Foreword

A Tale of Two Justices

*Ilya Shapiro**

The Cato Institute's Robert A. Levy Center for Constitutional Studies is pleased to publish this 18th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended plus a look at the term ahead. We are the first such journal to be released, and the only one that approaches its task from a classical liberal, Madisonian perspective, grounded in the nation's first principles, liberty through constitutionally limited government. We release this volume each year at Cato's annual Constitution Day symposium on September 17 (or a day or two before or after if Constitution Day is on a weekend). And each year in this space the publisher briefly discusses a theme that emerged from the Court's term or from the larger setting in which the term unfolded.

For the first time since the *Review*'s inception, that publisher is someone other than Roger Pilon. At the end of 2018, Roger stepped down as director of the Levy Center and handed the reins to me. Roger founded the Center in 1989, after holding five senior posts in the Reagan administration, and directed its growth into a respected and influential voice. Although he has taken emeritus status, Roger remains close to Cato, continuing to hold our B. Kenneth Simon Chair in Constitutional Studies and working on a book that will tie together the legal philosophy and constitutional theory that represent his life's work. He also recently oversaw the production of 10 videos for the Students for Liberty "Law 201" series, spreading the word to the next generation.

Having taken over the Levy Center, I in turn passed down editorial responsibility for the *Cato Supreme Court Review*, 11 volumes

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of which were produced on my watch. Stepping into my shoes is Trevor Burrus, who started at Cato as a legal intern after graduating from law school in 2010 and immediately made himself indispensable. Now a research fellow, as well as book review editor for the *Cato Journal* and cohost of the popular "Free Thoughts" podcast, Trevor is doing a wonderful job with the *Review*.

Of course, this was also the rookie year for a Supreme Court justice. After a bruising confirmation fight, Brett Kavanaugh took his seat on the Court the second week of the term. Replacing the predictably unpredictable Justice Anthony Kennedy, Justice Kavanaugh seemed poised to move the Court to the right. But looks can be deceiving. In a few high-stakes cases and, especially, petition rejections and other votes on the "shadow docket" (as opposed to fully briefed and argued cases), Kavanaugh demonstrated a pragmatic—not wholly originalist/textualist or "conservative"—approach to his craft.

And Kavanaugh has tried to keep a low and agreeable profile, easily becoming the justice most often in the majority (91 percent of the time) and second-most in the majority in 5-4 decisions (trailing only Justice Neil Gorsuch). That was a mild surprise to the conventional wisdom that now holds Chief Justice John Roberts to be at the Supreme Court's jurisprudential center—the first time the chief justice was also the median vote in half a century. This was an unusual term, however, with a small spread between winners and losers and no real ideological dominance. The justices least in the majority (a four-way tie among Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor, and Gorsuch) were still on the winning side 70 percent of the time. And for all the doomsday prophesying from progressives, of the twenty 5-4 rulings, only seven had Republican appointees versus Democratic appointees, while eight others saw a "conservative" justice cast the deciding vote alongside the "liberals" (four of those Gorsuch) and another four were beyond characterization. A reinvigorated conservative bloc may yet come to dominate the Court—especially if President Trump fills another seat—but that isn't the story yet.

What's more interesting than trying to discern some theme from the last term is to contrast the two newest justices. Justice Gorsuch is rapidly becoming a libertarian darling in many ways—his "defections" tend to be in criminal law—while Justice Kavanaugh steers down the middle of the road. Kavanaugh actually aligned

himself as much with Justices Stephen Breyer and Elena Kagan this term as with Gorsuch. According to Adam Feldman at *Empirical SCOTUS*, Gorsuch and Kavanaugh voted together less often in their first term together than any other two justices appointed by the same president, going back at least to JFK.

Probably the starkest difference emerging between Gorsuch and Kavanaugh is in constitutional criminal procedure, where in close cases Gorsuch essentially occupies the Scalia role as a friend of criminal defendants caught up in sloppy government action or legislation, while Kavanaugh slides toward a pragmatic deference to law enforcement.

For example, *United States v. Davis* was a 5-4 decision in which Justice Gorsuch wrote the majority opinion, striking down the federal law that provided enhanced penalties for using a firearm during a "crime of violence" as unconstitutionally vague. Justice Kavanaugh authored the dissent on behalf of the other more conservative justices, arguing that the provision focused on conduct during the specifically charged crime and was therefore distinguishable from other catch-all clauses that were struck down for vagueness.

Then in *United States v. Haymond*, another 5-4 case, Gorsuch again authored the lead opinion, joined by the more liberal justices (Justice Breyer only in the judgment). Here, the Court ruled that the defendant sex offender's Fifth and Sixth Amendment right to trial by jury were violated when he was sent back to jail for five years based on a judicial determination that he had violated the terms of his supervised release. Kavanaugh joined Justice Samuel Alito's dissent, which argued that supervised-release revocation proceedings simply do not require a jury trial.

Justice Kavanaugh got his revenge in *Mitchell v. Wisconsin*, finally coming out on the winning side of a 5-4, joining Justice Alito's plurality opinion (also joined by Chief Justice Roberts and Justice Breyer, with Justice Thomas concurring in the judgment), which held that when a person is unconscious, the exigent-circumstances doctrine allows for a blood test without a warrant. Justice Gorsuch filed a dissenting opinion, arguing that he would have dismissed the case as improvidently granted because the case was brought regarding implied consent to the blood-draw and the lower courts hadn't adequately addressed the exigent-circumstances doctrine. (Cato filed a brief on the losing side here.)

A couple of other criminal-justice-related cases show divergence between Gorsuch and Kavanaugh on constitutional structure. Although *Timbs v. Indiana* was a unanimous decision "incorporating" the Eighth Amendment's Excessive Fines Clause against the states through the Fourteenth Amendment, it contained Justice Kavanaugh's biggest disappointment of the term for originalists. Kavanaugh joined Justice Ginsburg's majority opinion that invoked substantive due process as the principal font of substantive rights. Justice Gorsuch wrote a brief concurrence to explain that, while it may not matter as to the right to be free from excessive fines, the Privileges or Immunities Clause, not the Due Process Clause, was the constitutionally faithful way of applying rights against the states. (Justice Thomas concurred separately along the same lines, which also echoed Cato's briefing.)

Then in *Gamble v. United States*, the 7-2 majority, writing through Justice Alito, upheld the dual sovereignty doctrine, under which identical offenses—here, felon in possession of a firearm—are not the "same offence" for purposes of the Fifth Amendment's Double Jeopardy Clause if charged by separate sovereigns. Gorsuch filed a dissenting opinion, on Cato's side, arguing essentially that if you read federalism to give state and federal governments multiple opportunities to prosecute someone for the same basic crime, you're doing it wrong. (Justice Ginsburg was the other dissenter; Justice Thomas had previously questioned the dual sovereignty doctrine, but reconsidered in the light of history.)

Three cases on the civil docket are also worth mentioning. In *Air and Liquid Systems Corp. v. Devries*, Kavanaugh authored a 6-3 majority opinion holding that manufacturers of asbestos-dependent equipment can be held liable to Navy sailors who became ill because of their contact with the asbestos. Under maritime law, Kavanaugh explained, the manufacturer has a duty to warn if (1) its product requires the incorporation of a part manufactured by a third party, (2) the combined product is likely dangerous for its intended use, and (3) the manufacturer has no reason to think that the users would be conscious of that danger. Gorsuch wrote the dissent (joined by Thomas and Alito), arguing that the common law of torts should apply instead—and thus the manufacturer cannot be held liable when shipping the product in "bare metal" form, which was not by itself dangerous.

Apple Inc. v. Pepper also featured dueling Kavanaugh-Gorsuch opinions. Kavanaugh, joined by the liberals in a 5-4 case in the only configuration of its kind this term, held that iPhone owners who bought apps through Apple's App Store are "direct purchasers" and therefore can sue Apple for anti-competitive pricing. Gorsuch in dissent argued that precedent does not allow for "pass on" antitrust damages, and thus the plaintiffs can't sue Apple directly. This was a close case, to be sure, but if a functionalism/formalism divide deepens between the two newest justices, it could prove prophetic.

Finally, a trio of sui generis cases offer further contrasts. First, in *Washington State Department of Licensing v. Cougar Den, Inc.*, five justices found that the "right to travel" provision of an 1855 treaty between the United States and the Yakama Nation of Indians preempts the state's fuel tax as applied to Cougar Den's importation of fuel by public highway for sale within the reservation. There was no majority opinion, but Justice Gorsuch wrote an opinion concurring in the judgment (joined by Justice Ginsburg), in which he argued that the treaty should be interpreted the way that the Yakama understood it because the United States drafted it in a language foreign to the tribe—and the Yakama gave up a large land area in exchange for the treaty rights. Justice Kavanaugh joined the other conservatives on Chief Justice Roberts's main dissenting opinion, which argued that the tax burdened possession of fuel, not travel, and so the treaty did not shield the Yakama. Kavanaugh also filed his own dissent (joined by Justice Thomas), arguing that the Yakama have only those rights to use public highways equal to other U.S. citizens—and so the nondiscriminatory fuel tax could be applied to them.

Second, in *Tennessee Wine and Spirits Retailers Association v. Thomas*, Justice Kavanaugh joined Justice Alito's 7-2 majority opinion that found the dormant Commerce Clause—which prevents states from interfering with interstate commerce even if Congress hasn't legislated in the area—to preclude a state from granting retail liquor licenses only to people who met state residency requirements. Justice Gorsuch, joined by Justice Thomas, argued in dissent that the Twenty-first Amendment (which repealed Prohibition) allows states to impose broad regulations on alcohol. The dormant Commerce Clause is probably the only broad doctrinal area on which Cato has taken positions diametrically opposite Justice Gorsuch—it's certainly the only kind of case in which I've found myself disagreeing with

him—but here Gorsuch gives special solicitude to alcohol regulation rather than parsing state legislators' protectionist motives and effects.

And third there's *Kisor v. Wilkie*, which may seem to be an odd case for this discussion, both because it was nominally unanimous—remanding an agency determination back to the lower courts for further scrutiny—and because Gorsuch and Kavanaugh found themselves on the same side of the larger issue not-so-buried within. The majority, in an opinion by Justice Kagan and joined by the other liberals and Chief Justice Roberts, declined to overrule the so-called *Auer* doctrine—whereby courts defer to agencies' reinterpretations of their own ambiguous regulations—and instead tightened the evaluative rubric judges should apply before deferring. Justice Gorsuch's concurrence was a dissent in all but name and was joined by the remaining conservatives, including Justice Kavanaugh. Gorsuch argued that the majority "has maimed and enfeebled—in truth, zombified" *Auer* deference, keeping it "on life support" in a way that deprives lower courts of clarity and litigants of independent judicial decisions. Kavanaugh wrote a separate concurrence (joined by Justice Alito) minimizing the distance between the Kagan and Gorsuch opinions—which, curiously, Roberts had also done in his concurrence.

Time will tell whether lower courts vindicate the Roberts/Kavanaugh view that Kagan essentially mended *Auer* without ending it, but *Kisor*'s nuances reveal the subtle differences between two justices who are second to no one—except perhaps Columbia law professor (and former Cato Constitution Day Simon Lecturer) Philip Hamburger—in pushing back on the administrative state. Whereas Gorsuch wants to pare back judicial deference, period, Kavanaugh focuses on reducing the number of instances where deference is at issue in the first place. For example, under the famous *Chevron* doctrine, judges defer to reasonable agency interpretations when the agency's operational statute is ambiguous—and Kavanaugh would rather that judges work not to find (or manufacture) that ambiguity. In this, as in certain other areas of both legal theory and judicial process, the Gorsuch-Kavanaugh divide will likely echo the Thomas-Scalia one.

In any event, this unconventional and relatively low-key term did little to establish exactly where among the more conservative justices Kavanaugh will eventually settle, or exactly how close he'll be

to John Roberts's minimalistic pragmatism. My fervent hope is that, wherever he ends up, it'll be for principled reasons rather than out of concern for "legitimacy"—be it his own or the Court's.

Although the radical right turn that many expected, whether out of hope or fear, failed to materialize this year, there was plenty of handwringing over judicial partisanship and warnings about the Court's integrity and independence. We've come to expect this sort of "working the refs"—most notoriously ahead of *NFIB v. Sebelius* (the 2012 Obamacare individual-mandate case), and this year making an appearance in the case about the inclusion of a citizenship question on the census—a cynical tactic that will continue so long as it appears to be an effective guilt trip against "institutionalist" judges.

In the end, the only measure of the Court's legitimacy that matters is the extent to which it maintains, or rebalances, our constitutional order. Indiana law professor Luis Fuentes-Rohwer put it best last year in a *Chicago-Kent Law Review* article titled "Taking Judicial Legitimacy Seriously," where he wrote that "judicial legitimacy is a trope deployed by judges in the pursuit of specific outcomes . . . a warning about the future and how a judicial outcome may be received, yet a warning that operates more as a boogeyman. It is a criticism, a call for restraint, yet lacking in empirical support."

"The man on the street does not care that the Court appears to side with one party over the other," Fuentes-Rohwer (no libertarian) explained in what is effectively an update of Berkeley law professor John Yoo's "In Defense of the Court's Legitimacy," which was published in the *University of Chicago Law Review* in the wake of *Bush v. Gore*. "He only cares that the Court follows a principled process."

As I wrote in the *Washington Examiner* magazine in July, the reason we have these legitimacy disputes isn't because the Court is partisan, but because it can't be divorced from the larger political scene, and because sometimes justices seem to make decisions not based on their legal principles but for strategic purposes. The public can see through that. Ultimately, it's when justices think about avoiding political controversy that they act most illegitimately.

Introduction

*Trevor Burrus**

This is the 18th volume of the *Cato Supreme Court Review*, the nation's first in-depth critique of the Supreme Court term just ended, plus a look at the term ahead. After 11 years of helming the ship as editor-in-chief, Ilya Shapiro has become the director of the Robert A. Levy Center for Constitutional Studies and publisher of the *Review*. Stewardship of the *Review* has been passed to me. I'm honored to be the fourth editor-in-chief, joining the estimable lineage of James L. Swanson, Mark Moller, and Ilya. From my summer internship in 2010 to now, I have worked on nine volumes of the *Review*, and I've always been proud of the quality of the product and the speed with which we put it together.

We release the *Review* every year in conjunction with our annual Constitution Day symposium, less than three months after the previous term ends and two weeks before the next term begins. It would be hard to produce a law journal faster. Given that the Court likes to hold big decisions until the end of June, authors often have little more than a month to produce their articles. Then, after a furious editing process—the editor of the *Review* is one of the only people in D.C. who can't leave town in August—we have the finished product in hand by mid-September. We're also proud that this isn't a typical law review, filled with long, esoteric articles on, say, the influence of Immanuel Kant on evidentiary approaches in

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18th-century Bulgaria.[1] Instead, this is a book of essays on law intended for everyone from lawyers and judges to educated laymen and interested citizens.

And we're happy to confess our bias: It's the same bias that infected Thomas Jefferson when he drafted the Declaration of Independence and James Madison as he contemplated a new plan for the government of the United States. Individual liberty is protected and secured by a government of delegated, enumerated, separated, and thus limited powers. Through the ratification process, the People created a federal government bound by the strictures of the Constitution.

The delicate balance of powers within the government is partially maintained by a judiciary that enforces the Constitution according to its original public meaning, which sometimes means going against the "will of the people" and striking down popularly enacted legislation. The Constitution is not an authorization for "good ideas." Everyone who cares about the Constitution should be able to think of something that they believe is a good idea but is unconstitutional, as well as something that is a bad idea but is constitutionally authorized. If you can't think of one, then you don't really believe in the Constitution, you just believe your good ideas. That's fine if you're a member of Congress (although they also take an oath to support and defend the Constitution), but judges and justices are obligated to think beyond their preferences and to enforce the law.

That fact is increasingly forgotten in modern times, as our Supreme Court confirmations look more and more like episodes of "Survivor." Nominees are asked to weigh in on substantive issues, or are queried about something vaguer, such as "will you promise to

[1] Chief Justice John Roberts once opined on the uselessness of law reviews: "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." Remarks at the Annual Fourth Circuit Court of Appeals Judicial Conference 28:45–32:05 (June 25, 2011), https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts. See also Orin S. Kerr, The Influence of Immanuel Kant Evidentiary Approaches in Eighteenth-Century Bulgaria, 18 Green Bag 2d 251, 251 (2015) ("Chief Justice Roberts has drawn attention to the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria. No scholarship has analyzed Kant's influence in that context. This Article fills the gap in the literature by exploring Kant's influence on evidentiary approaches in 18th-century Bulgaria. It concludes that Kant's influence, in all likelihood, was none.").

fight for the interests of the working class?" Such questions are not only insulting to nominees, but give the American public an image of the Court as nothing more than a super-legislature. Guaranteeing to fight for the working class is the pledge of a politician, not a judge.

At the beginning of this past term, we witnessed a bruising confirmation fight over the seat of Anthony Kennedy, who announced his retirement in June 2018. As the former "swing" justice, and every Democrat's favorite Republican appointee, the fight over Kennedy's seat was destined to be a difficult one. But the presidency of Donald Trump has increased animosity in Washington, and the confirmation of Brett Kavanaugh established a new baseline for vicious partisan fights over the Supreme Court. I fear, however, that it will only get worse. It's somewhat fitting that the fight over the Kennedy seat created a new nadir in confirmation battles. President Ronald Reagan's first choice to fill the seat of Justice Lewis Powell was Robert Bork, whose nomination was defeated in the first chapter of our modern partisan confirmation battles. Next came Douglas Ginsburg, who withdrew his name from consideration after it was revealed that he used marijuana as an assistant professor at Harvard. Kennedy was the third choice.

Because of the delay created by late-breaking sexual-assault allegations, Justice Kavanaugh missed the first few days of the term and was sworn in on October 6, 2018. That early absence likely proved consequential in at least one case, *Gundy v. United States*, where Kavanaugh might have been the fifth vote to revive the long dormant nondelegation doctrine. You can read more about that fascinating case in Professor Gary Lawson's excellent contribution to this volume.

In his first term, Justice Kavanaugh has largely done what he said he would do: judge narrowly and conservatively with faithfulness to the Constitution and the rule of law. As predicted, at least by those who have a deeper understanding of jurisprudence than merely looking to the party of the nominating president, Kavanaugh has generally shown himself to be more in the John Roberts/Samuel Alito camp than the Clarence Thomas/Neil Gorsuch one. In fact, Kavanaugh agreed 70 percent of the time with Justices Stephen Breyer and Elena Kagan, which is as much as he did with Justice Gorsuch. As Ilya notes in his foreword, that's the lowest level of agreement by two justices appointed by the same president since at least John F. Kennedy's presidency.

More generally, this term confounded those who believe that all the Court does is decide cases 5-4 along partisan lines. There were 20 5-4 decisions (out of 66 total rulings after argument), but only seven featured the Republican appointees vs. the Democrat appointees. When it came to 5-4 decisions, Gorsuch was in the majority in 14 of the 20 (70 percent), Kavanaugh in 12 of 18 (67 percent), and Thomas in 13 of 20 (65 percent). Still, only 39 percent of decisions were unanimous, which is the same as last term and tied for the lowest rate of unanimous decisions since October Term 2008. There are deep ideological divisions in this Court, but those divisions are as much within partisan "blocs" as they are between them.

Justice Kavanaugh, possibly keeping his head down after his raucous confirmation, was the most agreeable justice, voting 91 percent of the time with the majority (85 percent of the time in divided decisions). Next was Chief Justice John Roberts, 85 percent of the time (75 percent in divided decisions), followed by Alito and Kagan at 82 percent (70 percent in divided decisions). No other justice was above 80 percent, with Justices Thomas, Ruth Bader Ginsburg, Sonia Sotomayor, and Gorsuch all at 70 percent (59 percent in divided decisions).

Unsurprisingly, Chief Justice Roberts and Justice Kavanaugh agreed most often, 94 percent of the time, followed by Ginsburg and Sotomayor, 93 percent, and Alito and Kavanaugh, 91 percent. And although Gorsuch and Thomas agreed 100 percent of the time last term, this term saw some new divisions emerge. Who agreed least? As usual, Justice Thomas's adherence to originalism—which sometimes went too far for even Justice Antonin Scalia—creates divisions with many of the Democrat-appointed justices. Thomas agreed with Justices Ginsburg and Sotomayor only 50 percent of the time, Breyer 51 percent, and Kagan 60 percent. That may seem low, but it's worth remembering when the Supreme Court is attacked as a purely partisan institution: Ginsburg and Thomas agree half the time.

In his second term, Justice Gorsuch continues to be principled and iconoclastic. He has taken up the late Justice Scalia's role of often crossing the partisan divide in criminal-justice cases. He also continues to demonstrate that he has no qualms about rocking the boat by writing learned and persuasive opinions that often call into question well-established doctrines. We're no strangers to this at Cato,

where we often file amicus briefs that ask the Court to reconsider entrenched precedents, as a principled commitment to the Constitution will sometimes require.

In the 2017–2018 term, in *Carpenter v. United States*, Gorsuch wrote a lengthy dissent that called into question the bedrock case in Fourth Amendment jurisprudence, *Katz v. United States*, and asked whether a property-rights-centered view of the Fourth Amendment would be both more faithful to the Constitution and possibly better protective of privacy.[2] This term, Gorsuch and Justice Ginsburg were the lone dissenters from the majority decision in *Gamble v. United States*, which preserved the dual sovereignty exception to the Double Jeopardy Clause. Then, in *Kisor v. Wilkie*, Gorsuch chided the Court for not having the gumption to fully overrule *Auer v. Robbins*, which established the doctrine of judges deferring to an agency's interpretation of its own regulations. Perhaps most surprisingly, he crafted a spirited dissent in *Gundy v. United States*, joined fully by the chief justice and Justice Thomas, that argued for restoring constitutional limits on how much lawmaking power Congress can delegate.

Closer to home, it was another winning year for Cato at the Court. We filed 16 amicus briefs in cases on the merits, and our overall record was 12-4. That's better than the Ninth Circuit, which once again was the biggest loser at the Court, being reversed or vacated 12 times and upheld only twice. Of course, the Supreme Court usually reverses or vacates, and this term it did so at the same rate as last term, 74 percent of the time.

Turning to the *Review* itself, while the term was not as epic as some in the last decade—during my first few years at Cato, I got tired of writing "term of the century"—there were plenty of important and intriguing cases. As always, the volume begins with the previous year's B. Kenneth Simon Lecture in Constitutional Thought, which was delivered by famous columnist George F. Will. While it might seem strange to have an opinion journalist deliver a lecture in constitutional thought, Mr. Will has always been an astute observer of the Court and an insightful commentator on the Constitution. In his lecture, tellingly titled "The Insufficiently Dangerous Branch,"

[2] See the article on the case by me and James Knight in last *Cato Supreme Court Review*. Trevor Burrus and James Knight, *Katz* Nipped and *Katz* Cradled: *Carpenter* and the Evolving Fourth Amendment, 2017–2018 Cato Sup. Ct. Rev. 79 (2018).

Will confesses that he almost became a lawyer. When he was choosing between attending a prestigious law school or Princeton's Ph.D. program in political philosophy, he "chose to go to Princeton because it is midway between two cities with National League baseball teams." He takes up Alexander Bickel's question of the Supreme Court's "counter-majoritarian difficulty," or the problems posed by a non-elected Court overturning popularly enacted legislation. So be it, says Will. "Does judicial engagement make the judicial branch dangerous to the current scope of what is called, with much imprecision, majority rule? The one-word answer is: Yes. A three-word answer is: Not nearly enough."

Next, Professor Gary Lawson of Boston University School of Law (and a member of the *Review*'s Board of Advisors) discusses what was, in my view, one of the true blockbusters this term, even though it was one of the cases that Cato lost. That *Gundy v. United States* was even at the Court was a surprise. The petition was filed *in forma pauperis* (meaning fees were waived) by a public defender who raised four questions to the Court. The fourth one was a real long shot and so she spent less than two pages of the petition on it: whether parts of the Sex Offender Registration and Notification Act violated the nondelegation doctrine. The nondelegation doctrine is the simple idea that Congress can't delegate to other entities its own lawmaking duties. Nearly everyone agrees this is true in theory. If Congress decided to delegate its powers to one guy, Bob, and then go back to their districts, the resulting Bobocracy would be unconstitutional. While that much is obvious, no one knows where to draw the line. Consequently, it's been more than 80 years since the Court has ruled unconstitutional any delegation of congressional power. It was thus a bit shocking when the Court took up the nondelegation question, the only part of the petition it granted. Professor Lawson—who was cited prominently in Justice Gorsuch's dissent—explains how the Court got tantalizingly close to reviving the nondelegation doctrine. Because Justice Kavanaugh had not yet been seated, the vote was 4-1-3, with Justice Alito providing essentially a courtesy vote for the majority. Still, Lawson writes, "*Gundy* is the first time since 1935 that more than two justices in a case have expressed interest in reviving some substantive principle against subdelegation of legislative authority" and, with Kavanaugh now on the bench, "it is very hard to read *Gundy* and not count to five under your breath."

Paul Larkin of the Heritage Foundation discusses baseball, deference, and administrative law in his article on one of the term's cases that fizzled, *Kisor v. Wilkie*. Like Professor Lawson, Larkin and our "Looking Ahead" author, Elizabeth Slattery, were coauthors of an article that was prominently cited by Justice Gorsuch in his concurrence. For a couple of decades, conservative and libertarian legal scholars, like Larkin and Slattery, have had their eyes on *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, two cases that help empower the administrative state. *Auer* and *Seminole Rock* are a form of intra-agency deference—deferring to the agency's interpretation of its own regulations—and thus are different than *Chevron* deference, which is judicial deference to an agency's reasonable interpretation of a congressional statute. Larkin examines whether Justice Kagan's majority opinion in *Kisor*, which added more limitations to *Auer* deference instead of overruling the case, simply turned *Auer* into a mutant version of *Chevron*. The effects of the decision are an open question. Perhaps "*Kisor* set administrative law on a more sensible course" or perhaps "it merely gave the lower courts just enough rope to enable the Supreme Court to hang that decision—along with its partner in crime, *Chevron*."

Stanford law professor and former Tenth Circuit judge Michael McConnell covers the Bladensburg cross case, *American Legion v. American Humanist Association*, which was another challenge to a religious symbol on public land. The Court has heard many such challenges—to nativity scenes, menorahs, crosses, etc.—and the decisions have resulted in a patchwork of strange and sometimes contradictory rulings. This is due partially to the inadequacies of the *Lemon* test—named after the 1971 case *Lemon v. Kurtzman*, but the consensus is that it could also have been named after a bad used car—that, theoretically at least, is supposed to be one of the Court's main tools for examining Establishment Clause questions. I say theoretically, because the Court seems to go out of its way to avoid using it, yet it hasn't overruled it either. Many people thought it might do so in *American Legion*, but instead the Court seemed to put *Lemon* on life support. Professor McConnell argues that, in fact, *Lemon* might be squeezed dry: "I cannot imagine a lower court thinking, after this, that the *Lemon* test is good law." Like Lawson, Larkin, and Slattery, McConnell was prominently cited in both Justice Alito's majority opinion and in Justice Gorsuch's dissent, completing our quartet of Supreme Court-cited contributors to this volume.

We invited a Tennessean to comment on the challenge to Tennessee's durational residency requirement for retail liquor licenses. Braden Boucek of the Beacon Center covers *Tennessee Wine and Spirits Retailers Association v. Thomas*, which explored the fascinating interplay between the Commerce Clause and Section 2 of the Twenty-first Amendment. In repealing Prohibition, the Twenty-first Amendment also sought to give states more authority over alcohol than other items of commerce. Section 2 says, "The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[3] Since the amendment was passed, there's been much wrangling over the scope of powers it grants to the states. Can states have different drinking ages for men and women? Nope.[4] Can a municipal sheriff, without due process, post someone's picture in every retail liquor store forbidding sales to her for a year? Nope.[5] *Tennessee Wine* was the latest to wrestle with these questions, and the Court ruled that the state couldn't require two years residency before getting a liquor license. In so doing, the case "refines the standard for evaluating the limits on the government's police powers and permissible scope of judicial scrutiny," which is "a pretty interesting result for a little case about good ol' Tennessee spirits."

Property law expert Ilya Somin of the Antonin Scalia Law School at George Mason University (and also a member of our Board of Advisors) covers *Knick v. Township of Scott*, a case that overruled a 1985 case that had dogged takings plaintiffs for decades. That case, *Williamson County*, imposed a type of exhaustion requirement on plaintiffs seeking compensation for property taken through eminent domain. Plaintiffs had to get a "final decision" from a state court before filing a takings claim in federal court. Combined with

[3] In fact, transporting alcohol into a state "in violation of the laws thereof" is one of the two ways an individual person can violate the Constitution. The other? Enslave someone.

[4] Craig v. Boren, 429 U.S. 190 (1976). My parents grew up in Oklahoma and my mom once had to buy my dad beer.

[5] Wisconsin v. Constantineau, 400 U.S. 433 (1971) ("The chief of police of Hartford, without notice or hearing to appellee, caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquors to appellee were forbidden for one year."). A personal favorite of mine.

another decision in *San Remo Hotel*, which held that a final decision in a takings case from a state court precludes relitigation of the same issue in federal court, many plaintiffs were caught in what Somin calls a "catch-22": go to state court before federal court, but going first to state court kicks you out of federal court. Thankfully, the decision in *Knick* "should go down in history as a case that eliminated an egregious double standard that barred numerous takings cases from federal court in situations where other constitutional rights claims would not have been."

In *Gamble v. United States*, the Court directly addressed whether the dual sovereignty exception to the Double Jeopardy Clause should be overruled. That exception allows either the federal government or a state government to prosecute someone for the same offense after a state or federal prosecution. To the surprise of some, the Court upheld the exception by a 7-2 vote, reasoning that "offenses" are defined by laws, which are in turn defined by sovereigns. "So where there are two sovereigns," therefore, "there are two laws," in the words of Justice Alito. Covering the case is Professor Anthony Colangelo of the Southern Methodist University Dedman School of Law, who contributed a fascinating article exploring the meaning of jurisdiction for the purposes of prosecution. If you're a civil procedure or international law junkie, this article is for you. Professor Colangelo got me thinking about the meaning of sovereignty and when a sovereign is permitted to "grab" someone, so to speak, and prosecute them. While the Court's decision in *Gamble* was unfortunate for many, the Double Jeopardy Clause is still, in Colangelo's words, "an analytically gnarly beast" that seems like a "fairly straightforward prohibition on multiple prosecutions for the same crime" but "turns out to be a bramble bush of doctrinal twists and snarls."

Next, Brianne Gorod and Brian Frazelle, who work for our sometime-allies at the Constitutional Accountability Center, tackle *Timbs v. Indiana*. *Timbs* dealt with one of the last remaining questions about which provisions of the Bill of Rights are incorporated against the states. Over the past 100 years or so, the Court has incorporated most of the provisions of the Bill of Rights against the states in a piecemeal fashion. The last major incorporation case, *McDonald v. City of Chicago*, incorporated the Second Amendment against the states. In *Timbs*, the Court was asked to decide whether the Excessive Fines Clause of the Eighth Amendment is incorporated.

Tyson Timbs was arrested for drug trafficking, but the state of Indiana also tried to take his Land Rover through civil forfeiture. The maximum fine for his offense was $10,000, so taking his $42,000 SUV seemed like an excessive fine. But the claim couldn't be brought in federal court because the Excessive Fines Clause didn't yet apply to the states. Unanimously, the Supreme Court fixed that. Gorod and Frazelle examine the history of the clause and the importance of the Fourteenth Amendment, which was designed to incorporate the entire Bill of Rights against the states. "Upon ratification of the Fourteenth Amendment in 1868, it should have been clear—indeed, it *was* clear—that the Constitution no longer permitted states to impose excessive fines on their citizens," they write, "yet it took the Supreme Court more than a century and a half to definitively settle this proposition."

Finally, Bruce Kobayashi, director of the Bureau of Economics at the Federal Trade Commission, and Joshua Wright, professor of law at Antonin Scalia Law School at George Mason University, take on *Apple Inc. v. Pepper*. This was a massive antitrust suit against the tech giant, wherein iPhone users allege that Apple is violating federal antitrust law by requiring users to purchase apps through the App Store. The Court, in a somewhat surprising opinion by Justice Kavanaugh, joined by the four "liberal" justices, decided that app purchasers were "direct purchasers" and therefore could sue Apple for antitrust violations. Kobayashi and Wright examine the implications of that decision going forward. Will the plaintiffs succeed against Apple? That depends on whether they can demonstrate the economics of passing on costs to consumers when app developers, rather than Apple, set the price of their apps. Through graphs and fairly complex economics, the authors argue that, on remand, "the court considering pass-on damages will find that the plaintiffs have not suffered competitive harm arising from the static effects of Apple's App Store commission level."

The volume concludes with a look ahead to the upcoming October Term 2019 by Elizabeth Slattery of the Heritage Foundation. As of this writing, the Court has granted review in 42 cases, and will likely add another 20-odd cases to the docket through the fall and winter. On deck, we have the return of the Second Amendment to the Court for the first time in nine years (*New York State Rifle & Pistol Association Inc. v. City of New York*), although the city of New York

is feverishly trying to moot the case. Also coming up is the return of Deferred Action for Childhood Arrivals (DACA), which last visited the Court in 2016 after Justice Scalia's untimely death, resulting in a 4-4 tie. In *Espinoza v. Montana Department of Revenue*, brought by our friends at the Institute for Justice, the Court will determine whether Montana's "Blaine Amendment"—a provision of its constitution that prohibits state revenue from going to religious organizations or causes—unconstitutionally discriminates against religion when it is used to invalidate a religiously neutral student-aid program. Many states have similar provisions in their constitutions, and they are often construed to restrict or even prohibit school-choice programs. Other cases in the coming term: whether the Sixth Amendment right to a trial by jury requires a unanimous verdict (*Ramos v. Louisiana*), whether the Eighth and Fourteenth Amendment permit a state to abolish the insanity defense (*Kahler v. Kansas*), and whether the members of the Financial Oversight and Management Board for Puerto Rico are "Officers of the United States" within the meaning of the Appointments Clause of the Constitution (*United States v. Aurelius Investment*).

* * *

This is the first volume of the *Cato Supreme Court Review* I've edited, and I could not have done so without help. I'd like to thank Ilya Shapiro and Roger Pilon for trusting me with this task, and Roger particularly for hiring me out of the internship and saving me from a life in the doldrums of corporate law. Roger founded the Center for Constitutional Studies 30 years ago and conceived of this journal. His principled erudition helped create the ethos of the department, and I'm honored to help carry on the work that he started. I'd also like to thank the authors, without whom there would be nothing to edit or read. They are often given a difficult task—to write a ~10,000-word article in about five weeks—and still manage to produce readable and insightful commentary. When they hit their deadlines, it's even better.

Thanks also goes to my colleagues Bob Levy, Clark Neily, William Yeatman, Walter Olson, and (again) Ilya for helping to edit the articles, and legal associates Nathan Harvey, Dennis Garcia, James Knight, Michael T. Collins, and legal interns Christian Townsend and Kristen Toms for helping with the thankless but essential tasks of cite checking and proofreading. Special thanks goes to legal associate

Sam Spiegelman for stepping in and grabbing the administrative reins from Matt Larosiere. We both had to learn a little on the job, and Sam took to the task with gusto and an exceptional attention to detail.

I hope that this collection of essays will secure and advance the Madisonian first principles of our Constitution, giving renewed voice to the Framers' fervent wish that we have a government of laws and not of men. Our Constitution was written in secret but ratified by the People in one of the most extraordinary acts of popular governance ever undertaken. During that ratification process, ordinary people debated the pros and cons of the document, and, in so doing, helped turn the Constitution into a type of American DNA, belonging to no one but part of all of us. Those of the Founding generation shared many of our concerns today. They fretted over the possibility of rule by elites. They wished to ensure prosperity throughout the country. They worried that self-interested rulers would ignore the law and collect power in themselves. The Constitution is their best attempt at creating an energetic yet restrained government. It reflects and protects the natural rights of life, liberty, and property, and serves as a bulwark against government abuses. In this schismatic time, it's more important than ever to remember our proud roots in the Enlightenment tradition.

We hope that you enjoy this 18th volume of the *Cato Supreme Court Review*.

The Insufficiently Dangerous Branch

George F. Will[*]

Running for president in 1976, Jimmy Carter would tell voters "I am not a lawyer." Carter's boast is my confession to this august audience on this serious occasion, the 17th annual B. Kenneth Simon Lecture in Constitutional Thought. I did, however, come close to being a lawyer.

Nearing the end of two years at Oxford, I was undecided between an academic career and a life in the law. So, temporizing, I applied for admission to a distinguished law school and to Princeton's Ph.D. program in political philosophy. I chose to go to Princeton because it is midway between two cities with National League baseball teams. This gives you some idea of my seriousness as a scholar. Anyway, as I say, I came close to becoming a lawyer.

Now, baseball people say that close only counts in horseshoes and hand grenades. I, however, think that two ways that I prepared, away from law school, to think about American constitutional law brought me close to legal scholarship in important ways.

First, the study of American political philosophy is inextricably entwined with constitutional law. The title of my doctoral dissertation was "Beyond the Reach of Majorities." Some of you will recognize the phrase from Justice Robert Jackson's 1943 opinion in *West Virginia v. Barnett*, the second of the public school flag salute cases, in which Jackson wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. . . . Fundamental rights may not be submitted to vote; they depend on the outcome of no election.[1]

[*] This is a slightly revised version of the 17th annual B. Kenneth Simon Lecture in Constitutional Thought, delivered at the Cato Institute on September 17, 2018.

[1] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Which rights are "fundamental" and which are not? What are the rights of majorities? You see what I mean when I say that political philosophy is done regularly in the gleaming white building that William Howard Taft caused to be built. By the way, the subtitle of my dissertation was "Closed Questions in an Open Society." I shall have more to say about this anon.

A second way that my academic career proved relevant to reasoning about constitutional law is this: My Oxford years, 1962 through 1964, were during the high tide of linguistic philosophy. Perhaps the leading practitioner was J.L. Austin, whose "ordinary language" philosophy included the concept of speech acts. Linguistic philosophy was often arid and sterile regarding social and political questions. It had and has, however, something pertinent to say about today's skirmishing on the contested ground concerning originalism, textualism, and other rivalrous schools of thought about construing the Constitution. Austin's point was that any "speech act"—including, of course, written speech—is a performative activity. It involves promising, requesting, warning, exhorting, and so on. The meaning of the act depends on the speaker's intention and on the nature of the audience that the speaker intends to influence. The relevance of this to constitutional reasoning is that the original meaning of the Constitution's language depends on the intentions of the authors of this language, which in turn depends on the audience they had in mind, and the influence they hoped to have on this audience. Linguistic philosophy's mode of analysis is, I think, especially relevant to what Yale law professor Jack Balkin calls "living originalism." Balkin's phrase is not, as some might allege, an oxymoron. Rather, it denotes a defensible way to tip-toe through some intellectual mine fields.

It is paradoxical that in a nation where skepticism about government is at the core of the political philosophy bequeathed by the Founders, the elaboration and application of this political philosophy has been done largely by or through a government institution, the Supreme Court. There is a profound truth about the American polity and its history that is sometimes missed by even the most accomplished students of American history.

It is often said that ours is a nation indifferent to, even averse to, political philosophy. And it is said that this disposition is a virtue and a sign of national health. The theory is that only unhappy nations are constantly engaged in arguing about fundamental things, and

that the paucity—actually, it is merely a postulated paucity—of American political philosophy is evidence of a contented consensus about our polity's basic premises.

For example, Daniel J. Boorstin, then a University of Chicago historian and later Librarian of Congress, published a slender volume, "The Genius of American Politics," which appeared in 1953, during America's post-war introspection about the nature and meaning of our nation's sudden global preeminence. Boorstin's argument, made with his characteristic verve and erudition, aimed to explain why our success was related to "our antipathy to political theory."[2]

The genius of our democracy, said Boorstin, comes not from any geniuses of political thought comparable to Plato and Aristotle or Hobbes and Locke. Rather, it comes "from the unprecedented opportunities of this continent and from a peculiar and unrepeatable combination of historical circumstances." This explains "our inability to make a 'philosophy' of them," and why our nation has never produced a political philosopher of the stature of, say, Hobbes and Locke, or "a systematic theoretical work to rank with theirs."[3]

Well. Leave aside the fact that James Madison was a political philosopher of such stature—he was because he was also a practicing politician. And leave aside the fact, which it surely is, that *The Federalist*, although a compendium of newspaper columns written in haste in response to a practical problem (to secure ratification of the Constitution), is a theoretical work that ranks with Hobbes's *Leviathan* and Locke's *The Second Treatise on Civil Government*. Considered in the second decade of the 21st century, as we stand on the dark and bloody ground of today's political contentions, Boorstin's book remains interesting but primarily as a period piece. It is a shard of America's now shattered consensus. Or, more precisely, it is a document from the calm before the storm of the conservative counterattack against progressivism's complacent assumption that its ascendancy was secure.

The American argument about philosophic fundamentals is not only ongoing, it is thoroughly woven into the fabric of our public life. Far from being rare and of marginal importance, real political philosophy is more central to our public life than to that of any

[2] Daniel J. Boorstin, The Genius of American Politics 2 (1953).

[3] *Id*. at 1–2.

other nation. It is implicated in almost all American policy debates of any consequence. Indeed, it is, like Edgar Allen Poe's purloined letter, hidden in plain sight. All American political arguments involve, at bottom, interpretations of the Declaration of Independence and of the Constitution, which was written to provide institutional architecture for governance according to the Declaration's precepts. So, Supreme Court justices and other constitutional lawyers are, whether they realize this or like this, America's principal practitioners of political philosophy.

A good starting point for constitutional reasoning informed by philosophy is with this fact: The first of the 10 sentences that comprise the Gettysburg address does *not* begin "Three score and fifteen years ago. . . ." Lincoln did not say that "our fathers" had "brought forth" a new nation by writing the Constitution. There is profound constitutional importance in the symbolic fact that the Constitutional Convention met in the room where the Declaration of Independence was debated and endorsed. Ratification of the Constitution created a new regime for a nation then 13 years old. The Declaration did not specify particulars about the proper regime for the new nation. Rather, it said that a regime is legitimate if it secures natural rights and if it governs by the recurrently expressed consent of the governed.

Chief Justice Earl Warren has defined citizenship as "the right to have rights."[4] Actually, people have rights independent of their civic status. The Court should have said, consonant with the Declaration of Independence, that citizenship is the right to have one's natural rights recognized and their exercise protected.

The Declaration is, as Cato's Timothy Sandefur says, the "conscience" of the Constitution.[5] As he says, the essential drama of democracy derives from the inherent tension between the natural rights of the individual and the constructed right of the community to make such laws as the majority deems necessary and proper. So, the Declaration is not just chronologically prior to the Constitution, it is logically prior. Again, Sandefur: The Declaration "sets the

[4] See, e.g., Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

[5] See Timothy Sandefur, The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty (2015).

framework for reading" the Constitution.[6] By the terms with which the Declaration articulates the Constitution's purpose, which is to "secure" unalienable rights, the Declaration intimates the standards by which one can distinguish the proper from the improper exercises of majority rule. "Freedom" says Sandefur, "is the starting point of politics; government's powers are secondary and derivative, and therefore limited. . . . Liberty is the goal at which democracy aims, not the other way around."[7]

The progressive project, now in its second century, has been to reverse this, giving majority rule priority over liberty when they conflict, as they do, inevitably and frequently. The progressive project stands athwart what Madison wrote in 1792, the year after ratification of the Bill of Rights: "In Europe, charters of liberty have been granted by power. America has set the example . . . of power granted by liberty."[8]

The Declaration, which mentions neither democracy nor majority rule, does not stipulate a particular form of government. Rather, it stipulates two criteria of a legitimate government: Such government secures the natural rights of the governed and receives their recurrently expressed consent. So, of the three prepositions in Lincoln's Gettysburg formulation—government of, by, and for the people—it is the third that is dispositive. It is most probable that government will function for the people—will, that is, do what is most important for their happiness, secure their rights—if it is government of and by the people. So, the Declaration is only a contingently and implicitly democratic document. It implies that democracy is the form of government with the highest probability of governing for the people.

On September 17, 1787, the last day of the Constitutional Convention, George Washington, the Convention's president, distilled into two sentences the essence of natural rights theory and of the unending debate about rights, unenumerated yet retained. Washington said: "Individuals entering to society, must give up a share of liberty to preserve the rest. . . . It is at all times difficult to draw with

[6] *Id*. at 2.

[7] *Id*.

[8] For the National Gazette, Jan. 18, 1792, in The Papers of James Madison, vol. 14, Apr. 6, 1791–Mar. 16, 1793, 191–192 (Robert A. Rutland & Thomas A. Mason, eds., 1983).

precision the line between those rights which must be surrendered, and those which may be reserved."[9]

Drawing this line is the fundamental task of the judicial branch, which is tertiary in order but not in importance. This branch is the constitutional culmination: The legislative branch writes laws and the head of the executive branch takes care that the laws are faithfully executed, at which point the judiciary is perpetually poised to scrutinize the content and application of the laws. This makes the judiciary, charged with the supervision of democracy, the epicenter of constitutional government.

The idea that the federal judiciary wielding judicial review is an anomaly grafted onto popular government is mistaken. The judiciary is a republican institution in that it is connected to the people—but indirectly. Its members are nominated by the president and confirmed by the Senate.

America's judiciary also is a republican institution because it stands not in opposition to, but in constructive tension with, the principle of majority rule. Democracy and distrust usually are, and always should be, entwined. American constitutionalism, with its necessary component of judicial review amounts to institutionalized distrust. It is not true that, as Dr. Stockmann declares in Henrik Ibsen's *An Enemy of the People*, "the majority is always wrong." It *is* true, however, that the majority often is wrong, and that the majority often has a right to work its mistaken will anyway. The challenge is to determine the borders of that right and to have those borders policed by a non-majoritarian institution—the judiciary.

Alexander Hamilton said that because the judiciary "may truly be said to have neither force nor will, but merely judgment" it will always be the branch "least dangerous to the political rights of the Constitution."[10] But Alexander Bickel considered judicial review philosophically and morally problematic because it makes the Supreme Court a "deviant institution" in American democracy.[11] The power to declare null and void laws that have been enacted by

[9] Letter to the President of Congress, Sept. 17, 1787, in The Papers of George Washington, Confederation Series, vol. 5, Feb. 1, 1787–Dec. 31, 1787, 104–108 (W. W. Abbot, ed., 1997).

[10] The Federalist No. 78 (Hamilton).

[11] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–17 (1962).

elected representatives of the people poses what Bickel called the "counter-majoritarian difficulty."[12] This is, however, a grave difficulty only if the sole, or overriding, goal of the Constitution is simply to establish democracy and if the distilled essence of democracy is that majorities shall rule in whatever sphere of life where majorities wish to rule. Were that true, the Court would indeed be a "deviant institution." But such a reductionist understanding of American constitutionalism is peculiar.

It is excessive to say, as often has been and still is said, that the Constitution is "undemocratic" or "anti-democratic" or "anti-majoritarian." It is, however, accurate to say that the Constitution regards majority rule as but one component of a system of liberty. The most important political office is filled not by simple majority rule expressed directly but by the Electoral College. Supreme Court justices and all other members of the federal judiciary are nominated by presidents but must be confirmed by the Senate, whose members were, until the Seventeenth Amendment was ratified in 1913, elected indirectly by state legislatures. Of the major institutions created by the Constitution—Congress, the presidency, the Supreme Court—only one half of one of them, the House of Representatives, was, in the Framers' original design, directly elected by the people. Furthermore, the Constitution has 11 supermajority provisions pertaining to amendments, ratification of treaties, impeachments, and other matters. All such supermajority requirements empower minorities.

One reason to empower minorities is that majority opinion often is not in any meaningful sense a judgment, meaning a conclusion reached on the basis of information and reflection. The processes of democracy are supposed to refine and elevate public opinion, not merely reflect it. But woe betide the political candidate who suggests that the public's opinion needs to be refined and elevated, or even informed.

When Supreme Court Justice Antonin Scalia died in February 2016, Senate Republicans argued that his successor should not be confirmed until "the people" had spoken in that year's presidential elections. It was, however, risible to assert that more than a negligible portion of the electorate had opinions about, say, constitutional originalism, or due fidelity to stare decisis, or the proper scope of

[12] *Id*. at 16.

Congress's power to regulate interstate commerce. The problem is not that translating public opinion directly into public policy would be imprudent, which it certainly would be. Rather, the problem is that public opinion, in any meaningful sense, hardly exists about many, even most, public policies.

Those whom Edmund Burke delicately called "the less inquiring" might be as large a portion of the population today as they were when Burke wrote in the late 18th century. Then, very few could vote, so the many had small incentive to be inquiring about politics and government. Today, everyone can vote but no one can believe that his or her vote is apt to matter, and few have the time or incentive to become conversant with the complexities of the policies administered by the gargantuan and opaque administrative state. As Madison said in his analysis of ancient democracies, the larger the group engaged in determining the government's composition and behavior, the larger will be the portion who are "of limited information and of weak capacities."[13]

There are two reasons why we should not be greatly concerned about the counter-majoritarian difficulty. First, much of what majoritarian institutions do is done not to satisfy a demand or even a desire of a majority; a vast majority is completely oblivious of most of what today's government does. Most voters most of the time are ignorant—rationally so—of the government's processes and activities. The second reason to not lose sleep over the counter-majoritarian difficulty is that majority rule is not the point of the American project.

Sentimentalists about democracy generally insist that its defects result because voters' views are sensible but ignored. It is, however, at least as often the case that democracy produces unfortunate results because voters' views are foolish but honored. Often the problem is not that government is unresponsive but that it is too responsive. The political class is prudently reticent about the subject of the electorate's competence at rendering judgments, and democracies generate an ethos of contentment about their premises. So there rarely is heard a discouraging word about voters' political knowledge. It was, therefore, bracing, if naughty, for Winston Churchill to say—if he actually did so, sources differ—that "the best argument against democracy is a five-minute conversation with the average voter."

[13] The Federalist No. 58 (Madison).

Nevertheless, many voters' lack of information about politics and government is undeniable. It also often is rational. And it raises awkward questions about concepts central to democratic theory, including consent, representation, public opinion, electoral mandates and—this is perhaps the fundamental function of modern democracy—the ability of voters to hold elected officials accountable.

Scalia Law's Ilya Somin argues that, in general, an individual's ignorance of public affairs is essentially rational because the likelihood of his or her vote being decisive in an election is vanishingly small.[14] But if choosing to remain ignorant—to not invest the time and effort necessary to become knowledgeable—is rational individual behavior, this can and often does have destructive collective outcomes. The quantity of political ignorance matters because voting is not merely an act of individual choice. It also is the exercise of power over others. And, says Somin, "the reality that most voters are often ignorant of even very basic political information is one of the better-established findings of social science."[15]

In the Cold War year 1964, two years after the Cuban Missile Crisis, only 38 percent of Americans knew the Soviet Union was not a member of NATO.[16] In 2003, about 70 percent were unaware of enactment of the prescription drug entitlement, then the largest welfare state expansion since Medicare arrived in 1965.[17] In a 2006 Zogby poll, only 42 percent could name the three branches of the federal government.[18] Such voters cannot hold officials responsible because they cannot know what the government is doing, or which parts of government are doing what. So political ignorance is, as Somin says, "an obstacle to its own alleviation."[19] Given that more than 20 percent of Americans think the sun revolves around the Earth, it is unsurprising that only 30 percent can name their two senators, and, even at the peak of a campaign, a majority cannot name any congressional candidate

[14] See Ilya Somin, Democracy and Political Ignorance: Why Smaller Government is Smarter (2013).

[15] *Id*. at 17.

[16] *Id*. at 20.

[17] *Id*. at 187.

[18] *Id*. at 239.

[19] *Id*. at 220.

in their district.[20] According to a 2002 Columbia University study, 35 percent then believed that Karl Marx's "From each according to his ability, to each according to his needs" is in the U.S. Constitution.[21]

Many people acquire political knowledge for the reason many people acquire sports knowledge—because it interests and entertains them, not because it will alter the outcome of any contest. And with "confirmation bias," many people seek political information to reinforce their pre-existing views. Committed partisans are generally the most knowledgeable voters, independents the least. And the more political knowledge people have, the more apt they are to discuss politics with people who agree with them. A normal citizen learns about the politics of the day in the same way that a child first learns a language—by a blend of observation and osmosis of the conversation of society going on around the child.

The average American expends more time becoming informed about choosing a car or appliance than choosing a candidate. But then, the consequences of the former choices are immediate and discernible; the consequences of choosing a candidate often are neither. "The single hardest thing for a practicing politician to understand," said an experienced and successful politician, Britain's Tony Blair, "is that most people, most of the time, don't give politics a first thought all day long. Or if they do, it is with a sigh."[22]

All of this should inform our thinking about how troubled one should be about the supposed "counter-majoritarian difficulty" that troubled the distinguished scholar who coined that phrase, Alexander Bickel. How troubled should we be? Not very.

The Constitution, which is replete with proscriptions, tells Americans a number of things they cannot do even if a majority of them want them done. Nevertheless, there is a recurring impulse to argue that courts should have a somewhat majoritarian mentality, or that they should be directly subjected to majoritarian supervision. In his 1912 campaign, Theodore Roosevelt argued that "when a judge decides a constitutional question, when he decides what the people as a whole can and cannot do, the people should have the right to

[20] *Id*. at 91.

[21] *Id*. at 20.

[22] See Fareed Zakaria, The Convert, N.Y. Times (Oct. 8, 2010), available at https://nyti.ms/2H5NT2C.

recall the decision if they think it wrong." In Hillary Clinton's 2016 presidential campaign she said, "The Supreme Court should represent all of us." Actually, it should "represent" no one. Not if we understand representation to mean serving as a mirror to the public. "Reflecting" what, exactly? Or weighing "the people's" or a faction's "interests." Interests in what, exactly?

Abraham Lincoln spoke more judiciously about the sometimes ambiguous role of the Supreme Court in America's democracy. In his first Inaugural Address, he asserted that "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[23] This is true, but note the adverb "irrevocably." Lincoln understood as well as any politician before or since that in a democracy everything depends, ultimately, on public opinion, and public opinion is shiftable sand.

So, too, is opinion among that small sliver of the public that thinks about how to responsibly apply the Constitution to the constantly changing circumstances of this dynamic Republic's ever-churning society.

In a recent column suggesting questions that senators might usefully ask in confirmation hearings for Supreme Court nominees, I included this one: Can you cite an important constitutional provision the meaning of which today is the same as the public meaning of the provision's text when it was written and ratified? And I said: The nominee certainly could not cite the regulation of interstate commerce. Or the establishment of religion. Or abridgments of freedom of speech. Or government takings of private property for public use. Or the prohibition of cruel and unusual punishments.

In a supposed refutation of the point I was making, a critic wrote: "I certainly consider the fact that all members of the House are elected every two years important."[24] To which, I would reply: That provision is important, perhaps, but uninteresting. It is so because this

[23] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), available at https://bit.ly/1jKQbSw.

[24] Ramesh Ponnuru, A Reply to George Will's Questions for Kavanaugh, National Review, Sept. 4, 2018, https://bit.ly/2IWK4OS.

provision has never occasioned—it could not occasion—a controversy concerning constitutional reasoning (as distinct from policy reasoning). The same is true of the requirement that members of the House and Senate must be at least 25 and 30 years old, respectively. Or that presidents must be at least 35. What *is* interesting, however, is how little of the Constitution consists of such technical and unambiguous provisions. There is no scholarship seeking to establish the original public meaning of the phrase "have attained to the Age of twenty five Years." The stuff of constitutional law are what former Justice David Souter calls the Constitution's many "deliberately open-ended guarantees."[25]

When in a 1958 case Chief Justice Earl Warren said that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[26] he referred to a fact: Standards of decency do evolve. Which is not to say that they invariably become better; "evolving" is not a synonym for "improving." Still, it would be peculiar to insist that a conscientious originalist in the 21st century must construe the Eighth Amendment's proscription of "cruel" punishments with reference to the 18th-century public understanding of cruelty. Surely an originalist analysis should say: The Eighth Amendment's meaning is that the Framers intended a society in which government would not practice cruelty, and it falls to every generation to guarantee that its practices conform to this original meaning.

Yale Law School's Jack Balkin calls for fidelity to the original meaning of the Constitution's text as this meaning is derived with reference to the rules, standards, and principles explicitly or implicitly in the text.[27] The Constitution, he says, is basically "a plan for politics."[28] Its practical initial purpose was to ignite American politics. Its long-term purpose was, and remains, to make politics safe, meaning not dangerous to liberty. Balkin does not recommend just this or that doctrine of constitutional construction. Rather, he recommends

[25] David Souter, Justice, U.S. Supreme Court, Remarks at Harvard Commencement Ceremony (May 27, 2010), https://bit.ly/2HjCuLI.

[26] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[27] Jack M. Balkin, "Must We Be Faithful to Original Meaning?," 7 Jerusalem Rev. of Legal Stud., No. 1 57–86 (2013).

[28] *Id*. at 61.

"using all of the various modalities of interpretation: arguments from history, structure, ethos, consequences, and precedent."[29]

Advocates of "originalism"—adhering to the original public meaning of the words of the text—should not simply favor what Balkin terms "the original expected application" of the text.[30] Rather, they should discern and apply to contemporary circumstances the original intent of the Framers. Balkin terms this idea "living originalism": "In every generation, We the People of the United States make the Constitution our own by calling upon its text and its principles and arguing about what they mean in our own time."[31]

It took time, meaning historical learning, for the nation to come, a century after ratification of the Fourteenth Amendment's affirmation of equal national citizenship, to the conclusion that this required equal rights for women. The doctrine of "original expected applications" could not countenance this just outcome. The fact that the Framers adopted "general and abstract" concepts meant that subsequent generations would have no alternative to working out the scope and application of the abstractions to changing concrete circumstances. Hence, as Balkin says, the Constitution commits the country to "the tradition of continuous arguments."[32]

This guarantees the perpetual frustration of all those who hanker for a theory of constitutional construction that will deliver the serenity of finality. It also consigns all generations to endless arguing. The fact that ratification of the Constitution meant a contentious American future was, Balkin notes, immediately demonstrated by the heated argument that erupted—and provoked the emergence of political parties, which the Framers neither desired nor anticipated—about whether the Constitution's enumeration of Congress's powers authorized Congress to charter a national bank. In this argument, Hamilton and Madison, who wrote 80 of the 85 Federalist Papers, were at daggers drawn.

It is not quite right to say, as Justice Scalia did, that the Constitution's "whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take

[29] Jack M. Balkin, Living Originalism 4 (2011).

[30] *Id*. at 107.

[31] *Id*. at 11.

[32] *Id*. at 16.

them away."[33] Rather, the government's Madisonian architecture was designed to refine and elevate opinion so that future generations would not want to take away important rights. Strong desires that majorities have over time are probably going to be satisfied eventually, so attention must be paid to the shaping and moderating of those desires.

Be that as it may, those of us who believe that courts have been too permissive in discerning and deferring to a merely "rational basis" for this or that legislative action advocate a more engaged judiciary. The principle of judicial restraint, distilled to its essence, is that an act of the government should be presumed constitutional, and that the party disputing the act's constitutionality bears the heavy burden of demonstrating unconstitutionality beyond a reasonable doubt. The contrary principle, the principle of judicial engagement, is that the judiciary's primary duty is to defend liberty, and that the government, when it is challenged for an action that limits the liberty of the individual, or of two or more individuals engaged in consensual collaborative undertakings, bears the burden of demonstrating that its action is in conformity with the Constitution's architecture, the purpose of which is to protect liberty.

The government dispatches this burden by demonstrating that its action is both necessary and proper for the exercise of an enumerated power. A state or local government dispatches the burden by demonstrating that its act is within the constitutionally proscribed limits of its police power.

Does judicial engagement make the judicial branch dangerous to the current scope of what is called, with much imprecision, majority rule? The one-word answer is: Yes. A three-word answer is: Not nearly enough.

How much would be enough? It is impossible to stipulate using precise guiding principles. We can, however, say this: When the Constitution's Framers wrote its text, they committed speech acts that derive their meaning from their overarching intent in producing a document to create institutions consonant with America's purpose as stated in the Declaration of Independence.

[33] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 40 (Amy Gutmann ed., 1997).

Today there is a quest for something that has proved, and always will prove, elusive—a single approach, distilled into a concise doctrine, for construing the Constitution, with means for applying it to concrete cases and controversies. So, I regret to say, there is today a similarity between the intensity of doctrinal hairsplitting among constitutional scholars in their quest for decisive certainty and final clarity and the factionalism within the American Communist Party in the 1920s and 1930s—when the number of ideological schisms was more impressive than the number of the party's members. At one point, a faction that was loyal to Jay Lovestone was denounced by protestors wielding signs that read: "Lovestone is a Lovestonite." This accusation was true, but not clarifying.

Neither was Justice Clarence Thomas very clarifying when, in a 1996 speech, he said, "The Constitution means not what the Court says it does but what the delegates at Philadelphia and at the state ratifying conventions understood it to mean. . . . We as a nation adopted a written Constitution precisely because it has a fixed meaning that does not change."[34]

The meaning, however, is not fixed only by how the delegates and the conventions understood the immediate applications of what they were doing. If they understood their handiwork as providing institutional means to the Declaration's ends, then the fixed meaning of the Constitution is to be found in its mission to protect natural rights and liberty in changing—unfixed—circumstances. Fidelity to the text requires fidelity to some things that were, in a sense, prior to the text: the political and social principles and goals for which the text was written. It was written to be instrumental to goals served by the principles.

With an asperity born of exasperation, Scalia once wrote, "If you want aspirations, you can read the Declaration of Independence," but "there is no such philosophizing in our Constitution," which is "a practical and pragmatic charter of government."[35] Oh? Are we to conclude that philosophy is impractical and unpragmatic? There is no philosophizing in the Constitution—until we put it there by construing it as a charter of government for a nation that is,

[34] See Myron Magnet, "The Founders' Grandson, Part II," City Journal (Winter 2018), https://bit.ly/2Hjvyy6.

[35] See Scalia, *supra* note 33, at 143.

in Lincoln's formulation, dedicated to a proposition that Scalia dismissed as "philosophizing," the proposition that all men are created equal in possession of natural rights.

In the words of constitutional scholar Walter Berns, the Constitution is related to the Declaration "as effect is related to cause."[36] Or as Lincoln said in his "House Divided" speech, the Constitution is the "frame of silver" for the "apple of gold," which is the Declaration.[37] Silver is valuable and frames serve an important function, but gold is more valuable and frames are of subsidiary importance to what they frame. Today, the apple nourishes those of us who believe that the judiciary has been much too accommodating to legislatures that are too responsive to majorities, or to make-believe majorities, that are too indifferent to individual rights.

About all this there are, always have been, and always will be, strong differences of opinion. So, if you do not like constant high-stakes arguments about fundamental things, you should try another country. If, however, controversy is for you, as it is for me, life-sustaining oxygen, step inside conservatism's big tent.

Four decades have passed since an intellectual Democrat who became my best friend, Daniel Patrick Moynihan, said, with a mixture of admiration and regret, that the Republican Party had become the party of ideas. Recently the party has worked hard to refute that description. This much, however, remains true: The most interesting American political arguments today are not between progressives and conservatives but rather are intramural arguments among conservatives. It also is true that arguments within a family sometimes have a particularly serrated edge.

Never mind. Human beings are, as Aristotle said, language-using creatures. More precisely—forgive my audacity in presuming to improve Aristotle—human beings are persuading and persuadable creatures. Which is why things like the Cato Institute exist, and why we are here today, and why constitutional argument is such

[36] See Steven Hayward, Patriotism Is Not Enough: Harry Jaffa, Walter Berns, and the Arguments that Redefined American Conservatism 145, 168 (2017).

[37] Abraham Lincoln, Fragment on the Constitution and the Union (c. Jan., 1861), in 4 The Collected Works of Abraham Lincoln 168, 169 (Roy P. Brasler ed., 1953). Compare with Proverbs 25:11 (King James) ("A word fitly spoken is like apples of gold in a pictures of silver").

exhilarating fun, and why I am grateful to Roger Pilon for the privilege of participating in today's episode in America's unending argument about fundamental things.

But speaking of fun, I am acutely aware that I am standing between this audience and good food and adult beverages. So, I shall now subside, serenely confident that what I have said will ignite arguments that will begin as I say to you: Thank you for allowing this non-lawyer to step onto your turf.

"I'm Leavin' It (All) Up to You": *Gundy* and the (Sort-of) Resurrection of the Subdelegation Doctrine

*Gary Lawson**

In 2000, Cass Sunstein quipped that the conventional nondelegation doctrine, which holds that there are judicially enforceable constitutional limits on the extent to which Congress can confer discretion on other actors to determine the content of federal law, "has had one good year, and 211 bad ones (and counting)."[1] The "one good year," he said, was 1935, when the Court twice held unconstitutional certain provisions of the National Industrial Recovery Act that gave the president power to approve or create codes of conduct for essentially all American businesses, subject only to very vague, and often contradictory, statutory exhortations to pursue various goals.[2] In 2018, Professor Sunstein still claimed: "To say the least, the standard nondelegation doctrine does not have a glorious past. In all of American history, it has had just one good year."[3]

The "one good year" quip, while undeniably clever,[4] was not entirely accurate when Sunstein made it, either in 2000 or 2018.

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[1] Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 322 (2000).

[2] See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[3] Cass R. Sunstein, The American Nondelegation Doctrine, 86 Geo. Wash. L. Rev. 1181, 1207 (2018).

[4] Absolutely clever enough to warrant reuse, in fact. Cf. Gary Lawson, No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory, 64 Fla. L. Rev. 1551, 1567 (2012) (unashamedly reusing a quip previously used in Gary Lawson, Mostly Unconstitutional: The Case Against Precedent Revisited, 5 Ave Maria L. Rev. 1, 18 (2007)).

The conventional[5] nondelegation—or, more precisely, nonsubdelegation[6]—doctrine actually did pretty well in the early 1920s, when the Supreme Court held unconstitutional, expressly on subdelegation grounds, congressional statutes letting the federal courts fill in the content of a criminal law[7] and letting state legislatures fill in the content of federal admiralty law.[8] And it is hard to judge the effectiveness of something like the nonsubdelegation doctrine by a simple count of cases holding statutes unconstitutional. The bite of such a doctrine in the nation's first century and a half may have come largely from the way that it shaped the drafting of statutes or prevented their enactment altogether.[9] Nonetheless, Professor Sunstein was correct in 2000 and 2018 to say that 1935 was the only year in which a congressional statute giving discretion to federal *executive agents*—the president, a cabinet official, or an administrative agency—was formally held unconstitutional by the Supreme Court on subdelegation grounds.

He is still correct in 2019. Whether he will still be correct in 2020, 2021, or any subsequent year is an open question. In *Gundy v. United States*, decided on June 20, 2019, the Supreme Court declined—by

[5] Professor Sunstein maintains that a nonconventional, or nonstandard, variant of the doctrine is vibrant, consisting of a series of interpretative canons that collectively establish the proposition: "*Executive agencies cannot make certain kinds of decisions unless Congress has explicitly authorized them to do so*." Sunstein, *supra* note 3, at 1182 (emphasis in original). That is a descriptively accurate (and characteristically acute) account of modern case law. This article concerns only the standard or conventional doctrine which limits the power of Congress to grant lawmaking or law-defining discretion even pursuant to explicit authorizations.

[6] The "nonsubdelegation" label is correct, for reasons to be explained later. See *infra* notes 55–60 and accompanying text. In this article, I will use "nonsubdelegation doctrine" and "subdelegation doctrine" interchangeably, essentially employing whichever term sounds best in a given context.

[7] See United States v. L. Cohen Grocery Store Co., 255 U.S. 81 (1921) (holding unconstitutional a statute prohibiting "unjust or unreasonable" charges for any "necessaries").

[8] See Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) (holding unconstitutional statutes that made state workmen's compensation laws applicable in admiralty cases); Washington v. W.C. Dawson, 264 U.S. 219 (1924) (same). Credit is due to Professor David Schoenbrod for emphasizing the importance of these pre-1935 decisions. See David Schoenbrod, Consent of the Governed: An Underenforced Constitutional Norm (manuscript of March 13, 2019) (on file with author).

[9] See Joseph Postell & Paul D. Moreno, Not Dead Yet—or Never Born? The Reality of the Nondelegation Doctrine, 3 Const. Studies 41 (2018).

the intriguing vote of 4-1-3—to employ the nonsubdelegation doctrine against a federal statute that appeared, on its face, to give the attorney general the untrammeled power to determine to whom a federal criminal law will apply. The "4" was partly a function of creative (though not impossible or irrational) statutory interpretation that found implied limits on the attorney general's authority and partly a straightforward application of nearly a century of post-New Deal precedents upholding congressional subdelegations that make the statute at issue in *Gundy* unquestionably seem, as the *Gundy* plurality put it, "small-bore."[10] On the other hand, the "1-3," and the missing ninth vote in the case, offer more than modest solace to those who hope for the reinvigoration of a constitutional rule against subdelegation of legislative power. Lawyers even now are likely lining up the next challenges, which one suspects will expressly be framed as invitations to the Court—invitations that four justices have announced are welcome—to reconsider, and perhaps overrule, a line of cases which consistently upholds subdelegations as long as Congress provides an "intelligible principle"[11] to guide executive (or judicial) lawmaking discretion and consistently finds "intelligible principles where less discerning readers find gibberish."[12]

To be sure, this may all be wishful thinking. I am not a disinterested observer in this process and will probably be filing amicus briefs in future cases urging the Court to resurrect the nonsubdelegation doctrine. Nonetheless, *Gundy* is the first time since 1935 that more than two justices in a case have expressed interest in reviving some substantive principle against subdelegation of legislative authority.[13] And while you never count your votes until they are cast,[14] it is very hard to read *Gundy* and not count to five under your breath.

[10] Gundy v. United States, 139 S. Ct. 2116, 2130 (2019).

[11] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

[12] Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 329 (2002).

[13] See Am. Textile Manuf. Inst., Inc. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting, joined by Burger, C.J.).

[14] See, e.g, Planned Parenthood v. Casey, 505 U.S. 833 (1992). For a poetic (yes, really) account of *Casey* and its dashing of expectations, see Gary Lawson, Casey at the Court, 17 Const. Comment. 161 (2000).

Part I details the facts of *Gundy* and its unlikely path to the Court, including a brief summary of modern subdelegation case law and its relation to original constitutional meaning.[15] Part II summarizes the various opinions in *Gundy* and how they relate to the case law of the past century and the rise of the administrative state. Part III speculates—in a useful way, I hope—about the future direction of subdelegation challenges.

I. Gundy's Unlikely Path to the Supreme Court

Sex offenders are understandably unpopular sorts. No one wants to live next door to a convicted sex offender. Of course, no one probably wants to live next door to a convicted burglar or fraudster either, but sex offenders carry with them a special stigma, as reflected in federal rules of evidence that allow their past misdeeds to be admitted as evidence of present misconduct when such an inference is generally prohibited for every other kind of past misdeed (including murder).[16] It is therefore not entirely surprising that governments at both the state and federal level in recent decades have enacted statutes requiring convicted sex offenders to "register," so that their locations can be tracked by government officials and by private citizens among whom they live.

Congress gave this registration process a huge push in 1994 with the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act,[17] which spelled out federal standards for state sex-offender registration laws and then told states that they would lose ten percent of their law enforcement grant money if they

[15] The focus on case law is more than a bit misleading. In order for the Court to rule on a subdelegation challenge, Congress has to pass a law posing the problem, and either the president has to sign it or Congress has to enact it over a presidential veto. Either Congress or the president—Congress certainly and the president usually—can stop an unconstitutional subdelegation in its tracks by simply failing to enact or sign the relevant law. The courts are the last backstop, not the first backstop, against constitutional violations. But since neither modern Congresses nor modern presidents have ever shown any interest in policing the boundaries of subdelegation, I will focus my attention on judicial doctrine.

[16] See Fed. R. Evid. 404(a)(1), (b)(1) (setting forth the general rule against using past acts to show a person's "character" and then inferring conduct from that character); Fed. R. Evid. 413–15 (carving out exceptions to that rule for sexual assault and child molestation).

[17] 108 Stat. 2038 (codified at 42 U.S.C. §§ 14071 et seq. (1994)).

did not adopt the federal standards.[18] Every state unsurprisingly complied, but the patchwork of state laws did not sweep in everyone who might be considered a sex offender. Due to these coverage gaps, Congress in 2006 passed the Sex Offender Registration and Notification Act (SORNA)[19] to require, as a matter of federal law, registration of all sex offenders, both state and federal. The law makes it a federal crime, punishable by up to ten years in prison, to fail to register as a sex offender.[20]

Registration requires providing a great deal of information to the government, including your name, place of residence, place of work, place of attendance as a student, social security number, license number, travel plans, and "[a]ny other information required by the Attorney General."[21] The registrant must also update that information each time there is any change.[22] How long offenders must register depends upon various tiers, based on the perceived seriousness of the underlying offenses.[23] Each state must include in its published registry:

(1) A physical description of the sex offender.
(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.
(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.
(4) A current photograph of the sex offender.

[18] See *id*. at § 14071(g)(2) (1994).

[19] 120 Stat. 590 (codified at 34 U.S.C. §§ 20901 et seq. (2012)).

[20] 18 U.S.C. § 2250 (2012); 34 U.S.C. § 29013 (2012). The term "sex offender" is defined at some length—with many cross-references to other provisions—in 34 U.S.C. § 20911 (2012). A jurisdictional prerequisite for the registration requirement is that the convicted sex offender "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." 18 U.S.C. § 2250(a)(2)(B). Does Congress have the enumerated constitutional power to require persons convicted of state crimes to register as sex offenders, on pain of federal criminal penalties, simply because those persons travel across state lines? As a matter of original meaning probably not, though no one has brought, or will likely bring, that challenge.

[21] 34 U.S.C. § 20914(a)(8) (2012).

[22] *Id*. § 20913(c).

[23] *Id*. § 20915(a).

(5) A set of fingerprints and palm prints of the sex offender.
(6) A DNA sample of the sex offender.
(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.
(8) Any other information required by the Attorney General.[24]

All of this information must be provided by sex offenders "(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment."[25] Obviously, offenders who were convicted and served their sentences before the effective date of the act—July 27, 2006—cannot possibly comply with the literal terms of this timing provision. They cannot give information "before completing a sentence" if they have already completed that sentence. Accordingly, one very large question looming over SORNA is how, if at all, its registration provisions apply to people whose criminal sentences were completed before the act took effect. Since violation of the registration provisions can carry up to ten years in prison,[26] this is a matter of no small importance. As the Department of Justice put it in 2007: "This issue is of fundamental importance to the initial operation of SORNA, and to its practical scope for many years, since it determines the applicability of SORNA's requirements to virtually the entire existing sex offender population."[27]

The statute's solution to this problem reads, in full, as follows:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).[28]

[24] *Id*. § 20914(b).

[25] 34 U.S.C. § 20913(b) (2012).

[26] 18 U.S.C. § 2250(a)(3) (2012).

[27] Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8896 (2007).

[28] 34 U.S.C. § 29013(d) (2012).

"Yes, that's it."[29] In other words, Congress did not decide in the statute whether pre-SORNA offenders needed to register. It told the attorney general to decide that question.

On February 16, 2007, more than six months after enactment of SORNA, Attorney General Alberto Gonzalez promulgated an interim rule declaring: "The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act."[30] That rule categorically made SORNA apply retroactively to all sex offenders, regardless of the dates of their convictions. The interim rule was adopted as a final rule in 2010.[31] Along the way, subsequent attorneys general imposed different obligations on *states* to register offenders (remember that states can lose some of their federal money if they fail to comply with federal standards for maintaining registration systems). On July 2, 2008, Attorney General Michael Mukasey issued "Guidelines" for implementing the 2007 interim rule which declared states to be in compliance with SORNA if they registered offenders who "are incarcerated or under supervision, either for the predicate sex offense or for some other crime; . . . are already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; or . . . hereafter reenter the jurisdiction's justice system because of conviction for some other crime (whether or not a sex offense)."[32] That guideline did not make states responsible for keeping track of all prior offenders, because "[a]s a practical matter, jurisdictions may not be able to identify all sex offenders who fall within the SORNA registration categories . . . , particularly where such sex offenders have left the justice system and merged into the general population long ago."[33] On January 11, 2011, Attorney General Eric Holder issued modified guidelines indicating that states comply with SORNA if they register prior offenders who re-enter the justice system "through a subsequent criminal conviction in cases in

[29] Gundy, 139 S. Ct. at 2132 (Gorsuch, J., dissenting).

[30] 72 Fed. Reg. at 8897 (codified at 28 C.F.R. § 72.3 (2007)).

[31] Applicability of the Sex Offender Registration and Notification Act, 75 Fed. Reg. 81849, 81853 (2010).

[32] Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38046 (2008).

[33] *Id*.

which the subsequent [non-sex-offense] criminal conviction is for a felony, i.e., for an offense for which the statutory maximum penalty exceeds a year of imprisonment."[34] In other words, states would not be held responsible for registering prior offenders who have subsequent non-sex-related misdemeanor convictions. But throughout these changes, the various attorneys general consistently ruled that all *offenders* violated SORNA if they failed to register, regardless of the varying obligations of the states to keep track of them.

In 2005, Herman Gundy pleaded guilty to a second-degree sexual offense in Maryland for rape of a minor (to whom he supposedly also gave cocaine). Gundy served five years in state prison and then two additional years in a federal prison and a halfway house on a federal charge.[35] He was released from prison in New York in 2012, where he failed to register as a sex offender. On January 7, 2013, he was indicted on federal charges under SORNA for failing to register. "The indictment alleged that petitioner: (1) was 'an individual required to register' under SORNA based on the 2005 Maryland sex offense, (2) traveled in interstate commerce, and (3) 'thereafter resided in New York without registering' as required under SORNA."[36] Gundy objected that "the nondelegation doctrine prohibited Congress from outsourcing to the Attorney General the fundamentally legislative decision about whether SORNA applies to pre-Act offenders."[37] If that claim is correct, the statute under which Gundy was charged and convicted in 2013 was unconstitutional.

According to the Constitution, Gundy appears to have a point.

The Constitution vests "[all] legislative Powers herein granted . . . in a Congress of the United States, which shall consist of a Senate and House of Representatives."[38] The attorney general is none of the above. The only involvement of other actors in the lawmaking process is the requirement that congressionally enacted laws be presented to

[34] Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1639 (2011).

[35] When Gundy was convicted in Maryland, he was under supervised release from a prior federal cocaine offense. His Maryland state-law offense violated the terms of his federal supervised release, so he was sentenced to two years in prison for that federal supervised-release violation. See United States v. Gundy, 804 F.3d 140, 143–44 (2d Cir. 2015).

[36] Brief for Petitioner at 14, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086).

[37] *Id*.

[38] U.S. Const. art. I, § 1.

the president for signature or veto[39] and the vice president's power to preside over the Senate and break ties in that body.[40]

To be sure, the statute about which Gundy complains was enacted by Congress with the signature of the president, in accordance with the Constitution's formal provisions for lawmaking. When the attorney general determined SORNA's retroactive effect, he was doing exactly what Congress had decreed by law that the attorney general should do: determine SORNA's retroactive effect. Of course, the doctrine invoked by Gundy says something stronger than simply that Congress cannot allow other actors to exercise the formal power to vote on legislation.[41] It says that there are *substantive* limits on the kind of discretion that Congress can grant to other actors to define the content of federal law.

Suppose, for example, that Congress enacted a law using the formal constitutional procedures for lawmaking that said, "The attorney general shall have power to promulgate regulations to prohibit blonzfrinken, as determined by the attorney general." The attorney general then promulgates regulations making it a crime to transport Pokémon cards in interstate commerce, announcing that the attorney general has determined that interstate transport of Pokémon cards is blonzfrinken. Are the regulations lawful? If the answer is no (and, as I will demonstrate in a moment, it is *most definitely* no), it must be because there is some fundamental constitutional baseline regarding the obligations of Congress to determine the content of federal law. No one thinks that Congress must enact only laws that clearly and decisively resolve every possible issue that can arise under them—that kind of precision is not humanly possible. But that does not mean that anything goes. There are at least three different paths that all independently lead to the conclusion that Congress cannot grant limitless discretion to other actors to determine the content of federal law.

[39] U.S. Const. art. I, § 7, cls. 2, 3.

[40] U.S. Const. art. I, § 3, cl. 4.

[41] For the view that the Constitution *only* forbids Congress from allowing other actors to vote on legislation, see Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721 (2002); Eric A. Posner & Adrian Vermeule, Nondelegation: A Post-mortem, 70 U. Chi. L. Rev. 1331 (2003). For a (decisive, I think, but then I'm biased) rebuttal, see Gary Lawson, Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine, 73 Geo. Wash. L. Rev. 235 (2005).

First, the Constitution's structure obviously assumes that there is substantive content to the three great powers of government. Article III vests the "judicial Power of the United States" in federal courts,[42] Article II vests the "executive Power" in the president,[43] and Article I, as noted, vests "[a]ll legislative Powers herein granted" in Congress.[44] Three different kinds of powers are vested in three distinct institutions. That whole scheme is pointless and incoherent unless the three governmental powers describe different things.

The Constitution nowhere specifically defines what distinguishes legislative, executive, and judicial powers, but it assumes that an honest reader understands that some such distinction exists. Back in 1787, James Madison observed that "[e]xperience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the legislative, executive, and judiciary. . . . Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science."[45] Nonetheless,

> [t]hat adept-puzzling obscurity . . . did not stop Madison from categorically declaring that various powers of government are "in their nature . . . legislative, executive, or judiciary." Nor did it stop John Adams from stating that the "three branches of power have an unalterable foundation in nature; that they exist in every society natural and artificial . . .; that the legislative and executive authorities are naturally distinct; and that liberty and the laws depend entirely on a separation of them in the frame of government. . . ." Nor did it prevent many state constitutions of the founding era from including separation-of-powers clauses that expressly distinguished, again without express definitions, the legislative from the executive from the judicial powers. Nor did it prevent the United States Constitution from basing its entire scheme of governance on the distinctions among those powers. However difficult it may be at the margins to distinguish those categories of power from each other, the founding generation assumed that there was a fact of the matter about those distinctions

[42] U.S. Const. art. III, § 1.

[43] U.S. Const. art. II, § 1.

[44] U.S. Const. art. I, § 1.

[45] The Federalist No. 37, at 286 (James Madison) (John C. Hamilton ed., 1866).

> and that one could discern that fact in at least a large range of cases. The communicative meaning of the Constitution of 1788 cannot be ascertained without reference to some such distinction, even if legal scholars or political scientists (adept or otherwise) find the distinction unhelpful or confusing.[46]

And once one understands that there is substantive content to the legislative, executive, and judicial powers, it is not hard to mark out the broad outlines. Judicial power is quintessentially the power to decide cases in accordance with governing law, executive power is quintessentially the power to carry laws into effect, and legislative power is quintessentially the power to make laws. Something that looks formally like the exercise of judicial or executive power, because it decides a case or executes a law, could *in reality* be an exercise of legislative power if it truly creates rather than implements or interprets the law. Telling judges or executives that "blonzfrinken" is prohibited leaves it to those judicial or executive actors to determine the content of the law. It tells them to act as legislators exercising legislative power, and the Constitution does not permit such a subdelegation of legislative power to other actors. As I have written previously:

> Suppose that Congress enacts a "statute" that consists of blank verse or gibberish (or even Robert Bork's famous inkblot). The marks on the page of the Statutes at Large literally make no sense. If a court or the President tried to implement such a "statute," on the theory that any enactment by Congress must have some identifiable meaning, they would not be engaged in "interpretation" in any useful sense of that term. They would simply be making up a law—that is, exercising legislative power in the guise of interpretation. As used in the Constitution, the term "executive power" does not mean anything done by an executive actor, and the term "judicial power" does not mean anything done by a court. These are terms with real content. The courts and the President exceed their enumerated powers by purporting to give meaning to gibberish just as surely as they would exceed their enumerated powers by directly inserting their own texts into the Statutes at Large.[47]

[46] Gary Lawson, Take the Fifth . . . Please! The Original Insignificance of the Fifth Amendment's Due Process of Law Clause, 2017 B.Y.U. L. Rev. 611, 623–24 (2017) (footnotes omitted).

[47] Lawson, *supra* note 12, at 339–40 (footnotes omitted).

That does not mean that there are necessarily crisp lines among the legislative, executive, and judicial powers, but it does mean that there are lines. I will say more about the process of drawing those lines in Part III.

Second, one can reach the same conclusion by examining the Constitution's scheme of enumerated powers. From James Madison,[48] to John Marshall,[49] to William Rehnquist,[50] to John Roberts,[51] it has been clear that the federal government is a government of limited and enumerated powers. More precisely, the federal government is a government of *institutions* with limited and enumerated powers. The various powers granted to the federal government *are not actually granted to the federal government*. They are granted to specific institutions within the federal government. Each federal institution—most notably including Congress, the president, and the federal courts—is granted specific, enumerated powers (though in the case of the president and the courts those enumerated powers consist of entire categories of governmental action). Any action by those institutions must be grounded in, or at least fairly inferred from, those specific powers. Congress has no expressly enumerated power to subdelegate its law-defining authority to other actors. Any such power must come, if at all, from the Necessary and Proper Clause (or the "Sweeping Clause," as it was known until the 20th century), which gives Congress power "to make all

[48] The Federalist No. 45, at 292 (James Madison) (C. Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined.").

[49] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.").

[50] United States v. Lopez, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

[51] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534–35 (2012) (Roberts, C.J.) ("The Federal Government 'is acknowledged by all to be one of enumerated powers.' That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. . . . The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.").

Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[52] It is not very difficult to conclude that it cannot possibly be "proper" for Congress to give other actors so much discretion to be effectively exercising the substance of the legislative power. Nor, from the other direction, can it be "proper" to tell actors whose only granted powers are executive or judicial that they should be determining the content of federal law. The Necessary and Proper Clause is not an authorization for Congress to blow apart the constitutional structure.[53]

In an earlier scholarly life, I developed both foregoing lines of argument against subdelegation of legislative power at great length.[54] I still think that either line sufficiently establishes the constitutional pedigree of a principle against giving anyone other than Congress too much power to define the content of federal law. But both lines are subsumed under and superseded by a more fundamental consideration that most clearly establishes the constitutional pedigree of the principle against allowing other actors to define too much of the content of federal law.

The Constitution is a kind of agency, or fiduciary, instrument. As fiduciary instruments often do, the document's author, or principal—named "We the People"[55]—vests authority over some portion of We the People's affairs in certain designated agents. The overwhelming evidence for viewing the Constitution as some kind of agency/fiduciary instrument was first assembled in modern times by Robert Natelson,[56] was noted by Philip Hamburger,[57] and was further

[52] U.S. Const. art. I, § 8, cl. 18.

[53] See Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L.J. 267 (1993); Lawson, *supra* note 41.

[54] See Lawson, *supra* note 41; Lawson, *supra* note 12.

[55] U.S. Const. pmbl.

[56] See, e.g., Robert G. Natelson, The Constitution and the Public Trust, 52 Buff. L. Rev. 1077 (2004); Robert G. Natelson, The Agency Law Origins of the Necessary and Proper Clause, 55 Case W. Res. L. Rev. 243 (2004); Robert G. Natelson, The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan, 35 U. Rich. L. Rev. 191 (2001).

[57] Philip Hamburger, Is Administrative Law Unlawful? 377–80 (2014).

developed at book length by myself and Guy Seidman.[58] (In older times, it was so obviously taken for granted that the Constitution is an agency instrument that there was little point in making the characterization explicit.) One can argue about what kind of fiduciary instrument the Constitution most resembles—a power of attorney, a corporate charter, a trust, or a sui generis kind of agency instrument—but it is pretty clearly somewhere within the family of such instruments. And for purposes of the principle against subdelegation, the precise characterization of the Constitution as one or another kind of fiduciary instrument does not matter because the 18th-century rules for subdelegation were the same across the entire family of such instruments: subdelegation of delegated fiduciary authority is strictly forbidden unless it is expressly authorized by the instrument or is incidental by custom or necessity to delegated authority.[59] Accordingly, the principle against delegation of legislative authority is better called the principle against *subdelegation* of legislative authority.

The Congress is vested with all legislative powers herein granted, meaning that We the People have entrusted or delegated that particular power to specific institutional actors. Because those actors are fiduciaries, they are not permitted to subdelegate their authority without either specific authorization in the instrument (which does not exist) or custom or strict necessity (which also does not exist) that makes the power of subdelegation an incident to the grant of delegated authority.

And this is all apart from the many arguments against subdelegation of legislative authority grounded in concerns other than original meaning.[60] All in all, "[t]he rule against subdelegation of legislative authority is among the clearest constitutional rules one can imagine."[61] "Indeed, there are few propositions of constitutional meaning as thoroughly overdetermined as the unconstitutionality

[58] Gary Lawson & Guy Seidman, "A Great Power of Attorney": Understanding the Fiduciary Constitution (2017).

[59] See *id*. at 113–17.

[60] Important arguments along these lines have been made by Marty Redish, see Martin H. Redish, The Constitution as Political Structure 136–37 (1995), and David Schoenbrod, see David Schoenbrod, Power without Responsibility: How Congress Abuses the People Through Delegation (1993).

[61] Lawson & Seidman, *supra* note 58, at 117.

of subdelegations of legislative authority."[62] No wonder that Chief Justice John Marshall, in the Supreme Court's first serious encounter with the principle against subdelegation, confidently declared: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."[63]

Of course, to say that there is a constitutional principle against subdelegation does not say what that principle encompasses. As already noted, it cannot be the case that every federal law must neatly and cleanly resolve every possible circumstance that can arise under it. Executive power and judicial power involve *some* degree of interpretative authority. But that authority must be genuinely interpretative rather than creative. At some point, the power of "interpretation" shades so much into the power of law creation that it ceases to be an executive or judicial function and becomes a legislative function which can only be performed by the legislating authorities.

In Part III, I will say much more about the line-drawing problem raised by the constitutional rule against subdelegation. For Herman Gundy's purposes, it does not seem to matter. There is plainly nothing in SORNA for the attorney general to interpret with respect to the statute's application to pre-SORNA offenders. The statute simply tells the attorney general to decide the matter. It does not, for example, identify a set of facts (such as whether Great Britain is violating the neutral commerce of the United States[64]) for the attorney general to find, nor does it contain an ambiguous statutory term (such as "purity, quality, and fitness for consumption"[65]) for an executive agent to construe. The statute simply tells the attorney general to decide whether and to whom the law applies. It is hard to imagine a statute that more plainly does precisely what the basic fiduciary, and hence constitutional, rule against subdelegation forbids.

So Herman Gundy goes free? Not so fast.

As it happens, Mr. Gundy's lawyers could not plausibly have made the above arguments to federal judges in 2013. Those arguments are

[62] Gary Lawson, Representative/Senator Trump?, 21 Chap. L. Rev. 111, 119 (2018).

[63] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[64] The example is drawn from Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382 (1813).

[65] The example is drawn from Buttfield v. Stranahan, 192 U.S. 470 (1904).

all grounded in the Constitution's original meaning, and resort to original meaning as a method for determining the scope of Congress's power to subdelegate legislative authority vanished from the legal scene in the 1930s. In that respect, Cass Sunstein is correct: 1935 was the last, even if not the only, good year for the traditional doctrine against subdelegation of legislative authority.

The New Deal changed much of American constitutional law, and the principle against subdelegation of legislative authority was among the most notable casualties. Prominent New Deal cases upheld against subdelegation challenges statutes that authorized the Federal Communications Commission to grant broadcast licenses "if public convenience, interest, or necessity will be served thereby"[66]; allowed a federal price administrator to fix prices which "in his judgment will be generally fair and equitable"[67]; and instructed the Securities and Exchange Commission to approve a corporate financial structure if it "does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders."[68] The modern law was aptly summarized in 1989 in *Mistretta v. United States*,[69] in which the Court effectively declared the subdelegation doctrine nonjusticiable. In upholding sweeping authority to the United States Sentencing Commission to determine the appropriate range of sentences for violations of federal criminal laws—a "legislative" function if there ever was one—the Court announced that "our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[70] The Court latched onto a statement from a 1928 case that

[66] 47 U.S.C. § 307 (2012) (upheld in Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943)).

[67] Emergency Price Control Act, 56 Stat. 23 (1942) (upheld in Yakus v. United States, 321 U.S. 414 (1944)). For an important modern study of the Yakus case, see James R. Conde & Michael S. Greve, *Yakus* and the Administrative State, 42 Harv. J.L. & Pub. Pol'y 807 (2019).

[68] 15 U.S.C. § 79k (2012) (upheld in Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946)).

[69] 488 U.S. 361 (1989).

[70] *Id*. at 372. Presumably, according to the Court, Congress's "job" is to facilitate regulations with which a majority of the Court agrees rather than to exercise the powers actually granted to Congress by the Constitution. Just so we are clear.

had remarked, while upholding a grant of power to the president to determine tariff levels to "equalize the . . . costs of production" between American and foreign producers, that "[i]f Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[71] It is, therefore, "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[72]

The catch is that, given the sweeping delegations upheld since the 1930s, it is virtually impossible to find anything that the Court will not regard as adequate delineations of general policies and boundaries. Justice Antonin Scalia, while dissenting from the judgment in *Mistretta* on technical grounds concerning the specific functions of the Sentencing Commission,[73] went even further than did the majority in rejecting arguments based on the degree of discretion granted to executive (or judicial) agents:

> But while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. . . . As the Court points out, we have invoked the doctrine of unconstitutional delegation to invalidate a law only twice in our history, over half a century ago. What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a "public interest" standard?

[71] J.W. Hampton, Jr., & Co., 276 U.S. at 409 (1928) (emphasis added).

[72] Am. Power & Light, 329 U.S. at 90 (quoted in Mistretta, 488 U.S. at 372–73).

[73] The Sentencing Commission has no adjudicative authority; it is purely a rule-making body. According to Justice Scalia, executive authority must have some at least formal connection to law execution in order to be valid. An agency that does nothing but make rules, unconnected to any enforcement authority, is simply "a sort of junior varsity Congress." 488 U.S. at 427 (Scalia, J., dissenting).

> In short, I fully agree with the Court's rejection of petitioner's contention that the doctrine of unconstitutional delegation of legislative authority has been violated because of the lack of intelligible, congressionally prescribed standards to guide the Commission.[74]

A decade later, Justice Scalia authored an opinion for the Court rejecting a subdelegation challenge to a statute that defines primary air quality standards under the Clean Air Act as "ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator [of the Environmental Protection Agency], based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health."[75] Secondary standards were defined as standards which "specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air."[76] Invoking essentially the same authorities relied upon a decade earlier in *Mistretta*, the Court quickly brushed aside any subdelegation concerns on the ground that the statutes above are "in fact well within the outer limits of our nondelegation precedents."[77]

Moreover, in the period between *Mistretta* and *American Trucking*, the Court declined multiple opportunities to carve out enclaves within which a subdelegation principle might operate—for the taxing power,[78] criminal laws,[79] and the death penalty in military

[74] *Id*. at 415–16 (citations omitted).

[75] 42 U.S.C. § 7409(b)(1) (2012).

[76] *Id*. at § 7409(b)(2).

[77] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001).

[78] Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 222–23 (1989) (finding "no support . . . for . . . application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power").

[79] Touby v. United States, 500 U.S. 160, 166–67 (1991) (finding that the attorney general's power to move [after considering eight factors] controlled substances among schedules, which effectively determines the penalties associated with illegal activity involving each substance, "passes muster even if greater congressional specificity is required in the criminal context").

courts martial.[80] Those 80 years of precedents are so sweeping that they constitute essentially a fortiori authority for upholding any congressional grant of discretionary authority to executive or judicial agents—quite possibly including the authority under the National Industrial Recovery Act that was found unconstitutional in 1935.

To see just how thoroughly the subdelegation doctrine has been buried since 1935, consider two of the most prominent pieces of legislation in modern times: the Troubled Asset Relief Program and the Affordable Care Act (ACA). The former statute handed the secretary of the treasury nearly a trillion dollars in order to "purchase . . . troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary."[81] The statute defined (to use the term loosely) "troubled assets" as "any other financial instrument that the Secretary . . . determines the purchase of which is necessary to promote financial stability."[82] And one of the key provisions of the Affordable Care Act was the definition of a "qualified health plan," which is the only kind of plan that can be sold on ACA exchanges. The criteria for certification of a plan as qualified are: "The Secretary [of Health and Human Services] shall, by regulation, establish criteria for the certification of health plans as qualified health plans,"[83] subject only to nine vague considerations that the secretary must take into account.[84] To my knowledge, none of these provisions in some of the most high-profile and wide-reaching statutes in American history was ever even subject to a serious subdelegation challenge. Everyone assumed that such challenges would be frivolous.

To be sure, there were occasional snippets in some Supreme Court opinions that nodded towards a theoretical subdelegation doctrine,[85] but, given the post-1935 caselaw, it was no surprise that every circuit court—11 in all—that faced subdelegation challenges to the provision in SORNA telling the attorney general to determine whether and how the statute applies to pre-Act offenders rejected the challenges summarily. It was also no surprise when, in 2010, the

[80] Loving v. United States, 517 U.S. 748 (1996).

[81] 12 U.S.C. § 5211 (2012).

[82] *Id*. at § 5202.

[83] 42 U.S.C. § 18031(c)(1) (2012).

[84] *Id*. at § 18031(c)(1)(A)-(I).

[85] See Gary Lawson, Federal Administrative Law 157–65 (8th ed. 2019).

Second Circuit, as one of those eleven circuits to do so, brusquely dismissed a subdelegation challenge to the statute:

> A delegation is constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. In other words, Congress needs to provide the delegated authority's recipient an "intelligible principle" to guide it. The Attorney General's authority under SORNA is highly circumscribed. SORNA includes specific provisions delineating what crimes require registration, where, when, and how an offender must register, what information is required of registrants, and the elements and penalties for the federal crime of failure to register. If § 16913(d) gives the Attorney General the power to determine SORNA's "retroactivity," it does so only with respect to the limited class of individuals who were convicted of covered sex offenses prior to SORNA's enactment; the Attorney General cannot do much more than simply determine whether or not SORNA applies to those individuals and how they might comply as a logistical matter. . . . The Supreme Court has upheld much broader delegations than these.[86]

Thus, by the time Herman Gundy's subdelegation challenge reached the Second Circuit, that court had already decided the issue against him. Gundy nonetheless raised the challenge, which the court and Gundy both acknowledged "was foreclosed . . . and made only for preservation purposes,"[87] and which the court dismissed in a one-sentence footnote.[88]

Gundy sought certiorari in the Supreme Court on three statutory questions[89] and also on the preserved question of subdelegation,

[86] United States v. Guzman, 591 F.3d 83, 92–93 (2d Cir. 2010) (cleaned up).

[87] United States v. Gundy, 695 Fed.App. 639, 641 n.1 (2d Cir. 2017).

[88] See *id*.

[89] "(1) Whether convicted sex offenders are 'required to register' under the federal Sex Offender Notification and Registration Act ('SORNA') while in custody, regardless of how long they have until release. (2) Whether all offenders convicted of a qualifying sex offense prior to SORNA's enactment are 'required to register' under SORNA no later than August 1, 2008. (3) Whether a defendant violates 18 U.S.C. § 2250(a), which requires interstate travel, where his only movement between states occurs while he is in the custody of the Federal Bureau of Prisons and serving a prison sentence." Petition for a Writ of Certiorari at i, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086).

which was as wild a long shot as one can imagine. For more than 80 years, the Court had been indicating that it was not going to enforce a principle against congressional subdelegation. It had consistently upheld subdelegations incomparably more important and sweeping than the relatively minor provision in SORNA. Furthermore, there was no circuit split. The court of appeals opinion dismissing Gundy's challenge (in one sentence) was not even published, indicating that the Second Circuit did not consider the opinion of any general interest. It is true that the statute in SORNA contained literally no explicit statutory guidance—no "intelligible principle," in the Court's parlance—to guide the attorney general, but surely one could interpolate into the statute something like "for the public interest, convenience, or necessity" or "fair and equitable" or some other essentially meaningless weasel phrase that the Court had repeatedly taken as an adequate "intelligible principle." It was not at all obvious that a petition for certiorari was worth the printing fees.

The Department of Justice certainly thought little of the case. It waived its right to respond to the certiorari petition, which it often does when it regards a petition as so obviously meritless that there is no point in wasting time and energy answering it. Any single justice, however, can ask the government (or any party) to respond to a certiorari petition following a waiver of response,[90] and that happened in this case. (The Court, as a matter of practice, does not disclose which justice or justices make those requests.) The government reacted to this request for a response as one might expect:

> Every court of appeals to decide such a nondelegation challenge to SORNA has rejected it—ten of them in published decisions and one in multiple unpublished decisions.
>
> This Court has repeatedly denied petitions for writs of certiorari raising the same nondelegation claim [citing 15 cases]. There is no reason for a different outcome here.
>
> This Court's decisions recognize that the nondelegation doctrine is satisfied when a statutory grant of authority sets

[90] See David C. Thompson & Melanie F. Wachtell, An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General, 16 Geo. Mason L. Rev. 237, 242 (2009).

> forth an "intelligible principle" that "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." As the Court has repeatedly observed, it has found only two statutes that lacked the necessary "intelligible principle"—and it has not found any in the last 80 years.
>
> In enacting SORNA, Congress "broadly set policy goals that guide the Attorney General," and it "created SORNA with the specific design to provide the broadest possible protection to the public, and to children in particular, from sex offenders." Congress identified the Attorney General as its agent and it "made virtually every legislative determination in enacting SORNA, which has the effect of constricting the Attorney General's discretion to a narrow and defined category." This "Court has upheld much broader delegations than" Section 16913(d). Further review is not warranted.[91]

No one filed any amicus curiae briefs in support of Gundy's petition for certiorari. Why would they? Surely, the government was right, and there was no reason to expect the Court to take this case.

And yet, on March 5, 2018, the Supreme Court granted certiorari in Gundy's case, "limited to Question 4 presented by the petition,"[92] which was "(4) Whether SORNA's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine."[93] That means that at least four justices thought the issue worthy of consideration. It is fair to say that no one, presumably including Gundy's lawyers, saw that one coming. I sure didn't.

In the face of at least four justices signaling that something of consequence was potentially on the table, 13 amicus curiae briefs were filed on the merits—all 13 on the side of Gundy. Several of the filings that were nominally on behalf of Gundy, however, encouraged the Court to decide the case on narrow grounds that would not call into question the main line of subdelegation authority over the

[91] Brief for the United States in Opposition at 21–24, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086) (copious citations omitted).

[92] Gundy v. United States, 138 S. Ct. 1260 (2018).

[93] Petition for Certiorari, *supra* note 89, at i.

past 80 years. The ACLU, for example, urged the Court to carve out special rules for criminal cases without implicating the many vague civil statutes that empower the administrative state.[94] A brief filed by a group of scholars declared that, because SORNA's section 20913 contains literally no guidance at all to the attorney general, "[t]his is an exceptional case involving an exceptional statute" and that the "case does not require the Court to make new law in the area of the nondelegation doctrine."[95] A wide range of other filers, on the other hand, urged the Court to reconsider its whole body of subdelegation jurisprudence and, in particular, to move away from the constant invocation of an "intelligible principle" as the magic phrase to dismiss subdelegation challenges.[96]

The momentum had clearly shifted. Why would the Court take Gundy's case if not to reconsider, in some fundamental way, the approach to subdelegation that it had been taking for the better part of a century? Could Herman Gundy take a place alongside Clarence Earl Gideon[97] as among history's most unlikely fashioners of constitutional law?

II. The Decision: Bombshell or Misfire?

Gundy lost. Five justices voted to uphold his conviction. But for everyone other than Gundy, it was hardly a cut-and-dried outcome.

[94] See Brief Amicus Curiae of the American Civil Liberties Union in Support of Petition at 6–16, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086).

[95] Brief of William D. Araiza and 14 Other Constitutional, Criminal, and Administrative Law Professors as Amici Curiae in Support of Petitioner at 3–4, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086).

[96] See, e.g., Brief Amicus Curiae of Center for Constitutional Jurisprudence in Support of Petitioner, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086); Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioner, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086); Brief Amicus Curiae of Institute for Justice in Support of Reversal, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086); Brief Amicus Curiae of Pacific Legal Foundation in Support of Reversal, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086); Brief of the Competitive Enterprise Institute, Reason Foundation, and Cascade Policy Institute as Amici Curiae in Support of Petitioner, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086); Brief of the Cato Institute and Cause of Action Institute as Amici Curiae in Support of Petitioner, Gundy v. United States, 139 S. Ct. 2116 (2019) (No. 17-6086).

[97] See Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that indigent criminal defendants must be provided counsel by the government).

Four justices—Justices Elena Kagan, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor, who some would call the "liberal bloc"[98]—thought that section 20913(d) of SORNA "easily passes constitutional muster."[99] Indeed, they were puzzled why the Court had even taken the case.[100]

The plurality opinion invoked the usual suspects, most notably *Mistretta* and *Yakus*, for the modern "intelligible principle" idea. It repeated *Mistretta*'s now-stock phrase that "Congress simply cannot do its job absent an ability to delegate power under broad general directives" and noted that "we have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'"[101] Under that approach, "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation," because "[o]nly after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I. And indeed, once a court interprets the statute, it may find that the constitutional question all but answers itself."[102] Indeed, if all one needs is an "intelligible principle" in the statute, and if anything at all, however empty or vacuous, counts as an "intelligible principle," this is an accurate description of the inquiry.

The plurality found that "intelligible principle" for section 20913(d) in an interpretation of the statute—though not at all an implausible interpretation. The plurality invoked SORNA's "declaration of purpose" ("In order to protect the public from sex offenders and offenders against children . . . , Congress in this chapter establishes a comprehensive national system for the registration of those

[98] Personally, I am not terribly keen about putting people into blocs, but on "hot button" issues—and the survival of the administrative state is surely a "hot-button" issue—the concept of blocs has enough descriptive value to warrant at least a mention in quotation marks, though probably not much more than that.

[99] Gundy, 139 S. Ct. at 2121.

[100] *Id*. at 2122 ("The District Court and Court of Appeals for the Second Circuit rejected that claim, as had every other court (including eleven Courts of Appeals) to consider the issue. We nonetheless granted certiorari.") (citation omitted).

[101] *Id*. at 2123 (citations omitted).

[102] *Id*.

offenders"[103]), some subtle textual clues elsewhere in SORNA,[104] legislative history "showing that the need to register pre-Act offenders was front and center in Congress's thinking,"[105] and problems of feasibility with registering pre-Act offenders[106] to conclude that the statute "require[s] the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible."[107] "The text, considered alongside its context, purpose, and history, makes clear that the Attorney General's discretion extends only to considering and addressing feasibility issues."[108] In other words, the plurality read the statute to require the attorney general to apply SORNA to all pre-Act offenders to the extent feasible.[109]

That reading of the statute surely makes the subdelegation in SORNA, as the plurality described it, "distinctly small-bore."[110] The United States Code is full of vague feasibility requirements.[111] Accordingly, said the plurality, "if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."[112] And that surely can't be the case, can it?

The plurality's statutory interpretation, while perhaps a bit strained, is not entirely implausible. Surely Congress meant for the attorney general to exercise the granted authority under section 20913(d), if not solely with "feasibility" in mind, then at least in a "fair and equitable" manner or with an eye towards the "public interest, convenience, or necessity." The Court has long upheld statutes containing such language, and interpolating language of that sort into SORNA is not a wild stretch. If the Court's precedents from the past 80 years

[103] 34 U.S.C. § 20901 (2012).

[104] See *id*. at § 20911(1) (defining a sex offender as "an individual who *was* convicted of a sex offense," suggesting that all sex offenders, past and present, are presumptively obligated to register) (emphasis added).

[105] Gundy, 139 S. Ct. at 2127.

[106] See *id*. at 2128.

[107] *Id*. at 2123–24.

[108] *Id*.

[109] See *id*. at 2129 ("The statute conveyed Congress's policy that the Attorney General require pre-Act offenders to register as soon as feasible.").

[110] *Id*. at 2130.

[111] See *id*.

[112] *Id*.

hold sway, the plurality's result was not surprising. Indeed, even a holding that declined to interpolate any such language into section 20913(d) but maintained the Court's precedents would not have had much consequence. It simply would have required Congress, whenever it designated someone else to make law, to include some vague reference to fairness, equity, the public interest, or feasibility. The absence of any of those empty references from section 20913(d) is likely more of a scrivener's error than a constitutional violation.

Thus, the real question in *Gundy* was whether the grant of certiorari indicated that a majority of justices are willing to reconsider 80 years of precedent. The answer to that question: maybe.

Justice Samuel Alito concurred in the judgment, meaning that he agreed with the plurality that Gundy's conviction was valid. But his reasons for upholding section 20913(d) are intriguing enough, and short enough, to reproduce in full substance:

> The Constitution confers on Congress certain "legislative [p]owers," and does not permit Congress to delegate them to another branch of the Government. Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards.
>
> If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.
>
> Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.[113]

Obviously, Justice Alito is not going to get any encouragement "to reconsider the approach we have taken for the past 84 years" from any of the four justices in the plurality. Can he find four other justices who he can join in reconsidering the Court's approach to subdelegation problems?

[113] *Id*. at 2130–31 (Alito, J., concurring in the judgment) (citations omitted).

He seemingly can find three compatriots with ease. Justice Neil Gorsuch, joined by Chief Justice John Roberts and Justice Clarence Thomas (who has long advocated reconsideration of the Court's subdelegation precedents[114]), wrote a lengthy dissent—almost twice as long as the plurality opinion. The dissent described the plurality's approach as "[w]orking from an understanding of the Constitution at war with its text and history"[115]; and while Justice Alito was looking for a five-justice majority before reconsidering the Court's precedents, Justice Gorsuch said, "Respectfully, I would not wait."[116]

While a large chunk of the dissenting opinion challenges the plurality's interpretation of section 20913(d) as containing an unwritten register-offenders-to-the-maximum-extent-feasible requirement,[117] the opinion's real bite comes in its head-on challenge to the Court's approach to subdelegation since the New Deal.

Justice Gorsuch's dissent is in significant measure a primer on basic constitutional structure and the separation of powers.[118] It could readily be assigned in civics classes, and no summary can do it justice. Using some of the arguments previously presented here, it argues that a principle against legislative delegation (it *does not* adopt the agency/fiduciary language of subdelegation—maybe next time?) is fundamental to the constitutional order, essential to governmental accountability, and protective of liberty, especially the liberty of minorities (such as sex offenders) who are given an often potent voice through the Constitution's multi-layered, multi-constituency, and complex process for enacting legislation. The real question, however, is: "What's the test?"[119] How does one know when Congress has (sub)delegated legislative power?

[114] See Whitman, 531 U.S. at 487 (Thomas, J., concurring) ("As it is, none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

[115] Gundy, 139 S. Ct. at 2131 (Gorusch, J., dissenting).

[116] *Id*.

[117] See *id*. at 2145–48.

[118] See *id*. at 2133–35.

[119] *Id*. at 2135.

Justice Gorsuch identified three considerations that might validate what seem like broad grants of discretion to executive or judicial agents. "First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'"[120] "Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding."[121] "Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. . . . So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'"[122] Those considerations, he argued, might justify some of the results reached by the Court in modern times.[123] But the big problem, he maintained, is that the Court has not been asking those questions. Instead, it has been asking, as did the plurality in *Gundy*, whether the statute at issue supplies an "intelligible principle."

That term originated in the subdelegation context in 1928[124] in *J.W. Hampton, Jr., & Co. v. United States*.[125] Following other cases in which presidents were given power to determine the applicability of tariffs based on fact-finding concerning congressionally specified events,[126] the statute in *Hampton* authorized the president to alter the amount of tariffs to "equalize the . . . costs of production" between the United States and the exporting nation. The Court declared that the permissibility of such grants of power must be judged "according

[120] *Id*. at 2136.

[121] *Id*.

[122] *Id*. at 2137 (quoting David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 Mich. L. Rev. 1223, 1260 (1985)).

[123] *Id*. at 2139, 2140.

[124] The phrase "intelligible principle" appeared in Supreme Court cases five times prior to 1928 in other contexts, none of which is relevant to the subdelegation inquiry.

[125] 276 U.S. at 409.

[126] See Field v. Clark, 143 U.S. 649 (1892) (upholding, over two dissenting votes, a grant to the president of the power to suspend duty-free importation from countries that impose "reciprocally unequal and unreasonable" trade restrictions on American goods); Cargo of the Brig Aurora, 11 U.S. (7 Cranch) 382 (1813) (upholding a grant to the president of the power to stop a statutory embargo by determining that a foreign country had ceased to violate the neutral commerce of the United States).

to common sense and the inherent necessities of the governmental co-ordination,"[127] and it followed with the now famous language: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[128] There was no indication that the Court in *Hampton* thought that it was doing anything new or different from prior cases, much less that it was laying down a mantra that was henceforth to serve as the final word on subdelegation challenges. As Justice Gorsuch said, "it seems plain enough that [the Court in *Hampton*] . . . sought only to explain the operation of . . . traditional tests."[129]

Justice Gorsuch wrote that "the 'intelligible principle' remark eventually began to take on a life of its own,"[130] gaining steam in the late 1940s. "Only then did lawyers begin digging it up in earnest and arguing to this Court that it had somehow displaced (*sub silentio* of course) all prior teachings in this area."[131] And, Justice Gorsuch concluded, "[t]his mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."[132] A correct understanding of the intelligible principle idea, he argued, is readily available:

> To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.[133]

So how far would Justice Gorsuch and the other dissenters take the subdelegation principle? After noting that a number of doctrines,

[127] J.W. Hampton, Jr., & Co., 276 U.S. at 406.

[128] *Id*. at 409.

[129] Gundy, 139 S. Ct. at 2139.

[130] *Id*.

[131] *Id*.

[132] *Id*.

[133] *Id*. at 2141.

such as the void-for-vagueness doctrine in criminal law, already do some of the work that could be done under the principle of subdelegation,[134] Justice Gorsuch addressed the elephant in the room: If the Court began enforcing a serious principle against subdelegation, how much of modern government would survive? The Court in *Mistretta* openly grounded its decision on this concern, and the question came up in the oral argument in *Gundy*, in which Justice Breyer raised the specter of having to consider the constitutionality of some 300,000 administrative rules.[135] The dissent responded:

> Nor would enforcing the Constitution's demands spell doom for what some call the "administrative state." The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions like those implicated by SORNA. What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also commission agencies or other experts to study and recommend legislative language. Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.[136]

All in all, that makes five votes to affirm Gundy's conviction, three votes to overturn it, three votes to reconsider the Court's whole approach to subdelegation problems, and a fourth vote to reconsider the Court's whole approach to subdelegation problems if, but only if, a fifth vote for that enterprise can be found. That all makes it of more than passing importance that only eight justices participated in the decision in *Gundy* (hence the 4-1-3 split). *Gundy* was argued to the Court on October 2, 2018. Brett Kavanaugh was sworn in on

[134] See *id*. at 2140–42.

[135] Transcript of Oral Arg., Gundy v. United States at 7–8, 139 S. Ct. 2116 (2019) (No. 17-6086).

[136] Gundy, 139 S. Ct. at 2145.

October 6, 2018. While he technically could have participated in the decision despite missing oral argument, he obviously elected not to do so. Had he participated, would he and Justice Alito have formed the necessary majority to reconsider the Court's approach to subdelegation? Would that reconsideration have taken the form outlined in Justice Gorsuch's dissent? And if so, what would be the likely consequences of a subdelegation doctrine along the lines suggested by Justice Gorsuch?

These questions are all potentially related. Whether and how Justice Kavanaugh will join the party may well depend on what is being served. In the next Part, I will speculate on what the opinions in *Gundy* suggest about future cases and the administrative state more broadly.[137]

III. Constitutionalist Restoration or Conservative Retrenchment?

The Court's abandonment of subdelegation principles over the past 80 years has been a nonpartisan affair. In the early 1980s, then-Justice William Rehnquist and Chief Justice Warren Burger made some small noises about reviving some kind of subdelegation doctrine,[138] but those noises faded quickly. Chief Justice Rehnquist joined the near-unanimous majority opinion in *Mistretta* and the unanimous opinion in *American Trucking Ass'n* without a peep. Indeed, in the years between *Mistretta* in 1989 and *American Trucking Ass'n* in 2001, the combined votes in the Supreme Court on the merits of subdelegation challenges was 53-0. The only voice that was at all out of tune was Justice Thomas, who suggested in *American Trucking Ass'n*: "As it is, none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence

[137] The key word in this sentence is "speculate." The key fact that lies behind this speculation is that if I was actually any good at predicting the outcomes of Supreme Court cases, I would not be a law professor. I would be selling that remarkable talent to the highest bidder and becoming spectacularly rich. So treat everything in Part III accordingly.

[138] See Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in the judgment); Am. Textile Manuf. Inst., Inc., 452 U.S at 543 (Rehnquist, J., dissenting) (joined by Burger, C.J.).

has strayed too far from our Founders' understanding of separation of powers."[139]

And what of Justice Thomas's fellow conservative and originalist colleague, Justice Scalia? Justice Scalia was perhaps the Court's most vigorous *opponent* of reviving the subdelegation doctrine, as evidenced by his separate opinion in *Mistretta* and his brief and dismissive majority opinion in *American Trucking Ass'n*. The reasons for Justice Scalia's distaste for judicial enforcement of the subdelegation doctrine are not hard to find. Justice Scalia's jurisprudence is best explained by his famous article "The Rule of Law as a Law of Rules."[140] That article—published in 1989, the same year as *Mistretta*—makes clear that, for Justice Scalia, the judicial task of deciding cases according to law means deciding cases according to *rules*. By these lights, if a proposed legal norm cannot be reduced to a rule that can be neutrally and technically applied by a judge, then it does not really count as law.[141] In the context of the subdelegation doctrine, Justice Scalia simply could not come up with an inquiry that was sufficiently rule-like to allow him to apply the doctrine judicially. Thus, as he said in *Mistretta*, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."[142] Once Justice Scalia called the subdelegation inquiry a matter of degree rather than principle, that took it out of the realm of judicial enforceability (though presumably it could and should be enforced by Congress and the president). Any doctrine of subdelegation would not, in his view, be a law of rules.

Justice Scalia's replacement on the Court, Justice Gorsuch, had expressed some interest in reviving the subdelegation doctrine while a lower court judge,[143] so one could reasonably surmise that his elevation created two justices rather than one who would consider taking a critical look at the Court's subdelegation precedents.

[139] 531 U.S. at 487 (Thomas, J., concurring).

[140] Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989).

[141] For a more detailed description, and a detailed constitutional critique, of this aspect of Justice Scalia's jurisprudence, see Steven G. Calabresi & Gary Lawson, The Rule of Law as a Law of Law, 90 Notre Dame L. Rev. 483 (2014).

[142] 488 U.S. at 415 (Scalia, J., dissenting).

[143] See Gutierrez-Brizuela v. Lynch, 834 F3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring).

Nevertheless, given the strong opposition even from conservative originalists to reconsideration of the modern subdelegation doctrine, it is clear why almost no one saw coming the grant of certiorari in *Gundy*.

So how will Justice Kavanaugh view the subdelegation problem when he finally addresses it? *That* is the $64,000 (or perhaps 300,000-rule) question, and the available data point in different directions.

On the one hand, Justice Kavanaugh appears to be committed, more or less, to a jurisprudence of original meaning, especially in the area of separation of powers. "More or less" is plenty good enough in the context of subdelegation, because even a modest commitment to original meaning yields a principle against subdelegation of legislative power. As Justice Scalia noted in his *Mistretta* dissent, "the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system." That much is easy.

On the other hand, two countervailing considerations might—emphasize *might*—lead Justice Kavanaugh to the same position that was taken by Justice Scalia. One is precedent. The modern subdelegation doctrine has been embodied in case law for more than 80 years. A great many statutes have been enacted with that modern doctrine (or lack of doctrine) as the legal background. Even a modest commitment to stare decisis counsels with some measure of weight against reconsideration of that doctrine. How strongly Justice Kavanaugh values stare decisis over constitutional meaning is surely a question that many people are waiting to see answered in many contexts. The returns are obviously not yet in after only one (partial) term.

A second consideration is the same set of concerns that drove Justice Scalia. If one is truly an originalist—or, as I would prefer to term it, a constitutionalist—one will not worry too much about how rule-like or standard-like a norm the Constitution prescribes in any given setting. To a constitutionalist, that is the Constitution's call to make, not the judge's. If the Constitution gives you a vague and mushy standard, a constitutionalist will do his or her best to apply the vague and mushy standard. There is no a priori reason to suppose that the Constitution will always prescribe crisp and clear rules, and there is a great deal of empirical evidence to

the contrary.[144] Constitutionalists think that cases should be decided on the basis of the Constitution, whatever role for courts that turns out to prescribe.

But if one is less a constitutionalist than a *conservative*,[145] one might worry a great deal about the "appropriate" judicial role, public perceptions of the Court, the dangers of judicial "activism," and a host of other policy-laden considerations that are not grounded in constitutional meaning. Judicial *conservatives*, as opposed to judicial *constitutionalists* or *originalists*, have long worried about exactly these sorts of considerations. Indeed, those considerations are a large part of what defines someone as a judicial conservative. While perhaps not all these conservative considerations point against judicial enforcement of a subdelegation doctrine, at least some of them seem to do so with considerable force. A judiciary that seriously enforced a subdelegation doctrine would likely be very active (or, if one prefers, "activist") in the course of applying a constitutional standard that seems to require judges to exercise a strong measure of individual judgment about exactly which matters Congress must resolve when enacting statutes. If Justice Kavanaugh proves to be more of a conservative than a constitutionalist, he could easily conclude, as did Justice Scalia, that enforcement of the subdelegation principle is not properly a judicial function even if the subdelegation principle is clearly part of the Constitution's meaning.

It is tempting to find evidence of precisely such a conservative-over-constitutionalist tendency in *Rucho v. Common Cause*,[146] in which a 5-4 majority, including all the Court's conventionally labeled conservatives, held that questions of partisan gerrymandering are nonjusticiable political questions. The decision, joined by Justice Kavanaugh, was grounded largely in the Court's inability to devise a standard for sorting out permissible from impermissible districting decisions that was "clear, manageable, and politically

[144] For a more detailed discussion of the many ways in which the Constitution does not actually prescribe the kinds of rules that Justice Scalia sought, see Calabresi & Lawson, *supra* note 141.

[145] For more on the crucial distinction between conservatism on the one hand and originalism/constitutionalism on the other, see Gary Lawson, Conservative or Constitutionalist?, 1 Geo. J.L. & Pub. Pol'y 81 (2002).

[146] 139 S. Ct. 2484 (2019).

neutral."[147] Might the same considerations apply to subdelegation problems?

Maybe, but one must be careful when trying to extrapolate from *Rucho*. If one is a constitutionalist, it is pellucidly clear that Section 1 of the Fourteenth Amendment says nothing about voting, districting, or other political rights, and that all the case law that has developed under that provision is pretty obviously wrong.[148] Finding some number of those cases to be "political questions" partially restores the constitutional baseline without overruling some widely popular decisions. That is arguably different from refusing to enforce a clear, and even obvious, constitutional norm simply because the norm does not fit Justice Scalia's idea of a rule. Whether that kind of thinking drove Justice Kavanaugh in *Rucho* is not clear. I guess we'll all see in due course.

Of course, the conflict between conservatism and constitutionalism only exists for the subdelegation doctrine if one cannot come up with, to borrow a phrase, a clear, manageable, and politically neutral test for distinguishing forbidden subdelegations of legislative power from valid enactments that simply leave some measure of executive or judicial discretion in interpretation and application of law. This was the problem that Justice Gorsuch was obviously trying to address with his three-part standard for identifying permissible grants of discretion: it is all right for Congress to grant discretion for (1) filling up the details of a statute, (2) prescribing executive or judicial fact-finding, or (3) clarifying and implementing pre-existing executive or judicial powers. Would this inquiry have satisfied Justice Scalia? Will it satisfy Justice Kavanaugh if he inclines towards Justice Scalia's position?

[147] *Id*. at 2498 (quoting Vieth v. Jubilerer, 541 U.S. 267, 307–08 (2004) (Kennedy, J., concurring in the judgment)).

[148] See Akhil Reed Amar, America's Constitution: A Biography 391–92 (2005); Section 2 of the Fourteenth Amendment (and subsequent amendments such as the Fifteenth Amendment) clearly addresses some of those questions, and it is possible that some of the Section 1 cases could be correctly decided if the state-created political arrangements are so deviant that they deprive the people of a state of a "republican" form of government. See U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union, a Republican Form of Government"); Akhil Reed Amar, The Constitution Versus the Court: Some Thoughts on Hills on Amar, 94 Nw. U. L. Rev. 205, 210 (1999).

It seems it certainly would not satisfy Justice Scalia. To take the three parts of Justice Gorsuch's inquiry in reverse order:

Surely if Congress simply helps the president or the courts carry out pre-existing executive or judicial powers by prescribing statutory discretion, it would be a law "necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution . . . in any Department or Officer thereof" and would pose no constitutional problem. The difficulty, of course, is figuring out what counts as pre-existing executive or judicial powers. There are going to be very easy cases (appropriations for carrying on the business of the courts, for example), but plenty of hard cases will arise as well. Is prescribing criteria for the military death penalty an executive or legislative function?[149] The president has the "executive Power" and is "Commander in Chief,"[150] but Congress has power to "make Rules for the Government and Regulation of the land and naval Forces."[151] Is leaving the matter to the president allowing exercise of executive power or improper delegation-by-default of legislative power? It could be the former if the president has residual disciplinary power over the military that exists unless supplanted by Congress. Maybe the president has such power, but it is hardly something that can be determined by reference to a clear, rule-like line. Unless one clearly knows the content of the legislative, executive, and judicial powers, the third of Justice Gorsuch's three categories of permissible grants of discretion will be difficult for courts to administer.

It is also fine and well to say, in principle, that Congress can make the effect (and even the effective date) of laws depend on fact-finding by executive or judicial agents. That kind of "contingent legislation" has been around since the time of the Founding.[152] The problem is determining when Congress has simply let other agents find facts that trigger statutorily prescribed legal consequences and when it has let other agents make or determine the content of the law. The clarity of this line depends, among other things, on the

[149] See Loving, 517 U.S. 748 (upholding presidential power to prescribe criteria for the military death penalty).

[150] U.S. Const. art. II, § 1, cl. 1; art. II, § 2, cl. 2.

[151] U.S. Const. art. I, § 8, cl. 14.

[152] See Lawson, *supra* note 12, at 361–65.

clarity of the line between fact and law, and that is decidedly *not* a clear line. The literature on the law-fact distinction is voluminous. The bottom line is that there is a distinction to be drawn between law and fact—indeed, the Constitution demands that it be drawn in some contexts[153]—but that there is no clear principle that can be used to draw it. The law-fact distinction is conventional, not metaphysical or epistemological.[154] The (conventional) line must often be drawn solely on the basis of policy, and that is precisely what Justice Scalia was trying to avoid.

Finally, Justice Gorsuch said that Congress can enlist the aid of executive and judicial agents to "fill up the details"[155] of statutes. In the abstract, this must be corrrect. It cannot be the case that every statute must address every possible contingency that can arise under it. Not every executive action under a statute must give rise to an action in the nature of mandamus. But how does one tell a detail from an essential element? In *Wayman v. Southard*, Chief Justice John Marshall drew the distinction by separating "those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[156] I have argued at some length that this is precisely the inquiry demanded by the Constitution.[157] And it is precisely the kind of inquiry with which Justice Scalia wanted no part and which he considered judicially unenforceable.

So, in the next case that comes along, will Justice Kavanaugh take the constitutionalist route, as have Justices Thomas and Gorsuch, or the conservative route, as did Justice Scalia? And will Chief Justice Roberts and Justice Alito, who have generally been more conservative than constitutionalist in their times on the Court, stick to their guns when the statute, instead of being silent about the limits of discretion,

[153] See, e.g., U.S. Const. amend. VII ("no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law").

[154] For a short summary of the point, see Gary Lawson, Evidence of the Law: Proving Legal Claims 35–44 (2017). For a longer account, see Ronald J. Allen & Michael S. Pardo, The Myth of the Law-Fact Distinction, 97 Nw. U. L. Rev. 1792 (2003).

[155] Wayman, 23 U.S. (10 Wheat.) at 43.

[156] *Id*. at 42–43.

[157] See Lawson, *supra* note 12, at 372–78.

calls for decisions based on the public interest, fairness and equity, or feasibility? How many of those 300,000 regulations actually concern matters of "less interest" rather than "important subjects"?

The decision in *Gundy*, of course, answers none of these questions. But it raises them in a doctrinally serious way, and that is far more than one could have said before Herman Gundy's unlikely petition for certiorari. Maybe Gundy will someday take his place alongside Clarence Earl Gideon after all.

Baseball, Legal Doctrines, and Judicial Deference to an Agency's Interpretation of the Law: *Kisor v. Wilkie*

*Paul J. Larkin Jr.**

Introduction: The Ups and Downs of Baseball Teams and Legal Doctrines♦

Sports teams undergo fundamental transformations over time. Take the 1927 New York Yankees. That team had a lineup, known affectionately (for Yankees fans, that is) as "Murderers' Row." It included seven future Hall of Famers—Babe Ruth, Lou Gehrig, Tony Lazzeri, Earle Combs, Herb Pennock, Waite Hoyte, and manager Miller Huggins—who, at the zeniths of their careers, were among the greatest players in baseball history. The 1927 Yankees won 110 of 154 games, were in first place every day of the season, and swept the Pittsburg Pirates in the World Series. For almost the next 40 years, the Yankees remained the most successful team in Major League Baseball.

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♦ If you think that baseball has no bearing on the proper understanding of legal doctrines, read all the way through to the end of *Kisor v. Wilkie* and think again. Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring in the judgment) ("Formally rejecting *Auer* would have been a more direct approach, but rigorously applying [*Chevron*] footnote 9 should lead in most cases to the same general destination. Umpires in games at Wrigley Field do not defer to the Cubs manager's in-game interpretation of Wrigley's ground rules. So too here.").

Then, there were the 1966 Yankees. That team also had future Hall of Famers—Mickey Mantle and Whitey Ford—but each one was approaching the nadir of his career. The team finished with a win-loss record well below .500 and wound up in last place for the first time since Kaiser Wilhelm II was the German emperor. The 1966 team was still the Yankees, but with a very different lineup from the 1927 team, one that lacked nearly all the punch of Murderers' Row.

Decisions by the Supreme Court of the United States (an institution of prestige comparable to that enjoyed by the Yankees) also undergo major transitions. Take the Court's 1945 decision in *Bowles v. Seminole Rock & Sand Co.*,[1] along with its great-grandson, *Auer v. Robbins*.[2] *Seminole Rock* held that federal courts must "defer" to—in truth, accept as binding[3]—an agency's reasonable interpretation of a vague or ambiguous regulation or rule.[4] The effect was to give one party to a lawsuit—the federal government, the most frequent and powerful

[1] 325 U.S. 410 (1945).

[2] 519 U.S. 452, 461 (1997).

[3] The relevant portion of *Seminole Rock* reads as follows: "The problem in this case is to determine the highest price respondent charged for crushed stone during March, 1942, within the meaning of Maximum Price Regulation No. 188. Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But *the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation*." 325 U.S. at 413–14 (emphasis added). The proposition that a court should respect the expertise of an administrative agency long pre-dates *Seminole Rock*. See United States v. Eaton, 169 U.S. 331, 343 (1898) ("The interpretation given to the regulations by the department charged with their execution . . . is entitled to the greatest weight."). What *Seminole Rock* added was the proposition that the agency's interpretation is entitled to "controlling weight."

[4] "Legislative rules" and "interpretive rules" differ materially. Legislative rules, colloquially known as regulations, are junior-varsity statutes because they establish legally enforceable directives as to what private parties may and may not do. To require agencies to follow something resembling the type of democratic process that Congress (admittedly, only ideally) pursues before adopting statutes, the Administrative Procedure Act, (APA), 5 U.S.C. § 701 et seq. (2019), demands that agencies satisfy the "notice-and-comment rulemaking" procedures that the APA specifies. 5 U.S.C. §§ 801–05 (2019); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199 (2015). By contrast interpretive rules, also known informally as simply "rules," consist of agency statements that have the intent or effect of identifying or describing the agency's position as to what conduct federal statutes and regulations require, forbid, or permit. 5 U.S.C. § 551(4) (2019).

litigant in federal court—the power to decide the outcome of a case when the meaning of an agency's rule is the fulcrum of the dispute.[5]

Since 1945, the Court has affirmed *Seminole Rock* and *Auer* time and again.[6] Like the post-1927 Yankees, the post-1945 federal government, the principal and intended beneficiary of *Seminole Rock*, racked up an enviable win-loss record, prevailing in perhaps 75–90 percent of the cases in which *Seminole Rock* or *Auer* provided the rule of decision.[7] That's enough to make even the Yankees jealous.

Yet no team remains world champion forever, and no legal doctrine should remain unquestioned. For the last two decades, conservative scholars have engaged in an unrelenting assault on not merely the application of *Seminole Rock* and *Auer*, but the very legitimacy of those decisions. Then-Harvard law school professor (now dean) John Manning began the rally. In his 1996 article "Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules,"[8] Manning distinguished *Seminole Rock* deference from the similar interpretive rule that the Court adopted in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.[9] The *Chevron* rule affords agencies deference to an agency's interpretation of a vague or ambiguous law passed by Congress, he noted, not a rule of an agency's own devise. That difference, he maintained, was a critically important one. The rationale of *Chevron* rests on the assumption that Congress intended to authorize agencies to construe ambiguous statutory terms, to consider policy and practical factors when doing so, and to require courts to defer to agencies' reasonable implementation of their statutory responsibilities.[10] *Seminole Rock*, by contrast, never claimed to rest on a congressional

[5] The *Seminole Rock-Auer* rule, however, applies even when the federal government is not a party. Auer, 519 U.S. at 461–63.

[6] See, e.g., Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 613–14 (2013), PLIVA, Inc. v. Mensing, 564 U.S. 604, 613 (2011); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 59–63 (2011); Udall v. Tallman, 380 U.S. 1, 16–17 (1965).

[7] See, e.g., Sanne H. Knudsen & Amy J. Widermuth, Unearthing the Lost History of *Seminole Rock*, 65 Emory L.J. 47 (2015); Sanne H. Knudsen & Amy J. Widermuth, Lessons from the Lost History of *Seminole Rock*, 22 Geo. Mason L. Rev. 647, 652 n.58, 659 (2015); Richard J. Pierce & Joshua Weiss, An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules, 63 Admin. L. Rev. 519–20 (2011).

[8] John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612 (1996).

[9] 467 U.S. 837 (1984).

[10] *Id*. at 842–66.

delegation of any type of law-interpreting or law-implementing power to agencies. (In fact, *Seminole Rock* never gave *any* rationale for its rule.[11])

To make matters worse, the unjustified grant of law-interpreting authority gave agencies the incentive to write vaguely or ambiguously worded draft rules that could avoid raising contentious disputes during the notice-and-comment rulemaking process, while saving for later use in a guidance document the agency's position on any hot-button issues. The result was that *Seminole Rock* undermined the Framers' chosen structure for constitutional governance and disserved the public's interest in having a robust policy debate before the rulemaking processes became final.[12]

Over the ensuing 20-plus years, other members of the academic community enthusiastically joined in Professor Manning's criticisms of *Seminole Rock* (and *Auer*).[13] Eventually, the discontent spread to members of the federal judiciary. Several Supreme Court justices questioned the doctrine's validity.[14] As members of inferior courts,

[11] See Paul J. Larkin Jr. & Elizabeth H. Slattery, The World after *Seminole Rock* and *Auer*, 42 Harv. J.L. & Pub. Pol'y 625, 632–34 (2019).

[12] The Administrative Procedure Act, Pub. L. No. 324, 60 Stat. 237 (1945) (codified as amended in scattered sections of 5 U.S.C.).

[13] See, e.g., Jonathan H. Adler, *Auer* Evasions, 16 Geo. J.L. & Pub. Pol'y 1, 7 (2018); Robert A. Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 Admin. L.J. 1, 4–12 (1996); Kristin E. Hickman & Mark R. Thomson, The Chevronization of *Auer*, 103 Minn. L. Rev. Headnotes 103 (2019); Aaron L. Nielson, Cf. *Auer v. Robbins*, 21 Tex. Rev. L. & Pol. 303, 305 (2016); Jeffrey Pojanowski, Revisiting *Seminole Rock*, 16 Geo. J.L. & Pub. Pol'y 87 (2018); Kevin M. Stack, The Interpretive Dimension of *Seminole Rock*, 22 Geo. Mason L. Rev. 669 (2015). See generally Christopher J. Walker, Attacking *Auer* and *Chevron* Deference: A Literature Review, 16 Geo. J.L. & Pub. Pol'y 103 (2018). Of course, there were also scholars who found *Seminole Rock* and *Auer* to be right on the money. See, e.g., Cass R. Sunstein & Adrian Vermeule, The Unbearable Rightness of *Auer*, 84 U. Chi. L. Rev. 297 (2017).

[14] See, e.g., United Student Aid Funds, Inc. v. Bible, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from the denial of certiorari) ("Any reader of this Court's opinions should think that the doctrine is on its last gasp."); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215–22 (2015) (Thomas, J., concurring in the judgment); *id.* at 1210–11 (Alito, J., concurring in part and in the judgment); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 615–16 (2013) (Roberts, C.J., concurring); *id.* at 616–21 (Scalia, J., concurring in part and dissenting in part); Talk Am. Inc., 564 U.S. at 67–69 (Scalia, J., concurring); see also Clarence Thomas, A Tribute to Justice Antonin Scalia, 126 Yale L.J. 1600, 1603 (2017) ("[A] few Terms ago, as we came off the bench after hearing arguments in a case involving judicial deference to agencies, Nino announced that *Auer v. Robbins* was one of the Court's 'worst decisions ever.' Although I gently reminded him that he had written *Auer*, that fact hardly lessened his criticism of the decision or diluted his resolve to see it overruled.").

court of appeals judges continued to apply those decisions when deciding cases. Yet, because they remain free to criticize Supreme Court decisions they are nonetheless obliged to follow,[15] an increasing number of judges have openly expressed their doubts about the legitimacy of *Seminole Rock* and *Auer*.[16]

After two decades of hearing the criticism of *Seminole Rock* and *Auer* that agencies should not be free to delegate to themselves the final authority to adjudicate a legal issue, the Supreme Court decided to reexamine *Seminole Rock* and *Auer*. The case chosen for that vehicle was *Kisor v. Wilkie*.[17] Given that several justices had been quite critical of *Seminole Rock* and *Auer*, the Court's order granting certiorari in *Kisor* portended nothing but doom for supporters of those decisions. Perhaps reflecting the decisions' unpopularity, the number of amicus briefs filed asking the Court to ditch them was far greater than the number of briefs in their defense. It seemed that *Seminole Rock* and *Auer*'s supporters assumed that those decisions were goners and were husbanding their arguments for a defense of *Chevron*. If so, a betting man would have put his money on the proposition that those decisions would soon resemble the 1966 Yankees, not the 1927 version.

If he did, he lost. The Court decided to rewrite *Seminole Rock* and *Auer* rather than overrule them—a "mend it, don't end it" approach to administrative law, if you will.[18] The decisions survived, albeit in an entirely different form. *Seminole Rock* and *Auer* now far more closely resemble *Chevron* than their original opinions. Whether that is good or bad remains to be seen.

[15] Lower court judges are not soldiers (or pre–free agency baseball players). They must follow the rulings of higher courts, see, e.g., Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016), but are free to criticize them, see, e.g., Dronenberg v. Zech, 746 F.2d 1579, 1583 (D.C. Cir. 1984) (opinion of Bork, J., joined by Scalia, J., on denial of rehearing en banc).

[16] See, e.g., Forrest Gen. Hosp. v. Azar, 926 F.3d 221, 229–30 (5th Cir. 2019); San Diego Gas & Elec. Co. v. FERC, 913 F.3d 127, 145, n.4 (D.C. Cir 2019) (Randolph, J., dissenting).

[17] 139 S. Ct. 2400 (2019).

[18] See Kisor, 139 S. Ct. at 2410–23 (lead opinion); *id*. at 2424–25 (Roberts, C.J., concurring in the judgment).

Kisor has already attracted a fair amount of commentary.[19] Some scholars lament the lost opportunity to rein in some of the excesses of the regulatory state entrenched by *Seminole Rock* and *Auer*. Others take heart from the numerous limitations that the Court placed on what should henceforth be known as the *Kisor* deference doctrine[20] and also believe that the two sides will meet again in another case. My own view falls somewhere between the somewhat muted pessimism of the former group and unenthusiastic optimism of the latter, although I am far closer to the latter's views. I believe that we do not yet know what the new deference doctrine will be. We could see either the 1927 or the 1966 Yankees; it's too early to know which one.

This article will proceed as follows. Part I will discuss the three principal opinions in *Kisor*. Part II will summarize the new deference standard that *Kisor* adopted. Part III will close by asking whether Justice Neil Gorsuch was right that the five justices in the majority merely granted *Seminole Rock* and *Auer* a reprieve and left open the possibility that those decisions might be carted to the gallows again.

[19] See, e.g., Jonathan H. Adler, *Auer* Deference Survives Supreme Court Review (as the Liberal Justices Rule the Day), Reason: Volokh Conspiracy, June 26, 2019, https://reason.com/2019/06/26/auer-deference-survives-supreme-court-review-as-the-liberal-justices-rule-the-day/; Ronald A. Cass, Deference after *Kisor*, Penn. Reg'y Rev. July 10, 2019, https://www.theregreview.org/2019/07/10/cass-deference-after-kisor/; Ronald Levin, *Auer* Deference—Supreme Court Chooses Evolution, Not Revolution, SCOTUSBlog, June 27, 2019, https://www.scotusblog.com/2019/06/symposium-auer-deference-supreme-court-chooses-evolution-not-revolution/; Thomas W. Merrill, Shadow Boxing with the Administrative State, SCOTUSBlog, June 27, 2019, https://www.scotusblog.com/2019/06/symposium-shadow-boxing-with-the-administrative-state/; Eric Schmitt, *Kisor v. Wilkie*: A Swing and a Miss, SCOTUSBlog, June 27, 2019, https://www.scotusblog.com/2019/06/symposium-kisor-v-wilkie-a-swing-and-a-miss/; Daniel E. Walters, A Turning Point in the Deference Wars, Penn. Reg'y Rev. July 9, 2019, https://www.theregreview.org/2019/07/09/walters-turning-point-deference-wars/; Daniel E. Walters, Laying Bare the Realpolitik of Administrative Reconstruction, SCOTUSBlog, June 27, 2019, https://www.scotusblog.com/2019/06/symposium-laying-bare-the-realpolitik-of-administrative-deconstruction/.

[20] The lead opinion in *Kisor* by Justice Elena Kagan prefers to label the original doctrine as "*Auer* deference" rather than *Seminole Rock* deference, even though the latter decision was the origin of the rule. See, e.g., Kisor, 139 S. Ct. at 2412 (lead opinion of Kagan, J.) (labeling the doctrine as "*Auer* deference (as we now call it)"). Justice Kagan's opinion so completely rewrote the *Seminole Rock-Auer* deference rule, however, that the doctrine truly should now be called *Kisor* deference. For good or ill, the doctrine should bear the name of the decision that fundamentally rewrote it.

I. *Kisor*

James Kisor served in the Marine Corps during the Vietnam War. Afterwards, he sought disability compensation benefits from the Department of Veterans Affairs (DVA) for post-traumatic stress disorder. The DVA eventually granted his claim, but it fixed a later effective date than he sought, based on its interpretation of DVA regulations. The U.S. Court of Appeals for the Federal Circuit upheld the DVA's decision on the ground that, under *Seminole Rock*, *Auer*, and related decisions, the government's interpretation of its regulations was dispositive if the regulation was ambiguous, which, in the court's opinion, this rule was.[21] The Supreme Court granted certiorari limited to the question of whether to overrule *Seminole Rock* and *Auer*.[22]

The Supreme Court reversed. All nine justices voted to reverse the circuit court's judgment; that much is certain.[23] Beyond that, there is considerable uncertainty in what the Court held and what will happen next.

The justices split three ways in four separate opinions. Justices Elena Kagan and Neil Gorsuch wrote the two principal opinions. They disagreed over every issue arising from reconsideration of *Seminole Rock* and *Auer*. Joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor, Kagan found that *Seminole Rock* and *Auer* made sense as a matter of congressional intent, administrative law, and judicial review.[24] Kagan also reworked those decisions into *Chevron* deference. So revised, she wrote, *Seminole Rock* and *Auer* together provided a valuable tool for construing ambiguous agency rules in the implementation of regulatory programs.[25] In any event, she concluded, given stare decisis considerations, the argument for overruling those decisions was unpersuasive.[26]

[21] Kisor v. Shulkin, 869 F.3d 1360, 1361–69 (Fed. Cir. 2017), reversed and remanded, Kisor v. Wilkie, 139 S. Ct. 2400 (2019).

[22] Kisor v. Wilkie, 139 S. Ct. 657 (2018).

[23] Kisor, 139 S. Ct. at 2424 (lead opinion of Kagan, J.); *id*. (Roberts, C.J., concurring in part); *id*. at 2447–48 (Gorsuch, J., concurring in the judgment); *id*. (Kavanaugh, J., concurring in the judgment).

[24] *Id*. at 2410–14, 2418–22 (lead opinion of Kagan, J.).

[25] *Id*. at 2408–24.

[26] *Id*. at 2422–23.

By contrast, Gorsuch concluded that *Seminole Rock* and *Auer* were illegitimate at birth, in part because the Administrative Procedure Act (APA)[27] requires courts to conduct a de novo review of agency actions, and the decisions have created nothing but mischief ever since. As he read Kagan's opinion, she tried to make the *Seminole Rock-Auer* rule acceptable by transforming those decisions into "zombi[es]" fated to cause misery to whoever crosses their path.[28] Finally, stare decisis factors, he decided, did not justify retaining *Seminole Rock* and *Auer*.[29] Whether Kagan's opinion transformed those decisions into "zombi[es]"[30] from *The Walking Dead* or into "a tin god—officious, but ultimately powerless,"[31] the only humane and efficient step to take was to put them out of their (and our) misery by overturning them now.

Chief Justice John Roberts wrote a separate concurring opinion. Despite its brevity, his opinion is significant for three reasons. First, he joined two parts of Justice Kagan's opinion: the section that declined to overrule *Seminole Rock* and *Auer* decisions for stare decisis reasons, and the section describing how the new deference doctrine should work.[32] Because he did so, those portions of the Kagan opinion became a majority ruling. Second, the chief justice sought to bridge the gap between the Kagan and Gorsuch opinions. In his view, given the limited circumstances in which Kagan's new version of the *Seminole Rock-Auer* rule should apply and Gorsuch's acceptance of the principle that courts should defer to agencies in some instances, there was more commonality than disagreement in their opinions. Despite their variations in verbal formulations," he wrote, the difference between the Kagan and Gorsuch opinions "is not as great as it may initially appear."[33] Third, he was emphatic that *Kisor* and *Chevron* involved materially different

[27] The Administrative Procedure Act, Pub. L. No. 324, 60 Stat. 237 (1945).

[28] Kisor, 139 S. Ct. at 2425 (Gorsuch, J., concurring in the judgment).

[29] *Id*. at 2443–47.

[30] *Id*. at 2425.

[31] *Id*. at 2448.

[32] *Id*. at 2424–25 (Roberts, C.J., concurring in part) (referring to *id*. at 2414–18, 2422–24 (lead opinion of Kagan, J.)).

[33] *Id*. at 2424–25.

considerations[34] and that the Court's decision in *Kisor* did not resolve the legitimacy of the *Chevron* deference doctrine.[35]

Finally, Justice Brett Kavanaugh, joined by Justice Samuel Alito, wrote his own short opinion concurring in the judgment in which he emphasized two points. One was his agreement with the chief justice that the gap between the Kagan and Gorsuch opinions was hardly a canyon. Because Kagan's opinion endorsed the *Chevron* approach to construe agency rules, courts would be free to "'exhaust all the traditional tools of construction' before concluding that an agency rule is ambiguous and deferring to an agency's reasonable interpretation."[36] The result would be that "the court will almost always reach a conclusion about the best interpretation of the regulation at issue," thereby giving courts "no reason or basis to put a thumb on the scale in favor of an agency when courts interpret agency regulations."[37] The second point he emphasized was that the *Auer* and *Chevron* doctrines were neither twins nor even siblings. He therefore plainly signaled his agreement with the chief justice that *Kisor* did not settle the validity of *Chevron*.[38]

II. The *Kisor* Deference Standard

Much of the debate among the justices turned on what any new deference standard should be and how it should be applied. *Seminole Rock* and *Auer* effectively turned the law-interpreting process over to an agency in any case where a government lawyer could keep a straight face while arguing that the agency had reasonably read an arguably ambiguous rule. *Kisor* clearly rejected any such principle. Instead, Kagan's opinion started from scratch and constructed an entirely new deference standard, one that more resembles *Chevron* than either *Seminole Rock* or *Auer*. It is worth reading closely the

[34] *Id.* at 2425 (citing *Chevron* and stating the following: "issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress").

[35] *Id.* at 2425 ("I do not regard the Court's decision today to touch upon the latter question.").

[36] *Id.* at 2448 (Kavanaugh, J., concurring in the judgment).

[37] *Id.*

[38] *Id.*

Kagan lead opinion's rationale for upholding a deference doctrine, for it is a masterful piece of lawyering. It is also important to review Gorsuch's opinion, because it offers a different analysis of the deference standard.

Kagan starts out with a brilliant maneuver that makes sure the game will be played on the agency's home field. She starts by asking two questions: first, can language—which is ultimately all that the law is—precisely identify all the instances in which the government must or may take some type of action, and, second, who is best situated to answer that question in all of the myriad ways that it can arise?[39] For example, given the need to decide whether, for purposes of the federal food and drug laws, a company has created "a new active 'moiety' by joining together a previously approved moiety to lysine through a non-ester covalent bond," would you prefer to ask an attorney or a biochemist for the answer?[40] That question fairly well answers itself. Average, everyday terms are understandable, but often imprecise, while technical terms are precise, but often incomprehensible. So, we would likely turn to a scientist for the answer. Of course, not all inquiries are esoteric, so perhaps the "moiety" problem is an odd duck. Fine. We know that "baseball" is a game (at least, anyone who has read this far knows that). But what about "pepper"? Pepper is a pregame exercise in which one of a small line of players softly throws a ball to a batter standing about 20 feet away, who then must hit soft ground balls or line drives toward the line, and whoever catches the ball renews the exercise. Is that also a "game"?[41] If we have to answer that question, we are likely to ask a professional baseball player or a sportswriter, not someone who thinks that pepper is a spice. Here, too, expertise matters.

Once Kagan persuades the reader that professionals are better able than amateurs to answer the "moiety" question and others that

[39] *Id*. at 2410–11 (lead opinion of Kagan, J.).

[40] *Id*. at 2410. She found the subject of "moieties" particularly fascinating, pointing to it on three separate occasions in her opinion, *id*. at 2410, 2413, 2423—four, in fact, if you count the footnote defining that term for the 99-plus percent of lawyers who otherwise would have been bewildered by her reference to it. *Id*. at 2410 n.1.

[41] For the general difficulties in defining the term "game," see Ludwig Wittgenstein, Philosophical Investigations ¶¶ 68–75, at 32–35 (3d ed. G.E.M. Anscombe trans., 1973).

share a "family resemblance" or "similarity" to that one,[42] the rest of the game will be played on the agency's home field. Why?—because the reader will *want* to rely on the expertise of agency officials. They have education, training, and experience that the average person does not, and they also have on their side a legal, and practical, presumption that they will act in the public interest.[43] The result is that readers will be likely to conclude that agency officials have the same advantage over lawyers that professional ballplayers have over amateurs.

Kagan's second step is also a big one, and, like her first step, it principally relies on common sense, not legal doctrine. She invokes the proposition that a document's author is more likely to know what it said than anyone reading it. In her words, "the agency that promulgated a rule is in the better position to reconstruct its original meaning" than any judge.[44] She then offered another common-sense example. "Consider that if you don't know what some text (say, a memo or an email) means, you would probably want to ask the person who wrote it."[45] She acknowledged that there were common-sense limitations on when that interpretive approach is useful.[46] Asking an agency what it meant might not be helpful when the agency did not anticipate a new problem or when "lots of time has passed between the rule's issuance and its interpretation."[47] But those are details; she's concerned with the big picture. "All that said, the point holds good for a significant category of 'contemporaneous' readings."[48] Now, the finale: "Want to know what a rule means? Ask its author."[49]

[42] See *id*. ¶ 66, at 31–32, ¶ 67, at 32, ¶ 185, at 75, ¶ 444, at 131.

[43] See, e.g., U.S. Postal Serv. v. Gregory, 534 U.S. 1, 10 (2001); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971) ("Certainly, the Secretary's decisions are entitled to a presumption of regularity.").

[44] Kisor, 139 S. Ct. at 2412 (lead opinion of Kagan, J.) (citation and internal punctuation omitted).

[45] *Id*.

[46] Kisor, 139 S. Ct. at 2412. What she did *not* acknowledge is that there are also material common-sense differences between a *law* that governs private conduct and a *memorandum* that just explains why the law was adopted or what it says.

[47] *Id*.

[48] *Id*.

[49] *Id*.

Kagan then discussed congressional intent. Enter administrative law's presumptions, also known as "legal fictions," but better known (in my opinion) as judicial lies.[50] She did not identify any actual legislative intent to make agencies into law-interpreting bodies. Instead, she invoked "a presumption about congressional intent": Congress intended agencies "to play the primary role in resolving statutory ambiguities."[51] That presumption "stems from the awareness that resolving genuine regulatory ambiguities often entails the exercise of judgment grounded in policy concerns,"[52] and is "attuned to the comparative advantages of agencies over courts in making such policy judgments."[53] Finally, that presumption "reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules," and gives effect to Congress's frequent "preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation."[54] All that Kagan needed next was a reasonable explanation of how the new common-sense approach was consistent with existing law. Without a basis in legal doctrine, the approach would appear to be grounded entirely in reason. That approach works well in philosophy, but not in law. Remember, Kagan had gotten this far in her opinion without once adverting to, let alone quoting from, the rationale in *Seminole Rock* (hint: there was none[55]) and without even mentioning that the author of *Auer* later concluded that he had gotten it wrong.[56] Without a firm grounding in precedent, the opinion would have left the reader wondering why the *Seminole Rock-Auer* critics were not right to complain that those decisions were little more than a lawless delegation of judicial law-interpreting authority to federal agencies.

[50] Compare Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 517 (1989) (referring to *Chevron* as relying on "a fictional, presumed intent."), with Martin Shapiro, Judges as Liars, 17 Harv. J.L. & Pub. Pol'y 155, 156 (1994) ("Such is the nature of courts. They must always deny their authority to make law, even when they are making law. . . . Judges necessarily lie because that is the nature of the activity they engage in.").

[51] Kisor, 139 S. Ct. at 2412 (lead opinion of Kagan, J.).

[52] *Id*. at 2413 (citation and internal punctuation omitted).

[53] *Id*.

[54] *Id*. (citation and internal punctuation omitted).

[55] See *supra* note 11.

[56] See *supra* note 14.

That is where *Chevron* comes in. *Chevron* did all the work for her. She incorporated the *Chevron* deference standard into the new rule.[57] But Kagan didn't stop at adopting *Chevron*'s justification; she went all the way and effectively adopted *Chevron*'s methodology, too.

She started by stating that "the possibility of deference can arise only if a regulation is genuinely ambiguous."[58] That is, Kagan imported *Chevron* "Step One" into the *Seminole Rock* framework. Just as *Chevron* held that clear statutory language binds the courts,[59] Kagan stated that unambiguous regulatory terms control as well, regardless of what the agency thinks the rule says.[60] Next, Kagan declared that the task of rule interpretation must be resolved in the same manner as statutory interpretation. Just as *Chevron* held that a court must use all the "traditional tools" of statutory interpretation before deciding that an act of Congress is ambiguous,[61] Kagan concluded that a court must use "that legal toolkit" and cannot consider giving the agency's position deference unless the court's inquiry turns up "empty."[62] Only then can a court consider deferring to the agency's interpretation. Policymaking considerations come into play at that point, as *Chevron* explained and *Kisor* noted. An ambiguous statute gives rise to a presumption that Congress implicitly delegated to the agency the authority to fill in the blanks, *Chevron* explained,[63] which is a policymaking function.[64] Unlike courts, agencies may make policy judgments, and if Congress empowered an agency to do so, the courts may not overrule Congress's or the agency's decision.[65] Kagan declared that the agency's interpretation must always be a reasonable one, essentially importing *Chevron*'s "Step Two" into the *Seminole Rock* framework. *Chevron* required just that inquiry when an agency construed a statute,[66] and Kagan saw no reason for any

[57] Kisor, 139 S. Ct. at 2414–18 (lead opinion of Kagan, J.).

[58] *Id*. at 2414

[59] Chevron, 467 U.S. at 842–43.

[60] Kisor, 139 S. Ct. at 2415 (lead opinion of Kagan, J.).

[61] Chevron, 467 U.S. at 843 n.9.

[62] Kisor, 139 S. Ct. at 2415 (lead opinion of Kagan, J.).

[63] Chevron, 467 U.S. at 843.

[64] *Id.* at 843–44.

[65] *Id*. at 865–66.

[66] *Id.* at 845–66 (evaluating the agency's position for reasonableness).

different result simply because an agency rule was under consideration.[67] In that regard, Kagan noted, not every agency interpretation would automatically be deemed "reasonable" and therefore controlling. Only an agency's "official" and "authoritative" exposition counts,[68] and, even then, only if it "implicate[s]" the agency's "substantive expertise."[69] Finally, the agency's interpretation must reflect a "fair and considered judgment."[70] An interpretation that is just a "convenient litigating position"; reflects a "post hoc rationalization"; creates, by virtue of its novelty, "unfair surprise" to a regulated party; or that conflicts with an earlier agency interpretation—all those (and possibly other) factors would generally counsel against deference.[71] The new deference rule, in Kagan's words, is "not quite so tame as some might hope, but not nearly so menacing as they might fear."[72]

Responding to Kagan, Justice Gorsuch started with a bit of history by chronicling the provenance and growth of the *Seminole Rock-Auer* rule. The Gorsuch opinion explained that the rule could not trace its lineage to "the Constitution, some ancient common-law tradition, or even a modern statute."[73] Rather, "it began as an unexplained aside in a decision about emergency price controls at the height of

[67] Kisor, 139 S. Ct. at 2415 (lead opinion of Kagan, J.).

[68] *Id*. at 2416–17.

[69] *Id*. at 2417.

[70] *Id*. (citations and internal punctuation omitted).

[71] But not necessarily always. *Id*. (noting that the Court has only "rarely" deferred to an agency construction that conflicts with an earlier one).

[72] *Id*. at 2418. Want to see some additional great lawyering (or another great magic trick)? Read Section II.B. of Kagan's opinion in full. She goes out of her way to explain why the new deference rule will be relatively innocuous and infrequently applied. See, e.g., *id*. at 2414, 2416, 2418, 2424. Henceforth, the deference doctrine would largely be a bench-sitter, playing only a minor, supporting role in the law. Now, turn to Section III.B. of Kagan's opinion, which deals with stare decisis. There, she argues that overturning the deference doctrine would leave a hole in administrative law the size of the Tunguska event of 1908. See *id*. at 2422 ("First, Kisor asks us to overrule not a single case, but a long line of precedents—each one reaffirming the rest and going back 75 years or more. . . . This Court alone has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times. . . . It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.") (citations and internal punctuation omitted). It took only a dozen or so pages for the deference doctrine to be transformed from a singles hitter into a slugger.

[73] *Id*. at 2426 (Gorsuch, J., concurring in the judgment).

the Second World War."[74] There, its "dictum sat on the shelf, little noticed for years," until lawyers and judges "began to dust it off and shape it into the reflexive rule of deference we know today" without asking whether it "could be legally justified or even made sense."[75] *Auer* merely reiterated what was said in *Seminole Rock*. The result was that the deference rule came about more by accident than design.[76]

Gorsuch then asked whether the *Seminole Rock-Auer* rule, though of dubious legitimacy at birth, had perhaps become legitimized over time. For several reasons, he concluded that it had not. One reason was that any such rule conflicted with the lessons of the nation's early history, which revealed a clear intent to lodge the judicial power in the hands of an independent judiciary.[77] A second reason was that the *Seminole Rock-Auer* rule conflicted with the APA, which not only requires courts to resolve legal issues, but also requires an agency memorandum of whatever nature to withstand the APA notice-and-comment rulemaking process before it could be deemed a valid law.[78] *Seminole Rock* and *Auer*, however, sometimes permit such a document to bind the courts even when the agency has not even begun the notice-and-comment process, let alone completed it. A third reason was that the *Seminole Rock-Auer* rule allowed the "judicial Power"[79] to "be shared" between the judicial and executive branches.[80] Even *Marbury v. Madison*[81] ruled that it belongs exclusively to the courts.[82] Finally, Gorsuch found the policy rationales of the Kagan opinion irrelevant or unpersuasive.[83]

[74] *Id*. Of course, some "asides" are quite authoritative. See William S. Stevens, Aside: The Common Law Origins of the Infield Fly Rule, 123 U. Pa. L. Rev. 1474 (1975). That "aside" is particularly relevant here because, like judicial review of agency rules, baseball's infield fly rule is designed to prevent "trickery" from affecting the outcome of a game. *Id*. at 1478. But I digress.

[75] Kisor, 139 S. Ct. at 2426 (Gorsuch, J., concurring in the judgment).

[76] *Id*.

[77] *Id*. at 2437–38.

[78] *Id*. at 2432–37.

[79] U.S. Const. art. III, § 1.

[80] United States v. Nixon, 418 U.S. 683, 704 (1974).

[81] See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[82] Kisor, 139 S. Ct. at 2437–41 (Gorsuch, J., concurring in the judgment).

[83] *Id*. at 2441–43.

At the end of the day, Gorsuch would have jettisoned *Seminole Rock* and *Auer* in favor of the Court's earlier decision in *Skidmore v. Swift & Co.*,[84] which was decided only shortly before *Seminole Rock* but went unmentioned in the latter decision.[85] *Skidmore* concluded that an agency's interpretation of a statute is entitled to whatever persuasive value its reasoning can convey.[86] The effect would require a court to consider an agency's construction of a statute or rule in much the same way that a court would treat the views of a scholar like John Henry Wigmore or Arthur Corbin on the law of evidence and contracts, respectively.[87] Their views should be accorded respect, given their proven mastery of their fields of scholarship, but with the knowledge that the court must always have the final say on what a law means, because, ever since *Marbury*, that is what the judicial function has always demanded.

* * * * *

Over the next few years, the lower federal courts and the academy will take up the burden of elaborating what the new *Kisor* deference standard means in the context of interpreting legal rules.[88] If those courts conclude that the revised deference rule is just the *Chevron* standard applied not to acts of Congress but to agency rules—which, in my opinion, is the best reading of *Kisor*—the lower courts

[84] Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[85] Kisor, 139 S. Ct. at 2447 (Gorsuch, J., concurring in the judgment).

[86] Justice Robert Jackson's opinion for the Court in *Skidmore* offered the following explanation: "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore, 323 U.S. at 140.

[87] Justice Gorsuch even used those specific examples. Kisor, 139 S. Ct. at 2442 (Gorsuch, J., concurring in the judgment).

[88] For a partial list of authorities explaining how courts should undertake the legal interpretation of contracts, statutes, rules, and so forth, see Antonin Scalia & Bryan A. Gardner, Reading Law: The Interpretation of Texts (2012); Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527 (1947); Oliver Wendell Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417 (1899); James M. Landis, A Note on "Statutory Interpretation," 43 Harv. L. Rev. 886 (1930).

will simply wind up expanding the already ginormous corpus of administrative law decisions that *Chevron* has created.[89] The result is that we will continue to see and hear what pedestrians and drivers have always seen and heard whenever the police want to avoid having them congregate at the scene of a crime, arrest, accident, or similar law enforcement intervention: "Nothing to see here. Move on. Just keep moving."

III. Where Do We Go from Here?

Two decades ago, there was little indication that the Court would revisit the approach it has taken for five decades regarding judicial review of an agency's interpretations of its own rules. The worm turned in 1996, however, with the publication of Professor John Manning's challenge to the legitimacy of cases like *Seminole Rock*. His article awakened discontent in the academy over that decision. Despite the fact that Justice Antonin Scalia wrote the 1997 opinion in *Auer* reaffirming *Seminole Rock*, for nearly the last decade *Seminole Rock* and *Auer* have been under a deathwatch. Four justices had signaled their willingness to reconsider those decisions, and the Court granted review for the specific purpose of deciding whether to overrule them. Given the lead-up to and the outcome in *Kisor*, it would be understandable if critics of the administrative state became pessimistic about the possibility of reining it in, at least by returning to the courts their historic ultimate authority to adjudicate binding legal rights. Seeing their hopes for a rally dashed, those critics might abandon hope that the Supreme Court will ever overturn *Seminole Rock* and *Auer*.[90]

[89] A Westlaw search revealed that, as of July 18, 2019, *Chevron* has been cited in approximately 16,400 judicial decisions.

[90] They might ask Congress to pinch hit, and some members have taken their turns at the plate. Over the past few years, several members of Congress introduced bills that would have overruled *Seminole Rock*, *Auer*, and *Chevron* by revising the APA to require federal courts to conduct a "de novo" review of any and all legal issues. See Separation of Powers Restoration Act, H.R. 1927, 116th Cong. § 2 (2019); Separation of Powers Restoration Act, H.R. 76, 115th Cong. (2017); Separation of Powers Restoration Act, H.R. 4768, 114th Cong. § 2 (2016); Separation of Powers Restoration Act, S. 909, 116th Cong. § 2 (2019); Separation of Powers Restoration Act, S. 1577, 115th Cong. § 2 (2017); Separation of Powers Restoration Act, S. 2724, 114th Cong. § 2 (2016). None of those bills became law when the same party held a majority in both houses of Congress and occupied the White House, however, so the odds of any such bill passing when Congress is divided and a presidential election is upcoming are slim to none.

They should not despair. Three features of Chief Justice Roberts's opinion offer hope.

One is that he did not join the section of Kagan's opinion in which she rejected the argument that the *Seminole Roc*k and *Auer* deference rule violates the APA, as Gorsuch, writing for four justices, expressly concluded.[91] Section 706 of the APA instructs reviewing courts to "decide all relevant questions of law" and "set aside agency actions" the courts finds "not in accordance with law."[92] That command alone appears to resolve the deference issue in the critics' favor. Four justices thought so. If the chief justice agrees, even the new *Kisor* deference standard will necessarily fall.

The second hopeful feature of the chief justice's opinion is his quite emphatic statement that the *Kisor* decision did not resolve the legitimacy of *Chevron* deference. In some ways, that is the most significant aspect of his separate opinion. Kagan's opinion relied on the *Chevron* line of cases both to give content to the new deference rule and to justify that rule by invoking whatever legitimacy *Chevron* enjoys. Like *Seminole Rock* and *Auer*, however, *Chevron* itself has come under attack, and it is by no means certain that it will survive.[93] The chief justice's statement signals his belief that the dispute over *Seminole Rock* and *Auer* is but a prelude to a future case where the Court must reexamine the legitimacy of *Chevron*. That interpretation would explain why he reserved judgment about the effect of the APA on *Seminole Rock* and *Auer*. If those decisions conflict with the APA, so, too, does *Chevron*. Because the Court unanimously voted to reverse the judgment in *Kisor,* the chief justice likely decided to wait for a future case before resolving an issue fundamental to the survivability of *Chevron*.

The third reason for hope is that, given the disposition of *Kisor* and the rough agreement between the Kagan and Gorsuch opinions as to

[91] Kisor, 139 S. Ct. at 2432–37 (Gorsuch, J., concurring in the judgment); see also *id*. at 2433 n.49 (collecting authorities concluding that *Seminole Rock* and *Auer* conflict with Section 706 of the APA).

[92] 5 U.S.C. § 706 (2019).

[93] See, e.g., Jack M. Beerman, End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 779 (2010); Cory R. Liu, *Chevron*'s Domain and the Rule of Law, 20 Tex. Rev. L. & Pol. 391 (2016).

how any deference standard should work,[94] the chief justice might well have decided to wait and see how the lower federal courts apply the *Kisor* standard before deciding how the APA applies in cases like *Kisor* and *Chevron*. He might be looking for either or both of the

[94] I say "rough agreement." Professor Tom Merrill has offered a more sophisticated description of the Kagan and Gorsuch approaches, from the direction of their disagreements:

> Lawyers will want to know if there is any meaningful difference between Kagan's contextualized *Auer* and Gorsuch's contextualized *Skidmore*. I would characterize Kagan's approach to contextualization as a kind of step zero for *Auer* (or more accurately, a combination of step zero and step one), borrowed from the jurisprudence associated with *Chevron*. . . . The key point would be that, if the court grinds its way through all the factors relevant to step zero and step one, then the agency view must be adopted.
>
> The Gorsuch approach to contextualization would replace *Auer* with *Skidmore*. This draws upon roughly the same contextual factors invoked by Kagan. But the difference would seem to be that under *Skidmore*, deference exists on a sliding scale, rather than an all-or-nothing conclusion that emerges after a sequential inquiry. The court remains responsible for the interpretation, and whether the court adopts the agency view depends on how the various contextual factors stack up, either for or against the agency. The more the factors favor the agency, the more "persuasive" the agency view becomes, but at no point is the court compelled to adopt the agency view.
>
> If this characterization is correct, there are arguably two differences between Kagan's version of contextualization and Gorsuch's. One difference is that the Gorsuch approach adopts an established standard of review—*Skidmore*. Like other multi-factor standards, this is highly indeterminate, and subject to different outcomes in the hands of different judges. But at least *Skidmore* is a standard that has been around for a long time—since 1944 to be exact—and has accumulated a body of precedent and gained a degree of familiarity with judges. Kagan's new contextualized *Auer*, although it draws upon roughly the same factors as *Skidmore*, is an unknown animal at this point. Consequently, it is likely to produce significant uncertainty among lower court judges, agencies, and persons contemplating a challenge to agency interpretations. This difference, in my view, counseled in favor of adopting *Skidmore* rather than rewriting *Auer*.
>
> The second difference involves whether the agency is free to change its interpretation. Under Kagan's sequencing approach, the agency should be able to change its interpretation, provided the sequencing continues to favor deference to the agency. Under *Skidmore*, the interpretation is ultimately the court's, which means the agency may not be able to change its interpretation. (Justice Antonin Scalia made this point in his dissent in *Mead*.) Of course, insofar as agency consistency is one of the contextual factors under either approach, the agency's ability to change its interpretation may be constrained under either approach. So I would not give this difference great weight one way or the other.

Merrill, Shadow Boxing, *supra* note 19.

following developments: the workability of the *Kisor* standard, and the government's litigation success rate under that standard.[95]

A factor that the Court deems important when considering whether to overturn a precedent is the extent to which a decision has proved to be "unworkable in practice."[96] That factor could come into play here. The lower courts might find it impossible to reach a consistent application of the new factors articulated in *Kisor* or to adopt a coherent understanding of the type of considerations relevant to its analysis. *Kisor* relied on the multipart methodology adopted by *Chevron* and its offspring, as well as the type of factors that *Chevron* found relevant. Those factors, however, are not fixed in stone. In *King v. Burwell*,[97] the Court recognized an exception to *Chevron* for cases posing issues of "deep 'economic and political significance,'"[98] also known as the "Major Questions Doctrine," such as the interlocking reforms adopted by the Patient Protection and Affordable Care Act.[99] *Burwell* did not state that its new exception was exclusive, nor did it say that only the Supreme Court could recognize additional ones. The lower federal courts, therefore, might find additional

[95] The chief justice has taken a wait-and-see approach before. In 2009, he cautioned Congress in *Northwestern Austin Municipal Utility District No. 1 v. Holder* that it needed to reevaluate the preclearance features of Section 5 of the Voting Rights Act of 1965 in light of the very different features of 21st century America. 557 U.S. 193 (2009). Congress didn't. Four years after *Northwestern Austin*, he wrote the opinion in *Shelby County v. Holder*, holding Section 5 unconstitutional. 570 U.S. 529 (2013). In 2011, the Court ruled in *Bond v. United States* (*Bond I*), that a defendant can challenge the constitutionality of the federal law implementing the Chemical Weapons Treaty. 564 U.S. 211 (2011). The *Bond* case did not arise out of the use of chemical weapons in a battle like the one in the Great War depicted by John Singer Sargent in his painting *Gassed*. It stemmed from "an amateur attempt by a jilted wife to injure her husband's lover" and neighbor by placing some caustic chemicals on the neighbor's doorknob. Bond v. United States, 572 U.S. 844, 848 (2014) (*Bond II*). When the justice department decided to press forward with Bond's prosecution after its first loss in the Supreme Court, Chief Justice Roberts wrote the Court's opinion setting aside Bond's conviction. We might see act III of that wait-and-see approach play out in this setting.

[96] See, e.g., Knick v. Township of Scott, Pa., 139 S. Ct. 2162, 2178 (2019).

[97] 135 S. Ct. 2480 (2015).

[98] *Id*. at 2489 (quoting Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[99] Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 119 (2010).

factors relevant to the ones noted in *Kisor*, which could lead to very disparate results.[100]

The other development to watch is the federal government's success rate when litigating cases under *Kisor*. As noted above, the government has won perhaps 75–90 percent of its cases under *Seminole Rock* and *Auer*. That success rate alone makes it appear that the deference standard biased the decisionmaking process against private parties.[101] Gorsuch certainly thought so.[102] Kagan's opinion assured the critics of *Seminole Rock* and *Auer* that the new deference standard would be "not nearly so menacing as they might fear."[103] If the government maintains the same success rate going forward that it has historically enjoyed, however, the *Kisor* standard will be revealed as being just an old wolf in a modern sheep's clothing. That outcome should be relevant to its continued legitimacy.

Conclusion

Baseball fans know, as Ernest Lawrence Thayer wrote, that hope springs eternal.[104] For some time now, four justices believed that *Seminole Rock* and *Auer* were living on borrowed time. Those decisions survived in *Kisor*, but the critics of *Seminole Rock* and *Auer* might still be proved right. The number of factors that *Kisor* directs courts to apply is so great that we might see a host of different outcomes in the federal courts and several cases that the Supreme Court will need to review to resolve conflicts among the circuits. By so closely tying the new deference standard to the *Chevron* standard, we also will learn whether those disagreements illustrate the problems that occur when the Supreme Court, as it did in *Chevron*, makes up an entirely new law-interpreting doctrine rather than sticking to the rigors of a judicial process in which courts resolve cases by using

[100] Justice Gorsuch found that such confusion certainly existed prior to *Kisor*. See Kisor, 139 S. Ct. at 2430 (Gorsuch, J., concurring in the judgment). Justice Kagan did not take issue with the conclusion, but her opinion tried to address it by identifying those circumstances as ones in which an agency should not receive deference. See *id*. at 2417; *supra* text accompanying notes 68–71. Professor Merrill believes that the uncertainty might well continue. See *supra* note 94. Only time will tell.

[101] See Larkin & Slattery, *supra* note 11, at 641.

[102] Kisor, 139 S. Ct. at 2425 (Gorsuch, J., concurring).

[103] *Id.* at 2418 (lead opinion of Kagan, J.).

[104] See Ernest Lawrence Thayer, Casey at the Bat, st. 2, 2 (1888).

the traditional rules of statutory interpretation. Finally, a majority of the Court did not decide whether the APA resolves this entire matter by requiring courts to undertake a de novo review of all questions of law. If the APA does, courts will still consider whether an agency's interpretation of its rules is persuasive, but courts cannot defer to the agency's position.

The only certainty about the Supreme Court's *Kisor* decision is that James Kisor has another chance to prevail on his claim for disability benefits. Beyond that, we are looking through a glass darkly. It could be years before we know how the lower courts apply the teaching of *Kisor*. How coherently and consistently the lower courts decide those cases will answer the question of whether *Kisor* set administrative law on a more sensible course or whether it merely gave the lower courts just enough rope to enable the Supreme Court to hang that decision—along with its partner in crime, *Chevron*.

No More (Old) Symbol Cases

*Michael W. McConnell**

Almost no one admires the Supreme Court's decisions on the constitutionality of government-sponsored religious symbols. In its first foray into this field, *Lynch v. Donnelly*, the Court voted 5-4 to sustain the constitutionality of a nativity scene in a municipal holiday display, apparently on the ground that it was surrounded by Santa's house and sleigh, a cut-out clown, candy-striped poles, and (most memorably) a talking wishing well. Many believers found the rationale insulting. The four dissenters called the decision "a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority." Outside observers derided the Court for creating a "three-plastic-animal rule." Lower courts did not know what to do.[1]

The Court's second symbols case, *County of Allegheny v. ACLU*, approved a menorah displayed in close proximity to a taller Christmas tree, but disapproved a nativity scene. This nativity scene was bereft of any talking wishing wells, Santas, or other kitsch. Fully six of the justices disagreed with one half or the other of the decision and only one justice, the author Harry Blackmun, agreed fully with the reasoning.[2] Several years later, a 5-4 majority voted not to uproot an old Ten Commandments monument, while a different 5-4 majority voted to require the removal of a newly erected Ten Commandments monument.[3] In the latter case, eight of the nine justices disagreed with the rationale, but they split in two equal-but-opposite camps,

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[1] Lynch v. Donnelly, 465 U.S. 668 (1984).

[2] County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

[3] Van Orden v. Perry, 545 U.S. 677 (2005); McCreary County v. ACLU of Ky., 545 U.S. 844 (2005).

leaving the cases to be decided with only one justice, Stephen Breyer, in the majority in both cases. In its most recent symbols case prior to this term, the Court hopelessly fractured over a wooden cross erected as a World War I memorial 40 miles down a dirt road in the Sonoran Desert.[4]

To commentators of a secularist persuasion, the justices were wrong to condone any government endorsement of sectarian symbols, which they believe brand people of different faiths or no faith as outsiders and second-class citizens. To commentators of the opposite persuasion, many of these decisions seem to bristle with hostility toward traditional religion, which should instead be viewed as a legitimate part of our pluralistic culture. Other commentators simply think the Court's religious-symbol cases have been inconsistent and incoherent.

Arguably, the Court's attempts to reduce the "divisiveness across religious lines" that can be caused by governmental endorsement of religious symbols have stirred up more religious divisiveness than the symbols themselves. The justices are the oracles and umpires of American culture. If they say a religious symbol must be dismantled, this is a victory for atheists, agnostics, and other dissenters from the religious mainstream. If the justices say a religious symbol is consistent with the American constitutional tradition, this is a victory for the believers. It is not so much the crosses, nativity scenes, menorahs, and Ten Commandments that get the juices of sectarian tension flowing; it is the prospect of Supreme Court affirmation of one's side in the culture conflict, and—better yet—defeat for the other side.

Finally, in *American Legion v. American Humanist Association*, the Supreme Court put an end to it.

I. The Court's Decision

American Legion involved a 94-year-old war memorial in Bladensburg, Maryland. Inspired by the military cemeteries for American soldiers in Europe, with their dramatic rows of white crosses, the memorial takes the form of a large Latin cross with various patriotic inscriptions. It towers above the surrounding countryside. It was designed by a local citizens' commission shortly after World War I in honor of the community's fallen soldiers and was

[4] Salazar v. Buono, 559 U.S. 700 (2010).

completed by the efforts of the American Legion, a private veterans' group. The property is now owned and maintained by the state.

Applying the so-called "*Lemon* test," which proscribes government action that (1) lacks a "secular purpose," (2) has a "primary effect" that "advances or inhibits religion" (including "endorsement" of a religious message), or (3) entails "excessive entanglement" between religion and government,[5] the U.S. Court of Appeals for the Fourth Circuit concluded that the Bladensburg monument violates the Establishment Clause, largely because of the "inherent religious meaning" of the cross. The court ordered that the cross be dismantled or—remarkably—that its arms be chopped off.[6]

From the moment the Supreme Court granted the petition for certiorari, it was evident that the Court would likely reverse. But what would the Court's legal rationale be? Would the Court repudiate the *Lemon* test, which was the legal framework for the Fourth Circuit's decision? Would it go still further, and hold that the plaintiffs, whose only injury was being offended by observing the passive symbol, lacked standing to sue in federal court? Or would it base its decision on the details of the facts of the case: on the evident secular purpose for the memorial, on its long history as an accepted part of community life, on the secular appurtenances of the memorial, and the lack of controversy (until the filing of the lawsuit)?

If the Court merely reversed the Fourth Circuit on the basis of the particular facts, without changing legal doctrines, there would be no respite from this kind of litigation. The facts of the Bladensburg case were too easy. If the Court reversed on the facts, it would be child's play for lower courts to distinguish the decision with respect to symbols with a shorter history, a less impeccable secular purpose, fewer secular appurtenances, more controversy, or less association with fallen soldiers. Moreover, because of the costs and uncertainties of litigation, including the one-sided obligation on the part of defendants to pay the attorneys' fees of victorious plaintiffs, we might expect that cash-strapped cities would often cave in to demands, however unreasonable, to dismantle any symbols with a religious connotation that plaintiffs' groups might seek to target.

[5] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[6] Am. Humanist Ass'n v. Maryland-National Capital Park & Planning Comm'n, 874 F.3d 195, 202, n.7 (4th Cir. 2017).

But eliminating the *Lemon* test, or, more conspicuously, cutting back on standing to sue, would give credence to crazy hypotheticals about monuments that are not likely to be a realistic possibility in tolerant America and would spark angry dissents that would feed the flames of the religious-secular culture war: the very problem that the Court is presumably trying to lessen.

As it happened, the Court took an approach that solved the practical problem without taking any theoretical steps that would enflame the situation. Moreover, it avoided the 5-4 split that so often characterizes culture-warish cases these days. In an opinion written by Justice Samuel Alito and joined by Chief Justice John Roberts and Justices Stephen Breyer, Elena Kagan, and Brett Kavanaugh, the Court distinguished between "retaining established, religiously expressive monuments, symbols, and practices" and "erecting or adopting new ones," and held that the "passage of time gives rise to a strong presumption of constitutionality" of the already-established symbols.[7] The meaning is clear: lower courts may no longer apply the nebulous *Lemon* factors to overturn religiously expressive monuments, symbols, or practices that were created in the past.

The Court did not state what "test" will apply to the erection of new monuments, but it appears likely that the key question will be whether the monuments communicate a message not just of "endorsement" but of superiority or official privilege, or disparagement of minority religious views. The Court was probably wise to wait until such a case arises in actuality than to speculate about what it would do in the hypothetical future. There should be no presumption *against* new religiously expressive monuments.

A. The Limit of the Holding to Already-Established Symbols

The opinion wrestled thoughtfully with the reasons why the *Lemon* test, and its endorsement variant, is especially problematic in the context of cases where the sole injury claimed by the plaintiffs is symbolic, giving four reasons. First, because the cases often involve monuments or symbols established long ago, it is difficult to identify their "purpose," which is the first "prong" of the *Lemon* test. Actual purposes are lost in the mists of time. Second, over the course of time, the purposes or connotations of a monument symbol change and

[7] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2085 (2019).

multiply. "Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment."[8] The Court did not cite *McGowan v. Maryland*, but it would have provided support. In *McGowan*, the Court recognized that Sunday closing laws had an unmistakably religious purpose when they were enacted centuries ago, but in recent years they have been supported more effectively by the labor movement, which favors a uniform day of rest in which working families can be united.[9] Third, symbols are not static. Their message may "evolve" over time. In particular, religious symbols can become "embedded features of a community's landscape and identity."[10] The outpouring of grief over the burning of Notre Dame Cathedral is a recent and ready example. So too are the many religious place names scattered across America. And fourth, once a religiously expressive symbol has been established, "removing it may no longer appear neutral."[11] Accordingly, *Lemon*'s focus on purposes and on messages of endorsement or disapproval are especially likely to be misleading in the context of already-established symbols.

The Court's distinction between old and new symbols tacitly presupposes that the sweep of American cultural history has been in compliance with the values of the Establishment Clause, at least close enough that efforts to cure the defects will cause more divisiveness than litigation can remove. This, it seems, is the real brunt of the Ginsburg dissent: there is more work to be done to bring America into full compliance with our constitutional values of religious neutrality. The Court's approach will prevent future backsliding into a higher degree of government-approved sectarianism, but it will do nothing to root out entrenched vestiges of symbolic establishmentarianism, if any exist. *American Legion* is thus a status quo decision, neither attempting to cure the alleged sins of the past nor greenlighting future actions.

B. The Virtues of the Opinion: Near-Consensus

There is much to praise in the *American Legion* opinion. As already noted, cases about religiously expressive monuments and symbols

[8] *Id.* at 2083.

[9] McGowan v. Maryland, 366 U.S. 420 (1960).

[10] Am. Legion, 139 S. Ct. at 2084.

[11] *Id.*

in the past decades have been a minefield. The Court's opinions have tended to be sharply divided and unclear. The product of those cases has been continual litigation in the lower courts with unpredictable results, heightening rather than dampening the sectarian divide between religious and nonreligious, Christian and non-Christian. Justice Alito's opinion in *American Legion* is the first to break from that unfortunate model. Despite the failure to grapple with the deep theoretical issues lurking in the case, and perhaps because of that, the opinion promises to calm the waters.

Notably, the key holding of the Court was joined by two of the more liberal justices, Breyer and Kagan. This gives the holding a welcome sense of nonpartisanship and stability, which is especially important in culturally fraught cases. Breyer joined the Alito opinion in full.[12] Kagan joined much of the Alito opinion, including the "strong presumption" of constitutionality for established symbols, holding back—"in perhaps an excess of caution"—only from the sections that repudiated *Lemon* more broadly.[13] Only two justices, Ruth Bader Ginsburg and Sonia Sotomayor, dissented. Justice Kavanaugh, while joining the Alito opinion in full, wrote a separate opinion that would have gone farther and repudiated the *Lemon* test in all cases.[14] Justice Clarence Thomas did not join the Alito opinion on the ground that it did not go far enough, reiterating his long-held view that the Establishment Clause was not incorporated by the Fourteenth Amendment against the states except possibly insofar as it involves coercion against dissenters. He expressly stated his agreement with the Alito opinion regarding *Lemon*'s inapplicability in symbol cases and stated that he would "take the logical next step and overrule *Lemon* in all contexts."[15] Justice Neil Gorsuch did not join the Alito opinion on the ground that the plaintiffs did not have standing to sue, but explicitly agreed with its criticism of *Lemon* and with its treatment of the Bladensburg cross.[16] Thus, in spite of the appearance of a fractured Court, the justices broke 7-2 on the narrow question of already-established symbols and 6-3 on the broader question of *Lemon*.

[12] *Id.* at 2075.

[13] *Id.* at 2094 (Kagan, J., concurring).

[14] *Id.* at 2092 (Kavanaugh, J., concurring).

[15] *Id.* at 2094.

[16] *Id.* at 2098 (Gorsuch, J., concurring).

That supermajority, including two of the liberal justices, will go far to legitimate the decision in the eyes of the public and to insulate it against future challenge and from nitpicking by lower courts.

C. The Virtues of the Opinion: Moderation

By narrowly focusing on already-established symbols, the decision was able to situate itself in the moderate middle of the religious-symbol culture wars. It expressly departs from the constitutional vision, still held by the two dissenting justices, that seeks to purify the nation of perceived vestiges of establishmentarianism from the past, at least as a judicially enforceable constitutional matter. (People offended by religiously expressive symbols are, of course, free to pursue remedies in the political sphere, just as those offended by symbols reflecting the racial prejudice of the past are doing, with considerable success.) It allows religiously expressive sleeping dogs to lie. But it does not green-light attempts by present and future officeholders to interject new religious symbols as a type of religious-identity politics. (The erection by Alabama Judge Roy Moore of a marble Ten Commandments monument in the rotunda of the state courthouse, and refusal to remove it on court order, is the obvious example.) Such efforts are offensive to religious believers because they politicize religion—or, as James Madison wrote, "employ Religion as an engine of Civil policy [which is] an unhallowed perversion of the means of salvation."[17] And they deliberately seek to ostracize those whose religious conscience differs from majority sentiment.

The Court also avoided the temptation to uphold the symbol on the ground that it has lost its religious meaning—as the Court seemed to do in the Allegheny County menorah case and maybe the Pawtucket crèche case.[18] The idea of whitewashing religious symbols as meaningless relics of "ceremonial deism" neither takes seriously the reactions of dissenters who see in those symbols a message of exclusion, nor pleases the proponents, who value the symbols precisely because of their sacred character. In *American Legion*, the second paragraph of the opinion recognizes that "the cross has long

[17] James Madison, Memorial and Remonstrance against Religious Assessments [1785], reprinted in McConnell, Berg & Lund, Religion and the Constitution 43, 45 (3d ed. 2016).

[18] County of Allegheny, 492 U.S. at 611–15; Lynch, 465 U.S. at 684–87.

been a preeminent Christian symbol" and nowhere does the opinion suggest that its other meanings detract in the slightest from that role.

D. The Virtues of the Opinion: Relative Clarity

Among the virtues of the opinion are its clarity and moderation, which it achieves in part by its narrow focus on "established" religiously expressive symbols, not attempting to resolve the broad and miscellaneous range of church-state issues with a single "test." Indeed, that was the Court's primary critique of the *Lemon* test: that it was too ambitious and wide-ranging, with the result that it was not helpful in resolving actual legal problems. Nor did the Court take refuge in a highly fact-sensitive analysis, as is often true of judicial minimalism, and as plagued Justice Sandra Day O'Connor's jurisprudence in the area. When faced with a challenge to an already-established monument, symbol, or practice, a lower court will know what to do. It will reject the challenge, absent some extraordinary feature that would warrant departure from the presumption.

Already there is evidence that lower courts have understood the holding. In the first post–*American Legion* circuit court decision, a unanimous Third Circuit panel tossed an Establishment Clause challenge to a longstanding county seal containing the image of a cross, honoring early German settlers who came to Pennsylvania to worship in freedom. The court held that the *Lemon* test did not apply, and, armed with the "strong presumption of constitutionality," easily dismissed the plaintiffs' arguments against the seal. This decision is proof of the significance of the *American Legion* decision: the district court had reluctantly concluded that the seal was invalid under *Lemon*.[19]

To be sure, the Court's holding leaves wiggle room in two respects, which may detract from its clarity of application. First, it does not legitimize all established symbols, but merely creates a "strong presumption of constitutionality." Presumably, there could exist already-established symbols somewhere in the country that are so sectarian and so offensive that they could be held unconstitutional even under this standard. As Justice Breyer commented, "The case would be different . . . if there were evidence that the organizers had

[19] Freedom from Religion Found. v. Cty. of Lehigh, No. 17-3581, 2019 U.S. App. LEXIS 23681 (3d Cir. Aug. 8, 2019).

'deliberately disrespected' members of minority faiths."[20] But this is unlikely. Plaintiffs have been bringing challenges to religiously expressive symbols for the last 50 years, and one would guess they have been targeting the most offensive. An unqualified approval of *all* established symbols would have left the decision open to attacks based on wild hypotheticals. (What if there were a crucifix in the middle of the National Mall? What if Utah pasted images of the Angel Moroni on every driver's license?) Far-fetched criticism may not matter to life-tenured justices, but it would unnecessarily undermine the broad consensual effect of the Court's more cautious holding.

Second, the holding applies only to "established" monuments, symbols, and practices. That may give rise to uncertainties on the margin. As Justice Gorsuch asks, rhetorically: "How old must a monument, symbol, or practice be to qualify for this new presumption?"[21] The Court provides no definition of what it means, but presumably the term "established" refers to monuments or practices that were erected without significant controversy and remained in place for some period of time—not necessarily lengthy—before the litigation started to generate controversy (absent evidence that the lack of opposition was due to intimidation). It is impossible to predict how many cases, if any, will fall close to that line.

As an aside, the word "established" was perhaps an unfortunate choice, since "establishment" is the word used by the First Amendment to describe what is forbidden. But the Court evidently intentionally used the term in lieu of alternatives like "old" or "long-established," which would have given truck to arguments about how old is old enough.

E. The Opinion's Odd Organization

The analytical section of the Court's opinion, Section II, is divided into four parts. The first part is a general critique of the *Lemon* test. The second is a more focused critique of *Lemon* as applied to religious-symbol cases. The third is a discussion of the complicated role of the cross in World War I memorials. The fourth discusses precedents in which the Court declined to apply *Lemon* and instead "look[ed] to

[20] Am. Legion, 139 S. Ct. at 2091 (Breyer, J., concurring).

[21] Id. at 2102 (Gorsuch, J., concurring).

history for guidance" in Establishment Clause cases.[22] Section III of the opinion, joined by a majority, then analyzes the particular facts surrounding the Bladensburg Cross itself, concluding that maintenance of the memorial does not violate the Establishment Clause.

This organization is in some respects puzzling and suggests that the opinion may have been the product of internal dispute and compromise. Sections II-A, B, and D are about the *Lemon* test, moving from the general to the specific to the alternatives. Sections II-C and III are about the use of the cross as a memorial, moving again from the general to the specific. It is not clear how II-C and III logically relate to II-A, II-B, and II-D. If all established symbols are entitled to a strong presumption of constitutionality, there was no need for a detailed analysis of memorial crosses in general or the Bladensburg cross in particular. Perhaps II-C and III were included to reassure readers that even absent a presumption, the Bladensburg cross should not be regarded as a sectarian endorsement of a religious belief. Why the five sections are intermingled the way they are is simply a mystery. Why not put the *Lemon* test discussion in one section and the discussion of memorial crosses in another?[23]

F. Avoiding "Hostility" toward Religion

The opinion ends with a brief and eloquent statement:

> The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment.[24]

[22] *Id.* at 2087.

[23] One tiny, presumably insignificant detail is that the subject paragraph of Section II-B was cut off and appears at end of Section II-A. Not only is this confusing to the reader, but it means that the summary subject paragraph of a section commanding majority status is placed in a section commanding only a plurality. This is evidence that the subsections of Part II were reorganized at the last minute.

[24] Am. Legion, 139 S. Ct. at 2090.

As this conclusion exemplifies, the *American Legion* Court recognized the important point that in a complex, pluralistic society, neutrality and secularism are not the same thing. The baseline for evaluating neutrality is not a secular blank slate to which any addition of a religiously expressive element is a sectarian intrusion. Rather, the Court must be sensitive to the effects of court-ordered change from the status quo, which itself is a reflection of centuries of cultural development. "[W]hen time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance," the Court observed, "removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning."[25] In the most striking statement in the opinion, the Court stated that a "government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion."[26] Perhaps the point is that the government should not use its control over public space either to increase or to decrease the religiosity of the culture, or to shift the culture in favor of, or against, any particular religious tradition. The baseline of neutrality is set by the culture itself, as manifested in the nation's historical traditions and practices. The Establishment Clause is all about reducing the government's power to influence the national religious culture—not about reducing (or increasing) the role of religion. The best way for government's role to be minimized is for the governmental sphere to conform, in general, to the public culture as it has developed over time. That sphere is a mixture of the secular and the religious.

This theme of the opinion has inspired sharp criticism. One essayist in *Slate* wrote that the idea that dismantling religious symbols could show "hostility" to religion has been "repeatedly rejected" by the Supreme Court, even attributing the idea to "a severe persecution complex on the part of Justice Samuel Alito."[27] But in fact the concern about hostility has long been a part of the Court's jurisprudence.

[25] *Id.* at 2084.

[26] *Id.* at 2084–85.

[27] Andrew Seidel, Alito Says Moving a Big Cross Would Be Like a Reign of Anti-Religious Terror. Really?, Slate (June 21, 2019), https://slate.com/news-and-politics/2019/06/alito-big-bladensburg-cross-french-reign-of-terror.html.

In the first school prayer decision, Justice Arthur Goldberg (the nation's fourth Jewish justice) warned that

> untutored devotion to the concept of neutrality can lead to . . . results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.[28]

In the first religious-symbols case, the liberal giant William J. Brennan Jr., wrote that "intuition tells us that some official 'acknowledgment' is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people," and that "government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture."[29] It is one thing not to erect a cross as a memorial; it is quite another to tear one down. As the opinion drolly notes, "an alteration like the one entertained by the Fourth Circuit—amputating the arms of the Cross—would be seen by many as profoundly disrespectful."[30]

II. The *Lemon* Test and Its Alternatives

The *American Legion* opinion thus accomplished a lot. But it avoided most of the theoretical issues raised by the case, preferring instead to issue a narrower, more practically focused opinion with greater consensual support across the ideological divide of the Court. It is worth commenting on those, and where they stand.

A. The Lemon *Test*

A great deal of the speculation about the *American Legion* case had to do with whether it would finally put the *Lemon* test to rest. It has

[28] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

[29] Lynch, 465 U.S. at 714–16.

[30] Am. Legion, 139 S. Ct. at 2086.

been a quarter of a century since the late Justice Antonin Scalia issued his famous diatribe:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again. . . . Its most recent burial, only last Term, was, to be sure, not fully six-feet under: Our decision in *Lee v. Weisman*, conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart[,] and a sixth has joined an opinion doing so.
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, see, e.g., *Aguilar v. Felton*; when we wish to uphold a practice it forbids, we ignore it entirely, see *Marsh v. Chambers*. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[31]

The American Legion petitioners expressly asked that *Lemon* be overruled and replaced with a "coercion" test. (The other petitioner, connected to the State of Maryland, argued for a reversal based solely on the factual details.) My amicus curiae brief, on behalf of the Becket Fund for Religious Liberty, urged that *Lemon* be replaced with a comparison of the challenged government action to historical practices in America, and especially to the elements of an historical establishment of religion as it was known to the Framers. The Court almost took the advice. If you put together the Alito plurality and the Thomas and Gorsuch concurrences, it did.

Three of the four subsections in Part II, the analytical part of the Alito opinion, are devoted to *Lemon*. Part II-B decisively eliminates the *Lemon* test from the decisionmaking calculus for cases involving established symbols. The first and the fourth sections—II-A and II-D—strongly suggest that the *Lemon* test should no longer be used

[31] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (Scalia, J., concurring) (1993) (internal citations omitted).

in other areas, and that instead the courts should decide cases largely on the basis of historical practice. The opinion notes that "[a]s Establishment Clause cases involving a great array of laws and practices came to the Court" in the years after *Lemon*, "it became more and more apparent that the *Lemon* test could not resolve them."[32] It also notes that the *Lemon* test "has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars."[33] The Court does not utter the magic words, that the *Lemon* test is "repudiated" or "abandoned" (outside the narrow category of established symbols), but it comes close enough that lower courts should take the hint. Moreover, although Justices Gorsuch and Thomas do not join the Alito opinion, their separate concurrences go out of their way to join in the criticism of the *Lemon* test. Using the standard methodology for identifying the holding of a case where there are multiple opinions but no majority, it is clear that, despite Justice Kagan's choice "out of perhaps an excess of caution" not to join Sections II-B and II-D, the Alito opinion commands a solid majority of six votes. I cannot imagine a lower court thinking, after this, that the *Lemon* test is good law.

The Court did not get into any of the theoretical debates about *Lemon*—what precisely is meant by a "secular purpose," what is the baseline for determination of "advancement or inhibition" of religion, what kinds and degrees of "entanglement" between church and state are forbidden in a world where religion and government have constant and unavoidable interactions, where government coercion fits into the calculus, and what kind of neutrality among religions or neutrality between religion and nonreligion (whatever that means) is required. Scholars have spent buckets of ink on all these questions. Instead, the Court focused on its practical experience in trying to apply the three *Lemon* factors to the multifarious questions that arise under the Establishment Clause. In case after case, the *Lemon* test was either indeterminate or misleading, and the Court used some other approach. A remarkable number of the Court's early decisions based on *Lemon* later had to be overruled in substantial part.[34]

[32] Am. Legion, 139 S. Ct. at 2080.

[33] *Id.* at 2081.

[34] See Agostini v. Felton, 521 U.S. 203 (1997) (overruling Sch. Dist. v. Ball, 473 U.S. 373 (1985) and Aguilar v. Felton, 473 U.S. 402 (1985)); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality) (overruling Wolman v. Walter, 433 U.S. 229 (1977) and Meek v. Pittenger, 421 U.S. 349 (1975)).

The *Lemon* test was intended to "bring order and predictability to Establishment Clause decisionmaking" across a range of problems,[35] but each of its three "prongs" turned out to entail ambiguous and subjective judgments, with no predictability and little hope of order.

This line of reasoning—reminiscent of John Dickinson's statement at the Constitutional Convention that "[e]xperience must be our only guide. Reason may mislead us"[36]—presumably made it easier for the justices to reach a consensus to abandon the test. Reason might not have misled them, but it likely would have generated a wealth of disagreements. The experiential ground for abandoning *Lemon* was what John Rawls might have called an "overlapping consensus"—consensus about the answer without any consensus about the reasons. In any event, it is clear that *Lemon* is no longer the governing standard, even if there has been no judicial declaration regarding the errors of each of its parts.

In truth, as a matter of Supreme Court jurisprudence, the abandonment of *Lemon* in *American Legion* is no big deal. *Lemon* was already in tatters. The Supreme Court had not relied on the test in 13 years, despite large numbers of Establishment Clause cases. Tellingly, not even the dissenters in *American Legion* invoked *Lemon* in support of their view that the cross must come down. That speaks volumes. As the Alito opinion noted, in every recent Establishment Clause case the Court "has either expressly declined to apply the test or has simply ignored it."[37] In a variety of contexts, the Court has crafted more specific doctrinal frameworks, based on historical practice and precedent. For example, when evaluating inclusion of religiously affiliated organizations in public-benefit programs—the original context in which the *Lemon* test was announced—the Court now asks whether the program distributes benefits to a broad class of recipients "on the basis of neutral, secular criteria."[38] When evaluating statutory religious accommodations, where application of

[35] Am. Legion, 139 S. Ct. at 2080.

[36] 2 Records of the Federal Convention of 1787, at 278 (photo. reprint 1966) (Max Farrand ed., rev. ed. 1937).

[37] Am. Legion, 139 S. Ct. at 2080.

[38] Zelman v. Simmons-Harris, 536 U.S. 639, 652–54 (2002) (quoting Agostini, 521 U.S. at 231).

the *Lemon* test was categorically fatal,[39] the Court now asks whether the statute "alleviates exceptional government-created burdens on private religious exercise," is denominationally neutral, and does not impose disproportionate burdens on individual third parties.[40] When evaluating statutes that explicitly discriminate between religious denominations, the Court applies traditional equal protection strict scrutiny.[41] When evaluating prayers or other religious exercises in public-school settings, the Court asks whether the practice "has the improper effect of coercing those present to participate in an act of religious worship."[42] There is an absolute bar on government interference with a religious organization's internal governance, such as choice of clergy.[43] And so on. None of these subtests adverts to purpose, effect, or entanglement.

The problem was not at the Supreme Court level. The *Lemon* "ghoul" was thoroughly tamed at that level. The problem was in the lower courts, which do not have the luxury of ignoring or declining to follow Supreme Court precedent until the high court itself has said to stop.[44] The lower courts therefore felt obliged to continue to trudge through the three *Lemon* factors long after the justices had ceased to pay any attention to them. This was a waste of time at best, and—to the extent that the *Lemon* test had any actual effect on decisionmaking—misled the lower courts into erroneous judgments. No wonder the vast majority of Supreme Court cases under the Establishment Clause resulted in reversals of lower court decisions. How could it be otherwise, if the lower courts were applying a different substantive analysis than the one that would be applied by the Supreme Court?

B. Historical Practice as a Guide

The death of *Lemon* is therefore welcome. The main question is what will take its place. In many specific areas, already noted, the

[39] See Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

[40] Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

[41] Larson v. Valente, 456 U.S. 228, 246–47 (1982).

[42] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 312 (2000) (citing Lee v. Weisman, 505 U.S. 577, 594 (1992)).

[43] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

[44] Agostini, 521 U.S. at 237; Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

answer has already been given: lower courts will apply the more specific tests for benefits programs, accommodations, public school religious exercises, explicit denominational discrimination, and interference with internal church governance, with no need to give lip service to *Lemon*. And thanks to *American Legion*, we now know that already-established religious monuments, symbols, and practices enjoy a "strong presumption of constitutionality." That will make such cases easy to decide, and presumably will discourage plaintiffs from bringing them.

Beyond those more specific tests, the *American Legion* plurality (of four justices) states that instead of seeking "a grand unified theory of the Establishment Clause" on the model of the *Lemon* test, the Court has "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[45] That is nothing new. Long before the *Lemon* test was announced, in the school prayer decision, *Abington Township v. Schempp*, Justice Brennan declared that "the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[46] The Court's cases are studded with explorations of Establishment Clause history. This has often been faulty history, to be sure, leading to some grievous errors. But history has always played a more prominent role in Establishment Clause jurisprudence than in most other fields of constitutional law.

What does the history say about the use of religious symbology?

No one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment. Quite the contrary. For example, a committee formed on July 4, 1776, that included Benjamin Franklin and Thomas Jefferson—both religiously unorthodox and disestablishmentarian—was tasked by the Continental Congress with designing a seal for the new nation. They chose a scene from the Bible—Moses leading the Jewish people across the Red Sea—with the words "Rebellion to Tyrants Is Obedience to God."[47] There is no difference, in principle, between

[45] Am. Legion, 139 S. Ct. at 2087.

[46] Schempp, 374 U.S. at 294 (Brennan, J., concurring).

[47] James H. Hutson, Religion and the Founding of the American Republic 50–51 (1998).

justifying the Revolution by use of a biblical reference on the national seal and honoring the war dead with a cross in Bladensburg.

The seal that was officially adopted in 1782 likewise had religious imagery: an eye representing "the Eye of Providence" surrounded by "Glory" above the motto *Annuit Coeptis*—"He [God] has favored our undertakings."

President George Washington's 1789 Thanksgiving Day Proclamation recommended "a day of public thanksgiving and prayer"

for the "Supreme Being['s]" role in "the foundations and successes of our young Nation."[48] The same Congress that approved the Establishment Clause "provided for the appointment of chaplains" to open its sessions with often "decidedly Christian" prayer.[49] A church service was part of Washington's first inaugural, but no member of Congress refused to attend because of separationist concerns. Washington's personal addition to the oath of office—"So Help Me God"—was controversial in some quarters, but not because it was a religious reference. It was because that was the way the king ended his oath.[50] The Constitution was dated "the Year of our Lord" and exempted Sunday from the count of days for the president to sign legislation. Today, every state constitution likewise refers to "God" or an equivalent term.[51] Churches across America doubled as town meetinghouses and schools.[52] And no less disestablishmentarian a president as Jefferson allowed various denominations to use the Capitol and other federal buildings for weekly worship services—which he even attended.[53] School prayer, financial aid to religious schools, chaplains, and Thanksgiving Day proclamations all sparked constitutional conflict early in the 19th century. Religious symbols never did. To the best of my research, the first time anyone suggested that the display of symbols raises a constitutional problem was in the 1950s. All these historical practices are inconsistent with the notion, apparently entertained by the two dissenters, that any symbolic recognition of religion that can be seen as an "endorsement" violates the Constitution. To be sure, early leaders such as Washington were generally scrupulous to use broad, nonsectarian language, but this was a matter of statesmanship and civility, not of constitutional law.

[48] George Washington, Thanksgiving Proclamation [Oct. 3, 1789], reprinted in McConnell, Berg & Lund, *supra* note 17, at 491.

[49] Town of Greece v. Galloway, 572 U.S. 565, 576–80 (2014).

[50] See Martin J. Medhurst, From Duché to Provoost: The Birth of Inaugural Prayer, 24 J. Church & St. 573, 585–87 (1982).

[51] Aleksandra Sandstrom, God or the Divine Is Referenced in Every State Constitution, Pew Research Center (Aug. 17, 2017), https://www.pewresearch.org/fact-tank/2017/08/17/god-or-the-divine-is-referenced-in-every-state-constitution/.

[52] Edmund W. Sinnott, Meetinghouse & Church in Early New England 23 (1963).

[53] Hutson, *supra* note 47, at 84–94.

C. The Endorsement Test

In rejecting the *Lemon* test as a guide to cases involving already-established symbols that are religiously expressive, the Court—without calling attention to the fact—also rejected the endorsement test. Indeed, the Alito opinion treats the "effects" prong of *Lemon* as essentially congruent to the endorsement test, explaining that the Court "later elaborated that the 'effect[s]' of a challenged action should be assessed by asking whether a 'reasonable observer' would conclude that the action constituted an 'endorsement' of religion," citing Justice O'Connor's classic formulation of the endorsement test from the *Allegheny County* opinion.[54] The logic of the endorsement test is this: "Endorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[55] Operationally, according to Justice O'Connor, "[t]he effect prong asks whether . . . the practice under review in fact conveys a message of endorsement or disapproval"—what she elsewhere calls the "objective" meaning of the statement, whether intended or not, as evaluated by an "objective observer, acquainted with the text, legislative history, and implementation of the statute."[56]

The *American Legion* Court did not discuss the logic of the endorsement test but dismissed it along with the rest of *Lemon* on the ground that it has not worked in practice. In my opinion, the disutility of the endorsement test is traceable to two flaws in its logic: one psychological and one semiotic. Psychologically, I do not think it is true that endorsements necessarily send a message to outsiders that they are somehow excluded from the political community. The government

[54] Am. Legion, 139 S. Ct. at 2080. This is a mistake. In many religion cases, the effect of the government action is concrete: creating an exception to a generally applicable law, extending (or denying) a financial benefit on a nonneutral basis, coercing a religious practice like school prayer, and so on. It is only in the context of symbols, which by definition are purely symbolic and have no concrete effect, that the endorsement test has any real purchase. The Court's reframing of the effects "prong" of *Lemon* as congruent with endorsement is therefore accurate only in a subset of Establishment Clause cases.

[55] Lynch, 465 U.S. at 688.

[56] Wallace, 472 U.S. at 56 n.42, 76 (O'Connor, J., concurring).

speaks approvingly of many things, and this is not usually thought to stigmatize attachment to things not mentioned. The federal government maintains a spectacular Museum of African American History and Culture in a prominent location on the National Mall, right next to the Washington Monument. The presence of this museum must surely convey a message of affirmation to African Americans, but it would be a mistake to think that it sends any messages that Americans of other races are "outsiders, not full members of the political community." Congress passes hundreds of resolutions every year praising various people, products, activities, and events—some of them religious—which no doubt make persons affiliated with those things feel good, which is why representatives bother to sponsor them. But do these endorsements carry a message of disapproval for everything else? If Congress declares National Pickle Day—November 14, by the way[57]—are olive eaters demoted to second-class citizens? It is possible to endorse any number of beliefs, practices, people, places, or things, without casting aspersions on others.

To make sense, the endorsement test ought to focus not on whether a particular symbol, monument, or practice "endorses" religion, but on whether it conveys disrespect for others. That was the focus of Justice Breyer's concurrence and much of the Alito opinion. As Breyer stated, "No evidence suggests that [those who designed the Bladensburg memorial] sought to disparage or exclude any religious group."[58] He declared that "[t]he case would be different . . . if there were evidence that the organizers had 'deliberately disrespected' members of minority faiths."[59] The majority went out of its way to point out that the monument would not serve its intended role if it had disrespected Jewish soldiers and devoted a page of its opinion to refuting the respondents' "strain[ed]" attempts to connect the Bladensburg cross with anti-Semitism and the Ku Klux Klan.[60] Similarly, the Court (in the plurality part of its opinion) noted that

[57] See National Pickle Day—November 14, NationalDayCalendar.com, https://nationaldaycalendar.com/national-pickle-day-november-14/. I choose this example because in elementary school I happened to be assigned to give a talk on November 14 on a subject of my choice. I discovered that this was National Pickle Day—and that answered the question of what my topic would be.

[58] Am. Legion, 139 S. Ct. at 2091 (Breyer, J., concurring).

[59] *Id.*

[60] *Id.* at 2089–90.

the legislative prayers of the First Congress were "inclusive rather than divisive," and that the practice of congressional prayer ever since "stands out as an example of respect and tolerance for differing views."[61] If we are concerned—as we should be, culturally if not legally—about messages that treat some Americans as outsiders, we should worry not about "endorsements" but about disparagements.

Second is the semiotic problem: how to identify the "meaning" of symbols like the Bladensburg cross. This question has inspired an entire field of study. Justice O'Connor's classic statement of the endorsement test treats the meaning of a symbol as an "objective" fact to be assessed by an omniscient "reasonable observer." This is a misunderstanding: the meaning conveyed by a symbol is utterly and completely a product of perspective. There is no "objective fact" involved. For a familiar example, ask people of different ideological perspectives if the *New York Times* is a liberal newspaper, or if Fox News is fair and balanced. Those who share the *Times*'s general orientation will almost always regard it as fair and balanced; those who dislike Fox will regard it as biased in a right-wing direction. The answer to the question will reveal little about the two media companies, but much about the ideology of the responder. The question of "endorsement" and "disapproval" necessarily will be relative to the subjective preferences of the person making the assessment. Thus, when Justice O'Connor in the first case in which she put forward the endorsement test approved a nativity scene in a municipal holiday display, it was widely derided as the product of a "reasonable Episcopalian" test.

John Locke wrote that "the religion of every prince is orthodox to himself."[62] So also every judge will regard himself as the impeccably reasonable observer of which the endorsement test speaks. Some years ago, I presented a series of controversial fact patterns about religious conflict to a group of about 30 federal judges, along with about half a dozen possible "tests" for what counts as an establishment of religion. I also asked the judges separately to state how they thought each of the fact patterns should be resolved, based on their personal beliefs rather than any legal tests. It turned out

[61] *Id.* at 2088–89.

[62] John Locke, A Letter Concerning Toleration and Other Writings 38 (Mark Goldie ed., Liberty Fund 2010) (1689).

that, for every judge, the "endorsement test" came out the same way as their personal beliefs—the only one of the "tests" with that outcome. The endorsement test is the First Amendment equivalent of the Rorschach test. It is difficult but possible for people to put themselves in the shoes of others and guess whether they think a symbol is an endorsement. But if the question is what the symbol means, objectively, to a reasonable observer, the answer is whatever the particular observer happens to think.

Maybe there is nothing wrong with this. The law is full of subjective tests based on reasonableness; the effect is to judge human conduct against the baseline of community norms. But there is something perverse about incorporating this approach into the Establishment Clause. The point of the Establishment Clause is that there is no community norm—or perhaps that the community norm must be given no legal weight. The endorsement test has the effect of telling the individuals who are outside the mainstream not just that they are outvoted, but that their view is unreasonable—outside the range of reasonable belief. It seems to me that this is more stigmatizing than any symbol.

D. The Kavanaugh Proposal

Justice Kavanaugh, in his first encounter with the Establishment Clause as a justice, went bold. While joining the Alito opinion in its entirety, he was more forthright and insistent in his rejection of the *Lemon* test. Unlike the plurality, though, he is not disillusioned with the ambitious project of finding an alternative "grand unified theory" of the Establishment Clause. The plurality was content with following a "history and tradition" test, which might lead in different directions. Kavanaugh instead distills from the cases "an overarching set of principles":

> If the challenged government practice is not coercive and if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.[63]

[63] Am. Legion, 139 S. Ct. at 2093 (Kavanaugh, J., concurring).

He thus embraces a kind of coercion test, but not one that treats coercion as a necessary element in all Establishment Clause claims. Rather—and correctly, I think—he treats coercion as sufficient but not necessary to establish a violation. If the government coerces religious practice, it is unconstitutional. If the challenged government action is not coercive, that does not necessarily make it permissible.

Noncoercive action, according to Kavanaugh, may be sustained if it falls within one of three permissible headings: it is rooted in history and tradition, it is neutral between religion and comparable secular activities, or it is a permissible accommodation. This seems almost right, but it is nothing more than stringing together the holdings of the Court's cases in three of the specific areas of Establishment Clause contention. Why only three? Why not all five of the categories he lists in his opinion, or all six of the categories in the Alito opinion? For example, suppose that the government makes an explicit distinction among religious denominations, as in *Larsen v. Valente*.[64] Does that not affect the constitutional analysis? Or suppose the government interferes with internal church governance, perhaps through application of the anti-discrimination laws, as in *Hosanna-Tabor*.[65] Or it vests governmental power to regulate the lives or property of other people in religious organizations, as in *Grendel's Den*?[66] To be true to the Court's cases, we would have to contrive a five- or six-part "test," with some of the parts conjunctive and some of them disjunctive. That would be rhetorically unwieldy, and it would not provide any more clarification than the Court's cases in these areas already have.

E. Coercion, Standing, and Incorporation

There are three remaining theoretical positions at play in *American Legion*, which the opinion for the Court simply ignored. The American Legion petitioners urged the Court to replace the *Lemon* test with a "coercion test": "that the Establishment Clause is not violated absent government actions that . . . coerce belief in, observance of, or

[64] 456 U.S. 228 (1982).

[65] Hosanna-Tabor, 565 U.S. at 177–81.

[66] Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

financial support for religion."[67] Justice Thomas reiterated his long-held belief that the Establishment Clause should not be incorporated against the states through the Fourteenth Amendment.[68] And Justice Gorsuch took the view that plaintiffs lack standing to bring this sort of claim, where the only alleged injury from government action is a feeling of offense. These appear to be three entirely different sorts of argument: the American Legion argument is based on interpretation of the substantive meaning of the First Amendment; the Thomas argument is based on the scope of application of the First Amendment; and the Gorsuch argument is jurisdictional. Yet all have the same insight at their core.

This is not the occasion for a full-bore interpretation of the Establishment Clause. But let us assume, contrary to the American Legion argument, that the Establishment Clause is, at least in some respects, a structural provision analogous to a separation-of-powers provision; it bars the federal government from making law on a particular topic, namely the establishment of religion. That is not to say that "coercion" is irrelevant to establishment. There is little doubt that, as a historical matter, coercion was at the core of religious establishment. When describing the meaning of the amendment on the floor of the First Congress, Madison, the sponsor of the amendment, stated "that he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law." He also explained that "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform."[69] In his *Memorial and Remonstrance*, which is generally taken to be an authoritative statement of the philosophic basis for the Establishment Clause, Madison began with the principle that religion "can be directed only by reason and conviction, not by force or violence."[70] The notion that coercion is relevant only to free exercise and not to

[67] Brief for the American Legion Petitioners at 23, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (No. 17-1717).

[68] Am. Legion, 139 S. Ct. at 2094 (Thomas, J., concurring).

[69] 1 Annals of Congress 757–59, Aug. 15, 1789 (J. Gales ed., 1834).

[70] James Madison, Memorial and Remonstrance against Religious Assessments, *supra* note 17, at 43.

establishment, found in *Abington* and *Engel*, was a baseless fabrication.[71] But that does not necessarily mean that formal legal coercion is all that establishments of religion were about. For a relatively uncontroversial example, official discrimination in favor of one religious group and against another—denominational discrimination—is a species of establishment even if this has no discernible coercive effect. So let us take as established that there are some possible violations of the Establishment Clause that would not legally coerce any individual to practice or support religion against their will; the core of the clause protects personal liberty in much the same way as any other part of the First Amendment.[72]

How does this relate to incorporation and standing?

Incorporation: Although there are many differing verbal formulas, as well as disagreement over whether incorporation was accomplished through the Privileges or Immunities Clause or the Due Process Clause, the bottom line is that all the fundamental personal liberties in the Bill of Rights apply equally to the states.[73] Under that principle, at least those applications of the Establishment Clause that protect personal liberty, which includes all forms of coercion and discrimination, would seem to apply.

Standing: Plaintiffs have standing to sue in federal court to challenge government action that inflicts on them an injury in fact that is capable of judicial redress. Certainly, government action that coerces religious observance, or that discriminates on the basis of religious belief or status, qualifies as an injury in fact, and there is no reason to think such action would not be redressible by injunction or damages. Justice Gorsuch, joined by Justice Thomas, makes a powerful argument that mere psychological injury, such as a feeling

[71] See Michael W. McConnell, Coercion: The Lost Element of Establishment, 27 Wm. & Mary L. Rev. 933 (1986).

[72] The only theory under which the Establishment Clause does not extend even to coercive actions is that it is solely a protection for federalism: a guarantee that Congress will not pass laws meddling with state establishments, one way or the other. Even if that were the sole purpose at the time of adoption of the Bill of Rights, which is questionable, it was not the meaning by the time of the Fourteenth Amendment. See Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 Ariz. St. L.J. 1085 (1995).

[73] See generally McDonald v. City of Chicago, 561 U.S. 742 (2010); *id.* at 805 (Thomas, J., concurring). See generally Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986).

of offense, does not qualify under ordinary principles of standing jurisprudence.[74] The analogies to equal protection and separation-of-powers cases are persuasive. The Equal Protection Clause prohibits invidious discrimination by state action, but it has never been held to allow a plaintiff to challenge state action—such as flying a Confederate flag—that conveys a message of racial subordination. It seems strange that an atheist would have standing to challenge the flying of a Confederate flag on the ground that it contains a cross, but an African American would not have standing to challenge the same flag on the ground that it symbolizes slavery and Jim Crow. In separation-of-powers cases, individuals have standing to challenge infractions only if they suffer concrete injury as a result. Even if the Establishment Clause is in part a structural provision, as some scholars persuasively argue,[75] no one would have standing to sue to enforce them, absent particularized injury. It would seem to follow that only persons who have suffered coercion or discrimination, or some other nonpsychological injury, under the Establishment Clause would have standing to sue. The Court offers no response, even though courts have an obligation in every case to ascertain the basis of their jurisdiction.

The three arguments are thus based on precisely the same principle and logically should rise or fall together. If offense does not count as a legally cognizable harm, plaintiffs lack the standing to sue, the clause does not incorporate in that respect, and they have no substantive cause of action under the Establishment Clause.

All three lines of argument have powerful support, even if they are not ultimately correct. One might think they deserve an answer. Why did Justice Alito choose to ignore them? My guess is that he

[74] Am. Legion, 139 S. Ct. at 2098 (Thomas, J., concurring).

[75] See Carl H. Esbeck, The Establishment Clause as a Structural Restraint on Governmental Power, 84 Iowa L. Rev. 1 (1998). In more recent writing, Esbeck has defended what he calls "reduced rigor" in the rules for standing under the Establishment Clause on the ground that "the Court has long regarded the Establishment Clause as structural in nature with the task not of vindicating individual rights, but of keeping in proper order these two centers of authority we call church and state." Carl H. Esbeck, The World War I Memorial Cross Case: U.S. Supreme Court Takes a New Approach with the Establishment Clause (Aug. 13, 2019), Univ. of Mo. Sch. of Law Legal Studies Research Paper No. 2019-15. The premise is true, but the conclusion does not follow. The separation of powers provisions of the Constitution likewise are "structural in nature," but plaintiffs have standing to sue only when the violation of separation of powers affects their individual rights.

is not certain that the arguments are wrong, or that a majority of the Court would conclude they are wrong if forced to confront the issue. But any of the three arguments, if accepted, would explode the narrow, clear, moderate, largely consensual rationale on which Alito's majority-in-part, plurality-in-part opinion is based. At best, he would lose Justices Kagan and Breyer, and turn the case into yet another divisive 5-4 shouting match. At worst, the Court would fracture on various aspects of the three arguments, and there would be no clear resolution. Thus, I see the Court's decision not to grapple with the coercion argument in any of its three guises—substantive law, incorporation theory, or jurisdiction—as necessary to its considerable virtues of clarity, moderation, and consensus, rather than as any indication that the theoretical positions were found wanting.

Conclusion

Justice Alito's opinion in the *American Legion* case was a considerable achievement. By framing the question narrowly and not attempting to solve all the nation's Establishment Clause problems in a single opinion, he brought clarity and moderation to a highly charged subset of Establishment Clause cases that previously led to angry divisions, fractured Courts, and unpredictable results. He gained the vote of one liberal Justice, Breyer, on all points, and another, Kagan, on most—and even when she disagreed with two portions of the opinion, she had nice words to say about them. That is highly unusual. The Court also put to an end the strange and disruptive situation in which the lower courts were governed by one "test" for Establishment Clause violations, while the Supreme Court itself regularly ignored or decided to disregard that "test." All this was accomplished in an opinion that exudes a measured, calm reasonableness, despite the contentious nature of its subject matter.

This achievement was accomplished by ignoring serious and substantial theoretical arguments that would have pushed the judgment in a more radical direction. It was worth that price. Good work, Justice Alito.

That's Why I Hang My Hat in Tennessee: Alcohol and the Commerce Clause

*Braden H. Boucek**

> *The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.*
>
> Art. I, § 8 (a.k.a. the "Commerce Clause")
>
> *The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxication liquors, in violation of the laws thereof, is hereby prohibited.*
>
> Amend. XXI, § 2

Tennessee spirits have inspired many a song writer. George Jones got to number two with "Tennessee Whiskey." "Copperhead Road," Steve Earle's tale of three generations of East Tennessee bootleggers, is a classic. No doubt, Tennessee liquor has brought out the best in song writers. The Supreme Court got its turn this past term with the case of *Tennessee Wine and Spirits Retailers Association v. Thomas*, a major Supreme Court case involving the intersection of the Commerce Clause and the Twenty-first Amendment.

The respondents in this case—out-of-staters seeking retail liquor licenses—might argue that Tennessee liquor has not always brought out the best in the writers of Tennessee laws. Tennessee lawmakers went to great lengths to ensure that Tennesseans and only Tennesseans can sell alcohol in Tennessee by restricting retail liquor licenses to those who had resided in Tennessee for two years

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(what I'll call the "durational requirement").[1] This had the effect of denying two would-be retailers of alcohol—the Ketchum family, who recently relocated to Memphis and cashed in their savings to open a neighborhood store, and Total Wine & More, a wine and alcohol superstore—from operating in Tennessee.

Constitutional protection of the free flow of interstate commerce has been a frequent object of Supreme Court review since soon after the Founding, leaving behind a convoluted doctrine. Nothing makes the already-complicated Commerce Clause even more complicated than alcohol because of its unique constitutional status (constitutionally prohibited, then reinstated with states given special power over its regulation). So, can states constitutionally deny licenses to sell wine and liquor to parties who have not resided in the state for a specified period of time? Or are such durational residency requirements impermissible burdens on interstate commerce? These were the questions presented to the Supreme Court in *Tennessee Wine*.

Durational requirements seem at first blush to constitute obvious discrimination against out-of-state interests, thus violating the long-held doctrine against such interstate protectionism. So why was this case so difficult to get to the Supreme Court? As often is the case, alcohol is at the root of the problem. There are no two ways about it—if the licenses at issue had been to sell anything other than booze, then this case would never have been a case. States cannot burden interstate commerce by excluding out-of-staters from local markets.[2] Durational requirements on licenses to sell goods and articles like "cabbages and candlesticks" impermissibly burden interstate commerce and would be flagrantly and obviously unconstitutional.[3] Do the same rules apply to alcohol? Liquor does

[1] Two related durational restrictions were challenged as well. Tennessee also required that a person live in Tennessee for 10 years before they could renew the license. Tenn. Code Ann. § 57-3-204(b)(2)(A). The state also imposed additional residency requirements on officers and stockholders of any corporation wishing to acquire a retail license. Tenn. Code Ann. § 57-3-204(b). Only the two-year residency requirement was before the Supreme Court because, after the lower courts struck the others down, they were not appealed to the Supreme Court.

[2] Lewis v. BT Inv. Managers, Inc. 447 U.S. 27, 53 (1980) (excluding out-of-state banks); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391–92 (1994) (excluding out-of-state waste processors).

[3] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2484 (2019) (Gorsuch, J., dissenting).

tend to make easy things hard, but can it change the outcome in a Commerce Clause case?

Section 2 of the Twenty-first Amendment gives the states broad authority in the regulation of the sale and distribution of alcohol. Then again, the Supreme Court has already held that authority is not unlimited. In the Court's last foray into the Twenty-first Amendment, the 2005 case of *Granholm v. Heald*, it rejected the idea that the amendment was a total shield from the nondiscrimination principle. That case struck down a law discriminating against out-of-state alcohol products and producers.[4] But was that holding limited to producers, or would it extend to other tiers in the alcohol distribution scheme such as retailers?

Before *Tennessee Wine*, this was all about as clear as mud. Still, there were a couple of fixed points in the Twenty-first Amendment celestial sky. One, as mentioned above, is that, despite the Twenty-first Amendment, state alcohol regulations are not totally immune from Commerce Clause challenges. The second is that the three-tier system that many states use to regulate alcohol distribution is constitutional, however peculiarly unwieldy it may look.[5] The three-tier system originated during the Franklin Roosevelt administration, resulting from post-Prohibition efforts to subject alcohol to a demanding and exceptional regulatory scheme.[6] Alcohol is thus distributed through three distinct layers that may not overlap: producers, wholesalers, and retailers. "Manufacturers are limited to selling to wholesalers; wholesalers may sell to retailers, or in some cases to other wholesalers; consumers are required to buy only from retailers."[7] This brings us to a third fixed point. At the retail tier in particular, the state interest in local control reaches its highest level because of the undisputed need to control the "dispensation of alcoholic beverages within its borders."[8] As a result, one way of analyzing the question is to ask whether *Granholm* was limited to discrimination against out-of-state products and producers—a distinct part of the three-tier approach—but not out-of-state persons who wish to act as retailers, selling alcohol directly to the citizens of a particular state.

[4] Granholm v. Heald, 544 U.S. 460, 493 (2005).

[5] *Id.* at 488 (calling it "unquestionably legitimate").

[6] Jon Riches, It's Not Prohibition, so Ditch the Old Alcohol Laws, Ariz. Republic (Feb. 15, 2015).

[7] Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d 608, 612 (6th Cir. 2018).

[8] Craig v. Boren, 429 U.S. 190, 215 (1976) (Stewart, J., concurring).

In sum, are Tennessee's durational requirements the sort of economic protectionism that the Constitution stops in other contexts, or are they an appropriate way of maintaining local control of alcohol so as to address the problems involved with intoxicating spirits? Perhaps the more important question is whether the "dormant" Commerce Clause is even still a thing? As a doctrine, it has come under criticism.[9] In *Tennessee Wine*, the Supreme Court waded into these fraught waters.

Let's begin by examining the factual background and cast of characters. Then, let us take a brief look at the Commerce Clause, the Twenty-first Amendment, and how this case got to the Supreme Court. Then we can discuss what the justices did and what may still be lingering.

I. Factual Background

Doug and Mary Ketchum moved to Tennessee in 2016 from Utah.[10] They care for their disabled daughter, Stacy, who has cerebral palsy and quadriplegia requiring 24-hour care. Advised by her doctor to leave the area because the temperature inversion of Salt Lake Valley caused Stacy's lung to collapse, the Ketchums settled on a move to Memphis. They found a retail liquor shop that was up for sale and decided to buy it, enabling them to care for Stacy. In April 2016, they submitted a letter of intent to purchase the store.

At the time, they were aware of Tennessee's durational requirement, but they did not think it would matter. The Tennessee attorney general had issued two opinions on the durational requirement and determined that they were unconstitutional.[11] The Ketchums were advised by the Tennessee Alcoholic Beverage Commission (ABC) that it did not enforce the durational requirement. They were further told that the ABC had issued retail liquor licenses to other

[9] See, e.g., Garrick B. Pursley, Dormancy, 100 Geo. L.J. 497, 499 n.3 (2011) (collecting criticisms).

[10] The background facts are taken from the district court opinion. Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 259 F. Supp. 3d 785 (M.D. Tenn. 2017). See also, Joint Appendix, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019) (No. 18-96) (Nov. 13, 2018); The Tennessee Wine Case and the 21st Amendment, We the People Podcast, National Constitution Center (Feb. 14, 2019), https://constitutioncenter.org/podcast-the-tennessee-wine-case-and-the-21st-amendment.

[11] Tenn. Att'y Gen. Op. No. 12-59 (2012); Tenn. Att'y Gen. Op. No. 14-86 (2014).

nonresidents and would issue the Ketchums a retail liquor license. With this understanding, the Ketchums applied for a retail liquor license. The Ketchums submitted proof of their Utah residency along with the application. They were told the application was in order and would be placed on the commission's agenda in July 2016.

The Ketchums dove deeply into their retirement funds to pay for the purchase and secured financing. Doug quit his job in Utah, and the family moved to the Bluff City in July 2016, where they have resided ever since. Doug has been unable to find full-time employment since moving, so he lacks health benefits and has struggled to provide care for his daughter.

The other party that sought a retail license was Total Wine & More, a company looking to become the Walmart of alcohol. Total Wine was created as a limited liability company under Tennessee law in 2016, with the objective of opening one or more retail stores in the state. None of its shareholders were, or are, Tennessee residents. Total Wine's representatives met with ABC authorities to discuss opening a store and got the go-ahead, having directly asked about the durational requirement. ABC staff had told Total Wine that the agency did not enforce the durational requirement because of the attorney general's opinions, and that it had issued licenses to other nonresidents. The ABC recommended conditional approval, subject to the deliverance of a certificate of occupancy and an inspection, along with other routine matters. The ABC was scheduled to vote on the application in August 2016.

Without notice, the ABC deferred action. A trade association, the Tennessee Wine and Spirits Retailers Association (the association), threatened to sue the state unless it enforced the durational requirement. Clayton Byrd,[12] then the executive director of the ABC, initiated the lawsuit by filing a declaratory action, essentially asking the federal courts to tell him whether the durational requirement was unconstitutional.[13]

Total Wine invoked the dormant Commerce Clause. The Ketchums agreed and also relied on the Privileges or Immunities Clause at the

[12] Careful observers may note the first named defendant changed in the case headings throughout the proceedings. It is not important because the executive director for Tennessee's alcohol board kept changing.

[13] As the litigation unfolded, the ABC turned to actively defending the durational requirement by adopting the position of the association and ceding its argument to the association.

Supreme Court.[14] Before delving into the lower court proceedings setting up the Supreme Court case, a brief discussion of the pertinent doctrines is in order.

II. A Primer on the Dormant Commerce Clause and the Privileges or Immunities Clause

The dormant Commerce Clause is an offshoot of the Commerce Clause, which provides that "Congress shall have the Power . . . to regulate commerce . . . among the several States."[15] The courts have interpreted the Commerce Clause to have a negative component that limits the states by prohibiting them from discriminating or placing excessive burdens on interstate commerce.[16] Not actually a clause, the dormant Commerce Clause is instead a doctrine that is essentially the obverse of the Commerce Clause.

The dormant Commerce Clause arises from the constitutional concern over states' burdening interstate commerce.[17] Generally speaking, the dormant Commerce Clause protects against state regulations that "erect barriers against interstate trade."[18] Preventing interstate trade wars was one of the original purposes for convening the Constitutional Convention. As the Supreme Court stated in *Hughes v. Oklahoma*, by granting Congress authority over interstate commerce, the Constitution aimed to "avoid tendencies toward the economic Balkanization that had plagued relations among the colonies and later among the states under the Articles of Confederation."[19] The other prominent justification for the dormant Commerce Clause is that it promotes economic efficiency that

[14] The Ketchums had two obstacles to presenting this claim. First, they proceeded under the name of their corporation, Affluere Investments, and the Privileges or Immunities Clause applies to citizens, not corporations. The Ketchums argued that the durational requirement depended on the residency of the Ketchums and thus the license was bound up in the rights of citizens. Brief for Respondent Affluere Investments at 28 n.8, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019) (No. 18-96). Second, the Sixth Circuit had not ruled on Privileges or Immunities Clause grounds, though the Ketchums asked the Supreme Court to review the issue. *Id*. at 29.

[15] U.S. Const. art. I, § 8.

[16] Fulton Corp. v. Faulkner, 516 U.S. 325, 330 (1996).

[17] *Id*. at 330 (quoting Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 647 (1994)).

[18] Lewis v. BT Inv. Managers, Inc., 447 U.S. at 35.

[19] Hughes v. Oklahoma, 441 U.S. 322, 325 (1979); see also Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1794 (2015).

in-state protectionism would undermine.[20] And while the dormant Commerce Clause has its prominent detractors, it continues to be an important aspect of the Supreme Court's interpretation of the Commerce Clause and federalism principles.

Dormant Commerce Clause analysis falls under one of two categories. The first concerns a class of legislation that is virtually per se invalid.[21] The second considers "incidental burdens" on interstate commerce and engages in a balancing test.[22] It is not always easy to slot the legislation into one of the two. The Supreme Court has acknowledged that "there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach."[23] Under either analysis, however, "the critical consideration is the overall effect of the statute on both local and interstate activity."[24]

Two types of laws are considered per se violations of the dormant Commerce Clause: those that are facially discriminatory on out-of-state businesses, and laws that regulate extraterritorial conduct. State regulation of interstate commerce is facially discriminatory when it favors in-state interests over out-of-state ones. [25] A state law with the practical effect of regulating extraterritorial commerce—that is, commerce occurring wholly outside that state's borders, whether or not the commerce has effects within the state—is also a per se violation.[26] Courts will apply the same level of scrutiny to a law that is facially discriminatory as to one that wholly burdens out-of-state activity.[27] The defending state must overcome a presumption of unconstitutionality by demonstrating that the burden serves a legitimate local purpose that could not be adequately served by available nondiscriminatory alternatives.[28]

[20] Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 99 (1994).

[21] See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 108 (2d Cir. 2001).

[22] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[23] Brown-Forman Distillers Corp., 476 U.S. at 579 (1986).

[24] *Id.*

[25] Maine v. Taylor, 477 U.S. 131, 148 (1986); Or. Waste Sys., Inc., 511 U.S. at 99.

[26] See, e.g., Healy v. Beer Inst., 491 U.S. 324, 332 (1989); Am. Bev. Ass'n v. Snyder, 735 F.3d 362, 373 (6th Cir. 2013).

[27] Healy, 491 U.S. at 337 n.14; Brown-Forman Distillers Corp., 476 U.S. at 582.

[28] Granholm, 544 U.S. at 489 (quoting New Energy Co. of Ind. v. Limbach, 489 U.S. 269, 278 (1988)).

Commerce Clause challenges have cropped up in subjects as varied as fish, trains, and trucks. True to our Tennessee roots, this may all sound like a country song. Turning to two examples of facially discriminatory laws, consider bait.

In *Maine v. Taylor*, the Court considered a regulation from Maine that prohibited the import of out-of-state bait fish. Finding the regulation facially discriminatory, the Court nonetheless ruled the measure constitutional. Because the regulation saved Maine bait fish from out-of-state parasites, the Court determined that the law served a legitimate local purpose that could not be achieved with a nondiscriminatory alternative. The Court fished around further in *Hughes v. Oklahoma*. *Hughes* concerned an Oklahoma law that banned out-of-state buyers from purchasing Oklahoma minnows. The local purpose was allegedly to address waning minnow stock. Since this goal could be achieved by a nondiscriminatory alternative, specifically, limiting the sale of live minnows to all, the Court found the measure unconstitutional. In both instances, the Court required a high level of justification to expressly burden interstate trade.

For the plaintiff who brings an extraterritorial challenge, the question is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the state."[29] The Commerce Clause generally "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another."[30] A state cannot, for example, force "an out-of-state merchant to seek regulatory approval in one state before undertaking a transaction in another."[31] An extraterritoriality analysis requires a court to consider not only the consequences of the statute itself, but "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[32]

[29] Healy, 491 U.S. at 336 (citing Brown-Forman Distillers Corp., 476 U.S. at 579).

[30] *Id.* at 337.

[31] Int'l Dairy Foods, Ass'n v. Boggs, 622 F.3d 628, 645 (6th Cir. 2010) (quoting Healy, 491 U.S. at 337)).

[32] Healy, 491 U.S. at 336.

Extraterritoriality cases make up a slender portion of the Commerce Clause jurisprudence, but they are on the rise in the internet age.[33] As states increasingly try to regulate perceived problems online, extraterritoriality challenges are apt to increase as well. Given the borderless nature of the internet, any effort to regulate is doomed to "project its regulation" into other states and "directly regulate commerce therein."[34] The Supreme Court may one day need to weigh in on this issue separately, but states that wish to regulate online businesses would do well to carefully tailor those laws to remain in-state.

Laws that fall under the first slot of dormant Commerce Clause challenges (facially discriminatory and extraterritorial) are, as pointed out above, virtually per se invalid. It should be noted, however, that *taxation* and *regulation* of interstate commerce are two different things.[35] The compensatory tax doctrine allows even facially discriminatory laws to survive in the realm of taxation, so long as they are designed only to make interstate commerce bear a burden already born by intrastate commerce.[36] This is, however, different from the *regulation* of interstate commerce. Under a recognized line of cases, states may not require an out-of-state party engaging in

[33] See, e.g., Am. Booksellers Found. v. Dean, 342 F.3d 96, 104 (2d Cir. 2003); ACLU v. Johnson, 194 F.3d 1149, 1158 (10th Cir. 1999); Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 958 (N.D. Cal. 2006); Publius v. Boyer-Vine, 237 F. Supp. 3d 997 (E.D. Cal. 2017); Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 183–84 (S.D.N.Y. 1997); Cyberspace Communs., Inc. v. Engler, 55 F. Supp. 2d 737, 748 (E.D. Mich. 1999); Backpage.com, LLC. v. Cooper, 939 F. Supp. 2d 805, 836–37 (M.D. Tenn. 2013); Backpage.com, LLC. v. McKenna, 881 F. Supp. 2d 1262 (W.D. Wash. 2012).

[34] It is an open question whether state regulations of the internet would always violate the Commerce Clause, given its fundamentally interstate character. The lower courts are all over the map on this question. Compare the cases above with Ford Motor Co. v. Tex. Dep't of Transp., 264 F.3d 493 (5th Cir. 2001); Am. Booksellers Found. for Free Expression v. Strickland, 601 F.3d 622, 628 (6th Cir. 2010); Beyond Sys. v. Keynetics, Inc., 422 F. Supp. 2d 523 (D. Md. 2006); Washington v. Heckel, 24 P.3d 404 (Wash. 2001) (upholding state anti-spam law limited to computers located in Washington or to an email address held by a Washington resident).

[35] See, e.g., Sam Francis Found. v. Christies, Inc., 784 F.3d 1320, 1324 (9th Cir. 2015) (recognizing the distinction).

[36] Henneford v. Silas Mason Co., 300 U.S. 577, 584 (1937); Fulton Corp. v. Faulkner, 516 U.S. 325, 331–32 (1996); Evco v. Jones, 409 U.S. 91, 93 (1972); Dep't of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252, 254 (1941).

national transactions to qualify to do business in the state absent evidence that the party has sufficiently localized.[37]

Returning to subjects for country songs, the prominent Supreme Court cases in this area examine state efforts to regulate trains and trucks. In *Southern Pacific Co. v. Arizona*, the Court held that an Arizona law that limited the length of train cars was unconstitutional. It placed too high a burden on interstate commerce.[38] There was no evidence that it would actually lead to increased safety. With that ratio of burden-to-benefit, the Court had no problem striking the law as unconstitutional. In *Bibb v. Navajo Freight Lines*, the Court held that an Illinois law requiring trucks and trailers on state highways to have a specific type of mud flap would unduly and unreasonably burden interstate commerce.[39] The Court ruled that the asserted safety benefit of the mud flap was "inconclusive," while the burden was "clear" and "heavy." The constitutional concern overrode the Court's stated great deference to the state in providing safety regulation for vehicles.

Finally, when a facially neutral law has the effect of actually discriminating against out-of-state business, the Court reverts back to the level of scrutiny it applies to facially discriminatory measures. The burden falls back on the state to justify the local benefits of the law and the unavailability of other alternatives. In *Hunt v. Washington State Apple Advertising Co.*, the Court considered a North Carolina law that required all apples shipped into the state to display only the USDA apple grade.[40] While facially neutral, the law discriminated

[37] See, e.g., Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 292 (1921); Shafer v. Farmers' Grain Co., 268 U.S. 189, 198–99 (1925); Hood & Sons v. Du Mond, 336 U.S. 525, 539 (1949) (license); Allenberg Cotton Co. v. Pittman, 419 U.S. 20, 31–32 (1974); Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888 (1988); Johnson Creative Arts v. Wool Masters, 743 F. 2d 947, 954 (1st Cir. 1984); Ford Motor Co. v. Chroma Graphics, Inc., 678 F. Supp. 169 (E.D. Mich. 1987). If the firm localizes (say, by installing an office with staff), they can require a qualification to do business. Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944). But when an out-of-state business "enters the State to contribute to or to conclude a unitary interstate transaction," the state may not regulate without violating the Commerce Clause. Allenberg Cotton Co., 419 U.S. at 32–33 (quoting Union Brokerage Co., 322 U.S. at 211). Complicating this already-complicated doctrine even further, some lower courts have wondered aloud whether *Allenberg Cotton Co.* is a third form of a per se dormant Commerce Clause violation, or how it can be reconciled with *Pike*. See, e.g., BlueHippo Funding, LLC v. McGraw, 609 F. Supp. 2d 576, 591 (S.D. W. Va. 2009).

[38] S. Pacific Co. v. Arizona, 249 U.S. 472, 476–78 (1919).

[39] Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

[40] Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977).

against out-of-state interests because it had the effect of burdening Washington state apple companies. And because the law could achieve the goal of protecting citizens from confusion over the quality of apples through other means, the Court ultimately ruled the measure unconstitutional.

For less obviously discriminatory laws that incidentally burden interstate commerce, the Court uses the *Pike* balancing test. But this test is more deferential and would not be used on something that facially discriminates, such as Tennessee's durational requirement.

The dormant Commerce Clause has its critics who fault it for being constitutionally atextual. At least one active justice—Justice Clarence Thomas—numbers among them. Could other constitutional provisions serve as an alternative way to invalidate the durational requirement? Justice Thomas has suggested the Import-Export Clause[41] or the Privileges or Immunities Clause of the Fourteenth Amendment.[42] How new justice Brett Kavanaugh felt about the dormant Commerce Clause, or whether Justice Neil Gorsuch was receptive to one of the other alternatives, was anyone's guess.

For his part, Justice Gorsuch has demonstrated a willingness to accept a Privileges or Immunities claim as an alternate basis for incorporating constitutional rights against the states.[43] No doubt with an eye to at least Justices Thomas and Gorsuch, who are otherwise receptive to limited-government claims, the Ketchums thus also contended that the durational requirement violated the Privileges or Immunities Clause.

That clause provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In contrast to the Privileges *and* Immunities Clause found in Article IV (and which was raised by Total Wine at the district court level) which protects the privileges and immunities of state citizenship from interference by other states, the Privileges *or* Immunities Clause protects privileges and immunities of national citizenship from interference by other states. Simply stated, Article IV

[41] Camps New Found/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 624–36 (1997) (Thomas, J., dissenting).

[42] Saenz v. Roe, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting).

[43] Timbs v. Indiana, 139 S. Ct. 682, 691–92 (2019) (Gorsuch, J., concurring) (regarding the Eighth Amendment's Excessive Fines Clause, see Brianne J. Gorod & Brian R. Frazelle, "*Timbs v. Indiana*: Mere Constitutional Housekeeping or the Timely Revival of a Critical Safeguard," in this volume).

(Privileges and Immunities) protects citizens of other states from the actions of a state in which they do not reside, and the Fourteenth Amendment (Privileges or Immunities) protects citizens from their own state. What precisely those privileges or immunities consist of has been a frequent topic of controversy.

Not long after the enactment of the Fourteenth Amendment, the Court largely put the Privileges or Immunities Clause out to pasture in its seminal decision in the *Slaughter-House Cases*.[44] Yet perhaps the durational requirement could crack the doctrine open. Within the majority and dissent in the *Slaughter-House Cases,* the justices signaled agreement that one of the rights protected by the clause is the right of newly arrived residents of one state to be treated equally to longer-term residents. The decision squarely held that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State."[45] And in *Saenz v. Roe*, the Court struck down a one-year durational residency requirement enacted by California for the receipt of full welfare benefits on Privileges or Immunities grounds. The right of a newly arrived resident to be treated equally in a new state, according to the Court "is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States."[46]

III. A Primer on the Twenty-first Amendment

The durational requirement takes the most basic dormant Commerce Clause principle—that courts will closely and with deep skepticism examine state laws that overtly favor in-state interests over out-of-state interests—and crashes it straight into Section 2 of the Twenty-first Amendment, which expressly recognizes state authority to regulate alcohol.

[44] The Court held that the Privileges or Immunities Clause prohibits states from inhibiting the privileges or immunities possessed by virtue of national citizenship, which does not include a generalized right to economic liberty. Slaughter-House Cases, 83 U.S 36, 79–80 (1872) (listing privileges or immunities: the right to come to the seat of government to conduct business, seek its protection, share its officers, free access to the seaports, peaceably assemble and petition for redress, habeas corpus, the rights secured by treaties with foreign nations, etc.).

[45] *Id*. at 80.

[46] Saenz, 526 U.S at 508.

Alcohol regulation is just different. From a constitutional perspective, we only have the liberty to consume alcohol because of the Twenty-first Amendment, which erased the Eighteenth.[47] The Eighteenth Amendment was enacted in 1919, just after World War I, amid a wave of Progressive fervor that animated a series of constitutional amendments. Prohibitionists were a diverse ideological coalition made up of "racists, progressives, suffragists, populists (whose ranks included a small socialist auxiliary), and nativists."[48] Each of these unlikely allies had a different reason for supporting Prohibition, but "used the Prohibition impulse to advance ideologies and causes that had little to do with it."[49]

The speed with which Prohibition blazed through Congress is staggering (sobering?), but it was in a prime spot to succeed. Prohibition tickled many of the funny bones of the time. For progressive adherents to the rising fashionable science of eugenics, the way forward for improvement of the race lay with Prohibition.[50] They found common cause with moralists who hoped to forever rinse away the stain of alcohol. When the day of Prohibition finally arrived, evangelist Billy Sunday told a congregation of 10,000 that "the reign of tears is over." Historian Andrew Sinclair perfectly describes their eschatological vision: "With hope and sincerity, the prohibitionists looked forward to a world free from alcohol, and by the magic panacea, free also from want and crime and sin, a sort of millennial Kansas afloat on a nirvana of pure water."[51]

The suffragists had reasons of their own to believe that Prohibition would lead to the betterment of American women:

> A drunken husband and father was sufficient cause for pain, but many rural and small-town women also had to endure the associated ravages born of the early saloon: the wallet emptied into a bottle; the job lost or the farmwork left undone; and, most pitilessly, a scourge that would later

[47] See generally, John Kobler, Ardent Spirits: The Rise and Fall of Prohibition (1993 ed.); Andrew Sinclair, Prohibition: The Era of Excess (1962); Daniel Okrent, Last Call: The Rise and Fall of Prohibition (2010); Edward Behr, Prohibition: Thirteen Years that Changed America (1996).

[48] Okrent, *supra* note 47, at 42.

[49] *Id.*

[50] Sinclair, *supra* note 47, at 4.

[51] *Id.*

> in the century be identified by physicians as "syphilis of the innocent"—venereal disease contracted by the wives of drink-sodden husbands who had found something more than liquor lurking in saloons.[52]

Prohibition also spoke to rural anxieties over packed urban areas, brimming with vertically packed tenements and full of beer-swilling immigrants gathering in saloons.[53]

American entry into World War I proved to be the rocket fuel that propelled Prohibition forward. Amid the emotion attending the buildup to war, it was easy to bill prohibition as a wartime food-preservation measure. The prohibitionists were aided by the fact that many of these immigrants were Germans at a time when anti-German sentiments were cresting, and German-American associations and breweries were also actively involved in counter-lobbying. The war supplied a convenient villain for the prohibitionists in the form of the legions of German-Americans with supposedly conflicted loyalties "whose names were wreathed in the scent of malt and hops: Schmidt, Ruper, Pabst, and of course, Busch," who ran well-known breweries. [54] The attitude of the British prime minster embodied the sentiment of the time: "We have three foes—Germany, Austria and drink—and the greatest of these is drink!" A politician named John Strange felt comfortable telling the paper—in Milwaukee, no less—that out of all Germans, "the worst . . . the most treacherous, the most menacing, are Pabst, Schlitz, Blatz, and Miller."[55]

Prohibition had more than just war fever in its favor. The cause had been advancing for decades at the grassroots level. It had everything a cause needs to enact a profound change: organization, money, and purpose. Perhaps most of all, its supporters had the smell of recent success in their nostrils. Some form of prohibition had already been achieved in many states, but especially in rural areas.[56] By 1917, the champions of Prohibition were primed for success while everyone else was focused on the war.

[52] Okrent, *supra* note 47, at 16.

[53] Behr, *supra* note 47, at 47–49, 51, 63, 64; Okrent, *supra* note 47, at 26, 85, 102–03; Kobler, *supra* note 47, at 206.

[54] Okrent, *supra* note 47, at 85, 87.

[55] Kobler, *supra* note 47, at 211; see also Okrent, *supra* note 47, at 100, 170.

[56] Sinclair, *supra* note 47, at 4; Kobler, *supra* note 47, at 206, 217.

But whatever consensus existed at the time, it did not resemble what resulted under Prohibition, and the rapidly expanding urban areas never shared in it in the first place. Section 2 of the Eighteenth Amendment provided that the states and the federal government had "concurrent power" to enforce the amendment, but that quickly proved illusory. In 1919, the Volstead Act overrode all previous dry legislation in the states and declared an intoxicant anything with an alcohol content of .05 or higher.[57] This swept far too broadly. The sort of prohibition enactments that existed before the Eighteenth Amendment took a great variety of forms and did not address individual consumption. Twenty-three states had some type of prohibition, but "very few were as 'bone dry' as the Eighteenth Amendment."[58] Indeed, the prohibitionists had aimed to stop the liquor trade but not to outlaw drinking entirely. "We do not say that a man shall not drink," said Rep. Richmond Hobson, who introduced what became the Eighteenth Amendment in the House. Then, in 1920, in the *National Prohibition Cases*, the Supreme Court ruled that the Supremacy Clause rendered any state legislation that conflicted with federal law, including the constraints of the Volstead Act, preempted.[59] The states which had preceded the federal government in enacting Prohibition ceded enforcement to a woefully inadequate federal government.[60] Prohibition quickly reached a point at which it no longer represented the national will and became unenforceable.

As a consequence of Prohibition's failures, the Twenty-first Amendment, which repealed Prohibition, was particularly solicitous of state-enforcement authority. The Twenty-first Amendment repealed the Eighteenth Amendment in Section 1 and ended nationwide Prohibition, but, in Section 2, it gave control back to the states to regulate alcohol. It provides, "transportation or importation of alcohol into any State . . . for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, shall be prohibited" (emphasis added).

What exactly does that mean? One reading would have it mean that states can enact *any* law and claim it is constitutionally sanctioned, but that reading would produce unacceptable outcomes.

[57] Behr, *supra* note 47, at 78; Kobler, *supra* note 47, at 217.

[58] Okrent, *supra* note 47, at 53, 92, 94.

[59] National Prohibition Cases, 253 U.S. 350, 387 (1920).

[60] Behr, *supra* note 47, at 166.

No one would accept that a race-based liquor law would be constitutional. Clearly the states have constitutional authority to control the transportation and importation of alcohol. But how does this constitutional provision interact with other constitutional limits placed on the state, including the prohibition on state-protectionist measures?

The absolutist reading of Section 2 predominated immediately following the ratification of the Twenty-first Amendment.[61] Across the board, the courts largely viewed alcohol as the constitutional exception, enabling states to do all sorts of things that would otherwise be unconstitutional. This notion would not endure. In *Craig v. Boren*, the Court rejected the notion that the Twenty-first Amendment authorized the states to do something in the realm of alcohol it could not do anywhere else.[62] *Craig* was a challenge to an Oklahoma law that established different drinking ages for men and women—men had to be 21 to drink 3.2 percent beer, but women could drink it at 18. It was argued that Section 2 of the Twenty-first Amendment could save the law, which, while seeming absurd today, was actually an open question. The Court definitively held that there is not "sufficient 'strength' in the [Twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause."[63] But discriminatory drinking ages do not concern importation of alcohol into a state, which the Court said was a "regulatory area where the State's authority under the Twenty-first Amendment is transparently clear."[64] That raises the obvious question: what about the Commerce Clause?

This basic question has been before the Court several times. It is clear that states do not have unlimited power over importation and transportation, but they do have powers over alcohol that they would not have for any other product. Where the line is drawn is anything but well-established.

[61] Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d at 614 (quoting Granholm, 544 U.S. at 522).

[62] Craig, 429 U.S. at 209 ("We thus hold that the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case.").

[63] *Id.* at 207.

[64] *Id.*

The Court's first pass on the Twenty-first Amendment gave the states a near-total exemption from the Commerce Clause.[65] Starting in the 1960s, the Court began to beat back that notion.[66] The Court outright held that liquor was not exempt from the Commerce Clause in the 1964 case, *Hostetter v. Idlewild Bon Voyage Liquor Corp.* Yet it was not until the 1984 case of *Capital Cities Cable Inc. v. Crisp* that the Court began to put real parameters on the principle.[67] There, the Court laid out a balancing test: are the state's interests in regulations so "closely related to the powers reserved by the Amendment that the regulation may prevail, even though its requirements directly conflict with express federal policy"?[68] In *Bacchus Imports, Ltd. v. Dias*, decided the same year as *Crisp*, the Court laid out the seminal principle that protectionism tested the Court's indulgence of a state's regulation of alcohol.[69] The Court struck down a preferential tax for certain local Hawaiian liquors, finding, "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."[70] At that time, this was the Court's clearest articulation of the interplay between the Commerce Clause and the Twenty-first Amendment, and it hinted at a broader lesson.

Officially, the Twenty-first Amendment was no longer a trump card. The Court observed that it was "by now clear" that alcoholic beverages were not "entirely removed from the ambit of the Commerce Clause" because of the Twenty-first Amendment.[71] The notion that the end of Prohibition "somehow operated to 'repeal' the Commerce Clause" when it came to alcohol was described by the Court as "an absurd simplification."[72] Both the Commerce Clause and the Twenty-first Amendment were constituent parts of the Constitution

[65] State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939).

[66] See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (Commerce Clause); Dep't of Revenue v. James B. Beam Co., 377 U.S. 341 (1964) (Import-Export Clause); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (Due Process Clause).

[67] Capital Cities Cable Inc. v. Crisp, 467 U.S. 691 (1984).

[68] *Id.* at 714.

[69] Bacchus Imps., LTD v. Dias, 468 U.S. 263, 275–76 (1984).

[70] *Id.* at 276.

[71] *Id.* at 275.

[72] *Id.* (quoting Hostetter, 377 U.S. at 331–32).

and "must be considered in light of the other and in the context of the issues and interests at stake in any concrete case."[73]

The Court instead introduced a balancing test. For state laws that are "mere economic protectionism," the courts must evaluate "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[74] Because in *Bacchus*, the challenged regulation was not designed to promote temperance or any other purpose of the Twenty-first Amendment, but was instead designed to promote a local industry (pineapple wine and okolehao), the Court ruled that the measure unconstitutionally burdened interstate commerce.

In *Granholm v. Heald*, the Court reiterated the core principle that the Twenty-first Amendment provides no exemption from the Commerce Clause.[75] In *Granholm*, the Court struck down a Michigan law that banned the direct sale of out-of-state wine to consumers while allowing in-state sales. The Supreme Court stated that "state policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."[76]

This latter statement comes to full boil in *Tennessee Wine*. Tennessee's durational requirement satisfies a literal read of this statement. Liquor produced out-of-state is treated identically as liquor produced in-state. The durational requirement affects only who can sell wine and liquor at the retail level. Even if it patently discriminates in favor of Tennesseans, it does so only in the realm of *retailers*; it does not discriminate in favor of Tennessee *producers* or a Tennessee *product*. The Ketchums and Total Wine brought a whole other tier of the three-tier system before the Court. But the blatant discrimination in favor of Tennesseans was sure to make the law suspicious.

Larger issues about the regulation of alcohol, in particular the three-tier system, cast a large shadow over the issues here. And as the courts were to engage with the Tennessee durational requirement, they were apt to peer down the road, concerned about the larger implications of their rulings.

[73] *Id.* at 275.

[74] *Id.* at 275–76.

[75] Granholm, 544 U.S at 489.

[76] *Id.* at 463.

The core lesson to be learned from Section 2 of the Twenty-first Amendment seems to be that the regulation of alcohol is constitutionally different because Section 2 makes it constitutionally different. How far does that extend? All that could be said with certainty going into *Tennessee Wine* is that the Twenty-first Amendment is not a total pass on the Commerce Clause, but that states have special authority over alcohol under Section 2, which makes the regulation of alcohol different from the regulation of apples—especially at the retail level inside a state's borders. So how does Tennessee's durational requirement square with those principles?

IV. Procedural Background

The Ketchums and Total Wine carried the day in the lower courts. In the Middle District of Tennessee, District Judge Kevin Sharp held that the durational requirements were unconstitutional under the dormant Commerce Clause, and the Sixth Circuit affirmed.[77] After all, the Sixth Circuit, which includes the Middle District of Tennessee, had already struck a two-year residency requirement for a license to operate a winery.[78]

The Tennessee Wine and Spirits Retailers Association claimed the same logic did not extend past producers because Section 2 afforded states wide latitude to regulate the distribution of alcoholic beverages within their borders. The association also pointed out that several districts had agreed with its interpretation, limiting the reach to out-of-state products.[79] But Judge Sharp found the durational requirement facially discriminatory in violation of the dormant Commerce Clause. Relying on a Fifth Circuit case, *Cooper v. Texas Alcoholic Beverage Commission*, he ruled that the Commerce Clause limits state alcohol regulations differently for each tier in the three-tier system.[80] For producers, the Commerce Clause exerts greater limitations. For retailers and wholesalers, the limitations are less, but even those tiers are not immunized from Commerce

[77] Tenn. Wine & Spirits Retailers Ass'n, 259 F. Supp. 3d at 796–98; Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d at 623–26.

[78] Jelovsek v. Bredesen, 545 F.3d 431 (6th Cir. 2008).

[79] Arnold's Wines, Inc. v. Boyle, 571 F.3d 185 (2d Cir. 2009); S. Wine & Spirits of America, Inc., v. Division of Alcohol & Tobacco Control, 731 F.3d 799 (8th Cir. 2013).

[80] Cooper v. Tex. Alcoholic Beverage Comm'n, 820 F.3d 730 (5th Cir. 2016).

Clause scrutiny. *Granholm* affirmed that Commerce Clause principles apply to the treatment of people and things and not just liquor producers and products. Only in the narrowest of circumstances would state laws mandating "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter," be valid under the Commerce Clause.[81]

Judge Sharp was at a loss to come up with a reason why a durational requirement served a state's interest in regulating alcohol. Unlike a requirement that a retailer or wholesaler of alcohol products be physically present, an essential feature in a three-tier system, durational requirements "are not inherent to a legitimate three-tier system."[82] In the absence of a showing that no reasonable, nondiscriminatory alternative existed, the district court struck down the law.

The Sixth Circuit affirmed that ruling in a 2-1 opinion. It agreed that the Twenty-first Amendment did not immunize Tennessee's durational requirement. A flagrantly protectionist state law is not given the same deference that the courts ordinarily accord to combat "the perceived evils of an unrestricted traffic in liquor."[83] The Sixth Circuit asked if the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policy. Agreeing with the Fifth Circuit, the court determined that state alcohol laws are not immune from Commerce Clause analysis simply because they are part of the three-tier system. The Sixth Circuit agreed that a physical presence requirement might be essential to a three-tier system, but it determined that three-tier system could operate perfectly well without durational requirements: "Tennessee's durational-residency requirements do not relate to the flow of alcoholic beverages within the state. Instead, they regulate the flow of individuals who can and cannot engage in economic activities."[84] The court analyzed and rejected the stated rationales for the durational requirement because it

[81] Granholm, 544 U.S. at 472.

[82] Tenn. Wine & Spirits Retailers Ass'n, 259 F. Supp. 3d at 794.

[83] Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d at 615 (quoting Hostetter, 377 U.S. at 276).

[84] *Id.* at 623.

was comfortable that these goals could be pursued in a nondiscriminatory alternative manner.

Judge Jeffrey Sutton dissented.[85] He thought that the Twenty-first Amendment gave states the authority to regulate the sale of alcohol within their borders in all manner of ways. A durational requirement, like "these modest requirements," fits within a state's broad authority. Judge Sutton provided an insightful history of the Twenty-first Amendment, arguing that it was intended to give states authority to do things to alcohol it could not with other articles of commerce. Judge Sutton understood the durational requirement as the natural extension of the accepted rule that the states can require an in-state presence for retailers or wholesalers. If they can do that, they can "define the requisite degree of 'in-state' presence." Retailers are the ones closest to the interests involved in the tight regulation of alcohol, such as drunk driving, domestic abuse, and underage drinking. The durational requirement, therefore, "make[s] sense," by ensuring that retailers "will be knowledgeable about the community's needs and committed to its welfare."[86]

In presenting their case to the Supreme Court, the Ketchums and Total Wine argued that Tennessee's durational requirements were an unconstitutional burden on interstate commerce. The primary issue involved the dormant Commerce Clause. They argued that the Twenty-first Amendment may give the states a high degree of regulatory autonomy, allowing even a total prohibition on importation altogether for teetotaling states that wish to remain dry. But Section 2 does not allow states to so baldly discriminate in favor of its citizens. This, they maintained, is the very sort of economic protectionism that the Constitution was purposed to end when it turned a confederation of states into a nation. Under a straightforward application of *Granholm*, the durational residency requirements violate the dormant Commerce Clause.

But the Ketchums were also interested in raising the Privileges or Immunities Clause issue. They further argued, no doubt with an eye toward the justices skeptical of the dormant Commerce Clause as a theory, that the durational requirement violates the Privileges or Immunities Clause of the Fourteenth Amendment. That provision was

[85] *Id.* at 628–36 (Sutton, J., concurring in part and dissenting in part).

[86] *Id.* at 633.

intended to give people the right to be treated the same as any other citizen when moving to a new state. That includes the right to make a living by obtaining a license for which they were eligible but for the fact that they had not resided in Tennessee for a sufficient length of time.

V. Decision

By a 7-2 vote, the Supreme Court affirmed the Sixth Circuit, striking down the residency requirement as violating the dormant Commerce Clause, notwithstanding the Twenty-first Amendment.[87] In a nutshell, the Court ruled that Section 2 only allowed states to enact measures that were legitimate exercises of their inherent police powers. In-state protectionism was not a legitimate exercise because it did not have a real or substantial tendency to promote the public's health, safety, or welfare. Thus, Section 2 provided no basis to treat retailers of alcohol differently from any other product, and the durational requirement was an impermissible burden on interstate commerce without an adequate justification.

Aside from the core holding, the Court issued its most conclusive renunciation of a broad reading of Section 2 that would generally shield state regulation of alcohol from other constitutional considerations, including the Commerce Clause.[88] The Court also tore down the idea that *Granholm* was limited to producers and products, making its analysis applicable across the three tiers and using reasoning that may have broader implications for laws under the umbrella of the three-tier system.[89] The Court did not seem hesitant to reaffirm the dormant Commerce Clause doctrine in general.[90] And despite a skeptical note about the dormant Commerce Clause, the dissent differed over the meaning of the text of Section 2, leaving the Privileges or Immunities debate for another day.[91]

The breakdown in the two opinions came down to fundamental disagreement over the history of Congress's view of interstate regulation of alcohol before the Twenty-first Amendment and what was

[87] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2474–76.

[88] *Id.* at 2462.

[89] *Id.* at 2471.

[90] *Id.* at 2461 ("In light of this history and our established case law, we reiterate that the Commerce Clause by its own force restricts state protectionism.").

[91] *Id.* at 2477 (Gorsuch, J., dissenting, calling the doctrine "a peculiar one").

intended with Section 2. The majority, authored by Justice Samuel Alito, regarded Section 2 as a restoration of the rights enjoyed by the states to regulate alcohol before the Eighteenth Amendment. After a rigorous historical treatment, the Court concluded that states were only allowed to enact and enforce regulations that promoted public health and safety—applying those rules equally to all alcohol businesses (or would-be businesses)—not in-state protectionism.

The Court began by reaffirming that the regulation of alcohol is not immunized from the other portions of the Constitution.[92] Section 2 restored state authority to regulate alcohol to its pre-Eighteenth Amendment status. So what was that status? The Court looked to history, which "has taught us that the thrust of § 2 is to 'constitutionaliz[e]' the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment."[93]

Without question, alcohol had endured "waves of state regulation."[94] The first wave occurred in response to the country's early years, a "time of notoriously hard drinking."[95] Sunday closing laws and licensing requirements followed. The Court accepted these laws, but no particular theory carried the day and "the general status of dormant Commerce Clause claims was left uncertain."[96]

Next came the period following the Civil War. A wave of saloons and attendant social problems prompted fresh alcohol regulations, including total prohibition enacted at the state level. The three-tier system emerged during this period to counter what came to be known as the "tied-house" system, in which an alcohol producer would set up saloon keepers in exchange for exclusively selling that producer's wares. This incentivized saloon keepers to encourage "irresponsible drinking."[97] The three-tier system was a way of creating inefficiencies in the consumption of alcohol by disrupting the incentives created under an integrated "tied-house" system.

[92] *Id.* at 2462 ("we have held that § 2 must be viewed as one part of a unified constitutional scheme").

[93] *Id.* at 2463 (quoting Craig, 429 U.S. at 206).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at n.7.

During this period, the Court heard and rejected several constitutional challenges to state enactments and began to defer to states in the regulation of alcohol. In an observation that was later to prove determinative in this case, the Court emphasized that, under this line of cases, the Court had always insisted the law in question have a "real and substantial relation" to the promotion of public health and safety, and that "mere pretences [sic]" would not suffice.[98]

Furthermore, the Court's dormant Commerce Clause cases during this period needed to be contextualized because Congress was to fashion its legislation in response. An understanding of this dynamic proved to be critical to the Court's understanding of Section 2's limitations.

By the late 19th century, the Court's Commerce Clause jurisprudence had matured to a point at which the consensus view was that states could not discriminate against the citizens and products of other states, including alcohol.[99] States retained the authority to regulate alcohol under their police powers, but the Court continued to impose meaningful limits on a state's exercise of its police powers. In *Mugler v. Kansas*, the Court stressed that any regulation, even an alcohol regulation, needed to have a "bona fide" relation to protecting the public.[100] Nor was the Court content to ignore facially neutral laws when they placed an impermissible burden on interstate commerce.

Where the boozy dance between Congress and the Court started to become awkward relates to what became known as the "original package doctrine."[101] For the Court, the original package doctrine set the "outer limits" of Congress's ability to regulate interstate commerce. Under the original package doctrine, states were prohibited from regulating goods shipped in interstate commerce while they were still in their original package because they had yet to be "comingled with the mass of domestic property subject to state jurisdiction."[102]

[98] *Id.* at 2464 (quoting Mugler v. Kansas, 123 U.S. 623, 661 (1887)).

[99] *Id.* (citing Walling v. Michigan, 116 U.S. 446, 460 (1886)).

[100] *Id.* (quoting Mugler, 123 U.S. at 661).

[101] *Id.* (quoting Granholm, 544 U.S. at 477).

[102] *Id.* at 2465.

This created a real difficulty for dry states because it essentially established an end run around Prohibition. States that made a democratic choice to be alcohol-free saw that decision hampered if they could not inhibit the importation of out-of-state alcohol. The perverse effect, the Court recognized, was to "confer[] favored status on out-of-state alcohol, and that hamstrung the dry States' efforts to enforce local prohibition laws."[103]

Congress passed two laws to address this anomaly: the Wilson Act and the Webb-Kenyon Act. Both the majority and dissent in *Tennessee Wine* agreed that Section 2's language was modeled on Webb-Kenyon, but they fundamentally differed on what that language meant. First was the Wilson Act of 1890. To address the dormant Commerce Clause, Congress proposed to directly involve itself in the interstate commerce of alcohol. The Wilson Act left it to each state to determine whether to admit alcohol. The critical provision specified that alcohol "transported into any State or Territory" was subject "upon arrival" to the same restrictions imposed by the state "in the exercise of its police powers" on alcohol produced in the state. The Wilson Act, therefore, attempted to equalize the favoritism shown toward out-of-state alcohol under the original package doctrine.

The Wilson Act failed to alleviate the problem faced by dry states. In two cases, *Rhodes v. Iowa* and *Vance v. W.A. Vandercook Co.*, the Court construed the Wilson Act's reference to the "arrival" of alcohol to mean delivery to the *consignee*, not arrival within the state's borders.[104] Thus, the dry states continued to be plagued by the problem that the Wilson Act was supposed to fix. With states still helpless to stem the influx of out-of-state alcohol, Congress enacted the Webb-Kenyon Act.

Passed in 1913, Webb-Kenyon aimed to give the states more control to regulate the importation of alcohol. The law provided that the shipment of alcohol into a state, in the original package or otherwise, "in violation of such State," was prohibited. The Court observed the odd way in which Webb-Kenyon went about this enactment. Instead of directly conferring a power on the states—feared by some

[103] *Id.*

[104] Rhodes v. Iowa, 170 U.S. 412 (1898); Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898).

at the time as a potential unconstitutional delegation of Congress's legislative power over interstate commerce—Webb-Kenyon instead adopted a negative: prohibiting conduct that violated state law. However odd the approach was, Webb-Kenyon's language was the model for Section 2.

But Webb-Kenyon fell short as well. Unlike the Wilson Act, which directly mandated equality between in-state and out-of-state alcohol, Webb-Kenyon contained no explicit mandate for the reason explained above. And unlike the Wilson Act's reference to laws "enacted in the exercise of its police powers," Webb-Kenyon applied to "any law of such state." Such a sweeping statement was bound to attract the argument that Section 2 functioned to mean that literally "any" state law, no matter how much it might burden interstate commerce, had congressional imprimatur. But that argument was put away in *Granholm* when the Court rejected the notion that Webb-Kenyon acted to authorize even protectionist laws.

The *Tennessee Wine* decision built on *Granholm*'s foundation.[105] Before Webb-Kenyon, the Court had already limited the validity of state alcohol regulations. Laws that were pure protectionism would not avoid scrutiny merely because they were "disguised as exercises of the police powers."[106] Webb-Kenyon, by regulating interstate commerce in alcohol, could address any dormant Commerce Clause problems, but did not and could not override either (1) the Constitution, or (2) "the traditional understanding regarding the bounds of the States' inherent police powers."[107] Turning to the Wilson Act and Webb-Kenyon's references to state laws, the Court determined that the Wilson Act "merely restated" that state laws must be valid under the state's police powers, and that "consequently, there was no need to include such language in Webb-Kenyon."[108]

This took the Court to the repeal of Prohibition and the decision's core reasoning: Section 2 only "constitutionalized the basic understanding of the extent of the States' power to regulate alcohol that prevailed before Prohibition,"[109] and the Commerce Clause "did

[105] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2464–65.

[106] *Id.* at 2467.

[107] *Id.*

[108] *Id.*

[109] *Id.* (citations omitted).

not permit the States to impose protectionist measures clothed as police-power regulations."[110] The Court's decision boiled down to this statement: "the aim of Section 2 was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes."[111] This would prove fatal for Tennessee's durational requirement.

The Court did not credit the argument that *Granholm* only limited the state's ability to discriminate against one tier of the three-tier system: producers and products. If Section 2 was to give the states exceptional authority to institute protectionist laws over alcohol, then out-of-state production and producers would have been the ones most likely targeted for exceptional regulation. They are, after all, the ones responsible for that which Section 2 directly addresses: the importation of alcohol. Section 2 does not mention retail sales at all, unlike importation, so it would be counterintuitive if states had authority under Section 2 to engage in protectionism at the retail level when they lacked such authority for producers. *Granholm* should be understood as prohibiting state discrimination against out-of-state economic interests, not just producers.

The Court also rejected the justification of the durational requirement as a fair reading of its approval of the three-tiered system. *Granholm* may have "spoke approvingly" of the model, but it would be too much to understand it as blessing "every discriminatory feature that a State may embed into its three-tiered scheme." The Court observed that some of its cases immediately following the Twenty-first Amendment may have been "overly expansive" in construing Section 2's authority, and that some state laws "can no longer be defended."[112]

The Court returned to *Mugler* as well to emphasize that states did not historically enjoy "absolute authority to police alcohol within their borders."[113] "[T]he Court's police power precedents required an examination of the actual purpose and effect of a challenged law."[114] This meant that, despite Section 2 giving regulatory authority to

[110] *Id.* at 2468.

[111] *Id.* at 2469.

[112] *Id.* at 2472.

[113] *Id.* at 2473.

[114] *Id.*

Tennessee which it would not otherwise enjoy, Tennessee could not rely on "mere speculation" or "unsupported assertions" to sustain its residency requirement. The effort to justify the residency requirement, was "implausible on its face" because the stated objectives (such as ensuring retailers are available for process in state courts, or ensuring fitness), could be achieved by other, nondiscriminatory means. The measure failed because the "predominant effect" was protectionism, not the protection of health and safety.[115]

The dissenting justices, Gorsuch and Thomas, took a different view. They saw the dormant Commerce Clause as allowing Congress to "authorize[] States to adopt laws favoring in-state residents," which is precisely what it did with Webb-Kenyon.[116] Under the Wilson Act, Congress had authorized states to regulate the importation of alcohol, which ought to have alleviated the Commerce Clause problem, but the Court "did not seem to get the message." Webb-Kenyon was an even more sweeping law intended to remove alcohol from the purview of interstate commerce considerations. The dissenters agreed that Section 2 was modeled on the Webb-Kenyon Act. They regarded the same language and history as the majority but came to an opposite conclusion. To the dissent, those who ratified the amendment wanted the states to regulate the sale of alcohol "free of judicial meddling under the dormant Commerce Clause—and there is no evidence they wanted judges to have the power to decide that state laws restricted competition 'too much.'"[117] Competition and lower prices might actually have been perceived to be vices, not virtues, when it came to alcohol. Under this interpretation, the point of Section 2 was to allow states to decide how much free trade they wanted when it came to alcohol.

The dissent signaled that it did not intend to follow the association all the way down into an absolutist reading of Section 2. In response to the hypothetical question challenged by the majority—whether a state might pass a law restricting licenses to people whose ancestors resided in the state for 200 years—the dissent agreed that the law would be unconstitutional under the Fourteenth Amendment for lacking a rational basis (interestingly, the same reasoning by

[115] *Id.* at 2474.

[116] *Id.* at 2477 (Gorsuch, J., dissenting).

[117] *Id.* at 2481.

the Court in the *Mugler* opinion favored by the majority).[118] As long as the law had a "rational relationship to a legitimate state interest," then it should stand. But no special concerns over interstate commerce should attend when the people had spoken through Section 2 of the Twenty-first Amendment and Webb-Kenyon before that.

The durational requirement could pass "easily" under the dissent's test.[119] A residency requirement was a reasonable way to achieve oversight, even if it might not have been the only way. The dissent thought there was a good reason to treat producers differently under *Granholm*. The dissent further wondered how the lower courts were supposed to determine when protectionism "predominates" and whether discouraging competition did not count as a public-health benefit. In the end, the dissent criticized the majority for imposing its own "free-trade rules for all goods and services in interstate commerce," undoing the compromise of the Twenty-first Amendment.[120]

VI. What's Left?

The obvious question resulting from the *Tennessee Wine* decision surrounds the inevitable line-drawing involved in determining "[w]here the predominant effect of a law is protectionism, not the protection of public health or safety."[121] It is safe to say that in many states the liquor lobby enjoys a high degree of influence. Until this case, all parties may have operated under the assumption that they more-or-less had a constitutional free pass, which was certainly advantageous to the liquor lobby. Undoubtedly, all too many states have alcohol laws on the books with dubious health-and-safety rationales.

But the three-tier system is now no longer the "full stop" end of the constitutional conversation. All nine justices appear to accept the conventional wisdom that the three-tier system is itself perfectly fine, but the majority expressly recognized that laws are not shielded from judicial scrutiny merely because they fall under the umbrella of the three-tier system. As long as a law is not an "essential feature of a three-tier scheme," it can face substantial judicial engagement that would require a claim made under the police

[118] *Id*. at n.7.

[119] *Id*. at 2482.

[120] *Id*. at 2484.

[121] *Id*. at 2474.

powers to be linked to an articulable and evidence-based public health and safety justification.[122] And the explicit requirement that a justification be supported by something other than "mere speculation" or "unsupported assertions"[123] will obligate states to muster evidence that a challenged regulation achieves a public health and safety objective. For many alcohol-related laws, a state may find this impossible. Factoring in that the courts are no longer confined to the products and producers tier, there may be many liquor law challenges in the offing.

Given that every stated justification failed in *Tennessee Wine*, one wonders under what scenario a protectionist alcohol law would ever prevail. Justice Gorsuch was certainly right that reducing competition in the liquor market and thereby raising prices and reducing demand now appears to be an insufficient justification under the majority's rationale. So what does Section 2 allow a state to do to alcohol that it could not do to apples? It will be an active question how much protection of in-state liquor interests states may engage in before the courts intervene.

Behind the subject matter of liquor and protectionism, the larger, abstract debate about the dormant Commerce Clause remains. Whether the Privileges or Immunities Clause of the Fourteenth Amendment prohibits protectionist laws like the durational requirement was never addressed. The dissent never mentioned it. Somewhat surprisingly, the dissent showed no real interest in discussing the dormant Commerce Clause at all. Justice Gorsuch's dissenting opinion was mostly grounded in a disagreement over the meaning of Section 2, more or less accepting the majority's premise about the limitations on state authority under the dormant Commerce Clause, then diverging from the majority's understanding of the constitutional history behind Section 2.

The looming conservative argument over alternative constitutional theories will have to wait. For its part, the dormant Commerce Clause appears alive and well, with the majority's vigorous utilization of the doctrine gaining seven votes, including Justice Kavanaugh. The Ketchums probably did not care how they won, but to the cheerleaders of a Privileges or Immunities revival, the

[122] *Id*. at 2471.

[123] *Id*. at 2473.

victory probably tasted like Texas beef barbecue: better than nothing, but not as satisfying as the real deal.[124]

The real impact of the *Tennessee Wine* decision may prove to be the portion of the decision addressing the limitations on the police powers. Once the Court concluded that Section 2 did "not confer limitless authority," the Court turned to an inquiry wherein it asked "whether the challenged requirements can be justified as a public health or safety measure or on some other legitimate non-protectionist ground."[125] The Court ruled that Section 2 only authorized the state to enact measures that were legitimate exercises of the police powers. The Court then provided strong guidance, both on what constituted a legitimate exercise of the police powers and how courts were to evaluate those claims.

According to the Court:

- The police powers were "not understood to authorize purely protectionist measures with no bona fide relation to the public health or safety."[126]
- An exercise of the police powers "must have a *'bona fide'* relation" to the public's health, morals, or safety.[127]
- "Mere pretences [sic]" could not sustain a law. Neither could "speculation," or "unsupported assertions."[128]
- A statute "purporting" to protect the public health, safety, or morals must have a "real or substantial relation to those objects."[129]
- "The Court's police-power precedents required an examination of the actual purpose and effect of a challenged law."[130]

[124] Everyone knows that real barbecue is made with pork.

[125] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2474.

[126] *Id*. at 2462 n.5.

[127] *Id*. at 2464 (emphasis original).

[128] *Id*. at 2474 (quoting Mugler, 123 U.S. at 661) (cleaned up).

[129] *Id*. at 2464.

[130] *Id*. at 2473 (quoting Mugler, 123 U.S. at 661) (cleaned up) ("It does not at all follow that every statute enacted ostensibly for the promotion of 'the public health, the public morals, or the public safety' is 'to be accepted as a legitimate exertion of the police powers of the State.'").

- The Wilson Act only shielded laws enacted under its police powers "which, as we have seen, applied only to *bona fide* health and safety measures."[131]
- States cannot adopt laws "with no demonstrable connection" to those interests.[132]

The revitalization of *Mugler* authorizes courts to meaningfully scrutinize any exercise of the police powers to ascertain whether it has an actual public health and safety rationale, as well as whether it has any real or substantial tendency to promote those goals. Relying on *Mugler*, the Court took a view of judicial scrutiny that requires an examination of the "actual purpose and effect of a challenged law."[133] The Court did exactly that in *Tennessee Wine*. They analyzed the purported justifications for the residency requirement, even ones that were facially plausible, putting them up to the light of logic and facts and disregarding them, either because they were disproven or because the Court thought Tennessee could achieve its goals by alternative means. The Court's adoption of the rational basis test as envisioned in *Mugler* is thus significant on this basis alone and has application to future rational basis cases.

As a discussion of the limits of the police powers, this analysis exists independently of Commerce Clause doctrine. The Court relied upon *Mugler*, a Fourteenth Amendment case,[134] to rule that Section 2 could not mean that states had authority to enact discriminatory regulatory requirements because states never had that authority under their police powers in the first place.[135] Instead, the Court assessed the proffered justifications, rejecting them one by one. And if the state's police powers were so limited even in the

[131] *Id*. at 2466 (emphasis added).

[132] *Id*. at 2474.

[133] *Id*. at 2473. One commentator has promoted *Mugler* as a vehicle to fix the "broken" substantive due process doctrine. Jeffrey D. Jackson, Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment, 45 U. Rich. L. Rev. 491 (2011).

[134] Mugler, 123 U.S. at 653, 665 ("[T]he legislature, under the guise of that power, cannot strike down innocent occupations and destroy private property, the destruction of which is not reasonably necessary to accomplish the needed reform.").

[135] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2473 (citing Mugler, 123 U.S. at 661) ("the Court's police-power precedents required an examination of the actual purpose and effect of a challenged law").

field of alcohol, where the states enjoy special authority to regulate the distribution of alcohol in their borders, then they are certainly at least as circumscribed when it comes to other police-powers enactments.

Tennessee Wine thus refines the analysis for what a court is supposed to do when offered a police-powers justification. It reaffirms that a state's police powers are limited to those which actually protect the public, something the courts are competent to judge. Protectionism of in-state interests alone failed to protect the public in this case. Moreover, the courts do not uncritically accept the government's proffered justifications. Instead, the courts examine those justifications to determine whether they are bona fide and whether the challenged regulation has a real or substantial tendency to promote the public health, safety, or moral well-being. The Court's logic would obtain when a law is challenged under the rational basis test; any law with no real tendency to promote public health or safety would be a law that is constitutionally irrational.[136]

The related question would be how to evaluate any kind of protectionism, even those that exist not to protect in-state residents, but a discrete industry? As it stands, a circuit split exists over this very question.[137] *Tennessee Wine* bodes ill for the pro-protectionism circuits. About the only thing on which the two dissenting justices appeared to agree was that all state laws must bear a rational

[136] The courts of Tennessee frequently conflate the question of whether a regulation has a rational basis with whether it is a legitimate exercise of the police powers. See, e.g., Estrin v. Moss, 430 S.W.2d 345, 348 (Tenn. 1968) ("If the legislation is for the beneficial interest of the public health, then it constitutes a reasonable exercise of police power. . . . The sole test of the constitutionality of any particular classification is that it must be reasonable; that is, made up on a reasonable basis.") (citing Tenn. Bd. of Dispensing Opticians v. Eyear Corp., 400 S.W.2d 734, 741 (Tenn. 1966)); see also, State Personnel Recruiting Services Bd. v. Horne, 732 S.W.2d 289, 291 (Tenn. Ct. App. 1977).

[137] Compare Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002) (protectionism of a discrete interest group is not a legitimate governmental purpose), Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("[E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate government interest."), and St. Joseph Abbey v. Castille, 712 F.3d 215, 222 (5th Cir. 2013) (mere economic protectionism of a particular industry is not a legitimate governmental purpose), with Sensational Smiles LLC, v. Mullen, 793 F.3d 281, 287 (2d Cir. 2015) ("Much of what states do is to favor certain groups over others on economic grounds. We call this politics."), and Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).

relationship to a legitimate state interest.[138] And the dissent gave no reason to think that the durational requirement would have been constitutional for anything other than alcohol.

That line of thinking, in turn, bears on the application of the rational basis test. In evaluating whether the law was a legitimate exercise of the police powers, "justified as a public health or safety measure or on some other legitimate non-protectionist ground," the Court appeared to utilize the rational basis test or something indistinguishable from it.[139] Commentators, fairly or not, commonly characterize rational basis scrutiny as having two forms: rational basis and rational basis "with bite."[140] Under rational basis with bite, the courts consider whether the actual legislative purpose is a proper one and whether the law has any meaningful tendency to promote those objectives.[141] Under the more deferential form, the courts merely ask if there is a rational justification for a purported law. It is not necessary that the government prove that the law is rational if it is supported by rational speculation.[142] Under *Tennessee Wine*, a law must have a "real and substantial" relation to an actual public health or safety goal. That looks a lot like the rational basis with bite used by the Supreme Court in *Cleburne*. And given that Section 2 is supposed to give states more regulatory authority than they ordinarily have, it is illogical to suppose that a less exacting form of judicial scrutiny would attend an evaluation of state power outside the realm of alcohol regulation.

Tennessee Wine refines the standard for evaluating the limits on the government's police powers and permissible scope of judicial scrutiny. That's a very important issue and it's currently undergoing a revitalization[143]—a pretty interesting result for a little case about good ol' Tennessee spirits.

[138] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2477–84 (Gorsuch, J., dissenting).

[139] *Id.* at 2474.

[140] See Patel v. Tex. Dep't of Licensing & Regulation, 469 S.W.3d 69, 98–99 (Tex. 2015) (Willett, J., concurring); Timothy Sandefur, Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity," 25 Geo. Mason U. C.R. L.J. 43, 45 (2013).

[141] See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985).

[142] See, e.g., FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

[143] See generally, Clark M. Neily III, Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government (2013).

Knick v. Township of Scott: Ending a Catch-22 that Barred Takings Cases from Federal Court

*Ilya Somin**

Introduction

The Supreme Court's decision in *Knick v. Township of Scott* put a long-overdue end to a badly misguided precedent that had barred most takings cases from federal court.[1] The Court reversed a 1985 ruling that created a catch-22 blocking property owners from bringing takings claims against state and local governments in federal court. *Knick* was a closely divided 5-4 decision, with the justices split along left-right ideological lines. The case was initially argued before a court of only eight justices on October 3, 2018, during the period when Justice Brett Kavanaugh was still in the midst of a contentious confirmation process. It was then reargued in January, with Kavanaugh participating (likely because the Court had been evenly divided, 4-4, after the first oral argument).[2]

* Professor of law, George Mason University. I would like to thank James Burling, Trevor Burrus, Marty Lederman, Michael Masinter, Robert Thomas, and Ernie Young for helpful suggestions and comments, and Taylor Alexander and Tierney Walls for valuable research assistance. Parts of this article adapt material from an amicus curiae brief I wrote in the *Knick* case on behalf of the Cato Institute, the National Federation of Independent Business, the Southeastern Legal Foundation, the Beacon Center of Tennessee, and the Reason Foundation. However, the views expressed in the article are solely my own, and do not necessarily reflect those of the organizations that joined the brief.

[1] Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

[2] For my analyses of the first and second oral arguments, see Ilya Somin, Thoughts on Today's Supreme Court Oral Argument in *Knick v. Township of Scott*—A Crucial Property Rights Case, Reason: Volokh Conspiracy, Oct. 3, 2018, https://reason.com/2018/10/03/thoughts-on-todays-supreme-court-oral-ar; Ilya Somin, Thoughts on the Second Oral Argument in *Knick v. Township of Scott*, Reason: Volokh Conspiracy, Jan. 16, 2019, https://reason.com/2019/01/16/thoughts-on-the-second-oral-argument-in.

The big issue at stake in *Knick* was whether the Court should overrule *Williamson County Regional Planning Commission v. Hamilton Bank*.[3] Under *Williamson County*, a property owner who contends that the government has taken his property and therefore owes "just compensation" under the Takings Clause of the Fifth Amendment[4] could not file a case in federal court until he or she first secured a "final decision" from the relevant state regulatory agency and "exhausted" all possible remedies in state court.[5] The validity of this second "exhaustion" requirement was at issue in *Knick*.

Even after both *Williamson County* requirements were met, it was *still* usually impossible to bring a federal claim because various procedural rules preclude federal courts from reviewing final decisions in cases that were initially brought in state court.[6] As Chief Justice John Roberts wrote in his majority opinion for the Court, "[t]he takings plaintiff thus finds himself in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court. The federal claim dies aborning."[7]

Part I of this article briefly describes the background of the *Knick* case and the *Williamson County* decision that the Court ended up reversing. In Part II, I explain why the Court was right to conclude that *Williamson County* created an indefensible double standard under which takings claims against state governments were effectively barred from federal court in situations where other types of constitutional claims would not be.

Part III explains why overruling *Williamson County* is justified under the Supreme Court's admittedly imprecise doctrine on overruling precedent. Under the Court's established doctrine, *Williamson County* closely fits the profile of a case ripe for overruling. Justice Elena Kagan's dissenting opinion is wrong to argue that overruling *Williamson County* also entails overruling numerous earlier precedents.[8] In reality, it requires no more than modest modifications of them, if that.

[3] 473 U.S. 172 (1985).

[4] U.S. Const. amend. V.

[5] Williamson Cty., 473 U.S. at 186–97.

[6] Knick, 139 S. Ct. at 2167.

[7] *Id.*

[8] *Id.* at 2180–87 (Kagan, J., dissenting).

Finally, Part IV assesses the potential real-world impact of the *Knick* decision. In many cases, it will make little difference whether a takings claim gets litigated in state court or federal court. In some situations, however, the right to bring a claim in federal court is a vital tool to avoid potential bias in state courts and procedural hoops that subject property owners to a prolonged ordeal before they have an opportunity to vindicate their rights. Claims that *Knick* will lead to a flood of new takings litigation are overblown. But to the extent that substantial new litigation does result, that is likely to be a feature, not a bug. It would indicate that *Williamson County* blocked numerous meritorious takings cases that might have prevailed in federal court but were doomed to likely defeat in state courts unwilling or unable to protect the constitutional rights of property owners.

I. *Williamson County* and the Origins of the *Knick* Case

The *Knick* case arose from a seemingly minor dispute over alleged centuries-old gravesites. Rose Mary Knick owns a 90-acre farm in the Township of Scott, in rural eastern Pennsylvania.[9] Members of her family have owned the land since 1970.[10] Beginning in 2008, some other area residents claimed that there are old gravesites on the Knick property and sought access to them. In December 2012, the township enacted Ordinance 12-12-20-001, which requires "[a]ll cemeteries . . . be kept open and accessible to the general public during daylight hours."[11]

In April 2013, the township's code enforcement officer entered the property and concluded that several stones on the land are actually gravestones, and therefore the land qualified as a "cemetery" under the ordinance.[12] Under the ordinance, Knick would have to pay somewhere between $300 and $600 in daily fines for each day that the public and township enforcement officials do not have daylight access to the supposed cemetery.[13]

[9] The facts recounted here are drawn from Brief for Petitioner at 3–7, Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019) (No. 17-647), https://pacificlegal.org/wp-content/uploads/pdf/knick-v-scott-township-pennsylvania/Merits-Brief-Knick.pdf.

[10] *Id.* at 4.

[11] Scott Township, Pa., Ordinance 12-12-20-001 § 5.

[12] Brief for Petitioner, *supra* note 9, at 6.

[13] *Id.* at 4–7.

Knick filed a state court case challenging the ordinance, arguing that it amounts to an uncompensated taking in violation of the Takings Clause of the Fifth Amendment. The state court dismissed the case on procedural grounds, concluding that it was not ready for adjudication until the Township proceeded with a separate civil enforcement action against Knick.[14]

Failing to secure a decision in state court, Knick filed a takings claim in federal court. Citing *Williamson County*, both the district court and the U.S. Court of Appeals for the Third Circuit dismissed the case because Knick had not succeeded in getting a final decision by a state court before filing a federal takings claim.[15] The Third Circuit noted that the ordinance was "extraordinary and constitutionally suspect," but it could not address the merits of the case because *Williamson County* tied the judges' hands.[16]

The lower courts were surely right that Knick's suit was barred by *Williamson County*. That decision prevented a takings claim against a state or local government from being heard in federal court unless the property owner had first secured a "final decision" from the relevant state regulatory agency and "exhausted" all possible remedies in state court.[17] Such exhaustion can only occur if the state court had reached a final decision on the merits.

This made it virtually impossible to bring a takings case in federal court without first going to state court. But going to state court itself made it impossible to file a case in federal court afterwards. As the Supreme Court ruled in *San Remo Hotel v. City and County of San Francisco*, a final decision in a takings case from a state court precludes relitigation of the same issue in federal court.[18] Thus, *Williamson County* created a Kafkaesque system under which going to state court was both an essential prerequisite to getting into federal court, but also an absolute bar to doing so. As Chief Justice John Roberts wrote in his majority opinion in *Knick*, "[t]he takings plaintiff

[14] Knick, 139 S. Ct. at 2168.

[15] See Knick v. Twp. of Scott, 2016 WL 4701549 at *5–*6 (M.D. Pa., Sept. 7, 2016); Knick v. Twp. of Scott, 862 F.3d 310, 314 (3d Cir. 2017), rev'd, 139 S. Ct. 2162 (2019).

[16] Knick, 862 F.3d at 314.

[17] Williamson Cty., 473 U.S. at 186–97.

[18] San Remo Hotel v. City & Cty. of San Francisco, 545 U.S. 323 (2005).

thus finds himself in a Catch-22."[19] In a 2003 decision, the Second Circuit similarly noted that "the very procedure that [*Williamson County*] require[s] [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also preclude[s] [them] from ever bringing a Fifth Amendment takings claim."[20]

To make this system even more absurd, some state and local governments defending against takings claims even exercised their right to "remove" the case to federal court (on the grounds that it raised a federal question) and then successfully moved to get the case dismissed because the property owner did not manage to first "exhaust" state court remedies, as required by *Williamson County*—a failure caused by the defendants' own decision to have the case removed.[21] In 1997, the Supreme Court ruled that it is permissible to "remove" a takings claim from state court to federal court, despite the fact that such a claim would not yet be "ripe" for federal court consideration under *Williamson County*.[22]

The standard rationale for *Williamson County* was that a takings claim cannot be ripe until the government has not only taken the property in question but failed to pay just compensation.[23] And we cannot know if it will truly refuse to pay compensation until a state court has reached a final decision holding that it is not required to do so. But, as we shall see, this theory is at odds with both the text of the Takings Clause and the way courts routinely address other constitutional rights.[24]

II. An Indefensible Catch-22

The main impact of *Knick* is putting an end to a double standard under which takings cases against state and local governments were almost completely excluded from federal court in a way that was not true

[19] Knick, 139 S. Ct. at 2167.

[20] Santini v. Conn. Hazardous Waste Mgmt. Serv., 342 F.3d 118, 130 (2d Cir. 2003).

[21] See, e.g., Warner v. City of Marathon, 718 F. App'x 834 (11th Cir. 2017) (removed takings claim dismissed under *Williamson County*); Reahard v. Lee Cty., 30 F.3d 1412 (11th Cir. 1994) (same).

[22] City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156 (1997).

[23] See Williamson Cty., 473 U.S. at 195 ("if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation").

[24] See discussion in Part II, *infra*.

of any comparable constitutional rights claims. Chief Justice Roberts highlighted the double standard in his majority opinion for the Court:

> The state-litigation requirement relegates the Takings Clause "to the status of a poor relation" among the provisions of the Bill of Rights. Plaintiffs asserting any other constitutional claim are guaranteed a federal forum under §1983 [of the Civil Rights Act of 1871], but the state-litigation requirement "hand[s] authority over federal takings claims to state courts." Fidelity to the Takings Clause and our cases construing it requires overruling *Williamson County* and restoring takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights.[25]

As one academic analysis puts it, this aspect of *Williamson County* "finds no parallel in ripeness cases from other areas of law."[26] The double standard cannot be justified by any supposedly unique aspects of the Takings Clause. The history of the Fourteenth Amendment's "incorporation" of the Bill of Rights against the states strongly suggests that the amendment was originally understood to protect property rights no less than other rights. Arguments based on ripeness and the supposedly superior local expertise of state courts could just as easily be used to justify keeping numerous other constitutional claims out of federal court. The same is true of Justice Kagan's argument, in her dissent, that allowing takings cases to be brought in federal court would lead state and local officials to be unfairly treated as "constitutional malefactors."[27] Finally, *Williamson County*'s denial of federal judicial review for a whole category of constitutional rights claims was even more sweeping than current restrictions on judicial review of criminal defendants' claims in habeas corpus cases.

In a somewhat strange amicus brief on behalf of the federal government,[28] Solicitor General Noel Francisco argued that *Williamson County* should be interpreted in a way that avoids the

[25] Knick, 139 S. Ct. at 2169 (internal citations omitted; bracket in original).

[26] Gregory M. Stein, Regulatory Takings and Ripeness in the Federal Courts, 48 Vand. L. Rev. 1, 23 (1995).

[27] Knick, 139 S. Ct. at 2187 (Kagan, J., dissenting).

[28] Brief of the United States as Amicus Curiae in Support of Vacatur and Remand, Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019) (17-647).

catch-22 by reasoning that the state exhaustion requirement only applies to cases brought under 42 U.S.C. § 1983 (the federal statute authorizing law suits for violations of constitutional rights), but not ones brought to federal court under 28 USC § 1331, the law giving federal courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[29]

This argument makes little sense, because nothing in *Williamson County* distinguishes the two types of cases. Takings law expert Robert Thomas analogized the solicitor general's argument to Star Trek producers' lame attempts to "retcon" an in-universe explanation of why Klingons' foreheads looked very different in later movies and TV series, beginning with *Star Trek: The Next Generation*, than in the original 1960s TV version (the real explanation was a bigger makeup and special-effects budget).[30]

In addition, Section 1331 only gives federal courts jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." But the whole point of *Williamson County* is that there is no action "arising under" the Takings Clause of the Fifth Amendment until the government has refused to pay compensation, and there is no sufficiently definitive refusal until the property owner has "exhausted" all possible state court remedies.[31]

Ultimately, neither the majority nor the dissenting justices in *Knick* accepted the solicitor general's "Klingon forehead" argument, and the majority opinion dispensed with what it called a "novel" theory in a brief footnote indicating that it need not even be considered.[32] I therefore proceed on the assumption that the catch-22 is indeed an element of *Williamson County* that cannot be dispensed with without overruling the state exhaustion requirement.[33]

[29] 28 U.SC. § 1331.

[30] Robert H. Thomas, *Knick* and Klingon Foreheads, Inverse Condemnation Blog, Nov. 13, 2019, https://www.inversecondemnation.com/inversecondemnation/2018/11/knick-and-klingon-foreheads-retconning-williamson-county-.html.

[31] See discussion earlier in this Part.

[32] Knick, 139 S.Ct. at 2174 n.5.

[33] For more detailed analyses of the solicitor general's argument, see Thomas, *supra* note 30, and Ilya Somin, Will Supreme Court Reargument of the *Knick* Takings Case Come Down to the Federal Government's "Klingon Forehead" Argument?, Reason: Volokh Conspiracy, Nov. 19, 2018, https://reason.com/2018/11/19/will-reargument-of-the-knick-takings-cas.

A. Text and Original Meaning

There is no good textual or originalist reason to treat Takings Clause cases against state governments any differently from other constitutional claims against states and localities brought under the Fourteenth Amendment. In relevant part, the text of the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation."[34] If the government takes private property and does not pay, that is a violation of the amendment. It does not say that an uncompensated taking only becomes a violation after state courts refuse to order compensation after the fact.

As Chief Justice Roberts put it in his majority opinion in *Knick*: "[the Clause] . . . does not say '[n]or shall private property be taken for public use, without an available procedure that will result in compensation.' If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings."[35]

In her dissent, Justice Kagan takes issue with this point, noting that "the text does not say: '[n]or shall private property be taken for public use, without advance or contemporaneous payment of just compensation, notwithstanding ordinary procedures,'" and thereby concludes that the Takings Clause does not mandate the payment of compensation at any given time.[36] But this ignores the fact that, as soon as the government takes property, we necessarily have a taking of property "without just compensation" until such time as just compensation has actually been paid.

Property rights exist in time, as well as space. It is a long-established principle of takings law that if the government takes private property for a limited period of time, it must pay just compensation during that period.[37] Under Justice Kagan's approach, there would be no vi-

[34] U.S. Const. amend. V.

[35] Knick, 139 S. Ct. at 2170.

[36] *Id.* at 2184 (Kagan, J., dissenting).

[37] See, e.g., Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (applying that rule); United States v. Petty Motor Co., 327 U.S. 372 (1946) (same); United States v. Gen. Motors Corp., 323 U.S. 373 (1945) (same). For an overview of the Court's jurisprudence on temporary takings, see Daniel L. Siegel & Robert Meltz, Temporary Takings: Settled Principles and Unresolved Questions, 11 Vt. J. Envtl. Law 479 (2010).

olation of the Takings Clause until "the property owner comes away from the government's compensatory procedure empty-handed."[38] By that standard, the government could delay a decision on whether or not it intends to pay for years—perhaps even decades—without being in violation.

The original meaning supports the conjecture derived from the text. Indeed, historical evidence indicates that protecting constitutional property rights against abuses by state governments was one of the main reasons the Bill of Rights was "incorporated" against the states in the first place.

The framers of the Fourteenth Amendment sought to apply the Bill of Rights against the states because of a long history of abusive practices by state governments, including state courts.[39] Advocates feared that southern state governments threatened the property rights of African Americans and other political minorities, including whites who had supported the Union against the Confederacy during the Civil War.[40] The right to private property was a central component of the "civil rights" that the framers of the Fourteenth Amendment sought to protect.[41] As Rep. John Bingham, a leading framer of the Fourteenth Amendment, emphasized, the Takings Clause must be applied against the states to protect "citizens of the United States, whose property, by State legislation, has been wrested from them, under confiscation."[42] Bingham was referring to both African Americans and white unionists whose property rights

[38] Knick, 139 S. Ct. at 2184 (Kagan, J., dissenting).

[39] See generally, Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (1998).

[40] *Id*. at 268–69; see also The Civil Rights Implications of Eminent Domain Abuse, Testimony before the U.S. Comm'n on Civil Rights, 5–11 (Aug. 12, 2011) (statement of Ilya Somin) (discussing the relevant history), https://www.law.gmu.edu/assets/files/faculty/Somin_USCCR-aug2011.pdf.

[41] On the centrality of property rights to 19th-century conceptions of civil rights, see, e.g., Harold Hyman & William Wiecek, Equal Justice under Law: Constitutional Development, 1835–75, 395–97 (1982) (describing the right to property as one of the main elements of civil rights as conceived in the 1860s); Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism (1991) (describing how most 19th-century jurists viewed property as a fundamental right).

[42] Quoted in Amar, The Bill of Rights, *supra* note 39, at 268. On Bingham's role as the leading framer of the Fourteenth Amendment, see Gerard N. Magliocca, American Founding Son: John Bingham and the Invention of the Fourteenth Amendment (2013).

were threatened by southern state governments that had come under the influence of ex-Confederate political forces in the aftermath of the Civil War.[43] But the concern applies more broadly than this specific case. The protection of federal constitutional rights against state governments cannot be entrusted to the exclusive control of those states' own courts.[44] Section 1983 of the Civil Rights Act of 1871, the statute the Reconstruction Congress enacted to enable people to vindicate their new constitutional rights against state governments in federal court, was intended to provide broad access to federal court for a variety of rights claims; property rights cases were in no way excepted.[45]

B. Ripeness

The standard rationale for *Williamson County*, defended in Justice Kagan's dissent in *Knick*,[46] is that a takings case is not ripe until a state court has reached a final decision upholding the government's actions because the state has not really taken property without just compensation. Chief Justice Roberts nicely rebuts that theory:

> The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner. That principle was confirmed in *Jacobs v. United States*, where we held that a property owner found to have a valid takings claim is entitled to compensation as if it had been "paid contemporaneously with the taking"—that is, the compensation must generally consist of the total value of the property when taken, plus interest from that time.[47]

The ripeness argument fails for much the same reason as Justice Kagan's textual argument, discussed earlier.[48] Chief Justice Roberts

[43] See Amar, The Bill of Rights, *supra* note 39, at 268–69.

[44] For additional discussion of this point, see Part III, *infra*.

[45] For a recent summary of the relevant literature and evidence, see Michael M. Berger, What's Federalism Got to Do with Regulatory Takings?, Brigham-Kanner Prop. Rts. Conf. J., at 7–12 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3256989.

[46] Knick, 139 S. Ct. at 2180–90 (Kagan, J., dissenting).

[47] *Id.* at 2170 (internal citations omitted).

[48] See Part II.A, *supra*.

is right to conclude that the theory that no violation of the Takings Clause occurs until the state has refused compensation is incompatible with the longstanding principle that compensation must be paid for the full period during which the government controls the property in question—beginning at the time of the taking, not at the time the government reaches a final decision on whether it is willing to pay compensation or not. If there were no violation of the Takings Clause during the period between the taking and the payment, there would be no need to provide "just compensation" for the government's occupation of the property during that time.

Another way of putting the point is that ownership has a temporal, as well as a spatial dimension.[49] The government "takes" property without compensation when it delays payment almost as much as if it chooses to deny payment entirely. The old adage that "time is money" is relevant to takings cases: what matters is not just how much property the government has appropriated, but for how long.

The same ripeness reasoning that supposedly justifies *Williamson County* could be used to deny a federal forum for numerous other constitutional rights claims. By the logic of *Williamson County*, a state government has not really censored speech through "prior restraints" until a state court upholds the censorship policy.[50] Until then, the possibility exists that the state government won't actually suppress the speech in question but will allow it to proceed unimpeded.

Along similar lines, it could be said that a state government has not really engaged in unconstitutional racial discrimination in hiring or in university admissions until the plaintiff has exhausted all possible remedies in state court, and the highest available state court has upheld the hiring or admissions rules in question. Until then, the possibility always remains that a state court may strike down the relevant policy, in which case the job or university applicants in question would be evaluated under nondiscriminatory rules.[51]

[49] See Richard A. Epstein, Past and Future: The Temporal Dimension in the Law of Property, 64 Wash. U. L.Q. 667 (1986).

[50] See, e.g., Freedman v. Maryland, 380 U.S. 51 (1965) (striking down law imposing prior restraints on screening of movies, even though plaintiffs did not file a case in state court).

[51] See, e.g., Fisher v. University of Tex., 136 S. Ct. 2198 (2016) (recent case considering claim of unconstitutional racial discrimination in state university admissions, despite plaintiff's failure to file a claim in state court first).

C. The Supposedly Superior Expertise of State Courts on Property Rights Issues

Another traditional justification for treating takings cases differently from other constitutional rights claims is the idea that state courts have superior expertise on property rights issues, and therefore are more likely to resolve them correctly than federal courts. Justice Kagan takes up this theory in her *Knick* dissent, where she laments that "the majority's ruling channels to federal courts a (potentially massive) set of cases that more properly belongs, at least in the first instance, in state courts" because it involves "complex state-law issues" over which state courts have superior competence, such as whether the plaintiff has a state-law property interest in the land in question.[52]

But many other constitutional rights cases also routinely involve issues on which state judges might have superior expertise. State judges may sometimes know more than federal judges about "complex state-law issues" involved in some takings cases. But the same can be said of issues that arise in many cases involving other constitutional rights.[53] Outside the context of the Takings Clause, few argue that this possibility justifies relegating constitutional claims to state courts.

For example, some Establishment Clause claims require a determination of whether a "reasonable observer . . . aware of the history and context of the community and forum in which [the conduct occurred]" would view the practice as communicating a message of government endorsement or disapproval of religion.[54] State judges may well have more detailed knowledge of their community's perceptions than federal judges. But that does not stop aggrieved parties from bringing Establishment Clause cases to federal court.[55]

[52] Knick, 139 S. Ct. at 2187–88 (Kagan, J., dissenting). For an academic statement of much the same argument, see Eric A. Lindberg, Multijurisdictionality and Federalism: Assessing the Impact of *San Remo* on Regulatory Takings, 57 UCLA L. Rev. 1819, 1859–62 (2010).

[53] For numerous examples, see Ilya Somin, Federalism and Property Rights, 2011 U. Chi. Legal F. 53, 80–84.

[54] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

[55] Of course, federal district judges also live in the communities where they preside—they don't exist in some federal ether—and, as leading citizens, may even better perceive local goings-on.

The Supreme Court has also ruled that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[56] Whether any given speech is likely to incite "imminent lawless action" may well depend on variations in local conditions that state judges know more about than federal judges.

There are also plenty of other constitutional rights claims where the outcome depends in part on interpretations of state law. For example, the controversial "partial birth" abortion case, *Stenberg v. Carhart*, turned in large part on whether Nebraska law forbade all "partial birth" abortions, or just those that use one particular medical procedure. The Supreme Court split 5-4 on this apparently difficult question of state-law interpretation.[57] Yet it was not, as a result, relegated to state court.

Both Justice Kagan and some legal scholars argue that property-rights issues are especially suitable for relegation to state court because property rights are ultimately created by state law in the first place.[58] But this supposed fact does not give state judges any greater expertise advantage in property rights cases than they have in other constitutional cases where the outcome may depend on interpretations of state law or local conditions. Moreover, the theory ignores the fact that property rights have a basis in natural rights as well as purely positive state law. Indeed, the existence of property rights long predates state law, or indeed any law enacted by modern states. The natural-rights understanding of property rights was a crucial feature of the original meaning of the Takings Clause and other constitutional provisions protecting property rights.[59]

[56] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[57] Stenberg v. Carhart, 530 U.S. 914 (2001).

[58] See, e.g., Knick, 139 S. Ct. at 2187–88 (Kagan, J., dissenting); Frank I. Michelman, Property, Federalism, and Jurisprudence: A Comment on *Lucas* and Judicial Conservatism, 35 Wm. & Mary L. Rev. 301, 305–07 (1993); Melvyn R. Durchslag, Forgotten Federalism: The Takings Clause and Local Land Use Decisions, 59 Md. L. Rev. 464, 494 (2000); Stewart E. Sterk, The Federalist Dimension of Regulatory Takings Jurisprudence, 114 Yale L.J. 203, 226–29 (2004).

[59] The points raised in this paragraph are explicated in detail in Somin, Federalism and Property Rights, *supra* note 53, at 84–86, which also advances other criticisms of this particular justification for relegating takings cases to state court.

As Chief Justice William Rehnquist noted in his concurring opinion in *San Remo Hotel*, written on behalf of four justices, "the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment or the Equal Protection Clause."[60] If the expertise rationale is not enough to justify consigning these types of cases to state court, takings cases should not be treated any differently.

Furthermore, there is no reason to assume that state judges necessarily have greater knowledge of Takings Clause issues than federal judges do. Many state court judges are not property-law experts, and some federal judges do have relevant expertise. The differences depend far more on the backgrounds of individual judges than on whether they are members of state or federal judiciaries.

In many takings cases, the relevant issues involve difficult questions of interpretation of federal constitutional law precedents, on which federal judges presumably have greater expertise than their state counterparts. At the very least, there is no good reason to think that state judges have any expertise advantage here that is greater than that which they enjoy on many other issues that are routinely considered by federal courts.[61]

In *Rucho v. Common Cause*, the Supreme Court ruled that challenges to political gerrymandering cannot be considered by federal courts because they raise nonjusticiable "political questions."[62] In her dissent, Justice Kagan criticized the majority's claim that gerrymandering could be left to the consideration of state courts.[63] "But what do those [state] courts know," Kagan asked, "that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?"[64]

[60] San Remo Hotel, 545 U.S. at 350–51 (Rehnquist, C.J., concurring) (internal citations omitted).

[61] For more detailed discussion of this issue, see Somin, Federalism and Property Rights, *supra* note 53, at 86–88.

[62] 139 S. Ct. 2484 (2019).

[63] *Id.* at 2524 (Kagan, J., dissenting).

[64] *Id.*

That is an excellent question. But it applies just as readily to her own dissent in *Knick*. If state courts' potentially superior knowledge of redistricting in their states does not justify consigning political gerrymandering cases to their exclusive control, the same goes for takings cases. Indeed, there is far more federal jurisprudence outlining "neutral and manageable standards" in the latter field than in the former, where the Supreme Court prior to *Rucho* never definitively decided whether the issue was even justiciable. And state courts surely have at least as much an advantage over federal courts in understanding their own states' redistricting processes as they might on property rights issues.[65]

D. Treating State and Local Officials as "Constitutional Malefactors"

Justice Kagan's dissent offers yet another rationale for treating takings cases differently from other constitutional rights cases when she argues that doing otherwise would unfairly treat well-meaning state and local officials as "constitutional malefactors":

> [A] government actor usually cannot know in advance whether implementing a regulatory program will effect a taking, much less of whose property. Until today, such an official could do his work without fear of wrongdoing, in any jurisdiction that had set up a reliable means for property owners to obtain compensation. Even if some regulatory action turned out to take someone's property, the official would not have violated the Constitution. But no longer. Now, when a government undertakes land-use regulation (and what government doesn't?), the responsible employees will almost inescapably become constitutional malefactors. That is not a fair position in which to place persons carrying out their governmental duties.[66]

But, in fact, the majority does not turn government officials into "constitutional malefactors" merely because they enact a "regulatory program." It just holds that aggrieved property owners can then bring

[65] There is, perhaps, also a tension between Chief Justice Roberts's majority opinion in *Rucho* and his opinion in *Knick*, since the latter ignores arguments of comparative state court expertise. But the tension is minor, at most, since Roberts in *Rucho* does not rely on superior state court expertise so much as on the idea that state constitutions might have provisions with more precise standards for adjudicating gerrymandering claims than those of the federal Constitution. *Id.* at 2507–08.

[66] Knick, 139 S. Ct. at 2187 (Kagan, J., dissenting).

a takings case in federal court. There is no constitutional violation, however, unless the court finds that the program in question effects a taking and the state did not pay. The same exact thing happens when the regulatory program in question is challenged in state court, and the latter rules that it was a taking. As a practical matter, government regulators face the same risks of being declared "malefactors" who are required to pay compensation whether the case is brought in federal court or not.

The only difference arises in cases where a state court would declare that a policy is not a taking in a situation but a federal court would decide otherwise.[67] But state and local officials cannot complain that they are being treated "unfairly" merely because they can no longer get away with actions that federal courts—the ultimate interpreters of the federal Constitution—would invalidate.

It may well be true that state land-use regulators cannot completely avoid engaging in at least some policies that courts will later declare to be takings, contrary to officials' expectations. But this is just one of many areas of government policy where a government cannot completely avoid engaging in conduct that sometimes violates constitutional rights and therefore will be subject to remedial rulings issued by courts.

In Justice Kagan's terms, any police department that sometimes carries out searches or seizures cannot always "know in advance" whether some will turn out to be violations of the Fourth Amendment and cannot completely avoid engaging in some that turn out to be illegal. Thus, they cannot "do [their] work without fear of wrongdoing."[68] Any police department that questions suspects probably cannot completely avoid situations where the questioning violates the Fifth Amendment right against self-incrimination. The same is true of jurisdictions that regulate the "time, place, and manner" of speech (thereby risking violations of the Free Speech Clause),[69] jurisdictions that regulate firearms (thereby risking violations of the Second Amendment),[70] and many other types of regulation that routinely risk running afoul of constitutional rights.

[67] This issue is discussed in more detail in Part IV.B, *infra*.

[68] Knick, 139 S. Ct. at 2187 (Kagan, J., dissenting).

[69] See Ward v. Rock against Racism, 491 U.S. 781 (1989) (holding that the government may regulate the time, place, and manner of speech, but laying out a three-part test such regulations must follow).

[70] See McDonald v. City of Chicago, 561 U.S. 742 (2010) (ruling that the Second Amendment applies to state and local governments).

In each of these situations, government officials can reduce the incidence of constitutional violations by paying close attention to relevant judicial precedents and setting out policies that attempt to comply with them. But it is virtually impossible to completely avoid such violations because of the ambiguity and vagueness of some of the relevant legal rules and the sheer volume of law enforcement operations and regulations. Any government that engages in routine law enforcement, "time, place, and manner" speech regulation, or firearms regulation is likely to occasionally become a "constitutional malefactor."

The same point applies to land-use regulations and the Takings Clause. Well-run state and local governments can work to minimize violations, but cannot avoid them completely. If that unfortunate state of affairs is not enough to consign speech cases, Second Amendment cases, or Fourth Amendment cases to state court, it should not doom takings cases to that fate either.

E. The Habeas Analogy

Some have argued that *Williamson County* is not really so unusual in barring a category of constitutional rights cases from federal court because the same thing happens when restrictions on habeas corpus make it difficult to secure federal court review of state court rulings on the constitutional rights of criminal defendants.[71] The combination of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA) and later Supreme Court rulings interpreting it have indeed put severe limits on the availability of federal judicial review in such cases.[72]

But limitations on habeas review in federal court are still not as far-reaching as those *Williamson County* imposed on takings claims. The relevant Supreme Court cases place tight constraints on habeas review of state court decisions on issues involving criminal

[71] See, e.g., Kathryn E. Kovacs, Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion under *Williamson County*, 26 Ecology L.Q. 1, 38 (1999) (arguing that "[r]elegating takings claims to state court does not, therefore, flout the intent of § 1983 any more than does relegating the claims of victims of official misconduct or criminal defendants to state court"); Lindberg, *supra* note 52, at 1877–78 (making the same analogy).

[72] For a recent discussion, see Lynn Adelman, Who Killed Habeas Corpus?, Dissent (Winter 2018), https://www.dissentmagazine.org/article/who-killed-habeas-corpus-bill-clinton-aedpa-states-rights.

defendants' rights, but do not foreclose such review entirely, allowing it to continue in at least some categories of particularly egregious state court errors.[73] By contrast, the combination of *Williamson County* and *San Remo Hotel* barred federal court review of takings cases regardless of how badly state courts may have erred.[74]

A second noteworthy difference is that *Williamson County* was purely a judicially created doctrine, while AEDPA limitations on habeas are based on a congressionally enacted statute, which requires federal court deference to state court determinations of defendants' constitutional rights so long as the latter are "reasonable" and bars granting relief based on anything but "clearly established" Supreme Court precedent.[75] While Supreme Court cases interpreting AEDPA may have gone too far, they were at least relying on a statutory restriction rooted in Congress's power to pass laws determining the jurisdiction of the federal courts. Arguably, the Court's interpretation of AEDPA is more deferential to state courts than the statute actually requires.[76] One might even argue that the relevant provision of AEDPA is itself unconstitutional.[77] But the issue at least raises difficulties that are absent in *Williamson County*, which was a purely judicially invented constraint on judicial review.

Ultimately, AEDPA and the Supreme Court cases interpreting it place fewer sweeping constraints on federal court review of constitutional rights than *Williamson County*. And those constraints are also, at least in large part, grounded in a federal statute.

At the same time, I do agree that AEDPA and the resulting habeas jurisprudence have serious flaws.[78] Few if any of those who

[73] See, e.g., Harrington v. Richter, 562 U.S. 86, 102 (2011) (limiting habeas review to "extreme malfunctions" of the state criminal justice system "where there is no possibility that fair-minded jurists could disagree").

[74] See discussion in Part I, *supra*.

[75] 28 U.S.C. § 2254(d).

[76] See Stephen R. Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219 (2015) (making that argument).

[77] See, e.g., James S. Liebman & William F. Ryan, "Some Effectual Power": The Quality and Quantity of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696, 814–15 (1998) (making that argument).

[78] I agree with many of the criticisms raised in Adelman, *supra* note 72, and Reinhardt, *supra* note 76.

analogize *Williamson County* to the AEDPA cases actually support the latter. The proper remedy, therefore, is not to relegate both takings claims and defendants' rights to state courts, but instead to ensure strong federal judicial review for both. In that regard, *Knick* might even help habeas reformers insofar as it lends new weight to the principle that all federal constitutional rights deserve the protection of federal courts.

III. Overruling Precedent

For observers who do not have a special interest in property rights issues, the most controversial aspect of the *Knick* decision may well be its overruling of a longstanding precedent.[79] The establishment of a new 5-4 conservative majority on the Supreme Court has led many on the left to fear that a variety of significant liberal precedents may be imperiled.[80] In his dissent in *Franchise Tax Board v. Hyatt*, another recent case overruling precedent, Justice Stephen Breyer complained that ["t]oday's decision can only cause one to wonder which cases the Court will overrule next."[81] Justice Kagan's dissent in *Knick* also relies heavily on the argument that it was inappropriate for the Court to overrule precedent in this case.[82] There is also obviously a longstanding broader debate over the extent to which the Court should be willing to overrule wrongly decided precedent.

I will not try here to resolve the broader issue of when overruling precedent is appropriate as a general matter.[83] I limit myself to the narrower task of explaining why the overruling of *Williamson County* is consistent with the Court's admittedly somewhat imprecise

[79] Cf. Tadhg A.J. Dooley & David Roth, Supreme Court Update, National Law Review, June 26, 2019, https://www.natlawreview.com/article/supreme-court-update-knick-v-township-scott-no-17-647-nc-dep-t-revenue-v-kimberley ("*Knick* stands on its own as an important constitutional takings decision, but may well be remembered most as another example of the Roberts Court chipping away at longstanding precedent.").

[80] Cf. Henry Gass, Overruled: Is Precedent in Danger at the Supreme Court?, Christian Science Monitor, June 25, 2019, https://www.csmonitor.com/USA/Justice/2019/0625/Overruled-Is-precedent-in-danger-at-the-Supreme-Court.

[81] Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting).

[82] Knick, 139 S. Ct. at 2184–88 (Kagan, J., dissenting).

[83] I offer some thoughts on recent developments in that debate in Ilya Somin, The Rights and Wrongs of Overruling Precedent, Reason: Volokh Conspiracy, June 26, 2019, https://reason.com/2019/06/26/the-rights-and-wrongs-of-overruling-precedent/.

standards for overruling constitutional precedent, and why Justice Kagan is wrong to argue that the *Knick* majority implicitly overruled numerous other precedents that long predated *Williamson County*.[84]

A. Knick *and the Court's Precedent on Overruling Precedent*

The majority's decision to overrule *Williamson County* is consistent with the Court's own previously stated criteria for overruling constitutional precedent. We might call that doctrine the Court's "precedent about precedent."

The Court has stated that it will "overrule an erroneously decided precedent . . . if: (1) its foundations have been 'eroded' by subsequent decisions; (2) it has been subject to 'substantial and continuing' criticism; and (3) it has not induced 'individual or societal reliance' that counsels against overturning it."[85] Some cases also highlight the "workability" of the precedent in question.[86] An additional factor that the Court considers is whether the original decision was "well reasoned."[87] Furthermore, as Chief Justice Roberts points out in his majority opinion in *Knick*, the doctrine of stare decisis "'is at its weakest when we interpret the Constitution,' as we did in *Williamson County*, because only this Court or a constitutional amendment can alter our holdings."[88]

Williamson County fits all these criteria well. The double standard against takings claims that it established has been "eroded" by later Supreme Court decisions that explicitly caution against treating the Takings Clause—and property rights generally—as the "poor relation" of constitutional law.[89] Recent decisions have gradually cut back on other areas where takings claims have been disfavored relative to other constitutional rights cases.[90] In addition, post–*Williamson*

[84] *Id.* (citing Gass, *supra* note 80).

[85] Lawrence v. Texas, 539 U.S. 558, 587 (2003) (internal citations omitted).

[86] Janus v. State, Cty., and Mun. Employees, 138 S. Ct. 2448, 2478 (2018).

[87] Montejo v. Louisiana, 556 U.S. 778, 793 (2009).

[88] Knick, 139 S. Ct. at 2177 (internal citation omitted).

[89] See especially Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) (holding that there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation").

[90] For discussion of two notable examples, see Ilya Somin, Two Steps Forward for the "Poor Relation" of Constitutional Law: *Koontz*, *Arkansas Game & Fish*, and the Future of the Takings Clause, 2012–2013 Cato Sup. Ct. Rev. 215 (2013).

County rulings have held that local government land-use regulations can be challenged in federal court on other constitutional grounds, such as the First Amendment.[91] This makes *Williamson County* even more anomalous than it was before.

There is also little doubt that *Williamson County* has been subject to "substantial and continuing" criticism. As Chief Justice Roberts notes, "The decision has come in for repeated criticism over the years from Justices of this Court and many respected commentators."[92] The ruling has been the object of widespread criticism by legal scholars.[93] Perhaps more importantly, in a concurring opinion in *San Remo Hotel*, Chief Justice Rehnquist noted that *Williamson County* had severe flaws, was inconsistent with the Court's treatment of other constitutional rights, and "ha[d] created some real anomalies, justifying our revisiting the issue."[94] Rehnquist wrote that, although he had joined in the *Williamson County* ruling back in 1985, he had since come to believe that the state-litigation requirement of that ruling "may have been mistaken."[95] Rehnquist's concurrence was joined by three other members of the Court: Justices Anthony Kennedy,

[91] See, e.g., Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (First Amendment challenge to restrictions on locations of adult businesses).

[92] Knick, 139 S. Ct. at 2178 (citing examples).

[93] For examples of the many critiques, see, e.g., R.S. Radford & Jennifer Fry Thompson, The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court under *Williamson County* Has Yet to Be Made, 67 Baylor L. Rev. 567 (2015); Joshua D. Hawley, The Beginning of the End*? Horne v. Department of Agriculture* and the Future of *Williamson County*, 2012–2013 Cato Sup. Ct. Rev. 245 (2013); J. David Breemer, Overcoming *Williamson County*'s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims, 18 J. Land Use & Envtl. L. 209 (2003); Peter A. Buchsbaum, Should Land Use Be Different? Reflections on *Williamson County Regional Planning Board v. Hamilton Bank*, in Taking Sides on Takings Issues: The Public & Private Perspective 471, 473–74 (Thomas E. Roberts ed., 2002); Michael M. Berger & Gideon Kanner, Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage, 36 Urb. Law. 671, 673 (2004); Michael M. Berger, Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings, 3 Wash. U. J.L. & Pol'y 99, 102–03 (2000); Ilya Somin, Supreme Court Will Hear Important Property Rights Case, Reason: Volokh Conspiracy, Mar. 5, 2018, https://reason.com/volokh/2018/03/05/supreme-court-will-hear-important-proper.

[94] San Remo Hotel, 545 U.S. at 351 (Rehnquist, C.J., concurring).

[95] *Id.* at 348.

Sandra Day O'Connor and Clarence Thomas.[96] Justice O'Connor had also been on the Court in 1985 and also joined in the *Williamson County* majority. Few Supreme Court decisions have been so seriously questioned by four members of the Court, including two who initially supported it. If this does not qualify as "substantial and continuing criticism," it is hard to imagine what does.

When it comes to "workability," the catch-22 created by the combination of *Williamson County* and *San Remo Hotel* has made the decisions' rules "unworkable," as Roberts emphasized.[97] If any procedural rule qualifies as such, it is one where the very action that is a prerequisite to filing a case in federal court also prevents the plaintiff from doing so. The ability of defendants to defeat takings cases by "removing" them to federal court and then getting them dismissed for lack of conformity to *Williamson County* is another indication of how unworkable the state exhaustion requirement was.[98]

For reasons already discussed,[99] the reasoning of *Williamson County* is unusually bad. This flaw supports its reversal. As Roberts puts it, the decision "was not just wrong. Its reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence."[100]

The reversal of *Williamson County* does admittedly upset some "reliance interests." Some state and local governments that might otherwise have prevailed in takings cases filed in state court will probably now lose them in federal court. But, as Chief Justice Roberts points out, the Court does not usually give credence to reliance interests that depend on rules that do not "'serve as a guide to lawful behavior.' . . . Our holding that uncompensated takings violate the Fifth Amendment will not expose governments to new liability; it will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court."[101]

If an uncompensated restriction on property rights is constitutionally valid, the government should be able to defend it successfully

[96] *Id.*

[97] Knick, 139 S. Ct. at 2178–79.

[98] See discussion of this problem in Part I, *supra*.

[99] See Part I, *supra*.

[100] Knick, 139 S. Ct. at 2178.

[101] *Id.* at 2179 (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)).

in federal court. Constitutionally valid policies do not require the protection of the *Williamson County* doctrine, and such protection is not extended against any other types of constitutional claims. Ultimately, the only "reliance interests" protected by *Williamson County* were those of state and local governments that engaged in uncompensated takings that would be struck down in federal court but upheld by state courts that are biased in their favor or erroneously interpret relevant federal takings precedent. That is not an interest anywhere near strong enough to justify continuing to bar an entire category of constitutional rights cases from access to federal court.

Chief Justice Roberts also effectively responded to Justice Kagan's argument that *Williamson County* should be given the "enhanced" form of stare decisis deference usually applied to statutory decisions because Congress could reverse it by enacting a statute eliminating the "preclusion trap" the Court upheld in *San Remo Hotel*.[102] This would only partly fix the problems created by *Williamson County*, as there would still be a double standard between takings claims and other constitutional rights. As Roberts points out, "takings plaintiffs, unlike plaintiffs bringing any other constitutional claim, would still have been forced to pursue relief under state law before they could bring suit in federal court. Congress could not have lifted that unjustified exhaustion requirement because, under *Williamson County*, a property owner had no federal claim until a state court denied him compensation."[103] Moreover, if applied consistently, Justice Kagan's argument would justify giving enhanced status to any precedents establishing judicially created barriers to bringing constitutional rights claims in federal court, so long as Congress could potentially reverse or mitigate them.

None of these points should be decisive for those who believe that *Williamson County* was right on the merits, as the dissenting justices in *Knick* clearly do. But these considerations do count against keeping it in place simply based on adherence to the doctrine of stare decisis. They should also quiet concerns that *Knick* heralds a more general trend toward a greater willingness to overrule precedent.[104]

[102] *Id.* at 2189 (Kagan, J., dissenting).

[103] *Id.* at 2179.

[104] I do not, here, take up the issue of whether other recent reversals of precedent depart from the Court's established criteria for doing so.

Anyone who concludes that *Williamson County* was wrong for the reasons outlined by the *Knick* majority (and those described in this article) should have no qualms about the Court's decision to reverse its 1985 precedent. If the majority erred, it was in its substantive critique of *Williamson County*, not in concluding that the case should be overruled if that critique was sound.

B. Does Knick *Implicitly Overrule "Precedent after Precedent after Precedent"?*

In addition to defending *Williamson County* on grounds of stare decisis, Justice Kagan's dissent also argues that the *Knick* majority implicitly overruled numerous precedents going back to the 1890 case of *Cherokee Nation v. Southern Kansas Railway Co.*[105] She contends that the majority's approach "requires declaring precedent after precedent after precedent wrong."[106] These cases all mandate that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken" provided the government offers "reasonable, certain and adequate provision for obtaining compensation" after the fact.[107]

In his majority opinion, Chief Justice Roberts argues that these cases can be explained by the Court's unwillingness to provide injunctive relief against takings in situations where the property owner was able to get compensation; thus, "every one of the cases cited by the dissent would come out the same way—the plaintiffs would not be entitled to the relief they requested because they could instead pursue a suit for compensation."[108] Justice Kagan responds by pointing out that the distinction between compensation and injunctive relief "played little or no role in our analyses" in those cases.[109]

Both Roberts and Kagan ignore a far more significant distinction between most of the precedents the latter relies on and cases such as *Knick* and *Williamson County*. There is a crucial difference between a case where the government concedes there is a taking but merely

[105] 135 U.S. 641 (1890). For Justice Kagan's discussion of these cases, see Knick, 139 S. Ct. at 2182, n.1 & 2184–87 (Kagan, J., dissenting).

[106] Knick, 139 S. Ct. at 2186 (Kagan, J. dissenting).

[107] *Id.* at 2182 (quoting Cherokee Nation, 135 U.S. at 659).

[108] Knick, 139 S. Ct. at 2176–77.

[109] *Id.* at 2185 (Kagan, J., dissenting).

delays paying compensation, and a situation where the government denies that any taking has occurred at all. By definition, the latter scenario is *not* a situation where the government provides "reasonable, certain and adequate provision for obtaining compensation" after the fact.[110] Compensation from the state is uncertain—and thus also potentially inadequate—for the simple reason that the government denies that any compensation is due at all, and state courts could potentially endorse that position—even if federal courts might have decided the case differently.

Cases where both sides agree that compensation is due might be characterized simply as disputes over the timing and amount of compensation, which can usually be resolved by factual determinations about the value of the property in question. By contrast, disputes over whether a taking has occurred at all are textbook examples of litigation over whether there has been a violation of federal constitutional law—precisely the sort of issue that belongs in federal court, if anything does. While a state court could potentially rule against the government on the issue of whether a taking has occurred, the same thing could happen whenever a state denies that it has violated some other constitutional right.

As Robert Thomas asks in a critique of Kagan's opinion, "isn't there a big difference between an eminent domain quick take where the government occupies now, with the corresponding recognition of the absolute obligation to pay whatever the court later determines is just compensation, and a regulatory taking where the government is exercising some other power, and absolutely denies that it needs to pay *anything*?"[111]

A close look at the pre–*Williamson County* cases cited by Justice Kagan shows that all of those brought against state and local governments (and some brought against the federal government) were in fact cases where compensation was "certain" because the government had already conceded that a taking had occurred and payment was due. In *Cherokee Nation*, the 1890 case to which Kagan traces the

[110] Cherokee Nation, 135 U.S. at 659.

[111] Robert H. Thomas, *Knick* Analysis, Part IV: Why Not Let Sleeping Dogs Lie? The Dissent and Stare Decisis, Inverse Condemnation Blog, June 24, 2019, https://www.inversecondemnation.com/inversecondemnation/2019/06/knick-analysis-part-iv.html.

doctrine in question, Congress had mandated that "full compensation shall be made to the owner for all property to be taken" for the construction of a railroad that would pass through land owned by Native American tribes.[112] Because Congress had already authorized compensation for the land taken for the railroad, the Court ruled that "this provision is sufficiently reasonable, certain and adequate to secure the just compensation to which the owner is entitled."[113] The key point, however, is that "the owner is entitled to reasonable, certain and adequate provision for obtaining compensation *before his occupancy is disturbed*."[114] There can be no such advance assurance of "reasonable, certain and adequate" compensation in a case where the government denies that any compensation is due in the first place.

Virtually all the other cases cited by Justice Kagan are similar. Those brought against state and local governments (and some against the federal government) involve scenarios where the government conceded in advance that compensation is due, and the only issue was its timing or amount.[115]

[112] Cherokee Nation, 135 U.S. at 659.

[113] *Id.*

[114] *Id.* (emphasis added).

[115] See Dohany v. Rogers, 281 U.S. 362, 366–70 (1930) (state recognized the duty to compensate and enacted legislation to do so for land taken for a railroad); Joslin Mfg. Co. v. Providence, 262 U.S. 668, 677–78 (1923) (city committed to providing compensation to owners of land taken for the acquisition of water); Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 586–87 (1923) (government agreed in advance to provide compensation for land taken by eminent domain); Hays v. Port of Seattle, 251 U.S. 233, 234–38 (1920) (city formally asserted title over the owner's property, thereby essentially conceding that the property had been taken); Bragg v. Weaver, 251 U.S. 57 (1919) (government recognized obligation to compensate owners for land taken for purposes of repairing an adjoining road); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 242–43, 251–54 (1905) (state authorized compensation for the use of eminent domain to condemn property for a railroad); Williams v. Parker, 188 U.S. 491, 502–04 (1903) (state legislature recognized liability and provided compensation for the taking of property by eminent domain, and had the power to impose that liability on the City of Boston despite lack of "technical" estoppel); Backus v. Ft. St. Union Depot Co., 169 U.S. 557, 565–68 (1898) (state recognized obligation to compensate for damage to property that state law treated as the equivalent "condemnation" of property interests for the construction of railroad tracks); Sweet v. Rechel, 159 U.S. 380, 382, 400–02 (1895) (state recognized duty to compensate owners for the taking of and allocation of funds for that purpose). These cases are all cited in Knick, 139 S. Ct. at 2182 n.1 (Kagan, J., dissenting).

Three cases were brought against the federal government in situations where the latter denied there had been a taking.[116] But a takings claim against the federal government must necessarily be heard in federal court, regardless of the issue involved. And if the condemning authority refuses to pay at the time of the taking, the remedy will be an award of compensation paid after the fact, regardless of exactly which federal court hears the case and at which time.

Thus, such cases do not raise the possibility of denying access to federal court for a federal constitutional claim and do not change the nature of the compensation remedy successful plaintiffs stand to receive. As the Supreme Court noted in one of these decisions, "if the authorized action in this instance does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims."[117] The same point applies to Kagan's citation of cases involving takings claims brought against the federal government under the Tucker Act, which requires such cases to be brought in the Court of Federal Claims.[118]

Kagan's reliance on late-19th and early-20th century cases brought against state and local governments is also problematic for another reason. Those cases were decided before the Supreme Court recognized that the Takings Clause (and the rest of the Bill of Rights) was "incorporated" against the states. As a result, takings claims brought against state and local governments in federal court could only be litigated under the Due Process Clause of the Fourteenth Amendment, utilizing the Court's so-called substantive due process doctrine.[119] Takings cases decided under the Due Process Clause during this era were often litigated under rules that gave greater deference to the government than those brought under the Takings Clause (which could only be used against the federal government).[120] Thus, we

[116] See Yearsley v. W. A. Ross Constr. Co., 309 U.S. 18, 21–23 (1940); Hurley v. Kincaid, 285 U.S. 95, 104 (1932); Crozier v. Krupp A.G. 224 U.S. 290, 305–06 (1912).

[117] Yearsley, 309 U.S. at 21.

[118] See Knick, 139 S. Ct. at 2186 (Kagan, J., dissenting) (discussing several such cases).

[119] For a discussion of this distinction and its importance, see Ilya Somin, The Grasping Hand: *Kelo v. City of New London* and the Limits of Eminent Domain 123–26 (rev. ed. 2016).

[120] See *id*. at 50–51, 123–24.

should not assume that the former cases represent the Court's considered judgment of how takings claims against states and localities should be handled if the Takings Clause had applied to them.

In his concurring opinion in *Knick*, Justice Clarence Thomas went further than Chief Justice Roberts's majority opinion, arguing that,

> [t]he Fifth Amendment does not merely provide a damages remedy to a property owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking."[121]

Thomas therefore rejects the "'sue me' approach to the Takings Clause" under which the government is free to undertake policies that take private property without paying compensation in advance or simultaneously with the taking. Logically, Thomas makes a compelling point. The fact that compliance with the Constitution may be difficult for governments that enact extensive regulatory programs does not relieve them of those obligations. But unlike the majority opinion, Thomas's argument probably would require overruling of a substantial number of pre–*Williamson County* precedents holding that the Takings Clause does not require advance or contemporaneous compensation.[122]

Practically speaking, however, the difference between his approach and the majority's will usually be modest, at most. Either way, government regulators will sometimes violate the Takings Clause even if they try, in good faith, to avoid doing so. And either way the practical remedy for the violation of constitutional rights would be a lawsuit for compensation, filed after the fact.

The key difference might be that Thomas's theory might allow injunctive relief in some situations where Roberts's would not.[123]

[121] Knick, 139 S. Ct. at 2180 (Thomas, J., concurring) (internal citations omitted).

[122] See discussion of these cases earlier in this Part.

[123] See Knick, 139 S. Ct. at 2180 (Thomas, J., concurring) (rejecting the argument that government regulators should be able to pursue regulatory programs free of the threat of injunction).

But it is far from clear that there would be any significant number of such cases. As Thomas notes, "[i]njunctive relief is not available when an adequate remedy exists at law. And even when relief is appropriate for a particular plaintiff, it does not follow that a court may enjoin or invalidate an entire regulatory 'program.'"[124]

IV. The Practical Impact of *Knick*

Will *Knick* have any significant real-world effect? To put the question a different way, does it really matter whether takings cases are brought in state court or federal court? In many situations, the answer is likely to be "no." Both state and federal courts must address many of the same issues and follow the same federal court takings precedents.

On the other hand, there are cases where errors or biases by state courts are likely to lead to the denial of compensation in cases where federal courts would have ruled otherwise. State courts also sometimes create burdensome procedural obstacles to takings lawsuits that federal courts avoid. It is also possible—though far from certain—that *Knick* will create new opportunities to expand substantive protections for property rights.

Critics of *Knick* argue that it could generate a flood of new federal court litigation. It is by no means clear that this will happen. But if it does, it may well turn out be a good thing.

A. The Problem of State Court Bias

As Justice Joseph Story explained in the canonical 1816 case of *Martin v. Hunter's Lessee*, one of the most important reasons why federal courts have ultimate jurisdiction over federal constitutional issues is "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution."[125] The Court emphasized the danger that leaving such issues under the final control of state courts would pose, giving free reign to possible state court bias in favor of their own state governments. As Justice Story put it, "[t]he Constitution has presumed . . . that State attachments,

[124] *Id.* (internal citation omitted).

[125] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (Story, J.).

State prejudices, State jealousies, and State interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice."[126]

Potential bias by state courts in takings cases is more than just a theoretical problem, given the reality that many state judges are elected and have close ties to state parties and political leaders who adopt policies that result in regulatory takings.[127] Government officials can even deliberately arrange the appointment of judges likely to rule in favor of their preferred regulatory programs in takings cases.[128] In recent years, judicial elections in many states have increasingly been contested by parties and interest groups in much the same way as elections for "political" offices,[129] thereby increasing the extent to which state judges have ties to broader political coalitions and are likely to serve their interests.

State court bias need not manifest itself in the form of deliberate efforts by judges to bend the law to favor the interests of state and local governments. Rather, the political process can skew things in favor of the selection of judges with a pro-government orientation in takings cases, or at least those that challenge politically significant regulatory policies favored by the dominant political forces in the state.

Another potentially significant practical consequence of *Knick* is helping to ensure effective enforcement of a uniform federal "floor" for constitutional rights. One of the major purposes of "incorporating" the Bill of Rights against the states in the first place was to ensure adherence to such a floor. As Akhil Reed Amar puts it, "the federal Constitution stands as a secure political safety net—a floor below which state law may not fall."[130] Even if state courts do not have any systematic bias against takings claims, some are likely to fall below the federal floor through a combination of random

[126] *Id.* at 347.

[127] See Ilya Somin, *Stop the Beach Renourishment* and the Problem of Judicial Takings, 6 Duke J. Const. L. & Pol'y 91, 99–100 (2011) (discussing this problem and its implications for takings jurisprudence).

[128] See *id.* at 99 (discussing this problem).

[129] See research collected in Judicial Elections in the 21st Century (Chris W. Bonneau & Melinda Gann Hall eds., 2016).

[130] Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043, 1100 (1988). See also generally, Amar, The Bill of Rights, *supra* note 39, chs. 8–10.

variation, idiosyncrasies of political and legal cultures, and other factors. We readily acknowledge the need for federal judicial review to ensure uniform application of a federal floor with respect to other constitutional rights. The Takings Clause is no exception.

Allowing takings plaintiffs access to federal court can also help block state court procedural rules that inhibit effective vindication of property owners' rights to compensation. To take just one prominent example, California has a rule denying compensation in situations where restrictions on land use that would otherwise be considered compensable takings are simply "normal" delays in the process of obtaining a permit—even when the "normal" delay results from a mistake by a state regulatory agency, which erred in denying the owner's right to develop his or her land.[131] Such delays can last for years at a time.[132] New Jersey courts have adopted a similar approach.[133]

B. Will There Be a Flood of New Federal Takings Cases?

Critics of *Knick* fear that the decision will have a more harmful impact, leading to a surge of new takings cases in federal court. In her dissent, Justice Kagan warns that "[t]oday's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes."[134] Others have noted that there may be an especially significant expansion of federal takings litigation in states such as California, which have unusually severe land-use regulations.[135]

Predictions that *Knick* will result in a "flood" of new federal court takings litigation may be overstated. Plaintiffs will only have

[131] See Landgate v. Cal. Coastal Comm'n, 953 P.2d 1188, 1200–01 (Cal. 1998).

[132] See *id.* at 1208 (Brown, J., dissenting) (noting that the case involved a two-year delay). For an analysis, see Stephen E. Abraham, *Landgate*—Taken but Not Used, 31 Urb. Law. 81 (1999).

[133] Pheasant Bridge Corp. v. Twp. of Warren, 777 A.2d 334 (N.J. 2001) (holding there can be no "temporary taking" during the period it takes the landowner to successfully challenge an illegal ordinance restricting his or her ability to develop property). But see Eberle v. Dane Cty. Bd. of Adjustment, 595 N.W.2d 730, 742 n.25 (Wisc. 1999) (rejecting this approach).

[134] Knick, 139 S. Ct. at 2188–89.

[135] See, e.g., David G. Savage, Supreme Court Bolsters Rights for Developers and Property Owners in California and Elsewhere, L.A. Times, June 21, 2019, https://www.latimes.com/politics/la-na-pol-supreme-court-property-rights-taking-20190621-story.html.

incentives to bring such cases in situations where they can prevail in federal court but are significantly less likely to do so in state court. Bringing cases that are doomed to defeat will only saddle property owners with litigation costs and delays that most would surely prefer to avoid.

Property rights advocates such as the Pacific Legal Foundation—the public interest law firm that represented Mary Rose Knick—could well use this case as an opportunity to bring new ones seeking to strengthen protection for property rights under the Takings Clause. But, once again, such groups have an incentive to bring cases that are likely to prevail. Strategic public-interest litigators have every reason to avoid creating negative precedents that could hurt their cause.

If it turns out that there is indeed a large amount of new takings litigation in federal court as a result of *Knick*, that would indicate that state courts (at least in some parts of the country) have been severely underprotecting property owners' constitutional rights, taking advantage of the *Williamson County* regime to deny takings claims that federal courts would have upheld. In that scenario, the "flood" of new claims would be a feature rather than a bug.

Indeed, such an increase in litigation is a salutary result of any Supreme Court decision that strengthens protections for constitutional rights that have long been underenforced. Few today lament the "flood" of new civil rights cases that arose after *Brown v. Board of Education* undermined *Plessy v. Ferguson* by greatly increasing federal court scrutiny of state segregation laws.[136] Similarly, federal courts began to take a more active role in protecting criminal defendants' constitutional rights after the Warren Court adopted a series of precedents "incorporating" various parts of the Bill of Rights against the states and imposing more rigorous standards for their protection.[137] Here too, the additional litigation was entirely justified insofar as state courts had failed to provide proper protection for the rights in question.

Justice Kagan laments the possibility that *Knick* "makes federal courts a principal player in local and state land-use disputes."[138] But federal courts *should be* principal players in any area of public policy

[136] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[137] For an overview of these rulings, see Lucas A. Powe, Jr., The Warren Court and American Politics chs. 15–16 (2002).

[138] Knick, 139 S. Ct. at 2188–89 (Kagan, J., dissenting).

where the government systematically violates federal constitutional rights—especially if state courts fail to adequately protect them. That is a big part of what federal courts are for.

If something like a "flood" of new federal takings cases does emerge, it is possible that courts will take the opportunity to further develop currently vague or otherwise underspecified aspects of takings jurisprudence. Some observers also believe that it might enable more conservative judges—including those on the Supreme Court—to strengthen protection for property rights.[139]

However, it is far from clear that *Knick* presages a major revolution in favor of stronger protection for constitutional property rights under the Takings Clause. Because of the egregious nature of the double standard established by *Williamson County*, overruling it should have been relatively low-hanging fruit for property rights advocates. Indeed, such overruling was likely favored by Justice Kennedy, who had joined in Chief Justice Rehnquist's concurring opinion in *San Remo Hotel* suggesting it should be reversed.[140] The Court actually decided to hear *Knick* before Kennedy retired in late June 2018, and the resulting reversal of *Williamson County* probably would have occurred even if Kennedy had stayed on the Court and not been replaced by Justice Kavanaugh. The ruling therefore tells us relatively little about the potential future agenda of the new conservative majority on the Court.

Perhaps more importantly, the 5-4 split on the Court in *Knick*, with the justices splitting along ideological lines, suggests that the Court remains deeply divided on property rights issues. In recent years, the liberal justices have sometimes joined with the conservatives in ruling against the government in several important takings cases.[141] The liberals' strong stance against reversing *Williamson County* suggests that they may not be willing to go much further in strengthening enforcement of the Takings Clause. If so, such expansion may prove difficult, since it would apply only to issues on which there is

[139] See, e.g., Robert H. Thomas, *Knick* Analysis, Part V: What Next?, Inverse Condemnation Blog, June 24, 2019, https://www.inversecondemnation.com/inversecondemnation/2019/06/knick-analysis-part-v-whats-next-.html (raising this possibility).

[140] See discussion of this opinion in Part III.A, *supra*.

[141] For an analysis of some important examples, see Somin, Two Steps Forward, *supra* note 90.

full agreement among the five conservative justices. In the long run, it is difficult to firmly entrench strong judicial protection for any constitutional right unless there is substantial support for it from jurists on both sides of the ideological spectrum.[142]

The liberal justices' opposition to *Knick* may be due in part to concerns about reversing precedent, with an eye to preserving more significant liberal precedents that might be imperiled by the new conservative majority.[143] But it is notable that Justice Kagan's dissent forcefully defends *Williamson County* as right on the merits not merely on stare decisis grounds, at times arguing that takings issues are almost uniquely suited for relegation to state court.[144] It remains to be seen whether this deep skepticism about federal judicial protection of property rights extends beyond the specific issues raised in *Knick*.

As this article goes to press in the late summer of 2019, it is far too early to judge the impact of *Knick* on takings jurisprudence. Federal courts are just beginning to hear cases that, under *Williamson County*, would have been consigned to state court.[145] In one of the first lower-court opinions to cite *Knick*, the U.S. Court of Appeals for the Federal Circuit ruled that the decision actually harms property owners in one noteworthy sense. *Knick*'s holding that a takings claim accrues as soon as the taking occurs implies that the statute of limitations begins to toll at that point as well, even if it happens "before the effect of the regulatory action is felt and actual damage to the property interest is entirely determinable."[146]

That ruling, by the court that hears most appeals of takings cases brought against the federal government, could potentially make it harder for plaintiffs in regulatory takings cases to initiate their claims in time to avoid the statute of limitations, while simultaneously also having enough evidence to demonstrate the extent of compensation

[142] I discuss the significance of cross-ideological support for judicial protection of property rights in more detail in Ilya Somin, Taking Property Rights Seriously? The Supreme Court and the "Poor Relation" of Constitutional Law at 38–41, George Mason Law & Economics Research Paper No. 08-53, 2008, http://ssrn.com/abstract=1247854.

[143] See discussion of this issue in Part III, *supra*.

[144] Knick, 139 S. Ct. at 2188–90 (Kagan, J., dissenting).

[145] See, e.g., Mangal v. City of Pascagoula, 2019 WL 3413850 at *2 (S.D. Miss. July 29, 2019) (applying *Knick* to reject ripeness argument for relegating a takings case to state court).

[146] Campbell v. United States, 2019 WL 3483204 at *5 (Fed. Cir. Aug. 1, 2019).

necessary to offset the damage caused by the government action in question.[147] One possible answer to this dilemma is that the statute of limitations for takings claims should only toll when the plaintiff knew or reasonably should have known about the damage inflicted by the taking. This would be similar to the approach some courts take in medical malpractice tort cases, where they have held that the statute of limitations only tolls when the plaintiff knew or should have known that the doctor had committed a negligent act, such as leaving a foreign object in the patient's body after an operation.[148]

Another, more far-reaching possibility is that a Takings Clause violation should not be seen as a discrete act but as a continuing constitutional violation that goes on for as long as the government denies the owner the property right in question without paying compensation. This theory is consistent with the *Knick* majority's holding that a violation commences the moment the taking occurs, based on the idea that property rights exist in time as well as space, so each additional increment of time during which the right is violated exacerbates the violation.[149]

Conclusion

Knick v. Township of Scott should go down in history as a case that eliminated an egregious double standard that barred numerous takings cases from federal court in situations where other constitutional rights claims would not have been barred. Of course, it is also notable for overruling a longstanding precedent at a time when there are heated debates over the principle of stare decisis.

The ultimate impact of *Knick* is likely to take some years to determine. Much depends on how many new takings cases are brought in federal court as a result, and how they are resolved. But, at the very least, *Knick* has established the important principle that takings plaintiffs are entitled to their day in federal court.

[147] For an early analysis of this case and its potential implications, see Robert H. Thomas, Lattice of Coincidence: Regulatory Takings Claim Accrues When Regulator Makes Final Decision (*Williamson County* Lives!), Not When Appeals Are Exhausted, Inverse Condemnation Blog, Aug. 2, 2019, https://www.inversecondemnation.com/inversecondemnation/2019/08/lattice-of-coincidence-regulatory-takings-claim-accrues-when-regulator-makes-final-decision-not-when.html.

[148] See, e.g., Johnson v. St. Patrick's Hosp., 417 P.2d 469 (Mont. 1966).

[149] See discussion in Part II.A, *supra*.

Gamble, Dual Sovereignty, and Due Process

*Anthony J. Colangelo**

Introduction

The Constitution's Double Jeopardy Clause is an analytically gnarly beast. What seems like a fairly straightforward prohibition on multiple prosecutions for the same crime turns out to be a bramble bush of doctrinal twists and snarls. At the center is the so-called dual sovereignty doctrine. This principle holds that separate sovereigns (for example, a state and the federal government) may prosecute for what looks like the same "offence"—to use the Constitution's language[1]—because they have separate laws. And because those laws prohibit separate offenses, the Double Jeopardy Clause's bar on multiple prosecutions for the same offense simply does not come into play. As a doctrine that relates to a right guaranteed by the Bill of Rights, it's remarkably one-dimensional in favor of government.

In *Gamble v. United States*[2] the Supreme Court reaffirmed and built upon this view, or what I have called a "jurisdictional theory" of double jeopardy.[3] This theory peels back the label "sovereign" to extract its underlying rationale. Namely, sovereign means an entity with independent jurisdiction to make and apply law, or "prescriptive

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[1] The full language of the Double Jeopardy Clause reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

[2] 139 S. Ct. 1960 (2019).

[3] Anthony J. Colangelo, Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory, 86 Wash. U. L. Rev. 769, 775 (2009).

jurisdiction," and that prescriptive jurisdiction authorizes independent jurisdiction to enforce law through a separate prosecution. This terminological move from sovereignty to jurisdiction is not just semantic. Rather, it opens up analysis. The theory holds strong explanatory power for current double jeopardy law and practice as well as dynamic doctrinal and normative implications for double jeopardy law going forward—perhaps most of all for U.S. prosecutions relating to criminal activity abroad, such as human rights abuses, piracy, and various forms of terrorism.

The move also imports a whole other part of the Constitution: The Due Process Clause, or Clauses—the Fourteenth Amendment's for the states[4] and the Fifth Amendment's for the federal government[5]—for any exercise of jurisdiction in this country must be measured against due process. In other words, if the sovereign has no jurisdiction over the offense, the sovereign cannot successively prosecute. Here *Gamble*'s language that the United States might successively prosecute for crimes abroad when it has "interests" fits snugly into existing due process analyses because both the Fourteenth Amendment and the Fifth Amendment tests also involve interest analyses.

On this view, one question *Gamble* opens up is whether a prior prosecution might mitigate or erase state interests for purposes of due process and, hence, the Double Jeopardy Clause. Indeed, we already know this to be the case in at least one scenario: where the sole interest is in enforcing international law, the United States is jurisdictionally barred from successively prosecuting because the prior prosecution would have extinguished the only law available—international law—under which the defendant cannot be prosecuted twice. To be sure, this view of double jeopardy was articulated by Justice William Johnson in 1820.

Part I of this article is primarily descriptive. It seeks to recruit the Court's own language stretching back to the early 19th century to trace the origins and development of the jurisdictional view of double jeopardy. Part II also describes the law, in particular *Gamble*, with a focus, first, on the Court's adoption of a jurisdictional view and, second, on the Court's use of a state-interest analysis to explain

[4] U.S. Const. amend. XIV.

[5] U.S. Const. amend. V.

when the United States might seek successively to prosecute for crimes occurring abroad.

Part III contains the meat of the analysis. It attempts to interrelate the Double Jeopardy and Due Process Clauses in light of the the dual sovereignty doctrine. There is a certain structural appeal here. The Double Jeopardy Clause and Due Process Clause protections against federal power appear in the same amendment,[6] and the Fourteenth Amendment's Due Process Clause incorporates the Fifth Amendment's double jeopardy protection against the states.[7]

I begin by explaining that due process depends on state interests and that this interest analysis matches up with *Gamble*'s observation that the United States may seek a successive prosecution where it has an interest. I then propose that a useful measure of state interests can be found in international law. Indeed, this is exactly the body of law *Gamble* used to explain when the United States has an interest in successively prosecuting. International law is an appropriate gauge because it captures traditional bases of jurisdiction, and due process depends precisely upon traditional notions of fair play and substantial justice. Moreover, it is a body of law that courts already use when measuring U.S. interests in prosecuting crimes abroad under the Due Process Clause. Thus I argue not that international law limits a successive prosecution of its own force, but rather that it can be incorporated into the Due Process Clause to measure state interests. The more attenuated the interest, the weaker the jurisdictional claim. When combined with other factors—such as the influence one prosecuting entity has over the other, the extent to which the entities' laws and sentencing align, and whether the prior prosecution was a sham designed to shield the accused—there may be situations where a successively prosecuting state's interest is diminished to the vanishing point.

Exactly what such a disqualification of sovereignty would look like in precise fact is largely beyond the prescience of this author; my purpose in this short essay is merely to hatch an idea. But we do know at least one scenario, alluded to above, in which a U.S. interest in successively prosecuting would be erased by a prior prosecution: where the sole basis of jurisdiction would be to enforce international

[6] *Id.*

[7] Benton v. Maryland, 395 U.S. 784, 794 (1969).

law against certain universal crimes like human rights abuses, piracy, and certain acts of terrorism.

I. The Jurisdictional View of Sovereignty

This part traces the development of the dual sovereignty doctrine as fundamentally a doctrine of jurisdiction. At the outset, it will help to break out jurisdiction into three main types: (1) prescriptive; (2) adjudicative; and (3) enforcement. Prescriptive jurisdiction is generally understood as the power to make and apply law;[8] adjudicative jurisdiction is generally understood as the power to subject persons and things to judicial process;[9] and enforcement jurisdiction is generally understood as the power to enforce law.[10] These are just heuristics, but they do a good job helping distinguish different doctrinal tests from one another—for example, the test for personal jurisdiction before a court (adjudicative) from the test regarding when a state may apply its law for choice of law purposes (prescriptive). I propose that the Supreme Court's dual sovereignty jurisprudence can be viewed as upholding successive prosecutions for the same crime where prosecuting entities have independent jurisdiction to make and apply law, or prescriptive jurisdiction, which in turn authorizes independent jurisdiction to enforce that law through a separate prosecution.

Two cases from 1820 suggest the dual sovereignty doctrine. The first is *Houston v. Moore*, a case involving state application of a federal law punishing delinquency from military service.[11] As the Court explained, "[t]his concerns the jurisdiction of a State military tribunal to adjudicate in a case which depends on a law of Congress, and to enforce it."[12] Thus the question presented was framed in terms of concurrent jurisdiction by courts—not legislatures—over the same offense:

> Is it competent to a Court Martial, deriving its jurisdiction under State authority, to try and punish militia men, drafted,

[8] Restatement (Fourth) of the Foreign Relations Law of the U.S. § 101 (Am. Law Inst. 2018).

[9] *Id.*

[10] *Id.*

[11] 18 U.S. 1, 4 (1820).

[12] *Id.* at 24–25.

> detached and called forth by the President into the service of the United States, who have refused, or neglected to obey the call?[13]

The Court answered yes and observed that the offense was the same in both state and federal court because it originated from the same—federal—law.[14]

And here's where some double jeopardy language came in. Justice Bushrod Washington, writing for the Court (sort of[15]), addressed the argument that such a rule "might subject the accused to be twice tried for the same offence."[16] Washington rejected this argument, explaining that "if the jurisdiction of the two courts be concurrent, the sentence of either Court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other."[17] But again, this was only so because the state court was applying federal law, and the accused could not be put in jeopardy twice for the same offense under the same law.[18] *Houston* therefore left the dual sovereignty question open; all it stands for is the uncontroversial proposition that someone cannot be prosecuted multiple times under the same law, and it limited itself to that scenario.[19]

[13] *Id.* at 16.

[14] *Id.* at 17.

[15] As David Currie has noted, "Washington, however, cannot be said to have spoken for the Court in *Houston*" because of the disagreement on the reasoning for the judgment. David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888 110 (1st ed. 1985). Justice Washington suggested as much, writing at the end of his opinion: "Two of the judges are of opinion, that the law in question is unconstitutional, and that the judgment below ought to be reversed. The other judges are of opinion that the judgment ought to be affirmed; but they do not concur in all respects in the reasons which influence my opinion." Houston, 18 U.S. at 32. Justice Johnson was clear on this, explaining at the end of his concurrence that "there is no point whatever decided except that the fine was constitutionally imposed" by the state court, and that "[t]he course of reasoning by which the judges have reached this conclusion are [sic] various, coinciding in but one thing, *viz.*, that there is no error in the judgment [below]." *Id.* at 47.

[16] Houston, 18 U.S. at 31.

[17] *Id.*

[18] Washington posited the opposite scenario in which a federal court could not separately adjudicate a state civil law cause of action after the state court had already adjudicated that same cause of action. *Id*.

[19] See *id.* at 31–33.

But Justice Johnson did not so limit himself. Instead, he gave a full-throated exposition of the dual sovereignty doctrine as a matter of prescriptive jurisdiction, asking rhetorically, "Why may not the same offence be made punishable both under the laws of the States, and of the United States?"[20] He answered:

> Every citizen of a State owes a double allegiance; he enjoys the protection and participates in the government of both the State and the United States. . . . [W]here the United States cannot assume, or where they have not assumed [an] exclusive exercise of power, I cannot imagine a reason why the States may not also, if they feel themselves injured by the same offence, assert their right of inflicting punishment also.[21]

Indeed, "[t]he actual exercise of this concurrent right of punishing is familiar to every day's practice," according to Johnson, who gave the example of robbing the mail on a highway "which is unquestionably cognizable as highway-robbery under State laws," but also a federal offense under U.S. law.[22] Finally, Johnson turned to the consequences of a contrary rule, namely, that states could block a successive federal prosecution "when their real object is nothing less than to embarrass, the progress of the general government."[23] The dual sovereignty rule, on the other hand, would prevent this "evil."[24] He continued to reject the argument in jurisdictional terms:

> But this is a doctrine [prior acquittal as a bar to double jeopardy] which can only be maintained on the ground that an offence against the laws of the one government is an offence against the other government; and can surely never be successfully asserted in any instances but those in which jurisdiction is vested in the State Courts by statutory provisions of the United States. . . . [C]rimes against a government are only cognizable in its own Courts, or in those which derive their right of holding jurisdiction from the offended government.[25]

[20] *Id.* at 33.

[21] *Id.* at 33–34.

[22] *Id*. at 34.

[23] *Id.* at 35.

[24] *Id*.

[25] *Id.*

A couple of points come out of *Houston*. One is that the Court focused on different forms of jurisdiction when evaluating the double jeopardy question. Where multiple prosecutions were posed under the same law, or prescriptive jurisdiction, the prohibition on double jeopardy would kick in—even if the enforcement agents were different courts. But, at least for Justice Johnson, where the laws emanated from concurrent but independent prescriptive jurisdictions of different sovereigns, multiple prosecutions were permissible (and, in some cases, a good idea). If any doubt remains as to Justice Johnson's views regarding double jeopardy, it ought to be erased by his opinion for the Court in *United States v. Furlong*,[26] decided two weeks after *Houston*.

Furlong was a piracy case. *Dicta* in the opinion made a sharp distinction between the parochial crime of murder on the one hand and the international crime of piracy on the other.[27] This distinction had an outcome-determinative effect for double jeopardy law and practice. Piracy, as a result of a legal fiction, was outside the national jurisdiction of any state.[28] Pirates were by definition stateless individuals sailing on stateless vessels acknowledging the authority of no government (hence the black flag).[29] Elsewhere, the Court described them as "persons on board vessels which throw off their national character by cruising piratically and committing piracy on other vessels."[30] The crime was not "committed against the particular sovereignty of a foreign power; but . . . against all nations,

[26] See 18 U.S. (5. Wheat) 184 (1820).

[27] *Id*. at 197.

[28] See United States v. Klintock, 18 U.S. (5 Wheat.) 144, 152 (1820); see also, e.g., Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). To ensure that pirates were prosecuted wherever they were found and assertions of jurisdiction over them occasioned no interference with the sovereignty of other states, pirates were deemed outside of any state's national jurisdiction; see also Justice Antonin Scalia's more recent description in Sosa v. Alvarez-Machain, 542 U.S. 692, 748–49 (2004) (Scalia, J., concurring in part). Absent the fiction, prosecution of a pirate in custody for acts occurring outside the prosecuting state's territory theoretically could infringe another state's sovereignty; specifically, the state (or state's vessel) where the act occurred because, at the time, jurisdiction was strictly territorial in nature and the exercise of extraterritorial jurisdiction was seen as interfering with the sovereignty of the state where the crime occurred.

[29] See generally David Cordingly, Under the Black Flag: The Romance and the Reality of Life among the Pirates (1995).

[30] Klintock, 18 U.S. (5 Wheat.) at 153.

including the United States."[31] All states had jurisdiction over piracy not as a matter of their independent national jurisdiction over territory or national persons, but instead based on a shared international jurisdiction, or what's called "universal jurisdiction."[32] *Furlong* explained that piracy "is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* [already acquitted] would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State."[33] That sounds like the prohibition on double jeopardy.

But, the Court went on, "Not so with the crime of murder."[34] For murder, unlike piracy, was not an offense under international law "within this universal jurisdiction"[35] of all states, but rather was an offense against each state's national laws. "It is punishable under the laws of each State, and . . . an acquittal in [the defendant's] case would not have been a good plea in a Court of Great Britain."[36] Moreover, unlike with piracy, there was a jurisdictional limitation on prosecuting for murder: "punishing it when committed within the jurisdiction, or, (what is the same thing,) in the vessel of another nation, has not been acknowledged as a right, much less an obligation."[37] In other words, where there was no basis for independent national jurisdiction, a state could not prosecute. The Court went on, noting that U.S. citizens could nonetheless be subject to international double jeopardy by multiple nations with concurrent prescriptive jurisdiction over their crimes: "As to our own citizens . . . their subjection to those [U.S.] laws follows them every where,"[38] and while the U.S. Constitution may protect them from multiple prosecutions under

[31] *Id.* at 152; cf. United States v. Smith, 18 U.S. (5 Wheat.) 153, 161–62 (1820) ("The common law . . . recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is part of the common law,) as an offence against the universal law of society, a pirate being deemed an enemy of the human race.").

[32] Furlong, 18 U.S. at 197.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

U.S. law, this protection does not extend to prosecutions under foreign law where foreign nations have jurisdiction, for "if [the accused] are also made amenable to the laws of another State, it is the result of their own act in subjecting themselves to those laws."[39]

In sum, *Furlong* speaks of two types of law emanating from two types of jurisdiction: one national, the other international. National law derives from states' independent jurisdiction over national territory and persons. International law stems from the shared interests of all states to proscribe certain offenses that affect the international community. Where two states have independent national jurisdiction to prosecute, each may do so because each has an independent law and the bar on double jeopardy does not attach. But where international or universal jurisdiction authorizes the application of only international law, multiple prosecutions are prohibited because the first state to prosecute would have "used up" the international law and a subsequent prosecution would thus, impermissibly, be for the same offense, under the same law, twice.

A string of opinions prior to the first actual application of the dual sovereignty doctrine in 1922[40] only cements the jurisdictional reasoning in *Houston* and *Furlong*. The defendant in *Fox v. Ohio* challenged her state conviction for passing counterfeit coin on the ground that only the federal government had jurisdiction over that offense.[41] The Court disposed of her argument by distinguishing counterfeiting, which was an offense exclusively within the jurisdiction of the federal government to proscribe, from passing counterfeit coin, which was fraud within the state's jurisdiction to proscribe.[42] Three years later, *United States v. Marigold* reaffirmed *Fox*'s jurisdictional holding, explaining that the states and Congress each had an independent jurisdiction to prosecute and punish uttering false currency.[43] Then two years after *Marigold*, *Moore v. Illinois* solidified the jurisdictional foundation laid by the prior case law. *Moore* involved a challenge to a state court conviction under an Illinois law outlawing the harboring of fugitive slaves.[44]

[39] *Id.* at 197–98.

[40] United States v. Lanza, 260 U.S. 377 (1922).

[41] Fox v. Ohio, 46 U.S. 410, 433 (1847).

[42] *Id.* at 433–34.

[43] United States v. Marigold, 50 U.S. 560, 569–70 (1850).

[44] Moore v. Illinois, 55 U.S. 13, 17 (1852).

Moore argued that the federal Fugitive Slave Act preempted the Illinois statute, a necessary result because otherwise he could be prosecuted twice for the same offense.[45] As to the preemption argument, the Court found that Illinois had an independent jurisdiction to outlaw the harboring of fugitive slaves.[46] And as to the related double jeopardy argument, the Court announced the dual sovereignty doctrine:

> An offence, in its legal signification, means a transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other.[47]

Finally, a true dual sovereignty case presented itself. *United States v. Lanza* upheld a successive federal prosecution under the Volstead Act after a state conviction for the same acts.[48] The Court explained that "[e]ach State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State."[49] In jurisdictional terms, the "independent judgment" to make and enforce law "is an inseparable incident of independent legislative action in distinct jurisdictions."[50] Indeed, the Court observed that the dual sovereignty "doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate *only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction*."[51]

[45] *Id.*

[46] *Id.* at 18.

[47] *Id.* at 19–20.

[48] Lanza, 260 U.S. at 381.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 384 (quoting S. Ry. Co. v. R.R. Comm'n of Ind., 236 U.S. 439, 445 (1915)) (emphasis added).

The Court repeated this reasoning in subsequent cases upholding a federal prosecution following a state court conviction for the same act,[52] a successive state court conviction following an acquittal of the same acts in federal court,[53] and a successive federal prosecution following a conviction by an Indian tribunal.[54]

Moreover, the Court didn't find dual sovereignties only in respect to federal versus state and tribal authorities. In *Heath v. Alabama* the Court considered the case of a man prosecuted twice for a murder resulting from a kidnapping in Alabama, with the victim's body being found in Georgia.[55] Heath pleaded guilty in Georgia to avoid the death penalty, but was then retried in Alabama, where he was sentenced to death.[56] Before the Alabama trial, Heath leveled two challenges: one, he interposed the bar on double jeopardy; two, he contested Alabama's jurisdiction.[57] The Court found the jurisdictional challenge waived,[58] but there was something to it. It appeared that the vast majority of the acts leading up to the murder, including the planning, preparation, and murder itself, took place in Georgia (though the victim had been kidnapped in Alabama).[59] Moreover, Heath argued, the offenses for which he was prosecuted were identical for purposes of the Double Jeopardy Clause,[60] and his initial conviction in Georgia was the fruit of a joint investigation between

[52] Abbate v. United States, 359 U.S. 187 (1959).

[53] Bartkus v. Illinois, 359 U.S. 121 (1959).

[54] United States v. Wheeler, 435 U.S. 313 (1978); United States v. Lara, 541 U.S. 193 (2003).

[55] Heath v. Alabama, 474 U.S. 82, 84 (1985).

[56] *Id.* at 85–86.

[57] *Id.* at 85. Although Heath initially framed this as a "plea to the territorial jurisdiction of the Alabama court" (see Brief for Petitioner, Heath v. Alabama, 474 U.S. 82 (1985) (No. 84-5555), 1985 U.S. S. Ct. Briefs LEXIS 940 at *10), this argument would more appropriately have been styled as an objection to the application of Alabama law, since the court would have had jurisdiction over Heath by virtue of his physical custody.

[58] *Id.* at 87.

[59] Brief for Petitioner, *supra* note 57, at *13–15.

[60] *Id.* at *13. The relevant test here is the so-called *Blockburger* test. See Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."). For how the *Blockburger* test might factor into this essay's thesis that due process might constrain a sovereign's jurisdiction, see *infra* note 135 and accompanying text.

Georgia and Alabama law enforcement.[61] I would only point out that, on the analysis developed in Part III, the Court would have *had* to consider Heath's objections to Alabama's jurisdiction for it was *that very jurisdiction*, the ability to apply Alabama law to him, that made Alabama a "sovereign" within the meaning of the dual sovereignty doctrine.

In deciding the case on double jeopardy grounds, the Court basically restated the dual sovereignty doctrine and then applied it to the states. The restatement of the doctrine was largely a recitation of quotations from previous cases.[62] More interesting was the Court's discussion of why the doctrine applied to successive prosecutions by multiple states as opposed to states versus the federal government. Here the Court had to discern why, under the dual sovereignty doctrine, different states were separate sovereigns. The Court began by quoting *Lanza*'s statement that "[e]ach government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[63] That is to say, each government has independent jurisdiction to prescribe law. The Court repeated, "each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each is exercising its own sovereignty, not that of the other."[64] Thus, according to the Court, sovereignty really meant independent jurisdiction to make and apply law and the attendant jurisdiction to enforce that law.

But the Court did not always find this independent power. *Grafton v. United States*[65] is best conceptually understood as the intellectual heir of *Houston*. Grafton was serving in the U.S. Army in the

[61] *Id.* at *17. Although not grounded in due process, Heath also made a species of interest argument that the prior Georgia prosecution reduced Alabama's interest and that Heath's individual interest against multiple prosecutions outweighed Alabama's reduced interest. *Id*. at *27–31. Accord Ronald J. Allen and John P. Ratnaswamy, *Heath v. Alabama*: A Case Study of Doctrine and Rationality in the Supreme Court, 76 J. Crim. L. & Criminology 801, 823 (1985) ("A more realistic approach to ascertaining state interests than the definitional approach of the Court would have been for the Court to examine the extent to which the states actually assert that they have unique interests which cannot be satisfied by prior prosecution in another state.").

[62] Heath, 474 U.S. at 88–89 (quoting Lanza, 260 U.S. at 382; Houston, 18 U.S. at 19, 20).

[63] *Id.* at 89.

[64] *Id.* (cleaned up).

[65] Grafton v. United States, 206 U.S. 333 (1907).

then-U.S. territory of the Philippines.[66] While on duty, he killed two Filipinos and was tried by a military court martial under the Articles of War.[67] He was acquitted and then retried in the Filipino court system, where he was convicted of homicide under the Philippine Penal Code.[68] The Supreme Court explained that the court martial's "jurisdiction is not exclusive, but only concurrent with that of civil courts."[69] In other words, there was concurrent adjudicative jurisdiction. That is, "[t]he act done is a civil crime, and the trial is for that act. The proceedings are had in a court-martial because the offender is personally amenable to that jurisdiction[.]"[70] But as to prescriptive jurisdiction, it emanated "from the same government, namely, that of the United States[.]"[71] Indeed, the court martial's prescriptive jurisdiction even depended on the civil penal code: "a general court-martial has, under existing statutes, in time of peace, jurisdiction to try an officer or soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public."[72] Thus the court martial prosecuted Grafton for "the crime of homicide as defined by the Penal Code of the Philippines."[73] Because both the court martial and the Filipino Penal Code shared the same fundamental prescriptive jurisdiction,

> the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or another court, civil or military, of the same government.[74]

Just as in *Houston*, there was concurrent adjudicative jurisdiction. In *Houston*, it was the concurrent jurisdiction of state and federal courts. In *Grafton*, it was the concurrent jurisdiction of courts

[66] *Id.* at 341.
[67] *Id.* at 341–42.
[68] *Id.* at 342.
[69] *Id.* at 348.
[70] *Id.* at 347.
[71] *Id.* at 349.
[72] *Id.* at 351.
[73] *Id.* at 349.
[74] *Id.* at 352.

martial and local civil courts. But in both cases prescriptive jurisdiction drew power from a single source: the federal government. Because there was only one source of prescriptive jurisdiction, there was only one "offence," for which the accused could not be doubly tried.[75]

II. *Gamble*

Throughout the course of the opinion, *Gamble* uses the jurisdictional view that has been discussed so far. The Court started out by explaining, "[w]e have long held that a crime under one sovereign's laws is not 'the same offence' as a crime under the laws of another sovereign."[76] Thus, "a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute."[77] And as we by now know, by that reasoning the reverse is true also: a federal prosecution following a state prosecution is permissible, and that's what happened to Gamble. He had been prosecuted by Alabama under a state law prohibiting felons from possessing firearms and then prosecuted by the federal government for the same acts under a federal felon-in-possession law.[78]

[75] On the basis that territorial law is derivative of federal law, the Supreme Court more recently held that Puerto Rico is not a separate sovereign for purposes of the Double Jeopardy Clause. See Commonwealth of Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1869–70 (2016) ("Because that [prosecutorial] power originally 'derived from the United States Congress'—i.e., the same source on which federal prosecutors rely—the Commonwealth could not retry Sánchez Valle and Gómez for unlawfully selling firearms.") (internal citations omitted). On this logic, the Court has also found that a municipality is not a distinct sovereign from a state because, like Congress's power over the territories, the state legislature, according to the Florida Constitution, had the power "to establish, and to abolish, municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time." Waller v. Florida, 397 U.S. 387, 392 n.4 (1970) (brackets and internal citations and quotation marks omitted). This comports with "the traditional view . . . that the Supreme Court has predicated the constitutional status of local governments entirely on the theory that a local government is merely an administrative arm of the state, utterly lacking in autonomy or in constitutional rights against the state that created it." Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 Colum. L. Rev. 1, 85 (1990).

[76] United States v. Gamble, 139 S. Ct. 1960, 1964 (2019).

[77] *Id.*

[78] *Id.*

The Court then turned to the text. Here it focused on the word "offence" and quoted Justice Antonin Scalia's "soon-vindicated"[79] dissent in *Grady v. Corbin*, a case involving whether a single state could prosecute for different offenses arising out of the same facts.[80] There, Justice Scalia explained that "the language of the Clause . . . protects individuals from being twice put in jeopardy 'for the same offence,' not for the same conduct or actions," and "'[o]ffence' was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.'"[81] In light of this understanding, "[i]f the same conduct violates two (or more) laws, then each offense may be separately prosecuted."[82] *Gamble* transitioned this reasoning into the dual sovereignty context through the following syllogism: "an 'offence' is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two 'offenses.'"[83] This implicitly raises the question of what constitutes a "sovereign." As I hope to have shown by now, a sovereign is an entity that enjoys independent power to make and apply law, or prescriptive jurisdiction.

The Court next turned to the cases.[84] Unsurprisingly, it rehearsed the dual sovereignty reasoning of *Fox*, *Marigold*, and *Moore*.[85] But what's interesting here is the Court's heavy emphasis on "the substantive differences between the interests that two sovereigns can have in punishing the same act."[86] Hence the Court did not stop at an antiseptic jurisdictional reading of these opinions; rather, it went out of its way to "honor" the different federal and state interests at play in

[79] *Id.* at 1965.

[80] Grady v. Corbin, 495 U.S. 508 (1990).

[81] *Id.* at 529 (internal citations omitted).

[82] *Id.*

[83] Gamble, 139 S. Ct. at 1965. The Court also quoted parenthetically *Moore*'s statement that "[t]he constitutional provision is not, that no person shall be subject, for the same act, to be twice put in jeopardy of life or limb; but for the same offence, the same violation of law, no person's life or limb shall be twice put in jeopardy." *Id.* (quoting Moore, 55 U.S. at 17) (internal emphasis omitted).

[84] I should note that *Houston v. Moore* and *United States v. Furlong* were discussed in the Court's opinion, but were done so later on in the part of the opinion dealing with Gamble's arguments, which relied on those cases. See *id.* at 1976–79. The Court's reading of both cases is consistent with the argument presented here.

[85] *Id.* at 1966–67.

[86] *Id.* at 1966.

the successive prosecution scenarios illustrated by the cases. In *Fox*, it was the state's interest in prohibiting the passing of counterfeit coin;[87] and in *Marigold*, a case involving uttering false currency, the crime was measured by its "character in reference to each" prosecuting entity.[88] *Moore*, according to the Court, "expanded on this concern for the different interests of separate sovereigns"[89] by describing the hypothetical assault on a U.S. marshal that would offend both national ("hindering the execution of legal process"[90]) and state ("breaching the peace of the State"[91]) interests.[92]

And then the Court veered off the precedential track, so to speak. It speculated about the implications of Gamble's theory when it comes to prosecuting for crimes abroad. The Court worried that "[i]f . . . only one sovereign may prosecute for a single act, no American court—state or federal—could prosecute conduct already tried in a foreign court."[93] What about a U.S. national murdered abroad? In keeping with an interest analysis, the country where the murder occurred could "rightfully seek to punish the killer" because "[t]he foreign country's interest lies in protecting the peace in that territory rather than protecting the American specifically."[94] But the United States would also have an interest: the interest not to see its nationals killed—an interest captured by "customary international law."[95] Or we may have other "key national interests," among which might be "punishing crimes committed *by* U.S. nationals abroad."[96] The Court then repeated its interest approach in no uncertain terms: "a crime against two sovereigns constitutes two offenses because each sovereign has an interest to vindicate."[97]

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 1966–67 (cleaned up).

[91] *Id.* at 1967 (cleaned up).

[92] That the Court chose not to "honor" the specific facts and laws at play in *Moore* is not that surprising. The case involved upholding a state prosecution for harboring fugitive slaves. Moore, 55 U.S. at 17.

[93] Gamble, 139 S. Ct. at 1967.

[94] *Id.*

[95] *Id.*

[96] *Id.* (emphasis in original).

[97] *Id.*

If sovereign means jurisdiction, and jurisdiction is triggered by interests, what interests count? And, can they ever be mitigated by a prior prosecution so as to render a successive prosecution unconstitutional?

III. Due Process and Double Jeopardy

Before answering those questions, we must give them some constitutional context. Any exercise of jurisdiction in this country must comply with due process. The Fourteenth Amendment's Due Process Clause regulates assertions of state power[98] while the Fifth Amendment's Due Process Clause regulates the federal government.[99] The relevant type of jurisdiction for our purposes is, again, prescriptive—or the power to make and apply law. Unlike in civil cases, criminal cases do not proceed in absentia in the United States, so the court will always have personal, adjudicative jurisdiction over the accused (even if custody is obtained by force or fraud).[100] The applicable Supreme Court test for discerning whether an assertion of prescriptive jurisdiction comports with due process requires that a state have "a significant contact or significant aggregation of contacts, *creating state interests*, such that choice of its law is neither arbitrary nor fundamentally unfair."[101] That is the test under the Fourteenth Amendment; the Court has not yet resolved the test under the Fifth Amendment. But lower courts that have considered the matter agree that Fifth Amendment due process applies so as not to render the application of federal law "arbitrary or fundamentally unfair."[102] The tests vary, but all appear to have found this "common denominator."[103]

[98] U.S. Const. amend. XIV, § 1.

[99] U.S. Const. amend. V.

[100] See Anthony J. Colangelo, Spatial Legality, 107 Nw. L. Rev. 69, 84 (2012); Anthony J. Colangelo, What Is Extraterritorial Jurisdiction?, 99 Cornell L. Rev. 1303, 1330 nn.139–41 (2014).

[101] Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (emphasis added).

[102] See, e.g., United States v. Baston, 818 F.3d 651, 669 (11th Cir. 2016); United States v. Clark, 435 F.3d 1100, 1108 (9th Cir. 2006); United States v. Juda, 46 F.3d 961, 966 (9th Cir. 1995).

[103] United States v. Carvajal, 924 F. Supp. 2d 219, 262 (D.D.C. 2013). See also United States v. Ali, 718 F.3d 929, 943 (D.C. Cir. 2013).

In recent years, both the states[104] and the federal government[105] have been experimenting with stretching jurisdiction beyond territorial borders. The federal government in particular has begun projecting U.S. law abroad in aggressive and unprecedented ways.[106] This boom of what's called "extraterritorial jurisdiction" has triggered a spike in due process challenges to the application of U.S. law abroad.[107] I want to use these jurisdictional assertions to build out and illustrate my argument interrelating the Due Process Clauses and the Double Jeopardy Clause; namely, if we take seriously due process and combine it with the interest analysis suggested by *Gamble*, there may be situations in which a prior prosecution might mitigate a successively prosecuting state's interest so as to render subsequent application of its law arbitrary or fundamentally unfair, thus vitiating the state's status as sovereign for purposes of the Double Jeopardy Clause. Recall, although the dual sovereignty "doctrine is thoroughly established . . . [u]pon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction."[108]

[104] U.S. states have for the most part adopted statutes, based on the Model Penal Code, that enlarge their territorial jurisdiction to encompass conduct within the state that leads to, or is intended to lead to, a harmful result outside the state, as well as conduct outside the state that leads to, or is intended to lead to, a harmful result inside the state. See 4 Wayne R. LaFave et al., Criminal Procedure § 16.4(c) (4th ed. 2014). The constitutionality of this legislation has been held not to violate due process "[b]ecause such legislation adheres to the territoriality principle." *Id.*

[105] See *infra* notes 111–16.

[106] These jurisdictional assertions have led to a substantial number of international double jeopardy cases in U.S. courts. See, e.g., United States v. Alcocer Roa, 753 F. App'x 846 (11th Cir. 2018) (U.S. prosecution following Panamanian prosecution); United States v. Ducuara De Saiz, 511 F. App'x 892 (11th Cir. 2013) (prior Colombian prosecution); United States v. Jeong, 624 F.3d 706 (5th Cir. 2010) (prior South Korean prosecution); United States v. Rashed, 234 F.3d 1280, 1281 (D.C. Cir. 2000) (prior Greek prosecution); United States v. Rezaq, 134 F.3d, 1121, 1126–27 (D.C. Cir. 1998) (prior Maltese prosecution); United States v. Guzman, 85 F.3d 823, 826 (1st Cir. 1996) (prior Dutch Antillean prosecution); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1362 (11th Cir. 1994) (prior Bahamian prosecution); Chua Han Mow v. United States, 730 F.2d 1308, 1313 (9th Cir. 1984) (prior Malaysian prosecution); United States v. McRary, 616 F.2d 181, 185 (5th Cir. 1980) (prior Cuban prosecution); United States v. Richardson, 580 F.2d 946, 947 (9th Cir. 1978) (prior Guatemalan proceedings); United States v. Martin, 574 F.2d 1359, 1360 (5th Cir. 1978) (prior Bahamian prosecution).

[107] See *infra* notes 111–16.

[108] Lanza, 260 U.S. at 384 (quoting S. Ry. Co., 236 U.S. at 445).

Because federal extraterritoriality over crimes abroad promises to be the most fast-moving and controversial area going forward, this analysis focuses principally on that scenario. As noted, the Due Process Clause of the Fourteenth Amendment requires that a state have contacts creating state interests such that application of its law is neither arbitrary nor fundamentally unfair.[109] The same type of reasoning permeates Fifth Amendment due process regarding extensions of federal law. Courts began articulating Fifth Amendment due process as a "nexus" requirement,[110] and this test still prevails in some circuits.[111] Other circuits have rejected[112] or atrophied it.[113] Despite the varying tests, however, it should come as no surprise that courts approving the extension of U.S. law abroad have found it to be in the United States's interests to do so. This is not to say that courts always come out and announce, "It is in the interests

[109] Allstate Ins. Co., 449 U.S. at 312–13 (1981).

[110] United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003) (holding that due process requires a "sufficient nexus" such that application of U.S. law is not "arbitrary or fundamentally unfair") (quoting United States v. Davis, 905 F.2d 245, 248–49 (9th Cir. 1991)).

[111] *Id.* See also United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) (applying nexus test in prosecution for conspiracy to kill U.S. nationals, among other charges).

[112] United States v. Wilchcombe, 838 F.3d 1179, 1186 (11th Cir. 2016) (Due process does not require a nexus between the defendants and the United States in a suit brought under the MDLEA.); United States v. Campbell, 743 F.3d 802, 810 (11th Cir. 2014) (same). United States v. Suerte, 291 F.3d 366, 375–77 (5th Cir. 2002) (finding that no nexus is required where the flag nation consented or waived objection to enforcement); United States v. Cardales, 168 F.3d 548, 553 (1st Cir. 1999) (same); United States v. Martinez-Hidalgo, 993 F.2d 1052, 1056 (3d Cir. 1993) (finding that Congress may override a nexus requirement.).

[113] See, e.g., United States v. Shibin, 722 F.3d 233, 239 (4th Cir. 2013) (finding an exception to the nexus requirement where the offense is subject to universal jurisdiction). Al Kassar, 660 F.3d at 119 (finding an exception to the nexus requirement where conduct is "self-evidently" criminal); United States v. Caicedo, 47 F.3d 370, 372–73 (9th Cir. 1995) (finding an exception to the nexus requirement when defendants are aboard "stateless vessels"); Ali, 718 F.3d at 943–44 (finding an exception to the nexus requirement when a treaty exists on the substance of cause of action); United States v. Shi, 525 F.3d 709, 722 (9th Cir. 2008) (no nexus required where acts took place on a stateless vessel); United States v. White, 51 F. Supp. 2d 1008, 1011 (E.D. Cal. 1997) ("[W]here the government seeks to prosecute a United States citizen for acts occurring in foreign lands, due process does not require a demonstration of 'nexus.'"). Although the tests may look different on the surface, they all coalesce around international law principles of jurisdiction to determine whether an assertion of jurisdiction is arbitrary or fundamentally unfair.

of the United States to apply our law in this situation."[114] Rather, courts tend to draw from an established source of markers for state interests—indeed, the same source that the Court in *Gamble* drew from: international law.[115]

As discussed in Part II, *Gamble* spoke of a U.S. interest in successively prosecuting where a U.S. national is injured abroad[116]—or what is called the passive-personality basis of jurisdiction[117]—and where crimes are committed by U.S. nationals abroad[118]—or the active-personality basis of jurisdiction.[119] And it explicitly noted that international law permits jurisdiction on these bases to support

[114] Though some courts have explicitly said that where it is in the "interest" of the United States to apply U.S. law extraterritorially, due process is satisfied—and in the international double jeopardy context to boot. See White, 51 F. Supp. at 1011 (upholding jurisdiction on the basis of defendant's U.S. citizenship [the nationality basis of jurisdiction under international law] because "[t]he interest of the United States in this case can hardly be questioned."); see also United States v. Murillo, 826 F.3d 152, 157 (4th Cir. 2016) (holding that "it is not arbitrary to prosecute a defendant in the United States if his actions affected significant American interests—even if the defendant did not mean to affect those interests") (internal quotation marks omitted).

[115] United States v. Noel, 893 F.3d 1294, 1303 (11th Cir. 2018) ("Compliance with international law satisfies due process because it puts a defendant on notice that he could be subjected to the jurisdiction of the United States.") (internal citation and quotation marks omitted); Cardales, 168 F.3d at 553 ("In determining whether due process is satisfied, we are guided by principles of international law"; finding due process satisfied by relying on the interests created by the territorial principle and the protective principle); United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378–79 (11th Cir. 2011) ("In determining whether an extraterritorial law comports with due process, appellate courts often consult international law principles such as the objective principle, the protective principle, or the territorial principle."); Davis, 905 F.2d at 249 n.2 ("[i]nternational law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States"); Carvajal, 924 F. Supp. at 262 ("whatever the Due Process Clause requires, it is satisfied where the United States applies its laws extraterritorially pursuant to the universality principle" of international law) (internal citation omitted); see also, e.g., United States v. Rojas, 812 F.3d 382, 393 (5th Cir. 2016) (relying on objective territoriality in finding due process satisfied); Murillo, 826 F.3d at 157–58 (relying on passive personality in finding due process satisfied); Clark, 435 F.3d at 1108–09 (relying on nationality or active personality in finding due process satisfied); United States v. Yousef, 327 F.3d 56, 97 (2d Cir. 2003) (finding jurisdiction under the protective principle where "planned attacks were intended to affect the United States and to alter its foreign policy").

[116] Gamble, 139 S. Ct. at 1967.

[117] Restatement (Fourth) of the Foreign Relations Law of the U.S. § 411.

[118] Gamble, 139 S. Ct. at 1967.

[119] Restatement (Fourth) of the Foreign Relations Law of the U.S. § 410.

its analysis.[120] Add to this list subjective territoriality (where conduct occurs or has been initiated on the state's territory),[121] objective territoriality (where part but not necessarily all of the conduct is completed on the state's territory[122]), and "effects" jurisdiction (where conduct has or is intended to have an effect on the state's territory, even if the conduct occurs elsewhere).[123] Then there's the so-called protective principle, which authorizes jurisdiction where conduct affects official state functions or the security of the state.[124] Finally, there's universal jurisdiction,[125] already introduced in the discussion of *Furlong*.[126] This basis of jurisdiction essentially holds that certain offenses under international law are so harmful, any state in the world can prosecute the perpetrators.[127] The idea here, as I've argued, is that the state is not applying its national law to the accused, but rather is acting as the decentralized enforcement agent for an international law that covers the globe.[128]

None of this is to suggest that these bases of jurisdiction on their own have the force of law in U.S. courts such that if the United States exceeds its jurisdiction under international law, the exercise of jurisdiction is unconstitutional. Rather, the argument is more subtle. It seeks in effect to incorporate these jurisdictional principles into the Due Process Clause to measure the strength of a U.S. interest in successively prosecuting. In short, the jurisdictional bases are proxies for interests. The further away from the bases one gets, the less the interest, and the less a successive prosecution complies with due process and, hence, the Double Jeopardy Clause.

At this stage, a couple of points must be addressed. One involves the argument that these *particular* bases ought to serve as baselines, such that the further away one gets from a basis, the more

[120] Gamble, 139 S. Ct. at 1967.

[121] Restatement (Fourth) of the Foreign Relations Law of the U.S. § 408 cmt. c.

[122] *Id*.

[123] *Id*. at § 409.

[124] *Id.* at § 412.

[125] *Id.* at § 413.

[126] See *supra* notes 26–40.

[127] See Restatement (Fourth) of the Foreign Relations Law of the U.S. § 413.

[128] Anthony J. Colangelo, Universal Jurisdiction as an International "False Conflict" of Laws, 30 Mich. J. Int'l L. 881 (2009). See also Ali, 718 F.3d at 935 ("Universal jurisdiction is not some idiosyncratic domestic invention but a creature of international law.").

attenuated the interest. Who's to say that these bases, as opposed to other bases—say, the place where the family of the accused lives—ought to provide the constitutional touchstone? The answer is that these bases capture the traditional rationales upon which states assert jurisdiction; indeed, it is for this very reason that they embody customary international law.[129] And due process cares deeply about tradition, for it requires that any assertion of jurisdiction obey "traditional notions of fair play and substantial justice."[130] Satisfaction of this criterion, in turn, avoids the exercise of jurisdiction being "arbitrary or fundamentally unfair."[131] It is not arbitrary because the state has a recognized basis under an established body of law applicable to all on which to apply its law. And it is not fundamentally unfair because the individual defendant is on notice that the state's law may apply to him on a recognized basis under an established body of law applicable to all.[132]

The next point transitions to the double jeopardy discussion. So far we have been talking only about how attenuated the interest must be from traditional bases of jurisdiction for it to violate the Constitution. This question must be complicated, however. If that were the end of the discussion, it would be no different from the question of whether the United States has jurisdiction to begin with, which is something courts have been wrestling with for roughly a quarter century. The confounding variable for the present analysis is the prior prosecution. More specifically, the constitutional question

[129] Restatement (Fourth) of the Foreign Relations Law of the U.S. § 101 cmt. a ("customary international law . . . results from a general and consistent practice of states followed out of a sense of international legal right or obligation.").

[130] Burnham v. Superior Court of Cal., 495 U.S. 604, 609 (1990) (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)); Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 105 (1987) (quoting Int'l Shoe, 326 U.S. at 316). I realize that citing these cases adds to the prescriptive jurisdiction analysis considerations about adjudicative jurisdiction and, particularly, personal jurisdiction. However, as Justice William Brennan, paraphrasing Justice Hugo Black, has pointed out, "both inquiries are often closely related and to a substantial degree depend upon similar considerations." Shaffer v. Heitner, 433 U.S. 186, 224–25 (1977) (internal citation omitted). Requiring traditional bases of jurisdiction also provides a constraint on states from inventing or manufacturing novel interests upon which to apply their laws in extravagant ways.

[131] *Supra* note 102.

[132] Fair notice of the law is a primary consideration in due process analysis. See Colangelo, Spatial Legality, *supra* note 100, at 81.

is whether an attenuated interest *combined with* a prior prosecution comports with due process.

Here I want to propose other factors that may inform this calculus on an interest analysis: (a) the degree of influence the entity seeking successively to prosecute has on the initial prosecuting entity; (b) the degree to which the laws and sentencing align; and (c) the degree to which the foreign prosecution is a sham designed to shield the accused. Each of these factors can instruct whether the successively prosecuting state's interest has been sufficiently vindicated so as to render another prosecution unconstitutional.

As to the degree of influence one prosecuting entity has on the other, the more influence, the more both states' interests would appear to be vindicated by a single prosecution. Courts have already carved out an exception to the dual sovereignty doctrine that would bar a successive prosecution by a separate sovereign where "one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings."[133] I agree that this must be a high bar as a factor contributing to disqualifying sovereignty under the dual sovereignty doctrine lest it create a perverse incentive for prosecuting entities not to engage in beneficial communication and cooperation at the expense of giving up the right to prosecute successively.[134]

As to the laws aligning, the relevant test for double jeopardy purposes is the *Blockburger* test.[135] It provides that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two

[133] United States v. Guzman, 85 F.3d 823, 827 (1st Cir. 1996) (internal citation omitted). See also United States v. Raymer, 941 F.2d 1031, 1037 (10th Cir. 1991); United States v. Bernhardt, 831 F.2d 181, 182 (9th Cir. 1987).

[134] See Rashed, 234 F.3d at 1281 ("U.S. assistance was so pervasive that Greece gathered little of the presented evidence independently. But [the exception] acknowledges that extensive law enforcement and prosecutorial cooperation between two sovereigns does not make a trial by either a sham."). This is not to say that the bar could never be met and such a foreign state prosecution could never qualify for the exception. See *id.* at 1283 ("An easy case, for example, might be where a nation pursued a prosecution that did little or nothing to advance its independent interests, under threat of withdrawal of American aid on which its leadership was heavily dependent. But where the United States simply lends a foreign government investigatory resources, the manipulation moniker is out of the question.").

[135] See Blockburger, 284 U.S. at 304.

offenses or only one, is whether each provision requires proof of a fact which the other does not."[136] If the laws match up under this test such that the offenses are the same for double jeopardy purposes, the less a successive prosecution would seem appropriate.[137] Sentencing can be evaluated on a case-by-case basis,[138] but it obviously also factors into whether the previous trial is a sham. According to the Rome Statute for the International Criminal Court, if the proceedings were undertaken "for the purpose of shielding the person concerned from criminal responsibility," they would constitute a sham trial.[139] The more the previous trial looks like it was designed to shield the accused from criminal responsibility, the more appropriate a successive prosecution. A context-sensitive analysis that takes into account these factors and a successively prosecuting entity's degree of jurisdictional connection with the crime, as measured by established bases that capture state interests, provides a sophisticated and workable constitutional test.

At the very least there is one scenario, raised by *Furlong* back in 1820, in which the United States would be barred from successively

[136] *Id.*

[137] This was the case in *Heath*, for example. As Heath's counsel argued, "the elements of the two statutes being virtually indistinguishable, the *Blockburger* 'same elements' test is also satisfied." Brief for the Petitioner, *supra* note 57, at *8. The Court brushed this type of argument aside, flatly observing that "[i]f the States are separate sovereigns, as they must be under the definition of sovereignty which the Court consistently has employed, the circumstances of the case are irrelevant." Heath, 474 U.S. at 92. It is submitted that, as Part I demonstrated, the definition of sovereignty hinges on jurisdiction, and a jurisdictional analysis based on state interests may well consider the degree to which the laws align to measure whether the successively prosecuting state's interests have been satisfied.

[138] Defendants in *United States v. Richardson* were let go upon purchasing their freedom in Guatemala; the court noted that a successive U.S. prosecution was appropriate in part because they "were permitted to avoid prison terms by paying a relatively small sum of money." 580 F.2d 946, 947 (1978). See also Rashed, 234 F.3d at 1281 (U.S. successive prosecution where defendant was released by Greek authorities after eight years following conviction for, among other things, aircraft bombing and murder, which under U.S. law carries a sentence of death or life imprisonment); Rezaq, 134 F.3d at 1125–27 (U.S. successive prosecution where defendant was released by Maltese authorities after seven years following conviction for hostage taking and murder, which under a U.S. law prohibiting air piracy carries a sentence of death or life imprisonment).

[139] Rome Statute of the International Criminal Court, art. 17(2)(a), July 17, 1998, 2187 U.N.T.S. 90.

prosecuting under a jurisdictional view. Suppose the United States seeks successively to prosecute a foreign perpetrator of piracy, terrorism, torture, or genocide not explicitly linked to U.S. territory or nationals. There are a host of statutes on the books authorizing and arguably even mandating a U.S. prosecution in respect of these crimes if the United States gets personal jurisdiction over the alleged perpetrators.[140] And we have pursued such prosecutions.[141] But under international law, there would be no recognized national interest regarding U.S. territory or persons upon which to apply uniquely U.S. national law. The only interest (and indeed, authorization) would be the enforcement of international law, as implemented in the U.S. code, under the principle of universal jurisdiction. If a foreign nation gets there first and applies international law (via a prosecution resting on a national basis of jurisdiction or resting on universal jurisdiction), the United States may not do so again. Now, this would require applying the definition of the offense under international law in the foreign prosecution. But that would largely be the case where foreign law implements the international treaty proscribing the offense in question, since treaties largely embody customary international law definitions of universal crimes.[142]

[140] See, e.g., 18 U.S.C. § 2332f(2)(C) (American jurisdiction exists to prosecute for bombing occurring outside the U.S. when "a perpetrator is found in the United States."); see also 18 U.S.C. § 1091(e)(2)(D) (genocide); 18 U.S.C. § 2340A(b)(2) (torture); 49 U.S.C. § 46502(b)(2)(C) (aircraft piracy); 18 U.S.C. § 1203(b)(1)(B) (hostage taking); 18 U.S.C. § 1651 (piracy); 18 U.S.C. § 2339C(b)(2)(B) (financing terrorism). These statutes largely implement international treaties to which we are party, which mandate that we prosecute or extradite offenders found within our territory. See, e.g., International Convention for the Suppresion of Acts of Nuclear Terrorism, art. 9(4), Sept. 14, 2005, S. Treaty Doc. No, 110-4, 2445 U.N.T.S. 89; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5(2), Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

[141] See e.g., Ali, 718 F.3d at 942, 944 (universal jurisdiction over hostage taking); Shi, 525 F.3d at 722–23 (universal jurisdiction over piracy).

[142] Anthony J. Colangelo, Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law, 48 Harv. Int'l L.J. 121, 176–85 (2007). The treaties do not contemplate a bar on double jeopardy by multiple sovereigns. Rezaq, 134 F. 3d at 1129.

Conclusion

There exists a lens through which the Supreme Court's dual sovereignty jurisprudence coheres. That lens has been crafted by the Court's language throughout the history of the doctrine, spanning back to 1820. It provides that "sovereign" really means independent jurisdiction to make and apply law. Because any exercise of jurisdiction must comply with due process, the next question becomes how to measure jurisdiction under the Constitution's Due Process Clauses. *Gamble* gave a clue when it explained that historically different sovereigns were justified in prosecuting successively when they had an interest in doing so, and suggested that the United States might prosecute successively for a foreign crime when that crime touches U.S. interests as measured by international law.

This discussion of interests fits nicely with traditional due process tests that require established interests for a state to apply its law. And when it comes to extraterritorial assertions of jurisdiction, the established interests are found in international law, as *Gamble* indicated. The further the assertion of jurisdiction gets from these bases, the weaker the assertion of jurisdiction becomes as a matter of due process. Combined with other factors—such as the degree of influence a successively prosecuting state has over the initial prosecution, the degree to which the prior prosecution implements laws that align with those of the successively prosecuting state, and the extent to which the prior prosecution is a sham, a nuanced and managable new test emerges. Finally, where a successive prosecution is based only on the interest in enforcing international law and the prior prosecution has already used that same law, the successive prosecution is barred under a jurisdictional view.

Timbs v. Indiana: Mere Constitutional Housekeeping or the Timely Revival of a Critical Safeguard?

*Brianne J. Gorod and Brian R. Frazelle**

> "Here we are in 2018 still litigating incorporation of the Bill of Rights. Really? Come on."
>
> —Justice Neil Gorsuch to Indiana Solicitor General Thomas M. Fisher during oral argument in *Timbs v. Indiana*.

Introduction

To anyone familiar with the story of how selected parts of the Bill of Rights have become "incorporated" against the states, Justice Gorsuch's incredulous remark during the argument in *Timbs v. Indiana* is likely to resonate. When the Fourteenth Amendment was ratified in 1868, the well-understood purpose of its Privileges or Immunities Clause was to require, for the first time, that state governments observe the protections for individual liberty set forth in the Bill of Rights—protections that until then had restricted only the federal government. Yet 150 years later, the Supreme Court still had not resolved whether all of the constitutional protections in the Bill of Rights apply to the states. And so there was the Indiana solicitor general, standing before the justices and arguing that the Excessive Fines Clause of the Eighth Amendment does not limit Indiana's conduct in the same way it limits that of the federal government.

While Justice Gorsuch directed his dismay at counsel, it's no secret that the real culprit behind this state of affairs is the body of which

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Gorsuch is a member. It was the Supreme Court that subverted the meaning and purpose of the Fourteenth Amendment just a few years after its ratification, stymying the efforts of a nation that sought to reform the structure of our government in the wake of the Civil War and the South's ongoing refusal to respect fundamental rights. And it was the Supreme Court that never forthrightly corrected this misstep. Instead, for decades now, the Court has opted to "selectively" enforce certain protections from the Bill of Rights against the states, one by one, under the authority of the Fourteenth Amendment's Due Process Clause. The Court's stubborn adherence to that course is why, in the 21st century, several Bill of Rights protections still remain unincorporated.

That number got smaller with *Timbs*. Unanimously, the justices ruled that the Excessive Fines Clause applies equally to the states and the federal government. The decision, moreover, reaffirmed the Court's earlier holding that the clause extends its protection not only to straightforward monetary fines but also to civil asset forfeitures, like the one at issue in *Timbs*, when they are used at least in part to punish.

Putting aside the question of why the incorporation of the Excessive Fines Clause was still up for debate, the more interesting question is why the matter was finally decided now. On the one hand, incorporating the clause helps clean up the untidiness of the Court's Fourteenth Amendment jurisprudence. And in that sense, as Tyson Timbs's counsel told the justices at oral argument, the case was in part simply "constitutional housekeeping." But on the other hand, when one considers the factors that prompted the Court to take this case and rule so decisively in Timbs's favor, it becomes clear that much more was going on—and much more was at stake. The truth is that *Timbs* is a promising step in reviving a long-neglected constitutional safeguard to meet the challenges posed by a new breed of government abuses.

In recent decades, federal and state governments have dramatically ramped up their use of civil forfeiture proceedings, while altering the rules of these proceedings in ways that deny basic fairness to the individuals caught up in their webs. Particularly at the state and local level, forfeiture has become a cash cow, a tool used to fill the gaps of declining law-enforcement budgets without formally raising taxes. Meanwhile, the incentive structures in place under federal and state law permit police departments to retain much of the value of the assets

they seize—a moral hazard that fosters aggressive and unseemly tactics that blur the line between law enforcement and profiteering. And the spread of abusive civil forfeiture has not occurred in isolation. Rather, it has accompanied a more general rise in the use of exploitative fines and fees to generate revenue, largely on the backs of minority and low-income communities least equipped to resist.

Thanks to investigative journalists and the work of advocacy organizations, these unsavory tactics have been exposed to scrutiny in recent years. And that exposure has prompted a growing effort to curb abuses, one that increasingly spans the ideological spectrum.

The *Timbs* case exemplifies both the spread of civil-forfeiture abuse and the mounting strength of the movement against it. The Institute for Justice identified an outrageous case in which the Indiana courts allowed the state to seize the vehicle of a defendant who pled guilty to a small-time drug offense, even though his vehicle was worth four times more than the highest fine he could have received for his crime. At the certiorari stage and on the merits before the Supreme Court, Timbs's counsel mustered a broad coalition of amici—remarkable in its ideological diversity but united against oppressive civil forfeitures—that helped demonstrate the legal necessity of incorporating the Excessive Fines Clause against the states and the practical importance of doing so.

The resulting Supreme Court decision should add even more momentum to the movement against exploitive financial penalties. For a variety of reasons, the Court's clarification that all states must obey the Excessive Fines Clause should promote the development of more uniform and detailed standards concerning what is "excessive," making it easier for such challenges to succeed. And for that reason, *Timbs* is an important step toward the creation of a robust excessive-fines jurisprudence capable of reining in a host of modern injustices.

I. Legal and Historical Context

A. The Excessive Fines Clause: Curbing the Potential for Abuse of the Government's Power to Punish

One of three "parallel limitations"[1] that make up the Eighth Amendment, the Excessive Fines Clause is sandwiched between a

[1] Ingraham v. Wright, 430 U.S. 651, 664 (1977).

prohibition on excessive bail and the more familiar ban on cruel and unusual punishments:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The clause was not widely discussed when the First Congress proposed the Bill of Rights, nor in the state debates over ratification.[2] Remarkably, not until 1998 did the Supreme Court first apply the clause, and only a few decisions before that had discussed its meaning and scope.[3] Nonetheless, its origin and purpose are "undisputed."[4]

The Excessive Fines Clause, along with the rest of the Eighth Amendment, came essentially "verbatim" from the English Bill of Rights of 1689.[5] Like many constitutional safeguards, the clause is rooted in a series of notorious government abuses in England that spurred the entrenchment of countervailing legal rules.

After King Charles I dismissed the Parliament in the 1620s, he found himself—not unlike many U.S. states and localities today—in need of creative new ways to raise funds. And so the king "turned 'to exactions, some odious and obsolete, some of very questionable legality, and others clearly against law.'"[6] Despite a tradition of prohibiting disproportionate fines that stretched back to the Magna Carta, the Star Chamber began to "'impose[] heavy fines on the king's enemies.'"[7] And while the statute that eventually abolished that court "prohibited any court thereafter from . . . levying . . . excessive fines," this problem again became a "flashpoint" later in the century.[8] Once more, courts began to "impose[] ruinous fines on the critics of the crown,"[9] a practice that "became even more excessive and

[2] United States v. Bajakajian, 524 U.S. 321, 335 (1998).

[3] *Id.* at 327 (citing examples).

[4] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 266 (1989).

[5] Bajakajian, 524 U.S. at 335.

[6] Timbs v. Indiana, 139 S. Ct. 682, 693 (2019) (Thomas, J., concurring in the judgment) (quoting 1 H. Hallam, Constitutional History of England: From the Accession of Henry VII to the Death of George II 462 (1827)).

[7] *Id.* at 694 (quoting Lois G. Schwoerer, The Declaration of Rights, 1689 91 (1981)).

[8] *Id.* at 693–94 (quoting Schwoerer, *supra* at 91).

[9] *Id.* (quoting Schwoerer, *supra* note 7, at 91).

partisan,"[10] as when the sheriff of London, for instance, was fined over $10 million in present-day dollars for "speaking against the Duke of York."[11]

These excesses formed a key part of "the constitutional and political struggles between the king and his parliamentary critics" that culminated in the Glorious Revolution and the 1689 Bill of Rights.[12] That declaration of the "ancient rights and liberties" of English subjects contained a familiar-sounding provision: "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[13]

Those precise words, decades later and an ocean away, were included in the Virginia Declaration of Rights just as the American colonists were preparing to declare their independence from Great Britain.[14] And in 1789, when the new United States Congress proposed a federal bill of rights, its framers used Virginia's provision as their model for the Eighth Amendment—being "aware and [taking] account of the abuses that led to the 1689 Bill of Rights."[15] By then a majority of the states had some version of a similar ban in their own constitutions, and the clause prompted little "controversy or extensive discussion" in Congress or during ratification.[16]

Consistent with its origin and purpose, the clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense."[17] Its focus is curbing "the potential for governmental abuse of its prosecutorial power."[18]

[10] Browning-Ferris, 492 U.S. at 267 (quoting Schwoerer, *supra* note 7, at 91).

[11] Timbs, 139 S. Ct. at 694 (Thomas, J., concurring in the judgment).

[12] *Id*. at 693 (quoting Schwoerer, *supra* note 7, at 91).

[13] English Bill of Rights of 1689, http://avalon.law.yale.edu/17th_century/england.asp.

[14] Virginia Declaration of Rights, http://avalon.law.yale.edu/18th_century/virginia.asp.

[15] Browning-Ferris, 492 U.S. at 267.

[16] *Id.* at 264; see Timbs, 139 S. Ct. at 696 (Thomas, J., concurring in the judgment) (citing 1 Annals of Cong. 754 (1789)).

[17] Austin v. United States, 509 U.S. 602, 609–10 (1993) (emphasis and quotation marks omitted).

[18] Browning-Ferris, 492 U.S. at 266 (quotation marks omitted).

B. Civil War, Reconstruction, and the Black Codes: The South's Violations of Fundamental Rights

Throughout the antebellum period in American history, the Excessive Fines Clause—like the rest of the Bill of Rights—was generally understood as curbing only abuse by the *federal* government.[19]

That omission had consequences. Starting around 1830, Southern states enacted laws restricting freedom of speech and the press to suppress anti-slavery efforts; in at least one state, writing or publishing abolitionist literature was punishable by death.[20] And the consequences of this omission were particularly acute in the aftermath of the Civil War. At that time, the "overriding task confronting Congress and the new President was to restore the states that had attempted to secede to their proper place in the Union."[21] Complicating the task, those states remained defiant in their suppression of former slaves and their persecution of white Unionists who had opposed secession, blatantly violating fundamental liberties in the process.

In response, "Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union."[22] Composed of members of the House and Senate, the committee conducted fact-finding, took testimony, and controlled the framing of legislation and constitutional amendments concerning Reconstruction.

The joint committee submitted to Congress a report based on its exhaustive investigation into conditions in the South that "extensively catalogued the abuses of civil rights in the former slave States."[23] The report confirmed the systematic violation of fundamental rights by Southern states and demanded "changes of the organic law" to

[19] See Barron v. Mayor and City Council of Baltimore, 32 U.S. 243, 250 (1833).

[20] See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 160–61 (1998); Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 30, 40 (1986).

[21] David P. Currie, The Reconstruction Congress, 75 U. Chi. L. Rev. 383, 383 (2008).

[22] McDonald v. City of Chicago, 561 U.S. 742, 827 (2010) (Thomas, J., concurring in part and in the judgment) (citing Cong. Globe, 39th Cong., 1st Sess. 6, 30 (1865)).

[23] *Id.*

secure the "civil rights and privileges of all citizens in all parts of the republic."[24]

Of central concern to the joint committee and other members of Congress were the Black Codes. Enacted across the South, these legislative measures were an attempt to re-institutionalize slavery in a different guise—systematically violating the rights of the newly freed slaves to force them into conditions replicating the pre-war plantation system. Under "the barbarous codes which have been passed in all the rebel States," said one lawmaker, blacks were in "a condition of nominal freedom worse than a condition of actual slavery."[25] As one observer put it in a report read aloud to the Senate, "the South is determined to have slavery—the thing, if not the name."[26]

The "centerpiece" of these codes "was the attempt to stabilize the black work force and limit its economic options apart from plantation labor. Henceforth, the state would enforce labor agreements and plantation discipline, punish those who refused to contract, and prevent whites from competing among themselves for black workers."[27] Beginning in 1865, for instance, many localities "adopted ordinances limiting black freedom of movement, prescribing severe penalties for vagrancy, and restricting blacks' right to rent or purchase real estate and engage in skilled urban jobs."[28] Indeed, "[v]irtually all the former Confederate states enacted sweeping vagrancy and labor contract laws" that required freedmen to be privately employed under terms supervised by the state.[29]

Failure to comply with these contractual obligations was a crime, and, like other violations of the Black Codes, was punished with harsh penalties that included fines, imprisonment, lashings, forced

[24] Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. xxi (1866).

[25] Cong. Globe, 39th Cong., 1st Sess. 1839 (1866) (Rep. Clarke).

[26] Cong. Globe, 39th Cong., 1st Sess. 94 (1865) (Sen. Sumner).

[27] Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877 199 (1988).

[28] *Id.* at 198.

[29] *Id.* at 200; see Cong. Globe, 39th Cong., 1st Sess. 588 (1866) (Rep. Donnelly) ("The adult negro is compelled to enter into contract with a master, and the district judge, not the laborer, is to fix the value of the labor."); Report of the Joint Committee on Reconstruction, *supra* note 24, Pt. II, at 240 (statement of Capt. Alexander P. Ketchum).

labor, and forfeiture of property.[30] As contemporary observers could readily see, these measures were "calculated to virtually make serfs of the persons that the [Thirteenth Amendment] made free."[31]

C. Excessive Fines as a Tool of Oppression

The spread of the Black Codes and the denigration of individual rights in the post-war South have been widely recounted. But particularly notable here is the extent to which Southern governments used outlandish fines as a tool of oppression.[32] The infliction of these unpayable fines supplied the pretext under which slavery conditions were reinstituted, as freedmen convicted of vagrancy were "auctioned off as contract laborers to white employers who paid their fines."[33]

For instance, Florida law demanded that a vagrant "be punished by a fine not exceeding $500 and imprisoned for a term not exceeding twelve months, or by being sold for a term not exceeding twelve months, at the discretion of the court."[34] Mississippi law similarly decreed that "freedmen, free negroes and mulattoes" who were found "without lawful employment or business, or found unlawfully assembling themselves together," were to be fined up to $50.[35] The law further specified that "all fines and forfeitures collected under the provisions of this act shall be paid into the county treasury for general county purposes," and that, should anyone fail to pay, the county sheriff was obligated "to hire out said freedman, free negro or mulatto, to any person who will, for the shortest period of service, pay said fine or forfeiture."[36]

[30] See Foner, *supra* note 27, at 205.

[31] Cong. Globe, 39th Cong., 1st Sess. 1839 (Rep. Clarke).

[32] For more detail, see Brief for Constitutional Accountability Center as Amicus Curiae Supporting Petitioners, Timbs v. Indiana, 139 S. Ct. 682 (2012) (No. 17-1091), https://www.theusconstitution.org/wp-content/uploads/2018/03/Timbs-CAC-Merits-Brief-FINAL.pdf.

[33] Garrett Epps, The Antebellum Political Background of the Fourteenth Amendment, 67 Law & Contemp. Probs. 175, 204 (2004).

[34] Cong. Globe, 39th Cong., 1st Sess. 1621 (Rep. Myers).

[35] An Act to Amend the Vagrant Laws of the State § 2 (Nov. 24, 1865), reprinted in S. Exec. Doc. No. 39-6, at 192 (1867).

[36] *Id.* § 5.

Similar measures swept the South. Thus, when the commissioner of the Freedmen's Bureau compiled a synopsis of laws concerning people of color, he called "special attention" to the South's vagrancy laws, the terms of which "will occasion practical slavery."[37] The commissioner had received vivid evidence of such abuses, such as this report from Nashville, Tennessee:

> [T]he police of this city arrested some forty or fifty young men and boys (colored) on various pretexts, mostly for vagrancy, and they were thrown into the work-house to work out fines of from $10 to $60 each. By an arrangement with the city recorder . . . [two] residents of this city . . . by paying their fines, induced the prisoners, as is claimed, to consent to go to Arkansas to work on a plantation. . . . Many of them are minors, and were taken away without the knowledge or consent of their parents.[38]

Vagrancy, moreover, was only one of the "crimes" for which Southern governments levied oppressive fines. These jurisdictions criminalized a wide range of offenses to justify arresting freedmen and consigning them to forced labor to repay their fines. One critic described the measures as "laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude."[39]

It quickly became clear to Congress that Southern states could not be trusted to respect the fundamental rights of their own citizens. As one senator noted, "They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery."[40] Lawmakers viewed these abuses as violating core freedoms identified in the Bill of Rights. Condemning these laws as abridgements of fundamental liberties, they decried the lack of "protection to life, liberty, or property."[41] Something needed to be done.

[37] Letter from Maj. Gen. O.O. Howard to Sec'y of War E.M. Stanton (Dec. 21, 1866), reprinted in S. Exec. Doc. No. 39-6, *supra* note 35, at 2–3.

[38] Report from Brevet Brigadier Gen. J.R. Lewis, Assistant Comm'r, to Maj. Gen. O.O. Howard (Nov. 1, 1866), reprinted in S. Exec. Doc. No. 39-6, *supra* note 35, at 129.

[39] Cong. Globe, 39th Cong., 1st Sess. 1123 (Rep. Cook); see, e.g., *id.* at 516–17, 651, 1621, 2777.

[40] *Id.* at 474 (Sen. Trumbull).

[41] *Id.* at 1617 (Rep. Moulton).

D. The Fourteenth Amendment: Forcing the States to Respect the Bill of Rights and Other Fundamental Liberties

Congress first responded through legislation, enacting the Civil Rights Act of 1866 and later an expansion of the Freedmen's Bureau—both of which took aim at excessive and discriminatory penalties.[42] Proponents of these bills explicitly linked the freedoms denied to blacks in the South with the "inalienable rights" enshrined in America's founding documents.[43] According to one congressman, "the civil rights referred to in the bill are . . . the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of Independence."[44]

Ultimately, however, Congress "deemed these legislative remedies insufficient."[45] Among other problems, doubts were raised about the federal government's constitutional authority to impose such remedial measures. All told, "Southern resistance, Presidential vetoes, and [the Supreme Court's] pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks."[46] As one senator explained, the freed slaves needed to be guaranteed "the essential safeguards of the Constitution."[47]

Therefore, "to provide a constitutional basis" for the protection of fundamental rights in the South,[48] Congress crafted the Fourteenth Amendment to fundamentally transform our federal system. The debates in Congress over the amendment confirm that its first section—in particular the Privileges or Immunities Clause—was understood to secure against state encroachment the individual liberties enumerated in the Constitution and the Bill of Rights.

[42] See Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27, 27; Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176–77.

[43] Cong. Globe, 39th Cong., 1st Sess. 1839 (Rep. Clarke).

[44] *Id.* at 632 (Rep. Moulton); see also *id.* at 475 (Sen. Trumbull) (describing "[t]he great fundamental rights set forth in this bill").

[45] McDonald, 561 U.S. at 775.

[46] *Id.*

[47] Cong. Globe, 39th Cong., 1st Sess. 1183 (Sen. Pomeroy).

[48] McDonald, 561 U.S. at 775.

Section 1 of the Fourteenth Amendment was the brainchild of Ohio congressman John Bingham, who served on the Joint Committee on Reconstruction. Introducing his draft of the amendment in February 1866,

> Bingham began by discussing [the Supreme Court's] holding that the Bill of Rights did not apply to the States. He then argued that a constitutional amendment was necessary to provide "an express grant of power in Congress to enforce by penal enactment these great canons of the supreme law, securing to all the citizens in every State all the privileges and immunities of citizens, and to all the people all the sacred rights of person."[49]

Bingham "emphasized that § 1 was designed 'to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today.'"[50]

In April, the joint committee unveiled a revised draft of the amendment that contained in its present form the amendment's sweeping guarantee of fundamental rights and liberties:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[51]

"Senator Jacob Howard, who spoke on behalf of the Joint Committee on Reconstruction and sponsored the Amendment in the Senate, stated that the Amendment protected all of 'the personal rights guarantied and secured by the first eight amendments of the Constitution.'"[52] Howard "explained that the Constitution recognized 'a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, . . . some by the first eight amendments of the Constitution,'

[49] *Id.* at 829 (Thomas, J., concurring in part and in the judgment) (quoting Cong. Globe, 39th Cong., 1st Sess. 1089–90).

[50] *Id.* (quoting Cong. Globe, 39th Cong., 1st Sess. 1088).

[51] U.S. Const. amend. XIV, § 1; see Cong. Globe, 39th Cong., 1st Sess. 2764.

[52] McDonald, 561 U.S. at 762 n.9 (quoting Cong. Globe, 39th Cong., 1st Sess. 2765).

and that 'there is no power given in the Constitution to enforce and to carry out any of these guarantees' against the States."[53] He then "stated that 'the great object' of § 1 was to 'restrain the power of the States and compel them at all times to respect these great fundamental guarantees.'"[54]

Finally, "Representative Thaddeus Stevens, . . . acting chairman of the Joint Committee on Reconstruction," made the same point, explaining that "the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States."[55] Together, "these well-circulated speeches indicate that § 1 was understood to enforce constitutionally declared rights against the States."[56]

Once the Fourteenth Amendment was sent for ratification to the states in June 1866, ratification became the key political issue of the day. The 1866 elections "became a referendum on the Fourteenth Amendment," resulting in a landslide victory for its supporters in the Republican Party.[57] These decisive results turned the tide in favor of ratification, which was finally achieved in July 1868.

As more and more states voted on ratification, "the idea that the amendment would bind the states to enforce personal liberties enumerated in the Bill of Rights was no longer (if it ever was) a disputed proposition. No one argued the point. The debate involved *whether* this was a good idea."[58] The amendment's proponents stressed that its protection of rights against state abridgment would be "coextensive with the whole Bill of Rights."[59] Tellingly, among the "constitutional law treatises published after

[53] *Id.* at 831–32 (opinion of Thomas, J.) (quoting Cong. Globe, 39th Cong., 1st Sess. 2765).

[54] *Id.* at 832 (quoting Cong. Globe, 39th Cong., 1st Sess. 2766).

[55] *Id.* at 762 n.9 (majority opinion) (quoting Cong. Globe, 39th Cong., 1st Sess. 2459).

[56] *Id.* at 833 (Thomas, J., concurring in part and in the judgment).

[57] Foner, *supra* note 27, at 267; see Kurt T. Lash, The Origins of the Privileges or Immunities Clause, Part III: Andrew Johnson and the Constitutional Referendum of 1866, 101 Geo. L.J. 1275, 1279 (2013).

[58] Lash, *supra* note 57, at 1326. The records of the ratifying legislatures, though sparse, are "fully consistent with an intent to apply the Bill of Rights to the states." Curtis, *supra* note 20, at 147.

[59] Foner, *supra* note 27, at 267 (quoting N.Y. Times, Nov. 15, 1866).

the Fourteenth Amendment was proposed but before it was adopted, which . . . spoke to the question of the meaning of the Amendment," all of them "indicated the Amendment would enforce the Bill of Rights against the states."[60]

E. The Supreme Court's Evisceration of the Privileges or Immunities Clause

It was well understood, therefore, that the Fourteenth Amendment's Privileges or Immunities Clause was being adopted to effect a radical constitutional transformation—one that would "restrain the power of the States" by compelling them to respect the individual liberties enumerated in the federal Bill of Rights.[61]

Such clarity, however, escaped a majority of justices on the Supreme Court. Called upon to interpret the Privileges or Immunities Clause in the now-infamous *Slaughter-House Cases*, those justices swiftly cast aside the understood public meaning of the clause—reducing it, in the words of a dissenting justice, to "a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage."[62]

Embracing the jurisprudence of incredulity, the Court simply refused to admit that the purpose of the clause was to "radically change[] the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people."[63] Instead, the Court declared that the only privileges or immunities the clause was meant to protect were the limited set of rights that owe their existence to the federal government, like "the right of free access to its seaports."[64] With that, the Court banished reality from its view—not for the last time—and effectively wrote the Privileges or Immunities Clause out of the Constitution.

The decision in *Slaughter-House* was immediately condemned by former members of the 39th Congress as "a great mistake,"[65] reflecting an interpretation of the Privileges or Immunities Clause

[60] Richard L. Aynes, Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the *Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 632 (1994).

[61] Cong. Globe, 39th Cong., 1st Sess. 2766 (Sen. Howard).

[62] Slaughter-House Cases, 83 U.S. 36, 96 (1872) (Field, J., dissenting).

[63] *Id.* at 78 (majority opinion).

[64] *Id.* at 79.

[65] 2 Cong. Rec. 4116 (1874) (Sen. Boutwell).

that "radically differed" from its framers' intent.[66] But no matter. A string of later decisions continued this retreat from the clause's text and meaning—notably *United States v. Cruikshank*, which explicitly held that the rights to peaceably assemble for a lawful purpose and to keep and bear arms remained guarantees against Congress only, not the states.[67]

Expressing the national mood of a white majority that had grown weary of Reconstruction, the Supreme Court's failure of principle "reflected America's loss of will to memorialize the reforms begun in the late-1860s."[68]

F. Due Process and the Winding Road to Incorporation

The Court's throttling of the Privileges or Immunities Clause was, fortunately, not the end of the story. Later in the 19th century, "the Court began to consider whether the [Fourteenth Amendment's] Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights."[69] The Court "viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship," holding that the only rights protected were those "'of such a nature that they are included in the conception of due process of law.'"[70] Using a variety of formulations to describe which rights met that standard, the Court "selectively" incorporated individual protections from the Bill of Rights into the Due Process Clause, one at a time, in a series of cases decided through the 1960s.[71]

Eventually the Court settled on the standard it would use to decide if a particular right is incorporated against the states, asking whether that right is "fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition."[72] By 2018,

[66] Curtis, *supra* note 20, at 177 (quoting Sen. Edmunds); see also Michael Anthony Lawrence, Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses, 72 Mo. L. Rev. 1, 29–35 (2007).

[67] 92 U.S. 542 (1875).

[68] Lawrence, *supra* note 66, at 38.

[69] McDonald, 561 U.S. at 759.

[70] *Id.* (quoting Twining v. New Jersey, 211 U.S. 78, 99 (1908)).

[71] *Id.* at 760–63 (citing cases).

[72] *Id.* at 767 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968), and Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (emphasis omitted).

the Court had incorporated nearly all of the protections in the Bill of Rights.[73] Among the handful remaining: the Eighth Amendment's safeguard against excessive fines.

II. The *Timbs* Case—Background and Lower Courts

A. Small-Time Drug Deals and a High-End SUV

Tyson Timbs's journey to the Supreme Court began with a personal story that has become all too familiar. Timbs became addicted to an opioid medication prescribed to him for a painful physical condition; once his prescription ran out, he began buying pills illegally. And that eventually led to heroin. The death of his father around this time left him with about $73,000 in life-insurance proceeds. After using roughly $42,000 of this money to buy a Land Rover SUV ("a salesman steered him from the used vehicle Timbs intended to buy"[74]), he squandered the rest on his addiction. When his money ran out, selling heroin became a way to fund his habit. A confidential informant brought him to the attention of Indiana law enforcement, and undercover officers completed two controlled purchases of heroin from Timbs, after which he was arrested and charged. These were not large-scale transactions: each sale was for two grams of heroin, and Timbs's biggest haul from them was $225.[75]

Timbs eventually pled guilty to one count of dealing in a controlled substance and a related count of conspiracy. He was sentenced to one year of home detention followed by five years of probation, which included mandatory participation in an addiction-treatment program. Timbs also paid various fees associated with the costs of his prosecution and conviction.[76]

That was not enough for Indiana, though, which set its sights on Timbs's pricey SUV. Before his criminal prosecution was even resolved, the state filed a civil forfeiture action seeking to obtain

[73] *Id.* at 764–65 & n.13.

[74] Mark Walsh, What can states seize? SCOTUS will decide whether the excessive fines clause applies to states, ABA Journal (Dec. 2018), http://www.abajournal.com/magazine/article/scotus_excessive_fines_timbs_indiana.

[75] Brief for the Petitioner at 4–5, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief for the Respondent at 2, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[76] State v. Timbs, 84 N.E.3d 1179, 1181 (Ind. 2017).

ownership of Timbs's vehicle based on his alleged use of the vehicle to transport heroin.[77] Unlike the criminal prosecution, however, the forfeiture proceedings were not handled by government lawyers. Instead, that work was contracted out to a private law firm that would be entitled to a cut of whatever Indiana recovered. That's because Indiana, alone among the 50 states, "allows prosecutors to outsource civil-forfeiture cases to private lawyers on a contingency-fee basis,"[78] creating what is essentially an "institutionalized bounty hunter system in which state DAs contract with *private* attorneys to handle all of the county's civil forfeiture cases for a contingent fee of a quarter or a third of all the property they forfeit."[79]

Indeed, Indiana had developed a notorious reputation for its aggressive and at times unethical use of civil forfeiture, as Timbs's attorneys would later highlight before the Supreme Court. In one especially egregious example, "prosecutors sued to forfeit a teenager's car, after it was found with 'a large quantity of Gatorade bottles and assorted snacks and candies' stolen from a playground concession stand."[80] Multiple investigations by state and federal officials have uncovered rampant misuse of forfeited funds by local police departments, along with blatant conflict-of-interest violations stemming from Indiana's unusual contingency-fee arrangements with private lawyers.[81] A trial court in one county uncovered mishandling of forfeited assets and "secret agreements" that amounted to a "fraud on the court."[82]

[77] *Id.* at 1181–82, 1184–85.

[78] Brief for the Petitioner, *supra* note 75, at 32; see Ind. Code § 34-24-1-8.

[79] David P. Smith, Prosecution and Defense of Forfeiture Cases ¶ 1.01, at 1-13 (2017) (quoted in Brief for the Petitioner, *supra* note 75, at 30).

[80] Brief for the Petitioner, *supra* note 75, at 34 (quoting Pls.' Mot. Summ. J., State v. Jaynes, 2012 WL 12974140 (Ind. Super. Ct. May 23, 2012)).

[81] See, e.g., Petition for Certiorari at 31–32, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) (citing, inter alia, In re McKinney, 948 N.E.2d 1154, 1155–56 (Ind. 2011), and Office of the Inspector Gen., U.S. Dep't of Justice, Audit of Henry County Sheriff's Office's Equitable Sharing Program Activities, New Castle, Indiana, at 4 (Feb. 2017), https://oig.justice.gov/reports/2017/g5017001.pdf).

[82] Findings and Report on Civil Drug Forfeitures in Division 2, Including a Limited Number of Cases in the Other Four Divisions of the Delaware Circuit Court, at 6 (Ind. Cir. Ct., Delaware Cty. Aug. 18, 2008), http://www.fear.org/JudgeDaileyReport.pdf.

B. Timbs in the Indiana Courts

In Timbs's case, an Indiana Superior Court judge rebuffed the state's overreaching. Although Timbs had transported drugs in his vehicle, the judge noted that the maximum fine for the felony to which he had by then pleaded guilty was $10,000, and that his SUV was worth almost four times that amount.[83] Forfeiting the vehicle, the judge concluded, would violate the Excessive Fines Clause, as "[t]he amount of the forfeiture sought is excessive, and is grossly disproportional to the gravity of the Defendant's offense."[84] "While the negative impact on our society of trafficking in illegal drugs is substantial," the judge acknowledged, "a forfeiture of approximately four (4) times the maximum monetary fine is disproportional to the Defendant's illegal conduct."[85] The state was ordered to return Timbs's vehicle immediately.

Instead, the state appealed. But the Indiana Court of Appeals affirmed the dismissal of the forfeiture action. Comparing the severity of Timbs's offense with the value of his vehicle, it agreed that this forfeiture went too far.[86]

Not satisfied, the state took the case to the Indiana Supreme Court, where it found a more hospitable audience. That court reversed, but not because it disagreed that the forfeiture was excessive. Instead, the court declared that states like Indiana are not bound by the Excessive Fines Clause at all.

The Indiana Supreme Court's opinion is remarkable—and not in a good way. Timbs and Indiana agreed that the clause applies to the states; they disagreed only about the excessiveness of this particular forfeiture. But because the U.S. Supreme Court had never expressly held that states are bound by the Excessive Fines Clause, the state supreme court justices believed they could "decline to find or assume incorporation until the [U.S.] Supreme Court decides the issue authoritatively." And that's precisely what they did. Without even bothering to analyze for itself whether the Excessive Fines Clause met the standards for incorporation, the court simply pronounced

[83] Pet. App. 28–29, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091) (Judgment Order of the Ind. Super. Ct., Indiana v. Timbs, Aug. 28, 2015).

[84] *Id.* at 30.

[85] *Id.*

[86] State v. Timbs, 62 N.E.3d 472, 476–77 (Ind. Ct. App. 2016).

that "Indiana is a sovereign state within our federal system" and "we elect not to impose federal obligations on the State that the federal government itself has not mandated."[87] This rhetoric seemed more suited to a world in which the Civil War, Reconstruction, and the ratification of the Fourteenth Amendment had never taken place.

C. Securing Supreme Court Review

Timbs's attorneys from the Institute for Justice then petitioned the Supreme Court to answer the following question: "Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment."[88]

The timing was auspicious. Timbs's certiorari petition offered not only a chance to correct a gap in the Supreme Court's incorporation precedents but also an opportunity to advance the cause of placing appropriate constitutional limits on the use of civil forfeiture.

Over the preceding years, the widespread abuse of civil forfeiture had blossomed into public view, partly as a result of in-depth investigative reporting. News outlets uncovered outrageous incidents in which people carrying substantial amounts of cash for perfectly legitimate reasons had their money seized in dubious highway stops, and law enforcement officers had pressured them into surrendering their rights through threats of imprisonment. The media also showed how forfeiture can benefit private entities, such as companies that specialize in teaching profiling techniques to police departments, thus creating an interlocking network of perverse financial incentives.[89] Given the disproportionate impact of these rapacious policies on low-income communities and racial minorities, left-leaning social justice organizations joined with right-leaning property rights advocates to condemn the trend and call for reform. In a 2017 opinion respecting the denial of a certiorari petition, Justice Clarence Thomas noted the "well-chronicled abuses" arising from

[87] Timbs, 84 N.E.3d at 1183–84.

[88] Petition for Certiorari, *supra* note 81, at i. Documents from the case are available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1091.html.

[89] See, e.g., Michael Sallah et al., Stop and Seize, Wash. Post (Sept. 6, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/?utm_term=.22f5d8898ca0; Sarah Stillman, Taken, New Yorker (Aug. 5, 2013), https://www.newyorker.com/magazine/2013/08/12/taken.

a system in which "police can seize property with limited judicial oversight and retain it for their own use," and lamented how these operations "frequently target the poor and other groups least able to defend their interests in forfeiture proceedings."[90]

Indeed, in a sign of the cross-ideological support that Timbs's case inspired, his petition was supported by five amicus briefs representing a diverse array of organizations, from the Southern Poverty Law Center and the National Association of Criminal Defense Lawyers to the Cato Institute and the U.S. Chamber of Commerce. Our own amicus brief for the Constitutional Accountability Center focused on reminding the Court of the history recounted above—that the Fourteenth Amendment was intended to apply the Bill of Rights to the states—and on documenting how the Southern states' use of oppressive fines during Reconstruction was one of the central forces motivating the framers of that amendment. While the Supreme Court's granting of certiorari was not a foregone conclusion, neither was it a surprise.

III. *Timbs* at the Supreme Court

At the merits stage, Timbs's opening brief demonstrated beyond cavil that the right to be free of excessive fines met the standards for incorporation under the Due Process Clause—being both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[91]

Indeed, so unassailable was this point that Indiana did not try to deny it. Instead, the state labored mightily to reframe the question. Rather than ask as a general proposition whether the Excessive Fines Clause is incorporated against the states, Indiana argued that the Court should focus on the particular type of fine at issue—a civil *in rem* forfeiture. So narrowed, the issue would be whether America's legal tradition embraces a "right to be free of disproportionate *in rem* forfeitures."[92] According to Indiana, the answer was no.

[90] Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (statement of Thomas, J.).

[91] McDonald, 561 U.S. at 767 (citing Duncan, 391 U.S. at 149, and Glucksberg, 521 U.S. at 721) (emphasis omitted). Timbs also argued for incorporation under the Privileges or Immunities Clause, though the brief spent much more time on the due process argument.

[92] Brief for the Respondent, *supra* note 75, at 4.

But this tack created problems of its own. The Supreme Court had already decided, in 1992's *Austin v. United States*, that civil *in rem* forfeitures conducted pursuant to federal law qualify as "fines" under the Excessive Fines Clause.[93] If the Court were to hold that civil forfeitures conducted by the states were *not* fines for Eighth Amendment purposes, it would be creating an obvious and perhaps inexplicable disparity between federal and state standards, something the Court typically declines to do absent some exceptional justification.[94] Thus, Indiana had to persuade the Court to either embrace this unabashedly "two-tiered" approach to incorporation or else reverse the *Austin* decision.

Indiana's strategy produced an unusual oral argument, to say the least. At the outset of his remarks, state solicitor general Thomas Fisher was asked to concede the very question on which certiorari had been granted: whether the Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment. Interrupting Fisher's opening comments, Justice Neil Gorsuch asked: "Before we get to the *in rem* argument and its application to this case, can we just get one thing off the table? We all agree that the Excessive Fines Clause is incorporated against the states? Whether this particular fine qualifies because it's an *in rem* forfeiture, [that's] another question. . . . Can we at least agree on that?"[95] Fisher's resistance prompted an incredulous rejoinder: "[M]ost of these incorporation cases took place in like the 1940s. And here we are in 2018 still litigating incorporation of the Bill of Rights. Really? Come on, General."[96] To similar effect, Justice Brett Kavanaugh asked: "Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated?"[97] Justice Sonia Sotomayor later piled on, "Just so I'm clear, you're asking us to overrule *Austin*? Because that's the only way that you can win with a straight face?"[98]

[93] Austin, 509 U.S. at 604. The Court reasoned that forfeitures, even when they are civil in nature, qualify as "fines" when they serve, at least in part, to punish. *Id.* at 618.

[94] See McDonald, 561 U.S. at 765–66.

[95] Transcript of Oral Argument at 31, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1091_4h25.pdf.

[96] *Id.* at 32–33.

[97] *Id.* at 33.

[98] *Id.* at 53.

The oral argument left little doubt which side would prevail, and it was not surprising when the justices unanimously ruled in Timbs's favor three months later. Justice Ruth Bader Ginsburg's opinion for the Court was joined by everyone except Justice Thomas, who wrote a lengthy opinion concurring in the judgment. Justice Gorsuch also wrote a short concurrence.

A. Justice Ginsburg's Majority Opinion

Writing for the Court, Justice Ginsburg's opinion was characteristically efficient. It first held that the Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment's Due Process Clause, concluding that the prohibition against excessive fines is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[99] In eight crisp paragraphs, Justice Ginsburg canvassed the history presented by Timbs and his amici, demonstrating that "the protection against excessive fines has been a constant shield throughout Anglo-American history."[100] Based on the broad consensus that has surrounded this right from its medieval origins through the Founding, Reconstruction, and right up to the present, the opinion declares that "the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming."[101]

Having decided that matter, the opinion then disposes of Indiana's attempt to reframe the question. Although parties are entitled, "in their brief in opposition, to restate the questions presented," that prerogative "does not give them the power to expand [those] questions,"[102] and so the Court "decline[d] the State's invitation to reconsider [its] unanimous judgment in *Austin*."[103]

Nor were the justices persuaded by Indiana's "fallback" argument—that the Excessive Fines Clause should not be incorporated with respect to *in rem* forfeitures because its "application

[99] Timbs, 139 S. Ct. at 689 (quoting McDonald, 561 U.S. at 767).

[100] *Id*.

[101] *Id*. at 688.

[102] *Id*. at 690 (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 279, n.10 (1993) (alteration in *Timbs*)).

[103] *Id*.

to such forfeitures is neither fundamental nor deeply rooted."[104] This proposition "misapprehends the nature of our incorporation inquiry," which asks "whether the right guaranteed—not each and every particular application of that right—is fundamental or deeply rooted."[105] Otherwise, the Court explained, every time it construed the scope of a Bill of Rights protection that already had been incorporated against the states, the Court would have to ask whether its new application of that protection was fundamental or deeply rooted. That was something the Court had never done.[106]

B. Justice Thomas's Opinion Concurring in the Judgment

Justice Thomas concurred in the judgment only, writing separately to discuss his disagreement "with the route the Court takes to reach this conclusion." Instead of relying on the Due Process Clause, Thomas explained, he "would hold that the right to be free from excessive fines is one of the 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment.'"[107]

Thomas's opinion first briefly recaps his concurrence from *McDonald v. Chicago*, the 2010 decision which held that the newly recognized individual right to bear arms under the Second Amendment is incorporated against the states.[108] That concurrence had explained at length how the Supreme Court "marginaliz[ed]" the Privileges or Immunities Clause in the late 19th century, leading the Court to later find a substitute in the Due Process Clause, "a most curious place."[109] Having already covered that ground in *McDonald*, the bulk of Justice Thomas's *Timbs* opinion is devoted to showing that, when the Fourteenth Amendment was adopted, the ratifying public considered the Eighth Amendment's prohibition on excessive fines to be one of the "inalienable rights" of citizens that would be protected by the Privileges or Immunities Clause.

[104] *Id*. at 689–90.

[105] *Id*. at 690.

[106] *Id*. at 690–91 (citing as examples the First Amendment right recognized in Packingham v. North Carolina, 137 S. Ct. 1730 (2017), and the Fourth Amendment right recognized in Riley v. California, 573 U.S. 373 (2014)).

[107] *Id*. at 691 (Thomas, J., concurring in the judgment).

[108] McDonald v. City of Chicago, 561 U.S. 742 (2010).

[109] *Id*. at 809 (opinion of Thomas, J.).

First, the opinion traces the development of the protection against excessive fines throughout English history.[110] Next, it describes "the widespread agreement about the fundamental nature of the prohibition on excessive fines" in America when the Constitution and Bill of Rights were adopted.[111]

Finally, Thomas's opinion demonstrates that the prohibition on excessive fines "remained fundamental at the time of the Fourteenth Amendment."[112] Drawing heavily on our amicus brief for the Constitutional Accountability Center, the opinion describes the oppressive fines levied as a tool of social control by the Black Codes, which "informed the Nation's consideration of the Fourteenth Amendment."[113] As Thomas concluded: "The attention given to abusive fines at the time of the Fourteenth Amendment, along with the ubiquity of state excessive-fines provisions, demonstrates that the public continued to understand the prohibition on excessive fines to be a fundamental right of American citizenship."[114]

For Justice Thomas, this historical record "overwhelmingly" demonstrated that the Eighth Amendment's ban on excessive fines is "a constitutionally enumerated right understood to be a privilege of American citizenship," which therefore "applies in full to the States."[115]

C. Justice Gorsuch's Concurring Opinion

Given the changes in the Court's membership since *McDonald*—the last case addressing an incorporation question—one point of speculation in *Timbs* was whether the self-proclaimed originalist Justice Gorsuch, or his newer colleague Justice Kavanaugh, would follow Justice Thomas's lead in rejecting the Due Process Clause as a means for incorporating fundamental rights against the states. As it turned out, neither justice felt compelled to stake out such a position.

Justice Kavanaugh did not write separately but simply joined the majority opinion. Justice Gorsuch penned a one-paragraph concurring opinion, stating that the majority opinion "faithfully applies

[110] Timbs, 139 S. Ct. at 695 (Thomas, J., concurring in the judgment) (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)).

[111] *Id.* at 696.

[112] *Id.* at 697.

[113] *Id.* at 698.

[114] *Id.*

[115] *Id.* at 693, 698.

our precedent" and agreeing that, "based on a wealth of historical evidence," the Fourteenth Amendment incorporates the Excessive Fines Clause against the states.

Citing Justice Thomas's concurrences in *McDonald* and *Timbs*, Gorsuch also noted, "As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause." But "nothing in this case turns on that question," and "regardless of the precise vehicle," there is "no serious doubt that the Fourteenth Amendment requires the States to respect the freedom from excessive fines enshrined in the Eighth Amendment."[116]

IV. The Impact of *Timbs*

The outcome in *Timbs* was overdue, but just how significant is the decision? During oral argument, Timbs's counsel sought to reassure the justices: "Your Honors, this case is about constitutional housekeeping." Given the Court's prior suggestions that freedom from excessive fines is incorporated against the states, he continued, "all that remains to do is to expressly so hold."[117]

Moreover, almost all of the protections in the Bill of Rights already have been incorporated, with only a "handful" remaining.[118] And it seems that the only reason most of these protections remain unincorporated is that the Supreme Court has never had any cases presenting the question.[119] Thus, a case of "constitutional housekeeping"

[116] *Id*. at 691 (Gorsuch, J., concurring).

[117] Transcript of Oral Arg., *supra* note 95, at 63.

[118] McDonald, 561 U.S. at 764–65. By now "the only rights not fully incorporated" are (1) "the Third Amendment's protection against quartering of soldiers," (2) "the Fifth Amendment's grand jury indictment requirement," (3) "the Sixth Amendment right to a unanimous jury verdict," and (4) "the Seventh Amendment right to a jury trial in civil cases." *Id*. at 765 n.13. But see Englbom v. Carey, 677 F.2d 957, 961 (2d Cir. 1982) (concluding that the Third Amendment is incorporated against the states).

[119] While simple neglect may explain why most of the unincorporated provisions remain so, there is one exception: The Supreme Court has expressly held that the Sixth Amendment right to a unanimous jury verdict in criminal prosecutions is not fully incorporated, applying only to federal, not state, proceedings. See Apodaca v. Oregon, 406 U.S. 404 (1972). But that ruling "was the result of an unusual division among the Justices," McDonald, 561 U.S. at 766 n.14, and the Court has agreed to revisit that question during the October 2019 term. See Ramos v. Louisiana, 231 So. 3d 44 (La.App. 4 Cir., Nov. 2, 2017), cert. granted, 139 S. Ct. 1318 (Mar. 18, 2019) (No. 18-5924).

like *Timbs* could easily look like a mere tidying up of dusty corners in the Court's jurisprudence, the delayed but inevitable attending to an overlooked task.

On a practical level, too, one could question the decision's significance. Besides Indiana, only three other states (at most) had declined to enforce the Eighth Amendment's Excessive Fines Clause to state action.[120] And all 50 states have their own constitutional provisions prohibiting the imposition of excessive fines.[121] Many of those states interpret their own prohibitions to be identical to the Eighth Amendment.[122] In fact, Indiana itself is one of those states—its constitution specifies that "[e]xcessive fines shall not be imposed" and that "[a]ll penalties shall be proportioned to the nature of the offense,"[123] standards that the Indiana Supreme Court has indicated are "the same" as the Eighth Amendment's.[124] For reasons that aren't evident, Timbs relied only on federal law in challenging his forfeiture,[125] and no one addressed the Indiana Constitution on appeal.[126]

It is also far from clear how robust one can expect the protections of the Excessive Fines Clause to be. The Supreme Court has refused to require "strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense," instead adopting "the standard of gross disproportionality articulated in [its] Cruel and Unusual Punishments Clause precedents."[127] In *Timbs*, the justices did not decide whether forfeiture of Timbs's vehicle would be "excessive," but at least some justices suggested that the answer to that question was not, in their view, obvious. After all, Timbs could have been sentenced to six years' imprisonment for his offence. "Is it possible," asked Justice Samuel Alito, "that six years' imprisonment is not an Eighth Amendment violation, but a fine of $42,000 is . . . ?"[128]

[120] Petition for Certiorari, *supra* note 81, at 19–21.

[121] Brief in Opposition to Petition for Certiorari at 8, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[122] *Id*. at 9 (citing examples).

[123] Ind. Const. art. 1, § 16.

[124] Norris v. State, 394 N.E.2d 144, 150 (Ind. 1979).

[125] Timbs, 84 N.E.3d at 1184.

[126] Timbs, 62 N.E.3d at 475 n.4.

[127] Bajakajian, 524 U.S. at 336.

[128] Transcript of Oral Argument, *supra* note 95, at 14.

Justice Elena Kagan drove the point home: "We've made it awfully, awfully hard to assert a disproportionality claim with respect even to imprisonment. And if it's at least equally hard to assert a disproportionality claim with respect to fines, we could incorporate this tomorrow and it would have no effect on anybody."[129]

Despite all this, downplaying the impact of *Timbs* would be a serious mistake. While it's true that only a few states had actually declined to enforce the Excessive Fines Clause in their courts, the vast majority of states had never weighed in at all.[130] By settling the matter, *Timbs* prevents a wider bloc of states from withholding this fundamental protection from their residents, while saving innumerable future plaintiffs (many of whom may be in dire straits financially) from wasting time and lawyers' fees litigating the issue.

Moreover, because the Eighth Amendment now governs punitive fines across the country, plaintiffs need not rely on the excessive-fine protections of individual state constitutions, with their potential variations in scope.[131] That, in turn, should encourage the development of more uniform standards for measuring "excessiveness" in state and federal courts. Reducing local variation should make it easier for attorneys everywhere to research and rely on cases from other jurisdictions in advocating for their clients. It also should make it simpler for impact-litigation nonprofits like the Institute for Justice to conduct strategic, nationwide efforts to secure excessive-fines precedent protecting individual rights.

In addition, even in states that have construed their own excessive-fine protections as being coextensive with the Eighth Amendment, state court judges will increasingly have to reckon with the federal version itself, including the possibility of Supreme Court review of their decisions. That prospect may help curb any tendencies by state judges, some of whom are elected on tough-on-crime platforms,[132]

[129] *Id.* at 24.

[130] Petition for Certiorari, *supra* note 81, at 14–18 (identifying only 14 states as having held that the Clause applies to the states).

[131] See, e.g., *id.* at 20 (citing the "unique . . . four-part test" used by Mississippi courts to evaluate excessive-fine claims under the state constitution).

[132] See, e.g., Joanna Cohn Weiss, Tough on Crime: How Campaigns for State Judiciary Violate Defendants' Due Process Rights, 81 N.Y.U. L. Rev. 1101 (2006); Keith Swisher, Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification, 52 Ariz. L. Rev. 317 (2010).

to reflexively side with law enforcement in the inevitably subjective task of appraising a fine's excessiveness.

Some justices expressed concern in oral argument about whether the Excessive Fines Clause is capable of imposing meaningful limits on monetary penalties—particularly given the harsh prison sentences permitted by the Cruel and Unusual Punishments Clause. That concern may be misguided, or at least overblown. The Cruel and Unusual Punishments Clause does not refer to "excessive" punishments. Based on history and that textual distinction, some believe that the clause simply bans "'certain *methods* of punishment'" outright, "without reference to the particular offense" or whether the two are proportional.[133] Moreover, forbidding disproportionate fines makes sense even without a comparable limit on prison sentences or other penalties. Because "the State stands to benefit" from fines, they are more likely to be abused, as Justice Antonin Scalia once noted: "There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue."[134] Notably, some early American state constitutions banned excessive fines "without placing any restrictions on other modes of punishment."[135]

It is therefore premature to assume that applying the Excessive Fines Clause to the states will be a hollow victory merely because the Supreme Court has approved draconian prison sentences under a different portion of the Eighth Amendment.

Together, the changes wrought by *Timbs* hold out the prospect that our state and federal judiciaries will flesh out more robust rules capable of restraining the worst excesses of overbearing financial sanctions. Such rules could help curb not just unfair forfeitures but the full range of exploitive fines and fees that have undergone a

[133] Harmelin v. Michigan, 501 U.S. 957, 978–79 (1991) (opinion of Scalia, J.) (quoting Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 842 (1969) (emphasis added by Justice Scalia)). Even some who believe the clause contains a "proportionality principle" have described it as being "narrow." *Id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment).

[134] *Id*. at 978 n.9 (opinion of Scalia, J.).

[135] *Id.* (citing examples).

"dramatic increase in the last few decades" as local governments have turned to "criminal justice debt as funding sources."[136] Indeed, the mercenary practices on display in places like Ferguson, Missouri—raising revenue by issuing fines "for staying at a boyfriend's house, having tall grass, wearing saggy pants, or failing to sign up for a designated trash collection service"[137]—strikingly echo the Black Codes of the Reconstruction era, under which Southern governments imposed fines for things like entering town limits without special permission, being on the streets after 10 p.m. without a pass, preaching without a license, and being "stubborn or refractory."[138]

Such advancement of the law is sorely needed, given how underdeveloped the standards for Eighth Amendment "excessiveness" still are. The Supreme Court has not weighed in since adopting the "gross disproportionality" standard more than 20 years ago,[139] a standard that "has not given clear or meaningful guidance" about what "should be deemed 'excessive.'"[140] The result "has been a patchwork of inconsistent tests" among the circuits that have only "muddled the issue."[141] Even with respect to civil forfeiture alone, "lower courts have articulated many excessive fines tests . . . but no test is dominant."[142] Under these divergent approaches, basic questions remain.

For instance, does a person's wealth and income (or lack thereof) bear on whether a fine is excessive?[143] History suggests that the

[136] Neil L. Sobol, Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses, 88 U. Colo. L. Rev. 841, 859–60 (2017); see generally Beth A. Colgan, The Excessive Fines Clause: Challenging the Modern Debtors' Prison, 65 UCLA L. Rev. 2 (2018).

[137] Sobol, *supra* note 136, at 861.

[138] Cong. Globe, 39th Cong., 1st Sess. 1621 (Rep. Myers); *id*. at 516–17 (Rep. Eliot).

[139] Bajakajian, 524 U.S. at 336.

[140] David Pimentel, Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures, 11 Harv. L. & Pol'y Rev. 541, 542 (2017).

[141] *Id*. at 543–44.

[142] Brent Skorup, Ensuring Eighth Amendment Protection from Excessive Fines in Civil Asset Forfeiture Cases, 22 Geo. Mason U. C.R. L.J. 427, 431 (2012).

[143] See, e.g., Transcript of Oral Arg., *supra* note 95, at 28 (Chief Justice Roberts: "What if the person doing this, you know, was a multimillionaire? Forty-two thousand dollars doesn't seem excessive to him. . . . And yet, if someone is impoverished, it is excessive? Does that matter?").

answer is yes.[144] Among other things, the English jurist William Blackstone summarized the law as requiring that "no man shall have a larger [fine] imposed upon him, than his circumstances or personal estate will bear,"[145] and the Magna Carta directed that financial penalties "not be so large as to deprive [a person] of his livelihood."[146] But to date the Supreme Court has "tak[en] no position on the question whether a person's income and wealth are relevant considerations in judging the excessiveness of a fine."[147] An Eighth Amendment jurisprudence that truly protects "the poor and other groups least able to defend their interests"[148] from exploitive financial penalties may require a favorable answer to this question. By spurring on the progress of the law in this area, the *Timbs* decision could help speed up such a development.

In short, *Timbs* not only mends a significant hole torn long ago into the constitutional fabric. It also represents an important step forward in the development of a jurisprudence that better protects individuals from unfair and exploitive fines.

V. *Timbs* in Context

At this point we can step back and try to assess how *Timbs* fits within the big picture. While it may be a historical accident that the Excessive Fines Clause remained unincorporated for so long, it's no accident that this omission is finally being corrected now. Ultimately, the force behind the Supreme Court's belated action was an emerging, broad-based effort to combat the increasingly rapacious use of civil forfeiture—and other fines and fees—by state and local governments. Indeed, all signs suggest that the clause is being reinvigorated at this moment precisely because it holds the promise of addressing a pernicious new threat to individual liberty.

[144] See Nicholas M. McLean, Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause, 40 Hastings Const. L.Q. 833, 835 (2013); Beth A. Colgan, Reviving the Excessive Fines Clause, 102 Cal. L. Rev. 277, 279–81, 331 (2014).

[145] 4 William Blackstone, Commentaries on the Laws of England 372 (1770).

[146] Browning-Ferris, 492 U.S. at 271 (discussing the Magna Carta).

[147] Timbs, 139 S. Ct. at 688 (citing Bajakajian, 524 U.S. at 340 n.15, as reserving this question).

[148] Leonard, 137 S. Ct. at 848 (statement of Thomas, J., respecting the denial of certiorari).

There was irony in Indiana's attempt to win this case by distinguishing forfeiture of property from standard monetary fines. The first time the Supreme Court ever applied the Excessive Fines Clause was in a forfeiture case.[149] All told, the Court has construed the clause in only five decisions, finding it applicable in four of them, including *Timbs*. All four of those decisions were forfeiture cases.[150] Challenges to forfeitures have thus been the driving force of the Court's Excessive Fines Clause jurisprudence, such as it is. And, far from being an accident, this looks like the revival of a long-dormant safeguard to meet new exigencies.

Recent decades have seen "the number and size" of asset forfeitures "skyrocket,"[151] both at the federal and state levels. Originally propelled by the effort to combat sophisticated drug-smuggling operations, these new regimes have increasingly been criticized for their procedural injustice and for the egregious examples of overbearing conduct they have enabled. In turn, an ever-growing backlash has called for a restoration of basic concepts of fairness and restraint in how the government treats its citizens. A promising tool in this new endeavor is the Excessive Fines Clause, whose appearance in the Supreme Court has been a direct reaction to the rise of aggressive forfeiture.

As the Court itself has observed, "It was only in 1970 that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking."[152] Before that, "this mode of punishment . . . had long been unused in this country," and Congress recognized that criminal forfeiture was "an innovative attempt to call on our common law heritage to meet an essentially modern problem."[153] While *civil* forfeiture has a much stronger footing in traditional American practice,[154] its use

[149] Bajakajian, 524 U.S. at 332.

[150] Besides *Bajakajian* and *Timbs*, the other two cases were Austin v. United States, 509 U.S. 602 (1993), and Alexander v. United States, 509 U.S. 544 (1993).

[151] Pimentel, *supra* note 140, at 542.

[152] Bajakajian, 524 U.S. at 332 n.7 (citing the Organized Crime Control Act of 1970, 18 U.S.C. § 1963, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848(a)).

[153] *Id.* (quoting S. Rep. No. 91-617, at 79 (1969)).

[154] See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683–86 (1974); Austin, 509 U.S. at 613–14.

has changed in recent times, a phenomenon noted by the justices as early as 1993.[155]

"Starting in the 1970s and continuing through the 1980s, the Government came to believe that asset forfeiture could be a powerful tool in its efforts to curtail drug trafficking."[156] As recounted by one of the amicus briefs in *Timbs*, the idea was that "forfeiture could be used to confront the 'high echelon criminal elements who are isolated from the distribution of drugs but who direct, control, and profit from the drug traffic.'"[157] Over time, "Congress significantly broadened the categories of assets state and federal officers could seize." Predictably, it also expanded the use of forfeiture beyond drug trafficking to many other crimes. Perhaps the most fateful development, however, was that, "in an effort to incentivize enforcement agencies," Congress "began to permit the agencies to retain forfeited assets" while also authorizing the attorney general "to transfer to state or local law-enforcement agencies a share of forfeiture proceeds, through a program referred to as 'Equitable Sharing.'" That program "allows state and local law enforcement to receive up to eighty percent of forfeiture proceeds."[158]

This incentive structure triggered the danger always lurking in the government's power to levy fines. Instead of costing a state money, "fines are a source of revenue."[159] More than a desire to stop crime was now on the table; the state stood to benefit financially from successful forfeitures.

"The federal experiment inspired many states to enact their own forfeiture statutes," which likewise have permitted law enforcement to retain some or all of the assets seized.[160] As a result, Justice Thomas noted in 2017, "civil forfeiture has in recent decades become widespread and highly profitable."[161]

[155] See United States v. James Daniel Good Real Prop., 510 U.S. 43, 56, 82 n.2 (1993).

[156] Brief of Drug Policy Alliance et al. as Amici Curiae Supporting Petitioner at 4, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[157] *Id.* at 5 (quoting a 1984 Department of Justice strategy document).

[158] *Id.* at 5–7.

[159] Harmelin, 501 U.S. at 978 n.9.

[160] Brief of Drug Policy Alliance et al., *supra* note 156, at 8.

[161] Leonard, 137 S. Ct. at 848 (statement of Thomas, J., respecting the denial of certiorari) (citing Dick M. Carpenter II et al., Policing for Profit: The Abuse of Civil Asset Forfeiture 10 (2d ed. 2015)).

Unsurprisingly, this regime in which "police can seize property with limited judicial oversight and retain it for their own use" has "led to egregious and well-chronicled abuses."[162] Those abuses have been documented in numerous investigative reports,[163] which various amici brought to the justices' attention in *Timbs*.[164] Indeed, Timbs himself showed how the profusion of scandals and abuse under Indiana's forfeiture regime "vividly illustrates these national problems."[165] After Indiana gave law enforcement a financial stake in civil forfeiture in the 1980s, for example, one prosecutor effused that "the statute is limited only by your own creativity."[166] In *Timbs*, the Court's majority opinion endorsed these concerns about the "scarcely hypothetical" danger of fines and fees.[167] That recognition, and the signal it sends to lower-court judges, should prove valuable to future litigants.

The victory in *Timbs* also casts light on a growing and increasingly confident left-right alliance that has united in advancing a libertarian approach to core individual rights. At the Supreme Court, for instance, Timbs was supported by 19 amicus briefs representing more than 75 organizations that ran the ideological gamut. (Indiana, by

[162] *Id.*

[163] See, e.g., Dick M. Carpenter II et al., Institute for Justice, Policing for Profit: The Abuse of Civil Asset Forfeiture 10 (2d ed. 2015)), https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf; American Civil Liberties Union of California, Civil Asset Forfeiture: Profiting from California's Most Vulnerable (May 2016), https://www.aclunc.org/docs/aclu_california_civil_asset_forfeiture_report.pdf; Rebecca Vallas et al., Center for American Progress, Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-Income Communities and Communities of Color (Apr. 1, 2016), https://www.americanprogress.org/issues/criminal-justice/reports/2016/04/01/134495/forfeiting-the-american-dream; Southern Poverty Law Center & Alabama Appleseed Center for Law & Justice, Forfeiting Your Rights: How Alabama's Profit-Driven Civil Asset Forfeiture Scheme Undercuts Due Process and Property Rights (Jan. 2018), https://www.splcenter.org/sites/default/files/com_civil_asset_forfeiture_report_finalnocrops.pdf.

[164] See Brief of Drug Policy Alliance et al., *supra* note 156; Brief of American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief of DKT Liberty Project et. al. as Amici Curiae Supporting Petitioner, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief of Juvenile Law Center et al. as Amici Curiae Supporting Petitioner, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091); Brief of Scholars as Amici Curiae Supporting Petitioner, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[165] Petition for Certiorari, *supra* note 81, at 30.

[166] *Id.* (quoting Joseph T. Hallinan, Police can take crime cash but can't dish it out, Indianapolis Star, Feb. 2, 1986, at 6B).

[167] Timbs, 139 S. Ct. at 689.

contrast, had but one amicus brief, representing the interests of cities and counties.[168]) This emerging alliance is pressing the Court to correct past decisions that have wrongly facilitated government overreach and impunity, typically employing an arsenal of historical and originalist arguments. Along with the movement to curtail exploitive fines, fees, and forfeitures, examples of this alliance in action can be seen in efforts to scale back qualified immunity, prevent new technology from being used to undermine Fourth Amendment privacy safeguards, and—also at the Court this term—eliminate the "dual sovereignty" exception to the Double Jeopardy Clause. While it remains to be seen how successful these efforts will be,[169] they are certainly forcing the justices to consider these issues from a new perspective and with a new urgency.

VI. A Final Note on the Indiana Supreme Court's Decision—Are Some Framers More Equal than Others?

Before concluding, it's worth taking one last look at how the Indiana Supreme Court handled Timbs's case, because the court's attitude exemplifies a flaw that continues to plague discussions about the Constitution's meaning, both inside and outside the courts.

As explained earlier, the Indiana Supreme Court refused to enforce the Eighth Amendment's Excessive Fines Clause against the state until the U.S. Supreme Court "mandated" that it do so.[170] The court peppered its discussion with declarations that "Indiana is a sovereign state within our federal system" and that "we decline to subject Indiana to a *federal* test."[171] That rhetoric, with its states-rights overtones, betrayed an incomplete understanding of the Constitution and how it has been amended since 1789. And that reflects a broader, more common mistake in constitutional debate: the tendency to privilege the original 1789 text and its Framers over the landmark amendments that "We the People" have since adopted to improve that flawed document.

[168] See Brief of the Nat'l Association of Counties et al. as Amici Curiae Supporting Respondent, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091).

[169] By a lopsided margin, the Court reaffirmed the "dual sovereignty" exception to the Double Jeopardy Clause, allowing the federal and state governments to separately prosecute a person for the same conduct. See Gamble v. United States, 139 S. Ct. 1960 (2019). Justices Ginsburg and Gorsuch both dissented. See also the article covering the case by Anthony J. Colangelo in this volume.

[170] Timbs, 84 N.E.3d at 1184.

[171] *Id.* at 1183–84.

The Indiana Supreme Court began its discussion with this statement: "The framers' original conception was settled long ago that the Bill of Rights applies only to the national government and cannot be enforced against the States."[172] Having rhetorically elevated the "framers' original conception . . . settled long ago," the opinion then subtly portrays incorporation of the Bill of Rights as a modern whim of the Supreme Court: "Only after ratification of the Fourteenth Amendment did the Supreme Court, in the early twentieth century, begin to apply various provisions of the Bill of Rights to the States through the doctrine of selective incorporation."[173]

Completely missing from the court's summary was any acknowledgment that "[t]he constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system."[174] Ignoring the import of the Reconstruction Amendments—and the seismic shift they caused in the relationships among citizens, states, and the federal government—simply gets the Constitution wrong, subverting rather than respecting the document's "original meaning."

As *Timbs* illustrates, our nation is still reckoning with that history and its implications.

Conclusion

Upon ratification of the Fourteenth Amendment in 1868, it should have been clear—indeed, it *was* clear[175]—that the Constitution no longer permitted states to impose excessive fines on their citizens. Yet it took the Supreme Court more than a century and a half to definitively settle this proposition. That the Court finally took this belated step now is no accident. Rather, the change was prompted by the spread of a distinctly new set of government abuses and the corresponding rise of a cross-ideological movement aimed at checking those abuses. While it may have taken a century and a half too long to get here, the Excessive Fines Clause, after *Timbs*, offers a chance to help restore certain basic concepts of fairness and restraint in how the government treats its citizens.

[172] *Id.* at 1182.

[173] *Id.*

[174] McDonald, 561 U.S. at 754.

[175] See *supra* notes 3–14.

What's Next in *Apple Inc. v. Pepper*? The Indirect-Purchaser Rule and the Economics of Pass-Through

*Bruce H. Kobayashi and Joshua D. Wright**

I. Introduction

On May 13, 2019, the Supreme Court issued a narrow 5-4 decision in *Apple Inc. v. Pepper*. The decision, reviewing a motion to dismiss, was narrow in both the vote margin and the scope of the opinion. Writing for the majority, Justice Brett Kavanaugh, joined by the four Democrat-appointed justices, held that iPhone owners who purchased apps from the Apple App Store were direct purchasers and thus have standing under *Illinois Brick Co. v. Illinois* (1977) to sue Apple for alleged monopolization under Section 2 of the Sherman Act. In his dissent, Justice Neil Gorsuch concluded that the app developers were the direct purchasers of distribution services provided by Apple, and that, under *Illinois Brick* and Section 4 of the Clayton Act, recovery of damages by the iPhone owners was necessarily based upon a pass-on theory and therefore not allowed.

iPhone users purchase apps via Apple's App Store. The suit began in 2011 when four iPhone owners sued Apple, alleging that Apple unlawfully monopolized "the iPhone apps aftermarket."[1] The plaintiffs allege that Apple locks iPhone owners into paying higher prices via the App Store. Apple does not generally create apps. Instead,

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[1] Apple Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019).

the company relies upon third-party app developers who contract with Apple to distribute their apps to iPhone users. The app developers set the retail prices of their apps. Apple receives a 30 percent commission on all app sales and requires that the retail sales price end in $0.99. The plaintiffs allege that this 30 percent commission is "pure profit" for Apple, and that app prices would be substantially lower in a competitive environment but for Apple's conduct.[2] Apple moved to dismiss the complaint, contending that iPhone owners were indirect purchasers and thus barred from the claim by *Illinois Brick*.

The district court agreed with Apple, and granted its motion to dismiss, holding that the iPhone owners were indirect purchasers and thus were not proper plaintiffs in this antitrust case.[3] The Ninth Circuit reversed, holding that the iPhone owner-plaintiffs were direct purchasers under *Illinois Brick* because they purchased the apps directly from Apple via the App Store.[4] The Ninth Circuit construed *Illinois Brick* as barring only a party "two or more steps removed from the consumer in a vertical distribution chain."[5] Because the Ninth Circuit characterized the transaction between iPhone owners and the App Store as the direct purchase of apps from Apple, rather than from the app developers, it held that *Illinois Brick* did not bar their claim.

The Supreme Court granted certiorari and affirmed the Ninth Circuit's judgment. The majority and dissent each laid blame on their colleagues for elevating form over economic substance.[6] The majority and dissent each also claims its conclusion is the necessary result of a straightforward application of *Illinois Brick* and Section 4 of the Clayton Act.[7] The *Illinois Brick* rule bars indirect purchasers from federal antitrust claims.[8] From an economic perspective, the rule in *Illinois Brick* attempts to achieve optimal deterrence in several ways. First, given the Court's prior holding in *Hanover Shoe* barring

[2] *Id.*

[3] See In re Apple iPhone Antitrust Litigation, 2013 WL 6253147 (N.D. Cal. 2013).

[4] See In re Apple iPhone Antitrust Litigation, 846 F.3d 313 (9th Cir. 2017).

[5] See Apple Inc., 139 S. Ct. at 1519–20.

[6] See *id.* at 1523, 1529.

[7] See *id.* at 1520, 1526.

[8] See Ill. Brick Co. v. Illinois, 431 U.S. 720, 728–29 (1977).

"passing-on" defenses in federal antitrust suits,[9] the *Illinois Brick* rule prevents multiple recoveries for the same harm, eliminating a potential source of overdeterrence. Second, under the assumption that the deterrent effect of a fine does not depend upon which party collects the fine, the rule eliminates the need to engage in pass-on analysis, thus reducing the costs and scope of litigation without affecting the deterring effect of antitrust actions. Third, the rule increases the probability a lawsuit will occur. Because *Hanover Shoe* does not allow a reduction in the amount of recoverable damages due to pass-on, the rule increases direct purchasers' incentive to sue by concentrating the set of plaintiffs that are able to recover antitrust damages.

In *Apple Inc. v. Pepper*, the Court did not overrule *Illinois Brick*. Rather, the Court held that iPhone owners have standing as direct purchasers to bring antitrust claims against Apple and remanded the case to the district court to adjudicate the merits. Scholars and practitioners have debated the implications of *Apple Inc. v. Pepper* moving forward, particularly for firms serving as platforms in multisided markets. That includes possible tension with the Supreme Court's recent decision in *Ohio v. American Express* and a potential revival of *Kodak*-style Section 2 "aftermarket" lock-in claims against platforms.[10] Those issues are largely theoretical and premature in the context of appellate review of a motion to dismiss, which necessarily presumes disputed facts, such as Apple's possession of monopoly power in an alleged "App Store" market.[11]

The more immediate concern, and one that motivates the debate about the wisdom of *Illinois Brick*'s prohibition against indirect-purchaser suits, is lower courts' ability to handle the complex economics required to apportion damages among multiple direct purchasers in the platform setting. On remand in *Apple Inc. v. Pepper*, for example, the district court will potentially be tasked with apportioning any proven overcharge between the iPhone owners and the

[9] Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

[10] See Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018); Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992); see also Bruce H. Kobayashi & Joshua D. Wright, Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup, 5 J. Competition L. & Econ. 469 (2009).

[11] In considering a motion to dismiss made by a defendant, courts must accept all nonconclusory factual allegations as true and draw all reasonable inference in the plaintiffs' favor. See Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

app developers. This calculation turns on the rate at which developers are able to pass-through to consumers. Our analysis focuses on the question faced by the district court on remand—that is, the economics of pass-through analysis in the specific context of Apple's 30 percent royalty rate on apps sold by app developers to iPhone users in the App Store. On remand, the court will have to answer this question to determine if the plaintiffs were injured by Apple's conduct, and, if so, by how much.

II. The Court's Decision

The Supreme Court granted certiorari to the Ninth Circuit's decision that iPhone users were direct purchasers from Apple. Justice Kavanaugh, writing for the 5-4 majority, held that iPhone owners are direct purchasers under *Illinois Brick*. Justice Gorsuch, writing for the dissent, argued that the iPhone owners are indirect purchasers, and that the majority erred in allowing a "pass-on" case to proceed. At the Court's invitation, the Department of Justice filed a brief as amicus curiae to present the views of the United States. The Department of Justice similarly argued that the plaintiffs are indirect purchasers under *Illinois Brick*, and that the complaint should be dismissed.[12] The disagreement between the justices focuses on their differing interpretations of *Illinois Brick* and how it should be applied.

A. Justice Kavanaugh's Majority Opinion

Justice Kavanaugh's brief opinion concludes that iPhone users are proper plaintiffs for this antitrust suit.[13] Apple contends that because app developers set the price of apps within the App Store, it is the app developers and not Apple who are in the most "direct" relationship with the customer.[14] The majority holds that this theory does not bar the plaintiff's claim.[15] Applying the reasoning in

[12] See Brief for the United States as Amicus Curiae Supporting Petitioner, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204) [hereinafter U.S. Brief].

[13] Apple Inc., 139 S. Ct. at 1520.

[14] *Id.* at 1521–22.

[15] *Id.* at 1522 (stating that "Apple's effort to transform *Illinois Brick* from a direct-purchaser rule to a 'who sets the price' rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers").

Illinois Brick, the majority believes that allowing direct users to sue is more effective than only allowing app developers to bring suit directly against Apple.[16]

In concluding that consumers are proper plaintiffs in this antitrust suit, and specifically that they are "direct consumers,"[17] the majority begins with Section 4 of the Clayton Act,[18] which states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue."[19] The majority holds this broad text covers consumers who purchase goods at supracompetitive prices from a monopolistic retailer.[20] Turning to the Court's teaching in *Illinois Brick*, Justice Kavanaugh emphasizes that consumers who are "two or more steps removed from the antitrust violator in a distribution chain may not sue."[21] For the majority, the key question is whether the App Store is an intermediary in the relationship between iPhone users and Apple. Because there is no such intermediary, the Court concludes iPhone users are direct purchasers.[22]

Apple argues that because it did not set the price, consumers do not have standing to sue the company.[23] The majority characterizes this theory as inconsistent with Section 4 of the Clayton Act and *Illinois Brick*. The Court holds that *Illinois Brick* "established a bright-line rule where direct purchasers such as the consumers here may sue antitrust violators from whom they purchased a good or service."[24] Importantly, the Court concludes that setting the price is irrelevant to the *Illinois Brick* analysis and that any ambiguity should be resolved in the direction of the language of the Clayton Act, which contemplates direct purchasers as proper plaintiffs.

[16] *Id.* at 1524.

[17] *Id.* at 1520.

[18] *Id.*

[19] See 15 U.S.C. § 15(a).

[20] Apple Inc., 139 S. Ct. at 1520.

[21] *Id.* at 1521.

[22] *Id.*

[23] *Id.* at 1521–22.

[24] *Id.* at 1522.

The Court also rejects Apple's argument that iPhone users are not direct purchasers because Apple does not set the price as prioritizing form over economic substance.[25]

Justice Kavanaugh offers an example of two different methods of pricing—Apple's ad valorem royalty rate (a tax based on value) and a markup—which, he contends, generate identical economic outcomes for the manufacturer, retailer, and consumer.[26] Based upon this equivalence premise, Justice Kavanaugh rejects Apple's argument because it would allow an iPhone user standing to sue Apple in the markup-based scenario but not for its ad valorem royalty. To hold otherwise, Justice Kavanaugh contends, would elevate form over economic substance and allow Apple an arbitrage opportunity to alter its commission structure to avoid antitrust liability.[27]

Applying *Illinois Brick*'s pragmatic reasoning to the present case, the majority contends that iPhone users are not barred from bringing suit against Apple. *Illinois Brick* barred indirect-purchaser suits for three reasons: "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants."[28]

The majority argues that restricting standing to the app developers is not a more effective antitrust policy in terms of compensation and deterrence.[29] The majority reasons that doing so would place consumers at the mercy of monopolistic retailers simply because upstream suppliers could also sue,[30] and would undermine the purpose of *Illinois Brick* in prioritizing effective private antitrust enforcement.[31]

The majority concedes the complexity of the damages calculation required to apportion any damages between app developers and consumers, but rejects the view that *Illinois Brick* is "a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated."[32] The majority points

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1523.

[28] *Id.* at 1524.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

out that complicated damages calculations are typical of antitrust cases—often requiring expert testimony to establish the price and output in the but-for world[33]—and can be just as complex in the traditional "markup" case where Apple conceded consumers have standing.[34]

Apple claims that allowing the plaintiffs to sue will result in "conflicting claims to a common fund."[35] Apple and the Department of Justice argue that this leads to the overdeterrence that *Illinois Brick* sought to prevent.[36] The majority disagrees, stating that this is not a case in which multiple parties at different levels of the supply chain are trying to recover the same passed-on overcharge.[37] If successful, the iPhone owners would be entitled to the full amount of the overcharge.[38] But Apple may still be subject to multiple suits, and *Illinois Brick* does not bar such an outcome if it is unrelated to a passing-on claim. Here, the downstream users would be able to sue Apple on a theory of harm related to the exercise of monopoly power, while the app developers could sue Apple over a monopsony theory.[39] The majority points out that the two suits would rely on different theories of harm and therefore would not result in multiple claims to a common fund as Apple suggests.[40]

B. Justice Gorsuch's Dissenting Opinion

Justice Gorsuch, joined by Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito, argues that the plaintiff's claim is barred, relying on a straightforward application of *Hanover Shoe* and *Illinois Brick*.[41] The plaintiffs here are indirect purchasers and cannot sue Apple.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] See *id.*; U.S. Brief at 27; see also Antitrust Modernization Comm'n, Report and Recommendations 271 (2007), https://digital.library.unt.edu/ark:/67531/metadc1228317/m2/1/high_res_d/amc_final_report.pdf [hereinafter AMC Report].

[37] Apple Inc., 139 S. Ct. at 1525.

[38] *Id.*

[39] *Id.*; Cameron v. Apple Inc., No. 5:19-cv-03074 (N.D. Cal. June 4, 2019).

[40] Apple Inc., 139 S. Ct. at 1525.

[41] See Ill. Brick Co., 431 U.S. 720; Hanover Shoe, 392 U.S. 481.

In *Hanover Shoe*, the plaintiff-retailer brought suit against a manufacturer for alleging a violation of the antitrust laws resulting in supracompetitive prices. The manufacturer relied upon the defense that the plaintiff had not actually been damaged because it passed on any overcharge to its own consumers.[42] The Supreme Court rejected this passing-on defense, applying Section 4 of the Clayton Act against the backdrop of common law.[43] The general tendency of the law is to not "go beyond the first step" when calculating damages.[44] In *Hanover Shoe*, the first step was simply the defendant's overcharge to the plaintiff.[45] Looking beyond the first overcharge and debating whether or not the plaintiff passed on any of the overcharge would risk problems that traditional principles of proximate causation sought to avoid. The Supreme Court held that passing-on defenses were barred in federal antitrust suits except in certain limited circumstances.[46]

Illinois Brick addressed the opposite side of the passing-on theory. As *Hanover Shoe* held that an antitrust defendant could not rely on a pass-on theory to avoid damages, *Illinois Brick* barred antitrust plaintiffs from relying on a pass-on theory to recover damages. The dissent contends that *Illinois Brick* simply applied the traditional principles of proximate causation in the antitrust context.

Applying both *Hanover Shoe* and *Illinois Brick*, the dissent reasons that any overcharge in this context falls on the app developers, so they are the ones directly injured by it.[47] Plaintiffs could only be injured if the developers chose to pass on the overcharge to them. Specifically looking at causation, a court would have to look into whether Apple's conduct damaged the plaintiffs at all by investigating if the developers passed on the high commission price and to what extent. The dissent asserts that *Illinois Brick* set a bright-line rule to prevent courts from dealing with these complicated theories.[48] If the iPhone owners can directly sue Apple for a possible overcharge,

[42] See Hanover Shoe, 392 U.S. at 487–88.

[43] *Id.* at 488–89.

[44] *Id.* at 490 n.8 (quoting S. Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918)).

[45] *Id.* at 494.

[46] *Id.*

[47] Apple Inc., 139 S. Ct. at 1528.

[48] *Id.*

the courts will have to split up the overcharge by determining what percentage of the overcharge the developers passed on to the consumers and what percentage they did not. This could leave Apple at risk of duplicative damages awards. The dissent argues the Court now risks precisely the sort of overdeterrence that motivated its decision in *Illinois Brick* to bar indirect suits.[49]

The dissent also characterizes the majority view as elevating form over economic substance.[50] "Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the Court's test turns on who happens to be in privity of contract with whom."[51] The dissent also points Justice Kavanaugh's strategic arbitrage concern back at the majority, arguing that the Court's ruling allows Apple to avoid liability by structuring their relationships with developers differently.[52] The dissent finds *Illinois Brick's* approach "intelligible, principled, administrable, and far more reasonable than the Court's artificial rule of contractual privity,"[53] which it contends is a "pointless and easily evaded imposter."[54]

III. The Economics of Pass-On in *Apple Inc. v. Pepper*

The traditional economic explanation for the direct-purchaser rule in *Illinois Brick* is that avoiding pass-on analysis in federal antitrust litigation improves the deterrent effect of the antitrust laws. Under economic theories of optimal deterrence, the focus is on imposing a remedy that forces the defendant to internalize the expected harm caused by his actions, with little concern over where the damages go. As a result, allowing costly procedures that would require pass-on analysis, such as indirect-purchaser suits or actions for contribution, are disfavored under such an approach.[55]

[49] *Id.*

[50] *Id.* at 1529.

[51] *Id.*

[52] *Id.* at 1530.

[53] *Id.* at 1531.

[54] *Id.* at 1530.

[55] The same argument is also used to explain the inefficiency of allowing actions for contribution in antitrust cases. See Frank H. Easterbrook, William M. Landes & Richard A. Posner, Contribution among Antitrust Defendants: A Legal and Economic Analysis, 23 J.L. & Econ. 331 (1980).

The rules in *Illinois Brick* and *Hanover Shoe* are consistent with optimal deterrence in several ways. Allowing the direct purchasers to recover all of the damages from an antitrust case results in a cost-saving rule that allows both the avoidance of multiple recoveries and the costs of litigation associated with pass-on analysis without compromising the deterrent effect of the antitrust laws.[56] In particular, the rule eliminates the "massive evidence and complicated theories" needed to identify the fraction of the overcharge absorbed by retailers and distinguish it from the portion passed on to consumers in the form of higher prices.[57] And because the defendant is barred from using pass-on as a defense or to reduce damages, the amount of damages, and thus the deterrent effect of antitrust, will not be materially affected.

Under the economic theory of optimal deterrence, the rule in *Illinois Brick* coupled with the rule in *Hanover Shoe* has a second potential positive effect on antitrust deterrence through the distribution of awards. Eliminating indirect-purchaser claims concentrates recovery, allowing direct purchasers to appropriate all the returns to federal antitrust litigation. This increases a direct purchaser's incentives to sue, and thus plausibly increases the probability, all things being equal, that a lawsuit will be filed at all.[58] In addition, even if the direct-purchaser suit proceeds as a class action, allocating the federal right to sue to the direct purchasers likely will result in a less numerous class, arguably resulting in lower agency costs relative to an indirect-purchaser class.[59]

On the other hand, the economic case for the *Illinois Brick* rule seems to be weakened by several real-world factors. The first and most

[56] See William M. Landes & Richard A. Posner, Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*, 46 U. Chi. L. Rev. 602 (1979).

[57] Ill. Brick, 431 U.S. at 732 (quoting Hanover Shoe, 392 U.S. at 493); see also AMC Report at 268.

[58] For an economic analysis of how the incentives on care and litigation are affected by altering the amount of total damages paid that is recovered by the plaintiff, see A. Mitchell Polinsky & Yeon-Koo Che, Decoupling Liability: Optimal Incentives for Care and Litigation, 22 RAND J. Econ. 562 (1991).

[59] For a discussion of how similar plaintiff concentrating provisions affected agency costs in securities cases, see Stephen Choi, Jill E. Fisch & Adam Pritchard, Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act, 83 Wash. U. L.Q. 869 (2005).

important factor is the Court's decision in *California v. ARC America* that allowed states to pass laws that permit indirect-purchaser lawsuits.[60] Cases brought under these *Illinois Brick* repealer statutes would require pass-on analyses to avoid multiple recoveries. As a result, the existence of indirect-purchaser lawsuits under state law serves to undo the overall efficiencies of the *Illinois Brick*/*Hanover Shoe* rules discussed above.[61]

In addition, even setting aside the potential for indirect-purchaser cases under state law, there may be instances where the direct purchasers, even with a more concentrated interest in any recovery, may be less willing to sue (e.g., if they fear disrupting relations with their suppliers).[62] As a result, the effectiveness of the deterrent effect of the antitrust laws will in some cases be greater if indirect purchasers are allowed to sue. Thus, any increase in the costs of litigation that results from having to engage in pass-on analysis could, in theory, be justified by the deterrence benefits. Thus, the effect of the *Illinois Brick* rule on the probability and cost of a lawsuit may be more complex and varied than suggested above. Similarly, there may be some cases in which pass-on analysis would not be either complex or costly or require "massive evidence and complex theories."[63] Thus, the final evaluation of the rule's net effect on the probability and cost of litigation will depend upon both the feasibility of conducting pass-on analysis and the actual effects of pass-on in a given case.

To explore these issues, Part III. A provides a short examination of the feasibility of pass-through analysis and its use in antitrust analyses and litigation. Part III. B examines the effects of pass-through if *Apple Inc. v. Pepper* proceeds to litigation.

[60] California v. ARC Am. Corp., 490 U.S. 93 (1989). Thirty-four states and the District of Columbia have passed such statutes. See State *Illinois Brick* Repealer Laws Chart, WESTLAW Practical Law Checklist 8-521-6152 (accessed July 18, 2019); 14 H. Hovenkamp, Antitrust Law, ¶2412d (4th ed. 2019). See also Edward D. Cavanagh, *Illinois Brick*: A Look Back and a Look Ahead, 17 Loy. Consumer L. Rev. 1, 2 n.4 (2004) (listing state statutes).

[61] See John Cirace, Apportioning Damages between Direct and Indirect Purchasers in Consolidated Antitrust Suits: ARC America Unravels the *Illinois Brick* Rule, 35 Vill. L. Rev. 283 (1990).

[62] Ill. Brick, 431 U.S. at 746.

[63] Hanover Shoe, 392 U.S. at 493.

A. Pass-Through Analysis: Feasibility in General

There is a large and robust literature on the economics of pass-through.[64] As others have pointed out, the analysis of pass-through or pass-on in an antitrust case is a specific application of "incidence analysis," which examines how a tax or other cost is borne through various levels of the supply chain or the economy.[65] At a broad level, it has been shown that the rate at which an overcharge to a direct purchaser will be passed-on to indirect purchasers will depend on the nature of competition, though there is not a simple relationship between market power and the pass-on rate.[66] In particular, the theoretical determination of pass-through rates in differentiated products oligopoly models present complex issues, with the rates being a function of the type of interaction between firms, and relative elasticities of demand and supply, and demand curvature.

As a result, empirical assessments of pass-through can be challenging.[67] Causal empirical estimates of pass-through rates, largely based on natural experiments created by exchange-rate movements show that pass-through rates differ among industries.[68] In addition, pass-through rates or damages suffered by indirect purchasers can and have been estimated in antitrust cases.[69] However, estimating

[64] See E. Glen Weyl & Michal Fabinger, Pass-Through as an Economic Tool: Principles of Incidence under Imperfect Competition, 121 J. Pol. Econ. 528 (2013).

[65] *Id.*; see also Herbert J. Hovenkamp, *Apple v. Pepper*: Rationalizing Antitrust's Indirect Purchaser Rule (2019), Faculty Scholarship at Penn Law 2082, at n.71, https://scholarship.law.upenn.edu/faculty_scholarship/2082 (citing early tax cases and economic literature).

[66] See generally Joseph Farrell & Carl Shapiro, Recapture, Pass-Through, and Market Definition, 76 Antitrust L.J. 585 (2010); Luke M. Froeb, Steven T. Tschantz & Gregory J. Werden, Pass-Through Rates and the Price Effects of Mergers, 23 Int'l J. Indus. Org. 703 (2005); Paul L. Yde & Michael G. Vita, Merger Efficiencies: Reconsidering the "Passing-On" Requirement, 64 Antitrust L.J. 735 (1996).

[67] Landes & Posner, *supra* note 56.

[68] See, e.g., Weyl & Fabinger, *supra* note 64; Nathan H. Miller, Matthew Osborne & Gloria Sheu, Pass Through in a Concentrated Industry: Empirical Evidence and Regulatory Implications, 48 RAND J. Econ. 69 (2017).

[69] See Hovenkamp, *supra* note 65, at 7–8 (discussing methods used to estimate damages in indirect-purchaser cases under state law). See also Daniel L. Rubinfeld, Quantitative Methods in Antitrust Law, 1 Issues in Competition L. & Pol'y, ABA Section of Antitrust Law 723, 727 (2008) (describing reduced-form methods of estimating pass-through damages).

pass-through in antitrust cases in the absence of exogenous variation or in the context of a predictive exercise may be a difficult task that yields imprecise or erroneous estimates of pass-through.[70]

In addition to the potentially important use of pass-through analysis to apportion damages between direct and indirect purchasers, pass-through analysis plays an important role in other areas of antitrust law. In particular, pass-through analysis can be an important component of predictions of merger price effects. The complexities of pass-through analysis have led some to suggest approaches that avoid the inquiry by examining first-order conditions.[71] Other approaches to price prediction, such as merger simulation, rely on specific assumptions about the functional form of demand, including the second-order properties of demand. Under these approaches, assumptions about the functional form of demand will also greatly influence the predicted pass-through rate. However, other approaches are more optimistic regarding the ability to measure and use estimates of observed pass-through rates. These approaches would use estimated or observed pass-through rates to infer the second-order properties of demand, reducing the extent to which the predictions rely on assumptions about specific functional forms of demand.[72]

B. Pass-Through Analysis in Apple Inc. v. Pepper

Even if pass-through analysis would be complex, costly, and speculative in the general case, in some special cases, including a potential *Pepper v. Apple Inc.* case on remand, the pass-through analysis is neither complex nor speculative. In particular, Apple contracts with app developers include a fixed $99 yearly fee plus a 30 percent ad valorem royalty. Prices are set by the app developers, subject to the condition that the prices are set in $1 increments ending in .99.[73] Further, while app developers must incur the costs of developing

[70] Hovenkamp, *supra* note 65.

[71] See, e.g., Gregory J. Werden, A Robust Test for Consumer Welfare Enhancing Mergers among Sellers of Differentiated Products, 44 J. Indus. Econ. 409 (1996).

[72] See Sonia Jaffe & E. Glen Weyl, The First-Order Approach to Merger Analysis, 5 Am. Econ. J.: Microeconomics 188 (2013); Nathan H. Miller, Marc Roemer, Conor Ryan & Gloria Sheu, Pass-Through and the Prediction of Merger Price Effects, 64 J. Indus. Econ. 683 (2017).

[73] The analysis in this article does not address this aspect of Apple's App Store pricing, and it does not affect our conclusions.

and updating the software, these costs are largely fixed with respect to output. To the extent that the marginal costs of producing and distributing another copy of the app is zero, the theoretical calculation of the markup is far from complex—it is simple. And the effect of the Apple 30 percent ad valorem royalty on the optimal price set by the app developer is zero.

This result is likely not an accident, but rather an attempt by Apple to impose an efficient vertical pricing structure that eliminates the double margin that would be charged with a linear price. Indeed, the differential effect of ad valorem and unit royalties is a well-established and well-known result in the tax-incidence literature.[74] However, the majority fails to consider this, and even erroneously suggests that ad valorem royalties are economically equivalent to linear prices:[75]

> In a traditional markup pricing model, a hypothetical monopolistic retailer might pay $6 to the manufacturer and then sell the product for $10, keeping $4 for itself. In a commission pricing model, the retailer might pay nothing to the manufacturer, agree with the manufacturer that the retailer will sell the product for $10 and keep 40 percent of the sales price; and then sell the product for $10, send $6 back to the manufacturer, and keep $4. *In those two pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer.*[76] [emphasis added]

But, in equilibrium, things are not the same. To see this, consider Figure 1, which depicts the consumer demand for an app.[77] This consumer demand is labeled D_A and, as drawn, is assumed to be linear. With zero marginal cost and in the absence of any royalty or price collected by Apple, the app developer will set a price $P_A^* = 6$ that maximizes total revenue, TR_A^*. This price results in the app

[74] See Gerard Llobet & Jorge Padilla, The Optimal Scope of the Royalty Base in Patent Licensing, 59 J.L. & Econ. 45 (2016).

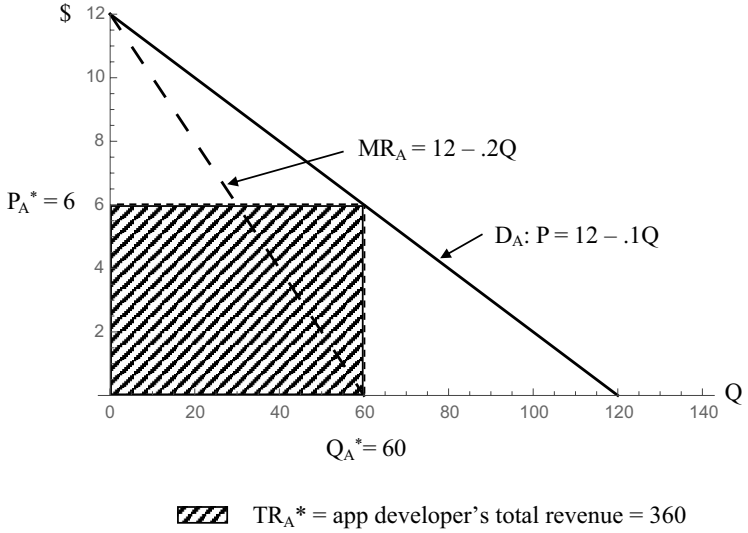
[75] Other analyses of the *Apple Inc. v. Pepper* decision also fail to consider the ad valorem nature of the App Store royalty. See, e.g., Hovenkamp, *supra* note 65. For a discussion of the importance of taking into account the differential effects of nonlinear pricing in antitrust analyses, see Dennis W. Carlton & Bryan Keating, Antitrust, Transactions Costs, and Merger Simulation, 58 J.L. & Econ. 269 (2015).

[76] Apple Inc., 139 S. Ct. at 1522.

[77] The example assumes linear demand for the app: D_A: $P = 12 - .1Q$.

Figure 1

Vertically integrated app developer/distributor (zero marginal cost)



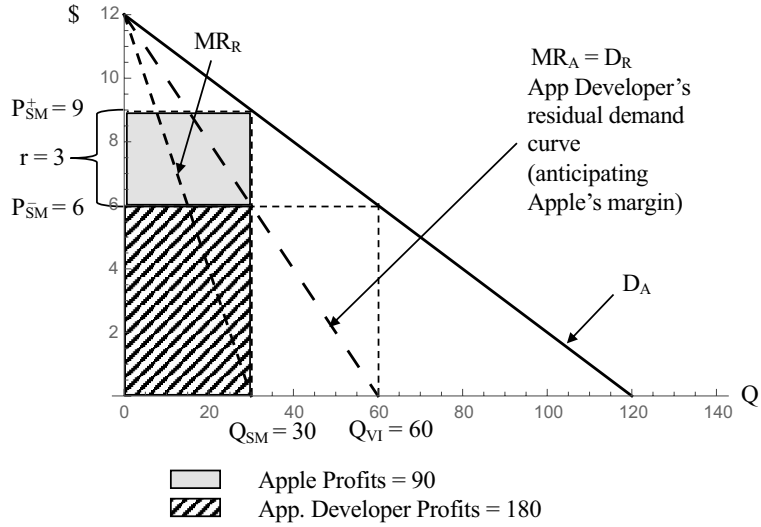
developer lowering its price until the marginal revenue curve associated with D_A (MR_A) equals zero, which occurs when $Q_A^* = 60$ iPhone owners purchase the app.

Figure 2 illustrates the equilibrium price and quantity when the app developer and app distributor with market power set independent per-unit prices. The app distributor will properly view the net price set by the app developer P_{SM}^- as a marginal cost and will set the distribution markup *r* equal to the difference between the app demand curve D_A and the marginal revenue curve MR_A. In setting his optimal net price P_{SM}^-, the app developer will anticipate the optimal markup *r* that will be set by the app distributor. As a result, the residual demand curve D_R facing the app developer will be equal to MR_A.

Specifically, suppose the app developer sets a net price $P_{SM}^- = \$6$ per download. The app distributor will maximize profits by setting its per-unit distribution markup $r = \$3$. Anticipating the distribution

Figure 2

Successive monopoly developer/distributor (with per-unit rate r* = 3 — zero marginal cost)



markup r = \$3, the optimal price for the app developer P^{-}_{SM} = \$6. Thus, when per-unit distribution markups are used, P^{-}_{SM} = \$6 and r = \$3 are equilibrium prices. The equilibrium price to the consumer will equal P^{+}_{SM} = \$9 and Q_{SM} = 30 units will be sold. The distribution markup on top of the app developer's markup is the standard example of "double marginalization," which results in higher prices to consumers, lower output, and lower consumer welfare when compared to the equilibrium outcome depicted in Figure 1. The app developer's total revenues fall to 180, and the app distributor's profits equal 90. Total joint revenues equal 270 and fall relative to the equilibrium outcome depicted in Figure 1, where total revenues equaled 360.

Now consider the effect of a 33.3 percent ad valorem royalty "imposed" by Apple, illustrated in Figures 3 and 4. In setting the optimal price, the app developer will face a residual demand curve that anticipates the App Store charge by Apple. For any ad valorem royalty s, the residual demand faced by the app developer is equal

Figure 3

Successive monopoly developer/distributor (with ad valorem rate s = 1/3 — zero marginal cost)

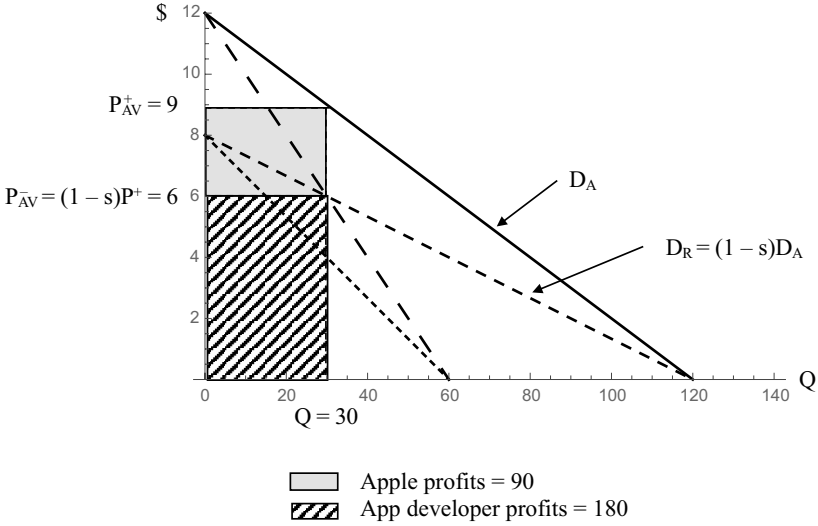
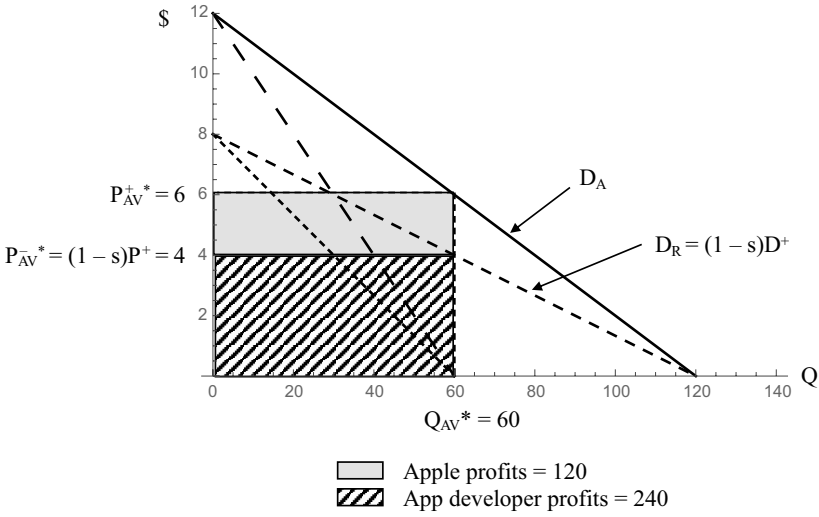


Figure 4

Successive monopoly developer/distributor (with ad valorem rate s = 1/3 — zero marginal cost)



to $D_R = (1 - s)D_A$. The ad valorem royalty s causes the residual demand curve facing the app developer to rotate inward from the intersection of D_A and the horizontal axis.

Figure 3 illustrates the outcome where the app developer sets the gross price $P^{+}_{AV} = \$9$, resulting in a net price $P^{-}_{AV} = \$6$ net of the ad valorem royalty. Prices, output, welfare, and the distribution of revenues between the app developer and the distributor are identical to the successive monopoly outcome illustrated in Figure 2. If $P^{+}_{AV} = \$9$ and $P^{-}_{AV} = \$6$ were equilibrium prices, then this example would illustrate the claim in the opinion of the Court that in the "two pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer."[78]

However, these are not equilibrium prices. The app developer, facing zero marginal cost and a 33.3 percent App Store charge will choose to set the price so that the marginal revenue curve associated with D_R equals zero. Examining Figure 3, marginal revenue at $P^{+}_{AV} = \$9$ is positive. Thus, the app developer would choose to lower the gross price from \$9 to $P^{+}_{AV}{}^{*} = \$6$ because the app developer maximizes two-thirds of total revenue by maximizing total revenue. Figure 4 illustrates the equilibrium outcome with an ad valorem royalty. Compared to the successive monopoly outcome depicted in Figure 2, prices are lower, output is higher, consumer welfare is higher, and the joint profits of the app developers and distributor are higher. Thus, everything is *not* economically the same for the manufacturer, retailer, and consumer in the two pricing scenarios (per-unit versus ad valorem retail markup).

Moreover, compared to the equilibrium in the absence of a retail markup illustrated in Figure 1, there is no effect of the ad valorem App Store charge s on the price of the app to consumers, that is $P_A^{*} = P^{+}_{AV}{}^{*} = 6$. As a result, output and welfare are also the same as depicted in Figure 1. Thus, for the plaintiff class of iPhone owners, there is no pass-through charge to the consumer caused by Apple increasing its ad valorem rate above what would have been charged in a world with competitive retailer/app stores. That is, the absence of an effect on the price charged to the consumer holds for any ad valorem rate $0 < s < 1$.

[78] Apple Inc., 139 S. Ct. at 1522.

While our example uses linear demand, the basic result is not dependent on that assumption. As long as the marginal cost of distribution is zero,[79] the basic result holds—that is, maximizing any fixed percentage of total revenue results in the same downstream app price, output, and static welfare as maximizing revenue.

Within the context of the future of the *Apple Inc. v. Pepper* litigation, our analysis suggests that on remand, and with Pepper et al. as direct purchasers, the court considering pass-on damages will find that the plaintiffs have not suffered competitive harm arising from the static effects of Apple's App Store commission level. Unless the plaintiffs expand their claim to reach beyond the static effects of App Store commissions and app developers pricing decisions, it seems unlikely that they will be able to prevail on their antitrust claim.[80]

IV. Conclusion

Apple Inc. v. Pepper is a narrow decision. It demurs on many significant issues that scholars and practitioners anticipated it would address when the Supreme Court granted certiorari. The ruling has left open many questions. Many, for example, believed the Court likely to take on the trio of *Illinois Brick*, *Hanover Shoe*, and *ARC America*.[81] Such a decision would no doubt have had a significant impact on the structure of antitrust deterrence and the allocation of rights and remedies between public enforcement agencies and private litigants. The ultimate economic foundation of *Illinois Brick* is grounded in a policy rationale favoring optimal deterrence over compensation for victims of anticompetitive conduct—that is, "from the deterrence standpoint,

[79] The result will hold approximately if the marginal cost of distribution is positive but close to zero. For an analysis of the difference between ad valorem royalties and unit royalties in the presence of positive marginal costs, see Llobet & Padilla, *supra* note 74.

[80] For example, reduced revenues from Apple's high ad valorem commissions could reduce the incentive for potential app developers to invest, altering the supply of apps and changing the equilibrium app price.

[81] See, e.g., John Gibson, Chahira Solh, Andrew Gavil & Akhil Seth, *Apple v. Pepper*: Tearing Down the *Illinois Brick* Wall?—Who Can and Cannot Sue Online Platforms under the Federal Antitrust Laws?, Lexology (Dec. 21, 2018), https://www.lexology.com/library/detail.aspx?g=c6cc5c38-4d24-42b2-805e-5ee275169e85; Matthew Perlman, States Urge Justices to Flip *Illinois Brick* in Apple Case, Law360, (Oct. 2, 2018), https://www.law360.com/articles/1088314/states-urge-justices-to-flip-illinois-brick-in-apple-case.

it is irrelevant to whom damages are paid, so long as someone redresses the violation."[82]

Some have criticized the Court's analysis for its alleged inconsistency with its recent ruling in *Ohio v. American Express (Amex)* regarding market definition and platforms.[83] Manne and Stout, for example, argue that "the Court's holding in *Amex* should *also* have required a finding in *Apple Inc. v. Pepper* that an app user on one side of the platform who transacts with an app developer on the other side of the market, in a transaction made possible and directly intermediated by Apple's App Store, should similarly be deemed in the same market for standing purposes."[84] Critics have thus concluded that the Court abandoned the lessons in platform economics learned and embedded into its *American Express* decision. We reject that characterization of *Apple Inc. v. Pepper* on procedural grounds. While such a criticism may ripen at a later stage in litigation, the critics have ignored the fact that the Supreme Court reviewed a ruling at the 12(b)(6) motion-to-dismiss stage. Thus, the lower court properly accepted the plaintiffs' alleged market definition for the purposes of its analysis.

Yet another potentially important issue the Supreme Court did not address in *Apple Inc. v. Pepper* is the viability of aftermarket antitrust claims against app distributors and platforms such as Apple. Aftermarket tying claims have largely been rejected by lower courts since the Supreme Court's 5-4 decision in *Eastman Kodak Co. v. Image Technical Services*.[85] If antitrust regulates the ad valorem royalty rate, resulting in nonlinear pricing by distributors, that result may give rise to such aftermarket claims. The Supreme Court was also silent on this issue, leaving an opportunity to address platform aftermarket claims for another day.

[82] Ill. Brick, 431 U.S. at 746 (internal citations omitted).

[83] Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

[84] Geoffrey Manne & Kristian Stout, In *Apple v. Pepper*, SCOTUS Leaves Home Without its Amex, Truth on the Market (May 13, 2019), https://truthonthemarket.com/2019/05/13/dementia-sets-in-at-scotus-as-the-justices-collectively-mislay-amex/.

[85] See David A.J. Goldfine & Kenneth M. Vorrasi, The Fall of *Kodak* Aftermarket Doctrine: Dying a Slow Death in the Lower Courts, 72 Antitrust L.J. 209 (2004); Kobayashi & Wright, *supra* note 10.

Our conclusion is a necessarily narrow one. Our pass-through analysis demonstrates that, on remand, the plaintiffs should not, and are unlikely to, prevail because they have not been harmed by the defendant's ad valorem rate. The Supreme Court's analysis leaves untouched a number of important issues surrounding the design of antitrust institutions, enforcement rights between public and private plaintiffs, market definition in the platform context, and the viability of aftermarket claims.

Looking Ahead: October Term 2019

*Elizabeth H. Slattery**

The Supreme Court's recently concluded October Term (OT) 2018 will more likely be remembered for Justice Brett Kavanaugh's confirmation hearings than any particular case the Court decided. It seems the justices wanted a low-profile term following the bruising confirmation, and they put off or denied review in many cases raising hot-button issues. The decisions that produced the most media attention and scrutiny—the political gerrymandering cases on direct appeal and the census case that was on a tight deadline—were ones that the Court could not ignore (either by statutory command or as a practical matter).

It is still too early to make sweeping statements about the impact of President Donald Trump's nominees to the Court, though the rapid destruction of America their opponents foresaw has yet to occur. Justices Kavanaugh and Neil Gorsuch have, however, lived up to the chief justice's declaration last fall that we do not have "Obama judges or Trump judges, Bush judges or Clinton judges."[1] Like their predecessors, Justices Kavanaugh and Gorsuch are their own men, at times bucking expectations of how a "Trump" judge will vote. Indeed, the pair disagreed in about 30 percent of cases last term, showing they are not cookie-cutter "Republican" judges but thoughtful jurists with independent views of the law.

Now the focus turns to the new term, which starts October 7. The Court receives roughly 7,000 petitions every term and agrees to review between 60 and 70 cases. The justices have already granted review in 42 cases, including a number of consolidated cases.

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[1] Mark Sherman, Roberts, Trump Spar in Extraordinary Scrap over Judges, AP (Nov. 21, 2018), https://apnews.com/c4b34f9639e141069c08cf1e3deb6b84.

They will add another 20-odd cases to their schedule over the course of the fall and early winter. OT 2019 promises to be an exciting term with disputes implicating claims of sexual orientation- and gender identity–based discrimination in the employment context, funding of religious school-choice efforts, and the first significant gun rights case in nearly a decade. This is shaping up to be a term of sequels, with Obamacare and the Deferred Action for Childhood Arrivals (DACA) policy returning to the Court. The justices may also revisit whether states can require doctors who perform abortions to have admitting privileges at a nearby hospital. For a term leading into a presidential election year, the justices are not shying away from headline-making cases that will place the Supreme Court squarely in the minds of Americans on Election Day 2020.

I. The Insanity Defense

Kicking off the term, the justices will hear *Kahler v. Kansas* on the first day of oral argument.[2] It is a busy fall for the Kansas attorney general's office, as it has three cases at the high court. *Kahler* asks the Court to decide whether the Constitution forbids a state from abolishing the insanity defense. This defense has a long history in Anglo-American law, but likewise, states have long employed a variety of approaches to incorporate it into their criminal law. The Supreme Court previously declined to constitutionalize the common-law rule, known as the *M'Naghten* rule, which instructs that a defendant should not be held criminally responsible if, at the time of the crime, he was unable either to understand what he was doing or that his action was wrong.[3] In *Clark v. Arizona* (2006), the Court held that due process does not require a state to employ both the cognitive and moral incapacity elements of the *M'Naghten* rule.[4]

A handful of states, including Kansas, have enacted laws allowing a criminal defendant to put on evidence of a mental disease or defect as it relates to his state of mind, or the *mens rea* element of the charged crime, rather than as an affirmative defense of insanity. The Court previously declined review in *Delling v. Idaho*, which asked the Court to hold that the Constitution mandates an insanity defense.

[2] Kahler v. Kansas, 139 S. Ct. 1318 (2019) (cert. granted).

[3] 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

[4] Clark v. Arizona, 548 U.S. 735, 749 (2006).

Joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, Justice Stephen Breyer dissented from the denial in *Delling*, writing that Idaho's law would allow disparate treatment of two equally unwell individuals. He posed the following hypothetical: A defendant who shot someone, believing the victim was a wolf, could assert an insanity defense to argue he lacked the *mens rea* to commit the crime. Another defendant who shot someone, recognizing his victim was a human but believing he was acting on the orders of a wolf, could not assert an insanity defense because he understood that he shot another person. In both situations, Breyer noted, "the defendant is unable, due to insanity, to appreciate the true quality of his act, and therefore unable to perceive that it is wrong."[5]

Turning to the case out of Kansas, James Kahler challenges his capital conviction for shooting his estranged wife and three other family members. Kahler and his wife had a contentious separation that led to Kahler's arrest for battery and subsequent severe depression and job loss. The Saturday after Thanksgiving in 2009, Kahler drove an hour to the home of his wife's grandmother, where she and their children were visiting. He shot and killed his wife, two daughters (but not his son), and the grandmother in a rampage that was recorded by the grandmother's Life Alert system. Kahler was charged with premeditated first-degree murder. At trial, his defense counsel argued that, due to Kahler's severe depression, he was unable to form the requisite intent and premeditation necessary for a capital murder conviction. The defense's forensic psychiatrist witness testified that Kahler "couldn't refrain from doing what he did," while the state's forensic psychiatrist concluded that Kahler had the capacity to form the necessary intent and premeditation, as shown by traveling to the grandmother's home, bringing a weapon with him, electing not to shoot his son, and initially evading capture. Kahler was convicted and sentenced to death. The Kansas Supreme Court affirmed his conviction.

Now at the U.S. Supreme Court, Kahler argues that Kansas has abolished the insanity defense in violation of the Eighth Amendment's prohibition on cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause. Kahler traces a

[5] Delling v. Idaho, 568 U.S. 1038, 1040 (2012) (Breyer, J., dissenting from denial of certiorari).

longstanding practice of providing an affirmative defense of insanity from the Founding era to the present day in 45 states. Kansas counters that it has not abolished the insanity defense but rather changed it from an affirmative defense to one way of showing the defendant lacked the necessary *mens rea*. Kansas maintains that states enjoy broad discretion in defining crimes, which includes making judgments about moral culpability and which affirmative defenses to allow. Last term, the justices laid bare their fierce disagreements over capital punishment, trading barbs in every capital case—from last-minute stay of execution requests to lethal injection drug protocols to mental competency.[6] As a practical matter, this case may not have huge implications since an overwhelming majority of states have already chosen to allow defendants to raise an insanity defense. Given the justices' fiery disagreements last term, this case may serve to deepen the divide over capital punishment.

II. Sex-Based Discrimination

After refusing to take up similar cases in previous terms, the justices agreed to hear three cases involving whether the federal ban on employment discrimination extends to sexual orientation- and gender identity–based discrimination. Title VII of the Civil Rights Act of 1964 bans employers from failing to hire, firing, or otherwise discriminating in the terms of employment because of an individual's race, color, religion, sex, or national origin. During the Obama administration, the Equal Employment Opportunity Commission (EEOC) began interpreting Title VII's ban on sex discrimination to include sexual orientation and gender identity, though Congress never amended the statute to include them as protected classes. Until just a few years ago, all the federal appeals courts had ruled against extending Title VII by judicial fiat. In *Hively v. Ivy Tech Community College* (2017), the U.S. Court of Appeals for the Seventh Circuit concluded that Title VII does, in fact, encompass discrimination based on sexual orientation.[7] Applying the Supreme

[6] Dunn v. Price, 139 S. Ct. 1312, 1314 (2019); Madison v. Alabama, 139 S. Ct. 718, 731 (2019) (Alito, J., dissenting); Murphy v. Collier, 139 S. Ct. 1111, 1112 (2019); Bucklew v. Precythe, 139 S. Ct. 1112, 1124 (2019); Reynolds v. Florida, 139 S. Ct. 27, 30 (2018); Zagorski v. Parker, 139 S. Ct. 11, 11 (2018).

[7] Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).

Court's 1989 *Price Waterhouse v. Hopkins* ruling that sex discrimination includes gender stereotyping, the en banc Seventh Circuit held that sexual orientation–based discrimination is indistinguishable from sex stereotyping.[8] In *Price Waterhouse*, Ann Hopkins argued her employer discriminated against her when she was denied a promotion because she was considered too aggressive and abrasive for a woman. Notably, the Supreme Court did not create a new protected class in *Price Waterhouse*, it simply identified a way to prove sex discrimination.[9]

The Eleventh Circuit came to the opposite conclusion of the *Hively* court in *Evans v. Georgia Regional Hospital* (2017), but the Supreme Court declined to hear that case.[10] Then the Second Circuit joined the Seventh Circuit in extending Title VII in *Zarda v. Altitude Express Inc.* (2018).[11] The Supreme Court granted review after the Second Circuit ruled for a skydiving instructor who alleged he was fired because he was gay. The employer says it fired Donald Zarda (whose estate continued litigating the case after he passed away in 2014) because he shared inappropriate information about his personal life and made clients uncomfortable. The employer also argues that, despite its nondiscriminatory reason for firing Zarda, Title VII does not recognize claims of sexual orientation–based discrimination. The EEOC and the justice department filed dueling briefs at the Second Circuit in *Zarda*, with the EEOC doubling down on the Obama-era interpretation of Title VII and the Trump administration's justice department disagreeing.

The justices will also hear *Bostock v. Clayton County, Georgia*, in which a child welfare services coordinator argues he was fired after his employer discovered he is gay and played in a gay softball league. The county maintains it fired Gerald Bostock for mismanaging public funds, which was uncovered during an audit. Following its decision in *Evans*, the Eleventh Circuit ruled for the County in Bostock's case. The third case is *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*,

[8] *Id.* at 347.

[9] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

[10] Evans v. Ga. Reg'l Hosp., 138 S. Ct. 557 (2017); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1254–55 (11th Cir. 2017).

[11] Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018).

which involves gender identity, rather than sexual orientation.[12] A male funeral director at a Christian funeral home informed the company he is transgender and would start dressing as a woman, going by the name Aimee Stephens. After weighing concerns about which bathroom Stephens would use, that Stephens's transition could be disruptive to grieving clients, and that Stephens would no longer comply with the company's sex-specific dress code, the funeral home fired Stephens and offered a severance package, which Stephens declined. Stephens filed a complaint with the EEOC, which brought suit against Harris Homes. The Sixth Circuit held that the funeral home violated Title VII's ban on sex discrimination because discrimination based on transgender status "necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be."[13]

The central issue in these three cases is whether the words enacted by Congress ("because of . . . sex") have an enduring meaning or whether they should change with the times. Title VII's use of "sex" had a pretty clear meaning in 1964—to combat discrimination women faced in the workforce. Since then, though Congress has included sexual orientation or gender identity in other federal laws—such as the Violence against Women Reauthorization Act, the Americans with Disabilities Act, and the Hate Crimes Prevention Act—it has considered and rejected many efforts to amend Title VII. In deciding these cases, the justices will likely fall into one of two camps: those who believe Congress should make the law and the courts should eschew invitations to "update" or "revise" language and those who think statutory text "can enlarge or contract their scope as other changes, in the law or in the world, require."[14]

III. Immigration and Executive Action

Making good on President Barack Obama's promise to use the power of the pen and phone to make changes that Congress was unwilling or unable to enact, in 2012 the Department of Homeland Security (DHS) created the Deferred Action for Childhood Arrivals

[12] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 (6th Cir. 2018).

[13] *Id*. at 578.

[14] New Prime Inc. v. Oliveira, 139 S. Ct. 532, 544 (2019) (Ginsburg, J., concurring).

(DACA) program. The program enabled 800,000 illegal aliens under 30 years old who were brought to the United States as children to apply for work authorization and deferred deportation. The administration expanded the program in 2014 to eliminate the age cap and increase the term of deferred action from two to three years, and later created a second program (known as Deferred Action for Parents of Americans, or DAPA) conferring deferred action on illegal aliens whose children are U.S. citizens or lawful permanent residents. Texas and 25 other states challenged the DACA expansion and DAPA program for violating the Administrative Procedure Act's (APA) requirement that substantive agency rules go through public notice and comment. The U.S. District Court for the Southern District of Texas granted the states a preliminary injunction, and the Fifth Circuit affirmed. While the case was pending at the Supreme Court, Justice Antonin Scalia suddenly passed away. The eight-member Court deadlocked, leaving the lower court ruling in place in June of 2016. These rulings did not affect the original DACA program, which remained in place.

In June 2017, after President Trump was elected, Texas and the other states announced plans to challenge the original DACA program. The Trump-led DHS then issued a memorandum concluding that the program was unlawful, explaining it would begin rolling it back. DHS announced that it would continue to process pending renewal requests from current DACA recipients for those set to expire within six months. The department's action immediately drew legal challenges alleging the rescission of DACA is arbitrary and capricious and violates equal protection, due process, and the APA's notice-and-comment requirement, among other claims. District courts in California and New York granted preliminary nationwide injunctions, finding the challengers were likely to succeed on the merits of their claims.[15] The District Court for the District of Columbia vacated the rescission but stayed its order to preserve the status quo while the multiple suits continued.[16] The Trump administration appealed to the Second, Ninth, and D.C. Circuits but also asked the Supreme Court to take up the cases on an expedited

[15] Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018); Regents of the Univ. of Cal. v. United States, Dep't of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal. 2018).

[16] NAACP v. Trump, 321 F. Supp. 3d 143 (D.D.C. 2018).

basis before the appeals courts ruled. The Ninth Circuit has since issued its panel opinion, ruling for the challengers.[17]

The Supreme Court granted the Trump administration's petitions in *McAleenan v. Vidal*, *Department of Homeland Security v. Regents of the University of California*, and *Trump v. NAACP*. The administration argues that the APA bars review of agency enforcement decisions, such as the DACA rescission, that are "committed to agency discretion by law."[18] It also contends that, even if it is reviewable, DHS's decision to abandon an unlawful program is rational, and it does not violate equal protection or due process principles since it applies equally to all ethnicities and does not deprive recipients of a constitutionally protected interest. The challengers, including DACA recipients and several states, maintain that the DACA rescission is not the run-of-the-mill discretionary enforcement decision contemplated by the APA's bar on reviewability since DACA conferred numerous benefits on recipients. They further complain that the DACA rescission deprives recipients of due process and was motivated by racial animus against Latinos.

Tempers run high at the Supreme Court in cases involving the Trump administration and immigration (even those tangentially related to immigration), such as challenges to the travel ban and census citizenship question. Indeed, Justice Sotomayor compared the travel ban to one of the most shameful moments in American history, the Japanese internment during World War II, and Justice Breyer wrote that the addition of a citizenship question on the census would "undermin[e] public confidence in the integrity of our democratic system."[19] The administration will likely face more of the same skepticism of its motives in the DACA rescission case. Another issue that may receive attention in this case is the practice of district courts issuing nationwide injunctions, which presidential administrations have uniformly decried. In the travel-ban case, Justice Gorsuch questioned the legitimacy of "cosmic injunctions" and Justice Clarence

[17] Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec., 908 F.3d 476 (9th Cir. 2018).

[18] 5 U.S.C. § 701(a)(2).

[19] Dep't of Commerce v. New York, 139 S. Ct. 2551, 2584 (2019) (Breyer, J., concurring in part and dissenting in part).

Thomas strongly suggested in his concurrence that district courts lack the authority to enter "universal injunctions."

IV. The Right to Keep and Bear Arms

The Supreme Court has not heard a significant case involving the Second Amendment since its landmark rulings in 2008 in *District of Columbia v. Heller* and 2010 in *McDonald v. City of Chicago*.[20] In those cases, the Court recognized that the Second Amendment protects an individual right to keep and bear arms (rather than a collective right enjoyed only by state militias) and that this right applies against the states as well as the federal government. The justices left for another day issues such as the standard of review courts should apply in reviewing regulations that infringe this newly protected right, the types of firearms, ammunition, and magazines government may ban, and to what extent this right extends beyond the home. In the past decade, the Supreme Court has turned away several cases raising these and other issues surrounding the Second Amendment, often over the protest of one or more of the justices. Last year, Justice Thomas chastised his colleagues for treating the Second Amendment like a "constitutional orphan" and "disfavored right," pointing to the vast number of First and Fourth Amendment cases the Court has heard since it last reviewed a case dealing with the Second Amendment.[21] Thus, the Supreme Court's review of a Second Amendment case is a long time coming.

New York State Rifle & Pistol Association v. City of New York involves a challenge to New York City's ban on transporting licensed handguns anywhere within city limits except to a gun range. Under the city's regulations, residents must obtain a special "premises license," which allows them to possess a handgun in their home and transport it to and from one of seven gun ranges in the city. The regulations forbid transporting handguns to any other location, such as a gun range beyond city limits or a second home (or even a new home if the resident moves). Members of a local shooting club challenged these restrictions, arguing that they flunk any level of constitutional

[20] McDonald v. City of Chicago, 561 U.S. 742 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).

[21] Silvester v. Becerra, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from the denial of certiorari).

scrutiny, burden the fundamental right to travel, and violate the Commerce Clause by controlling economic activity beyond the city's borders. The District Court for the Southern District of New York ruled for the city, finding the regulations are reasonably related to the city's legitimate interests in public safety and crime prevention. The Second Circuit affirmed, noting that the regulations "impose at most trivial limitations" on residents' ability to lawfully possess firearms for self-defense.[22]

At the Supreme Court, the challengers contend that the city's regulations—which are among the most restrictive in the country—treat the possession of a handgun as "a privilege granted as a matter of municipal grace" rather than as a constitutionally protected right.[23] They argue that text, history, and tradition establish that the right to keep and bear arms is not confined to the home. The city, which defended its regulations as reasonable because residents could borrow or rent handguns if they wish to frequent gun ranges outside the city or purchase another handgun if they have a second home, has sought to prevent the Supreme Court from hearing this case. After the Court granted review, the city amended its regulations, effective July 21, 2019, to allow residents with a premises license to transport their handguns to another residence within or outside of the city and to gun ranges outside the city. This came after six years of litigation in which the city defended the old gun regime. The city now claims the case is moot and asked the Court to rule on its motion to dismiss the case. The challengers responded in a letter to the Court that they welcome the opportunity to address why they believe the case is not moot. As of this writing, the Court has denied the city's request for an extension to file its brief but has not ruled on the city's suggestion of mootness. While it is not clear what the Court will do, it is readily apparent that the city is trying to prevent the Court (with its current pro-Second Amendment majority) from resolving the case on its merits.

V. Tax Credits and the Religion Clauses

The Supreme Court will also hear a case asking whether, consistent with the religion clauses of the First Amendment, states can exclude religiously affiliated schools from a scholarship program.

[22] N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 883 F.3d 45, 57 (2d Cir. 2018).

[23] Brief for Petitioners at 1, N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, No. 18-280 (U.S. May 7, 2019).

The challengers seek to build on the foundation laid in a 2017 Supreme Court decision involving state discrimination against church-affiliated organizations. In *Trinity Lutheran Church v. Comer*, the Supreme Court held that Missouri violated the Free Exercise Clause of the First Amendment when it barred a church-run daycare center from receiving a public grant to resurface its playground.[24] The Court determined that the state improperly singled out the daycare center for disfavored treatment and denied it a public benefit solely because of its religious affiliation. Missouri relied on a "no aid" provision in its constitution (known as a Blaine Amendment[25]) to bolster its decision to exclude a religiously affiliated organization from competing for a public grant. Chief Justice John Roberts wrote that the Court's ruling was limited to "express discrimination based on religious identity with respect to playground resurfacing," stressing that it did not "address religious uses of funding or other forms of discrimination."[26] Justice Gorsuch, joined by Justice Thomas, explained in a concurrence that the principles laid down in the Court's ruling "do not permit discrimination against religious exercise—whether on the playground or anywhere else."[27] Shortly thereafter, the Supreme Court ordered courts in Colorado and New Mexico to revisit their rulings in cases dealing with a school voucher program and a textbook lending program in light of *Trinity Lutheran*. Now the Court may determine whether the logic of *Trinity Lutheran* extends to student aid programs.

Espinoza v. Montana Department of Revenue stems from a 2015 Montana law establishing a tax credit of up to $150 per year for donations taxpayers make to a scholarship-granting organization. That organization then provides scholarships to income-eligible children to attend a private school of their choice. Scholarship recipients may

[24] Trinity Lutheran Church v. Comer, 137 S. Ct. 2012 (2017).

[25] Blaine Amendments prohibit public money from going to churches. Named for Sen. James G. Blaine of Maine, who in the late 1800s pushed to amend the federal Constitution to prohibit aid to "sectarian" schools, Blaine Amendments can be found in the constitutions of more than three dozen states. Justice Thomas detailed the ignoble roots of Blaine Amendments in *Mitchell v. Helms*, explaining how the original amendment "arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" 530 U.S. 793, 828 (2000).

[26] Trinity Lutheran Church, 137 S. Ct. at 2024 n.3.

[27] *Id.* at 2026 (Gorsuch, J., concurring in part).

use the funds at any qualified school, which initially included religiously affiliated private schools. In 2016, the Montana Department of Revenue enacted a rule excluding religious schools, citing the state's "no aid" constitutional provision. Families with children at religious schools challenged the rule, maintaining that it violates their federal constitutional right to free exercise of religion and that the tax credit incentivizes private donations so there is no public funding at issue. Indeed, the Supreme Court has long drawn a distinction between the government directly providing aid to religiously affiliated schools and the government providing aid to individuals who then choose to use the funds at religious schools.[28]

The district court of the Eleventh Judicial District of Montana agreed with the families, entering a permanent injunction. On appeal, the Montana Supreme Court reversed and invalidated the scholarship program in its entirety, finding that indirect payments to religiously affiliated schools violate the "no aid" constitutional provision. The court also dismissed the families' free exercise claims, explaining that the "play in the joints" between what the Establishment and Free Exercise Clauses require of states allow them to erect higher barriers between religion and government than the federal Constitution requires. The U.S. Supreme Court granted review. The families ask the Supreme Court to extend the logic of *Trinity Lutheran* to rule that states may not exclude religiously affiliated schools from student-aid programs. Montana points to the Court's previous holding in *Locke v. Davey* (2004) that states could prohibit the use of public scholarship funds for college students studying to become ministers, consistent with Establishment Clause concerns about training clergy.[29] The *Locke* Court did not address, more broadly, whether states may entirely exclude religious schools from voucher or scholarship programs. The *Espinoza* case offers the Court the opportunity to harmonize the rulings in *Trinity Lutheran* and *Locke*.

VI. Obamacare Returns, Again

Congress's passage of the Affordable Care Act (ACA) is the gift that keeps on giving to the Supreme Court bar as the justices will hear a fifth challenge stemming from the 2010 health care law. Three

[28] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[29] Locke v. Davey, 540 U.S. 712 (2004).

consolidated cases, *Moda Health Plan Inc. v. United States, Maine Community Health Options v. United States*, and *Land of Lincoln Mutual Health Insurance Co. v. United States*, invoke an ACA provision that committed the government to reimburse health insurers for a portion of their losses for providing insurance through the new exchanges to individuals with preexisting conditions for the first three years. Using appropriations riders in 2014, 2015, and 2016, Congress limited the funds available to the Department of Health and Human Services (HHS) to make these payments but failed to amend the ACA itself. What was meant to incentivize insurers to expand coverage to individuals with preexisting conditions (thereby assuming significant risks) led to "a $12 billion bait-and-switch."[30]

Several health insurers that relied on the government's promise to share the financial burden filed suit, asserting the ACA requires the government to reimburse them using the statutory formula and that the government breached an implied contract by failing to pay up. The U.S. Court of Federal Claims agreed and ordered the government to fulfill its financial obligation to the insurers. On appeal, the Federal Circuit acknowledged that the ACA obligated the government to pay these insurers using the statutory formula but found that the appropriation riders demonstrated Congress's clear intent to abrogate that obligation. On the breach-of-contract claim, the appeals court reasoned that Congress makes laws to establish policies, not contracts, and without clear evidence to the contrary, legislation does not "establish[ ] the government's intent to bind itself in a contract."[31] The appeals court declined to rehear the case sitting en banc over the protest of two judges. In dissent, Judge Pauline Newman opined, "This is a question of the integrity of our government. . . . Our system of public-private partnership depends on trust in the government as a fair partner. . . [and] assurance of fair dealing is a judicial responsibility."[32]

At the Supreme Court, the insurers explain that the government's bait and switch did not just affect them—its failure to pay has led to

[30] Petition for Writ of Certiorari at 16, Moda Health Plan, Inc. v. United States, No. 18-1028 (U.S. Feb. 4, 2019).

[31] Moda Health Plan, Inc. v. United States, 892 F.3d 1311, 1329 (Fed. Cir. 2018).

[32] Moda Health Plan, Inc. v. United States, 908 F.3d 738, 740–41 (Fed. Cir. 2018) (Newman, J., dissenting from denial of rehearing en banc).

insurers going out of business, driving up costs and leaving individuals with fewer insurance options. They maintain that the appeals court erred in concluding that Congress evinced its clear intent to revoke the government's financial obligation in the appropriations riders because the text simply limited the source of the funds. The insurers further point out that the 2014 appropriations rider (passed in December 2014) could not retroactively eliminate the obligation incurred during that calendar year, which was the first year insurers offered plans through the new insurance exchanges. They complain the government "lured private parties into expensive undertakings with clear promises, only to renege after private parties have relied to their detriment and incurred actual losses."[33] The federal government argues that the ACA set up a temporary subsidy program for which Congress never appropriated funds and did not require HHS to make payments in the absence of an appropriation. While this case does not seek to overturn any part of the ACA, it highlights how the nearly 10-year-old law created as many problems as it sought to fix. But another case waiting in the wings may signal the death knell for the ACA, unless the chief justice saves it once again.

VII. On the Horizon

There's no shortage of important cases on the Court's docket in OT 2019, but there are a few others the justices may agree to review in the coming months. In *Texas v. Azar*, the justices may be asked to weigh in on the ACA for a sixth time.[34] In 2012, in *National Federation of Independent Business v. Sebelius*, the Supreme Court acknowledged that the ACA's individual mandate provision, which requires people to buy health insurance or pay a penalty, exceeded Congress's power to regulate interstate commerce.[35] The Court instead upheld the individual mandate as a lawful exercise of Congress's taxing power. Then Congress eliminated that tax penalty when it passed the

[33] Petition for Writ of Certiorari, *supra* note 30, at 17.

[34] The Supreme Court has decided four cases stemming from the Affordable Care Act, or what should be called the Supreme Court Bar Full Employment Act: Nat'l Fed'n of Indep. Bus v. Sebelius, 567 U.S. 519 (2012); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); King v. Burwell, 135 S. Ct. 2480 (2015); and Zubik v. Burwell, 136 S. Ct. 1557 (2016). As discussed above, the Court will hear a fifth case, Moda Health Plan, Inc. v. United States, in OT 2019.

[35] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 557 (2012).

Tax Cuts and Jobs Act of 2017. Private individuals along with Texas and 19 other states filed suit, seeking a declaration that the individual mandate is unconstitutional and cannot be severed from the remainder of the law. The Trump administration in large part agrees with the plaintiffs, and California, 15 other states, and the District of Columbia intervened in the suit to defend the law. The District Court for the Northern District of Texas ruled for the challengers, explaining that the individual mandate is the "linchpin" of the ACA. The appeal is currently pending before the Fifth Circuit.

Another case the justices may soon agree to hear is *June Medical Services v. Gee*, which challenges a Louisiana law requiring doctors who perform abortions to have admitting privileges at a nearby hospital. If this sounds familiar, that's because the Supreme Court decided a case involving a similar Texas law in *Whole Woman's Health v. Hellerstedt* (2016), finding the law was an undue burden on women's access to abortion.[36] One of Louisiana's four abortion clinics challenged the law, and, citing *Hellerstedt*, the District Court for the Middle District of Louisiana held that it advanced minimal health benefits while placing substantial burdens on women seeking an abortion. The Fifth Circuit reversed, citing the fact that only one doctor in Louisiana had been unable to gain admitting privileges and no clinics had closed due to the new law.[37] The clinic asked the Supreme Court to temporarily enjoin the law while it appeals the Fifth Circuit's ruling. The Court granted the stay over the protest of Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh. June Medical Services already filed its petition for a writ of certiorari, so the justices could grant review when they return in late September to consider petitions filed over the summer.

A final issue the justices may hear is the legality of the Trump administration's attempt to withhold certain federal funds from jurisdictions (known as sanctuary cities) that refuse to cooperate with the administration's immigration enforcement. Soon after President Trump took office, he issued an executive order and then-Attorney General Jeff Sessions issued a backgrounder explaining that receipt of federal dollars, such as Community Oriented Policing Services

[36] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[37] June Med. Servs., L.L.C. v. Gee, 905 F.3d 787 (5th Cir. 2018).

(COPS) grants and Byrne Memorial Justice Assistance grants, are contingent on local law enforcement's cooperation with the federal government's immigration enforcement efforts. More than 300 jurisdictions (cities, counties, and even entire states) have refused to comply with federal immigration enforcement efforts, such as notifying Immigration and Customs Enforcement when illegal aliens are released from prison. Chicago, Los Angeles, New York City, Philadelphia, and San Francisco challenged the administration's conditioning of federal funds on their compliance, arguing that this exceeds the federal government's authority and violates the separation of powers and the Spending Clause, among other claims. The district courts uniformly ruled for the cities, with a few issuing nationwide injunctions. All but one of the appellate courts affirmed, although some limited the scope of overzealous district courts that entered nationwide injunctions. The Ninth Circuit recently ruled for the Trump administration in Los Angeles's case challenging the denial of its application for a $3 million COPS grant.[38] Given the split among the federal appeals courts, this dispute may end up before the Supreme Court before long.

VIII. Conclusion

The Supreme Court's OT 2019 begins October 7, with the justices hearing cases involving an Obamacare bait and switch, the Trump administration's decision to roll back the DACA program, onerous restrictions on gun rights, claims of sexual orientation- and gender identity–based employment discrimination, school-choice efforts for religiously affiliated schools, and a capital defendant's attempt to employ the insanity defense, among many other cases. Cases on the horizon that the Court may take up later in the term include challenges to an admitting privileges requirement for doctors who perform abortions, the Trump administration's attempt to withhold federal dollars from sanctuary cities, and whether Obamacare must fall now that Congress has eliminated the tax penalty associated with the individual mandate. While the justices shied away from the spotlight in OT 2018, the next term will feature many high-profile issues in headline-making cases and place the justices front and center leading up to Election Day 2020.

[38] City of L.A. v. Barr, No. 18-55599, 2019 U.S. App. LEXIS 20706 (9th Cir. July 12, 2019).

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