the time.[256] Instead, it was figures like mayors with independent, non-national platforms in nonpartisan or heavily-one-party cities (like Gavin Newsom of San Francisco and Jason West of New Paltz) who did so.[257] A more effective partisan federalism, one in which state officials want to serve their national party to a greater degree, will almost surely result in the squashing of local irregularities that do not help the party brand, and may well lead to monotone parties. Whether nationalist federalists embrace second-order elections and partisan federalism may turn on whether they are more concerned with the power of massive, national-level political losers or tiny idiosyncratic groups—Karl Rove or Jason West?[258]

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255. Shaila Dewan, *Awaiting a Big Day, and Recalling One in New Paltz*, N.Y. TIMES (June 19, 2011), http://www.nytimes.com/2011/06/20/nyregion/gay-couples-recall-a-pivotal-day-in-new-paltz.html [https://perma.cc/2QHV-CBUK].

256. *See* Mark Carl Rom, *Introduction*, *in* THE POLITICS OF SAME-SEX MARRIAGE 1, 29 (Craig A. Rimmerman & Clyde Wilcox eds., 2007) (noting that public opinion in 2004 was solidly against same-sex marriage and that both presidential candidates that year, although issuing "equivocating statements," opposed it as well).

257. *See* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148–49 (2005) (describing the role of mayors in the marriage equality movement in the mid-2000s).

258. Or, to reverse the politics, Jerry Brown or Joe Arpaio.

V. Conclusion: Reforming State Politics as a Means of Achieving the Ends of Federalism

This paper has veered (mostly) from suggesting reforms. But the arguments above do suggest new avenues for those in favor of "more federalism." Rather than focusing solely on devolving more power *to* states, proponents of federalism ought to consider political reform *within* states—to increase responsiveness to state voters, creating more experimentation, opportunities to vote with the feet, and the like. In short, proponents of federalism should seek to make state politics less second order.

This Conclusion will provide a quick sketch of what such reforms might look like. There are two types of political reforms at the state level that might help to differentiate state politics: constitutional or organizational changes, and electoral changes.

It should be said that these reforms are not a free lunch. Our current, heavily-second-order state electoral scheme does achieve a backdoor nationalism. If states adopt either Republican or Democratic policies with no variation (not quite where we are, as discussed above), we reduce to some extent the problems of patchwork policy making.

But even if these reforms are not a free lunch, they are a cheap one. Second-order state elections produce solutions that don't quite fit for many states—states that might prefer middle-ground answers get right- or left-wing ones.[259] And the lack of retrospective accountability is hard to justify by any means. Promoting federalism by reforming state politics would generate more state variation and experimentation without requiring the federal government to abandon national resolutions where appropriate.

A. State Reorganization

One of the lessons of the literature on second-order elections is that, the higher profile the office, the easier it is for voters to develop independent preferences about office holders. Elections for Governor are less second order than elections for state auditor or for the state legislature. Big-city mayoral elections are more competitive than city council races. And so forth.

If reformers want more differentiated state politics, there is a good argument that they should seek to grant more authority to state and local chief executives—figures more easily monitored by voters. This can be done in a number of ways. One would be by passing statutes authorizing the Governor (or mayor) to wield greater administrative authority. Courts would have to play along, however, by overruling decisions like *Boreali* and *Statewide Coalition* that handicap state and local administrative lawmaking.

Another route might be state-constitutional reform that rebundles the state executive branch. While the President truly heads the federal Executive

259. And states that might want truly radical answers may get ordinary partisan ones.

Branch, state executive authority is notably "unbundled."[260] Voters elect a wide variety of state executive officers—attorneys general, most notably, but also lieutenant governors, treasurers, insurance and public-utility commissioners, and others. (On average, states have about 6.7 directly elected state officers.)[261] County executive power is quite divided, with general executives, elected district attorneys, sheriffs, and many others, and cities frequently have several directly elected officials as well.[262] Christopher Berry and Jacob Gersen laud this aspect of American political development, arguing that unbundled executives allow voters to exercise greater control over specific issues without having to compromise, reducing slack between voter opinion and public policy.[263] But they also note that the case for unbundling gets weaker as monitoring costs increase.[264]

Second-order elections can only occur in the presence of high monitoring costs. Or rather, they are evidence of high monitoring costs. If voters can't figure out who the insurance commissioner is, what she does, or how to hold her accountable for facts on the ground, they vote for the candidate from the party they prefer on issues of war and peace. There is an irony here. In America, we unbundle executives more at the state level, where the lack of media coverage makes monitoring costs higher than at the national level. This excessive unbundling for officials often produces bad policy outcomes where monitoring costs are high. For instance, borrowing costs in California cities with appointed treasurers are nineteen to thirty-one percent lower than in ones where those officials are elected.[265]

Bundling executive authority in governors, county executives, and mayors—at least when that authority is taken back from those elected officials that voters have the least capacity to directly monitor—would, perhaps counterintuitively, seem to produce more accountability and greater fit to voter preferences within states. It also would, for the reasons discussed

260. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1399 (2008).

261. *Id.* at 1434.

262. Berry and Gersen also offer empirical data suggesting that unbundling leads to better representation in counties. *See generally* Christopher R. Berry & Jacob E. Gersen, *Fiscal Consequences of Electoral Institutions*, 52 J.L. & ECON. 469 (2009). They find that own-source revenue (roughly, how much taxes are raised) at first decreases as the number of elected executive officials in a county increases, and then in turn increases as that number gets higher. *Id.* at 482–87. They interpret this as suggesting that some diffusion of power leads to a more accountable government, but that too much does not. *Id.* at 490. But they simply assume that voters want less local government rather than more, which is surely true in some places—but not in others. *See id.* at 472. Even so, the basic structure of their argument fits with the discussion here: Where monitoring costs are too high, executive power should be "rebundled."

263. Berry & Gersen, *supra* note 260, at 1394.

264. *Id.* at 1395–96.

265. *See* Alexander Whalley, *Elected Versus Appointed Policy Makers: Evidence from City Treasurers*, 56 J.L. & ECON. 39, 42 (2013) (using close elections to create natural experiments).

in Part III, likely produce more innovation, variation, and all the other ends of federalism.

B. State Electoral Reform

Another possibility is to reform state electoral procedures. The idea would be to change election rules to make state elections more responsive to state opinion and less responsive to preferences about national politics. This would produce better fits on state-specific issues, greater variation, and more experimentation.

This is not an entirely new idea. However, the central reform that states employ—holding elections "off-cycle"—does not seem to work, and, in any case, it produces negative collateral effects. Five states hold gubernatorial elections in odd years.[266] Many counties and municipalities hold elections in non-November months during years without presidential or gubernatorial races.[267] The only real justification for this is to get voters to focus on state or local elections rather than on more prominent national ones.[268]

However, there is no evidence that voters do in fact focus on state issues in off-cycle elections.[269] And there is substantial evidence that holding elections off cycle radically reduces turnout, even in cities with high turnout in presidential election years.[270] In fact, as Zoltan Hajnal finds, "election timing is the most important factor in explaining local voter turnout."[271]

This has negative effects on the representation of local opinion. Hajnal finds that the economic and racial composition of electorates in on- and off-cycle elections differs tremendously; off-cycle electorates are, on balance,

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266. Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 NW. U. L. REV. 1181, 1222 n.167 (2013).

267. SARAH F. ANZIA, TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS 6–10 (2014); *see also* Christopher R. Berry & Jacob E. Gersen, *The Timing of Elections*, 77 U. CHI. L. REV. 37, 50–52 (2010) (discussing election timing and finding that off-cycle elections depress turnout).

268. *See* ANZIA, *supra* note 267, at 41–49 (showcasing Progressive Era arguments that off-cycle local elections would keep local politics pure of national partisan influence, and arguing in contrast that the question was in fact largely driven by political factors).

269. For instance, New York City Council races are held off cycle and are almost perfectly second order. *See* Schleicher, *supra* note 6, at 458–59 (describing one district's perfectly second-order city council race, where the mayoral race went entirely in the opposite direction).

270. *See* ANZIA, *supra* note 267, at 2–3 (illustrating the pattern of substantially decreased voter turnout in off-cycle election years with the example of Palo Alto, which had 82% voter turnout in 2008 but only 38% in 2007).

271. ZOLTAN L. HAJNAL, AMERICA'S UNEVEN DEMOCRACY: RACE, TURNOUT, AND REPRESENTATION IN CITY POLITICS 159 (2010); *see also* United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 444 (S.D.N.Y. 2010) ("[H]olding local elections 'off-cycle' in March and staggering . . . [t]rustee elections combines to enhance the opportunity for discrimination against the Hispanic voting population."). Anzia finds that cities where one would expect high turnout based on demographics have far lower turnout than comparable cities when their elections are off cycle. *See* ANZIA, *supra* note 267, at 2–3 (comparing Berkeley and Palo Alto).

whiter and richer.[272] According to Hajnal (and as one might expect), this substantially affects public policy.[273] And organized interest groups also fare better in off-cycle elections. For example, Sarah Anzia has shown that off-cycle school board elections lead to higher teacher salaries, since teachers have more influence when no one else shows up to vote.[274]

The "mismatch" theory that I have offered in the past predicts these negative effects of off-cycle local elections.[275] Information deficits form the core of local-election problems. Even if voters bother to show up, they simply do not know enough about local politics to do anything but use national-party preference—an only weakly useful heuristic—to guide their votes.[276] And voters without knowledge will lack incentives to show up at all.

Election reforms should be aimed at changing the information available to local voters—preferably, on the ballot itself. For instance, states could publish on the ballot which party controls the state legislature. Those voters who have no idea who is in control, but know the state of the roads, could punish or reward the right legislators.[277] Alternatively, the state could allow independent groups to make on-ballot endorsements during primaries, providing voters with information about candidates that would truly matter in some jurisdictions.[278] States could also reform the process by which candidates get on the state or local ballot to encourage locality-specific rebranding by minority parties. For instance, states could force parties to earn their way on to local ballots rather than granting them that right on the basis of up-ballot performance. Minority parties could remove the stink of unpopular national figures by filing under a different, locality-specific party name ("Reform" instead of "Republican" in New York City, perhaps).[279]

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272. *See* HAJNAL, *supra* note 271, at 2, 166–67 (noting that disadvantaged persons are less likely to vote overall, and that on-cycle elections increase turnout substantially, necessarily making for a more representative electorate).

273. *See id.* at 176, 183 (noting that "[l]ow and uneven participation [by racial and ethnic minorities] is . . . a culprit in the skewed nature of local government spending priorities" and that "the skew in participation in local elections by class is almost as severe as it is with race").

274. ANZIA, *supra* note 267, at 166.

275. *See supra* notes 68–69 and accompanying text.

276. *See* Schleicher, *supra* note 6, at 451 (noting implications of voter ignorance on local partisan competition).

277. *See* Elmendorf & Schleicher, *supra* note 9, at 411–14 (suggesting reforms to improve party accountability).

278. *See id.* at 409–11 (preferring partisan to interest-group cues).

279. *See* Schleicher, *supra* note 6, 468–70 (discussing party requalification and "fusion" platforms). This goes both ways. Local Democratic Party branches in Republican areas might choose to rebrand themselves as "Southern Mother*%&#ing Democratic-Republicans" in order to appeal to Republican voters and theater geeks. *Cf.* LESLIE ODOM, JR. ET AL., *Washington on Your Side*, *on* HAMILTON: AN AMERICAN MUSICAL (ORIGINAL BROADWAY CAST RECORDING) (Atlantic Recording Corp. 2015).

I have provided a menu of reforms elsewhere, from the quotidian to the fanciful.[280] Whether any of these would work is hard to say; few have been tried, so there's little evidence. But the regrettable condition of state and local elections cries out for experimentation. The focus of these reforms should be to provide voters with state-specific information about policy, politicians, and parties. This information would allow voters to focus on state politics when voting in state elections. Representative state and local governments are central to the promise of our federalism. Achieving them will take work.

280. Elmendorf & Schleicher, *supra* note 9, at 409–24.

Book Reviews
Kent Greenawalt, Defender of the Faith

Andrew Koppelman*

EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? By Kent Greenawalt. Cambridge, Massachusetts: Harvard University Press, 2016. 288 pages. $49.95.

Introduction

Not long ago almost everybody loved the idea of exempting religious objectors from generally applicable laws. In 1993, after the Supreme Court, abandoning a decades-old rule, noted that exemptions weren't constitutionally required,[1] Congress was nearly unanimous in reversing that result by statute.[2]

Two controversies have splintered that coalition. The 1993 law, the Religious Freedom Restoration Act (RFRA), has been deployed to challenge the so-called "contraception mandate," which requires employee and student health insurance plans to cover the costs of most forms of contraception.[3] Litigants have sought, and some state legislatures have attempted to provide, religious exemptions from laws banning discrimination on the basis of sexual orientation.[4]

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1. Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

2. *See* Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J. F. 416, 416–17 (2016) (noting that "almost every member of Congress" voted for the act, reinstating the standard for religious exemption set in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The Religious Freedom Restoration Act provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the Government "demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1 (2012), *application to state governments invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

3. *See* Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 52–53, 53 n.5 (2014); Andrew Koppelman & Frederick M. Gedicks, *Is* Hobby Lobby *Worse for Religious Liberty Than* Smith*?*, 9 U. ST. THOMAS J.L. & PUB. POL'Y 223, 233 (2015).

4. *See* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 621–22, 630–38 (2015) [hereinafter *Gay Rights, Religious Accommodations*] (listing the various state legislative proposals to provide religious exemptions from antidiscrimination laws).

More fundamental than either of these flashpoints is a growing sense that it is unfair to single out religion in this way—that religion is not distinctive enough to deserve special treatment by the law.[5]

So Kent Greenawalt's defense of exemptions is well timed. For many years, Greenawalt has been a giant in the field of law and religion. His two-volume treatise, *Religion and the Constitution*,[6] is the most comprehensive treatment of the law of the religion clauses. This new book takes on the specific issue of exemptions in shorter compass, centered on these newer controversies that have arisen since the earlier volumes were published. He has an easy mastery of this complex area. He writes beautifully.

The book is a careful defense of exemptions against the new challenges. It does not offer any general theory of exemptions, instead focusing closely on the details of specific types of situations. The general lesson is that "no sensible person can suggest that all claims of exemption should be granted or refused."[7]

The book ranges over a wide range of issues, though it is not quite as comprehensive as the first volume of his treatise.[8] Its aim is "to explore the complexity of many concerns about exemptions and implicitly encourage those on opposite sides of particular controversies to recognize, and perhaps even acknowledge, that competing considerations do carry some weight."[9] Greenawalt selects his cases with that in mind.[10]

A large literature of general theories of religious accommodation is on offer.[11] He resists them all.

> No single theory covers everything; multiple reasons typically support a practice and carry varying weights in different contexts. This reality applies to many particular issues about government concessions not to perform general duties. Once this is recognized, people should not

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5. The increasing number of scholars who are persuaded by this objection are discussed and cited in KATHLEEN A. BRADY, THE DISTINCTIVENESS OF RELIGION IN AMERICAN LAW: RETHINKING RELIGION CLAUSE JURISPRUDENCE 46–55 (2015) and ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 153–65 (2013) [hereinafter DEFENDING AMERICAN RELIGIOUS NEUTRALITY].

6. 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS (2006) [hereinafter FREE EXERCISE AND FAIRNESS]; 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008) [hereinafter ESTABLISHMENT AND FAIRNESS].

7. KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? 33 (2016).

8. The treatise took up history and doctrine, objections to educational requirements, the military, unemployment compensation, Sunday closing laws, government development of sacred property, church property disputes, employment harassment, and child custody issues. *See generally* FREE EXERCISE AND FAIRNESS, *supra* note 6.

9. GREENAWALT, *supra* note 7, at 3.

10. As will become clear, I don't agree with every choice he makes here. Some discussions are tangential to the main ambition of the book.

11. He engages them in detail in FREE EXERCISE AND FAIRNESS and ESTABLISHMENT AND FAIRNESS, *supra* note 6.

> expect matters to reduce to a single justification that clearly warrants some exemptions and does not warrant others . . . .[12]

If the book has a general thesis, it is that exemptions should not be rejected wholesale.

Exemptions is, however, deliberately unhelpful with respect to broader questions that weigh on the minds of many. Why is it fair, as a general matter, to single out religion for special treatment? And what general principles should legislatures or courts follow if they are going to devise exemptions on an ad hoc basis?

An intervention tailored to contemporary debates ought to address these questions, which have become so salient.

The overall pattern of special treatment is what has generated a sense of unfairness. Even if the details can be shown to cumulate intelligibly, a defense of exemptions needs to say something about what the cumulation amounts to. The book is thus an important but incomplete defense of exemptions.

This Review will offer an account of the missing principles inferred from what Greenawalt does say.

Whatever is valuable about religion is not directly detectable by law. People are too opaque to one another for the state to assess the value of each person's attachments. Greenawalt is exquisitely attentive to the state's limitations in this regard.

Greenawalt's argument thus points to a strategy of devising workable proxies for what perfect transparency would give us. "Religion" can function as such a proxy. It is a good, albeit rough, indicator of whether the objector has a valuable and weighty reason for the objection. That is the best the law can do. This approach has internal tensions, but courts can muddle through to reasonably just outcomes.

Part I of this Review examines Greenawalt's specific arguments for (and, in some cases, against) exemptions. Part II takes up the question of whether it is fair to give religion special treatment. Part III considers the problem of how to determine substantial burdens on religion.

I. Specifics

Greenawalt starts with some familiar cases in which exemptions are easily justified. The book's strategy is that "reflecting on other circumstances can help one's assessment of what is now most controversial and sharply debated."[13]

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12. GREENAWALT, *supra* note 7, at 49.

13. *Id.* at 77.

The exemption of Quakers and Mennonites from military service has been the law since colonial times.[14] No one questions it: Quakers would make lousy soldiers anyway.[15] More generally, accommodation here does not defeat the purpose of the law. "So long as the government does not really need virtually all healthy young men in its armed forces, granting exemptions to pacifists will not interfere with the effectiveness of its service members."[16] Greenawalt would extend the accommodation to nonreligious conscientious objectors, so long as their sincerity is clear.[17]

Religious bodies are exempted from income and property taxation, unlike for-profit businesses. Donations to religious bodies are tax deductible for the donor.[18] Since these accommodations are granted to organizations, individual conscience is not at issue.[19] Greenawalt surveys a number of mutually reinforcing justifications for these exemptions, including the public functions served by nonprofit charities, the value of institutions outside government, encouragement of caring among citizens, and doubt whether, if one subtracts gifts passed on to the beneficiaries of charity work and business expenses, churches have any relevant income to be taxed.[20]

This discussion establishes that accommodation sometimes rests not on individual conscience but on more general considerations of the public interest. It does not show that special treatment of religion is justified: The exemptions here are generally under the description of nonprofit charities. It is therefore less clear that this chapter does much to advance the general project of justifying religion-specific accommodations. It is probably in this book because preferential tax treatment is such an enormous part of religion's special treatment,[21] is often complained about,[22] and therefore is likely to loom large in the minds of many readers.

Greenawalt next takes up the consumption of forbidden substances.[23] This issue is salient because the consumption of sacramental wine was

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14. *Id.* at 25; R. R. Russell, *Development of Conscientious Objector Recognition in the United States*, 20 GEO. WASH. L. REV. 409, 412–13 (1952).

15. *See* GREENAWALT, *supra* note 7, at 31 (discussing the risks to military effectiveness if a genuine religious pacifist submits to the draft and faces armed combat).

16. *Id.*

17. *Id.* at 35–38.

18. *Id.* at 49.

19. *Id.* at 48.

20. *Id.* at 50–55.

21. Tax exemptions, Greenawalt writes, are the exemptions "that almost certainly have the greatest overall social consequences." *Id.* at 47.

22. *See, e.g.*, Mark Oppenheimer, *Now's the Time to End Tax Exemptions for Religious Institutions*, TIME (June 28, 2015), http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/ [https://perma.cc/BFB8-AXC5] (arguing that religious institutions should no longer be tax exempt for three reasons: Exemptions force the IRS to determine what organizations qualify as religious, the IRS subsidizes wealthy institutions, and because many religious institutions engage in partisan politicking and advocacy).

23. GREENAWALT, *supra* note 7, at 64.

specifically protected during Prohibition,[24] and because the well-known case in which the Supreme Court abandoned the rule of constitutionally compelled accommodation involved the religious use of peyote by Native Americans.[25]

If a drug is dangerous enough to justify a general prohibition, but some users consume the drug in a disciplined and safe way for unusually exigent reasons, then Greenawalt thinks an exemption is justified.[26] In this context, however, such exemptions cannot be safely extended to nonreligious groups.

> The difficulty is this: if nonreligious groups can use a drug, individuals who wish personally to do so will have an incentive to get together and form a group and to schedule meetings at a convenient time so that what really happens is that the individuals can take the substance for whatever purposes move them.[27]

Greenawalt's answer to the question why religion should ever receive special treatment is not only about administrative workability. He evidently thinks that religion is in fact special: "[R]eligious freedom is an important value in this society and in other liberal democracies," and "the government should need a strong interest to interfere with the fundamental practices of worship."[28]

At this point, the reader is likely to ask: Just what is the nature of this value? Is it unique to religion? Greenawalt gestures toward an answer, conceding that a drug may be used "to enrich the understanding and experience of life for the participants."[29] Evidently religion is only one of many activities that enrich the understanding and experience of life. The line should be drawn at religion for "reasons of overall enforcement and prevention of fraud."[30] In this context, there is no more workable place to draw it. The general lesson—and the reason this chapter is here—is that we should reject gross generalizations about the appropriateness of special treatment for religion. "One needs to focus on exactly what kind of exemption is involved and what is workable for effective administration."[31]

Now Greenawalt is ready to take on some live controversies. He next considers receiving and participating in medical procedures.[32] An extended discussion of the right to refuse medical treatment doesn't help his argument much, since that right is generally available for reasons of bodily integrity,

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24. National Prohibition Act, ch. 85, tit. 2, § 3, 41 Stat. 305, 308–09 (1919) (repealed 1935) ("Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, [and] sold . . . but only as herein provided . . . .").

25. Emp't Div. v. Smith, 494 U.S. 872, 874, 883, 888–90 (1990).

26. GREENAWALT, *supra* note 7, at 72–73.

27. *Id.* at 73.

28. *Id.* at 72.

29. *Id.* at 73.

30. *Id.* at 75.

31. *Id.*

32. *Id.* at 76.

long protected at common law, that have nothing to do with religion.[33] Harder cases are presented by Christian Scientists and Jehovah's Witnesses who refuse some or all treatment for their children.[34]

Religiously based parental choices over education are privileged over nonreligious ones, notably in *Wisconsin v. Yoder*,[35] which held that the Amish had the right to remove fourteen-year-olds from school after the eighth grade and to learn farming instead.[36] Here, again, Greenawalt thinks that religious claims should get special treatment, "because of the dangers of fraud if any claim of conscience is treated similarly."[37] Here, however, it is less clear than in the drug case just what the fraud would consist of. With drugs, people might pretend to be pursuing enriched understanding of life when they really want pleasant stupefaction (which the state is stipulated to have a legitimate interest in prohibiting).[38] But any parent who withdraws their child from school is likely to think, however misguidedly, that this is really better for the child. As for medical treatment for children, Greenawalt thinks that little will be accomplished by criminal punishment when the child is harmed by the refusal, since strongly religious people may not be deterrable.[39]

This discussion is interesting but doesn't shed much light on the core issues that motivate the book. It could have been deleted without much loss.

Vaccinations are another case in which religion-alone exceptions may make sense, though here what is doing the work appears to be the need to limit the number of unvaccinated children.[40] This conclusion seems distressingly ad hoc. Whether exemptions from universal vaccination are safe depends on the contingency of whether the number of claims rises to a level that impairs herd immunity.[41] If it does, there is a public health danger, and it may be fairer to allow no exemptions at all than to arbitrarily single out the religious for special treatment.

On obligations of hospitals to provide abortion services, Greenawalt similarly relies on religion as a good place to draw the line: He proposes to "limit the exemptions for institutions to religious bodies whose convictions

33. *See id.* at 81; *see also* FREE EXERCISE AND FAIRNESS, *supra* note 6, at 397 & n.4.

34. GREENAWALT, *supra* note 7, at 84.

35. 406 U.S. 205 (1972).

36. *Id.* at 205, 234.

37. GREENAWALT, *supra* note 7, at 85.

38. This raises complexities about legitimate state interests in drug regulation that I cannot explore here. *See generally* Andrew Koppelman, *Drug Policy and the Liberal Self*, 100 NW. U. L. REV. 279 (2006).

39. GREENAWALT, *supra* note 7, at 89.

40. *Id.* at 95–97.

41. *See* Paul Fine et al., *"Herd Immunity": A Rough Guide*, 52 CLINICAL INFECTIOUS DISEASES 911, 913–14 (2011) (noting the effect of vaccination exemptions on communities' vulnerability to infectious diseases, especially in conjunction with the "[s]ocial clustering" characteristic of "religious communities that eschew vaccination").

not to supply abortions are drawn from the understandings of their faiths."[42] Here, as with vaccination, the question of accommodation can't be resolved without considering ecological effects. There are regions of the United States where every hospital is either Catholic or constrained to follow Catholic doctrine.[43] In some of those places, medically necessary procedures aren't available anywhere.[44] Greenawalt observes that, in these cases, a vague statute like RFRA is unhelpful; legislatures should fashion more specific accommodations.[45]

Halfway through the book, at long last, he takes up the contraception problem, as presented in *Burwell v. Hobby Lobby*.[46] In that case, applying RFRA to federal law, the Court fashioned a new exemption for for-profit businesses that had religious objections to providing insurance for certain contraception methods that they regarded as abortifacients.[47] Here, Greenawalt thinks that an accommodation is appropriate, though any exemptions "should be carefully constrained so that those who want the drugs suffer no genuine inconvenience or embarrassment."[48] It does not matter here whether the exemption is confined to the religious since there are no known nonreligious objectors in this context.[49]

Although he agrees with the result, Greenawalt is troubled by some of the reasoning of the *Hobby Lobby* Court.[50] The Court's easy assumption that corporations are covered is doubtful as a matter of statutory interpretation. The Court's deference on the question of substantial burden raises large problems. The Court, here doing some violence to the language of the statute,[51] thought it unseemly to inquire into whether a burden was sufficiently substantial.[52]

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42. GREENAWALT, *supra* note 7, at 103.

43. *See* Elizabeth Sepper, *Contracting Religion, in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES (Holly Fernandez Lynch et al. eds., forthcoming 2017) (manuscript at 2), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2783518 [https://perma.cc/N8SA-MK7F].

44. *See id.* (manuscript at 12).

45. GREENAWALT, *supra* note 7, at 104.

46. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

47. *Id.* at 2759, 2781–82.

48. GREENAWALT, *supra* note 7, at 115.

49. *Id.* at 129.

50. *Id.* at 120–28. Greenawalt observes that "such objections will almost always be connected to religious convictions." *Id.* at 115. I am unaware of any nonreligious cases, and it is hard to imagine them.

51. *See generally* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94 (2017); *see also* Lederman, *supra* note 2, at 418.

52. *Compare* Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1(b) (2012), *application to state governments invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997) (requiring a government action to "*substantially* burden[] somone's exercise of religion" for the statute's protections to apply (emphasis added)) , *with Hobby Lobby*, 134 S. Ct. at 2778 (noting that "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim" (quoting Emp't Div. v. Smith, 494 U.S. 872, 887

Perhaps the very fact that a claim is being litigated is evidence that the law bears hard on the claimant. But granting that claim will open the door to a lot of others. "When it comes to the coverage of insurance requirements, no one is going to interview all the owners of companies to see if their objection is both fully sincere and adequately intense."[53] The *Hobby Lobby* case suggests to Greenawalt that the assessment of burden should "depend at least partly on how most people would perceive the connection between the convictions and the degree of involvement."[54] That is an important point, about which more will come later.

Instead of turning to the gay-rights issue, he takes up prisons and land use. There are live questions here because the Religious Land Use and Institutionalized Persons Act requires states to consider religious exemptions in those contexts.[55] The land-use cases are not about the protection of conscience but about facilitating the collective exercise of religion, as with tax exemptions.[56] Prison cases, which generally involve grooming and clothing, diet, group worship, and access to literature, are generally notable for the weakness of the prisons' reasons for resisting the prisoners' claims.[57]

(1990)). Instead, the Court's "'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'" *Hobby Lobby*, 134 S. Ct. at 2779 (quoting Thomas v. Review Bd. 450 U.S. 707 (1981))). In so holding that judicial review of the substantiality of the burden placed on religious exercise is precluded by the Court's "religious question" doctrine, RFRA's prima facie requirement of a "substantial burden" is rendered all but meaningless against essentially any claimant's invocation of RFRA's protections and the consequent demands on the government's justification for its action.

53. GREENAWALT, *supra* note 7, at 124.

54. *Id.* On the question of least restrictive means, he is unfortunately drawn to Justice Alito's suggestion that government could be required to supply the contraception itself. *See Hobby Lobby*, 134 S. Ct. at 2780–81 (suggesting that RFRA may require the government to expend additional funds, such as to provide contraceptives, to accommodate citizens' religious beliefs). Government provision of contraception for most women "would be fairly expensive, but it would be a small amount in comparison with the total national budget." *Id.* at 129. On why this suggestion would be disastrous in practice, see Koppelman & Gedicks, *supra* note 3, at 235–37 (arguing that the necessary funding is unlikely to be provided, and that if it is deemed a less restrictive means, the outcome will be simply to deny women contraception).

55. Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc(a)(1) (2012) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution . . . ."); *id.* at § 2000cc-1(a) ("No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability . . . .").

56. GREENAWALT, *supra* note 7, at 145.

57. *See, e.g.*, *id.* at 137 (describing an Arizona prison rule forbidding beards for reasons other than medical necessity on the grounds that it permitted rapid and accurate identification of prisoners); *id.* at 140 (discussing cases where courts have held that wearing crosses "did not present a sufficient danger of thefts or use as weapons to justify a prohibition"); *id.* at 141 (arguing that insofar as increased costs are the government's basic competing consideration against allowing religiously observant diets, such as kosher meals, "given all the expenses of prison management" such added costs should not "typically amount to a compelling interest"); *id.* at 142 (referencing a case in which a prisoner was barred from Jewish worship services because as a believer in Judeo-Christianity, Protestant worship services were considered adequate); David M. Shapiro, *Lenient in*

Here, it is worth noting one consideration in favor of special treatment of religion: RLUIPA generates the only prisoner claims that are treated with any respect by the courts.[58] Absent a discourse of religious liberty, it is hard to see how one could smuggle into American law the notion that convicts are human beings with rights.[59]

Finally comes the gay-rights issue. Many religious conservatives feel that it would be sinful for them to personally facilitate same-sex marriages, and they have sought to amend the laws to accommodate their objections. They argue, with some force, that there are plenty of other wedding photographers, and that accommodating them would have no significant effect on any gay person's opportunities.[60]

These efforts have met fierce resistance and political disaster.[61] Greenawalt sensibly prescinds from political questions and simply tries to decide what rules would make sense.

In this chapter, he becomes less confident than he is in much of the book, aiming to capture the complexity of the problem rather than offer clear prescriptions. He rejects the claim that opposition to same-sex marriage is as repugnant as opposition to interracial marriage, arguing that even though some racists offered religious justifications for their position, "at least for some people, the religious ground was likely an attempt to support, perhaps even in their own minds, a more complex cultural and psychological view."[62] This is accurate but irrelevant, since this is probably true to some extent of all religious views. The fact that they have social and psychological underpinnings neither confirms nor undermines their reliability.[63] Greenawalt thinks that when exemptions for opponents of same-sex marriage are considered, one should consider "not only the overall soundness of convictions but whether they are at least based on acceptable values, such as

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Theory, Dumb in Fact: Prison, Speech, and Scrutiny, 84 GEO. WASH. L. REV. 972, 995–1005 (2016) (describing many examples of courts deferring to even weaker reasons for denying prisoner claims).

58. *See* Shapiro, *supra* note 57, at 980 (2016) (finding that RLUIPA has been "at least moderately successful" in protecting religious-access rights for prisoners).

59. This is particularly important given American law's tendency to overpunish. *See* Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933 (2016) (describing the growing chasm between American and European criminal penalties, the former becoming far more severe).

60. *See Gay Rights, Religious Accommodations*, *supra* note 4, at 621–22, 629, 641–44. Evidently most Americans are inclined toward accommodation. *See* Maggie Gallagher, *New Poll: 80 Percent of Americans Support the Christian Photographer's Right to Say "No,"* PULSE 2016 (Aug. 6, 2015), http://thepulse2016.com/maggie-gallagher/2015/08/06/new-poll-80-percent-of-americans-support-the-christian-photographers-right-to-say-no/ [http://perma.cc/X2Q7-VNDX].

61. *See Gay Rights, Religious Accommodations*, *supra* note 4, at 631–38 (reviewing negative reactions to state legislatures' attempts to pass laws creating broad religious exemptions to antidiscrimination laws).

62. GREENAWALT, *supra* note 7, at 164.

63. *See* PETER L. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION app. 2 at 179–85 (1969); HANS KÜNG, FREUD AND THE PROBLEM OF GOD 42–43 (Edward Quinn trans., 1979).

what is good for children or a deep religious tradition, and are defensible in principle."[64] It is dangerous to have religious freedom turn on a state judgment of the reasonableness of the underlying religious views.

On the core question of whether there should be accommodation of religious objectors from antidiscrimination laws, Greenawalt would distinguish expressive from nonexpressive businesses. Thus, to take two prominent recent cases, a wedding photographer should be exempted because her activity implicitly conveys acceptance of the marriage, while the involvement of the baker of a wedding cake is "best viewed as too remote to be protected against."[65] There is a constitutional dimension here: "[T]he Supreme Court has sometimes protected a right to discriminate based on free speech considerations."[66]

Here Greenawalt cites *Boy Scouts of America v. Dale*,[67] which declared that forbidding the Boy Scouts to expel a gay scoutmaster "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[68] The Court's extension of the compelled-speech doctrine has absurd implications: It would allow anyone to violate a law if obeying it would conventionally be taken to convey a message with which the objector disagrees.[69] This is probably why *Dale* has been largely ignored by lower courts.[70] It is a mistake to rely on it.

In the actual wedding photographer case, the New Mexico Supreme Court considered and rejected the compelled-speech claim. The antidiscrimination statute "does not compel Elane Photography to either speak a government-mandated message or to publish the speech of another."[71] A contrary result would have generated a whole new body of legal doctrine:

> We decline to draw the line between "creative" or "expressive" professions and all others. While individuals in such professions undoubtedly engage in speech, and sometimes even create speech for others as part of their services, there is no precedent to suggest that First Amendment protections allow such individuals or businesses to violate antidiscrimination laws . . . . Courts cannot be in the business

64. GREENAWALT, *supra* note 7, at 167.

65. *Id.* at 170–71.

66. *Id.* at 174.

67. 530 U.S. 640 (2000); GREENAWALT, *supra* note 7, at 251 n.77.

68. *Dale*, 530 U.S. at 653.

69. ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION 39 (2009).

70. *Id.* at 48–52.

71. Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 59 (N.M. 2013).

> of deciding which businesses are sufficiently artistic to warrant exemptions from antidiscrimination laws.[72]

Greenawalt acknowledges that it may be difficult to write legislation that draws the line in the way he contemplates.[73] He doesn't appear to see just how difficult it would be.

A better approach to the free speech issue would build on a different suggestion by the New Mexico court: "[B]usinesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws."[74]

Such an announcement inevitably would function as a signal, and as such would effectively keep gay customers away—unless they have no reasonable alternative—without technically violating the antidiscrimination statute. Who wants their wedding photographed, or their cake baked, by someone who despises the whole undertaking? A business that posts such a disclaimer might never need to violate its conscience by facilitating same-sex marriages.[75]

Present constitutional law is confused about whether the speech described by the New Mexico court is constitutionally protected or whether it would be actionable harassment.[76] I have elsewhere argued that it should be protected by the First Amendment.[77]

Greenawalt would allow exemptions for the facilitation of weddings. "For the provision of ordinary services broadly available to the public, no exemption is justified from laws barring unequal treatment of gays."[78] The only other exemption he would allow is for expressive associations and schools. "Whether religious or not, an organization whose purpose is to educate children or convey an important public message should not have to hire someone for a position whose important tasks include conveying its

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72. *Id.* at 71. For a defense of this conclusion and a response to additional free speech arguments, see Andrew Koppelman, *A Zombie in the Supreme Court: The* Elane Photography *Cert Denial*, 7 ALA. C.R. & C.L. L. REV. 77, 95–96 (2015).

73. GREENAWALT, *supra* note 7, at 172–73.

74. *Elane Photography*, 309 P.3d at 59.

75. There are, to be sure, some gay people who *are* spoiling for a fight, who will spend their money at such establishments just to have the satisfaction of forcing them to comply with the law. The New Mexico court's proposal will not prevent all such conflicts. It will prevent most of them.

76. *See* Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125, 1129–30 (2016) (discussing the "contradictory lines of authority" that the Supreme Court has created between antidiscrimination and free speech law).

77. *See id.* at 1138 (arguing that the First Amendment's protection of free speech allows business owners to post disclaimers about their views in their stores).

78. GREENAWALT, *supra* note 7, at 179.

basic premises, if that person is obviously living a life directly contrary to . . . those premises."[79]

His final chapter takes up whether religion should ever be a defense against a private lawsuit. The question arises because the New Mexico court held that the state's mini-RFRA did not apply to such suits.[80] Greenawalt argues that tort recovery can be a burden on religion and that legislatures should consider accommodation when they create new statutory duties.[81]

He could have stopped there. His pertinent point is made. Instead, he takes up a range of issues that he dealt with at greater length in his earlier treatise: Clerical privilege not to testify, failure to give adequate advice, disclosure of embarrassing facts, defamation, shunning, and institutional liability. Here, once more, it is not obvious what these discussions are doing in this book. They have nothing to do with the question raised by the New Mexico courts, and they have not become more salient since Greenawalt wrote his treatise. The defamation question is already covered by free speech, so religion is not even relevant.[82] This chapter should have been much shorter, perhaps even folded into the gay-rights chapter.

II. Why Single Out Religion?

A. A Heap of Judgments

A growing body of scholars insist that singling out religion for special protection is unfair to comparable nonreligious views.[83] Greenawalt responds by showing, in various areas, that accommodation is appropriate and that religion is a sensible place to draw the line. For the reasons already discussed, religion-only accommodation is appropriate for forbidden substances,[84] withdrawing children from school,[85] exemption from vaccines,[86] pharmacists' objections from providing abortifacients,[87]

79. *Id.* at 183.

80. Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 59 (N.M. 2013).

81. GREENAWALT, *supra* note 7, at 188–210; *see also* FREE EXERCISE AND FAIRNESS, *supra* note 6, at 246–48 (clerical privilege not to testify); *id.* at 292–303 (shunning); *id.* at 303–08 (disclosure of embarrassing facts and defamation); *id.* at 315–20 (failure to give adequate advice); *id.* at 320–25 (institutional liability).

82. Greenawalt's discussion of the issue cites only free speech law. GREENAWALT, *supra* note 7, at 203–04 (discussing how the Free Speech Clause limits recovery for defamation of public officials and analyzing the potential applicability of this limitation to religious figures).

83. *See* sources cited *supra* note 5.

84. GREENAWALT, *supra* note 7, at 73, 75.

85. *Id.* at 84–85.

86. *Id.* at 97.

87. *Id.* at 115.

employer provision of contraceptives,[88] and exemption from land-use regulations.[89]

In a way, that disposes of the objection: If it is sometimes appropriate to single out religion for special treatment, then that is the end of the claim that exemptions are never appropriate. Many readers, however, will still want to know what all of these specific answers amount to. On that question, Greenawalt is less helpful. In the treatise, he wrote:

> A person who believes that multiple values bear on the resolution of major social and legal issues . . . [m]ay feel confident about which features matter most and even about particular overall assessments, without being able to offer a set of abstract principles to demonstrate the correctness of his judgments.[90]

The book risks becoming a heap of particular judgments without any overall structure. Steven D. Smith, reviewing the earlier treatise, complains that Greenawalt, after stating each issue, "does not purport to reconcile the positions or to show that one set of arguments and authorities is right and the other wrong[; r]ather, he pronounces his judgment."[91] Smith finds no persuasive power in Greenawalt's "highly conclusory pronouncements."[92]

Greenawalt does not deduce his conclusions logically from any clear set of premises. But then, why do I have the experience, when I read him, of being in the presence of an intellect of the very-first rank, one that captures each of these difficult questions with extraordinary nuance and fairness? Why do Greenawalt's pronouncements command my assent? Resolutions repeatedly emerge from the careful description of what is at stake, in the same way that, in a good appellate brief, the preferred resolution emerges from the statement of the facts. Greenawalt thinks that if we can just perceive each situation correctly, a solution will become apparent based on the reader's inarticulable common sense. The fact that Smith is so isolated in his complaint suggests that Greenawalt is on to something.

At the very end of *Exemptions*, Greenawalt does offer a few generalizations. When there are religious exemptions, "if there are genuine nonreligious views that are closely similar and the dangers of fraud are not increased significantly, the exemption should definitely be broadened."[93] There are also some areas in which vague standards of accommodation, such as RFRA, "are too hard for officials and judges to apply, and they do not give individuals, organizations, and employers adequate notice about what

88. *Id.* at 129.

89. *Id.* at 145–52.

90. FREE EXERCISE AND FAIRNESS, *supra* note 6, at 7.

91. Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1892 (2009) (reviewing 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS (2008)).

92. *Id.* at 1893.

93. GREENAWALT, *supra* note 7, at 220.

behavior is protected or not."[94] (An example is the case, discussed above, of hospital refusals to provide medical services which, depending on local circumstances, may not be available elsewhere.)[95] In such situations, legislatures should draw specific lines for courts to administer.

All this makes sense, but it still doesn't explain why religion is the core from which one extrapolates additional accommodations. However, it is possible to build upon what Greenawalt does say to a more general defense of singling out religion.

Greenawalt describes two kinds of accommodation claims: Those based on individual conscience, such as draft exemptions,[96] and those based on communal exercise of religion, such as exemption from land-use restrictions.[97] It is not clear, and Greenawalt does not tell us, what these two kinds of cases have in common.

On the other hand, the case for some accommodation in both of those cases is powerful. We have had those accommodations for a long time, and they have done obvious good and little harm. Any general principle should not bar such longstanding and benign practices.

Political philosophy does not only work from first principles. It also relies on settled cases. John Rawls famously proposed a theory of justice that aimed to be "strictly deductive."[98] His deductions, however, take place within a larger account of justification that he calls "reflective equilibrium," in which we try to bring our considered moral judgments into line with our more general principles.[99] "A conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view."[100] Any general theory must be consistent with the specific judgments "in which we have the greatest confidence," such as our judgments "that religious intolerance and racial discrimination are unjust."[101] These are "provisional fixed points which we presume any conception of justice must fit."[102] The deduction, in short, does not always go in one direction. "It is a mistake to think of abstract conceptions and general principles as always overriding our more particular judgments."[103] Greenawalt provides us with a set of carefully defended particular judgments.

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94. *Id.* at 223.

95. *See supra* notes 41–42 and accompanying text.

96. GREENAWALT, *supra* note 7, at 25–26.

97. *Id.* at 132.

98. JOHN RAWLS, A THEORY OF JUSTICE 121 (1971) [hereinafter RAWLS (1971)]; JOHN RAWLS, A THEORY OF JUSTICE 104 (rev. ed. 1999) [hereinafter RAWLS (rev. ed. 1999)].

99. RAWLS (1971), *supra* note 98, at 48–50; RAWLS (rev. ed. 1999), *supra* note 98, at 42–43.

100. RAWLS (1971), *supra* note 98, at 21; RAWLS (rev. ed. 1999), *supra* note 98, at 19.

101. RAWLS (1971), *supra* note 98, at 21; RAWLS (rev. ed. 1999), *supra* note 98, at 17.

102. RAWLS (1971), *supra* note 98, at 20; RAWLS (rev. ed. 1999), *supra* note 98, at 18.

103. JOHN RAWLS, POLITICAL LIBERALISM 45 (expanded ed. 2005); *see also* Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV.

B. Doing Without "Religion"

So, take these fixed points and see if we can build some general principles out of them. The only common denominator in the individual and communal accommodations is the practice of treating religion as something special. As we have already noticed, this special treatment is increasingly regarded as unfair. Can it be defended?

Here I propose to defend it by seeing what happens if we try to do without it.

Stipulate, as a thought experiment, that religion is not special and will not be treated as such by the law. What do we do then? I will review a number of proposals. All come to grief and show the attractions of an approach like Greenawalt's.

I note at the outset that the proposals have all sought to account for exemptions for individuals. Another well-established exemption is the "ministerial exception" from employment regulation: Churches can fire ministers for any reason they like without state interference.[104] Some have tried to defend this rule as an aspect of freedom of association,[105] but no secular entity has comparable freedom.[106]

One proposal is that religious liberty ought to be protected indirectly, under the description of more familiar general rights (so that heresy, for example, is protected as free speech),[107] or disaggregated into its component goods.[108] This approach however will not protect religion in some of the most salient cases: It is no help for Quaker draft resistors, or Native

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647, 659 (2013). For a good discussion of the role of reflective equilibrium in Rawls's work, see SAMUEL FREEMAN, RAWLS 29–42 (2007). Greenawalt understands Rawls very well and has made major contributions to the interpretation of his work. *See* KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 106–20 (1995) (engaging with Rawls at length); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 51–57 (1988) (same).

104. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 132 S. Ct. 694, 705–06 (2012).

105. *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 63 (2007) (arguing that the constitutional immunity of the Catholic Church from equal-employment-opportunity mandates in the choice of church priests can be readily explained as an instance of the associational freedom that contemporary constitutional law endorses).

106. An absolute right of noncommercial associations to select their leaders was argued and rejected in *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). *See also* Andrew Koppelman, *'Freedom of the Church' and the Authority of the State*, 21 J. CONTEMP. LEGAL ISSUES 145–47 (2013).

107. IRA C. LUPU & ROBERT W. TUTTLE, SECULAR GOVERNMENT, RELIGIOUS PEOPLE 177–210 (2014) (arguing that freedom of religion need not be a separate category of protection because it is protected by existing rights and liberties); James Nickel, *Who Needs Freedom of Religion?*, 76 U. COLO. L. REV. 941, 942 (2005) (same). For a further response to Lupu and Tuttle, see Andrew Koppelman, *Lupu, Tuttle, and Singling Out Religion*, 111 NW. U. L. REV. ONLINE 41 (2016) (book review).

108. Cécile Laborde, *Religion in the Law: The Disaggregation Approach*, 34 LAW & PHIL. 581, 594–95 (2015).

Americans who want to use peyote in their rituals, or Muslim prisoners who want to wear beards, or even Catholics who want to use sacramental wine during Prohibition.[109]

Another response is to supplement the familiar rights of speech, association, and so forth with an additional right of individual exemption that captures the salient aspect of religion but is not confined to religion (thus avoiding the unfairness objection). This entails substituting some right *X* for religion as a basis for special treatment, making "religion" disappear as a category of analysis. Many candidates for *X* are on offer: Individual autonomy, mediating institutions between the individual and the state, psychologically urgent needs, norms that are epistemically inaccessible to others, and many more.

Here I will focus on the three most prominent, which I will call "Equality," "Conscience," and "Integrity."

Begin with Equality. Christopher Eisgruber and Lawrence Sager build their whole approach around the unfairness objection. The privileging of religion is wrong because "religion does not exhaust the commitments and passions that move human beings in deep and valuable ways."[110] They claim that the state should "treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."[111] When religion is burdened, they write, courts should ask whether comparably deep nonreligious interests are being treated better: Where a police department allowed an officer to wear a beard for medical reasons, it also was appropriately required to allow a beard for religious reasons.[112]

Eisgruber and Sager never explain what "deep" means—how to tell which concerns are "serious" and which are "frivolous."[113] Even if one takes the term commonsensically, to signify interests that are intensely felt, their principle cannot be implemented. Thomas Berg observes that the same police department did not allow beards "to mark an ethnic identity or follow

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109. Nickel argues that individual exemptions can be created without using the category of "religion," for example when it is decided "to give scientific researchers exemptions from drug laws in order to allow them to study controlled substances." Nickel, *supra* note 107, at 958. It is not obvious, however, and Nickel does not explain, how one could justify classic religious accommodations, such as sacramental wine, under a nonreligious description. Laborde suggests (responding to me) that sacramental wine could be protected by freedom of association. Laborde, *supra* note 108, at 598 n.45. This mischaracterizes that freedom. A group that gathers for the purpose of violating the law is not constitutionally protected. Rather, it is guilty of the additional crime of conspiracy.

110. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1245 n.†† (1994).

111. *Id.* at 1285.

112. EISGRUBER & SAGER, *supra* note 105, at 90–91.

113. *Id.* at 101. *See generally* Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Cécile Laborde, *Equal Liberty, Nonestablishment, and Religious Freedom*, 20 LEGAL THEORY 52 (2014).

the model of an honored father."[114] So the requirement of equal regard is incoherent: "When some deeply-felt interests are accommodated and others are not, it is logically impossible to treat religion equally with all of them."[115] Eisgruber and Sager are reluctant to specify a baseline, but they can't do without one.

The two other candidates for *X* that I will consider here avoid this error by answering the "equality of what?" question.

The most commonly invoked substitute for "religion" is Conscience.[116] This doesn't really address the unfairness problem, because it uncritically thematizes one principal theme of Christianity. Many who propose it treat its value as so obvious as not to require justification,[117] suggesting that unstated and perhaps unstatable (because theologically loaded) premises are at work. They also implausibly assume that the will to be moral trumps all other projects and commitments when these conflict and that no other exigency has comparable weight.[118]

Conscience is also underinclusive, focusing excessively on duty. Many and perhaps most people engage in religious practice out of habit, adherence to custom, a need to cope with misfortune and guilt, curiosity about metaphysical truth, a desire to feel connected to God, or happy enthusiasm, rather than a sense of duty prescribed by sacred texts. Conscience is salient for some people, but others have needs equally urgent that can't be described in those terms, and so the fairness problem is simply transcribed into a different register. Conscience, like religion, is one exigency among many.

The Integrity approach avoids these difficulties by broadening the focus beyond conscience. Joseph Raz thinks that "[t]he areas of a person's life and plans which have to be respected by others are those which are central to his own image of the kind of person he is and which form the foundation of his

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114. Thomas C. Berg, *Can Religious Liberty Be Protected as Equality?*, 85 TEXAS L. REV. 1185, 1194 (2007) (reviewing CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007)).

115. *Id.* at 1195.

116. *See, e.g.*, KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 98 (2005) (arguing that "equally conscientious reasons" should be treated the same as religious reasons for objecting to a law); AMY GUTMANN, IDENTITY IN DEMOCRACY 168–78 (2003) (arguing that freedom of religion is a subset of and should be replaced by a freedom-of-conscience standard, the source of which is "variously identified as God, nature, reason or human individuality"); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 65–71 (1996) (arguing that conscience is more exigent, and so entitled to more respect, than individual choices); Rogers M. Smith, *"Equal" Treatment? A Liberal Separationist View*, *in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 179, 181 (Stephen V. Monsma & J. Christopher Soper eds., 1998) ("[T]here should be no special protections for religious perspectives over . . . those provided for claims of secular moral conscience.").

117. *See* sources cited *supra* note 113.

118. Bernard Williams spent much of his career refuting that. *See generally, e.g.*, BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY (1985).

self-respect."[119] Paul Bou-Habib relies on the value of acting in light of one's deepest commitments.[120] Ronald Dworkin claims that laws are illegitimate if "they deny people power to make their own decisions about matters of ethical foundation—about the basis and character of the objective importance of human life."[121]

Jocelyn Maclure and Charles Taylor offer the most detailed account of Integrity. "Core beliefs" are those that "allow people to structure their moral identity and to exercise their faculty of judgment."[122] "Moral integrity, in the sense we are using it here, depends on the degree of correspondence between, on the one hand, what the person perceives to be his duties and preponderant axiological commitments and, on the other, his actions."[123] There is no good reason to single out religious views, because what matters is "the intensity of the person's commitment to a given conviction or practice."[124]

There is, however, reason to doubt whether wholehearted commitment, without more, should warrant deference. Its object might be worthless.[125] There is also an epistemic problem. How can the state discern what role any belief plays in anyone's moral life? What could the state know about my moral life? About which decisions of mine involve matters of ethical foundation?[126]

Proponents of Integrity tend to think that religion is always a matter of intense commitment.[127] Religion, however, does not hold the same place in the lives of all religious people. An individual may not think much about his religion until a crisis in middle age. If commitment were what matters, then there would be no basis for protecting spiritual exploration by the merely curious.

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119. JOSEPH RAZ, *A Right to Dissent? II. Conscientious Objection*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 276, 280 (1979).

120. Paul Bou-Habib, *A Theory of Religious Accommodation*, 23 J. APPLIED PHIL. 109, 117–18 (2006). He focuses on moral commitments, but his argument's logic entails Integrity rather than Conscience. *Id.*

121. RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 368 (2011). Dworkin confidently declares that these include "choices in religion." *Id.* Chandran Kukathas claims that he wants to protect "conscience," but he understands this term so capaciously that he is more appropriately classified as an Integrity theorist. CHANDRAN KUKATHAS, THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM 41–73 (2003).

122. JOCELYN MACLURE & CHARLES TAYLOR, SECULARISM AND FREEDOM OF CONSCIENCE 76 (Jane Marie Todd trans., 2011).

123. *Id.*

124. *Id.* at 97.

125. *See* Andrew Koppelman, *Conscience, Volitional Necessity, and Religious Exemptions*, 15 LEGAL THEORY 215, 216 (2009) (explaining that wholehearted commitment may result from amoral allegiances and is not necessarily connected to any objective value).

126. Some Supreme Court opinions and commentators have similarly suggested deference to each person's "ultimate concerns," with similarly anarchic implications. *See, e.g.*, JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES 69–74 (1995).

127. *See, e.g.*, DWORKIN, *supra* note 121, 214–18.

C. *The Hobbes Problem and Its Solution*

Any defense of religious accommodations must confront Thomas Hobbes's classic argument for denying all claims of conscientious objection. For Hobbes, human beings are impenetrable, even to themselves, their happiness consisting in "a continuall progresse of the desire, from one object to another; the attaining of the former, being still but the way to the later;"[128] their agency consisting of (as Thomas Pfau puts it) "an agglomeration of disjointed volitional states (themselves the outward projection of so many random desires)."[129] Concededly some people have unusually intense desires of various sorts. But "to have stronger, and more vehement Passions for any thing, than is ordinarily seen in others, is that which men call MADNESSE."[130] No appeal to "such diversity, as there is of private Consciences" is possible in public life for Hobbes.[131]

Part of Hobbes's objection to any reliance on Conscience or Integrity is epistemic: He doubts that the law can discern "the diversity of passions, in divers men."[132] But this epistemic skepticism is parasitic on his skepticism about objective goods: "Since different men desire and shun different things, there must needs be many things that are *good* to some and *evil* to others . . . . [T]herefore one cannot speak of something as being *simply good*; since whatsoever is good, is good for someone or other."[133]

When there are disagreements:

> [C]ommonly they that call for right reason to decide any controversy, do mean their own. But this is certain, seeing right reason is not existent, the reason of some man, or men, must supply the place thereof; and that man, or men, is he or they, that have the sovereign power . . . .[134]

What is most exigent in other minds is not knowable, because there is nothing coherent there to know.[135]

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128. THOMAS HOBBES, LEVIATHAN 160 (C.B. Macpherson ed., Penguin Classics 1985) (1651).

129. THOMAS PFAU, MINDING THE MODERN: HUMAN AGENCY, INTELLECTUAL TRADITIONS, AND RESPONSIBLE KNOWLEDGE 189 (2013).

130. HOBBES, *supra* note 128, at 139.

131. *Id.* at 366; *see also* PFAU, *supra* note 129, at 194–95.

132. HOBBES, *supra* note 126, at 161.

133. THOMAS HOBBES, DE HOMINE (1658), *reprinted in* MAN AND CITIZEN (Charles T. Wood et al. eds., Anchor Books 1972); *accord* HOBBES, *supra* note 128, at 120.

134. THOMAS HOBBES, THE ELEMENTS OF LAW: NATURAL AND POLITIC 188 (Ferdinand Tönnies ed., Barnes & Noble, Inc. 2d ed. 1969) (1650); *see also* HOBBES, *supra* note 128, at 111 (discussing the lack "of a Right reason constituted by nature").

135. *See* HOBBES, *supra* note 128, at 82–83 ("[F]or the similitude of the thoughts, and Passions of one man, to the thoughts, and Passions of another, whosoever looketh into himself, and considereth what he doth, when he does *think*, *opine*, *reason*, *hope*, *feare*, &c, and upon what grounds; he shall thereby read and know, what are the thoughts, and Passions of all other men, upon the like occasions. I say the similitude of *Passions*, which are the same in all men, *desire*, *feare*, *hope*, &c; not the similitude of *the objects* of the Passions, which are the things *desired*, *feared*,

At least at the architectonic level, Hobbes's political philosophy is consistent with the constraint of liberal neutrality: In Dworkin's classic formulation, "the government must be neutral on what might be called the question of the good life," so that "political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life."[136] Hobbes thinks the state can ignore the question of the good life, whose answer is merely the gratification of appetite.[137]

American law, however, does not conform to liberal neutrality. It routinely relies on contestable conceptions of the good.[138] "Religion" is one of them.[139] That is how the law manages to overcome Hobbes's objection.

Hobbes is at least right about this: We are too opaque to one another, our depths are too personal and idiosyncratic for the state to know for certain which of one another's commitments and passions really merit respect.

The various integrity principles that have been proposed can't be administered—at least, not with any precision. Maclure and Taylor write that "[t]he special legal status of religious beliefs is derived from the role they play in people's moral lives, rather than from an assessment of their intrinsic validity."[140] If the state is supposed to defer to identity-defining commitments, how can it tell what these are?[141] Simon Cabulea May hypothesizes a draft resistor for whom military service would prevent the perfection of his skills at chess, which he regards as "a most vivid manifestation of the awesome beauty of the mathematical universe."[142] Perhaps chess really does play a quasi-religious role in his moral life.

John Rawls thought that, for purposes of theorizing about justice, we must regard one another with a model of agency as opaque as that of Hobbes, in which for all we can tell the man who compulsively counts blades of grass is pursuing what is good for him.[143] If people are thus incommensurable,

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hoped, &c: for these the constitution individuall, and particular education do so vary, and they are so easie to be kept from our knowledge, that the characters of mans heart, blotted and confounded as they are, with dissembling, lying, counterfeiting, and erroneous doctrines, are legible onely to him that searcheth hearts.").

136. RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985). For Hobbes, there are no individual rights against the state, but the sovereign's interests entail a broad field of liberty for the subjects. IAN SHAPIRO, THE EVOLUTION OF RIGHTS IN LIBERAL THEORY 29–34 (1986).

137. *See supra* notes 131–33 and accompanying text.

138. DEFENDING AMERICAN RELIGIOUS NEUTRALITY, *supra* note 5, at 26–39.

139. *Id.*

140. MACLURE & TAYLOR, *supra* note 122, at 81.

141. Raz understands the difficulty of discerning anyone's conscience, and so advocates less intrusive devices, such as "the avoidance of laws to which people are likely to have conscientious objection." RAZ, *supra* note 119, at 288. This is not possible: there are too many kinds of objections.

142. Simon Cabulea May, *Exemptions for Conscience*, *in* RELIGION IN LIBERAL POLITICAL PHILOSOPHY (Cécile Laborde & Aurelia Bardon, eds., forthcoming 2017).

143. RAWLS (1971), *supra* note 98, at 432–33. Michael Sandel observes that among the circumstances of justice that motivate Rawls's liberalism is an "*epistemic* deficit" in "our cognitive access to others." MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 172 (1982).

then it is not apparent how some of their desires can legitimately be privileged over others, leaving Rawls's "liberty of conscience" indeterminate. Conscience, at least as it is understood in the original position, is in the same black box that it was in Hobbes.[144]

Sherbert v. Verner[145] held that a state unemployment bureau could not deny unemployment compensation to a Seventh-Day Adventist who refused to work on Saturdays: "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[146] Suppose someone quits his job because he claims that integrity requires him to spend his days counting blades of grass. What is the state supposed to do?

D. The Value of Vagueness

That brings us back to Greenawalt's defense of specifically religious exemptions. The failure of alternatives to religion shows that he is right: Sometimes there is no alternative to using religion as a legal category.

We are in our depths mysterious to one another. But we are similar enough to know where the deep places are likely to be. Those deep places consist, in large part, in goods toward which we are drawn. The sources of value in terms of which people tend to define themselves are not as idiosyncratic as Hobbes imagined. That provides an anchor for accommodations.

Hobbes's skepticism can be avoided—generally *is* avoided—because our agency consists in the pursuit of ends outside ourselves.[147] Hobbes thought there were no such ends. Religion denotes a cluster of such ends that are salient for Americans.

The American idea of religious liberty is rooted in dissenting Protestantism's bitter conflicts, first with the Church of England and then with established Puritanism.[148] Its central ideas, of state incompetence over

144. In Rawls, this problem is remediable at the constitutional stage of the four-stage sequence, but only because at that stage liberal neutrality must be abandoned. Andrew Koppelman, *A Rawlsian Defence of Special Treatment for Religion*, *in* RELIGION IN LIBERAL POLITICAL PHILOSOPHY, *supra* note 143.

145. 374 U.S. 398 (1963).

146. *Id.* at 399, 406.

147. My argument is anticipated in a way by C.B. Macpherson, who argued that Hobbes failed to anticipate that there could be a group "with a sufficient sense of its common interest that it could make the recurrent new choice of members of the legally supreme body without the commonwealth being dissolved and everyone being thrown into open struggle with everyone else." C.B. Macpherson, *Introduction* to HOBBES, *supra* note 128, at 55. But Macpherson thought that the common interest could be found in the economic position of the bourgeoisie. *Id.* There are other possibilities.

148. *See* JOHN WITTE & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 15–17 (3d ed. 2011).

religious matters and the importance of individual conscience, are responses to that experience.

Since colonial times, the United States has been religiously diverse, but the overwhelming majority of Americans have felt that religion is valuable. Early struggles turned on an instrumental dispute over whether its value was best realized by state support for religion or by disestablishment. The proponents of disestablishment won. Their views, that religion is valuable and that this value is best realized by disabling the state from taking sides in religious disputes, have shaped American law ever since.[149]

In the United States today, "religious liberty" remains an attractive candidate for protection. That's why the ACLU and the Christian Coalition unite in wanting to protect it.[150] "Religion" denotes a known set of deeply held values. Religious beliefs often motivate socially valuable conduct. Hardly any religious groups seek to violate others' rights or install an oppressive government. All religions are minorities and so have reason to distrust government authority over religious dogma. There are pockets of local prejudice, especially against Muslims.[151]

"Religion" is, of course, a cluster concept with no essence, as Greenawalt has shown better than anyone.[152] Within the cluster are multiple goods. Deciding which of them is most salient is itself a theological question that the state had best stay away from.

The singling out of religion is appropriate precisely *because* it doesn't correspond to any real category of morally salient thought or conduct, and thus is flexible enough to capture intuitions about accommodation while keeping the state neutral about theological questions. It is the most workable proxy for whatever genuine value ought to be promoted in accommodation cases. Other, more specific categories are either too sectarian to be politically usable, too underinclusive to substitute for religion, or too vague to be administrable.

Sometimes the unfairness complaint is made as if one could reasonably demand that law recognize all pressing moral claims, with no imprecision at

149. *See* DEFENDING AMERICAN RELIGIOUS NEUTRALITY, *supra* note 5, at 1–77.

150. *See, e.g.*, Christi Parsons, *Religious Groups Unite in the Name of Freedom*, CHI. TRIB. (Mar. 12, 1998), http://articles.chicagotribune.com/1998-03-12/news/9803120216_1_religious-freedom-restoration-act-christian-coalition-senate-committee [https://perma.cc/E3UJ-QDVY] (reporting on the ACLU and Christian Coalition joining forces to protect the freedom of religious expression).

151. *See, e.g.*, Joanna Walters, *Muslims in US Fear Increasing Prejudice on Wave of Anti-Islamic Sentiment*, GUARDIAN (Dec. 12, 2015), https://www.theguardian.com/us-news/2015/dec/12/muslims-fear-prejudice-in-wake-of-anti-islamic-sentiment [https://perma.cc/GYW6-4QZE] (giving examples of hostile and violent incidents against Muslims in American communities).

152. Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984), is the leading and classic article. For Greenawalt's recent restatement of the same claim, see FREE EXERCISE AND FAIRNESS, *supra* note 6, at 124–56.

all.[153] Clifford Geertz observes that "the defining feature of legal process" is "the skeletonization of fact so as to narrow moral issues to the point where determinate rules can be employed to decide them."[154] Rules, Frederick Schauer writes, are "crude probabilistic generalizations that may thus when followed produce in particular instances decisions that are suboptimal or even plainly erroneous."[155]

"Religion" is overinclusive and underinclusive—like most other legal categories. It is an imperfect but workable proxy for the deep commitments that people actually feel.[156]

Greenawalt never makes clear what he thinks is good about religion. Reviewing the treatise, Smith complains that, on the core question of why religion is singled out for special treatment, "Greenawalt seems almost aggressively complacent."[157] I think Greenawalt is consciously trying to avoid proposing a canonical basis for a valuable practice that is the object of overlapping consensus among people with very diverse views. There is some evidence that he has the proxy strategy in mind. In the multiple places where he draws the line at religion, allowing religious but not nonreligious exemptions, it is never because he thinks that religion is more valuable than other human activities. Rather, it is always because of concerns about administrability and potential fraud.[158] Greenawalt sees that "religion" does not denote any essence but that it is a workable legal proxy for what really does matter.

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153. Brian Leiter, for example, thinks that religious accommodation should be based on "features that *all and only* religious beliefs have," and complains that, under prevailing understandings of religious liberty, a Sikh will have a colorable claim to be allowed to carry a ceremonial dagger, while someone whose family traditions value the practice will be summarily rejected. BRIAN LEITER, WHY TOLERATE RELIGION? 1–3, 27 (2013). Under what description could the law accommodate the latter? Much later in his book, Leiter acknowledges the indispensability of legal proxies but does not examine the impact of that concession on his thesis that singling out religion is unfair. *Id.* at 94–99. For further critique, see Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961, 967–68 (2010).

154. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 170 (3d ed. 2000).

155. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE, at xv (1991). Since rights claims are always rule invoking, they are inevitably underinclusive and distracting. *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

156. I have expanded on this point in Andrew Koppelman, *"Religion" as a Bundle of Legal Proxies: Reply to Micah Schwartzman*, 51 SAN DIEGO L. REV. 1079 (2014); Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71 (2013), http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf [https://perma.cc/P9NJ-GYE3]; Andrew Koppelman, *Nonexistent and Irreplaceable: Keep the Religion in Religious Freedom*, COMMONWEAL (Mar. 27, 2015), https://www.commonwealmagazine.org/nonexistent-irreplaceable [https://perma.cc/4FXE-7C7C].

157. Smith, *supra* note 91, at 1903.

158. FREE EXERCISE AND FAIRNESS, *supra* note 6, at 72–73.

In the treatise, he wrote: "The complexities of determining sincerity provide one reason why people may choose 'second-best' legal standards, rather than different standards that they would choose as better if all relevant facts were easily knowable."[159] Sometimes sincerity is detectable: "A finding that a claimant is sincere should be easy if one cannot discern any secular advantage from a person's engaging in the behavior she asserts is part of her religious exercise."[160] But that is not true of all accommodation cases.[161] And why focus on religious sincerity? The answer is administrability.

III. Substantial Burden and State Competence

Another and more difficult question is deciding whether religion is substantially burdened in any particular case.

The Court in *Burwell v. Hobby Lobby* construed RFRA to almost automatically find both burden and substantiality in every case.[162] The question of how substantial any burden is, the Court declared, is a "difficult and important question of religion and moral philosophy," and the believer's response to that deserves deference from courts.[163]

This interpretation is inconsistent with the language of the statute, which makes substantiality and burden elements of a claim.[164] It does, however, respond to a real and intractable problem. If the state must refute these elements, then it inevitably will argue "that a particular religious practice is trivial, or nonobligatory, or capable of being replaced by a substitute practice."[165] One core premise of disestablishment is the state's incompetence to decide theological questions.[166]

Greenawalt thinks that there is no alternative to directly examining the claimant's religious views: "[A]ssessing burdens and government interests, which RFRA and similar state requirements require, inevitably makes outcomes partly depend on a group's religious views and the effects of its actions."[167] For example, "what counts as a substantial burden should depend significantly on just how close is the connection between one's convictions and the behavior to which one objects."[168]

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159. *Id.* at 109.

160. *Id.* at 122–23.

161. *See id.* at 106–23 (elaborating on the risk of arbitrary administration that results from individualized judgments of sincerity).

162. Gedicks, *supra* note 51, at 98.

163. Burwell v. Hobby Lobby Stores Inc., 134 S. Ct. 2751, 2778 (2014).

164. Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1(a) (2012); Gedicks, *supra* note 51, at 149–51; Lederman, *supra* note 2, at 417.

165. LUPU & TUTTLE, *supra* note 107, at 198.

166. Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1836, 1841–42 (2009).

167. GREENAWALT, *supra* note 7, at 207–08.

168. *Id.* at 125.

In the treatise, he surveys various proposals to codify the substantial burden and compelling interest requirements into clear rules and finds them all inadequate. The best judges can hope to do is to "reasonably comprehend a person's religious beliefs and practices" and thereby "be able to identify some interferences as very great and others as trivial."[169]

When the state tries to assess such burdens, disaster can follow. In a particularly egregious recent case, a prison imposed restrictions on Jewish religious groups that it did not impose on any other groups, based on a rabbi's advice—with which the complaining inmate disagreed—that Jewish worship requires a minyan or quorum of ten adult Jews. Because there were only three Jews in the prison, they were never allowed to meet at all.[170] The lower courts agreed with the rabbi, thus holding, as Justice Alito noted in his dissent from denial of certiorari, that "Ben-Levi's religious exercise was not burdened because he misunderstands his own religion."[171]

This kind of train wreck can be averted if courts, in trying to discern religious burdens, understand the dangers of relying on a group's theology to determine that of the individual. Greenawalt is clear on that point: "[A]n individual's convictions need not correspond with the dominant beliefs of his religious group."[172] Alito is right that the lower courts were wrong under well-settled precedent. The difficulty of perceiving someone else's religious exigencies—a central problem for Hobbes[173]—is made harder by the Supreme Court's decision (with which Greenawalt agrees) to focus on the beliefs of individual claimants, rather than those of the groups to which they belong.[174]

Greenawalt evidently thinks that, if there is going to be accommodation, courts have to be permitted to ask where it hurts and how much. In his earlier work, he acknowledges concerns "that most administrators have neither the talent nor the time to scrutinize individual religious sentiments and that individuals may be less than candid or genuinely uncertain about what they believe."[175] But these judgments are inevitable, and they influence judgments of the other elements of a RFRA claim: "[I]n reality, courts consider burden in light of government interest and government interest in light of burden, striking a kind of balance."[176] An adequately sensitive court will be able to avoid disasters like *Ben-Levi*.

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169. FREE EXERCISE AND FAIRNESS, *supra* note 6, at 210.

170. Ben-Levi v. Brown, 136 S. Ct. 930, 930–31 (2016) (Alito, J., dissenting) (mem.).

171. *Id.* at 933.

172. FREE EXERCISE AND FAIRNESS, *supra* note 6, at 121.

173. *See supra* subpart II(C).

174. Thomas v. Review Bd. v. 450 U.S. 707, 715–16 (1981); FREE EXERCISE AND FAIRNESS, *supra* note 6, at 125 n.6.

175. FREE EXERCISE AND FAIRNESS, *supra* note 6, at 206.

176. *Id.* at 202.

Mutual opacity remains an obstacle: "[O]dd and unusual claims" are less likely to be persuasive.[177] As noted earlier, Greenawalt thinks a court's judgment will and should "depend at least partly on how most people would perceive the connection between the convictions and the degree of involvement."[178] This is, however, the least unfair approach. As he notes elsewhere, "in practice, the test may disfavor unpopular minority religions, but this difficulty is not crucial, given that the obvious alternative of no required exemptions is still less favorable for minority religions."[179]

Greenawalt's proposal, in essence, is that courts muddle through. There are potential dangers, but they have always been there. Courts can arrive at reasonably just outcomes if—it is a big if—they are as intelligent and sensitive as Greenawalt.

Conclusion

Greenawalt's exceedingly fact-specific casuistry invites Hobbesian skepticism to the extent that it requires daily confrontation with intersubjective opacity. This raises reasonable questions about the workability of the entire operation, at least when legislated into a vague rule such as RFRA. Greenawalt tries to address these questions by microscopically analyzing the facts of specific types of situations. Most of his answers make sense. That is the deepest significance of his work on religious exemptions.

Legislative accommodation predates the framing of the Constitution,[180] but, as Lupu and Tuttle have emphasized, the *principle* of religious accommodation "had never . . . appeared in our constitutional law" before *Sherbert*.[181] The Court subsequently limited the principle in a variety of ways: It did not apply it in taxation cases,[182] or cases involving internal government operations, or the disposal of government property.[183] It emphatically did not apply to claims made by prisoners.[184] Eventually the Court discarded it altogether, provoking Congress to reinstate it by statute in RFRA.[185]

There hasn't been enough reflection on the sheer novelty of this test. It is sometimes offered as if it were the original meaning of the Free Exercise

177. GREENAWALT, *supra* note 7, at 142.

178. *Id.* at 124.

179. KENT GREENAWALT, INTERPRETING THE CONSTITUTION 266 (2015).

180. *See* GREENAWALT, *supra* note 7, at 25.

181. LUPU & TUTTLE, *supra* note 107, at 192.

182. Hernandez v. Comm'r, 490 U.S. 680, 700 (1989); United States v. Lee, 455 U.S. 252, 260 (1982).

183. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450, 452 (1988); Bowen v. Roy, 476 U.S. 693, 699 (1986); Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986).

184. O'Lone v. Estate of Shabazz, 482 U.S. 342, 351–53 (1987).

185. *See supra* notes 1–2 and accompanying text.

Clause, but in fact it is a judicial construct that was invented in 1963.[186] We are still learning how it works. That means we are still learning whether it can work.

So the commonsensical, deliberately atheoretical formulations that Greenawalt offers are an important contribution. They are a persuasive piecemeal defense of the practice of religious exemptions. More importantly: They show that the thing can be done.

186. The notion that it is the original meaning is refuted in Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 948 (1992). It could nonetheless be the most appropriate interpretive construct. I agree with Greenawalt that "[t]he evidence about any original understanding about compelled exemptions is sufficiently indecisive so that the issue is most sensibly resolved in terms of free exercise values and the appropriate functions of courts and legislatures." FREE EXERCISE AND FAIRNESS, *supra* note 6, at 25.

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A Civics Lesson

LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS. By Catherine J. Ross. Cambridge, Massachusetts: Harvard University Press. 2015. 368 pages. $39.95.

William S. Koski*

Introduction

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1]

With that famous passage, the Supreme Court established the high watermark for protection of public school students' right to free speech. With the publication of *Lessons in Censorship* some forty-five years later, Professor Catherine Ross forcefully argues that "[a] mix of ignorance about, indifference to, and disdain for the speech rights of students permeates society"[2] leading to "rampant constitutional violations that plague our schools."[3] Not only does the erosion of free speech in school harm the individual student, Ross argues it also threatens the very core of our democracy when schools fail to model and inculcate the norms of citizenship that include the right to express and the obligation to tolerate a multitude of ideas and perspectives. Simply put, suppression and punishment of student speech threatens to undermine the constitutional bulwark that protected the Tinker and Eckhardt children the days they wore their black armbands to school in protest of the Vietnam War.[4] "That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[5]

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1. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

2. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 1 (2015).

3. *Id.* at 287.

4. *Tinker*, 393 U.S. at 503–04.

5. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

Lessons in Censorship is not only a comprehensive and colorfully written treatment of the Court's student-speech jurisprudence, but it also reminds us that we must remain vigilant in our protection of free speech in the classroom and the courtroom. After bringing clarity to the Court's often opaque student-speech decisions in the wake of *Tinker*, Ross demonstrates that modern free speech controversies go beyond the schoolhouse gate and reflect the heated battles being waged in the culture wars. Whether it's banning a t-shirt that says "All the Cool Girls are Lesbians" because it's "offensive to some people" in one school district,[6] or banning another elsewhere that proclaims "Be Happy, Not Gay" because it disparages a group of students,[7] Ross explains that suppression of speech isn't solely a conservative or progressive impulse. Such sensational examples of what Ross calls "pure" speech aside,[8] Ross also aims to show how speech that seems less valuable in the marketplace of ideas, such as insubordinate, hurtful, uncivil, or just-plain-offensive speech (what Ross calls *sans-gêne* speech),[9] ought to be protected in schools so long as the speech does not materially disrupt the educational process. Along the way, Ross offers an analytic approach to and ways of thinking about the law that would forcefully protect free expression without creating disruption in school.

Here I first summarize *Lessons in Censorship* with a focus on its contributions to First Amendment analysis. I then probe Ross's argument that protection of all pure student speech, even that which is hurtful, insubordinate, and offensive, is essential to the school's duty of modeling and transmitting the values of citizenship. Though we must value the robust exchange of ideas, even at the expense of allowing hurtful and disrespectful language, I argue below that we must also ask our schools to convey that the values of civility, mutual respect, and safety for all persons are part of our duties of citizenship. In schools especially, where learning is the central mission, we must ensure that all students feel safe and free from threat or harm so that they are free to learn. Moreover, in the often chaotic hallways of our schools, administrators must constantly make split-second decisions on how to respond to insubordinate or offensive speech that may also be tangled up with perceived threats or subtle conduct. Navigating free speech landmines under such conditions is challenging.

This tension between protecting student speech and ensuring civility and safety is real. But resolution is possible. As Ross points out, school administrators can respond constructively to insubordinate, hurtful, or *sans-*

6. ROSS, *supra* note 2, at 139 (citation omitted).

7. *Id.* at 187.

8. Ross calls "'pure' student speech" that which "isn't school sponsored, lewd, or pro-drug." *Id.* at 129–30.

9. *Id.* at 71–73.

gêne speech.[10] In addressing such—let's call it "low value"—speech, schools need not suspend, expel, or otherwise harshly punish students. Exclusionary discipline is unnecessary and unproductive for such minor offenses, particularly where there are better methods for both preventing and responding to those infractions. Through social–emotional learning and restorative justice practices, school-wide positive behavioral interventions, and other culture-shifting programs, schools can establish a climate in which students internalize the values of mutual respect, social responsibility, and freedom from threat.

Stated differently, what at first appears to be a free speech problem may be better characterized as a problem of appropriate school-discipline practices. I see no deep controversy or problem over free speech in principle; rather, there are simply inappropriate administrative responses to everyday, yet ambiguous and complicated, interactions in school that may involve protected speech. The reduction and even elimination of exclusionary school discipline for minor, often discretionary, offenses, such as disruption of school activities or willful defiance,[11] not only protects student speech, I argue, but it also narrows the school-to-prison pipeline.

I. Overview of *Lessons in Censorship*

The ambitious agenda of *Lessons in Censorship* is to make sense of student-speech controversies in our schools—ranging from online bullying, to adolescent humor, to unpopular political speech—and explain the constitutional law that governs student speech. Ross, an unrepentant defender of student speech, argues that the lack of legal clarity, lack of understanding among school administrators,[12] and the fear of controversy on campuses[13] have lead both administrators and courts to censor expression. This, she argues, is not only an affront to constitutional rights but also a challenge to our democracy. "Schools have a unique opportunity and obligation to demonstrate the importance of fundamental constitutional values as an integral part of preparing students to participate in a robust, pluralist democracy," she argues.[14] "And the best way of transmitting values is by modeling them—showing how the principles that govern us work in action."[15]

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10. *Id.* at 67.

11. *See, e.g.*, CAL. EDUC. CODE § 48900(k)(1) (West 2017).

12. ROSS, *supra* note 2, at 3–4 (stating that a "complex series of tests" causes a lack of legal clarity and misunderstanding among judges, which makes it "expected that teachers, principals, and school board members should fail to understand [the] legal intricacies").

13. *See id.* at 74 ("Administrators want to avoid public controversy that might call their performance into question, and school board members presumably want to be reelected.").

14. *Id.* at 6.

15. *Id.*

It's hard to argue with that proposition in theory. But schools are messy. Should the principal tell a white student that she can't wear a Confederate flag to a school with a large African-American population? If the school sponsors a Day of Silence to show support for LGBT youth, must it also tolerate a group of evangelical Christian students who oppose homosexuality informally holding a "Day of Truth," and donning t-shirts that say "My Day of Silence"? Ross recognizes the inherent tension in instilling "intolerance for intolerance in elementary and secondary schools"[16] but demands that the "First Amendment doesn't permit schools to silence or punish students for what they say merely because their opinions differ from the school's preferred values."[17]

It is against that backdrop that *Lessons in Censorship* weaves together three stories: how our nation's most volatile racial, religious, and sexual disagreements inevitably find their way onto K–12 campuses; how an increasingly conservative Supreme Court has eroded student-speech rights; and how schools themselves frequently fail to foster the free exchange of ideas so essential to citizenship and democracy. But this is not a story of a lost cause because Ross concludes with practical ideas for protecting speech without materially disrupting the classroom.

A. Bringing Clarity to a Muddled Free Speech Jurisprudence

In the first section of the book, Ross explains the history of the Supreme Court's treatment of the Speech Clause of the First Amendment, with a focus on cases arising from the public school context.[18] Here Ross accomplishes the delicate task of writing for a sophisticated legal audience while at the same time making her prose and analysis accessible to parents, teachers, and school administrators. In less skilled hands, for instance, Ross's tutorial in the common law method would prove tedious for a legal audience, but Ross manages to maintain the attention of both audiences with her clear and engaging voice.

Though the Court initially took a narrow view of the Speech Clause beginning in the 1920s by upholding government censorship of speech, particularly that which expressed politically dissident views, Ross explains how the view of Justices Brandeis and Holmes (channeling John Stuart Mill)—that the "marketplace of ideas" was the best crucible for arriving at the "discovery and spread of political truth"—eventually prevailed.[19] When

16. *Id.* at 7.

17. *Id.* at 8.

18. *Id.* at 13.

19. *Id.* at 14–15 (quoting Whitney v. California, 274 U.S. 357, 375–76 (Brandeis, J., concurring)).

the argument first surfaced in *Minersville School District v. Gobitis*,[20] a majority of the Court refused to extend the marketplace to the classroom and cited "national cohesion" in upholding the school district's refusal to exempt young Jehovah's Witnesses from reciting the Pledge of Allegiance.[21] But that deference to local authorities was short-lived; when school districts and localities, emboldened by *Gobitis*, adopted strict compulsory-Pledge laws that would offend the religious beliefs of Jehovah's Witnesses and subject them to expulsion, public ridicule, and worse should the religious schoolchildren refuse to take the Pledge.[22] It was against that backdrop that the Barnette sisters refused to salute the flag and recite the Pledge, were consequently expelled from school, and sued the state of West Virginia for violating their free speech rights.[23]

"In an unusual somersault," Ross explains, the *Barnette*[24] Court reversed the *Gobitis* decision and issued a resounding defense of public school students' right to free speech.[25] While the Court could have declared West Virginia's actions unconstitutional on religious freedom grounds, it took the more ambitious route of establishing the right to be free from coerced speech generally. Ross further explains, the Court "resisted the temptation to treat a question involving the rights of schoolchildren as less significant than other controversies."[26] Indeed, schoolchildren particularly should be free to speak their minds because school is the place where children learn lessons in liberty and tolerance.

It would be more than twenty-five years before the Court would take another student-speech case (they have reviewed only four such cases since *Barnette*), but during that hiatus from student-speech cases, the Court continued to protect free speech outside the schoolhouse gate, while recognizing that certain speech—such as "true threat[s]"—could be punished,[27] and all speech could be subjected to "reasonable 'time, place, and manner' regulations."[28] In 1969, hardly was there a more controversial issue than America's participation in the Vietnam War. Naturally, that issue found its way into our schools, famously on the black-armbanded sleeves of the

20. 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

21. *Id.* at 591, 595–600.

22. ROSS, *supra* note 2, at 17.

23. *Id.* at 16, 18.

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

25. ROSS, *supra* note 2, at 18.

26. *Id.* at 21.

27. *See* Watts v. United States, 394 U.S. 705, 707–08 (1969) (per curiam) (finding that a criminal statute prohibiting threats against the President "must be interpreted with the commands of the First Amendment clearly in mind" and requires the Government to prove a true threat rather than hyperbole).

28. Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (quoting Cox v. New Hampshire, 312 U.S. 569, 575–76 (1941)).

Tinker and Eckhardt children. In what would prove to be the pinnacle of protection of speech in schools, the Court overturned the Des Moines schools' rule against wearing black armbands as a violation of the children's speech rights.[29] But, as Ross points out, the Court did not stop there. It went on to establish an enduring and workable constitutional standard, "one that would balance the need for order with the right to free speech."[30] To justify suppression of student speech, school officials must demonstrate that the student speech "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school," and collides "with the rights of other students to be secure and let alone."[31] Recognizing that this standard departs from the "strict scrutiny" afforded speech outside of school, but that it also does not allow schools unfettered discretion to censure student speech, Ross labels this standard "demanding" and establishes it as the default test for the constitutionality of speech regulation in schools.[32] Having established the pinnacle of student-speech protection, it would only be downhill from there for the Court.

Elucidating the second story of *Lessons in Censorship*, Ross opens Chapter 2 by describing how the *Tinker* Court, led by liberal Justices Warren, Fortas, Marshall, Brennan, and Douglas, was realigned with President Nixon's appointing to Chief Justice the conservative Warren Burger and would drift further rightward under Chief Justices William Rehnquist and John Roberts.[33] As Ross explains, the Burger Court took the first swipe at *Tinker* in 1986 when it upheld the suspension of Matthew Fraser for his nominating address of a friend running for school office that "might easily have been dismissed as a mix of juvenile humor and miscalculation about adult tolerance."[34] In *Bethel School District No. 403 v. Fraser*,[35] the Court, which labeled Fraser's speech "an elaborate, graphic, and explicit sexual metaphor," did not object to the viewpoint or content of the speech, but rather ruled that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [Fraser's] would undermine the school's basic educational mission."[36]

Two years later, the Rehnquist Court further eroded *Tinker*, Ross argues, by holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related

29. *See supra* note 4 and accompanying text.

30. ROSS, *supra* note 2, at 29.

31. *Id.* at 29–30 (describing what is known as the *Tinker* test).

32. *See id.* at 33–34 (stating that *Tinker* remains "the starting point for analyzing student speech rights").

33. *Id.* at 34–37.

34. *Id.* at 38.

35. 478 U.S. 675 (1986).

36. *Id.* at 678, 685.

to legitimate pedagogical concerns."[37] By simply categorizing student speech as "school-sponsored" rather than *personal* speech, Ross argues, the Court not only complexified the Speech Clause doctrine, it provided a "get out of jail free" card to any administrator who could shoehorn student speech into "school-sponsored" speech that might be reasonably perceived as bearing the "imprimatur of the school."[38] Then came the Roberts Court's turn to carve out an exception—albeit a narrow one—to *Tinker*'s robust protection of student speech. In upholding the suspension of Joseph Frederick for his goofy parade-route banner that proclaimed "BONG HiTS 4 JESUS,"[39] the Court not only explicitly stated that the *Tinker* rule is not the sole test for the restriction of student speech but also, for the first time, permitted the school to regulate the content—not merely the manner—of student speech.[40] Narrowly, a school could prohibit speech that promotes the use of illegal substances,[41] but more broadly, the decision begs the question of what other speech could be banned based on its content.

Ross later summarizes and clarifies the Court's student-speech decisions with a handy infographic and the simple rule that schools may only silence student speech in three circumstances: (1) if it is the student's own (pure) speech, it cannot be suppressed unless the school "reasonably anticipate[s] material disruption" or the violation of the rights of others; (2) if the speech appears to be school sponsored, it may be censored for "legitimate pedagogical reason[s]"; and (3) if the speech is "lewd, pro-drug, threatening, inciting violence, or defamatory," it may be censored and punished full stop "unless the pro-drug speech is 'political.'"[42] Notwithstanding this clear formulation, at the close of Chapter 2, Ross laments the Court's proliferation of categories and standards that undermine *Tinker*'s robust and workable test and punt to the lower courts and school officials the job of applying the incoherent and general exceptions to the rule of *Tinker*.[43]

B. Expansion of the Exceptions

In Part II of the book, "Pushing Porous Boundaries," Ross argues that school administrators and courts alike have taken advantage of the vague and general departures from the *Tinker* standard to crack down on speech that

37. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

38. ROSS, *supra* note 2, at 52–54 (quoting *Hazelwood*, 484 U.S. at 281 (Brennan, J. dissenting)).

39. Morse v. Frederick, 551 U.S. 393, 397 (2007).

40. *Id.* at 396–97, 403; *see* ROSS, *supra* note 2, at 57 ("[T]he decision inadvertently admitted that the content of expression—including expression protected by the Speech Clause—may determine how much liberty the speaker has to voice it, at least in school.").

41. *Morse*, 551 U.S. at 403 (holding that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use").

42. ROSS, *supra* note 2, at 294.

43. *Id.* at 62.

would be protected under *Tinker*.[44] In Chapter 3, Ross argues that schools have stretched *Fraser*'s exception for "lewd" speech to ban "inappropriate," "off-color," and "insubordinate speech."[45] Seeking to restore *Fraser*'s boundaries, Ross first identifies what I will later argue is at the heart of the problem: the manner in which schools respond to such "low-value" speech. Generally speaking, Ross explains, schools can take an instructional approach that treats "inappropriate" student speech and language as an opportunity to teach and model socially acceptable behavior; or schools can punish such speech with either on-campus penalties such as barring students from activities and reducing student grades; or schools can exclude students from school through suspension and expulsion.[46] The former, she concedes, is not constitutionally barred, while the latter two raise constitutional concerns.

Take *sans-gêne* speech, for instance. Ross is technically correct in arguing that a distasteful student campaign speech that made fun of an assistant principal for stuttering (even though he had no such speech impediment), or a pregnant Crystal Kicklighter's defiant conduct and crude insult to a male classmate that "[y]ou just mad because you ain't got nobody pregnant," or Ryan Posthumus's comment to his buddy that the dean of students was a "dick" are not lewd and therefore can't be shoehorned into *Fraser*, as the schools attempted to do in each case.[47] But it is far from clear that such inappropriate speech couldn't be interpreted by administrators as "genuinely insubordinate" speech or conduct that requires some type of response.[48] Ross is keenly aware that

> [t]he harm genuinely insubordinate speech can cause is clear. The problem is how to define and confine the scope of the speech educators can legitimately punish as insubordinate, especially when they point to intangibles such as "tone of voice" or facial expression that students will never be able to rebut.[49]

Precisely. That is the problem; a problem that should not reach constitutional proportions, because even First Amendment heavyweights such as Eugene Volokh and Kent Greenawalt haven't been able to craft a widely implemented, bright-line rule that would meaningfully "help educators (or their attorneys) sort out the distinctions between students who have an insubordinate attitude and those who engage in insubordinate conduct."[50] Parsing conduct from speech in the fluid and sometimes chaotic

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44. *Id.* at 65–66.
45. *Id.*
46. *Id.* at 67.
47. *Id.* at 76, 78–81.
48. *Id.* at 83.
49. *Id.*
50. *Id.*

environment of a school weight room, student commons, or seminar room should not subject teachers and administrators to constitutional liability.

I'll return to this later, but for now it seems fair to recognize that the split-second decisions of school officials in response to perceived minor offenses should be only rarely subjected to constitutional scrutiny. Better to avoid *Tinker* and *Fraser* altogether, as Ross recognizes when she notes that "[r]eflective exercise of common sense in the first instance instead of severe penalties for teachers or students would help to defuse most of these controversies."[51]

Turning from the outer limits of *Fraser* to the expansion of *Hazelwood*, Ross argues in Chapter 4 that school "[o]fficials exploit the construct of school sponsorship to roll students' rights further back than the Supreme Court had envisioned. . . . [S]chools have pushed relentlessly to bring virtually every sort of speech on campus within the definition of *school sponsored*, including the spontaneous speech of students in their classrooms."[52] Although I have no doubt that some schools have justified suppression of student speech on the ground that it bears the school's imprimatur—Ross provides several outrageous examples of such post hoc rationalizations[53]—such a bold assertion begs empirical support. The empirical evidence in *Lessons in Censorship* is derived from reported cases, media accounts, and "the websites of reputable public interest organizations."[54] Ross suggests that such selective data collection probably only represents the tip of the suppressive iceberg due to the hurdles in bringing legal action.[55] I have represented hundreds of students in school-discipline matters (many of which implicated First Amendment concerns), and I heartily concur with the notion that many potential free speech infringements go unreported and unprosecuted. Yet it has not been my experience that cases involving pure speech or certainly those that suggest content or viewpoint censorship, as opposed to the murky insubordinate speech–conduct allegations, are not pursued. My view is that a few schools may have pushed the limits of *Hazelwood* in defense of censorship, but schools generally seem to want to steer clear of First Amendment controversy.

Scope of the threat aside, schools *have* invoked *Hazelwood* to ban theatrical performances (e.g., *The Crucible*) and censor school newspapers

51. *Id.* at 91.

52. *Id.* at 96.

53. *See id.* at 96–97 (describing with skepticism school-administrator rationalizations for censorship in which the censored speech alleged to be school sponsored was highly critical of the school); *see also id.* at 99–109 (describing specific cases that involve school-administrator rationalizations for censorship that Ross views skeptically).

54. *Id.* at 5.

55. *Id.*

(e.g., a review of the films *Mississippi Burning* and *Rain Man*).[56] This despite the fact that even if such speech bears the imprimatur of the school, the censorship may not be reasonably related to a legitimate pedagogical concern. Rather, it is merely an effort to avoid controversy in the community. Ross also raises the specter of teachers stifling classroom discussion and even engaging in viewpoint discrimination under *Hazelwood*'s rationale, but she lucidly preempts the effort to bring student discussion under the banner of school-sponsored curriculum by arguing that such personal speech cannot be perceived to bear the school's imprimatur.[57] More important, she warns, if schools convince courts that classroom speech is school sponsored and cannot deviate from the school's viewpoint, those "classrooms could become precisely the closed-circuit environment the First Amendment forbids."[58] This is a threat to critical thinking and democratic values, indeed.

C. *Threats to* Tinker

Having cabined *Fraser* and *Hazelwood* to their original parameters, *Lessons in Censorship* turns in Part III to several contemporary and thorny challenges to student speech that threaten *Tinker*'s protective ruling. Here Ross analyzes specific types of speech that schools have restricted even using *Tinker*'s two-pronged test of "material disruption" or infringement on the "rights of others."[59] Those speech types include the labeling of speech as "threatening" and overblowing minor inconveniences and distractions to material disruptions; the stated efforts to protect the rights of others by punishing speech that bullies individuals or disparages groups; and the censoring of online taunts, and off-campus and *sans-gêne* speech.[60]

In the wake of Columbine, Paducah, Jonesboro, Santee, and other horrific episodes of gun violence on school grounds perpetrated by students, administrators have become understandably wary of even the slightest threat. Ross argues, however, that these fears are sometimes (often?) overblown, as schools treat as a "true threat"—and therefore beyond the First Amendment's protection—even those student remarks that are not concrete enough to justify restrictions on speech and punishment.[61] Ross helpfully isolates three factual patterns that place in stark relief the difficult choices that administrators must make: "private expression" that was never communicated to others; "recipient projection" in which a person

56. *See id.* at 101–02 (recounting a high school principal's decision to cancel a student production of *The Crucible*); *id.* at 105–06 (describing resulting litigation after a middle school principal blocked publication of student reviews of *Rain Man* and *Mississippi Burning*).

57. *Id.* at 120–21 (arguing that a student's profane speech can't be said to be school sponsored unless the teacher adopts such speech).

58. *Id.* at 125.

59. *Id.* at 131.

60. *Id.* at 129–30, 160, 207.

61. *Id.* at 142–43.

unreasonably misconstrues speech as threatening; and "stale expression" that was held privately for so long that it is unlikely to lead to action.[62] I'd add to the confusion the sometimes lack of cultural competency or implicit bias that infects many interactions with students of color and may lead to recipient projection. Ross argues that courts give too much deference to school officials tasked with making such nuanced determinations, but she does recognize that the "(probability of harm) × (severity of harm)" assessment is the necessary and appropriate way to analyze such perceived threats.[63]

Closely related are those situations in which "some school officials . . . push the boundaries of 'material disruption' beyond recognition."[64] Essential to this argument is Ross's premise that the *Tinker* standard of material disruption is "not designed to be easily satisfied" because school officials must be able to point to specific "facts which might reasonably have led school authorities to forecast . . . material interference"[65] that amounts to "more than a . . . desire to avoid . . . discomfort and unpleasantness."[66] What if political speech might lead to student demonstrations on campus? What if David Griggs's t-shirt with an M-16 rifle or Zachary Guiles's t-shirt with an impolite montage of words describing President Bush might cause arguments in the classroom?[67] "Heckler's vetoes" aside, Ross makes a compelling case that the censorship of such speech is often an overreaction given the high bar that *Tinker* sets and the "undifferentiated fear of controversy" that the situations present.[68]

Perhaps the most delicate student-speech controversies are those Ross tackles in Chapters 6 and 7—harmful words that may threaten the rights of others such as group disparagement and hate speech, insults hurled at individuals, and verbal bullying.[69] Incidents involving these speech forms are made more difficult by the *Tinker* Court's vague and unexplained second category of speech that may be punished—that which trammels on the rights of others—and the lower courts' avoidance of interpreting that language.[70] Given that vacuum, Ross stakes out the speech-friendly position (bolstered by Judge Richard Posner's opinion in *Nuxoll* ex rel. *Nuxoll v. Indian Prairie*

62. *Id.* at 143.

63. *See id.* (suggesting the examination of the degree of risk and the potential severity of the risk with respect to the timing of the action, the investigation, and the penalties imposed).

64. *Id.* at 150.

65. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

66. ROSS, *supra* note 2, at 151 (quoting *Tinker*, 393 U.S. at 509).

67. *Id.* at 157.

68. *Id.* (explaining that the "normal background noise of schools" is insufficient to constitute a material disruption and exemplifying the argument with cases in which the school has censored speech that is far from meeting the high standard of material disruption).

69. *Id.* at 160, 207.

70. *Id.* at 160–61 (noting that the Supreme Court has never applied the "rights of others" prong from *Tinker* and lower courts have mostly ignored it).

School District #204)[71]: "[T]he rights of others rubric alone never provides a sufficient rationale for censoring student speech, no matter how unpleasant. *Tinker*'s second prong has been found to justify censorship only when accompanied by a reasonable apprehension of material disorder."[72] Ross may be correct in her reading of the case law, but I'm less persuaded that the rights of others cannot be an independent reason for suppressing speech. After all, the Court did cite it separately from material disruption.[73]

More important, as I explore below more fully, children and adolescents require a sense of safety and belonging to be prepared to learn, and it is the school's responsibility to create that safety, the freedom from verbal abuse, so that all children—whether disfavored minorities or social outcasts—can learn.[74] Let's call it the individual's right to learn or at least be free from serious verbal abuse.[75] Does this necessarily mean that schools should punish such harmful speech? No, there are better alternatives. But Ross seems less protective of those students who feel and experience a real lack of safety that affects their learning. Yet she is not so unwavering in her position that the rights of others are unimportant to the free speech calculus. To the contrary, she lays out a thoughtful "infringement matrix" for school officials to employ before relying on the rights of others to censor student speech, which includes how aggressive the speech was, the effect the speech had on the targeted students, and the ages of the targets.[76]

In Chapter 7, Ross takes her analysis of hurtful and *sans-gêne* speech off campus and online. Much ink has been spilled in recent years on the question of under what circumstances and on what grounds schools may regulate online hate speech and cyberbullying.[77] Ross carefully analyzes the

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71. *See* 523 F.3d 668, 672 (7th Cir. 2008) (noting that there is no legal right to be free from criticism).

72. ROSS, *supra* note 2, at 161.

73. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that speech that is a material disruption *or* invades the rights of others is not constitutionally protected).

74. Here I am not talking about a *legal* responsibility to create a safe learning environment, but rather a pedagogic responsibility. *See infa* subpart II(C).

75. I agree with Ross that "tepid" disparagement or even one-time "scalding" name-calling should at most draw a firm rebuke, but repeated, serious verbal disparagement that creates an unsafe learning environment may require heightened intervention. *See* ROSS, *supra* note 2, at 202 (arguing that *Tinker* "protects bullying speech unless the school has legal grounds to restrain it," and the legal grounds could potentially be found in an individual's right to educational opportunity).

76. *Id.* at 195.

77. *See generally* DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); AMY ADELE HASINOFF, SEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY, AND CONSENT (2015); Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641 (2011); Karly Zande, *When the School Bully Attacks in the Living Room: Using* Tinker *to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103 (2009); Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845

emerging legal regime that "requires schools to show a connection between off-campus speech and events at school before schools can punish student expression,"[78] and offers her own view as to where the line between the school's authority and the parent/guardian's authority should be drawn. As headline-grabbing as online bullying, sexting, and disparaging school authorities in social media may be, Ross makes it clear that without a close nexus between the speech and school and without satisfying *Tinker*'s requirements, the school cannot punish students posting in the privacy of their bedrooms.[79]

D. Protecting Speech

In her concluding chapter, "Living Liberty," Ross reemphasizes her lodestar principle that schools must provide good models by respecting rights, and further adds that "less authoritarian environments promote mutual respect between educators and [students]" leading to better academic results and fewer disciplinary problems.[80] I concur with this ideal. And Ross goes further by making several concrete recommendations, including better teacher and administrator training in civil liberties and First Amendment rights, vigilance on the part of parents and students, and a less deferential judiciary when it comes to adjudicating student-speech matters.[81] I agree with these proposals and I will offer a few of my own that focus on how schools can prevent or diminish student-speech controversies and appropriately respond to them when they occur, thus avoiding Speech Clause challenges. But first, I offer a somewhat broader view of the school's role in teaching "citizenship."

II. Civics Lessons

We ask our schools to teach our children to become citizens. It is a legitimate and understandable purpose of education. But complications arise when we define—or courts define—what it means to be a citizen and therefore which civics lessons—both formal and informal—our schools must

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(2010); Jamie L. Williams, *Teens, Sexts, & Cyberspace: The Constitutional Implications of Current Sexting & Cyberbullying Laws*, 20 WM. & MARY BILL RTS. J. 1017 (2012).

78. ROSS, *supra* note 2, at 207.

79. *See id.* at 210, 224–27 (noting that the Supreme Court's decisions make it clear that "[t]he school's authority generally ends at the campus perimeter" and the majority of appellate decisions have held that schools may only discipline students for off-campus speech "if threshold conditions are met"). While there is a circuit split on how to define these threshold conditions, most lower courts agree that *Tinker* should govern and require a nexus between the speech and the school community. *Id.* at 224–27.

80. *Id.* at 289.

81. *See id.* at 295–98 (recommending, *inter alia*, that school administrators have at least a rudimentary understanding of the governing law, that parents and other citizens outside of the school community take ownership of the important roles they play in the "battle over student speech," and that judges rule less deferentially in student-speech cases).

teach.[82] *Lessons in Censorship* provides a robust case for the respect for individual liberty as the central pillar of citizenship. But in any reasonable understanding, "citizenship" is more complicated and the duty and role of schools to teach citizenship goes beyond respect for individual liberty.

A. Liberty, Autonomy, Individual Rights, and Democracy

It's difficult to argue with Ross's idea—what she calls "living liberty"—that "[s]chools teach rights best by honoring them, by modeling a government that means what it says about individual liberty, thus creating an environment in which liberty can flourish. Students for their part learn rights by living them in a respectful setting."[83] Schools are viewed as laboratories for democratic citizenship and spaces that model good citizenship, and in the process, help cultivate citizenship. This idea is a conception of civic education that is consistent with liberal theories of education that aim to inculcate individual rights and liberties even though they manifest themselves politically in the form of freedom of expression, formal equality under the law, and respect for privacy (i.e., freedom from unwarranted search and seizure).[84] Liberal theorists "also typically emphasize autonomy, the freedom to develop and revise a life plan, and the need for an informed citizenry capable of critical thinking so that political participation can be effective."[85]

Thus, when schools engage in viewpoint repression—e.g., permitting students to honor LGBT rights through a "Day of Silence," yet censoring an evangelical Christian student for wearing a "Be Happy, Not Gay" t-shirt—they are squelching the robust debate that our democracy requires. Or, when school officials punish students for openly criticizing their coaches or teachers,[86] they implicitly teach that our democratic institutions will not tolerate dissent or the hearing of grievances. These are relatively easy cases with teachable moments in which schools ought to allow discourse, disagreement, and lessons in our classically liberal citizenship.

But we demand more of our citizens than autonomy and respect for individual rights, and schools must similarly take a more expansive view of what it means to be a citizen.[87] The liberal tradition agrees with this as well.

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82. For a succinct discussion of the many dimensions and contested definition of "citizenship," see Dominique Leydet, *Citizenship*, STAN. ENCYCLOPEDIA PHIL. (Aug. 11, 2011), http://plato.stanford.edu/archives/spr2014/entries/citizenship/ [https://perma.cc/XW8K-56YW].

83. ROSS, *supra* note 2, at 288.

84. ROB REICH, BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION 11 (2002).

85. *Id.*; *see also* AMY GUTMANN, DEMOCRATIC EDUCATION 50–52 (1987) (discussing the school's role in teaching "deliberative" or "democratic" character traits).

86. ROSS, *supra* note 2, at 82.

87. For a comprehensive discussion of the differing approaches to teaching "citizenship" and the potential conflicts that arise among them, see generally Joel Westheimer & Joseph Kahne,

B. Civility, Tolerance, Social Cohesion, and Democracy

One point of civic education in a democracy is to raise free and equal citizens who appreciate that they have both rights and responsibilities. Students need to learn that they have freedoms, such as those found in the Bill of Rights in the U.S. Constitution (press, assembly, worship, and the like). But they also need to learn that they have responsibilities to their fellow citizens and to their country. This requires teaching students to obey the law, not to interfere with the rights of others, and to honor their country, its principles, and its values. "Schools must teach those traits or virtues that conduce to democratic character: cooperation, honesty, toleration, and respect."[88]

Along with the rights of citizenship come responsibilities to our fellow citizens.[89] Take hate speech, for example. Disparagement of groups or

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Educating the "Good" Citizen: Political Choices and Pedagogical Goals, 37 POL. SCI. & POL. 241 (2004), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/430F5F14810632DD0A0E99812E9AF1D4/S1049096504004160a.pdf/div-class-title-educating-the-good-citizen-political-choices-and-pedagogical-goals-div.pdf [https://perma.cc/5K5W-VFNM]. *See also* CAMPAIGN FOR THE CIVIC MISSION OF SCHS., GUARDIAN OF DEMOCRACY: THE CIVIC MISSION OF SCHOOLS (Jonathan Gold et al. eds., 2011) http://civicmission.s3.amazonaws.com/118/f0/5/171/1/Guardian-of-Democracy-report.pdf [https://perma.cc/4A26-CALT].

88. Jack Crittenden & Peter Levine, *Civic Education*, STAN. ENCYCLOPEDIA PHIL. (May 30, 2013), http://plato.stanford.edu/archives/sum2013/entries/civic-education/ [https://perma.cc/97US-FC6B]. For an elegant and thoughtful argument that children in liberal democracies must be educated in both "free and equal citizenship," as well as a "shared way of public life" which includes "an active commitment to the good of the polity" and "a respect for fellow citizens and a sense of common fate," see EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY 2–3 (1997). *See also* IAN MACMULLEN, CIVICS BEYOND CRITICS: CHARACTER EDUCATION IN A LIBERAL DEMOCRACY 20–31 (2015) (discussing the proper role, degree, and scope of civic character education); William Galston, *Civic Education in the Liberal State*, *in* LIBERALISM AND THE MORAL LIFE 89, 89 (Nancy L. Rosenblum ed., 1989) (arguing that civic education in a liberal state that "embrace[s] fundamentally differing conceptions of choiceworthy lives" is "both necessary and possible").

89. Here I recognize that I come close to aping Chief Justice Burger's argument in *Fraser*:

> The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." . . . These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

individuals based on arbitrary and often immutable characteristics is unacceptable in public and private discourse, and schools should not shy away from addressing such offensive and hurtful speech. This is particularly necessary in a nation in which minority groups have been historically and routinely ostracized, dehumanized, and subordinated by hate speech.[90] While I recognize the difficult and mostly unsuccessful efforts of public school districts and college campuses to regulate hate speech by censoring and punishing such (difficult-to-define) speech, this does not mean that schools should idly sit by and tolerate disparaging speech that ultimately undermines democratic values in civil discourse and deliberation.[91] As I discuss below, schools should actively create a culture of tolerance, cohesion, and respect. This too is what it means for the school to be a laboratory for citizenship.[92]

Similarly, teachers need to ensure civility and respect for others and the learning environment.[93] As I've already discussed, in the hurly-burly of the school day, it is challenging to make the constitutional distinction between disruptive conduct—such as failure to comply with a teacher's instruction—that can be censured and protected speech.[94] Heated exchanges can be further problematic because teachers' perceptions of student conduct may reflect implicit racial bias or outright racial hostility. It is better to establish school-

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90. *See, e.g.*, U.S. DEP'T OF EDUC., DATA POINT: TRENDS IN HATE-RELATED WORDS AT SCHOOL AMONG STUDENTS AGES 12 TO 18 (July 2016), http://nces.ed.gov/pubs2016/2016166.pdf [https://perma.cc/6E24-ZZGU] (finding that, while incidences of hate speech in U.S. middle and high schools has decreased overall, the percentage of students called hate words based on their race, ethnicity, or sexual orientation increased in 2013 as compared to 2001); Scott Jaschik, *Epidemic of Racist Incidents*, INSIDE HIGHER ED (Sept. 26, 2016), https://www.insidehighered.com/news/2016/09/26/campuses-see-flurry-racist-incidents-and-protests-against-racism [https://perma.cc/S3RU-NFZS] (detailing a rise in the incidence of hate speech on U.S. college campuses in 2016, which included the use of blackface on social media and the graffitiing of swastikas and racist language in dormitories).

91. Ross recognizes this:

> Schools can transform offensive speech into teachable moments. In the real world children will grow up to live in, they will likely have to learn how to respond to speech they find objectionable and even unbearable without sinking to the offensive speaker's level or slugging him. It may be best to learn how to respond, whether by walking away or questioning, as a student under the watchful guidance of teachers rather than as an adult at a bar.

ROSS, *supra* note 2, at 186.

92. *See infra* Part II.

93. Ross also recognizes this; she says:

> The Constitution is no obstacle to teaching norms of civility, including the words not to be used in polite company that can get people fired from their jobs when directed at bosses, coworkers, or customers. It only prevents the school as an arm of the state from imposing a formal penalty with long-term repercussions on the wayward student for expression that the First Amendment places beyond the school's authority to regulate.

ROSS, *supra* note 2, at 67.

94. *See supra* notes 48–49 and accompanying text.

wide norms for appropriate conduct, model those norms through explicit curricula and activities, and avoid mistakes in the heat of the moment.

C. *Safety and Security*

"Bully!" The label is usually a show stopper. No one wants to be a bully and no one tolerates bullying. But the ease with which the term is deployed belies its complexity and nuance.

In Chapter 6, Ross aims to strictly define "bullying," accuses schools of over-diagnosing students as bullies, and specifically criticizes school officials for failing to distinguish between punishable conduct and protected speech.[95] Having represented many children and youth who were labeled "bullies" and recommended for expulsion, I am sympathetic to Ross's argument. But here's the rub: many (most?) of the bullies I've represented have themselves been exposed to bullying language and conduct, as well as to violence and trauma; in many instances they have identified or unidentified emotional disabilities. Naturally, I want to protect these putative bullies from expulsion, but, equally as important, I want schools to take seriously the culture of bullying that may have contributed to their behavior. Bullying is more than a single student's actions: it's a manifestation of a school's or a community's climate. Indeed, a culture of harsh discipline itself may be a contributor to bullying.[96]

Among the more sobering recent breakthroughs of neuroimaging and genetics has been the recognition that childhood trauma can cause changes in brain architecture and function, as well as gene expression and regulation.[97] These changes are detrimental to the child's capacity to learn. This means that children who have experienced trauma are more likely to face serious learning and behavioral challenges.

The young brain is particularly sensitive to environment and experience, and significant trauma or repeated stressful events can alter the functioning of the brain's neural circuits that regulate and manage stress.[98] A brain that

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95. *Id.* at 200 (recognizing that although good intentions may motivate administrators' efforts to reduce and control bullying, those efforts may still be in violation of First Amendment speech protections).

96. Alfie Kohn, *Why Punishment Won't Stop a Bully*, EDUC. WK. (Sept. 6, 2016), http://www.edweek.org/ew/articles/2016/09/07/why-punishment-wont-stop-a-bully.html?qs=bullying+the+bully [https://perma.cc/R634-ANMZ] (noting that punishment "is likely a hidden contributor to bullying, both because of what it models and because of its effects on the students who are punished"—because it is the deliberate use of power to make a child suffer, it may cause anger or frustration, it teaches that it is okay to use power over someone who is weaker, and it does not focus on the effects of an action on others).

97. My sincere thanks to Pamela Shyme for her research and summary of the literature regarding childhood trauma, its effects on brain architecture and functioning, and the consequences for behavior and learning.

98. *See* Nat'l Sci. Council on the Developing Child, *Excessive Stress Disrupts the Architecture of the Developing Brain* 2 (Ctr. on the Developing Child at Harvard Univ., Working Paper 3, 2014),

cannot regulate its response to stress, one that is set to "red alert," may cause a person to "flee, fight, or freeze" in response to common stressors, even if there is no danger.[99] In children, the result may be difficulty in concentrating, learning, or even sitting still.[100] Children whose brains are in hypervigilant mode may also erupt into rages, lash out at others, or hurt themselves.[101] But none of this behavior is completely volitional, though some of it may be labeled verbal bullying.

The problem is that a school with an unchecked culture of bullying, teasing, and taunting is not safe for children who have experienced childhood stress. And those children, in turn, may lash out with hurtful, offensive, and bullying language. Then administrators might punish the bully with suspension. Thus, a cycle of bullying is created. Below I discuss what to do about it.

III. Protecting Student Speech *and* Promoting Civility, Tolerance and Safety

In fulfilling their obligation to prepare our children to be citizens, public schools must not only "live liberty," they must also teach our students to respect one another's rights to be free from harm and create a safe environment where all children can learn. They must also teach civility and tolerance, and the democratic view that all citizens are equals. Invoking individual liberty to be uncivil, intolerant, or to treat others as political inferiors/subordinates is no good defense. Living liberty is not enough, or more precisely, it's not the only thing civic education requires.

Though these separate civic virtues/values are frequently aligned, tensions arise when students engage in hurtful, harmful, and offensive

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http://developingchild.harvard.edu/wpcontent/uploads/2005/05/Stress_Disrupts_Architecture_Developing_Brain-1.pdf [https://perma.cc/S5FV-LQBD] ("The neural circuits for dealing with stress are particularly malleable (or 'plastic') during the fetal and early childhood periods. . . . Toxic stress during this early period can affect developing brain circuits and hormonal systems . . . throughout the lifespan.").

99. *See id.* ("[C]hildren may feel threatened by or respond impulsively to situations where no real threat exists, such as seeing anger or hostility in a facial expression that is actually neutral, or they may remain excessively anxious long after a threat has pas.

100. *See id.* at 7 (suggesting that "children who exhibit symptoms related to abnormal stress responses" may "exhibit excessive fears, aggressive behavior, or difficulties with attention or 'hyperactivity'").

101. *See, e.g.*, DC'S CHILDREN'S LAW CTR., ADDRESSING CHILDHOOD TRAUMA IN DC SCHOOLS 2 (2015), http://www.childrenslawcenter.org/sites/default/files/CLC%20--%20Addressing%20Childhood%20Trauma%20in%20DC%20Schools--June%202015.pdf [https://perma.cc/G52C-KREH] (describing how "[t]raumatized children may develop hyper-vigilance," which, in turn, leads to "higher rates of school discipline referrals and suspensions, lower test scores and grades[,]" and a lowered likelihood of graduation); Kenneth A. Dodge et al., *Hostile Attributional Bias and Aggressive Behavior in Global Context*, 112 PROC. NAT'L ACAD. SCI. U.S. 9310, 9314 (2015), http://www.pnas.org/content/112/30/9310.full.pdf [https://perma.cc/QA3C-XM5Y] (finding that hypervigilance may lead to aggression in children).

speech. Rather than resolving these tensions by invoking the ultimate value of individual liberty and free speech, I claim that many, if not all, such tensions can be handled by wise administrative school policies. There is no need to ascend to high principle; there is just a need for wise principals.

Traditionally, schools might censor, exclude, or otherwise punish such speech under the banner of willful defiance of valid school authority or material disruption of school activities.[102] But those disciplinary practices, as Ross argues, raise serious First Amendment concerns.

Over the last decade or so, however, many schools and school districts have begun to recognize the damage caused by exclusionary school discipline. Such practices—often the first step on the school-to-prison pipeline—increase the risk of grade retention, dropout, arrest, and incarceration; create a climate of alienation and fear in schools; and disproportionately affect African-American and Latino students, economically disadvantaged students, and students with disabilities.[103] In response, schools have begun to develop and experiment with several promising practices that aim to create a school environment that will prevent behavior (and speech) that might previously have resulted in suspension, and interventions that respond to "willful defiance" and "disruption of school activities" not with exclusion,[104] but rather with accountability, restoration, and an opportunity for all to be citizens of the school community. As an added benefit, these practices also avoid the risk of squelching student speech, even that speech with little value in the marketplace of ideas.[105]

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102. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that student speech that "materially disrupts classwork" is not constitutionally protected and can be punished).

103. *See* Catherine J. Ross, *"Bitch," Go Directly to Jail: Student Speech and Entry into the School-to-Prison Pipeline*, 88 TEMP. L. REV. 717, 719–23, 735 (2016) (arguing that the practice of using exclusionary school discipline for minor offenses and language that does not materially disrupt the educational process helps to prime the school-to-prison pipeline and disproportionately harms students of color).

104. Several large, urban school districts—including Los Angeles and San Francisco—have banned the use of suspension for "willful defiance," while the State of California has followed suit for the early elementary grades and discourages its use at all levels. DANIEL J. LOSEN ET AL., THE CTR. FOR CIVIL RIGHTS REMEDIES, CLOSING THE SCHOOL DISCIPLINE GAP IN CALIFORNIA: SIGNS OF PROGRESS 6, 18 (2015), https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/summary-reports/ccrr-school-to-prison-pipeline-2015/UCLA15_Report_9.pdf [https://perma.cc/367V-MQZQ].

105. Ross broadly recognizes that schools can (and do) engage in creative interventions as a response to such speech:

> Throughout, I have offered examples of constructive interventions to problematic episodes involving student expression. I have emphasized the distinction between censoring or punishing speech and using protected but ill-advised, inappropriate, or offensive speech as the basis for teaching about norms of respect and civility in public discourse. Consistent with constitutional limitations, these lessons can take the form of private discussions with individual students or public discussions with a whole class, a grade level, or the student body and can even bring in parents and community groups

Here I will only summarize three promising school- and district-wide approaches to creating a safe environment while respecting student speech: school wide positive behavior intervention and supports; restorative justice practices; and social–emotional learning.

School wide positive behavior intervention and supports (SWPBIS) originated with the use of positive behavioral interventions and supports for children with disabilities, particularly those with emotional and behavioral disabilities. Starting from that individualized approach, educators and researchers developed a school-wide approach to discipline "that is intended to create safe, predictable, and positive school environments that are responsive to entire school populations' varying needs for certain types and levels of support."[106] Central to the SWPBIS strategy is the focus on changing adult behavior rather than punishing student behavior. Accordingly, SWPBIS practices: (1) define behavioral expectations that are valued in the school community; (2) teach those behaviors in various school settings; (3) reward students for compliance; (4) administer a tiered continuum of consequences for violations; and (5) continuously collect and analyze data to determine the causes of behavioral incidents and students' responsiveness to nonpunitive interventions.[107] What sets SWPBIS apart from other strategies for addressing student behavior is that it enjoys some twenty years of experience in almost every state and thousands of school districts.[108] More importantly, it works. SWPBIS is linked to a reduction in discipline referrals and an improvement in adults' perceptions of school safety.[109]

Much more could be said about SWPBIS, but for our purposes, the most salient feature of this intervention is its focus on how adult actions can create a school culture that results in fewer disciplinary referrals—including referrals for verbal incidents—and a reduction in exclusionary discipline for such low-level offenses.

Restorative justice (RJ) practices have become a critical component of behavioral management in schools that attempt to depart from zero tolerance and harsher punitive and exclusionary school discipline strategies toward

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if the grievances the speech generates seem to require dialogue with a broader audience.

ROSS, *supra* note 2, at 292.

106. Claudia G. Vincent et al., *Effectiveness of Schoolwide Positive Behavior Interventions and Supports in Reducing Racially Inequitable Disciplinary Exclusion*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION 207, 208 (Daniel J. Losen ed., 2015).

107. *Id.* at 208–09.

108. *School-wide Positive Behavioral Interventions and Supports (Tier 1)*, COUNTY HEALTH RANKINGS AND ROADMAPS (Feb. 4 2016), http://www.countyhealthrankings.org/policies/school-wide-positive-behavioral-interventions-and-supports-tier-1 [https://perma.cc/C5QJ-KCXN]

109. Robert H. Horner et al., *Examining the Evidence Base for School-Wide Positive Behavior Support*, FOCUS ON EXCEPTIONAL CHILD., Apr. 2010, at 1, 7–8.

measures that focus on inclusion and community building.[110] RJ practices center on three key pillars: accountability, community safety, and competency development.[111] RJ practices give "wrongdoers" opportunities to be held accountable to those they have harmed directly, enabling them to repair the harm they caused (as much as they possibly can).[112] Finally, RJ aims to increase prosocial skills of "offenders" by addressing underlying factors that lead youth to behave poorly and builds on the strengths of each individual.[113]

Restorative practices can take the form of conferences, restorative circles, and mediation. Conferences and mediation occur when an event has taken place that requires the involved parties to come together in order to come to a resolution.[114] Restorative circles can be both preventative, as a daily classroom practice that begins and ends each day, and reactive, used as needed when a conflict occurs.[115] A restorative circle can include just a class and the teacher (which is often the more preventative model), or in reaction to conflict, a circle may bring in other affected parties such as administrators, parents, and other family or friends.[116]

Evidence of RJ's success is more sparse than SWPBIS due, in part, to the fact that there is no singular RJ "model" and schools often implement RJ practices in an *à la carte*, often-haphazard manner. For our purposes, among the greatest assets restorative practices offer schools is their view of discipline from a lens of growth. Rather than leaving students out of the picture once they have broken a rule, restorative practices offer students a

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110. *See generally* Martell L. Teasley, Editorial, *Shifting from Zero Tolerance to Restorative Justice in Schools*, 36 CHILD. & SCHOOLS 131 (2014) (advocating for the research into and implementation of RJ and other less punitive methods in schools).

111. Gordon Bazemore, *What's "New" About the Balanced Approach?*, JUV. & FAM. CT. JUDGES, Feb. 1997, at 1, 3.

112. *See, e.g.*, Thalia González, *Socializing Schools: Addressing Racial Disparities in Discipline Through Restorative Justice*, *in* CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, *supra* note 106, at 151, 161–62 (describing a restorative justice policy focusing on students' ability to learn from their mistakes while addressing the needs of those affected by their misconduct).

113. *See* TREVOR FRONIUS ET AL., WESTED JUSTICE & PREVENTION RESEARCH CTR., RESTORATIVE JUSTICE IN U.S. SCHOOLS: A RESEARCH REVIEW 21 (2016), http://jprc.wested.org/wp-content/uploads/2016/02/RJ_Literature-Review_20160217.pdf [https://perma.cc/3J22-BCJ9] (finding positive increases in prosocial attitudes for participants in RJ).

114. *Id.* at 11 (explaining that restorative justice practices such as "victim–offender mediation conferences, group conferences, and various circles . . . [are used to] determine a reasonable restorative sanction for the offender").

115. *See* González, *supra* note 112, at 153 (admitting that RJ is often perceived as a way to respond to student misconduct, but arguing that proactive restorative exchanges have the greatest impact).

116. *See id.* at 160 (describing the use of restorative circles in classrooms to generally "support learning outcomes, set boundaries, and develop positive relationships" and also to resolve specific conflicts between particular parties).

way to remain part of the community and constructively learn from their actions.[117] In this way, restorative practices allow schools to frame low-value verbal incidents as teachable moments rather than punishable offenses.

"Social and emotional learning (SEL) is the process through which children and adults acquire and effectively apply the knowledge, attitudes, and skills necessary to understand and manage emotions, set and achieve positive goals, feel and show empathy for others, establish and maintain positive relationships, and make responsible decisions."[118] SEL came out of the recognition that the traditional view of education was not comprehensive and that there should be an explicit focus on educating the whole child. This includes "fostering a wide range of life skills, dispositions, and knowledge including social and emotional competencies, character, and social responsibility."[119] SEL programs teach, model, practice, and apply the competencies of self-awareness, self-management, social awareness, relationship skills, and responsible decision making. SEL is meant to create an ethos that is embedded into all actions and interactions at school and outside of school. It engenders the skills and motivations to practice healthy behaviors and make decisions in responsible ways.

SEL often starts with the adoption of one of many possible well-defined practices or curricula.[120] This might look like teaching students about the chemical reactions that happen in the brain when someone is triggered so that they are aware when they are triggered and can wait until they are detriggered before acting or making a decision. Or, it might look like each student identifying a SEL goal at the beginning of each day. Or, SEL might look like classroom or physical education class time wherein the activities are wholly student driven. In support of all of these more well-defined practices, teachers may then emphasize specific SEL qualities during anticipated

117. *See* HEATHER T. JONES, UNIV. OF TEX. SCH. OF SOC. WORK, RESTORATIVE JUSTICE IN SCHOOL COMMUNITIES: SUCCESSES, OBSTACLES, AND AREAS FOR IMPROVEMENT 3 (2013), http://irjrd.org/files/2016/01/Jones_Restorative-Discipline_12-29-13.pdf [https://perma.cc/4B3V-43B5] (describing RJ as a method of discipline that involves students in constructive dialogue with the goal of repairing relationships and learning from mistakes that is more educative than traditional disciplinary methods).

118. *What is SEL?*, COLLABORATIVE FOR ACAD. SOC. & EMOTIONAL LEARNING, http://www.casel.org/what-is-sel [https://perma.cc/HT8D-G22G].

119. Kimberly A. Schonert-Reichl & Roger P. Weissberg, *Social and Emotional Learning: Children*, *in* ENCYCLOPEDIA OF PRIMARY PREVENTION AND HEALTH PROMOTION 936, 936 (Thomas P. Gullotta & Martin Bloom eds., 2014), http://link.springer.com/content/pdf/10.1007%2F978-1-4614-5999-6_133.pdf [https://perma.cc/M6Y8-SGLQ].

120. SEL can refer to such a huge variety of practices with an equal variety of goals that it is impossible to list them here. Two useful resources that provide lists of programs and information as to their efficacy are the CASEL website which provides an extensive list of quality programs (http://www.casel.org/guide [https://perma.cc/QA78-F2CK]), and Edutopia which provides a list of studies conducted on different SEL programs (http://www.edutopia.org/sel-research-annotated-bibliography [https://perma.cc/C4NA-MXFM]). No written description, however, can substitute for seeing how SEL works in practice.

teachable moments, helping students apply SEL skills throughout the day. In this way, SEL becomes part of the school culture and infuses all classroom lessons and school interactions rather than being limited to the confines of the class time during which SEL values are explicitly taught.

"An incredible wealth of research links SEL programs to decreased truancy, less drug use, lower dropout rates, improved academic performance, improved connection to school, and fewer behavioral problems."[121] Naturally, such improvement in connectedness to school and behavioral incidents reflects a school culture that frowns upon language and speech that is harmful, hurtful, and offensive, while in no way impairing authentic dialogue and disagreement.

Conclusion

Catherine Ross teaches us three important things in *Lessons in Censorship*. First, controversies surrounding student speech on campus reflect the culture-war schisms that have arisen in our nation at large. Second, it is essential that our schools teach the values of critical dialogue, a robust exchange of ideas, and tolerance of the views of others by modeling those values, not censoring and suppressing speech that might be controversial or even hurtful to some. And third, the courts (and consequently school administrators) have failed to defend student speech and instead have slowly chiseled away at the robust protection provided by *Tinker*. This is where Ross steps in to provide a full-throated defense of student speech and a clear-headed reading of the case law that will ensure that constitutional values are not trammeled by administrative expediency, fear of controversy, or misguided disciplinary actions aimed at student speech.

I accept and endorse these lessons. Yet in the hectic hallways of America's high schools, making split-second decisions about hurtful, hateful, offensive, and defiant speech is difficult. Sometimes free speech challenges our other values such as civility, tolerance, respect, cooperation, and the demand to treat others as equals. Sometimes hurtful words make schools unsafe for learning for some students. But, as Ross recognizes, squelching speech is not the answer. Rather, creating a teachable moment from such speech and facilitating a robust (and hopefully restorative) conversation can address such low-value speech. To that I would add school-wide practices

121. Danfeng Soto-Vigil Koon, *Exclusionary School Discipline: An Issue Brief and Review of the Literature*, CHIEF JUST. EARL WARREN INST. ON L. & SOC. POL'Y, Apr. 2013, at 1, 15–16 https://www.law.berkeley.edu/files/BMOC_Exclusionary_School_Discipline_Final.pdf [https://perma.cc/D4ZZ-BENY].

aimed at creating a culture of positive behavior, tolerance, and respect through school wide positive behavior intervention and supports, restorative practices, and social emotional learning. With a focus on how they prevent and respond to disruptive speech (and conduct), school administrators can similarly avoid the constitutional landmines that *Lessons in Censorship* reveals.

Notes

Courts Have Gone off the Map: The Geographic Scope of the Citizenship Clause*

Introduction

The Citizenship Clause of the Fourteenth Amendment has certainly generated controversy over the past several years. Scholars have now debated for decades whether the Citizenship Clause grants birthright citizenship to children of illegal immigrants[1] as well as what certain dicta in the Supreme Court's *Wong Kim Ark*[2] case means. But this Note is not about that controversy. In all of the debates surrounding birthright citizenship, it appears that a small, yet critical, piece of the Citizenship Clause has been overlooked. The Clause reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[3] Few courts, however, have paused to consider what the phrase "in the United States" means because it seems so obvious. At first glance, everyone knows what that phrase must mean. We all looked up at the map of America from our desks in elementary school, the teacher pointed to the states, we memorized them, we took our exams, and that was the end of it.

Recently, however, some courts have had to consider the geographical scope of the phrase "in the United States."[4] They have ruled that an American

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1. *See generally* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985) (arguing that the Constitution should not be interpreted as mandating birthright citizenship for the children of illegal immigrants).

2. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

3. U.S. CONST. amend. XIV, § 1.

4. *E.g.*, Thomas v. Lynch, 796 F.3d 535, 538 (5th Cir. 2015) (considering whether petitioner born on a U.S. military base in what is now Germany was born "in the United States" for purposes of the Fourteenth Amendment), *cert. denied*, 136 S. Ct. 2506 (2016); Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015) (considering whether American Samoa is "in the United States" for purposes of the Citizenship Clause), *cert. denied*, 136 S. Ct. 2461 (2016); Nolos v. Holder, 611 F.3d 279, 284 (5th Cir. 2010) (holding that persons born in the Philippines during its status as a U.S. territory were not born "in the United States" under the Fourteenth Amendment and citing *Rabang v. INS*, 35 F.3d 1449 (9th Cir. 1994)); Lacap v. INS, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam) (following *Rabang* and denying birthright citizenship to persons born in the Philippines during the territorial period); Valmonte v. INS, 136 F.3d 914, 920 (2d Cir. 1998) (holding that persons born in the Phillipines during its time as a U.S. territory are not U.S. citizens, relying on *Rabang*); Rabang v. INS, 35 F.3d 1449, 1454 (9th Cir. 1994) (concluding that "persons born in the Philippines during

military base in Germany,[5] American Samoa,[6] and the Philippines at the time it was a U.S. territory[7] are not "in the United States" for the purposes of the Fourteenth Amendment. Despite the fact that where the United States ends and another sovereign begins is a serious constitutional issue and has obvious implications for the American immigration system, the Supreme Court this past term denied certiorari on this question.[8]

This Note will argue that, from an originalist, historical perspective, all of the recent federal appellate cases interpreting the phrase "in the United States" for purposes of the Fourteenth Amendment have been incorrectly decided, and that if one wishes to stay true to the framers' intent, the correct interpretation of that phrase is "in the *dominion* of the United States." In other words, the framers of the Fourteenth Amendment would have considered anywhere that the United States exercises sovereignty to be "in the United States," not just the fifty states and the District of Columbia. This would include U.S. territories, military bases, embassies, and other similarly situated locations.

Part I of this Note will examine the English common law idea of citizenship and show how that definition of citizenship crossed the Atlantic. Part II will discuss early interpretations of the Fourteenth Amendment and argue that it codified the citizenship ideas of the common law, specifically the geographical scope of birthright citizenship. It will further assert that early Supreme Court decisions recognized this in dicta. Finally, Part III will analyze recent federal appellate decisions that have interpreted the phrase "in the United States" and argue that those cases have been incorrectly decided from an originalist, historical perspective.

I. The English Common Law of Birth Within the Dominion

The English common law concept of citizenship originated in *Calvin's Case*.[9] *Calvin's Case* was the earliest and most important decision ruling on the idea of citizenship.[10] It held that all persons born within the "dominion" of the King, that is, anywhere in which the King was sovereign, were his

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the territorial period were not 'born . . . in the United States,' within the meaning of the Citizenship Clause of the Fourteenth Amendment, and are thus not entitled to citizenship by birth").

5. *Thomas*, 796 F.3d at 538.

6. *Tuaua*, 788 F.3d at 302.

7. *Nolos*, 611 F.3d at 284; *Lacap*, 138 F.3d at 519; *Valmonte*, 136 F.3d at 920; *Rabang*, 35 F.3d at 1454.

8. Tuaua v. United States, 136 S. Ct. 2461 (2016).

9. Calvin's Case (1608) 77 Eng. Rep. 377, 7 Co. Rep. 1a.

10. Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUMAN. 73, 74 (1997).

subjects.[11] This idea of birth anywhere in which government was sovereign eventually found its way into the Fourteenth Amendment.[12]

The origins of the legal disputes in *Calvin's Case* began after the death of Queen Elizabeth I, when the Queen died without issue.[13] James VI of Scotland thereby became King as James I of England, uniting England and Scotland.[14] This led to the issue in *Calvin's Case* of "whether persons born in Scotland, following the descent of the English crown to the Scottish King James VI in 1603, would be considered 'subjects' in England."[15]

Robert Calvin was born in Scotland after the English throne had passed to James I.[16] Two estates in England had been conveyed to Calvin, but the defendants attempted to take the land away from him, arguing that Calvin was an alien and "born 'within [James's] kingdom of Scotland, and out of the allegiance of the said lord the King of his kingdom of England.'"[17]

If Calvin were declared an alien, then, under English law, he could not possess a freehold in England.[18] "The defendant's plea thus made the status of persons born in Scotland after the accession of James I to the throne of England the paramount legal issue."[19]

The Court ruled that those born in Scotland after James I became King of England were not aliens, but rather, natural-born subjects, and thus could inherit English land.[20] In holding this, the court, as reported by Sir Edward Coke, articulated this key rule:

> Every one born *within the dominions of the King of England, whether here or in his colonies or dependencies, being under the protection of*—therefore, according to our common law, owes allegiance to—the King and is subject to all the duties and entitled to enjoy all the rights and liberties of an Englishman.[21]

"Coke's report of *Calvin's Case* was the first comprehensive statement in England of the law of naturalization."[22] The key language of the rule is that one born "within the dominions of the King" whether "in his colonies or dependencies" was a subject of the King. Critically, the rule makes no distinction between one born in England itself or one born in the English

11. *Id.* at 83.
12. *Id.* at 74, 83.
13. *Id.* at 80.
14. *Id.*
15. *Id.* at 73.
16. *Id.* at 81.
17. *Id.* at 81–82 (alteration in original).
18. *Id.* at 82.
19. *Id.*
20. *Id.*
21. *Id.* at 83 (emphasis added).
22. *Id.*

"colonies or dependencies." In other words, anyone born in a place where the King was sovereign, with certain exceptions for those with diplomatic immunity (ambassadors), enemy combatants, and others, were English subjects.[23] This rule, making no distinctions between England proper, or "colonies or dependencies," "was one of the most important English common-law decisions adopted by courts in the early history of the United States. Rules of citizenship derived from *Calvin's Case* became the basis of the American common-law rule of birthright citizenship . . . ."[24]

Coke was not the only great English legal mind to avoid a distinction between England proper versus "colonies or dependencies" with regards to birthright citizenship. Sir William Blackstone also took Coke's position. Blackstone divided the population into aliens and natural-born subjects.[25] According to Blackstone, "[n]atural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or, as it is generally called, the allegiance, of the king; and aliens, such as are born out of it."[26] Like Coke, Blackstone's distinction between an alien and a subject turns on birth within the *dominion* of the King, not on a distinction between birth in England proper versus a colony or dependency of England. This is because of the concept of allegiance embedded in the common law's idea of citizenship. As Blackstone explained, "[a]llegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject."[27] That is, the reason a person born anywhere within the King's dominion was a subject, and not an alien, was because the King was responsible for protecting that person from foreign governments. Hence, there was no reason for a distinction to exist, for most cases, between someone born in England proper versus elsewhere where the King was sovereign because he was responsible for protecting both.

The idea of allegiance being determinative of subject versus alien is further exemplified by the few exceptions to birthright citizenship within the dominion. Even if born in England, the children of those with diplomatic immunity—the children of ambassadors—or the offspring of enemy combatants were not considered the King's subjects.[28] This was because they were "not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King."[29] In other words, because the King was not responsible for protecting these people, for the obvious reasons that diplomats represented a foreign power and enemy

23. United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898).
24. Price, *supra* note 10, at 74.
25. 1 WILLIAM BLACKSTONE, COMMENTARIES *366.
26. *Id.*
27. *Id.*
28. *Wong Kim Ark*, 169 U.S. at 655.
29. *Id.*

combatants were the King's enemies, they owed no allegiance to the King and thus were not his subjects. Therefore, according to Blackstone, the key distinction between subject and alien at common law turned on allegiance and the King's responsibility for protecting that individual.

In short, the English common law, as conveyed by Coke and Blackstone, made no distinction between England itself and colonies or dependencies for citizenship purposes. Under the common law, "[e]very one born within the dominions of the King of England, whether here or in his colonies or dependencies," were English subjects, with certain exceptions for diplomats, enemies, and possibly others.[30]

This common law idea of citizenship vesting at birth within the dominion of the King crossed the Atlantic and formed the basis for the American idea of citizenship. When the original Constitution was ratified, nothing "explicitly indicated whether the United States adopted the common law rule that all persons born within the dominion of the sovereign were citizens."[31] However, the United States "followed Coke's theory of birthright citizenship, and came to recognize all children born within the dominion of the United States as citizens, owing allegiance to and receiving protection from the national sovereign."[32]

John Marshall expounded on the phrase "United States" by saying, "[i]t is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania . . . ."[33] Thus, albeit not in the context of a case about citizenship, John Marshall thought that the phrase "United States" referred to everywhere that the United States was sovereign,[34] echoing Coke and Blackstone.

Joseph Story, in an opinion joined by Marshall, further demonstrated that the common law idea of birth within the dominion crossed the Atlantic. Story wrote that "[t]wo things usually concur to create citizenship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or in other words, within the ligeance of the sovereign."[35] He further explained that "the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently

30. Price, *supra* note 10, at 83.

31. Johnathan C. Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 683 (1995).

32. *Id.* at 684.

33. Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319 (1820).

34. *Id.*

35. Inglis v. Trs. of the Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., concurring).

owe obedience or allegiance to the sovereign."[36] Story then proceeded to list the typical common law exceptions to this rule, including the children of ambassadors and enemies.[37]

These early Supreme Court cases demonstrate that Marshall and Story both recognized that the common law idea of birth anywhere in which the government was sovereign had become a part of American law after the ratification of the Constitution. Story essentially copied the rule in *Calvin's Case* and echoed Blackstone. Story could have noted that birth within one of the states was different from birth within the "dominion" of the United States for citizenship purposes, but he did not. Instead, he implicitly took Marshall's view that "[t]he district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania"[38]—analogous to "a place where the sovereign is at the time in full possession and exercise of his power."[39] Early Supreme Court cases decided shortly after the ratification of the Constitution therefore demonstrate that the English common law citizenship requirement of birth within any place in which the government was sovereign, not just birth within a state or the District of Columbia, was one of the original American requirements for citizenship.

II. The Fourteenth Amendment Codified Birth Within the Dominion

The Citizenship Clause of the Fourteenth Amendment simply codified the English common law ideas of citizenship that the Supreme Court had already recognized, including birthright citizenship within the dominion of the United States. Thus, the correct interpretation of the Citizenship Clause's phrase "in the United States" is actually "in the dominion of the United States." This is apparent in both the legislative debates surrounding the passage of the Amendment and in Supreme Court decisions shortly thereafter.

Early legislative debates regarding the meaning of the Citizenship Clause imply that it merely codified the common law idea of birth within the dominion of the United States. The Citizenship Clause of the Fourteenth Amendment was meant to constitutionalize the citizenship language of the 1866 Civil Rights Act and to abrogate *Dred Scott.*[40] The drafters of the 1866 Civil Rights Act "insisted that it merely declared the existing law prior to *Dred Scott* and codified the common law principles that had theretofore

36. *Id.*
37. *Id.* at 155–56.
38. *Loughborough*, 18 U.S. (5 Wheat.) at 319.
39. *Inglis*, 28 U.S. (3 Pet.) at 155.
40. Dred Scott v. Sanford, 60 U.S. 393 (1856); Drimmer, *supra* note 31, at 695–96.

defined birthright citizenship."[41] Specifically, "Congressman Wilson, chairman of the House Judiciary Committee, stated that under the bill, as before, '[e]very person born within the United States, its territories or districts, whether the parents are citizens or aliens, is a natural-born citizen of the Constitution.'"[42] Further, during the debates on the Fourteenth Amendment itself, Senator Johnson said that citizenship refers to birth within the territory of the United States.[43] Critically, both Wilson and Johnson did not limit the geographic scope of "the United States" to the several states and the District of Columbia. Rather, they explicitly referenced the common law of Coke and Blackstone, asserting that the borders of the Citizenship Clause extended into "territories" of the United States—that is, any place in which America was sovereign.

Overall, however, there was little debate surrounding what the phrase "in the United States" meant. The debates on the Citizenship Clause were mostly focused on whether it granted birthright citizenship to Native Americans, Gypsies, Chinese people, and others.[44] In other words, legislators were greatly concerned about whether the Citizenship Clause would give the children of foreigners birthright citizenship.[45] But these debates were largely centered around the Citizenship Clause's second part, "subject to the jurisdiction thereof," not the first part, "in the United States."[46] This emphasis on debating the phrase "subject to the jurisdiction thereof," and not "in the United States," implies that most legislators agreed with Wilson and Johnson that the latter phrase, as used in both the 1866 Civil Rights Act and the Citizenship Clause, was simply an extension of the common law idea of birth within the dominion.

The Supreme Court's *Wong Kim Ark* case most clearly demonstrates that, at the time of the adoption of the Fourteenth Amendment, the phrase "in the United States" meant "in the dominion of the United States." In that case, the Court clearly articulated the common law. It first correctly declared that "[t]he interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."[47] Then,

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41. Drimmer, *supra* note 31, at 695.

42. *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (statement of Rep. Wilson)).

43. *Id.* at 696 n.211 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (statement of Sen. Johnson)).

44. James Ho, *Defining 'American': Birthright Citizenship and the Original Understanding of the 14th Amendment*, FEDERALIST (Aug. 25, 2015), http://thefederalist.com/2015/08/25/defining-american-birthright-citizenship-and-the-original-understanding-of-the-14th-amendment/ [https://perma.cc/M8V4-HX57].

45. *Id.*

46. *Id.*; U.S. CONST. amend. XIV, § 1.

47. United States v. Wong Kim Ark, 169 U.S. 649, 655 (1898) (quoting Smith v. Alabama, 124 U.S. 465, 478 (1888)).

the Court explained that "[t]he fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called 'ligealty,' 'obedience,' 'faith' or 'power,' of the King. The principle embraced all persons born within the King's allegiance, and subject to his protection."[48] Next, the Court listed the familiar exceptions to common law birthright citizenship—children of ambassadors and children of foreign enemies[49]—before explicitly referring to *Calvin's Case*.[50] Finally, the Court held that, "[t]here is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment . . . there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion."[51]

Hence, at the time of *Wong Kim Ark* in 1898, it was abundantly clear to the Supreme Court that the phrase "in the United States" meant "in the dominion of the United States." The Court cited *Calvin's Case*, described the common law concept of allegiance, and concluded that the appropriate rule was birth "within the dominion" of the United States.[52]

In short, we have now seen approximately three hundred years of history. The common law idea of birth within the dominion of the King first appeared in the early 1600s at the time of *Calvin's Case*, was expounded upon by Blackstone thereafter, and was recognized shortly after the ratification of the original Constitution by John Marshall and Joseph Story. Finally, *Wong Kim Ark* and the legislative history of the Fourteenth Amendment strongly indicate that the rule became constitutionalized in the Citizenship Clause without much debate.

Yet, no modern federal appellate decisions have chosen to follow this history. Since the 1990s, six appellate cases, over one sharp dissent, have ruled that birth in various places within the dominion of the United States, but not one of the several states, was not birth "in the United States" for purposes of the Fourteenth Amendment.[53] Based on the history discussed above, I will argue that these cases, at least from an originalist perspective, were incorrectly decided.

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48. *Id.*

49. *Id.*

50. *Id.* at 656.

51. *Id.* at 667.

52. *See id.* at 658 (explaining that common law allegiance depends upon the person simply being born within the jurisdiction and allegiance of the sovereign).

53. Thomas v. Lynch, 796 F.3d 535, 538 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016); Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016); Nolos v. Holder, 611 F.3d 279, 284 (5th Cir. 2010); Lacap v. INS, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam); Valmonte v. INS, 136 F.3d 914, 920 (2d Cir. 1998); Rabang v. INS, 35 F.3d 1449, 1454 (9th Cir. 1994).

III. Modern Appellate Decisions Treating the Geographic Scope of "in the United States" Have Been Incorrectly Decided

The first modern case treating this issue was *Rabang*, a Ninth Circuit decision.[54] In that case, the dispositive issue was whether persons born in the Philippines at the time it was a U.S. territory were born "in the United States" for Citizenship Clause purposes.[55] Over a sharp dissent by Judge Pregerson, the court ruled that the Philippines during the territorial period was not "in the United States."[56] In reaching this holding, the court dismissed *Wong Kim Ark* as dicta.[57] The Ninth Circuit was correct that the language covering the geographical scope of the Citizenship Clause in *Wong Kim Ark* was dicta, because *Wong Kim Ark* "held that a person born in San Francisco, California, of Chinese parents, could not be excluded from the United States under the Chinese Exclusion Acts after a temporary visit to China."[58] However, dicta simply means that the language is not binding; it does not mean that the language is not legally and historically correct. The larger problem with *Rabang*, however, is that it dismissed one case as dicta, while choosing other nonbinding language that it preferred.

After ignoring *Wong Kim Ark*, the *Rabang* court incorrectly ruled that in a case called *Downes v. Bidwell*,[59] "the Supreme Court decided that the territorial scope of the phrase 'the United States' as used in the Constitution is limited to the states of the Union."[60] This statement is simply inaccurate. As the court acknowledged in the very same paragraph, *Downes* was a case interpreting the Revenue Clauses of the Constitution, not the Citizenship Clause.[61] Thus, the Supreme Court had not already decided the "territorial scope" of "the United States" in the Constitution, as the Court had only decided that phrase's meaning in the context of the Revenue Clauses.

But, more importantly, because *Downes* was a case about the Revenue Clauses, it was just as nonbinding on the Ninth Circuit as the dicta in *Wong Kim Ark*. So, the Ninth Circuit simply ignored nonbinding language from one Supreme Court case, the case that had cited three hundred years of history, while latching onto nonbinding language from another case that interpreted a different clause of the Constitution. Such results occur when courts refuse to be faithful to history. When courts rebuke originalism, they may select their desired outcome and then write an opinion to achieve that

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54. *Rabang*, 35 F.3d at 1454.

55. *Id.* at 1451.

56. *Id.* at 1454.

57. *Id.*

58. *Id.* at 1453.

59. 182 U.S. 244 (1901).

60. *Rabang*, 35 F.3d at 1452.

61. *See id.* (explaining that *Downes* was a ruling over what constituted being in the United States in regards to the Revenue Clauses in Article I, Section 8 of the Constitution).

result. History and originalism should matter more than that. As Judge Pregerson argued in dissent, the court's "narrow approach overlooks principles of common law, readily accepted by the framers of the Constitution and the authors of the Fourteenth Amendment, which demonstrate that the Citizenship Clause applies to all persons who owe allegiance to, and are born within the territory or dominion of, the United States."[62] Yet, his dissent fell on deaf ears and the framers' intent was ignored.

Rabang, unfortunately, was not the only case to ignore the history and intent of both the common law and the authors of the Citizenship Clause. In a similar case from the Second Circuit, the court also decided whether the Philippines during the territorial period was "in the United States" for purposes of the Fourteenth Amendment.[63] When the petitioner argued that *Wong Kim Ark*'s reasoning regarding *Calvin's Case* and the common law should be followed, the court announced "[w]e decline petitioner's invitation to construe *Wong Kim Ark* . . . so expansively," and that the case was not "reliable authority for the citizenship principle petitioner would have us adopt," namely that "in the United States" means "in the dominion of the United States."[64]

The court's statement was filled with irony. The court refused to give an expansive reading to *Wong Kim Ark*, yet it gave a vastly expansive reading to *Downes*, a case about the Revenue Clauses, claiming that it provided "authoritative guidance on the territorial scope of the term 'the United States' in the Fourteenth Amendment."[65] Yet, a plurality of the Supreme Court had cautioned that "it is our judgment that neither the cases [including *Downes*] nor their reasoning should be given any further expansion."[66] Thus, the *Valmonte* court declined to read *Wong Kim Ark* expansively but proceeded to give an expansive reading to *Downes*, which a plurality of the Supreme Court had admonished them not to do. This, unfortunately, is the result when courts refuse to follow three hundred years of history and interpret the Constitution from an originalist perspective; they are left to choose the dicta they prefer and decide the case accordingly.

With the exception of one short per curiam opinion, which simply followed *Rabang* and *Valmonte*,[67] the issue of the geographic scope of the Citizenship Clause disappeared from the federal appellate courts until 2010. In that year, the Fifth Circuit sided with *Rabang* and *Valmonte* and became

62. *Id.* at 1455 (Pregerson, J., dissenting).

63. Valmonte v. INS, 136 F.3d 914, 920 (2d Cir. 1998).

64. *Id.* at 919–20.

65. *Id.* at 918.

66. *Rabang*, 35 F.3d at 1464 (Pregerson, J., dissenting) (quoting Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion)).

67. Lacap v. INS, 138 F.3d 518, 519 (3d Cir. 1998) (per curiam).

the most recent court to rule that the Philippines during the territorial period was not "in the United States."[68] Just as in *Rabang* and *Valmonte*, the petitioner argued "that the Fourteenth Amendment codified the principles of the English common law that birth within a sovereign's territory confers citizenship," and just as in the previous cases, the court rejected that reasoning.[69] The relevant part of the opinion largely relied on *Rabang*, *Valmonte*, and *Downes*,[70] the last of which formed the flawed reasoning of the first two, as discussed above. Thus, nonbinding language in *Downes* had been followed by *Rabang* and *Valmonte*, which, in turn, had been followed by *Nolos*. Multiple flawed cases were now citing each other to provide the main points of their reasoning.

By this point, all of the appellate decisions were relying on *Downes*, yet none of the majority opinions mentioned a serious problem with it: *Downes* is a 100-year-old case decided, at least in part, on racial grounds. *Nolos* simply adopted the reasoning of *Downes* and the other appellate decisions, but did not consider "that the *Insular Cases*[71] are a product of their time, a time when even the Supreme Court based its decisions, in part, on fears of other races."[72] Indeed, *Downes* was tainted with outdated ideas about foreigners. One passage reads:

> It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people . . . which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race . . . .[73]

Such a statement, of course, is premised on 1901-era logic that white Americans are a superior race to those that live on various Pacific islands.[74] Additionally, those words were written by Justice Brown in 1901, a mere five years after he had written *Plessy*.[75] Simply put, *Downes*, one of the *Insular Cases*, was influenced by inappropriate racial ideas and written by the same Justice who began the era of "separate but equal." Perhaps this is why, over

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68. Nolos v. Holder, 611 F.3d 279, 284 (5th Cir. 2010).

69. *Id.*

70. *Id.* at 282–84.

71. The name for a group of cases including *Downes*. *See id.* at 282 (explaining that "the *Insular Cases* were a series of Supreme Court decisions that dealt with . . . duties on shipments from Puerto Rico to the United States mainland").

72. Rabang v. INS, 35 F.3d 1449, 1463 (9th Cir. 1994) (Pregerson, J., dissenting).

73. Downes v. Bidwell, 182 U.S. 244, 282 (1901).

74. *See id.* at 279 (using discriminatory language to reason that "if [the inhabitants of the annexed territories] do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such," and ultimately concluding that the consequences of annexation would be "extremely serious").

75. Plessy v. Ferguson, 163 U.S. 537 (1896).

fifty years after *Downes* (and also after *Brown*[76] overruled *Plessy*), a plurality of the Supreme Court cautioned:

> [I]t is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.[77]

In other words, the Court warned that *Downes* should not be expanded because it was tainted with racism.

Yet, *Nolos*, like *Valmonte* and *Rabang* before it, still relied on *Downes*, even though the Supreme Court implied that it contained dangerous racial ideas.[78] *Nolos* could have avoided this problem simply by adopting an originalist interpretation of the Citizenship Clause and following *Wong Kim Ark*. Unfortunately, that did not happen, resulting in a third major appellate decision following tainted Supreme Court dicta.

Five years later, in 2015, the issue of "in the United States" arose again, but for the first time in a different context. In that year, the D.C. Circuit was asked in *Tuaua*[79] to determine whether American Samoa was "in the United States."[80] The decision was significantly flawed for two reasons. First, the part of the opinion attempting to interpret the Citizenship Clause from an originalist perspective misrepresented the founders, and second, it openly decided the case in part on public policy grounds, which is the job of legislatures, not judges.

Tuaua began with an accurate reflection of the common law. It explained that "[t]hose born 'within the King's domain' and 'within the obedience or ligeance of the King' were subjects of the King, or 'citizens' in modern parlance. The domain of the King was defined broadly. It extended beyond the British Isles to include, for example, persons born in the American colonies."[81] The court also acknowledged that "[a]fter

76. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

77. Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion).

78. *See id.* (refusing to further expand the *Insular Cases*).

79. Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

80. *Id.* at 302–03.

81. *Id.* at 304 (internal citations omitted).

independence the former colonies continued to look to the English common law rule."[82]

But then the court's originalist interpretation of the Citizenship Clause went off the rails. The court held that "we are skeptical the framers plainly intended to extend birthright citizenship to distinct, significantly self-governing political territories within the United States's sphere of sovereignty—even where, as is the case with American Samoa, ultimate governance remains statutorily vested with the United States Government."[83]

This skepticism was misplaced. What mattered to the common law, and by extension the framers, was not the fact that some territories are self-governing, but rather, who was responsible for protecting the people at issue.[84] The rule in *Calvin's Case* thus made no distinction between self-governing versus non-self-governing territories, but clearly stated that "[e]very one born within the dominions of the King of England, whether here or in his colonies or dependencies," was an English subject (provided no exceptions applied) because the King had to protect them, regardless of their level of self-governance.[85]

Blackstone also made no self-governance distinction for the same reason, explaining that being a subject, or today, a citizen, rested on the idea of allegiance, and that "[a]llegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject."[86] History, therefore, shows that the common law and the framers of the Citizenship Clause were not concerned with levels of self-governance in granting birthright citizenship, but rather with who was ultimately responsible for protection. Since American Samoa is a U.S. territory, over which the United States exercises sovereignty,[87] it is responsible for the protection of the island. Originalism, therefore, dictates that those born on American Samoa are born "in the United States" for purposes of the Fourteenth Amendment.

The D.C. Circuit's departure from a historically accurate originalist interpretation of the Citizenship Clause led it further astray. In a later part of the *Tuaua* opinion, the court openly decided the case, in part, on public policy grounds. The court reasoned that "[d]espite American Samoa's lengthy relationship with the United States, the American Samoan people have not formed a collective consensus in favor of United States citizenship."[88] For

82. *Id.*
83. *Id.* at 306.
84. *See supra* notes 25–27 and accompanying text.
85. Price, *supra* note 10, at 83.
86. 1 BLACKSTONE, *supra* note 25, at *366.
87. *Tuaua*, 788 F.3d at 306.
88. *Id.* at 309.

this reason, the court held that it would be wrong "to impose citizenship by judicial fiat—where doing so requires us to override the democratic prerogatives of the American Samoan people themselves."[89]

There are two flaws with this judicial reasoning. First, "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[90] not what it should be. Openly disregarding history and deciding a case on policy grounds based on what a segment of the population may or may not want is usurping the province of the legislature.

Second—as the court correctly indicated—it is not even clear whether the American Samoan people want American citizenship.[91] Some Samoans do not want American citizenship,[92] but others certainly do, as they feel that being labeled a "national," as opposed to a "citizen" is demeaning.[93] This is especially true for some Samoans who have served in the U.S. Armed Forces but do not receive birthright citizenship.[94] For these reasons, split public opinion regarding birthright citizenship in American Samoa is a reason to make birthright citizenship the default and allow those who do not want it to renounce it,[95] not the other way around.

The D.C. Circuit thus not only openly decided a case in part on public policy grounds, something a court should not do, but arguably made a bad public policy decision. If, however, the court had not ignored history and interpreted the Citizenship Clause in light of *Calvin's Case* and Blackstone, then it never would have had to enter the public policy arena and perhaps would have even granted birthright citizenship to some who have served our country in the armed forces but are not presently citizens. Surely, such a result could not be bad.

The final and most recent case interpreting the geographic scope of the Citizenship Clause occurred shortly after *Tuaua*. This time, the Fifth Circuit was asked whether an American military base in Germany was "in the United States."[96] Like all of the previous cases, the court held that it was not.[97] The court largely followed *Nolos*, *Valmonte*, *Rabang*, and *Downes*,[98] and, as

89. *Id.* at 302.

90. Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803).

91. *Tuaua*, 788 F.3d at 309.

92. *See id.* at 309–10 (discussing the reluctance some American Samoans feel toward American citizenship because of how citizenship could interfere with their traditions and way of life).

93. *See* Last Week Tonight, *U.S. Territories: Last Week Tonight With John Oliver (HBO)*, YOUTUBE (Mar. 8, 2015), https://www.youtube.com/watch?v=CesHr99ezWE [https://perma.cc/8AZQ-9D5Y] (showing that one American Samoan believed his status as a national "demeans me as a person").

94. *Id.*

95. *See* 8 U.S.C. § 1481(a) (2012) (explaining the procedures for renouncing U.S. citizenship).

96. Thomas v. Lynch, 796 F.3d 535, 538 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016).

97. *Id.*

98. *Id.* at 539–40.

usual, declined to apply *Wong Kim Ark*.[99] This case, however, would have been the *best* situation to apply the common law. Unlike all of the previous cases that concerned territories like the Philippines and American Samoa, *Thomas* was about a military base, which is perhaps most closely tied to the reasons behind the common law rule of birthright citizenship within the "dominion."[100]

As Blackstone explained, the common law idea of citizenship by birth within the dominion of the King was based on allegiance.[101] "Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject."[102] In other words, the two chief concerns behind the common law were allegiance to the sovereign and the sovereign's responsibility for protecting its citizens. These principles apply to Mr. Thomas, the petitioner, more closely than in any other case.

Thomas was born on a military base in Germany because his father was in the Army (and a U.S. citizen) serving there.[103] Surely, the son of a member of the Army born on a military base fits the criterion of "allegiance" more so than anyone else. Regarding protection, if the United States has no obligation to protect the child of a member of the armed forces born on the sovereign territory of a military base, born there only because his father answered the call to serve, then to whom does the United States have any obligation to protect? The reasons behind the common law of birth within the dominion of the sovereign apply to Mr. Thomas's situation more so than any other plaintiff. Yet, once again, the court held that the common law, as articulated in *Wong Kim Ark*, did not apply.[104] To avoid unjust results such as these, courts should consider history and originalism more closely.

Conclusion

In summary, the English common law concept of birth anywhere within the dominion, or sovereignty, of the King was first articulated in *Calvin's Case*, was later endorsed by Blackstone, and found its way to America, at least according to John Marshall and Joseph Story. It was implicitly ratified in the text of the Citizenship Clause of the Fourteenth Amendment, as recognized by legislative history and the Supreme Court in *Wong Kim Ark*. Today, however, appellate decisions have chosen to disregard three hundred years of this history when interpreting the geographic scope of the Citizenship Clause, when such history dictates that the correct construction

99. *Id.* at 541–42.
100. *Id.* at 536.
101. 1 BLACKSTONE, *supra* note 25, at *366.
102. *Id.*
103. *Thomas*, 796 F.3d at 536–37.
104. *Id.* at 541–42.

of "in the United States" is "in the dominion of the United States." These cases have led to arguably unjust results, resulting in the denial of birthright citizenship to, among others, the son of a man on active military duty stationed on a base in Germany.

The Supreme Court, instead of denying cert on this question,[105] should take a case and definitively hold that the dicta regarding the common law in *Wong Kim Ark* is the correct interpretation of the geographic scope of the Citizenship Clause. In light of all of the history, such a ruling would perhaps best encapsulate Marshall's admonition that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[106] not what it should be.

—Benjamin Wallace Mendelson

105. Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

106. Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803).

The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA*

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Introduction

As the world has grown increasingly interconnected over the past century, issues that were once addressed nationally now represent international concerns. Professor Niels Blokker has described the issue thusly: "An increasing number of State functions can no longer be performed in splendid isolation. World trade, sustainable development, human rights, not to forget the maintenance of peace and security, have all outgrown the national legal order and have become the subject of international regulation."[1]

Indeed, hundreds of international organizations have emerged since the end of the Second World War to address the numerous areas requiring international cooperation. Though comprised solely of sovereign nations, these international organizations are recognized as having distinct legal personalities. Accordingly, much thought has been devoted to implementing laws that assist these organizations in fulfilling their lofty goals.

In the United States, the International Organizations Immunities Act of 1945 (IOIA) grants international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments."[2] However, two circuit courts are split concerning whether subsequent changes in the law of foreign sovereign immunity should be reflected in the IOIA.[3] Consequently, international organizations may be entitled to either the absolute immunity afforded to foreign states in 1945 or the restrictive immunity afforded to foreign states today. This Note will argue that Congress intended for the IOIA to incorporate changes in foreign sovereign

1. Niels Blokker, *Proliferation of International Organizations: An Exploratory Introduction*, *in* PROLIFERATION OF INTERNATIONAL ORGANIZATIONS 1, 11–12 (Niels M. Blokker & Henry G. Schermers eds., 2001) ("The fundamental nature of globalization makes international cooperation inevitable.").

2. 22 U.S.C. § 288a(b) (2012).

3. *Compare* Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (holding that "Congress' intent was to adopt that body of law only as it existed in 1945—when immunity of foreign sovereigns was absolute"), *with* OSS Nokalva, Inc. v. E. Space Agency, 617 F.3d 756, 764 (3d Cir. 2010) ("Congress intended that the immunity conferred by the IOIA would adapt with the law of foreign sovereign immunity.").

immunity and that the purposes of international organizations are best served by restrictive rather than absolute immunity.

It is well established under international law that an international organization should enjoy such immunity as is "necessary for the fulfilment of the purposes of the organization."[4] In the United States, however, international organizations enjoy far more immunity than that—the D.C. Circuit, which has venue over the majority of suits filed against international organizations,[5] has ruled that such organizations are entitled to absolute immunity under the IOIA.[6] Accordingly, international organizations are generally entitled to greater immunity in U.S. courts than foreign governments. However, there exists one prominent exception—the Third Circuit has held instead that the IOIA incorporated subsequent changes in the law of foreign sovereign immunity, most notably the Foreign Sovereign Immunities Act of 1976 (FSIA).[7] Thus, in the Third Circuit, international organizations may be subject to jurisdiction for claims arising out of their commercial activities, tortious actions, or violations of international law.

In Part I, this Note discusses the theoretical foundations and history of international organization immunity as well as the scope of foreign sovereign immunity prior to and after the enactment of the IOIA. Part II outlines the current split between the D.C. Circuit and Third Circuit regarding the level of immunity provided to international organizations under the IOIA. Also introduced in Part II is the current standard for waiver of immunity under the IOIA. In Part III, the Note concludes with an argument for why international organizations should not be entitled to absolute immunity and why a system of restrictive immunity would produce a more preferable outcome. Changes to the standard for waiver and various policy proposals are offered as additional methods for reining in the amount of immunity currently enjoyed by international organizations. Additionally, the varying approaches taken by Austria, Italy, and the United Kingdom regarding international organization immunity are briefly discussed.

I. Historical Underpinnings of International Organization Immunity

A. The Genesis of International Organizations

A small number of international organizations began emerging as far back as the early nineteenth century. The oldest existing international organization is the Central Commission for Navigation of the Rhine (Rhine

4. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 467(1) (AM. LAW INST. 1986).

5. This is by virtue of the fact that "the vast majority of those organizations are based in the District of Columbia." Charles H. Brower, II, *United States*, *in* THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS 303, 311 (August Reinisch ed., 2013).

6. *Atkinson*, 156 F.3d at 1341.

7. *OSS Nokalva*, 617 F.3d at 765.

Commission).[8] Established in 1815, the Rhine Commission was created by the Rhine River's bordering states to improve navigability and the condition of towpaths.[9] Similarly, the European Commission of the Danube was formed in 1856 to ensure freedom of navigation, thereby promoting commerce on the Danube River.[10] Other examples of pioneering international organizations include the Universal Postal Union[11] and International Telegraph Union.[12] However, these organizations constitute an exception to the general rule—international cooperation through the creation of multilateral institutions was exceedingly rare prior to 1900.[13]

Over time, states increasingly began to recognize the potential benefits of cooperation through international organizations. The end of the First World War brought with it the first truly global international organization—the League of Nations (the League). Founded in 1920, the League was created "to promote international co-operation and to achieve international peace and security."[14] There existed forty-eight member states by the end of the League's first year, and by 1934 the League was comprised of fifty-eight members.[15] Though the League's Covenant did not initially grant the organization immunity from suit, a subsequent agreement was reached with Switzerland—the host nation of the League—stipulating that "the League possessed international personality and . . . could not in principle, according to the rules of international law, be sued before the Swiss courts without its consent."[16]

B. The International Organizations Immunities Act of 1945

Toward the end of World War II, there existed a growing understanding amongst the United States and its allies that an increasing number of state

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8. Dale S. Collinson, *The Rhine Regime in Transition—Relations Between the European Communities and the Central Commission for Rhine Navigation*, 72 COLUM. L. REV. 485, 485 (1972).

9. *History: Introduction*, CENT. COMMISSION FOR THE NAVIGATION OF THE RHINE, http://www.ccr-zkr.org/11010100-en.html [https://perma.cc/ASE3-KWR3].

10. Edward Krehbiel, *The European Commission of the Danube: An Experiment in International Administration*, 33 POL. SCI. Q. 38, 39, 44 (1918).

11. The Universal Postal Union was established in 1874. *The UPU*, UNIVERSAL POSTAL UNION, http://www.upu.int/en/the-upu/the-upu.html [https://perma.cc/6WYN-7PZJ].

12. The International Telecommunication Union was established in 1865. *History*, INT'L TELECOMM. UNION, http://www.itu.int/en/about/Pages/history.aspx [https://perma.cc/R66R-U2LA].

13. *See* Blokker, *supra* note 1, at 1 (noting that "[i]n the year 1900 only a few international organizations existed").

14. Covenant of the League of Nations pmbl.

15. *National Membership of the League of Nations*, IND. U. CTR. FOR THE STUDY OF GLOBAL CHANGE, http://www.indiana.edu/~league/nationalmember.htm [https://perma.cc/3JLY-B5J5].

16. August Reinisch, *Privileges and Immunities*, *in* RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 132, 133 (Jan Klabbers & Åsa Wallendahl eds., 2011) (internal quotations omitted).

functions could no longer be accomplished unilaterally.[17] Indeed, concerns regarding international security, economic development, the settlement of disputes, and cultural misunderstandings led to the creation of the United Nations in 1945.[18] Contemporaneous with the founding of the United Nations, numerous other international organizations were created to govern "international co-operation in all kinds of areas, both at the global and the regional level."[19] Notably, the two Bretton Woods organizations—the International Monetary Fund (IMF) and World Bank—were established in 1944 in an effort to finance postwar reconstruction and promote free trade.[20]

Even before this burgeoning of international organizations, scholars and courts alike recognized the need to grant such institutions the immunity necessary to effectively achieve their organizational purposes.[21] Known as the "functional necessity" doctrine, this underlying belief in the purpose of international organization immunity is still internationally accepted.[22] Until 1945, however, the United States had enacted no law that conferred any privileges, immunities, or exemptions on international organizations.[23] This proved problematic for the United States because, absent some guarantee of organizational immunity, the United Nations seemed likely to locate its headquarters elsewhere.[24] Accordingly, the State Department drafted the

17. *See* PAUL KENNEDY, THE PARLIAMENT OF MAN 25–30 (2006) (discussing the motivations of the United States and its Allies behind the creation of the United Nations); Blokker, *supra* note 1, at 1 (explaining that the "reluctance to create international organizations came to an end during and immediately after the Second World War").

18. *Id.* at 31–32.

19. Blokker, *supra* note 1, at 1.

20. M.J. Stephey, *A Brief History of Bretton Woods System*, TIME (Oct. 21, 2008), http://content.time.com/time/business/article/0,8599,1852254,00.html [https://perma.cc/NLB2-4FB2].

21. *See, e.g.*, Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 828, 836 (1947) (explaining that international organization immunity "always had and has today basically the same reason and purpose: to secure for [international organizations] both legal and practical independence, so that these international organizations should be able to fulfill their task").

22. *See* Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 SUFFOLK TRANSNAT'L L. REV. 471, 519 (2008) (noting that the functional necessity doctrine is "the internationally accepted approach to defining the immunity of international organizations").

23. Lawrence Preuss, *The International Organizations Immunities Act*, 40 AM. J. INT'L L. 332, 333 (1946); *see also* H.R. REP. NO. 79-1203, at 2 (1945) ("[T]here exists at the present time no law of the United States whereby this country can extend privileges of a governmental character with respect to international organizations.").

24. *See* 91 CONG. REC. 10,866 (1945) (statement of Rep. Cooper) ("[I]f we are to hope to have the United Nations Organization's headquarters to be located in the United States, it will be absolutely essential for [some form of immunity granting] legislation to be passed."); 91 CONG. REC. 10,865 (1945) (statement of Rep. Robertson) ("The State Department has called to our attention that other members of the United Nations Organization have taken similar action, and it is very important for us to take this action.").

IOIA to assure the United Nations sufficient immunity to achieve its intended purpose.[25] Congress promptly passed the IOIA in December 1945.[26]

The IOIA provides that designated international organizations "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."[27] The Act's grant of immunity is limited to organizations in which the United States is a participant and that have been designated as "entitled to enjoy the privileges, exemptions, and immunities [of the statute]" by the President through executive order.[28] Additionally, the President may "withhold or withdraw" from an organization any privilege or immunity otherwise afforded to it by the Act.[29]

Importantly, there exists little explanation regarding why Congress chose to grant international organizations immunity by reference to foreign sovereign immunity.[30] This ambiguity has led both courts and scholars to question whether the IOIA intended to incorporate subsequent changes in foreign-sovereign-immunity law or only such immunity as it existed in 1945.[31]

C. *The Evolution of Foreign Sovereign Immunity*

Until the middle of the nineteenth century, U.S. courts granted foreign states absolute immunity with respect to all activities, both governmental and commercial.[32] Over time, however, the suggestions of the State Department played an increasingly influential role in judicial determinations of whether a foreign state was entitled to immunity in a particular case.[33] In the 1930s,

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25. Letter from Harold D. Smith, Dir. of the Bureau of the Budget, to James F. Byrnes, U.S. Sec'y of State (Nov. 6, 1945), *reprinted in* H.R. REP. NO. 79-1203, at 7 (1945); *see also* H.R. REP. NO. 79-1203, at 2 ("[T]he probability that the United Nations Organization may establish its headquarters in this country, and the practical certainty in any case that it would carry on certain activities in this country, makes it essential to adopt this type of legislation promptly.").

26. International Organization Immunities Act, Pub. L. No. 79-291, 59 Stat. 669 (1945) (codified as amended in scattered sections of Titles 8, 22, 26, and 44 U.S.C.); H.R. 4489, 79th Cong. (1945) (enacted).

27. 22 U.S.C. § 288a(b) (2012).

28. *Id.* § 288.

29. *Id.*

30. *See* Herz, *supra* note 22, at 489 ("It is not entirely clear why the State Department and Congress chose to resolve the immunity problem by reference to the immunities of foreign states.").

31. *See id.* ("The IOIA fails, however, to specify the nature and scope of this immunity."). *Compare* Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (noting that IOIA intended only such immunity as it existed in 1945), *with* OSS Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756, 762–64 (3d Cir. 2010) (noting that IOIA intended to incorporate subsequent changes in foreign sovereign immunity).

32. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 232 (5th ed. 2011).

33. *Id.* at 232–33; *see also* Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 59 (1995)

mounting judicial deference to the Executive Branch clearly signaled a trend away from the absolute theory of foreign sovereign immunity.[34] Indeed, in *Republic of Mexico v. Hoffman*,[35] decided just prior to the passage of the IOIA, the Supreme Court held that determinations of foreign sovereign immunity are inherently political in nature and rightfully within the sole discretion of the political branches.[36]

With the "Tate Letter" in 1952, the State Department officially renounced absolute immunity in favor of a restrictive theory of foreign sovereign immunity.[37] However, the State Department's subsequent erratic, and occasionally disingenuous, decisions regarding sovereign immunity led to the passage of the FSIA, which codified the restrictive theory of foreign sovereign immunity.[38] Under the FSIA, foreign states are entitled to immunity unless their actions fall under one of several listed exceptions.[39] Notably, the FSIA denies immunity in cases where states have engaged in certain commercial activities.[40] Specifically, a foreign state is subject to jurisdiction where an action is based upon (1) the state's commercial activity in the United States, (2) an act performed in the United States in connection with the state's commercial activity elsewhere, or (3) an act outside the United States in connection with the state's commercial activity that causes a direct effect in the United States.[41] While the FSIA resolved much of the uncertainty surrounding foreign sovereign immunity, it was notably silent regarding its effect on the immunity of international organizations.

("[E]xecutive pronouncements, often during consideration of the individual case, strongly influenced the courts.").

34. *See* Herz, *supra* note 22, at 501 ("Soon after the passage of the IOIA, the Supreme Court took note of the growing perception of sovereign immunity as 'an archaic hangover not consonant with modern morality,' and explained that it would generally countenance Congress's increased willingness to allow suits against a sovereign to go forward.") (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 703 (1949)).

35. 324 U.S. 30 (1945).

36. *See id.* at 35–36 ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."); *supra* note 26 and accompanying text.

37. BORN & RUTLEDGE, *supra* note 32, at 233.

38. *See id.* at 234 (noting that defects in Executive Branch application of the restrictive theory generated pressure for reform and Congress enacted the FSIA after a lengthy legislative process).

39. *Id.*

40. 28 U.S.C. § 1605(a)(2) (2012).

41. *Id.*

II. Judicial Interpretations of International Organization Immunity

A. The Circuit Split in IOIA Interpretation

1. The Atkinson *Approach.*—With its decision in *Atkinson v. Inter-American Development Bank*,[42] the D.C. Circuit became the first circuit court to interpret the scope of immunity provided to international organizations under the IOIA.[43] Atkinson brought suit against the Inter-American Development Bank (IDB), a designated international organization, to garnish the wages of her ex-husband, an IDB employee who had failed to pay child support and alimony.[44] When the IDB asserted it was immune from the garnishment proceedings, Atkinson sought declaratory judgment that the Bank was not entitled to immunity under the IOIA.[45]

After determining that the IDB had not waived its immunity, the court was then tasked with determining whether "Congress intended to incorporate in the IOIA post-1945 changes to the law governing the immunity of foreign sovereigns."[46] The court began by noting a well-known canon of statutory interpretation regarding reference statutes (the reference canon): "A statute which refers to a subject generally adopts the law on the subject as of the time the law is enacted. This will include all the amendments and modifications of the law subsequent to the time the reference statute . . . was enacted."[47]

Although the court felt that the statute was ambiguous, it nonetheless found use of the reference canon unnecessary because "the IOIA sets forth an explicit mechanism for monitoring the immunities of designated international organizations: the President retains authority to modify, condition, limit, and even revoke the otherwise absolute immunity of a designated organization."[48] The court reasoned that future changes in the immunity of international organizations were tethered to the decisions of the President rather than developments in the law of foreign sovereign immunity.[49]

Additionally, the court pointed to the IOIA's legislative history as supporting its interpretation that international organization immunity may

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42. 156 F.3d 1335 (D.C. Cir. 1998).

43. *See* Brower, *supra* note 5, at 315 (noting that *Atkinson* "finally delivered a definitive opinion on whether the FSIA curtailed the availability of immunity for international organizations under the IOIA").

44. *Atkinson*, 156 F.3d at 1336–37.

45. *Id.* at 1337.

46. *Id.* at 1338–39, 1340.

47. *Id.* at 1340 (quoting 2B SUTHERLAND STATUTORY CONSTRUCTION § 51.08 (Norman J. Singer & J.D. Shambie Singer eds., 5th ed. 1992)).

48. 22 U.S.C. § 288 (2012); *Atkinson*, 156 F.3d at 1341.

49. *Atkinson*, 156 F.3d at 1341.

only be altered through the exercise of presidential discretion.[50] Indeed, the Senate Report on the IOIA states that the President was granted the authority to modify an organization's immunity to address "the event that any international organization should engage, for example, in activities of a commercial nature."[51]

Accordingly, the court ruled that Congress intended for the immunity of international organizations to reflect the immunity of foreign sovereigns as it existed in 1945, notwithstanding any subsequent changes in the law of foreign sovereign immunity.[52] In so holding, the court also determined that in 1945 foreign sovereigns enjoyed "virtually absolute immunity," contingent only upon the State Department making a request to the court.[53] Thus, international organizations are currently afforded absolute immunity in the D.C. Circuit.

2. The OSS Nokalva *Approach.—Atkinson* remained the sole interpretation of the IOIA's grant of immunity for over a decade. However, the Third Circuit eventually offered a competing interpretation with its decision in *OSS Nokalva, Inc. v. European Space Agency*.[54] Prior to *OSS Nokalva*, district courts in the Third Circuit followed *Atkinson*, holding that the IOIA afforded international organizations absolute immunity.[55] However, *OSS Nokalva* explicitly rejected *Atkinson*, holding instead that Congress intended the IOIA to "adapt with the law of foreign sovereign immunity."[56]

In *OSS Nokalva*, a New Jersey software corporation sued the European Space Agency (ESA), a designated international organization, over a contract dispute.[57] The district court held that international organizations are generally entitled to absolute immunity but that the ESA had waived its immunity in this case under the "corresponding benefit" test.[58] However, on appeal, the Third Circuit held that addressing the issue of waiver was unnecessary because the ESA was not entitled to absolute immunity in the first place.[59]

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50. *Id.*

51. S. REP. NO. 79-861, at 2 (1945); *see also* H.R. REP. NO. 79-1203, at 3 (1945) ("The broad powers granted to the President will permit prompt action in connection with any abuse of the privileges and immunities granted . . . .").

52. *Atkinson*, 156 F.3d at 1341.

53. *Id.* at 1340 (quoting Varlinden B.V. v. Cent. Bank of Nigeria, 46 U.S. 480, 486 (1983)).

54. 617 F.3d 756 (3d Cir. 2010).

55. *See, e.g.*, Bro Tech Corp. v. Eur. Bank for Reconstruction and Dev., 2000 WL 1751094, at *3 (E.D. Pa. Nov. 29, 2000) (adopting "the reasoning of the D.C. Circuit, and find[ing] that the EBRD is entitled to absolute immunity under the IOIA").

56. *OSS Nokalva*, 617 F.3d at 764.

57. *Id.* at 758–59.

58. *Id.* at 760. For a discussion of the "corresponding benefit" test, see *infra* subpart II(B).

59. *OSS Nokalva*, 617 F.3d at 761.

While the Third Circuit agreed with the D.C. Circuit that the IOIA is facially ambiguous regarding its incorporation of subsequent changes in the law of foreign sovereign immunity, the two courts took completely disparate paths of statutory construction. Contrary to the reasoning in *Atkinson*, the Third Circuit found "nothing in the statutory language or legislative history that suggests that the IOIA provision delegating authority to the President to alter the immunity of international organizations precludes incorporation of any subsequent change to the immunity of foreign sovereigns."[60] Accordingly, the court found the reference canon to be persuasive in its suggestion that a reference statute "will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted."[61] Moreover, the court reasoned that Congress could have easily inserted language in the statute to negate such an interpretation.[62]

Additionally, the court gave substantial weight to the 1980 pronouncement of the State Department that "[b]y virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities."[63] The position of the State Department was viewed as particularly persuasive because of the Department's role in drafting and supporting the IOIA.[64]

Finally, the court found the policy implications of absolute organizational immunity to be untenable.[65] If an international organization is guaranteed broader immunity than its member states enjoy when acting alone, there would exist a perverse "incentive for foreign governments to evade legal obligations by acting through international organizations."[66] Accordingly, in the Third Circuit, international organizations are subject to the same restrictions as foreign governments under the FSIA.[67]

B. Waiver of Immunity Under the IOIA

The immunity provided by the IOIA is limited to the extent that organizations "may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."[68] Apart from waivers made in

60. *Id.* at 763.

61. *Id.* (emphasis omitted) (quoting 2B SUTHERLAND STATUTORY CONSTRUCTION § 51.08 (Norman J. Singer & J.D. Shambie Singer eds., 5th ed. 1992)).

62. *Id.* at 764 ("Congress could have simply stated that international organizations would be entitled to the 'same immunity as of the date of this Act.'").

63. *Id.* at 763–64 (emphasis omitted) (quoting Letter from Roberts B. Owen, Legal Adviser, State Dep't, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 917, 918 (1980)).

64. *Id.* at 764.

65. *Id.*

66. *Id.*

67. *Id.* at 765.

68. 22 U.S.C. § 288a(b) (2012).

specific cases or contracts, the D.C. Circuit has held that an organization's charter may also effect a waiver of its immunity otherwise available under the IOIA.[69]

The charters of many international organizations clearly consider the possibility of facing legal action in the courts of its member states. For instance, the charters of the IDB and the International Bank for Reconstruction and Development (World Bank) each contain the following provision: "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities."[70]

Initially, the D.C. Circuit construed such provisions as broad waivers of immunity, subjecting organizations with similar charters to a wide range of lawsuits.[71] Indeed, in *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*,[72] the court held that the IDB's charter "permitt[ed] the assertion of a claim against the Bank by one having a cause of action for which relief is available."[73] The court reasoned that the phrase "actions may be brought against the Bank" clearly evidenced an awareness by the drafters that "they were waiving immunity in broad terms."[74]

Over fifteen years later in *Mendaro v. World Bank*,[75] the D.C. Circuit rejected the *Lutcher* court's expansive approach to charter-based waiver. Mendaro, a former World Bank employee, sued the Bank, alleging sexual harassment and discrimination during her employment.[76] Because the World Bank's charter contained an identical provision to that at issue in *Lutcher*, Mendaro argued that the Bank had waived its immunity under the IOIA.[77] However, the court refused to follow *Lutcher*, holding instead that the Bank's "facially broad waiver of immunity . . . must be narrowly read."[78]

Rather than hold that such provisions effect a blanket waiver of immunity, the court ruled that they should be narrowly construed as waiving immunity only in cases where the organization would gain a "corresponding

69. Herz, *supra* note 22, at 513.

70. Agreement Establishing the Inter-American Development Bank art. XI, § 3, Apr. 8, 1959, 10 U.S.T. 3029, 3095, 389 U.N.T.S. 69, 128; Articles of Agreement of the International Bank for Reconstruction and Development art. VII, § 3, Dec. 27, 1945, 60 Stat. 1440, 1447, 2 U.N.T.S. 134, 180.

71. *See* Herz, *supra* note 22, at 514 (noting that the D.C. Circuit's "early jurisprudence gave full effect to the plain meaning" of provisions waiving immunity).

72. 382 F.2d 454 (D.C. Cir. 1967).

73. *Id.* at 457.

74. *Id.*

75. 717 F.2d 610 (D.C. Cir. 1983).

76. *Id.* at 612–13.

77. *Id.* at 613.

78. *Id.* at 611.

benefit which would further [its] goals."[79] The court duly noted the functional necessity doctrine,[80] reasoning that an organization would only effect a waiver that benefited its organizational objectives.[81] Accordingly, because exposure to employment suits would not further the "purposes and operations of the Bank . . . [and] would lay the Bank open to disruptive interference with its employment policies," the court held that the World Bank had not waived its immunity in regard to Mendaro's claim.[82]

The standard for waiver laid out in *Mendaro*, referred to as the "corresponding benefit" test, has been consistently applied to insulate international organizations from claims that do not benefit the foundational purposes of an organization.[83] Conversely, the corresponding benefit test has been equally effective in waiving immunity where waiver is viewed as benefiting an organization's goals. In *Vila v. Inter-American Investment Corp.*,[84] an independent consultant sued the Inter-American Investment Corporation (IIC) for unjust enrichment from services provided without compensation.[85] The D.C. Circuit held that the IIC had waived its immunity because such a waiver provides the organization a corresponding benefit: consultants would be more willing to negotiate and enter into contracts with the IIC if given the guarantee that "they would be fairly compensated for any benefit they have provided that the IIC has unjustly retained."[86] Additionally, the court considered it important to note that the "services were related to the furtherance of the IIC's stated objectives in the commercial marketplace."[87]

Similarly, in *Osseiran v. International Finance Corp.*,[88] Osseiran alleged that the International Finance Corporation (IFC) had broken its promise to sell him its shares in a Guersney corporation.[89] The D.C. Circuit held that the IFC was not immune from such a promissory estoppel suit because it "might help attract prospective investors by reinforcing expectations of fair play."[90] However, the court indicated that an organization's own "judgment about the need for immunity in certain classes of cases [might be] deserving of judicial deference."[91]

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79. *Id.* at 617.

80. *See supra* notes 21–22 and accompanying text.

81. *Mendaro*, 717 F.2d at 617.

82. *Id.* at 611, 618.

83. *See, e.g.*, Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1338–39 (D.C. Cir. 1998) (holding that the IDB's immunity was not waived in respect to wage garnishment proceedings because such suits "provide[] no conceivable benefit in attracting talented employees").

84. 570 F.3d 274 (D.C. Cir. 2009).

85. *Id.* at 277–78.

86. *Id.* at 276.

87. *Id.* at 280.

88. 552 F.3d 836 (D.C. Cir. 2009).

89. *Id.* at 837–38.

90. *Id.* at 840.

91. Importantly, the court noted that the IFC failed to make such an argument. *Id.*

While the corresponding benefit test may deny immunity to international organizations for many commercial activities, the scope of immunity for such activities is still far broader than that provided to foreign states under the FSIA. Indeed, in *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.*,[92] the D.C. Circuit unequivocally stated that "[b]ecause the immunity conferred upon international organizations by the IOIA is absolute, it does not contain an exception for commercial activity such as the one codified in the Foreign Sovereign Immunities Act."[93] *Inversora* held that the World Bank was immune from a nonwage garnishment proceeding initiated by a judgment creditor of one of the Bank's contractors.[94] The court reasoned that such a proceeding, although arising out of commercial activities, proved more costly than beneficial to the Bank's objectives.[95]

III. Restricting International Organization Immunity

The functional necessity doctrine, which was central to the intention of the IOIA,[96] does not condone absolute immunity; rather, it counsels against it. Though most international organizations and some scholars contend that absolute immunity is the only way to ensure the effective fulfillment of organizational purposes,[97] these opinions are rooted in a time when international organizations were far smaller and more fragile.[98] Indeed, it seems wholly unnecessary—if not counterproductive—to afford international organizations absolute immunity for routine contractual arrangements that do not relate to a foundational purpose, like purchases of travel arrangements, office supplies, or food.[99]

In fact, the doctrine of functional necessity, when properly applied, precludes absolute immunity. The concept of necessity is, by definition, restrictive, meaning that an international organization should be entitled *only* to the immunity it unequivocally requires to accomplish its organizational

92. 264 Fed. Appx. 13 (D.C. Cir. 2008).

93. *Id.* at 15.

94. *Id.* at 15–16.

95. *Id.* at 15.

96. *See* Preuss, *supra* note 23, at 332 (explaining that the IOIA "constitutes belated recognition of the need for granting to international organizations . . . a legal status which is adequate to ensure the effective performance of their functions and the fulfillment of their purposes").

97. *See* Broadbent v. Org. of Am. States, 628 F.2d 27, 28–32, 28 n.1 (D.C. Cir. 1980) (noting that, apart from the defendant's brief, "[a]mici [c]uriae briefs were submitted by the International Bank for Reconstruction and Development and the Inter-American Development Bank, the International Telecommunications Satellite Organization, [and] the United Nations" arguing that "Congress granted international organizations absolute immunity in the IOIA"); Finn Seyersted, *Jurisdiction Over Organs and Officials of States, the Holy See and Intergovernmental Organisations (2)*, 14 INT'L & COMP. L.Q. 493, 526 (1965) (arguing that international organizations are subject exclusively to the "legislative, executive and judicial power" present within the organizations, unless those powers are delegated to an external authority).

98. Herz, *supra* note 22, at 522; Singer, *supra* note 33, at 66–67.

99. Singer, *supra* note 33, at 141.

goals.[100] This restrictive view of functional necessity suggests a presumption of jurisdiction rather than immunity.[101] Accordingly, the foundational principle of international organization immunity favors restrictive rather than absolute immunity.

Conversely, the strongest argument in favor of granting international organizations absolute immunity is the effect that such policies have in attracting organizations to establish their headquarters in the United States. If immunity were restricted, many international organizations might leave the United States for a nation with a more favorable legal climate. While the desire to host international organizations undeniably underlies political decisions granting absolute organizational immunity,[102] it seems a stretch to conclude that organizations based in the United States for over half a century would simply shutter their facilities if denied immunity in cases unrelated to fulfilling their goals. However, because it is difficult to know with any certainty how international organizations would react, the ongoing relations between the United States and the organizations it hosts should be carefully evaluated before any permanent change in policy.

The remainder of Part III explores the misguided approach the D.C. Circuit has taken concerning international organization immunity by first explaining why courts should implement a restrictive theory of international organization immunity under the IOIA. This is followed by an analysis of why the corresponding benefit test is an undesirable standard for waiver under the IOIA. Additionally, for means of comparison, a brief accounting of international organization immunity in Austria, Italy, and the United Kingdom is also provided. Finally, Part III concludes with several alternative solutions to the concerns posed by absolute international organization immunity.

A. The IOIA Should Not Afford International Organizations Absolute Immunity

1. The IOIA Did Not Intend to Grant Absolute Immunity.—In *Atkinson*, the D.C. Circuit provided little support for its determination that foreign sovereigns enjoyed absolute immunity in 1945.[103] However, a proper historical analysis of foreign sovereign immunity leads to the conclusion that, while immunity was much broader than it is today, foreign states did not enjoy absolute immunity. The judiciary's trend of deferring to executive

100. Herz, *supra* note 22, at 519.

101. *Id.* at 519–20.

102. *See supra* notes 24–26 and accompanying text; *infra* notes 139–40 and accompanying text.

103. *See* Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335, 1340 (D.C. Cir. 1998) (citing two sources for its conclusion: the 1983 Supreme Court decision in *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983), and Robert B. von Mehren's *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978)).

determinations of immunity had slowly eroded absolute immunity for years prior to the enactment of the IOIA.[104] Indeed, as early as the 1920s, the State Department had denied immunity to foreign states engaged in "ordinary commercial transactions."[105]

Though the precise level of immunity provided to foreign states in 1945 is difficult to ascertain, history makes clear that foreign states were denied absolute immunity in at least several cases. Therefore, even if the IOIA fails to incorporate subsequent changes in foreign sovereign immunity, international organizations should nonetheless be granted something less than absolute immunity. If, as the D.C. Circuit ruled, international organizations are entitled to the immunity that foreign states enjoyed in 1945, then their immunity should properly be tethered to the case-by-case determinations of the State Department, as was the immunity of foreign states at the time.[106] Ironically, given the subsequent pronouncements of the State Department, such determinations would likely subject international organizations to the same exceptions as foreign states under the FSIA.[107]

2. The IOIA Intended to Incorporate Subsequent Changes in Foreign Sovereign Immunity.— Between the competing interpretations of the IOIA in *Atkinson* and *OSS Nokalva*, the reasoning in *OSS Nokalva* proves more persuasive. Perhaps the most perplexing aspect of the *Atkinson* decision is the D.C. Circuit's insistence that use of the reference canon was unnecessary in light of the authority delegated to the President.[108] As the Third Circuit correctly noted, nothing about this delegation of authority to the President "precludes incorporation of any subsequent change[s] to the immunity of foreign sovereigns."[109] Accordingly, the statute is wholly ambiguous regarding whether subsequent changes should be incorporated, and the

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104. *See supra* notes 33–36 and accompanying text.

105. *See* United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 200 (S.D.N.Y. 1929) (referring to a letter from the Secretary of State, which stated "that it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here"); *see also* The Pesaro, 277 F. 473, 479 n.3 (S.D.N.Y. 1921) (noting the State Department's suggestion "that government-owned merchant vessels . . . employed in commerce should not be regarded as entitled to the immunities accorded public vessels of war").

106. *See Atkinson*, 156 F.3d at 1340 (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983)) ("When Congress enacted the IOIA in 1945, foreign sovereigns enjoyed—contingent only upon the State Department's making an immunity request to the court—'virtually absolute immunity.'").

107. *See* Letter from Roberts B. Owen, Legal Adviser, State Dep't, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n (June 24, 1980), *as reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 917, 917–18 (1980) ("By virtue of the FSIA . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities.").

108. *Atkinson*, 156 F.3d at 1340–41.

109. OSS Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756, 763 (3d Cir. 2010).

reference canon resolves this ambiguity by stipulating that the IOIA "includes all amendments and modifications [of foreign-sovereign-immunity law] subsequent to the reference statute's enactment."[110]

Moreover, Congress was more than likely aware of the reference canon, given its use as far back as the late nineteenth century.[111] Consequently, Congress's failure to use express language to negate the reference canon is quite revealing. Contrary to the D.C. Circuit's assertion that Congress was merely "legislating in shorthand,"[112] Congress should have been well aware of the implications tied to the passage of a reference statute. Thus, both the reference canon and congressional intent lend themselves to the interpretation that the IOIA incorporates subsequent changes in the law of foreign sovereign immunity.

3. Restrictive Immunity Would Benefit International Organizations and the Public.—The primary consequence of merging modern foreign-sovereign-immunity law with the IOIA would be the application of the FSIA to international organizations. Indeed, in *OSS Nokalva*, the ESA was denied immunity because "the Agreements at issue . . . constituted . . . 'commercial activity' and . . . the IOIA . . . incorporate[s] the exceptions to immunity set forth in the FSIA."[113]

Some commentators have argued that full application of the restrictive doctrine of immunity would negatively impact the successful operation of many international organizations.[114] While it is true that the core activities of organizations like the World Bank and International Monetary Fund would generally be subject to jurisdiction under the commercial-activities exception, they may still be insulated from such suits pursuant to their underlying treaties. Importantly, agreements establishing international organizations supersede the IOIA, allowing organizations like the World Bank to assert immunity from the commercial-activities exception because of the need "[t]o enable the Bank to fulfill the functions with which it is entrusted."[115] This charter-by-charter approach would be more consistent

110. 2B SUTHERLAND STATUTORY CONSTRUCTION § 51.08 (Norman J. Singer & J.D. Shambie Singer eds., 5th ed. 1992) (emphasis omitted).

111. *See, e.g.*, Culver v. People *ex rel.* Kochersperger, 43 N.E. 812, 814 (Ill. 1896) ("Where . . . the adopting statute makes no reference to any particular act . . . but refers to the general law regulating the subject in hand, the reference will be regarded as including, not only the law in force at the date of the adopting act, but also the law in force when action is taken or proceedings are resorted to.").

112. *Atkinson*, 156 F.3d at 1340.

113. *OSS Nokalva*, 617 F.3d at 765.

114. *See* Singer, *supra* note 33, at 63–64 ("[A]pplying the restrictive doctrine to international organizations would have severe adverse consequences.").

115. Articles of Agreement of the International Bank for Reconstruction and Development art. VII, § 1, Dec. 27, 1945, 60 Stat. 1440, 1447, 2 U.N.T.S. 134, 180; *see* Sadikoğlu v. United Nations Dev. Programme, No. 11 Civ. 0294 (PKC), 2011 WL 4953994, at *4 (S.D.N.Y. Oct. 14,

with the doctrine of functional necessity by making international organizations specifically define which immunities are required for them to accomplish their organizational purposes. Moreover, as discussed below, removing international organizations from the auspices of absolute immunity would directly benefit the businesses they interact with and the public they serve.

The argument that restrictive immunity is better for international organizations inevitably gives rise to the question: then why do international organizations consistently argue in favor of absolute immunity? First, international organizations most frequently advocate for absolute immunity *after* a lawsuit has already been brought.[116] Predictably, the risk of liability in the instant suit would prevent an organization from then advocating for less immunity. Second, taking immunity away from organizations would likely expose their management to a great deal more scrutiny. By shielding employment discrimination, sexual harassment, and other disputes from domestic courts, those that run international organizations are protected from any aspersions the judicial system may cast on their leadership abilities. Accordingly, these directors may have a vested interest in preserving their organizations' unfettered immunity.

The remainder of this subsection will address the several benefits that would accrue to international organizations and the public if a system of restrictive immunity were implemented.

a. Lower Transaction Costs.—In the late 1980s, the International Monetary Fund entered into negotiations with the Western Presbyterian Church over the purchase of the church's land, which happened to be situated on the one plot of real estate adjoining the IMF's Washington headquarters.[117] Although the church would normally possess a significant bargaining advantage in such a situation, it was reluctant to enter into any contract with the IMF because the organization's absolute immunity would allow it to renege on the agreement with impunity.[118] To assuage these concerns, the IMF bore significant up-front costs, which included the construction of a new church, the purchase of a new plot of land, the provision of a $4 million endowment, and even payment for the church's lawyers and architects,

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2011) (holding that the UN Charter and the Convention on Privileges and Immunities of the United Nations superseded any lack of immunity the UN might have been exposed to under the IOIA).

116. *See, e.g.*, Polak v. Int'l Monetary Fund, 657 F. Supp. 2d 116, 119–21 (D.D.C. 2009) (invoking immunity for the International Monetary Fund under the IOIA after the plaintiff filed suit for negligence); OSS Nokalva, Inc. v. Eur. Space Agency, No. 08–3169 (MLC), 2009 WL 2424702, at *1, *3–4 (D.N.J. Aug. 6, 2009) (considering the European Space Agency's claim of absolute immunity, raised in a breach of contract suit).

117. Anne Swardson, *A Celebrated Separation of Church and State: Western Presbyterian Reaches Agreement to Move Out of the IMF's Long Shadow*, WASH. POST, Dec. 24, 1990, at 1, 14.

118. *Id.* at 15.

against whom the IMF would be negotiating.[119] Though the deal ultimately benefited both sides, a lawyer for the church understandably characterized the negotiations as "a time-consuming and expensive process."[120]

This scenario illustrates the substantial transaction costs that often attend day-to-day contractual dealings with international organizations simply because of their broad grant of immunity. Because the budgets of international organizations are zero sum, the payment of high transaction costs—like the IMF's costly provisions to the Western Presbyterian Church—necessarily drains funds that could otherwise be spent on accomplishing organizational objectives. By removing immunity for routine transactions unrelated to an organization's purpose, not only will organizations be able to dedicate more resources to that purpose, but businesses will also be more confident in their negotiations with organizations by knowing that a proper remedy is available for any potential dispute.

b. Increased Accountability.—Inherent in any grant of immunity is the risk of potential abuse. Even apart from outright abuses of immunity, there necessarily exists the likelihood of an avoidance of justice. These concerns have led most international organizations to establish internal procedures for oversight and dispute resolution.[121] However, some international organizations still have yet to establish any mechanism for the settlement of disputes.[122] Moreover, even if such procedures exist, they are nonetheless viewed skeptically because of the absence of an independent, external authority.

For instance, the World Bank established its Inspection Panel in 1993 amid harsh criticisms leveled against the Bank by international environmental and human rights organizations.[123] The stated objective of the Panel is to determine "whether the Bank is complying with its own policies and procedures, which are designed to ensure that Bank-financed operations provide social and environmental benefits and avoid harm to people and the environment."[124] Despite the Panel's promise of greater accountability, many contend that it has failed to provide a fair and adequate procedure for

119. *Id.*

120. *Id.* at 15.

121. Reinisch, *supra* note 16, at 140 (noting that "administrative tribunals exist for most international organizations").

122. *Id.*

123. Jonathan A. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 GLOBAL GOVERNANCE 279, 279 (2000).

124. THE INSPECTION PANEL, THE WORLD BANK, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL AT 15 YEARS 2 (2009), http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf [https://perma.cc/8K7U-WTLK].

those adversely affected by the Bank's actions.[125] Indeed, in just the last three years, critics have derided the Panel for declining to investigate the Bank's alleged support of child labor in Uzbekistan and the displacement of over 9,000 slum residents in Nigeria.[126]

While internal procedures like the World Bank's Inspection Panel are a step toward greater organizational accountability, they are still a far cry from the scrutiny imposed by domestic litigation. Crucially, administrative tribunals like the Inspection Panel fail to guarantee any remedial or corrective measures—they do not produce enforceable judgments.[127] Thus, international organizations should be subjected to judicial scrutiny to ensure that they are not achieving their organizational objectives at the expense of those they intend to serve.

c. Better Public Perception.—Generally, Americans tend to view international organizations much more negatively than citizens of other countries.[128] Though it is unclear whether this view stems from the immunity provided to international organizations in America, the United Nations Development Programme has noted that "[l]arge parts of the public no longer believe that . . . [international] institutions are adequately accountable for what they do."[129] Thus, the increased accountability that would flow from less immunity could potentially increase public approval of international organizations. Better public perception would clearly benefit organizational goals by providing increased influence, cooperation, and political support.

d. Preserving Limitations on Foreign Sovereign Immunity.—Somewhat paradoxically, subjecting international organizations to the exceptions of the FSIA would also ensure that foreign states remain susceptible to those same

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125. *See, e.g.*, Jeff Tyson, *Is the World Bank's Inspection Panel Working the Way It Should?*, DEVEX (Nov. 10, 2015), https://www.devex.com/news/is-the-world-banks-s-inspection-panel-working-the-way-it-should-86973 [https://perma.cc/9CU6-SCR8] (describing the Inspection Panel's refusal to conduct a formal investigation into alleged abuses in Nigeria and Uzbekistan and critics' claims that the Panel was failing to adequately educate communities about their rights to compensation).

126. *Id.*

127. *See* Sabine Schlemmer-Schulte, *The World Bank Inspection Panel: A Model for Other International Organizations?*, *in* PROLIFERATION OF INTERNATIONAL ORGANIZATIONS, *supra* note 1, at 483, 510 (explaining that "[t]he Panel does not provide for a right to remedial measures or any other corrective measures [and] . . . [t]he result of the Panel process is not an enforceable judgment but findings by the Panel").

128. *See* COUNCIL ON FOREIGN REL., PUBLIC OPINION ON GLOBAL ISSUES 7–8 (2009), http://i.cfr.org/content/publications/attachments/USPOPCH10Institutions.pdf [https://perma.cc/A3C5-AELH] (noting that Americans' favorability ratings for the World Bank and IMF are "well below the global average").

129. SAKIKO FUKUDA-PARR ET AL., UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2002: DEEPENING DEMOCRACY IN A FRAGMENTED WORLD 112 (2002), http://hdr.undp.org/sites/default/files/reports/263/hdr_2002_en_complete.pdf [https://perma.cc/R2R2-HXAD].

exceptions. In *OSS Nokalva*, the Third Circuit noted that granting international organizations absolute immunity creates a perverse "incentive for foreign governments to evade legal obligations by acting through international organizations."[130] This tactic creates a loophole in the FSIA, granting state action absolute immunity when it is disguised through the decisions of an international organization. Such a loophole breathes life into a theory of immunity that has been disavowed since the middle of the twentieth century.[131]

B. Waiver Should Be Predicated on Functional Necessity, Not Corresponding Benefit

Along with its decision in *Atkinson*, the D.C. Circuit's treatment of waiver by international organizations is ultimately misguided. The "corresponding benefit" test outlined in *Mendaro* misinterprets the functional necessity doctrine, resulting in blanket immunity for international organizations that is wholly unnecessary. In holding that charter provisions like that of the World Bank[132] waive immunity only in cases where immunity would hinder the organization's objectives, the Court effectively *reverses* the doctrine of functional necessity.[133] Proper application of the functional necessity doctrine would lead to the opposite conclusion—that such provisions waive immunity in all cases unless immunity is necessary to achieve the organization's objectives.

While *Lutcher* may provide too lenient of a standard for waiver, its conclusion that full effect should be given to facially broad waivers of immunity in an organization's charter is persuasive. Indeed, where a charter states, for instance, that "actions may be brought against the Bank,"[134] a plain reading supports the notion that the organization has made itself amenable to suit, thus waiving its immunity "in broad terms."[135] However, it should not be assumed that an organization intended to waive the immunity necessary for it to achieve its intended purpose. Contrary to *Lutcher*, which permitted the assertion of any claims for which relief is available,[136] functional

130. OSS Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756, 764 (3d Cir. 2010).

131. *See* BORN & RUTLEDGE, *supra* note 32, at 232–33 (discussing the departure from absolute immunity theory, according to which all actions of a sovereign are afforded sovereign immunity).

132. *See supra* note 70 and accompanying text.

133. *See* Herz, *supra* note 22, at 519 ("[I]t reverses the presumption against immunity that is inherent in the doctrine of 'functional necessity,' the internationally accepted approach to defining the immunity of international organizations."); Singer, *supra* note 33, at 136 ("The organization will face undue burdens in the exercise of its functions unless it is vulnerable to suit on certain kinds of claim. This is a doctrine of functional necessity in reverse.").

134. This was the language used in the IDB charter provision at issue in *Lutcher*. Agreement Establishing the Inter-American Development Bank, *supra* note 70, 10 U.S.T. at 3095, 389 U.N.T.S. at 128; *see supra* note 70–72 and accompanying text.

135. Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank, 382 F.2d 454, 457 (D.C. Cir. 1967).

136. *Id.*

necessity dictates that any claim may be asserted unless it impedes the fulfillment of an organizational purpose.

Simply reforming the jurisprudence currently applied to waiver would greatly curtail much of the unnecessary immunity currently provided to international organizations. Indeed, facially broad waivers of immunity are contained in many international organization charters, with only a few exceptions.[137] If such provisions were construed as making these organizations susceptible to suits unrelated to organizational goals, many of the issues inherent in the IOIA's grant of absolute immunity would be resolved or substantially mitigated.

C. *Approaches in Other Countries to International Organization Immunity*

While this Note does not purport to extensively document all the various methods dealing with international organizations, it is worth noting some of the differing approaches abroad. Specifically, this subpart details the levels of immunity provided to international organizations in Austria, Italy, and the United Kingdom. These are not random selections—each of these countries hosts numerous international organizations and, therefore, faces many of the same policy considerations as the United States. Though imperfect, the approaches taken by these three countries are still preferable to the American approach and provide a useful point of comparison. Indeed, aspects of each approach could easily be adopted in the United States to curtail the degree of immunity provided to international organizations.

1. Austria.—In Austria, "[i]t is settled case law that international organizations enjoy absolute immunity," provided that they act within their assigned functions.[138] Austria provides privileges and immunities to more than forty international organizations, many of which are seated in Vienna.[139] Similar to the United States, Austria's broad grant of immunity may flow from "the political interest of states to attract international organizations in their choice of headquarters."[140] Indeed, the Austrian government described

137. *See, e.g.*, Agreement Establishing the Inter-American Development Bank, *supra* note 70, 10 U.S.T. at 3095, 389 U.N.T.S. at 128. One such exception is contained in the Asian Development Bank's Articles of Agreement, which specifies that "[t]he Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities." Articles of Agreement Establishing the Asian Development Bank art. 50, Dec. 4, 1965, 17 U.S.T. 1418, 1449, 571 U.N.T.S. 123, 192.

138. Kirsten Schmalenbach, *Austrian Courts and the Immunity of International Organizations*, 10 INT'L ORG. L. REV. 446, 457–58 (2013).

139. Gregor Novak & August Reinisch, *Austria*, *in* THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS, *supra* note 5, at 31, 31 n.2.

140. *See* Schmalenbach, *supra* note 138, at 448 (suggesting that immunity concessions can be used to entice organizations to settle within states' borders).

the presence of international organizations in the country as an "important goal [that] . . . positively affects the country's reputation and influence in international relations."[141]

Perhaps due to the futility of pursuing a claim against an international organization in Austrian courts, most disputes are settled through a mediation procedure, with the Austrian Foreign Ministry serving as mediator.[142] Though this necessarily requires the acquiescence of the organization, such a procedure might prove useful in the United States, where grievances against an organization would be mediated by the State Department. The mediation process would allow international organizations to retain their immunity but also provide some measure of remediation for aggrieved parties. Additionally, an independent mediator avoids the issue of bias implicit in any administrative tribunal set up by the organization.

2. Italy.—In Italy, courts "have consistently interpreted the jurisdictional immunity of international organizations restrictively" by applying the distinction between *acta iure gestionis* and *acta iure imperii*.[143] Italian courts only grant organizations immunity for *iure imperii* acts—i.e., actions that flow from some degree of sovereignty and that cannot ordinarily be carried out by private entities.[144] Consistent with this approach, Italian courts frequently rely on the principles of foreign-sovereign-immunity law in cases concerning the scope of international organization immunity.[145]

In *Food and Agriculture Organization v. INPDAI*,[146] a landlord brought suit against the FAO for failing to pay the rent on one of the buildings it occupied.[147] Rent had been increased on the property pursuant to a provision in the lease agreement; however, the FAO felt the provision was inapplicable.[148] In denying immunity to the FAO, the Italian Supreme Court of Cassation held that "whenever [international organizations] acted in the private law domain, they placed themselves on the same footing as private persons with whom they had entered into contracts, and thus forewent the right to act as sovereign bodies."[149] The Italian Supreme Court has since reversed the *INPDAI* decision, holding that Italy's Headquarters Agreement with the FAO prevents suits against the organization in Italian courts,

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141. Novak & Reinisch, *supra* note 139, at 31 (quoting the response of the Federal Minister of European and International Affairs to a parliamentary request).

142. Schmalenbach, *supra* note 138, at 447.

143. A.S. MULLER, INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES 61 (1995).

144. *Id.*

145. Riccardo Pavoni, *Italy*, *in* THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS, *supra* note 5, at 155, 158.

146. Cass., sez. un., 18 ottobre 1982, n. 5399, 87 ILR 1982, 1 (It.).

147. MULLER, *supra* note 143, at 172.

148. *Id.*

149. *Id.*

resulting in a much-more-absolute grant of immunity.[150] However, absent such headquarters agreements, Italian courts are still quick to apply customary principles of sovereign immunity to international organizations.[151]

3. United Kingdom.—Like the United States and Austria, the United Kingdom (UK) has been the host country for numerous international organizations, including the International Maritime Organization, the World Bank, and the International Tin Council.[152] In the UK, international organizations are generally granted some degree of immunity pursuant to the International Organisations Act 1968 (IOA).[153] Under the IOA, an international organization may be granted any of seven privileges and immunities listed in the Act to such extent as is specified by an "Order in Council."[154]

Though the Act commonly grants organizations "[i]mmunity from suit and legal process,"[155] the IOA is still preferable to the American approach. Ostensibly, the IOA vests in the Queen authority to determine the extent of immunity granted to international organizations through an Order in Council, similar to the President's authority under the IOIA.[156] In practice, however, Orders in Council are "subject to parliamentary procedure," [157] and royal assent is a mere formality.[158] Thus, determinations of organizational immunity in the UK are subject to public debate and not solely within the discretion of a single individual.

D. Other Potential Solutions to the Absolute Immunity Problem

1. Presidential Declaration of Activities Subject to Jurisdiction.—One method of reining in international organization immunity absent judicial decree would be for the President to limit the immunity of organizations pursuant to his express authority under the IOIA.[159] Presently, of the eighty-

150. Pavoni, *supra* note 145, at 168.

151. *Id.* at 170.

152. Dan Sarooshi & Antonios Tzanakopoulos, *United Kingdom*, *in* THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS, *supra* note 5, at 275, 275.

153. International Organisations Act 1968, c. 48 (U.K.).

154. *Id.* § 1(2)(c), sch. 1.

155. *Id.*; *see* Sarooshi & Tzanakopoulos, *supra* note 152, at 276 (explaining that "[i]t is relatively rare for cases against international organizations to be brought before the UK courts since these organizations will often enjoy immunity from legal process" pursuant to the IOA).

156. Sarooshi & Tzanakopoulos, *supra* note 152, at 290.

157. CABINET OFFICE, THE CABINET MANUAL DRAFT 19 (2010), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60645/cabinetdraftmanual.pdf [https://perma.cc/W66F-HNG4].

158. "[U]nder the modern constitutional convention," the Queen may not refuse to give assent. Francis Bennion, *Modern Royal Assent Procedure at Westminster*, 1981 STATUTE L. REV. 133, 138 (1981). Royal assent has not been refused since 1707. *Id.* at 138 n.25.

159. 22 U.S.C. § 288 (2012).

four international organizations designated by executive order, only one has had its immunity under the IOIA limited by the President to any degree.[160] Professor Michael Singer has proposed that the President reduce organizational immunity through a specific list of activities subject to jurisdiction, with the U.K. State Immunity Act of 1978 serving as one prominent example of such a list.[161] A primary benefit of this method would be the ability of the President to address immunity on an organization-by-organization basis, allowing specific determinations of when immunity would benefit an organization's goals.

2. Requirement of Express Notice of Immunity.—International organization immunity could also be limited by reversing the presumption that immunity exists unless expressly waived. Indeed, many of the negative effects of absolute immunity may be obviated if there were the presumption that immunity does not exist unless expressly asserted by an international organization in a given transaction. While this change in jurisprudence would have to be limited to contractual dealings, requiring organizations to give notice of their immunity might eliminate many of the uncertainties and transaction costs that currently exist when businesses negotiate with international organizations.

Though international organizations may currently waive their immunity in any given contract, they are incredibly loath to do so.[162] Thus, by reversing the presumption of immunity in contractual dealings, organizations may be more willing to forgo the imposition of immunity and all the attendant difficulties. At the very least, businesses dealing with international organizations would be put on notice regarding an organization's willingness to submit to jurisdiction over a given contract.

3. Amendment of the FSIA or IOIA.—The simplest and most obvious method of restricting international organization immunity is by legislative amendment of either the FSIA or IOIA. All Congress need do is expressly state that either: (a) the FSIA applies to international organizations or (b) the IOIA provides international organizations the same immunity that foreign states currently enjoy and incorporates any subsequent changes in foreign-sovereign-immunity law.

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160. The one organization with limited immunity is the International Food Policy Research Institute. Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 26, 1982). Additionally, INTERPOL had limited immunity for nearly thirty years until President Obama removed all such limitations in 2009. Exec. Order No. 13,524, 74 Fed. Reg. 67,803 (Dec. 16, 2009).

161. Singer, *supra* note 33, at 145.

162. *See id.* at 137 ("[A]ny international organization can waive its own immunity in any case, yet such waivers are rare.").

Conclusion

When Congress passed the IOIA in 1945, it likely did not intend the substantial gap in the relative immunities of international organizations and foreign states that exists today. Indeed, it is somewhat anomalous that international organizations are afforded greater immunity from suit than the individual states that comprise them. However, conventional international law supports a grant of immunity only insofar as it is necessary for an international organization to fulfill its intended purposes.

The D.C. Circuit's interpretation of the IOIA misconstrues not only the theoretical foundation of international organization immunity but also the intent of the Act. This is evidenced by a widely accepted canon of interpretation, which counsels that the statute likely intended to keep international organization immunity at a level commensurate with that of foreign states. Moreover, the D.C. Circuit has also erred by so narrowly construing facially broad waivers of immunity contained in organizational charters.

Most importantly, implementing a system of restrictive immunity in regard to international organizations would be preferable to one of absolute immunity. Not only is such an approach consonant with the principles of international law, but it also increases the efficacy of international organizations through reduced transaction costs, greater accountability, and improved public perception. Additionally, restrictive immunity gives businesses greater confidence in dealing with international organizations and prevents foreign states from cleverly avoiding the exceptions present within the FSIA.

—Carson Young

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